

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES – GENERAL**

Case No. LA CV15-04029 JAK (AGRx)

Date June 15, 2017

Title Linda Lanford v. Life Insurance Company of North America, et al.

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Present: The Honorable JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer

Not Reported

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

**Proceedings: DEFENDANT'S MOTION FOR JUDGMENT/COURT TRIAL (DKT. 33)**

**I. Introduction**

Plaintiff Linda Lanford ("Plaintiff") brought this action pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA") against Life Insurance Company of North America ("Defendant"). Plaintiff challenges an administrative decision denying her claim for long term disability benefits. First Amended Complaint ("FAC"), Dkt. 12. Plaintiff claims that she was disabled due to the ongoing pain that she has had since undergoing treatment for colorectal cancer in 2010. She seeks payment of those benefits that she contends should have been paid during the time period that she was eligible for disability coverage.

On April 26, 2016, Plaintiff submitted an Opening Trial Memorandum ("Trial Brief" (Dkt. 32)) and Defendant filed a Motion for Summary Judgment ("Defendant's Motion" (Dkt. 33)). Each party then filed an opposition to the motion brought by the other ("Plaintiff's Response" (Dkt. 36) and "Defendant's Response" (Dkt. 37)).

A hearing on both motions was held on October 31, 2016, and the matter was taken under submission. Dkt. 47. Thereafter, the parties were directed to file supplemental briefs in light of *Armani v. Northwestern Mutual*, 840 F.3d 1159 (9th Cir. 2016). Dkt. 49. Plaintiff submitted her supplemental brief on November 22, 2016. Dkt. 50. Defendant submitted its responsive supplemental brief on November 28, 2016. Dkt. 51. The matter was then resubmitted.

For the reasons stated in this Order, Plaintiff's request for relief is **GRANTED**.

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**II. Factual Background**

**A. Plaintiff's Employment and Insurance Coverage**

From 2006 to 2010, Plaintiff was employed by ISEC, Inc. ("ISEC") as a Single CF Project Manager ("Project Manager"). ISEC performs certain work related to construction projects.<sup>1</sup> AR 971. Plaintiff's duties included the general oversight of construction projects. AR 568-69. In the course of her work she interacted with the purchasing department of ISEC as well as outside vendors to ensure that necessary materials were timely provided for projects. *Id.* She also monitored the status of projects by making on-site visits. *Id.* In addition, Plaintiff oversaw the administrative process with respect to the completion of projects, including making payments to suppliers and vendors and collecting them from clients. *Id.*

ISEC provided Plaintiff with a long-term disability insurance policy ("LTD Policy") that became effective on July 1, 2010. AR 1427. The LTD Policy was administered by Defendant. *Id.* In the event that Plaintiff became disabled as defined in the LTD Policy, following a 90-day "elimination period," Plaintiff could receive benefits until the earlier or when she was no longer disabled, or the age of 65. AR 1430-31. These payments would be in amounts based on her earnings at the time of the disability. *Id.* For the first 90 days of a claimed disability, Plaintiff was insured under a separate short-term disability policy ("STD Policy") that was also administered by Defendant. AR 309.

The LTD Policy provides benefits for disabled employees and former employees in two stages. For the first 24 months of benefits, an employee is "disabled" if:

. . . solely because of Injury or Sickness, he or she is:

1. unable to perform the material duties of his or her Regular Occupation; or
2. unable to earn 80% or more of his or her Indexed Earnings from working in his or her Regular Occupation.

AR 1433.

After the payment of benefits for 24 months, a new definition of "disability" applies. Under its terms, a claimant is eligible to receive benefits only if he or she is unable to perform the duties of any occupation for which he or she "is, or may reasonably become, qualified based on education, training or experience." AR 1433.

**B. Plaintiff's Medical History**

1. Medical Background

In June 2010, Plaintiff underwent surgery for the removal of an "invasive squamous cell carcinoma," which was a small cancerous growth in her anal canal. AR 679; 944; 1312. Plaintiff then underwent

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<sup>1</sup> ISEC, Inc. was named as a Defendant in the FAC, but has been dismissed as a party to this action. Dkt. 17.

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radiation treatment from July through October 2010. AR 317. In September 2010, Plaintiff's treating physicians noted that her symptoms were "almost completely gone," and that her cancer appeared to be in remission. AR 1312; 625. They also reported a small area of "firmness" where the surgery had been performed. *Id.*

Due to this procedure, Plaintiff was away from work for three months. She returned on a part time basis in September 2010, and continued to work on that basis for approximately one year. In September 2011, which was approximately one year after Plaintiff had returned to part-time employment, she stopped working due to what she reported as chronic pain in her lower back and anal area. AR 1420-25.

## 2. Pain and Difficulty Sitting

Plaintiff applied for benefits under the STD Policy. Her claim was supported by a medical request form signed by Dr. Mario Curti, who is an oncologist. AR 1328. On the form, Curti noted that Plaintiff formerly had a squamous cell cancer of the anus, which had been removed and treated. *Id.* He also stated that Plaintiff was taking Percocet, a narcotic painkiller, and Neurotin, which is used to treat nerve pain. *Id.* The form also included his statement that Defendant was unable to return to work, even if accommodations were made, due to "pain out of control, [and] decreased mobility." *Id.* He assigned restrictions of no lifting or bending due to pain in the lower back, and estimated that Plaintiff could return to work in six months with certain restrictions, and one year without them. AR 1366.

Defendant approved Plaintiff's claim under the STD Policy on October 6, 2011. AR 528, 536. Defendant then began evaluating Plaintiff's eligibility for coverage under the LTD Policy. Plaintiff completed a disability questionnaire on November 30, 2011. AR 1292-1294. There, Plaintiff stated that she was unable to return to work due to continued pain in her anus and lower back and a raw area around tailbone and anus. *Id.* She stated that all of these conditions were caused by the treatment that she had received for her cancer, including the removal of the cancerous growth and the subsequent radiation therapy. *Id.* She also stated that she was unable to sit for extended periods of time, could only drive about five miles, and was taking prescription pain medications. *Id.* She added that she was able to do some cooking, cleaning and shopping, and walked "maybe 1/4 mile" once or twice a week. *Id.* Plaintiff identified her treating physicians as Dr. Alam Nisar Syed, (oncologic radiologist), Dr. Imad Shbeeb (surgeon), and Curti. *Id.*

In December 2011, Defendant approved Plaintiff's receipt of benefits under the LTD Policy, thereby transitioning from the STD Policy.

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3. Updates Regarding Plaintiff's Condition (2012-2013)

Throughout 2012 and continuing into 2013, Plaintiff and her treating physicians submitted periodic reports to Defendant regarding Plaintiff's condition. These reports stated that Plaintiff continued to suffer from pain in her lower back and anus, was taking narcotics to address the pain, and was limited in her physical activities. They also stated that there was no evidence that she did not remain in remission.

In June 2012, Curti provided Defendant with medical records showing that Plaintiff had completed chemotherapy without signs of any ongoing metastatic cancer. AR 1235-1245. Curti also stated that Plaintiff had developed radiation induced neuropathy, which left her with pain in her lower back. This reduced her mobility and required her to use pain medication on a regular basis. AR 1235. Curti stated that Plaintiff was "unable to work" due to this back pain. *Id.* Plaintiff also submitted notes from Dr. Stanley Chou, her pain management specialist. They included a "Physical Ability Assessment," which stated that Plaintiff should sit no more than 2.5 hours a day, lift no more than 50 pounds, carry no more than 20 pounds, and push or pull no more than 20 pounds. AR 1199-1200.

On July 6, 2012, Plaintiff spoke by telephone with a nurse case manager employed by Defendant. AR 229. During the call, Plaintiff stated that she needed and used pain medication daily in order to cope with severe pain. *Id.* The notes from the call state that Plaintiff reported that, on a daily basis, she tried to do "some things around house during day or go food shopping but then ha[d] to lay down due to pain." *Id.* Plaintiff stated that she loved her job, but did not see how she could resume work due to her pain. *Id.* On the basis of this communication and other medical information that was provided, the case manager determined that Plaintiff was disabled "by ongoing severe pain in anal/sacral area where pt [patient] had brachtherapy/radiation therapy with residual nerve damage and frequent skin breakdowns." AR 226.

In a report dated October 8, 2012, Curti repeated the finding that Plaintiff was experiencing pain at the location where the radiation treatment had been directed, but reported no other physical symptoms. AR 1168-1169. In a Physical Ability Assessment dated November 26, 2012, Curti checked boxes indicating that Plaintiff could engage in the following activities on an "occasional" basis, defined as "0-2.5 Hrs/Day" or "0-2/3 of the Day": sitting, standing, walking, reaching, and lifting or carrying up to 20 pounds. AR 1165-1166. Curti also checked a box indicating that Plaintiff could "frequently" engage in activities requiring "fine manipulation" and "grasps," meaning that she could participate in such activities "2.5-5.5 Hrs/Day" or "1/3-2/3 of the Day." *Id.*

In or about October 2012, Plaintiff was granted Social Security Disability Income ("SSDI") based on a finding by an Administrative Law Judge ("ALJ") that she was disabled as the term is defined under the Social Security Act. AR 1177; 784. The Administrative Record includes three pages of the decision by the ALJ. AR 784-786. There, it is stated that Plaintiff's "medically determinable impairments could reasonably be expected to produce the alleged symptoms, and that the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are credible." AR 785. The ALJ agreed that Plaintiff's pain "would affect her ability to sit for any length of time." *Id.* The ALJ also noted that Plaintiff "consistently sought treatment for her pain and there is a reasonable basis for it." *Id.*

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Chou also submitted his notes about his examinations of Plaintiff during office visits through November 26, 2012, as well as “pain questionnaires” he completed based on statements by Plaintiff. AR 1128-1153. On a “Restrictions and Limitations Form,” that Chou completed, it was stated that Plaintiff could “frequently” lift/carry up to 10 lbs; “occasionally” lift/carry up to 20lbs; “frequently” climb and balance; and “occasionally” stoop, kneel, crouch, crawl and reach above shoulder level. AR 1135. Chou also submitted a completed “Physical Effects of Pain Form.” It stated that Plaintiff suffered from pain that had a reasonable medical basis. AR 1136. Chou opined that Plaintiff’s pain was so disabling that it would prevent her from full-time work, including in a sedentary job. *Id.* Similarly, a “Mental Effects of Pain Form,” that Chou completed stated that the medications prescribed for Plaintiff affected her attention and concentration to a degree that she could not perform even simple, unskilled tasks at work. AR 1140.

In December 2012 and January 2013, Jean Kozik-Kulis, a Nurse Case Manager then employed by Defendant, contacted Chou by letter and telephone. AR 179. In notes regarding these communications, Kozik-Kulis noted that Chou’s statements about restrictions on Plaintiff’s ability to work appeared to conflict with Plaintiff’s physical examinations, where the results were within normal limits. AR 493-494. Chou responded that Plaintiff continued to complain of pain at the site of her radiation therapy, and still had a small open wound around the incision from that procedure. AR 179. Based these facts, Chou opined that Plaintiff could walk, but not sit down. He also stated that he was trying to “wean her down” from her use of Percocet, and had added Cymbalta, an alternative pain medication. *Id.* He stated that Plaintiff was “[m]entally doing OK.” *Id.*

The notes by Chou from Plaintiff’s regular visits to his office from December 2012 through May 10, 2013, refer to Plaintiff’s complaints of continued pain. AR 1071-85. The notes state that the results of the physical examinations showed that Plaintiff was normal, except that she continued to have “constant moderate pain in the lower back area.” AR 1071. *Id.* These records also consistently reflect a guarded prognosis for Plaintiff, noting that she was in the “rehab[ilitation]” phase of treatment. AR 1072. In response to a request for clarification from Defendant, Chou left a voicemail on July 1, 2013. In it he stated that Plaintiff’s only restriction was that she could not sit in a chair for more than ten minutes due to severe anal pain. AR 141.

Other reports submitted in early 2013 confirmed that Plaintiff was in remission, and stated that her physical condition was relatively normal. Curti provided a report dated March 25, 2013 with respect to the results from certain medical scans. AR 1116-1120. It states that there was no evidence of any malignancy. *Id.* An April 2, 2013 office visit note from Curti stated that [o]verall the patient is doing fair, [n]o evidence of disease.” *Id.* It also stated a plan to “[c]ontinue monitoring for recurrent disease.” *Id.* Similarly, the notes from Plaintiff’s visits to Shbeeb’s office from April 13, 2013 and May 29, 2013, reflected “no evidence of recurrence of carcinoma.” AR 1095. Shbeeb’s physical examination identified a “scar in the . . . anorectal area, small internal hemorrhoids, and small external hemorrhoids,” as well as some “skin radiation effect.” *Id.* He was extremely pleased with the findings. *Id.*

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**C. “Any Occupation” Investigation**

1. Commencement of Investigation

On June 12, 2013, Defendant wrote to Plaintiff, informing her she had been receiving LTD benefits for 18 months. AR 466. This was relevant, because as of December 9, 2013, she would have received them for 24 months, and would qualify for continued payments only if she were unable to perform the duties of “any occupation” for which she “is, or may reasonably become, qualified.” *Id.* Defendant informed Plaintiff that it would “begin a review” to determine if she qualified for continued payment of benefits under this standard. *Id.*

As part of the review process, Plaintiff submitted an updated disability questionnaire, dated July 1, 2013. It stated that she had “[c]onstant pain in rectal area from radiation treatment,” was “continually fatigued” and needed to lie down often, and required regular pain medication. AR 1053. She reported the ability to drive short distances, including to a store within 10 miles of her home, and said that she also did light housework and went shopping twice a week. *Id.* She also reported that she was able to use her computer four to five times per week, and engage in activities for a half hour per day. For recreation, Plaintiff stated that she read or watched television, spent 15 minutes each day working in her vegetable garden in a standing position, and walked four days a week for 15 minutes. She reported that she was taking a nightly dose of Zolpidem, which is a sleep aid, and 10 mg of Percocet for pain, which she took three to four times per day. AR 1050-1055.

On the questionnaire, Plaintiff stated that she did not know whether she could return to work. *Id.* She stated that she was unable to sit for long periods, and felt that she lacked the physical ability to perform the functions required of her former job. *Id.*

2. Covert Surveillance of Plaintiff

From July 29, 2013 to July 31, 2013, Defendant arranged for covert surveillance of Plaintiff, which was videotaped. On July 29, Plaintiff left her home at 12:40 p.m., and drove to several local retail stores. AR 1022-26. Plaintiff was observed carrying a large plastic bag from one of the stores. *Id.* After shopping at these stores, Plaintiff returned home at 2:38 p.m. *Id.* Plaintiff was also observed stepping into a camper trailer parked on her property. *Id.*

On July 30, Plaintiff left her home at 10:42 a.m. and drove for approximately five minutes to a gas station where she purchased fuel and had her vehicle washed. AR 1027-32. She then returned home, exited the vehicle and inspected its exterior. *Id.* She then drove back to the gas station, where an employee inspected her vehicle and photographed it. *Id.* Plaintiff then drove to a grocery store where she shopped. *Id.* She then left the store, loaded groceries into the trunk of the car and returned to her home at 12:44 p.m. She did not leave the house again that day. *Id.*

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On July 31, Plaintiff was observed leaving her home at 11:13 a.m. AR 1032-36. A man, whom Plaintiff later identified as her husband, then drove her in a truck to two local retailers. *Id.* She was observed pushing a shopping cart through each of them and then helping her husband load the purchases into the bed of the truck. *Id.* Plaintiff returned home again at 12:31 p.m., and remained there for the rest of the day. *Id.*

Over the three days, the surveillance agent described Plaintiff's movements as "fluid," and indicated that Plaintiff appeared to act without physical restrictions. AR 1022-1036.

3. Scheduled Medical Examination

Through a letter dated July 30, 2013, Defendant informed Plaintiff that it would schedule a Functional Capacity Evaluation ("FCE") of Plaintiff. AR 458. Its purpose was to evaluate her physical condition, as permitted under the LTD Policy. *Id.* In a subsequent phone conversation with Defendant, Plaintiff asked for information on why the FCE was necessary, and whether it was being scheduled due to inadequate information in her medical record. AR 133. Plaintiff also expressed concern that she would require transportation assistance to get to the FCE. *Id.* On August 8, 2016, Defendant notified Plaintiff that it intended to do a medical examination, rather than an FCE. AR 129. The Record states that this switch was made "based on medical appropriateness for [Plaintiff's] disability." AR 129.<sup>2</sup>

The medical examination was scheduled for September 24, 2013, and was to be conducted by Dr. Charles Wiseman, an oncologist. AR 457; 987. Plaintiff states that her husband "took off from work to drive her" to the examination in Beverly Hills, because the distance from her home to that office was too great for her to drive by herself. Dkt. 32 at 16. When Plaintiff arrived for the scheduled examination, Wiseman was not there. Plaintiff was also informed by Wiseman's staff that he had not received her medical records. AR 969. Plaintiff states that after waiting 30 minutes, Plaintiff and her husband decided to leave. *Id.* On their way out, Plaintiff and her husband met Wiseman in the hallway, and he allegedly "made a cryptic comment that 'we would probably not be happy with his opinions so it would be better not to see him anyway.'" *Id.* Plaintiff's trip home took more than an hour. AR 1006-1007.

Wiseman wrote a letter dated September 26, 2013, which states what he recalls about the events on September 24, 2013. AR 990. The letter states that Wiseman was only ten minutes late for the appointment, but understood that Plaintiff and her husband had arrived 30 minutes early, and had been in the waiting area for approximately 40 minutes. *Id.* The letter states that, during the interaction with Plaintiff and her husband in the hallway, Wiseman noticed that Plaintiff's husband was upset and that he raised his voice while speaking. *Id.* The letter also states that Wiseman was unable to calm Plaintiff's husband. *Id.* Because Wiseman believed Plaintiff and her husband had been rude to him and his staff, he concluded that he would be unable to provide an objective opinion. *Id.* Therefore, he declined to proceed with an examination of Plaintiff. AR 990, 992, 978.

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<sup>2</sup> Defendant states that the FCE was cancelled due to the objections by Plaintiff. Defendant has not cited to any evidence of an objection in the Administrative Record other than the questions Plaintiff posed that are described above.

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4. Second Round of Surveillance

Defendant arranged another three days of covert surveillance of Plaintiff from September 23-25, 2013. AR 928-930. On September 23, 2013, the party conducting the surveillance spent the entire day outside of Plaintiff's home. *Id.* He did not see Plaintiff leave the residence. *Id.*

On September 24, 2013, Plaintiff left her home at 9:32 am and drove to a professional building. She returned home at 10:46 a.m. AR 931-32. Plaintiff states that this building is where Chou's office is located. Dkt. 32 at 17. Plaintiff's husband then drove Plaintiff to Wiseman's office in Beverly Hills, as described above. *Id.* He then drove her home. AR 932-33.

On September 25, 2013, Plaintiff was observed driving her son to a nearby sushi restaurant at 10:56 a.m. AR 933-36, 621. They sat at the restaurant for 29 minutes, ate food and returned home at 12:06 p.m. *Id.* Plaintiff remained at home for the rest of the day. *Id.*

5. Additional Medical Information

Syed provided an office note dated October 1, 2013. It stated that Plaintiff remained free of cancer. AR 962-964. Under the heading titled, "Subjective," Syed wrote that Plaintiff was "maintaining excellent general physical condition." AR 963.

Curti also submitted records from office visits by Plaintiff on April 2, 2013 and October 3, 2013. AR 946-956. The results of each of these physical examinations showed normal conditions. *Id.* However, each report also stated that Plaintiff continued to complain of lower back pain at the site of her prior radiation therapy. AR 953.

Shbeeb provided notes from office visits by Plaintiff on April 15, May 29 and September 11, 2013. AR 941-944. His note from the September 11, 2013 visit stated that Plaintiff was experiencing rectal pain and stated this was "suggestive of levator and muscle spasm." *Id.* He also reported that, during his examination of Plaintiff, he found skin changes consistent with prior radiation therapy and identified "mild anal stenosis," *i.e.*, narrowing of the anal canal. AR 944.

Chou provided pain management records for Plaintiff for the period from February 29, 2012 through October 22, 2013. AR 848-899. His report of the physical examination of Plaintiff on October 22, 2013, states that her conditions were normal, but that she experienced mild pain on flexion and extension of the spine. AR 896-899.

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**D. Denial of Plaintiff's Claim, and Appeals**

1. Denial of Plaintiff's Claim

On November 13, 2013, Plaintiff's claim was reviewed by Kozik-Kulis. AR 92. Her conclusions and recommendations were based on facts in the Administrative Record. They included the following:

Medical does not demonstrate a current impairment to support a current functional loss as demonstrated by exams which are within normal limits for July, August, September, and October of 2013 w/ oncologist. [Plaintiff] does complain of pain, and pain is noted to be worse with bowel movements, straining w/stool, and walking. Methadone was added to [Plaintiff's] pain medication regime at last visit in October of 2013.

AR 92.

Kozik-Kulis also noted that Plaintiff's pain medications had been adjusted. Kozik-Kulis's assessment was confirmed by Associate Medical Director, Dr. Dennis Korpman. AR 88-89. He stated: "In my opinion, with a reasonable degree of medical certainty, limitations/restrictions for physical impairment are not supported." AR 89.

On November 21, 2013, Defendant issued a written notice of the termination of the payment of benefits to Plaintiff under the LTD Policy. AR 439-43. The notice explained that the denial was based on current medical information, video surveillance and the failure to complete an IME with Wiseman. *Id.* These facts were deemed to show that Plaintiff had the ability to perform the requirements of her regular occupation. AR 82; AR 827-28.

This denial of coverage took place only 18 days before the first 24 months of LTD coverage was completed. As noted above, at that 24-month threshold, the standard for recovery of benefits would have changed to a more rigorous one, allowing her to recover only if her disability prevented her from occupying "any occupation," rather than her "regular occupation." However, because that 24-month threshold had not been reached, denial was based solely on Plaintiff's ability to perform her regular occupation.

2. Plaintiff's First Appeal

a) Basis of Plaintiff's Appeal

On May 5, 2014, Plaintiff appealed the denial of her claim. AR 619. In connection with the appeal, Plaintiff submitted a letter stating that she was aware that she appeared to be healthy, but had debilitating pain. *Id.* The letter stated:

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I have pain that is not normal and it is unbearable if not treated with medication, lidocaine and sitz baths. I want to reinforce that I have never looked sick, never lost my hair or look [sic] like I have cancer. I got up every day and put on my makeup and tried to look as normal as possible, and have done that every day since being diagnosed. Just because someone does not look sick or in pain does not mean they are not.

*Id.*

The letter also addressed the surveillance videos of Plaintiff, specifically whether they could be interpreted to show Plaintiff's moving without pain. The letter stated that at the time each surveillance video was made, she had already taken her first, daily course of pain medication:

I get up early every day, usually before 6 and 7 am and immediately need to take pain medication. As shown on your video surveillance I do not leave my home until hours after I have taken my first daily round of pain medication, and there are days when I do not leave my home at all.

AR 620.

Plaintiff's appeal also included a January 7, 2014 letter from Chou. It recommended that Plaintiff receive permanent disability status:

Mrs. Lanford states that she has continued pain along the posterior aspect of the anus, the coccyx, especially when she sits for more than 1 hour or more. The medications used to control the pain are Percocet and Methadone. Mrs. Lanford is home bound at this time for a major part of the day, and seldom goes shopping because the level of pain requires her to consume medications to control her level of acute pain. The level of pain is further described as constant moderately severe restricted movement and inflexibility and stiffness and pins and needles sensations as well as achy, burning, excruciating, throbbing, stinging, shooting, sharp and stabbing pain localized in the left coccyx region and right coccyx region.

AR 624.

Plaintiff also presented an update from Syed, which was dated December 10, 2013, and based on Plaintiff's case history. AR 625. Syed noted that "[Plaintiff] continued to have pain along the posterior aspect of the anus over the coccyx, especially if she sits for more than half an hour or so, and relieved by Percocet and methadone." *Id.* Syed also stated that "Mrs. Lanford, most of the time, is home-bound but does go out for shopping, but cannot stay more than an hour without taking pain medication before she leaves home." *Id.* Syed added that Plaintiff "cannot sit for more than 45 minutes due to the pain" which "is most likely due to nerves trapped in the scar tissue." *Id.*

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b) Defendant's Investigation and Denial of Appeal

In response to the appeal, Defendant arranged for Plaintiff to have independent medical examinations ("IMEs") by two different physicians -- Dr. Philip Marion, who specializes in occupational medicine, and Dr. Xiao Su, an oncologist.<sup>3</sup> Each was assigned by a third party contractor to perform an IME.<sup>4</sup>

Marion prepared a report, which is dated June 25, 2014. AR 670-77. It describes Plaintiff's medical records and telephone conversations Marion had with Chou and Shbeeb. *Id.* The report states that Chou told Marion that Plaintiff's primary physical problem was sitting, and that he had recommended that she sit "no more than 20 minutes at a time without benefit of the ability to stand for approximately 5 minutes." AR 671-72. Chou stated that he was not aware of any adverse cognitive effects from Plaintiff's use of prescription medications, and had not restricted her from driving. *Id.*

Among the medical records that Marion reviewed was a December 2013 report by Syed. It includes his opinion that:

[Plaintiff] has a tender area of about 5 x 5 x 3 mm size, posteriorly at the 6 o'clock position to the anus over the coccyx. She continues with Percocet and methadone at two tablets a day with pain relief, with limited activity. She cannot sit for more than 45 minutes due to the pain. The pain is most likely due to nerve trapped in the scar tissue. However [Plaintiff] did have pain in the same area even before starting external irradiation.

AR 626.

Marion also reported that Shbeeb "indicated he had not addressed occupational or disability issues with Ms. Lanford. He indicated he would not have placed her on disability. However, Shbeed [sic] indicated he had no opinion regarding Ms. Lanford's ability to work." AR 672.

Based on his communications with these treating physicians, as well as a review of clinical factors, Marion found that there was no physical evidence to support Plaintiff's complaints of pain. AR 677. Marion also found that the surveillance footage undermined Plaintiff's claims of pain, noting that "Ms. Lanford has been observed performing activities she previously claimed she was incapable of performing." AR 676. Actions that were purportedly "not consistent with the customer's claimed functional

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<sup>3</sup> Plaintiff argues that Marion provided an assessment designed to support the insurer, and has called his credibility into question by submitting case citations in which Marion's assessments of other claims based on debilitating physical pain have been rejected. See Dkt. 32 at 22 n. 6 (citing cases that awarded benefits notwithstanding Marion's "attempts to minimize the insured's condition"). In response, Defendant has submitted a list of other cases in which Marion's conclusions were upheld. Dkt. 35 at 10.

<sup>4</sup> The contractor is Professional Disability Associates ("PDA"). Plaintiff contends, without presenting any supporting evidence, that PDA is "a company that specializes in insurer-friendly medical file reviews." Dkt. 32 at 20-21.

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limitations” included “standing and walking,” having lunch in a restaurant, performing “routine shopping activities” and “driv[ing] a motor vehicle.” AR 677.

Su’s June 17, 2014 report (AR 679), summarized statements by Curti, including that “[Plaintiff] is able to return to work as long as she can change her body position so that she does not have to sit continuously for more than 30 minutes.” AR 681. Su also found that Plaintiff’s activities in the surveillance footage “are not consistent with the customer’s claimed functional limitations.” AR 697.

Su’s report also included the following assessment:

Ms. Lanford should avoid work activities which require prolonged or continuous sitting for more than 30 minutes without changing her body position. Ms. Lanford was diagnosed with locally advanced squamous cell carcinoma of the anal canal, and underwent transanal resection, followed by concurrent chemoradiation therapy and a interstitial brachytherapy boost. She developed long-standing anal pain which makes her unable to sit for prolonged periods of time. This was consistently documented in the office visit notes by Ms. Lanford’s medical oncologist, radiation oncologist and colorectal surgeon.

AR 686-687.

After Defendant requested certain clarifications, Su responded by noting that “[Plaintiff] has no functional limitation as long as she is able to change her body position as needed.” AR 668-69. He reiterated that “[t]here is clinical evidence to support that Ms. Lanford has anal pain that makes it difficult for her to sit continuously for prolonged periods of times.” *Id.*

On July 7, 2014, Defendant again denied Plaintiff’s claim. AR 389. A primary basis for this denial was primarily Curti’s statement to Su that Plaintiff could do sedentary work if allowed to shift positions during the course of her required actions. AR 390.

3. Plaintiff’s Second Appeal

a) Basis of Plaintiff’s Second Appeal

Plaintiff submitted a request to Defendant for a second appeal in October 2014. AR 596. Plaintiff argued that her ability to sit was not the only problem. *Id.* The bigger issue was that the pain she had prevented her from focusing in a manner sufficient to work effectively. AR 597. As Plaintiff stated in support of the appeal:

[I]n order to do a job well you need to be able to focus, especially when the job is dealing with purchasing of a multitude of produces on each job, making sure all is in compliant to the specifications, as well as coordinating all phases of the construction projects and installation.

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*Id.*

In support of the second appeal Plaintiff also stated that Curti had informed her that his statement about her ability to work, which Marion cited in his report, had been “taken out of context.” *Id.* Curti submitted a letter in connection with the second appeal. It stated:

Based on my professional knowledge, training and experience, it is my medical opinion that [Plaintiff] is unable to perform the duties of any occupation with reasonable continuity because of lower back pain due to radiation therapy effects, given for Anal Cancer.

AR 599.

b) Defendant’s Investigation and Denial of Second Appeal

Defendant arranged for another IME of Plaintiff through a third party agency. The examiner was Dr. Sandiford Helm, a “pain specialist.” AR 576. On the basis of his examination and review of the medical evidence and surveillance footage, Helm assigned the following restrictions to work by Plaintiff:

Work restrictions precluding sitting or standing for more than one hour without being afforded the ability to get up and move around, and of not driving more than 40 minutes without being able to rest prior to resuming driving. She may work 8 hours a day, 5 days a week.

AR 588.

Helm also referred to the aforementioned surveillance videos and concluded that they showed that Plaintiff was capable of moving fluidly and sitting in a car for more than an hour. AR 589. He then stated that “[r]egarding sedation, the only medication which would cause sedation would be the methadone, which she takes at night.” AR 587. Helm observed that Plaintiff “is on a low dose of medication.” AR 588. This assessment was based in part on a conversion of her dosage to a “morphine-equivalent dose” using a method from the National Institutes of Health. Helm concluded that Plaintiff’s dosage was equivalent to “about 25 mg/day” of morphine. *Id.* Helm added that [v]arious guidelines, such as the Medical Board of California’s, point to doses of about 80 to 130 MED at which one should start to be concerned.” *Id.* Furthermore, Helm opined that “[r]egardless as to whether the dose is low, the reason to give opioids is to increase function. If her opioids are causing functional problems, then her prescribing physician has many alternatives to try in an attempt to ameliorate these reported side effects.” *Id.*

An updated occupational analysis was completed on February 24, 2015 by Melissa Mendez, a nurse and “vocational rehab counselor.” AR 573-574. It found the restrictions and limitations stated by Helm were consistent with the requirements of Plaintiff’s own sedentary occupation as a Project Manager. *Id.*

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Defendant then issued its final denial letter, which is dated February 25, 2015. It states:

According to Dr. Helm, you reported the inability to sit for long periods of time due to your pain. You were observed in surveillance driving for 1 hour and 13 minutes so this provided a lower bound to your ability to sit. Your only prescription medication that causes sedation is methadone and you were on a low dose of this medication that you reported taking at night.

AR 380.

**III. Analysis**

**A. Legal Standards**

1. ERISA

Section 502(a)(1)(B) of ERISA provides,

a civil action may be brought by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

ERISA § 502(a)(1)(B) (numbering omitted).

2. Fed. R. Civ. P. 58

Fed. R. Civ. P. 52 provides:

In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

*Id.*

3. Standard of Review

The parties have stipulated that a de novo standard of review applies in this case, and waived their rights to conduct discovery. Dkt. 23. Their agreement was accepted and entered. Dkt. 26.

Under a de novo standard, a court must determine whether benefits should have been granted or denied based on the evidence in the Administrative Record. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). “When conducting a de novo review of the record, the court does not give deference to the claim administrator’s decision, but rather determines in the first instance if the claimant has adequately

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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).

As the party claiming benefits, Plaintiff has the burden to prove that she qualified for them under the LTD policy, applying the standard for coverage that was in effect at the time that coverage was denied. *Muniz*, 623 F.3d at 1295-96 (“when the court reviews a plan administrator’s decision under the de novo standard of review, the burden of proof is placed on the claimant”). The preponderance of the evidence standard applies. *Id.* at 1294. As noted, Defendant denied Plaintiff’s LTD claim only 18 days before the first 24 months of coverage was completed. At that time, the LTD policy allowed for coverage if Plaintiff was unable to perform the material duties of her regular occupation, or unable to earn 80% or more of her indexed earnings from working in that occupation. AR 1433.

At the 24-month threshold, the standard for recovery of benefits would have changed to a more rigorous one. Thus, Plaintiff could recover only if her disability prevented her from occupying “any occupation” rather than her “regular occupation.” Plaintiff’s eligibility for benefits under this standard is not addressed in this Order because it was not applied in the challenged proceedings. Instead, if Plaintiff prevails here, Defendant will be required to provide coverage for the final eighteen days of the “regular occupation” standard, and will then be required to determine whether Plaintiff is eligible for benefits under the “any occupation” standard. Any dispute regarding eligibility for coverage under the “any occupation” standard would be adjudicated in a separate proceeding.<sup>5</sup>

The term “regular occupation” refers to the usual work performed by Plaintiff prior to her disability. *Wirries v. Reliance Standard Life Ins. Co.*, 247 F. App’x 870, 871 (9th Cir. 2007) (“[T]he term “regular occupation” unambiguously refers to the usual work that the insured performed immediately before the onset of disability.”). A “regular occupation” is not limited to the specific characteristics of the position formerly held by the claimant, but is “defined as a position of the same general character as her job.” *Kinstler v. First Reliance Standard Life Ins. Co.*, 181 F.3d 243, 253 (2d Cir.1999) (internal quotation marks omitted). Thus, Plaintiff’s eligibility for benefits depends on an assessment of her physical limitations, if any, as well as her ability to perform the functions required of a project manager position. “The mere existence of an impairment is insufficient proof of disability. A claimant bears the burden of proving that an impairment is disabling.” *Matthews v. Shalala*, 10 F.3d 678, 680 (9th Cir. 1993).

<sup>5</sup> Plaintiff argues that as a result of this arrangement, “[Defendant] only has to pay a pittance in benefits, and can then deny further benefits because [Plaintiff] doesn’t qualify under the ‘any occupation’ standard, forcing another round of litigation. And [Plaintiff], in turn, must win both rounds of the litigation in order to receive the benefits she paid for and to which she is entitled.” Dkt. 36 at 28. Plaintiff claims that the timing of the denial of coverage suggests bad faith by Defendants.

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**B. Application**1. Overview

A consideration of the Administrative Record shows that Plaintiff has met her burden of proof. It shows that she has established by a preponderance of the evidence that at the time of the denial of coverage she suffered from physical pain that precluded her from performing the functions required of her prior position. Thus, she could not sit in one position for more than 30 minutes, which was required for her work. Further, due the prescribed pain medications that she took, Plaintiff was often unfocused and fatigued. These symptoms barred Plaintiff from performing the functions necessary for her prior position. These conclusions are supported by the reports from Plaintiff's treating physicians, Defendant's medical experts and the statements by Plaintiff.

2. Plaintiff's Pain Symptoms

Plaintiff stated, "I am not able to sit for long periods of time, usually between half hour to an hour before needing to stand up and walk or lay down due to pain in the anal area and tailbone." AR 768. She made such statements consistently, explaining that this pain precludes her from performing the functions of her prior position. In her first application for STD coverage in 2011, Plaintiff stated that she suffered from pain that made her "[u]nable to sit for extended periods of time." AR 1292. She also stated that the pain required her to take medication which made her tired. *Id.* In June 2013, shortly before the denial of coverage, Plaintiff again informed Defendant that she had "lots of pain from brachytherapy radiation, [and] cannot sit long." AR 1053. She also reported that the pain was "constant," and that she was "continually fatigued." *Id.* Plaintiff's position is also supported by the findings of the ALJ who evaluated Plaintiff's claims for SSDI. The ALJ concluded that "the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are credible." AR 785.

Plaintiff's treating physicians consistently have noted Plaintiff's anal pain that resulted from her prior treatment for cancer. Defendant's medical experts -- including Helm, who conducted an IME of Plaintiff -- offer opinions that dispute the severity of the pain claimed by Plaintiff. However, they have not opined that there is no basis for the claim of some pain. Nor have they disputed that the pain is the result of the prior cancer treatment and has a sufficient medical basis.

Curti stated that the pain was "due to radiation therapy effects, given for Anal Cancer" (AR 599), and provided a diagnosis of "radiation induced neuropathy." AR 1213. Similarly, Syed opined that Plaintiff's pain may be due to "nerve trapped in the scar tissue" which resulted from the radiation treatment Plaintiff received. AR 626. Syed has also noted that the area on Plaintiff's body where the radiation treatment was administered remains "very sensitive" with "a lot of tiny nerve endings." Syed added that it is "not uncommon for patients to experience this kind of pain after radiation therapy." AR 317. Similarly, Su found that "[t]here is clinical evidence to support that Plaintiff has anal pain that makes it difficult for her to sit continuously for prolonged periods of time." AR 669. He added that "[a]norectal examination and proctoscopy revealed anal stenosis with fibrosis around the anal sphincter, and colonoscopy on 4/17/134

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revealed radiation proctitis.” AR 686. Helm observed that “light touch to the anus is painful” and that “the region around the anus is marked by punctuate areas of erythema.” AR 586.

The treatment that Plaintiff has received due to her pain has been consistent and overseen by her experienced, treating physicians. There is substantial documentation of the pain symptoms and corresponding treatment in Plaintiff’s medical records. This includes that Plaintiff saw Chou, her treating physician as to pain management, on a monthly basis. Many of these visits resulted in the renewal of prescriptions for pain management drugs. See e.g. AR 1062; AR 1071-1085. Plaintiff’s treatment has consistently included medications for pain, periodic reports to her pain management physician and bi-annual routine follow-up sessions related to her cancer, which was in remission. AR 626, 629.

The Administrative Record also reflects that Plaintiff saw Shbeeb approximately every three months. See AR 944 (summarizing visits). Furthermore, although Plaintiff’s pain medication prescriptions have changed over time, there is no evidence that this is because she reported having less pain. Plaintiff’s initial prescription from Chou was issued in February 2012. It was for a dosage of “10/325mg Q6H” of Percocet.” AR 1062.<sup>6</sup> By September 2013, the dosage of Percocet was reduced to one 10/325 mg pill every 12 hours. AR 895. However, by that time, Plaintiff was also taking Methadone, a different narcotic used to treat pain, at a dosage of 10 mg pill every 12 hours. *Id.*

A significant component of the disagreement between the parties concerns how long Plaintiff can remain in a seated position before her pain becomes disabling. Plaintiff stated that this is usually between 30 and 60 minutes. The evidence from medical professionals is consistent with this assertion. Indeed, all of those who examined Plaintiff agreed that she cannot sit for extended periods of time, and that she must be able to change position. Although there is disagreement as to precisely how long Plaintiff can remain seated in light of her pain, there is little dispute that pain would arise after 30-60 minutes. For example, in December 2013, Syed stated that Plaintiff “cannot sit for more than 45 minutes due to the pain.” In June 2014 Curti stated that Plaintiff could not sit or lie down for more than 30 minutes. Similarly, at that same time, Chou stated that it was recommended that Plaintiff sit for “no more than 20 minutes at a time without benefit of the ability to stand for approximately 5 minutes.” Su, who was engaged by Defendant, stated that Plaintiff “should avoid work activities which require prolonged or continuous sitting for more than 30 minutes without changing her body position.” Helm’s report proposed “[w]ork restrictions precluding sitting or standing for more than one hour without being afforded the ability to get up and move around, and of not driving more than 40 minutes without being able to rest prior to resuming driving.”

There is some evidence that is inconsistent with or fails to support Plaintiff’s position. For example, there is no evidence that she experienced other symptoms that are often linked to pain. As Defendant argues, “[e]xtensive clinical workup failed to demonstrate evidence of significant acute or recurrent pathology. Musculoskeletal and neurological examinations were consistently normal. Radiological studies

<sup>6</sup> Plaintiff explains that “Percocet is a mixture of acetaminophen and oxycodone, so a ‘10/325’ Percocet pill is comprised of 10 mg oxycodone [sic] and 325 mg acetaminophen, and is the strongest dosage available. The ‘Q6H’ notation means that one 10/325 Percocet pill should (or in some cases could) be taken every six hours.” Dkt. 36 at 10-11.

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demonstrated findings which were normal, negative or unremarkable.” Dkt. 33 at 26. However, this evidence is outweighed by the substantial and credible record of statements by Plaintiff and her physicians that Plaintiff suffers from debilitating pain.

Defendant also argues that if Plaintiff’s pain were debilitating, she would have sought other treatment options. For example, according to Chou, an “intrathecal pump” can be used to treat intense pain. He described this in his report dated February 29, 2012, stating that it could be considered “if everything failed and persisted severe pain.” AR 1062. Furthermore, the record does not show that Lanford ever used a medical “donut” pillow to reduce pressure on the painful area of her body. Defendant argues that this is a common method of reducing pain of the sort Plaintiff claims to have experienced. Dkt. 33 at 30.

Defendant also relies on Plaintiff’s failure to participate in a medical examination with Wiseman, and her activities recorded on the surveillance videos, to oppose Plaintiff’s claim of intense pain. Defendant argues that avoiding the examination by Wiseman shows Plaintiff’s bad faith, which weighs against a finding of disability. This position is unpersuasive for two reasons. First, there was a significant wait time for Plaintiff to see Wiseman. There is a dispute as to how much of that time was due to Wiseman’s late arrival. However, that Plaintiff travelled a substantial distance to attend and arrived at least by the time of the scheduled appointment, is inconsistent with bad faith, particularly given that her medical records had not been received. Second, after that examination did not go forward, Plaintiff agreed to a medical examination by Helm that addressed the same issues that Wiseman was to consider.

No different result is warranted by a review of the surveillance videos. Among other things, they reflect that Plaintiff spent long, uninterrupted periods of time inside her home. This is consistent with Plaintiff’s representations that she does so due to her pain. The claimed “fluidity” of Plaintiff’s movements during the time that she left the residence does not show that she was not experiencing pain. Further, at those times, Plaintiff was taking prescription medications to address her pain. No different conclusion results from the recorded trip by automobile that lasted approximately 73 minutes. This time included the return from a medical visit. Plaintiff’s husband drove the vehicle. Plaintiff states that she was able to recline her seat to ease her pain. Dkt. 32 at 25. In sum, these videos are not sufficient to offset the other evidence that has been presented in the Administrative Record as to the intensity of Plaintiff’s pain. That evidence is sufficient to satisfy the preponderance standard. *See Montour v. Hartford Life & Acc. Ins. Co.*, 588 F.3d 623, 633 (9th Cir. 2009) (based on a review of similar surveillance videos, concluding “that Plaintiff could perform sedentary activities in bursts spread out over four days does not indicate that he [is] capable of sustaining activity in a full-time occupation”).

Further support for Plaintiff’s position is provided by the determination by the ALJ who granted disability benefits to Plaintiff pursuant to the SSDI process. To qualify to receive such benefits a claimant must show that he or she cannot “engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months” 42 U.S.C. § 423(d)(1)(A). As Plaintiff notes, this standard is more rigorous than the standard that was in place at the time LTD

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benefits were denied.<sup>7</sup> *See also Montour*, 588 F.3d at 635 (a Social Security Administration award is relevant to, but not dispositive of, whether disability insurance benefits should be paid).

For the foregoing reasons, a preponderance of the evidence in the Administrative Record shows that Plaintiff suffered from ongoing and severe pain, which prevented her from sitting for lengthy periods of time. This supports a restriction on her sitting for periods of more than 45 minutes without interruption. Furthermore, although Defendants argue that Plaintiff's regular occupation would permit her to get up and move every 30 minutes, the evidence noted above supports a finding that this occupation requires prolonged periods of sitting over the course of the day. As is noted below, the preponderance of the evidence also supports Plaintiff's contention that both her pain and medication interfere with her ability to concentrate at least to some degree.

3. Plaintiff's Fatigue and Ability to Concentrate

There is less evidence in the Administrative Record to support Plaintiff's claims of debilitating fatigue. Although some of her treating physicians have observed that Plaintiff experiences some fatigue, only a 2012 report by Chou opined that this condition was disabling. AR 1135, 1140. Chou's subsequent reports continued to note Plaintiff's pain, but did not state any similar concerns as to fatigue or lack of concentration. *See, e.g.*, AR 624. Furthermore, when Chou spoke with Marion in June 2014, he did not identify fatigue as a significant disability. AR 672.

Plaintiff's other physicians have recommended disability benefits on the basis of her pain, without referring to fatigue or mental confusion in general or due to the use of prescription pain medications. Helm found that Plaintiff's dosage of pain medications was substantially lower than would be expected to cause fatigue in a morphine equivalent dose. He added that if this were an issue, there were alternative drugs that could be used that would not have the same side effect. AR 588. Helm also noted that although "sedation is a side effect" of methadone, it "generally goes away." *Id.*

The Administrative Record also includes Plaintiff's statements during the relevant time period about her chronic fatigue and inability to focus. She made these statements both before and after the denial of coverage. A July 2013 medical report, which was issued prior to the denial of coverage, states that Plaintiff reported that she felt "chronically fatigued." AR 1053. In her second appeal of the denial of coverage, Plaintiff placed substantial emphasis on her difficulty in focusing given her fatigue from medications and pain. AR 597.

At the time of the denial of further coverage, Plaintiff's claim of fatigue received very little support from her medical professionals. It was supported only by Plaintiff's claims of fatigue, and Chou's statement in 2012 that was consistent Plaintiff's claims. In contrast, the existence of Plaintiff's ongoing pain is adequately supported by the Administrative Record, for the reasons previously stated. Because Plaintiff has not shown that a preponderance of the evidence in the Administrative Record demonstrates that she suffers

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<sup>7</sup> Plaintiff notes that Defendant initially required that Plaintiff apply for SSDI, as required by the terms of her policy. Once SSDI benefits were granted, Defendant reduced the LDI benefits by the amount paid as SSDI. AR 1177-80.

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from disabling fatigue, it does not provide an independent basis to sustain her present challenge to the denial of benefits.

4. The Requirements of Plaintiff's Occupation

As noted, Plaintiff's last position was as a "Project Manager." Plaintiff's employer submitted a written Position Description, which identifies the duties that are associated with this position. They are primarily non-physical and require providing management direction for projects. AR 1322-1323. As the Position Description states:

The Project Manager will provide overall management direction to single or multiple projects, establish project objectives and policies, maintain liason [sic] with prime client contacts, and monitor construction and financial activities through administrative direction of on-site construction manager.

AR 568.

Plaintiff has identified many of the tasks related to her position. They include "[e]stimate overruns and/or under-runs" "[i]nitiate and respond to daily correspondence," "[r]eview, code, and return invoices to Accounting," and update the "ISEC Project Control/Document Control System." AR 568. She states that these tasks are typically performed while spending substantial time seated in front of a keyboard and computer. *Id.* AR 568.

Defendant's decision on benefits was also based, at least in part, on a description of the position in the Dictionary of Occupational Titles ("DOT"). The DOT is a compendium of job descriptions that was published by the United States Department of Labor.<sup>8</sup> For example, an internal review document dated July 7, 2014, notes that "[r]eview of the [DOT] indicates the customers [sic] occupation is performed at the sedentary physical demand level and requires mostly sitting but may involve standing and walking for brief periods of time." AR 49. See *also* DOT description of Project Manager position. AR 1306-1307.

Defendant also relied on a source referred to as "ERI," which "indicates this occupation does have a sit/stand option which would allow for the required positional changes." AR 49. Defendant explains that "ERI" refers to an online database of job descriptions based on the DOT that is maintained by a third-party agency. However, the record does not include any materials from this source.<sup>9</sup> No other

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<sup>8</sup> Plaintiff contends that "[t]he DOT is an outdated description of the various jobs available in the economy, which is no longer maintained by the DOL and which hasn't been updated since 1991." Dkt. 36 at 19. Plaintiff also seeks judicial notice of certain relevant portions of the DOT. Plaintiff contends that they show that the DOT does not suggest that its description of the Project Manager occupation includes a sit/stand option. Dkt. 36-1. Because this information is of very limited relevance, the request for judicial notice is DENIED.

<sup>9</sup> Defendant seeks judicial notice of two "screenshots" of the ERI resource. They concern the document and its use. Dkt. 39. Plaintiff objects, arguing that the screenshots are from web pages of sites operated by two private companies. Dkt. 40 at 1. Plaintiff also claims that this proffered evidence is not relevant because the Administrative

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evidence from the Administrative Record has been identified showing that the position held by Plaintiff includes a sit-stand option. Defendant's Motion continues to assert, without support on the Record, that Plaintiff's employer "even offers a sit/stand work option." Dkt. 33 at 24.

Defendant also argues that even without a formal sit/stand option, one who works in a job where the primary functions are performed while the person is seated will be allowed to move. For example, a person working in Plaintiff's former position could stand up and move about while communicating with colleagues or taking breaks. The person could also simply switch positions. There is no evidence in the Administrative Record showing that a person working in the position of Project Manager is not permitted to take any of these common sense steps, nor is there evidence that Plaintiff or others did so while employed by ISEC.

Even assuming that such movements were permitted, a preponderance of the evidence in the Administrative Record shows that they would not have been sufficient to allow Plaintiff to perform the duties of a Project Manager. This evidence shows that Plaintiff is unable to sit for long periods of time without suffering severe and debilitating pain. Similarly, she has established that the functions required of someone working as a Project Manager require such extended periods of sitting. She has not shown that a preponderance of the evidence in the Administrative Record shows that she suffers fatigue and a resulting inability to focus. However, Plaintiff has met her burden of proof as to the nature and effect of the pain that she continues to suffer, and has adequately shown that its effect is substantial. Thus, a preponderance of the evidence in in the Administrative Record shows that she is objectively incapable of performing her job as a Project Manager. *See Armani v. Nw. Mut. Life Ins. Co.*, 840 F.3d 1159, 1163 (9th Cir. 2016) ("[A]n employee who cannot sit for more than four hours in an eight-hour workday cannot perform work classified as "sedentary.").

#### **IV. Conclusion**

For the reasons stated in this Order, Plaintiff has shown by a preponderance of the evidence that she was disabled as defined under the LTD Policy at the time benefits were terminated. Therefore, Plaintiff's Motion is **GRANTED**. Defendant's denial of benefits to Plaintiff is reversed and Plaintiff is awarded such benefits for the disputed time period.

In light of this Order, the parties' joint request for status of decision (Dkt. 53) is **MOOT**.

On or before June 22, 2017, Plaintiff's counsel shall provide to Defendant's counsel a proposed judgment consistent with this Order. By June 29, 2017, Plaintiff shall lodge a proposed judgment, together with a statement as to whether its form is disputed by Defendant. If Defendant disputes the form of the proposed judgment, it shall timely file any objections in accordance with the Local Rules no later than July 6, 2017.

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Record does not refer to the eDOT. Defendant's Reply states that the screenshots are offered for the limited purpose of explaining the reference to the ERI in the Administrative Record. Dkt. 44. Because this information is of very limited relevance, the request for judicial notice is DENIED.

