No. 2:15-cv-00546-KJM-CKD
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Fowkes v. Metro. Life Ins. Co.

Decided Jan 24, 2017

No. 2:15-cv-00546-KJM-CKD

01-24-2017

YVONNE FOWKES, Plaintiff, v. METROPOLITAN LIFE INSURANCE COMPANY, Defendant.

ORDER

Plaintiff Yvonne Fowkes moves for summary judgment against Metropolitan Life Insurance Company (MetLife), contending MetLife violated the Employee Retirement Income Security Act (ERISA) when it denied her long-term disability (LTD) benefits claim. MetLife contends its denial posed no violation and also moves for summary judgment. At hearing on the cross-motions, David Allen appeared for Ms. Fowkes and Misty Murray appeared for MetLife. As explained below, the court DENIES Ms. Fowkes's motion and GRANTS MetLife's cross-motion.

I. PROCEDURAL HISTORY

Ms. Fowkes filed a complaint against MetLife on March 11, 2015, challenging the denial of her LTD claim under ERISA. ECF No. 1. After MetLife answered the complaint on July 13, 2015, ECF No. 7, the parties
2 agreed Ms. Fowkes's ERISA claim would be resolved *2 through cross-motions for summary judgment brought under Federal Rule of Civil Procedure 52, ECF No. 16. The parties filed their cross-motions on March 21, 2016, ECF Nos. 19, 20, and oppositions to the cross-motions on April 4, 2016, ECF Nos. 22, 23.

II. BACKGROUND

The material facts are reported in the administrative record and are undisputed. *See Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 970 (9th Cir. 2006) (district courts rely on the administrative record in assessing an ERISA claim); *see also Harlick v. Blue Shield of Cal.*, 686 F.3d 699, 706 (9th Cir. 2012) (in the ERISA context, "the usual tests of summary judgment, such as whether a genuine dispute of material fact exists, do not apply.").

A. MetLife Insurance Plan

On May 24, 1999, Ms. Fowkes started work with Vision Service Plan (VSP), an eye care insurance company, as a customer service representative; she became a network administrator in 2008. AR 1718. As an employee, Ms. Fowkes was entitled to short-term and long-term disability income insurance benefits from MetLife, VSP's insurer and claims administrator. AR 2147. On January 1, 2011, MetLife issued a Certificate of Insurance Plan (Plan), a coverage plan that discussed the procedure for claiming disability benefits. *Id.* For those seeking benefits, the Plan provided its definition of "disability" as follows:

Disability or Disabled means that as a result of Sickness or injury You are [either] Totally Disabled [or Partially Disabled].

Totally Disabled or Total Disability means:

During the Elimination Period and the next 24 months, You are unable to perform with reasonable continuity the Substantial and Material Acts necessary to pursue Your Usual Occupation in the usual and customary way.

After such period, You are not able to engage with reasonable continuity in any occupation in which You could reasonably be expected to perform satisfactorily in light of Your:

• age;

• education;

• training;

• experience;

3 *3

• station in life; and

• physical and mental capacity

that exists within any of the following locations:

• a reasonable distance or travel time from Your residence in light of the commuting practices of Your community;

• a distance of travel time equivalent to the distance or travel time You traveled to work before becoming disabled; or

• the regional labor market, if You reside or resided prior to becoming disabled in a metropolitan area.

AR 2172 (brackets in original). "Elimination period," as discussed in the disability provision, is defined as "the greater of the Short Term Disability Maximum Benefit Period or 180 Days." AR 2166. "Substantial and material acts," also discussed in the disability provision, are defined as follows:

> the important tasks, functions and operations generally required by employers from those engaged in Your Usual Occupation that cannot be reasonably omitted or modified.
>
> In determining what substantial and material acts are necessary to pursue Your Usual Occupation, We will first look at the specific duties required by Your job.
>
> If You are unable to perform one or more of these duties with reasonable continuity, We will then determine whether those duties are customarily required of other employees engaged in Your Usual Occupation.

AR 2173. "Usual occupation" is similarly discussed in the disability provision, and is defined in part as

> any employment, business, trade or profession and the Substantial and Material Acts of the occupation You were regularly performing for the employer when the Disability began. Usual Occupation is not necessarily limited to the specific job that You performed for the employer.

4 *Id*. ///// ///// *4

The Plan also summarizes how an employee can support her disability claim:

> If You become Disabled while insured, Proof of Disability must be sent to Us. When We receive such Proof, We will review the claim.

AR 2182. "Proof" is defined as follows:

> Proof means Written evidence satisfactory to Us that a person has satisfied the conditions and requirements for any benefit described in this certificate. When a claim is made for any benefit described in this certificate, Proof must establish:
>
> • the nature and extent of the loss or condition;
>
> • Our obligation to pay the claim; and
>
> • the claimant's right to receive payment.

AR 2170. Proof must be provided at the claimant's expense. *Id*. The claimant has the burden of proof in substantiating his or her disability claim. *Id*.

B. Ms. Fowkes Leaves VSP

Ms. Fowkes's job as a network administrator included working with providers to ensure compliance with VSP network criteria, evaluating a doctor's practices to determine if he or she meets VSP criteria, and communicating with doctors and office staff through phone, fax, or email regarding missing VSP network participation criteria information. AR 1940. She was expected to work eight hours a day, mainly in a seated position, while handling "multiple tasks and prioritz[ing] effectively." AR 1940, 1965. She ended her time with VSP on March 12, 2013, when she was taken to the emergency room for chest pains and shortness of breath. AR 1957, 1962, 1968.

C. Ms. Fowkes Applies for Short-Term Disability

1. Evidence Submitted

On April 4, 2013, less than a month after the last day she had worked, Ms. Fowkes filed a claim for short-term disability benefits (STD) with MetLife. AR 1958, 1968-1969. Ms. Fowkes claimed she could not return to work until June 1, 2013, attributing her absence to several conditions, including heart disease, shortness of
5 breath, hypoglycemia, and a "full blown *5 flare up" of fibromyalgia, which caused her severe pain and confined her to bedrest. AR 1968-1969.

Shortly after filing her claim, MetLife's STD case manager Carolann Kolodziej called Ms. Fowkes and directed her to complete and submit an attending physician statement, a report by a treating doctor filed in support of a disability claim, to confirm her conditions. AR 1969. Ms. Fowkes agreed to submit a form after her visit with Dr. Gavin Pereira, her orthopedic surgeon. *Id*. The record does not make clear whether Ms. Fowkes visited Dr. Pereira as planned. Ms. Fowkes did, however, visit Dr. Gerson Stauber, her primary care physician, on March 27 and April 2, 2013. AR 1970. During these visits, Dr. Stauber drafted office notes discussing Ms. Fowkes's history of fibromyalgia,[1] hypoglycemia,[2] hypotension,[3] osteoarthritis,[4] and past episodes of chest pain. AR 1970-1971. Dr. Stauber also noted Ms. Fowkes was suffering from diarrhea and was preparing for a left knee replacement surgery. *Id*. Ms. Fowkes submitted these office notes to the STD case manager, *id*., along with an attending physician statement confirming her conditions of fibromyalgia and hypoglycemia, AR 57. She also submitted an attending physician statement supporting an osteoarthritis diagnosis. *Id*. The physician statements
6 discussed Ms. Fowkes's restrictions and limitations, stating Ms. Fowkes could sit for two hours, *6 stand for an hour, walk for an hour, and lift up to twenty pounds. *Id*. The statements also noted, however, Ms. Fowkes could not work due to chronic pain. *Id*.

1 Fibromyalgia is a condition with symptoms most commonly characterized by widespread pain, fatigue, and sleep disturbance. 99 Am. Jur. Proof of Facts 3d 1 (originally published 2008). The diagnosis of fibromyalgia requires a history of at least three months of widespread pain, and pain and tenderness in at least 11 of 18 tender point sites. The tender point sites include the fibrous tissue or muscles of the neck, shoulders, chest, rib cage, lower back, thighs, knees, arms (elbows), and buttocks. *Id*.

2 Hypoglycemia is defined as low blood glucose level that destabilizes energy production. American Law of Medical Malpractice § 14:10 (3rd ed. 2016). The brain is dependent upon an adequate level of circulating glucose and requires a constant supply to support energy consuming cerebral activity. *Id*.

3 Hypotension or low blood pressure is a condition that can cause dizziness or fainting spells. Maryland Practice: DUI Handbook § 10:7 (2016 ed.).

4 Osteoarthritis is the most common form of chronic arthritis. It is a degenerative disease of the articular cartilage in joints . It affects primarily the joints of the hip, knee, spine and hands causing pain, stiffness, deformity and decreased range of motion. Attorneys Medical Deskbook § 24:19 (2016 ed.).

2. MetLife Denies STD Application

On April 11, 2013, MetLife denied Ms. Fowkes's STD claim, concluding the evidence submitted did not support a finding of disability as defined by the Plan. AR 1971-1972. In particular, the case manager noted, " [b]ased on medical information reviewed, there is not any particular illness that substantiates time [out of work]." AR 1972. The case manager did note, however, Ms. Fowkes's claim could be reviewed again if she submitted information verifying her left-knee replacement surgery. *Id*. Ms. Fowkes received a copy of her denial letter from MetLife on April 23, 2013. AR 1974.

3. MetLife Revisits Claim and Approves STD

On July 15, 2013, MetLife received information verifying Ms. Fowkes's left-knee replacement surgery, which had occurred on April 30, 2013, and documentation supporting a right-knee replacement surgery, which had occurred on June 30, 2013. AR 1978. MetLife approved Ms. Fowkes's STD claim and granted retroactive benefits from March 12, 2013, Ms. Fowkes's last day of work, to August 16, 2013. *Id*.

D. Ms. Fowkes Applies for Long-Term Disability

1. Disabilities Claimed

On August 13, 2013, while still off work, Ms. Fowkes filed her claim for LTD benefits. AR 1982, 1986. MetLife initiated the claims process through a phone interview with Ms. Fowkes on August 22, 2013, first inquiring about the conditions supporting her claim. AR 1999. Ms. Fowkes stated she could not work because of fibromyalgia, chronic epileptic seizures, frequent chest pain, dizziness, issues with her coronary artery, and an inability to walk due to her knee-replacement surgeries. *Id.;* AR 2000, 2004. MetLife then asked Ms. Fowkes if there were any aspects of the job she was able to complete, her conditions notwithstanding. AR
7 2004. Ms. Fowkes stated she could sit at a desk and answer phones for short periods of time. *Id*. *7

2. Evidence Submitted

The same day MetLife interviewed Ms. Fowkes, it received office notes from several of Ms. Fowkes's doctors: (1) Dr. John Luke, who replaced Dr. Stauber as Ms. Fowkes's primary care physician; (2) Dr. Nander Bukkapatnum, Ms. Fowkes's cardiologist; and (3) Dr. Andrew Oh, Ms. Fowkes's neurologist. AR 2000-2001. In support of the LTD claim, Dr. Luke filed office notes from Ms. Fowkes's visit in August 8, 2013, in which he discussed Ms. Fowkes's dizziness when walking, frequent chest paints, at least four heart attacks from 2006 to 2009, and a stroke in 2006. *Id*. Dr. Bukkapatnum, who saw Ms. Fowkes on August 1, 2013, submitted notes discussing Ms. Fowkes's pacemaker installed in 2012, her shortness of breath, and her chest pains. *Id*. Dr. Oh, who saw Ms. Fowkes on August 22, 2013, submitted notes discussing her uncontrollable epileptic seizures. AR 2002. Dr. Oh noted her seizures occurred several times a day and became so uncontrollable that her driver's license had to be revoked. *Id*. He recommended MetLife find Ms. Fowkes totally disabled. *Id*.

On August 22, 2013, MetLife directed Ms. Fowkes to complete and file attending physician statements to confirm her conditions, and Ms. Fowkes agreed to do so. AR 2006. The next day, MetLife sent a fax to UC Davis, where Ms. Fowkes's physicians worked, to obtain additional medical records, including additional office visit notes from Dr. Luke, Dr. Bukkapatnam, and Dr. Oh. AR 2009. MetLife also faxed Ms. Fowkes's orthopedic surgeon, Dr. Pereira, to ask for visit notes from an August 2013 meeting, a month after Ms. Fowkes's right-knee replacement surgery. AR 2009-2010.

On September 4, 2013, Dr. Pereira submitted office visit notes to MetLife, reporting Ms. Fowkes had a good range of motion but throbbing pain on her lateral side. AR 2018. Dr. Pereira noted full recovery was likely in eight weeks, and Ms. Fowkes would then no longer need orthopedic services. AR 2013. The record does not make clear whether Ms. Fowkes's other doctors submitted office notes. *See* AR 2013-2018.

3. MetLife Extends STD Benefits While Reviewing LTD Claim

As noted above, Ms. Fowkes was out of work and on short-term disability when she filed her LTD claim. AR
8 1982. While her LTD claim was pending, MetLife submitted Ms. *8 Fowkes's STD claim to internal nurse consultant Karen Manley to determine if STD benefits should be extended. AR 2010-11. In particular, MetLife asked nurse consultant Manley to review the evidence Ms. Fowkes submitted in support of her STD and LTD claims, in addition to any notes taken from the March 12, 2013 emergency room visit, to determine how long

Ms. Fowkes should be in recovery and if she could plausibly be expected to return to work and when. *Id*. In short, MetLife asked its nurse consultant if Ms. Fowkes's condition was severe enough to keep her from working. *Id*.

On September 4, 2013, nurse consultant Manley reviewed the evidence and concluded despite Ms. Fowkes's multiple diagnoses, including fibromyalgia and seizures, she could not establish disability, because the conditions were not supported by "medical from the treating provider(s)." AR 2013 (verbatim transcription). Before determining whether Ms. Fowkes could return to work, nurse consultant Manley recommended MetLife request Ms. Fowkes file a Restriction and Limitation Form (R&L) from each of her health care providers to determine if Ms. Fowkes was precluded from completing the tasks of her position. AR 2013-2014. In accordance with the nurse consultant's request, on September 5, MetLife requested Ms. Fowkes submit R&L forms from her health care providers. AR 2016. While waiting on the forms, MetLife referred Ms. Fowkes's case to internal claims support specialist Bonnie Levy to determine if her STD benefits could be extended from August 17, 2013 to September 16, 2013, the maximum benefits period date. AR 2012. Claims support specialist Levy concluded STD should be extended to September 16, 2013, noting Ms. Fowkes submitted records showing she had throbbing pain from prolonged recovery of her left knee. AR 2019. MetLife notified Ms. Fowkes of the STD decision on September 11, 2013. *Id*.

4. MetLife Requests More Evidence to Support LTD Claim

On September 17, 2013, MetLife followed up with Ms. Fowkes regarding her LTD claim, again asking for R&L forms from Dr. Pereira, Dr. Stauber, and Dr. Oh to determine her restrictions and level of functionality. AR 2023-2025. After informing MetLife that Dr. Luke replaced Dr. Stauber as her primary care physician, AR 2024, Ms. Fowkes agreed to have the forms completed and submitted, AR 2025. On September 25, 2013, Dr.
9 Oh sent an *9 attending physician statement to MetLife, in which he diagnosed Ms. Fowkes with temporal lobe epilepsy. AR 2026. In the statement, Dr. Oh noted that although Ms. Fowkes had no restrictions or limitations, she had no capacity to work due to her seizures. *Id*. Dr. Oh also noted an electroencephalogram (EEG)[5] showed "left temporal lobe epileptic discharge," *id*., but she was able to "function under stress and engage in interpersonal relations with no limitations," AR 1724. It is undisputed a copy of the EEG report was not provided with the attending physician statement. *See id*.; AR 1726.

[5] An electroencephalogram, or EEG, is a test that detects electrical activity in the brain using small, flat metal discs (electrodes) attached to the scalp. This activity shows up as wavy lines on an EEG recording. An EEG is one of the main diagnostic tests for epilepsy. *See* Dortland's Illustrated Medical Dictionary 536 (27th ed. 1988).

That same day, Dr. Bukkapatnum submitted an attending physician statement noting Ms. Fowkes could sit, stand, and walk intermittently for one hour, AR 2026, could operate a motor vehicle, AR 1714, and was able to function in most stress situations and engage in some interpersonal relations, *id*. Dr. Bukkapatnum noted, however, that Ms. Fowkes could not carry over twenty pounds and had "zero work capacity." *Id*. MetLife did not receive a response from Dr. Pereira until October 8, 2013, when he noted Ms. Fowkes was no longer under his care. AR 2028. Dr. Pereira did note, however, that Ms. Fowkes's right knee was "doing well except for scar tissue stitch, which will be resolved in the next 3-6 months." AR 2028. Dr. Pereira did not provide any R&L forms. *Id*.

On October 30, 2013, after reviewing office visit notes and documents received from Ms. Fowkes's doctors, MetLife called to inform Ms. Fowkes it needed medical records beginning March 12, 2013, the day she started her STD benefits. AR 2029-2031. MetLife also informed Ms. Fowkes it had received attending physician statements from Dr. Bukkapatnum and Dr. Oh, but not from Dr. Stauber or Dr. Pereira. AR 2031-2032. In

response, Ms. Fowkes explained Dr. Stauber was no longer her primary care physician, AR 2032, and Dr. Pereira was no longer her doctor after September 16, 2013, AR 2031-2032, which also was the last day of her
10 STD benefits coverage. Additionally, Ms. Fowkes stated she no longer claimed disability due to *10 her knees but continued to claim disability due to epilepsy and a heart condition. AR 2032. At the same time, Ms. Fowkes did not claim a disability due to fibromyalgia. *See* AR 2031-2032. Ms. Fowkes agreed to submit medical records from March 2013 onward. AR 2032.

On November 14, 2013, MetLife again referred Ms. Fowkes's case to nurse consultant Manley to determine if Ms. Fowkes had adequately supported an LTD claim based on epileptic seizures and a heart condition, or alternatively, what documents would be needed to support her LTD claim. AR 2037-2039. On November 27, 2013, the nurse consultant Manley completed review, AR 2039, and summarized the contents of Ms. Fowkes's claim files, AR 2041, including documents supporting both her STD and LTD claims. The records supporting Ms. Fowkes's STD claim included (1) office visit notes from Dr. Pereira discussing Ms. Fowkes's left-knee replacement surgery, *id*., (2) an attending physician statement from Dr. Bukkapatnum discussing a cardiac diagnosis of sick sinus syndrome[6] and diastolic dysfunction[7], *id*., and (3) an attending physician statement from Dr. Oh discussing a neurological diagnosis of temporal lobe epilepsy, *id*. The records supporting Ms. Fowkes's LTD claim included (1) the September 25, 2013 attending physician statement from Dr. Oh discussing the epilepsy diagnosis, *id*., (2) the September 25, 2013 attending physician statement from Dr. Bukkapatnum discussing Ms. Fowkes's restrictions and limitations, *id*., and (3) the October 8, 2013 office visit note from Dr. Pereira discussing the end of orthopedic treatment and Ms. Fowkes's period of recovery following her knee surgeries, *id*.

6 Sick sinus syndrome is a condition with symptoms ranging from dizziness to unconsciousness due to chaotic or absent activity in the upper chamber of the heart, also known as the atria. Stedmans Medical Dictionary 882040 (2014 ed.).

7 Diastolic dysfunction is a condition in which the ventricle walls of the heart do not properly relax and thereby become rigid, preventing the walls from filling with blood. *See* Christine Stewart, MD & Betty Brutman, MD, JD, Attorneys Medical Advisor (2016), *available at* 8 Attorneys Medical Advisor § 89:38 (Westlaw).

On November 27, 2013, after reviewing the records Ms. Fowkes submitted in support of her STD and LTD claims, MetLife's nurse consultant Manley concluded Ms. Fowkes did not provide "objective evidence . . . from
11 . . . providers to support that she would be unable to *11 perform her job duties." AR 2042. Nurse consultant Manley found several additional records were needed, including Dr. Oh's medical and office notes from the day he diagnosed her with epilepsy. *Id*. Nurse consultant Manley noted "EEG results also would be beneficial," *id*., and found MetLife would also need Dr. Bukkapatnum's medical and office notes that show "pacemaker checks, symptomology," and cardiac catheterization reports to support Ms. Fowkes's diagnosis of diastolic dysfunction. AR 2042.

On December 12, 2013, MetLife again referred Ms. Fowkes's file to nurse consultant Manley to determine if there was enough information to support a disability claim. AR 2047. After reviewing the record, nurse consultant Manley concluded there was "no objective evidence provided from any of the above health care providers, cardiology or neurology, this [] includes a lack of office visit exam findings, symptoms, diagnostics, or treatment plan." AR 2052-53. In particular, the "medical[s] provided" did not substantiate Ms. Fowkes's disability claims due to temporal lobe epilepsy, sick sinus syndrome, periventricular beats and diastolic dysfunction. AR 2051. As for Ms. Fowkes's other diagnoses, including fibromyalgia, nurse consultant Manley concluded there was "no medical submitted to indicate this or how this impacts her disability." AR 2052. From the "limited" medical records on file, nurse consultant Manley concluded she "could not see why claimant could not return to work in her previous capacity as claimant has had the above diagnosis of seizures since

2008." AR 2051-55. In short, nurse consultant Manley agreed with her prior finding that Ms. Fowkes's file did not substantiate her claim of disability, and informed MetLife Ms. Fowkes would need "medical[s] . . . includ[ing] [o]ffice visit notes with exam findings [and] diagnostic findings supporting the diagnosis submitted." *Id*. Based on nurse consultant Manley's findings, MetLife concluded Ms. Fowkes did not have enough evidence "demonstrating the functional impairments provided that would support [Ms. Fowkes's] inability to perform her sedentary job duties." AR 2060. ///// ///// ///// ///// *12

On December 13, 2013, MetLife sent an LTD claim status letter to Ms. Fowkes, discussing the information needed to support her claim:

> The information needed includes office visit notes, diagnostic test reports, therapy notes and evaluations, procedure reports, hospital admission and discharge summaries, and other medical information which will support your claim for disability.

AR 1637, 2046. MetLife informed Ms. Fowkes it had requested these records in prior letters sent on September 17, 2013, September 25, 2013, October 17, 2013, and November 14, 2013, and that the requested information was due December 15, 2013. AR 2046.

On December 16, 2013, after the scheduled deadline for submitting the additional medical records had passed, Ms. Fowkes called MetLife to say she was still trying to obtain her medical records. AR 2063-64. MetLife informed Ms. Fowkes that if it received no medical records, a final decision would be made soon. *Id*.

5. MetLife Denies LTD Claim

On December 17, 2013, Ms. Fowkes sent MetLife office notes, medical diagnoses, and lab reports from Dr. Oh, Dr. Luke, Dr. Bukkapatnum, and Dr. Pereira. AR 1345-1636, 2068. After receiving the additional medical information, MetLife referred Ms. Fowkes's file to internal nurse consultant Debra Cwik to determine if nurse consultant Manley's assessment should be changed. AR 2070. That same day, after noting the additional medical records consisted of "labs," Cwik as the new nurse consultant concluded the prior consultant's conclusion would not be changed. *Id*. To support her finding, nurse consultant Cwik relied on records showing Ms. Fowkes's recovery from her knee surgery. *Id*. Further, she concluded there were no notes from Ms. Fowkes's cardiologist, rheumatologist, or neurologist to support a finding of disability due to cardiac issues, fibromyalgia, or epilepsy. *Id*.

The nurse consultant concluded that to support a claim of disability due to cardiac issues, Ms. Fowkes would have to submit among other things an echocardiogram report, cardiac catheterization reports, and pacemaker checks to substantiate a diagnosis of sick sinus syndrome. AR 2071. To support a claim of disability due to fibromyalgia, Ms. Fowkes would have to *13 submit office visit notes from her rheumatologist with a list of positive "trigger points."[8] *Id*. To support a claim of disability due to epilepsy, Ms. Fowkes would have to submit office notes with EEG reports showing seizure activity. *Id*.

[8] Trigger points are sites that become tender during a fibromyalgia flare-up, which is a syndrome of chronic, widespread musculoskeletal pain. *See* Mikel A. Rothenberg, M.D., Preparing Orthopedic Disability Cases (2006), *available at* §6.01 FIBROMYALGIA, PORDC §6.01 (Westlaw). --------

On December 18, 2013, Dr. Luke submitted office notes to MetLife, noting that a cardiac catheterization from September 2012 showed normal coronaries but displayed evidence of diastolic dysfunction. AR 2072. Based on a September 2008 MRI of the brain without contrast, Dr. Luke noted the results were within "normal limit[s]."

Id. No other test results were submitted, including an EEG, rheumatology reports, positive cardiac catheterization reports, or positive MRIs to support heart conditions or epileptic seizures. AR 2072.

On December 19, 2013, MetLife denied Ms. Fowkes's LTD claim. AR 2075.

E. Ms. Fowkes Appeals the LTD Denial

On June 18, 2014, Ms. Fowkes, through her attorney, appealed MetLife's LTD claim denial. AR 1276, 2080. In support of her appeal, Ms. Fowkes provided a letter from Dr. Oh dated March 31, 2014, and a letter from Dr. Bukkapatnum dated April 3, 2014. AR 1309, 2086. In his letter, Dr. Oh reported Ms. Fowkes had been treated within the UC Davis Health System for the last six years because of her seizures. AR 1309. He noted it was uncertain whether the "origin of the seizures is epileptic or non-epileptic . . . and further diagnostic studies are planned." *Id*. No laboratory or medical tests were attached to the letter. *See id*. The letter from Dr. Bukkapatnum stated Ms. Fowkes was under his care for complex cardiovascular issues. AR 1310. In the letter, Dr. Bukkapatnum stated Ms. Fowkes has "severe diastolic dysfunction, orthostatic hypotension, [and] sick sinus syndrome with a pacemaker." *Id*. As with Dr. Oh's letter, Dr. Bukkapatnum did not attach laboratory or medical test results. *See id*. In addition to the letters, Ms. Fowkes submitted 999 pages of medical records from the UC Davis Health System, which included office notes, laboratory reports, medication logs, radiology
14 reports, lists *14 of diagnoses, and medical history reports from Ms. Fowkes's primary care, neurology, cardiology, orthopedic, and pain management doctors from 2010 through April 2014. AR 2086.

MetLife followed up with Ms. Fowkes's lawyer on July 21, 2014. AR 2095-2096. With Ms. Fowkes's lawyer, MetLife confirmed her position that the following conditions impacted her functioning: (1) osteoarthritis, (2) congenital heart failure, (3) epilepsy with resulting seizures, (4) right hand tremors, and (5) fibromyalgia. AR 2096. When MetLife asked about her depression, Ms. Fowkes's lawyer stated her depression was likely due to her several physical conditions, was not disabling her, was not being treated, and did not need to be addressed on appeal. AR 2097. Lastly, MetLife confirmed Ms. Fowkes's health care providers were Dr. Oh, Dr. Pereira, Dr. Luke, and Dr. Bukkapatnum. *Id*.

1. MetLife Refers File to Appeals Nurse Consultant

On July 21, 2014, MetLife sent Ms. Fowkes's appeal file, including her attorney letters, records of discussions with her lawyer, and medical records to internal appeals nurse consultant Nancy Brasefield. AR 2099. Appeals nurse consultant Brasefield reviewed the materials in Ms. Fowkes's file, which included the materials submitted in support of her initial LTD claim and the additional materials submitted in support of her appeal. AR 2100-2124. On August 1, 2014, appeals nurse consultant Brasefield completed the review and made several findings regarding Ms. Fowkes's conditions. AR 2101.

Regarding osteoarthritis, appeals nurse consultant Brasefield noted Ms. Fowkes's last follow-up with orthopedic surgeon Dr. Pereira was on September 23, 2013, at which point he stated no further treatment was needed. AR 2119. Regarding her heart conditions, appeals nurse consultant Brasefield noted her pacemaker was installed in June 2012 to take care of sick sinus syndrome, well before Ms. Fowkes began to claim disability. AR 2120. Her other heart conditions, including congenital heart failure, were not supported by "clinical exam findings." AR 2123. Regarding Ms. Fowkes's epileptic seizures and right hand tremors, the most recent EEG exam, completed on November 1, 2013, reflected several shaking behaviors but no "electroencephalographic correlation," suggesting the seizures were not induced by epilepsy. AR 2120.
15 Regarding fibromyalgia, nurse clinician Brasefield noted Ms. Fowkes's file contained one *15 report from 2011 showing positive findings of fibromyalgia, but this report was made while Ms. Fowkes worked for VSP, and no

recent clinical evidence or exam supported a current flare-up of fibromyalgia. AR 2123. In the end, appeals nurse consultant Brasefield concluded it was "unclear" whether the evidence Ms. Fowkes provided substantiated her claims for disability. AR 2122-2123.

2. MetLife Refers Claim to Outside Medical Consultant

MetLife next sent Ms. Fowkes's file to Dr. Arousiak Varpetian, a board certified neurologist and independent physician consultant for an independent third party review. AR 66. MetLife asked Dr. Varpetian if the physical conditions "alone, or in combination, support [Ms. Fowkes's disability claim]." AR 77. MetLife also asked Dr. Varpetian to describe the clinical findings that supported Ms. Fowkes's functional limitations. *Id*. Dr. Varpetian reviewed Ms. Fowkes's appeal file, including notes, labs, and reports from her doctor's visits from 2010 to 2014, and concluded "the documentation does not support continuous functional impairment." AR 63.

Regarding her osteoarthritis, Dr. Varpetian found Ms. Fowkes was "able to walk and took medication for the pain." AR 64. He concluded, "there is no documentation in the notes from the orthopedic surgeons that claimant was impaired from daily routine walking or activities of daily living. No restrictions or limitations were recommended due to bilateral knee surgery in the post-operative period and thereafter." *Id*. Regarding her heart conditions, Dr. Varpetian reviewed office notes and laboratory reports from her March 2013 emergency room visit, and her visits with Dr. Bukkapatnum to determine if Ms. Fowkes was disabled due to "chest pain, orthostatic hypotension, diastolic dysfunction, and sick sinus syndrome." AR 63. He found Ms. Fowkes had an extensive cardiac evaluation and was found to have "normal coronary arteries and systolic function." *Id*. Dr. Varpetian also concluded Ms. Fowkes's "cardiac function was well compensated and no impairment was found due to her cardiac condition." AR 64. In sum, Dr. Varpetian concluded "the records do not support any restrictions or limitations due to claimant's cardiac diagnosis other than not working overhead with the left arm
16 because of the pacemaker." *Id*. Regarding her epilepsy and resulting seizures and tremors, Dr. Varpetian *16
studied the results of the 48-hour ambulatory EEG monitoring test Ms. Fowkes underwent on November 1, 2013 to determine if her seizures were caused by epilepsy. *Id*. According to the EEG, Ms. Fowkes's seizures were "non-epileptic" in nature. *Id*. As to her hand tremor, Dr. Varpetian observed examination results were "inconsistent, with tremor appearing during examination and not other times." *Id*. Regarding the tremors, Dr. Varpetian observed, "no neurological examination is evident from the records." *Id*. Overall, Dr. Varpetian concluded Ms. Fowkes's "reports of seizure-like activities are not neurological in nature and don't warrant any restrictions or limitations from [the] neurological perspective." AR 65. Regarding her fibromyalgia, Dr. Varpetian found Ms. Fowkes was evaluated by two different rheumatologists and "no impairment was noted due to the subjective complaints of pain." AR 64. The progress notes from various providers "showed the claimant in no distress despite complaining of severe diffuse pain." AR 17. Based on his findings, Dr. Varpetian concluded "there is no subjective or objective evidence in the reports to support restrictions or limitations from full time work due to pain." AR 64. Ms. Fowkes also claimed disability due to constant migraines. *Id*. The doctor noted she made complaints of migraines on December 13, 2010 in the hospital emergency department, AR 47, on November 1, 2013 with Dr. Luke, AR 60, and on April 26, 2014 also with Dr. Luke, AR 64. He noted the complaints did not cause long-term difficulties. *Id*.

In sum, Dr. Varpetian found Ms. Fowkes's disability appeal was not supported by her evidence. AR 45-64. He concluded she was not disabled under the terms of the Plan. AR 2135.

3. MetLife Confirms LTD Denial

On September 16, 2014, MetLife sent Dr. Varpetian's report to Doctors Bukkapatnum, Pereira, Oh, and Ms. Fowkes's attorney, AR 2136, and allowed fourteen days for any responses, *id*. By October 1, 2014, MetLife had not received any response from Ms. Fowkes's doctors or attorney. *Id*. MetLife confirmed Ms. Fowkes's LTD claim denial that same day. AR 2137. MetLife informed Ms. Fowkes and her attorney of the denial by letter to her attorney, which stated in part, [17]

> [W]e have taken into consideration all the information that was provided by you, Ms. Fowkes, and her treating physicians.
>
> In making our determination, we acknowledged and considered the records provided in which you felt establish that Ms. Fowkes was unable to work due to her uncontrolled epilepsy, total knee replacement and revision, and cardiac condition, along with right hand tremor, and cognitive issues due to her medical conditions.
>
> However the determination of disability is not solely based on diagnoses, but on functional capabilities related to symptoms and substantiated by clinical findings.
>
> Our review, which included a Board Certified [Independent Physician Consultant], who spoke with Ms. Fowkes['s] treating providers, found there was insufficient clinical evidence to support a severity of Ms. Fowkes['s] medical conditions that would support a continuous impairment or would prevent Ms. Fowkes from performing her own job, or usual occupation from March 12, 2013 forward.
>
> . . .
>
> Therefore, Ms. Fowkes did not meet the Definition of Disability and the original decision to deny her LTD benefit was appropriate, and benefits will remain denied.

AR 2137-2142. Because Ms. Fowkes had exhausted her administrative remedies under the Plan, "no further appeals w[ould] be considered" by MetLife. AR 2137-2130.

F. Documents Submitted After MetLife Appeal and Final Denial

On October 16, 2014, Ms. Fowkes's attorney responded to MetLife's denial letter with additional records to support Ms. Fowkes's disability claim. AR 2144. He faxed a complete medical report from social worker Maatisak Amenhetep, which evaluated Ms. Fowkes's mental and emotional capabilities. AR 3-7. Social worker Amenhetep noted Ms. Fowkes was in a critical mental health state and had a "poor" capacity to maintain attention and concentration and to interact with supervisors. AR 5. In sum, social worker Amenhetep concluded Ms. Fowkes was "totally unable to work" because she suffered from "severe post-traumatic stress disorder." AR 8.

While the record does not make clear whether supporting evidence was submitted, Ms. Fowkes also contends that on February 24, 2015, the Social Security Administration (SSA) [18] found her to be disabled with an onset date of March 12, 2013. *See* Pl.'s Mot. at 11, ECF No. 19-1.

III. DISCUSSION

Ms. Fowkes argues she is disabled as defined under the terms of the Plan due to the following conditions: (1) osteoarthritis; (2) epilepsy; (3) a "heart condition"; (4) fibromyalgia; (5) migraine headaches and neck pain; (6) right hand tremors; (7) memory loss; and (8) depression. Pl.'s Mot. at 9. MetLife argues that despite Ms. Fowkes's several diagnoses, she is not disabled under the terms of the Plan because she did not provide evidence showing she was precluded from performing the "substantial and material duties of her sedentary occupation." Def.'s Mot. at 6, ECF No. 20.

Below, the court discusses the standard governing the ERISA cross-claims, the propriety of considering evidence submitted after MetLife's appeal denial, and the merits of the parties' cross-claims. As explained in more detail below, the court reviews the cross-claims under a *de novo* standard, does not consider documents submitted after MetLife's appeal denial, and concludes Ms. Fowkes has not established disability under the terms of the Plan.

A. Legal Standards

1. ERISA Generally

ERISA provides claimants with a federal cause of action to recover benefits due under an ERISA plan. 29 U.S.C. § 1132(a)(1)(B). Under Rule 52(a) of the Federal Rules of Civil Procedure, each of the parties moves for judgment in its favor on the ERISA claim, and the court conducts what is essentially a bench proceeding based on the record, evaluating the persuasiveness of conflicting testimony and deciding which is more likely true. *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1094-95 (9th Cir. 1999). As recounted above, the parties agreed the matter would be resolved by cross-motions for judgment under Rule 52 based on the record submitted to the court. ECF No. 16 at 2. No party requested the opportunity to prevent live testimony.

ERISA specifically provides for judicial review of a decision to deny benefits to an ERISA plan beneficiary.
19 *See* 29 U.S.C. § 1132(a)(1)(B). It also establishes federal court *19 jurisdiction to hear such a claim. *See* 29 U.S.C. § 1132(e). A denial of ERISA benefits "is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *see also Abatie*, 458 F.3d at 963 ("*De novo* is the default standard of review."). If the terms of the plan grant discretionary authority, a less stringent "abuse of discretion" standard is applied. *Abatie*, 458 F.3d at 967. "To assess the applicable standard of review, the starting point is the wording of the plan." *Id.* at 962-63.

Here, Ms. Fowkes contends it is irrelevant whether the Plan grants discretionary authority to MetLife because California law has rendered such discretionary grants "void and unenforceable." Pl.'s Mot. at 14. She further contends because the discretionary grant is "void and unenforceable," *de novo* review is proper here. *Id.* MetLife does not disagree. Def.'s Mot. at 19. The court finds *de novo* review is the correct standard, as explained below.

2. California's Ban on Discretionary Clauses

On January 1, 2012, California barred application of language in an employment insurance plan that grants discretionary authority to the plan administrator. Cal. Ins. Code § 10110.6; *Jahn-Derian v. Metro. Life Ins. Co.*, No. 13-7221, 2016 WL 1355625, at *5 (C.D. Cal. Mar. 31, 2016). The law provides, in relevant part,

> If a policy, contract, certificate, or agreement offered, issued, delivered, or renewed, whether or not in California, that provides or funds life insurance or disability insurance coverage for any California resident contains a provision that reserves discretionary authority to the insurer, or an agent of the insurer, to determine eligibility for benefits or coverage, to interpret the terms of the policy, contract, certificate, or agreement, or to provide standards of interpretation or review that are inconsistent with the laws of this state, that provision is void and unenforceable.

Cal. Ins. Code § 10110.6. The statute defines "renewed" as "continued in force on or after the policy's anniversary date." *Id*. A renewal of an insurance policy is significant because "[t]he law in effect at the time of renewal of a policy governs the policy . . . ." *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 927 (9th Cir. 2012). "Each renewal incorporates any changes in the law that occurred prior to the renewal." *Id*. Thus, any
20 relevant changes in the statutory or *20 decisional law in force at the time the insurance policy is renewed "are read into each policy thereunder, and become a part of the contract with full binding effect upon each party." *Id*.

Although the Ninth Circuit has not addressed the applicability of section 10110.6 to ERISA plans, several district courts have concluded *de novo* review is appropriate where section 10110.6 voids plan discretionary clauses. *See*, *e.g.*, *Hirschkron v. Principal Life Ins. Co.*, 141 F. Supp. 3d 1028, 1032 (N.D. Cal. 2015) (provisions of plan with complete discretion to interpret plan and determine eligibility for benefits were invalid and unenforceable under California law, and, thus, plan administrator's decision denying long LTD insurance benefits to plan participant was subject to *de novo*, rather than arbitrary and capricious, standard of review in participant's action to recover benefits under ERISA); *Cerone v. Reliance Standard Life Ins. Co.*, 9 F. Supp. 3d 1145, 1152 (S.D. Cal. 2014) (same); *Curran v. United of Omaha Life Ins. Co.*, 38 F. Supp. 3d 1184, 1191 (S.D. Cal. 2014) (same); *Gonda v. The Permanente Med. Grp., Inc.*, 10 F. Supp. 3d 1091, 1095 (N.D. Cal. 2014) (same).

Here, the certificate date of MetLife's insurance Plan is January 1, 2011. AR 2147. This same policy was in effect in October 2014, when MetLife denied Ms. Fowkes's long-term disability benefits. AR 2137. The policy "thus continued in force on or after the policy's anniversary date." *See id*.; Cal. Ins. Code § 10110.6. Section 10110.6 applies here and voids any grant of discretion to the Plan administrator. Accordingly, the *de novo* standard is proper.

In employing a *de novo* standard of review, the court "simply proceeds to evaluate whether the plan administrator correctly or incorrectly denied benefits." *Abatie*, 458 F.3d at 963. "[T]he court does not give deference to the claim administrator's decision, but rather determines in the first instance if the claimant has adequately established that he or she is disabled under the terms of the plan." *Muniz v. Amec Const. Mgmt., Inc.*, 623 F.3d 1290, 1295-96 (9th Cir. 2010). Before applying this standard, however, the court must first
21 decide whether it may consider Ms. Fowkes's post-appeal evidence. *21

B. Extra-Record Evidence

Ms. Fowkes requests that the court to consider two pieces of evidence outside the administrative record: (1) the SSA determination that Ms. Fowkes is disabled, and (2) an October 2014 report from social worker Maatisak S. Amenhetep, which supports a diagnosis of severe post-traumatic stress disorder. Pl.'s Mot. at 11; AR 4. MetLife requests the court disregard this evidence, contending neither the SSA determination nor the Amenhetep report was provided to MetLife before it made its LTD determination. Def.'s Evid. Obj. at 2, ECF No. 23-1.

When reviewing an ERISA claim, the court is ordinarily limited to the administrative record before the plan administrator at the time of the claimant's benefit denial. *See Abatie*, 458 F.3d at 970. This restriction is based on the principle that federal district courts should not function "as substitute plan administrators," and that expanding the record on appeal "would frustrate the goal of prompt resolution of claims by the fiduciary under the ERISA scheme." *Taft v. Equitable Life Assurance Soc'y*, 9 F.3d 1469, 1472 (9th Cir. 1993) (citation omitted), abrogated on other grounds by *Abatie*, 458 F.3d at 973. Where, as here, the court reviews an ERISA claim *de novo*, it can admit outside evidence "only when circumstances clearly establish that additional evidence is necessary to conduct an adequate *de novo* review of the benefit decision." *Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan*, 46 F.3d 938, 944 (9th Cir. 1995) (citation omitted). In most cases where review is *de novo*, "additional evidence is not necessary for adequate review of the benefits decision, [and] the district court should only look at the evidence that was before the plan administrator . . . at the time of the determination." *Id*. That "someone at a later time comes up with new evidence" does not make outside review necessary. *Id*. Rather, the facts of the case should fit within one of the following non-exhaustive "list of exceptional circumstances" to warrant consideration of materials beyond the record:

> [1] claims that require consideration of complex medical questions or issues regarding the credibility of medical experts; [2] the availability of very limited administrative review procedures with little or no evidentiary record; [3] the necessity of evidence regarding interpretation of the terms of the plan rather than specific historical facts; [4] instances where the payor and the administrator are the same entity and the court is concerned about impartiality;

22 *22

> [5] claims which would have been insurance contract claims prior to ERISA; and [6] circumstances in which there is *[sic]* additional evidence that the claimant could not have presented in the administrative process.

Opeta v. Nw. Airlines Pension Plan, 484 F.3d 1211, 1217 (9th Cir. 2007) (citation omitted).

The *Mongeluzo* case illustrates how the court determines whether outside evidence is necessary for an adequate review of a plan decision. In that case, the plaintiff's employer denied his claim for long term benefits, finding the plaintiff could not qualify because his conditions fell within the Plan's limitation clause, which stated in relevant part, "[p]ayment will not be made under this plan for any disability . . . for more than 24 months during your lifetime if the disability is caused by mental illness or functional nervous disorder." *Mongeluzo*, 46 F.3d at 941. Although the Plan did not define the terms "mental illness" and "functional nervous disorder," the plaintiff's employer, after a medical evaluation from an employer-sponsored physician, concluded the plaintiff's conditions were caused by "mental illness or functional nervous disorder," and therefore disqualified him for long-term disability benefits because no coverage was provided for such conditions under the Plan. *Id*.

Two years after the denial, a doctor diagnosed the plaintiff with chronic fatigue syndrome and concluded the plaintiff's disability was "not caused by a mental illness or functional nervous disorder." *Id*. The plaintiff's employer, however, refused to consider the doctor's report or the new diagnosis. *Id*.

The plaintiff and employer filed cross-motions for judgment in district court under ERISA. *Id*. In support of its motion, the plaintiff argued the "mental illness" limitation was ambiguous and needed to be construed against the drafter in evaluating the employer's benefit denial. *Id*. The plaintiff also argued the district court should consider the diagnosis of chronic fatigue syndrome because it had been unavailable when he became disabled, first presented a claim for disability benefits to the employer; and then appealed internally to the employer. *Id*. The district court declined to consider the new evidence. *Id*.

The Ninth Circuit reversed, first holding the terms "mental disorder" or "functional nervous disorder" were
23 ambiguous and should therefore be construed against the *23 drafter in favor of the plaintiff. *Id*. With ambiguities resolved in the plaintiff's favor, the Ninth Circuit narrowed the definition of mental illness, concluding, "if either a cause or a symptom of the disease were physical and caused the disability in whole or in part, then benefits are payable." *Id*. (citing *Patterson v. Hughes Aircraft Co*., 11 F.3d 948, 949 (9th Cir. 1993)). In light of this narrowed definition, the court held a genuine dispute of fact existed as to whether the plaintiff's conditions fell within the Plan's limitation clause. *Id*. at 943.

The narrowed definition also prompted the Ninth Circuit to conclude the plaintiff's additional evidence was necessary to conduct an "adequate *de novo* review of the benefits decision." *Id*. at 944. In support of its holding, the court looked to the nature of the outside evidence, reasoning the chronic fatigue syndrome diagnosis was not a "new claim, but simply a new explanation for [the plaintiff's disability]." *Id*. The court noted this "new explanation" was not, and could not have been, available to the administrator prior to its decision, and the new diagnosis was "part of the determination of whether physical causes or physical symptoms were in whole or in part a cause" of the plaintiff's disability such that benefits should have been paid. *Id*. The Circuit reversed and remanded, "for a factual determination whether [the plaintiff] suffers from a disability not caused by mental illness or functional nervous disorder," under the terms of the Plan as construed by the Circuit. *Id*. at 944.

Ninth Circuit opinions subsequent to *Mongeluzo* have referenced *Mongeluzo* either distinguishing it or, like it, holding review of additional evidence warranted only in exceptional circumstances. *See Kearney v. Standard Ins. Co*., 175 F.3d 1084, 1091 (9th Cir. 1999) (additional evidence could not be admitted where plaintiff could have "easily submitted . . . material" to employer); *Opeta*, 484 F.3d at 1219 (videotape of plaintiff doing light yard work, made almost two months before final disability finding, was inadmissible where employer could have, but did not, submit materials to independent medical examiner); *Silver v. Exec. Car Leasing Long-Term Disability Plan*, 466 F.3d 727, 732 n.2 (9th Cir. 2006) (SSA decision inadmissible because grant of disability "merely repeat[ed] information that was already available to employer"); *Friedrich v. Intel Corp*., 181 F.3d 1105, 1111 (9th Cir. 1999) (additional evidence could be admitted because employer prevented plaintiff from
24 providing medical evidence to support disability claim). *24

Here, the Social Security decision is not necessary or relevant to the court's *de novo* review. First, while no Ninth Circuit holding explicitly speaks to the issue of whether a subsequently granted SSA award should be considered, the Seventh Circuit has addressed the question, persuasively. In *Majeski v. Metro. Life Ins. Co*., 590 F.3d 478, 483 (7th Cir. 2009), that circuit opined a district court need not consider a subsequently granted SSA award in evaluating a plan administrator's decision, because doing so would pose "practical problems" by effectively allowing supplementation of the administrative record "without limit," and would amount to reopening a "closed appeal" to consider evidence not before the administrator at the time of review. *Id*.

Second, while Ms. Fowkes's case is analogous to *Mongeluzo* in that the SSA disability finding became available only after MetLife denied her LTD claim, her case is distinguishable in that the "new evidence" is unnecessary for a full review because the definitions of disability under the Plan and SSA rules are different. *Compare* AR 2172 (to establish disability under Plan, claimant must show inability to "perform with reasonable continuity the [s]ubstantial and [m]aterial [a]cts necessary to pursue . . . [u]sual [o]ccupation in the usual and customary way") *with Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999) (to establish disability under the SSA Act, claimant must show he "suffers from a medically determinable physical or mental impairment that

can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than twelve months"). Because the Plan's definition of disability is different from the SSA definition, it is entirely plausible that Ms. Fowkes is disabled under the SSA Act and not disabled under MetLife's Plan.

Finally, unlike in *Mongeluzo*, Ms. Fowkes does not contend MetLife's Plan is ambiguous, or that MetLife erroneously defined a term in the Plan. Ms. Fowkes merely argues that under the terms of the Plan, she qualifies for LTD benefits. The SSA award will not be considered in reviewing the merits of Ms. Fowkes's ERISA claim.

Similarly, the Amenhetep report is not necessary to the court's *de novo* review. Unlike in *Mongeluzo*, Ms. Fowkes was diagnosed with and treated for severe post-traumatic stress disorder during the LTD appeals period
25 and well before MetLife denied LTD benefits in *25 October 2014. Ms. Fowkes does not contend MetLife or other circumstances precluded her from filing treatment notes related to her condition before MetLife denied her benefits. The Amenhetep report will not be considered.

C. Establishing Disability under *De Novo* Review

As noted above, Ms. Fowkes argues she is disabled as defined by the terms of the Plan due to (1) osteoarthritis; (2) epilepsy; (3) a "heart condition"; (4) fibromyalgia; (5) migraine headaches and neck pain; (6) right hand tremors; (7) memory loss; and (8) depression. Pl.'s Mot. at 9. The Plan states Ms. Fowkes is required to provide "[w]ritten evidence satisfactory to [MetLife]" for any claim for LTD benefits. AR 2170. Where a plan requires a claimant to provide "satisfactory proof of disability, the claimant must proffer evidence not only that she has a relevant diagnosis, but also that the illness or injury precludes her from performing the tasks required by her regular occupation. *See Jordan v. Northrop Grumman Corp. Welfare Benefit Plan*, 370 F.3d 869, 880 (9th Cir. 2004) ("That a person has a true medical diagnosis does not by itself establish disability"), *overruled in part on other grounds by Abatie*, 458 F.3d at 969.

Ms. Fowkes does not contend the Plan's written evidence requirement violates ERISA. Instead, she takes issue with the procedures MetLife used to evaluate her LTD claim. *See* Pl.'s Mot. at 17. In particular, she contends MetLife required her to present "objective evidence" in support of her LTD claim, *id*., and argued at hearing that MetLife did not consider the cumulative effect of her conditions in determining whether she adequately established disability. MetLife contends subjective reports of pain need not be taken at face value, Def.'s Mot. at 23, and argued at hearing no disability is established even when considering Ms. Fowkes's conditions in combination.

Even assuming Ms. Fowkes's contentions have merit, they do not warrant judgment in Ms. Fowkes's favor at this late stage, for she does not point the court to the "[w]ritten proof needed to establish disability under the terms of the Plan. This lack of written proof provides sufficient grounds to uphold MetLife's decision to deny LTD benefits.

Regarding osteoarthritis, while the record shows Ms. Fowkes had throbbing pain in her left knee from
26 prolonged recovery, AR 2018, orthopedic surgeon Dr. Pereira did not *26 provide a restrictions and limitations form showing Ms. Fowkes would be precluded from engaging in the tasks of her sedentary position, *id*. Further, Dr. Pereira noted her recovery would occur during the eight weeks from September 4, 2013, and that Ms. Fowkes would then no longer need treatment, AR 2013. In fact, the record shows she stopped seeking treatment on October 8, 2013, and no longer claimed disability due to her knee surgery. AR 2032. In cases in which a plaintiff significantly decreases or does away with treatment for a purportedly disabling condition, the plaintiff's disability claim may be undermined. *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995). In any

event, as of October 30, 2013, Ms. Fowkes no longer claimed disability due to her osteoporosis. *Id*. Lastly, evidence in the record establishes Ms. Fowkes can complete the tasks of her sedentary position. For example, on September 25, 2013, Dr. Bukkapatnum noted Ms. Fowkes could sit, stand, and walk intermittently for one hour. AR 2026. While Ms. Fowkes's position required her to work for more than one hour, Ms. Fowkes has not shown or argued her job precludes her from sitting intermittently. Further, on August 13, 2013, after knee replacement surgeries, Ms. Fowkes informed MetLife she could sit at a desk and answer phones for short periods of time. AR 2004. Ms. Fowkes has not established disability due to osteoarthritis.

Regarding Ms. Fowkes's claims of disability due to epilepsy, on March 31, 2014, Dr. Oh noted it was unclear whether the origin of her seizures was epileptic. AR 1309. That her seizures were not attributed to epilepsy was confirmed on November 1, 2013, where an EEG reflected several shaking behaviors but no "electroencephalographic correlation." AR 2120. Ms. Fowkes argues she was able to work until her seizure medications failed, Pl.'s Mot. at 4, but does not point to a pin cite in the record supporting this claim, and the court otherwise finds no support. Ms. Fowkes also has not provided evidence establishing the seizures, epileptic or not, precluded her from engaging the tasks of her position.

Regarding her hand tremors, a March 27, 2014 examination noted Ms. Fowkes's tremors were "inconsistent" with tremor appearing only with examination when, at other times, she sat comfortably with no tremors
27 apparent. AR 65. Ms. Fowkes does not point the court to ///// *27 evidence undermining these findings, and the court has not found evidence in the record. *See* Pl.'s Mot. at 9. Ms. Fowkes has not established disability due to epilepsy or right hand tremors.

Regarding her claims of disability due to a "heart condition," primary care physician Dr. Stauber noted Ms. Fowkes could sit for two hours, stand for an hour, walk for an hour, and lift up to twenty pounds. AR 57. Although Dr. Stauber also noted Ms. Fowkes could not work due to chronic pain, he did not provide restriction reports or other evidence supporting this finding. This evidence of her ability to engage in the tasks of her sedentary position was not undermined by primary care physician Dr. Luke's office notes, which stated Ms. Fowkes had normal coronaries but displayed evidence of diastolic dysfunction. AR 2072. Dr. Luke did not discuss how or whether these diagnoses precluded Ms. Fowkes from performing the tasks of her position as a network administrator. *See id*. On April 3, 2014, cardiologist Dr. Bukkapatnum reported he was treating Ms. Fowkes for complex cardiovascular issues. AR 1310. He also stated Ms. Fowkes has "severe diastolic dysfunction, orthostatic hypotension, [and] sick sinus syndrome with a pacemaker." *Id*. But, similarly to Dr. Luke's evaluation, Dr. Bukkapatnum's notes do not discuss whether these diagnoses precluded Ms. Fowkes from doing her job. *See id*. Ms. Fowkes has not established disability due to her heart conditions.

Regarding fibromyalgia, the record includes one report from 2011 showing positive findings, but this report was made at a time Ms. Fowkes worked for VSP, and no more recent clinical evidence or exam findings support a flare-up in the relevant time period. AR 2123. Similarly, Ms. Fowkes's complaints of migraines occurred while she was working for VSP, suggesting the condition was not disabling. AR 47, 60, 64. In any event, Ms. Fowkes does not point the court to evidence establishing the migraines are so debilitating that she is precluded from working in her position. *See* Pl.'s Mot. at 9. Ms. Fowkes has not established disability due to her fibromyalgia or migraines.

Finally, regarding her depression, Ms. Fowkes's lawyer explicitly disclaimed depression as a cause of her disability on July 21, 2014, stating her depression was likely due to her several physical conditions, was not disabling, was not being treated, and need not be addressed on appeal. AR 2097. Ms. Fowkes argues her

28 depression leaves her feeling hopeless *28 because of her "health, medical condition, and lack of money," Pl.'s Mot. at 9, but she does not provide any evidence establishing it precludes her from engaging in the tasks of her position. Ms. Fowkes has not established disability due to depression.

In sum, upon *de novo* review, Ms. Fowkes has not met her burden to establish she was disabled under the terms of the Plan.

IV. CONCLUSION

Ms. Fowkes's cross-motion for judgment is DENIED and MetLife's motion is GRANTED.

This order resolves ECF Nos. 19 and 20. This case is CLOSED.

IT IS SO ORDERED. DATED: January 24, 2017.

/s/_____

UNITED STATES DISTRICT JUDGE