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2
3 UNITED STATES DISTRICT COURT
4 NORTHERN DISTRICT OF CALIFORNIA
5

6 MARK FAGAN,
7 Plaintiff,

No. C 09-2658 PJH

8 v.

**ORDER RE CROSS-MOTIONS
FOR SUMMARY JUDGMENT**

9 LIFE INSURANCE CO. OF NORTH
10 AMERICA, et al.,

11 Defendants.
12 _____ /

13 The parties' cross-motions for summary judgment came on for hearing on June 30,
14 2010 before this court. Plaintiff Mark Fagan ("plaintiff") appeared through his counsel,
15 William Green. Defendants Novartis Vaccines and Diagnostics, Inc. ("Novartis") and Life
16 Insurance Company of North America ("LINA")(collectively "defendants") appeared through
17 their counsel, Charan Higbee. Having read all the papers submitted and carefully
18 considered the relevant legal authority, the court hereby GRANTS plaintiff's motion for
19 summary judgment and DENIES defendants' motion for summary judgment, for the
20 reasons stated at the hearing, and as follows.

21 **BACKGROUND**

22 This is an ERISA case, challenging the denial of payment of disability insurance
23 benefits. Forty year old plaintiff Mark Fagan was employed by defendant Novartis as a
24 software designer from September 1, 2004 until February 29, 2008 – his last day of work.
25 See Administrative Record ("AR") 0621. Plaintiff's specific job title was "Lead Specialist,
26 Informatics." AR 0601-602.

27 While an employee, plaintiff was enrolled in a Long Term Disability ("LTD") plan
28 pursuant to a welfare benefit plan governed by ERISA (the "Policy") and insured under a

1 group insurance policy issued by defendant LINA, Group Policy No. FLK-960101.¹ LINA
2 was also the claims administrator with respect to plaintiff's claim for LTD benefits.

3 A. The Relevant Policy Terms

4 The Policy contains the relevant insuring provisions covering total disability benefits.
5 Of particular note here, it contains the following Disability/Disabled provision:

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7 "The Employee is considered Disabled if, solely because of Injury or
8 Sickness, he or she is: [1] Unable to perform the material duties of his or her
9 Regular Occupation; and [2] Unable to earn 80% or more of his or her
10 Indexed Earnings from working in his or her Regular Occupation."

11 See AR 0298. "Regular Occupation" is furthermore defined as the "occupation the
12 Employee routinely performs at the time the Disability begins." AR 0316.

13 An Elimination Period also applies under the policy, which is in turn defined as "the
14 period of time an Employee must be continuously Disabled before Disability Benefits are
15 payable." AR 0305.

16 Finally, the Policy contains a limitation that is pertinent here – the "Limited Benefit
17 Periods." That limitation states as follows:

18 "The Insurance Company will pay Disability Benefits on a limited basis
19 during an Employee's lifetime for a Disability caused by, or contributed to
20 by, any one or more of the following conditions. Once 24 monthly Disability
21 Benefits have been paid, no further benefits will be payable for any of the
22 following conditions[:] 1) Alcoholism 2) Anxiety disorders 3) Delusional
23 (paranoid) disorders 4) Depressive disorders 5) Drug addiction or abuse 6)
24 Eating disorders 7) Mental illness 8) Somatoform disorders (psychosomatic
25 illness)..."

26 See AR 0308.

27 B. Background Facts

28 1. History of Plaintiff's Medical Condition

Plaintiff's pain-related issues began in 1995, when he suffered a compound fracture

¹ While many of the documents in the administrative record refer to Cigna, not LINA, defense counsel explained at the hearing that LINA is a CIGNA company.

1 of his right tibia and fibula. A nail was inserted into his right knee, and then eventually
2 removed. In the years following this injury, however, plaintiff began to experience pain in
3 other parts of his body, particularly in his lower back area. AR 469.

4 Beginning in March 2007, plaintiff's lower back pain dramatically increased in
5 severity, and went from intermittent to constant. One of plaintiff's primary medical
6 providers, Dr. Anthony Somkin, referred plaintiff to Dr. Michael K. Park, a physical medicine
7 and rehabilitation specialist.

8 Dr. Park examined plaintiff and on September 20, 2007 conveyed his findings to Dr
9 Somkin. AR 0432. Dr. Park noted that plaintiff had a history of back pain, with pain
10 centralized in the lower back. Dr. Park also noted that plaintiff experienced "sharp pain" at
11 the L4-L5 intervertebral space, and "symptoms of diskogenic pain from L4-L5 disk." *Id.* Dr.
12 Park recommended an MRI and an epidural injection. AR 432, 469.

13 On October 3, 2007, plaintiff had an MRI. AR 426, 469. Dr. Park noted that the MRI
14 study showed "5 mm central protrusion of disk at L4-L5 with annular tear." *See* AR 469.
15 Dr. Park also found that plaintiff was reporting that the pain was at times "excruciating." *Id.*
16 Dr. Park thereafter again recommended a "second epidural steroid injection at L5." Plaintiff
17 underwent an epidural steroid injection at L5 on October 15, 2007. AR 469-70. Plaintiff
18 and Dr. Park reported that the injection failed to provide any pain relief. AR 470.

19 Several months later, in February 2008, Dr. Park referred plaintiff for examination by
20 Dr. Gordon Tang, a physician with East Bay Neurosurgery and Spine, Inc. AR 605-007.
21 On March 20, 2008, Dr. Tang reported on the results of his examination. He noted that the
22 MRI of plaintiff's cervical spine "appeared to be fairly unremarkable." AR 606. Dr. Tang
23 also noted that, although plaintiff had started physical therapy, plaintiff was "fairly
24 pessimistic" about the idea that the therapy would be helpful. Dr. Tang recommended a
25 conservative course of treatment involving pilates, acupuncture, and other modalities. If all
26 conservative measures were to fail, Dr. Tang reported that the plaintiff would then be a
27 reasonable candidate to have a discogram, in order to try and "elucidate" the source of the
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1 problem, and to perform adequate medical intervention from there. AR 607.

2 On April 3, 2008, plaintiff was examined by Dr. Gabriel Schonwald at the Stanford
3 Pain Management Clinic. AR 583-88. That same day, Dr. Schonwald reported the findings
4 from this visit to plaintiff's primary physician, noting the following: plaintiff's past medical
5 history was "significant" for hypothyroidism and depression and anxiety; plaintiff felt that his
6 pain-related problems initially stemmed from his lower leg injuries, but that recently, the
7 pain in his back – which had a gradual onset – had become the primary problem; plaintiff's
8 back pain was making him depressed and was the reason for his having left the job at
9 Novartis to go on disability; and plaintiff's back pain – which is located in the L3-5 areas of
10 his spine – is worse while sitting and relieved by lying down. AR 583-86.

11 Dr. Schonwald also reported on the results of plaintiff's physical examination of
12 plaintiff and found: that plaintiff has a normal gait; is noted to have "very significant
13 paraspinal muscle tenderness with tremendous spasm in his erector spinae group
14 bilaterally in the quadratus lumborum;" and that plaintiff's sensory exam is "entirely within
15 normal limits." AR 586. Dr. Schonwald also noted that, based on the prior year's MRI
16 results, the etiology of plaintiff's lower back pain "may be due to facet arthropathy bilaterally
17 as well as a discogenic component." *Id.* In terms of recommendations, Dr. Schonwald
18 stated, among other things, that a psychological recommendation would await the report by
19 a Dr. Joshua Kirz, but that in Dr. Schonwald's opinion, the psychological issues were "an
20 overriding issue," in the sense that plaintiff was once a fully functional individual working for
21 a prestigious firm, and was no longer able to work. AR 587. Dr. Schonwald also closed the
22 report by noting: "The patient probably made a wise decision, taking a disability at this time,
23 as not to have a bad performance record and to deal with his problem, which is a very
24 mature way of dealing with this...". AR 587.

25 A few days afterward, on April 8, 2008, Dr. Kirz of the Stanford Pain Management
26 Center provided his psychological report to Dr. Somkin. Dr. Kirz noted: that plaintiff's
27 medical records indicated a history of depression, insomnia, and GERD; plaintiff's current
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1 mood was described by plaintiff as demoralized, depressed, and increasingly hopeless
2 about his condition; that plaintiff had appeared on time at his appointment with Dr. Kirz and
3 that his "cognition appeared grossly intact, with no evidence of sedation or compromise;"
4 that plaintiff exhibited mild to moderate symptoms of depression when tested; and that
5 plaintiff "appears to have developed a significant reactive depression" subsequent to his
6 injury, "which could be characterized as a major depressive episode or an adjustment
7 disorder with depressed mood." AR 578-81.

8 On May 2, 2008, Dr. Schonwald sent a follow-up letter to Dr. Somkin. AR 564. Dr.
9 Schonwald, as before, noted that the MRI scans, which the Stanford doctors had not seen,
10 disclosed that the etiology of plaintiff's lower back pain might be due to the facet
11 arthropathy bilaterally, as well as a discogenic component. AR 564. A physical
12 examination, however, did not evidence any active radiculopathy. Id. Final
13 recommendations largely remained the same as those reported in Dr. Schonwald's
14 previous letter. In terms of psychological intervention, however, Dr. Schonwald noted that if
15 the plaintiff were taken slowly off narcotics, which did not seem to be helping him, and
16 started on appropriate antidepressants, plaintiff would improve markedly. AR 566. At that
17 point, and in the event plaintiff were still experiencing significant back pain, plaintiff could
18 have another evaluation by the pain psychologist, specifically with regard to the plaintiff
19 being a candidate for "spinal cord stimulation." Id.

20 On April 10, 2008, plaintiff returned to Dr. Park for a follow-up appointment. AR 470.
21 Dr. Park concluded that a discography seemed to be "the reasonable next step," and this
22 was performed on April 28, 2008. AR 598-599. The discography revealed that plaintiff had
23 a "posterior annular tear at L4-5 with concordant back pain and also mild degenerative disk
24 disease with posterior annular degeneration with reproducible pain at that L5-S1." AR 575.
25 In reporting on the results, Dr. Park noted that plaintiff was a candidate for "disk
26 replacement procedure" and recommended that plaintiff consult with Dr. Vikram Talwar
27 regarding the procedure. Id.

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1 Dr. Talwar examined plaintiff on June 24, 2008. In his report of the exam, Dr. Talwar
2 noted that he had looked at the MRI scan report taken the year preceding and that it
3 "seems as though [plaintiff] has broad-based disc herniations or disc bulges, which are
4 contral in nature." AR 439. Dr. Talwar noted that these are "painful lesions for patients."
5 Dr. Talwar also performed a physical examination of plaintiff, and found that plaintiff had
6 "tenderness to palpation over his low back from the L-4 through S1 area." Plaintiff's motor
7 strength, sensation, and deep tendon reflexes were all normal. In looking at x-rays,
8 however, Dr. Talwar noted that they showed that plaintiff had "quite significant degenerative
9 disc disease at L5-S1" although the L4-L5 level looked normal. AR 440. Dr. Talwar
10 reported that he had spoken with the plaintiff about the possibilities of a fusion surgery
11 versus a disc replacement surgery, and that he requested that plaintiff think about those
12 options, and then come back with the actual MRI scans, so that he could review them with
13 plaintiff. AR 440.

14 Plaintiff duly returned to Dr. Talwar on July 25, 2008. He spoke with Dr. Talwar
15 about the potential for surgery. Dr. Talwar reported on that meeting, and noted that plaintiff
16 had thought a lot about his options, and wanted to try to do anything in his power to avoid
17 surgery. AR 535. To that end, one of the things that plaintiff had not tried yet was
18 radiofrequency ablation and/or facet joint injections from L4 through S1. Thus, Dr. Talwar
19 recommended that plaintiff return to Dr. Park for facet injections and to consider
20 radiofrequency ablations. AR 535. Notably, Dr. Talwar also stated that plaintiff "has had a
21 positive discogram so I think he is in fact heading toward a lumbar surgery," but that Dr.
22 Talwar "would like to see what happens if we inject into his facet joints," for pain purposes,
23 in the hopes of avoiding surgery. See id.

24 On August 4, 2008, plaintiff indicated that his appointment for a lumbar facet joint
25 injection with Dr. Park had been scheduled for August 25, 2008. AR 537-38.

26 **2. Denial of Plaintiff's Claim**

27 Shortly after becoming disabled, plaintiff submitted his disability claim to defendant
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1 LINA.

2 In connection with his claim, on May 13, 2008, plaintiff provided documentation in
3 support of the LTD claim. AR 591-600. Plaintiff's documentation included several letters
4 from Dr. Park from fall 2007, up through the end of April 2008, as well as the report of the
5 MRI scan taken in October 2007. AR 591. The documentation also included reports from
6 Drs. Kirz, Schonwold, and Somkin. Id.

7 On May 5, 2008, plaintiff's primary care physician, Dr. Somkin, had estimated that
8 plaintiff could return to work, with restrictions, on June 30, 2008. AR 589. In a telephone
9 call with LINA on June 16, 2008, Dr. Somkin again gave the same information, although he
10 additionally noted that plaintiff's pain was a "good enough" reason to preclude plaintiff from
11 being able to work. AR 0123. Plaintiff himself reported that he was unable to perform his
12 occupation, because he could not sit, and was on medication, on July 3, 2008. AR 0112.

13 On July 17, 2008, plaintiff submitted further information in response to letters from
14 Cigna. AR 0437. Plaintiff detailed his current course of treatment, which was to follow the
15 recommendations set forth by the Stanford Management team. Plaintiff also detailed the
16 reasons why he could not perform his occupation. He stated that he could not sit at a
17 workstation for more than 20 minutes, and that after doing so, he would have to lie down. If
18 not, he would be incapacitated for anywhere from an hour to several hours while he
19 recovered. Taking short breaks every 20 minutes would not be helpful, as it would require
20 long breaks to alleviate the discomfort. Furthermore, plaintiff noted that while his
21 occupation is "sedentary," this nomenclature is misleading, because even sitting at his
22 workstation required turning, twisting, sitting, standing, bending and reaching – all of which
23 were precluded due to plaintiff's severe pain. AR 437-38.

24 On July 25, 2008, Dr. Somkin completed a Physical Abilities Assessment ("PAA") in
25 connection with plaintiff's claim. AR 434-35. Dr. Somkin reported that plaintiff could
26 occasionally (defined as less than 2.5 hours per day) sit, stand, walk, and lift/carry eleven
27 or more pounds. AR 434. On July 29, 2008, plaintiff completed a Disability Questionnaire
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1 form for defendant, wherein he stated that he had not been without pain for more than 13
2 years, and could not work due to his degenerative disc disease and chronic pain and
3 fatigue. AR 532-34.

4 Dr. Penny Chong, board certified in internal medicine, reviewed plaintiff's claim
5 information for LINA, and prepared a report dated August 13, 2008. AR 524-26. She
6 concluded, "with a reasonable degree of medical certainty," that plaintiff is capable of a
7 sedentary job with changes in position at will. AR 524. She noted that physical
8 examinations generally failed to demonstrate the presence of limitations, that
9 neurologically, plaintiff was intact, and that his stance and gait are normal. Dr. Chong also
10 noted Dr. Somkin's assessment – that plaintiff could occasionally lift 100+ pounds, and she
11 furthermore noted that Dr. Schonwald recommended that narcotics be discontinued
12 altogether – supporting plaintiff's ability to be present at the job without cognitive
13 impairments caused by plaintiff's narcotics use. Id.

14 On August 15, 2008, LINA denied plaintiff's claim for benefits. AR 261-62. LINA
15 acknowledged plaintiff's self-reported limitations and the use of narcotics to help, but based
16 on the reports provided by Dr. Tang, Dr. Schonwald, and Dr. Talwar, noted that plaintiff's
17 use of narcotics was contributing to plaintiff's depression, and furthermore that plaintiff
18 should be undergoing massage, acupuncture and pilates as treatment. AR 261-62. LINA
19 noted that the Department of Occupational Training rates plaintiff's job as sedentary –
20 defined as a mostly sitting job that consists of lifting, carrying, pushing and pulling up to 10
21 lbs occasionally, as well as standing and walking for brief periods of time. And according to
22 plaintiff's own statement that he could drive for 20 minutes, take a 10-15 minute walk and
23 use a laptop computer, he could perform his occupation. AR 262.

24 3. Plaintiff's Two Appeals of Defendant's Denial

25 Plaintiff appealed the denial of benefits via letter on August 29, 2008, and sent follow
26 up letters to LINA requesting confirmation that plaintiff had 180 days in which to submit his
27 record on appeal. AR 508. On February 6, 2009, plaintiff's attorney wrote to LINA and
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1 notified them that plaintiff was appealing the denial, and further enclosing a January 22,
2 2009 letter from Dr. Somkin explaining some of the bases for plaintiff's appeal. AR 468.
3 The letter from Dr. Somkin outlined his belief that defendant had made several errors with
4 respect to its conclusions regarding plaintiff's condition. AR 469-475. Dr. Somkin reviewed
5 the plaintiff's medical history in the letter, claiming that it showed marked disc degeneration,
6 and then went on to detail the functional requirements of plaintiff's job and to explain how
7 plaintiff could not meet those requirements. Dr. Somkin challenged Dr. Chong's opinion
8 and assessments point by point, and concluded that Dr. Somkin had no doubt that plaintiff
9 was disabled from performing his regular occupation. AR 475.

10 Drs. Park and Talwar also submitted letters on March 23, 2009 and February 6,
11 2009, respectively, indicating their full agreement with Dr. Somkin's assessment and
12 response to defendant's denial, as set forth in Dr. Somkin's January 22 letter. AR 450,
13 460.

14 Defendant responded to plaintiff's appeal by having Dr. Michael Weiss, board
15 certified in orthopedic surgery, conduct a peer review of plaintiff's medical records. He
16 submitted a report dated April 16, 2009. AR 336-39. Dr. Weiss reviewed the medical
17 history and reports on file, up to and including Dr. Somkin's January 22, 2009 letter, and
18 Drs. Park and Talwar's concurring letters. Dr. Weiss concluded, based on his review, that
19 the medical records supported restrictions and limitations as outlined "by Dr. Talwar on July
20 25, 2008." AR 338. Dr. Talwar's July 25 2008 evaluation seemed "to document the ability
21 to do sedentary to light duty work" according to Dr. Weiss, and this conclusion, in
22 conjunction with the fact that plaintiff "has not undergone a lumbar operation, has no true
23 neurologic deficit, and whose overriding issue is complaints of pain and not a specific
24 objective anatomic abnormality," supported the conclusion that plaintiff could perform his
25 occupation at a "light duty level." AR 338.

26 Dr. Weiss's report also revealed that he had called Drs. Talwar, Park and Somkin to
27 discuss plaintiff's case, but that none of these physicians returned his call. AR 338. Dr.
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1 Weiss left his messages during the lunchtime hour on April 14, and completed his report on
2 April 16.

3 On April 23, 2009, and in reliance on Dr. Weiss's findings, LINA notified plaintiff that
4 it was affirming the previous denial of plaintiff's claim for LTD benefits. AR 240.

5 On June 8, 2009, plaintiff's attorney sent a letter to defendant advising that plaintiff
6 was appealing the denial of his LTD claim for a second time. See AR 340-41. In that letter,
7 plaintiff's counsel also included an enclosure from the Social Security Administration
8 ("SSA"), documenting the SSA's determination that plaintiff was totally disabled. Plaintiff's
9 counsel also pointed out, in connection with Dr. Weiss's reliance on Dr. Talwar's July 25
10 evaluation indicating plaintiff's ability to do "sedentary to light duty work," that no such
11 evaluation existed in the file. AR 340-41.

12 On December 15, 2009, plaintiff's counsel submitted a May 12, 2008 report by Dr.
13 Schonwald in support of the second appeal. On January 11, 2010, counsel submitted an
14 MRI and CT scan of plaintiff's lumbar spine in connection with the second appeal. AR 901-
15 05, 923-26.

16 On July 7, 2009, LINA sent plaintiff a letter indicating that it would schedule an
17 Independent Medical Examination ("IME") as part of the evaluation of the claim on appeal
18 and to determine plaintiff's functional ability. AR 233-34. Plaintiff wished to have his
19 counsel attend and audio record the IME, however, and LINA refused to allow any audio
20 recordings. Plaintiff's counsel sought to arrive at a compromise with LINA: plaintiff would
21 agree to attend the IME exam and would forego an audio recording of the exam, in
22 exchange for LINA allowing plaintiff to exclude the exam from the record in the event
23 plaintiff objected to it. Plaintiff would not, however, allow defendant to similarly exclude the
24 report in the event defendant objected to it. AR 937-38. LINA was not in agreement, and it
25 chose not to have an IME of plaintiff completed and preferred to rest upon the record
26 submitted. AR 811.

27 As an alternative, however, defendant obtained another peer review from a
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1 physician specializing in orthopedic surgery, Dr. Agnew. Dr. Agnew provided his report to
2 LINA on January 7, 2010. AR 881-82. Dr. Agnew considered all the evidence thus far in
3 the record, including Dr. Schonwald's report dated May 12, 2008. Dr. Agnew concluded
4 that none of the additional information reviewed would modify or alter any of the opinions
5 set forth in the initial review of April 15, 2009 and clarified on July 22, 2009. AR 881.

6 On January 20, 2010, Dr. Agnew followed up with another report noting his
7 consideration of December 31, 2009 CT and MRI scans. AR 887-89. In that report, Dr.
8 Agnew noted that the MRI demonstrated that the L5-S1 posterolateral disc herniation had
9 "increased in size with a new posterior deflection of the descending left S1 nerve root that
10 was not detected" previously, and furthermore that the lumbar CT scan "showed mass
11 effect on the descending left S1 nerve as it crossed the L5-S1 disc space...". AR 888-89.
12 Dr. Agnew concluded, however, that since there were no medical records available from
13 recent evaluation to suggest that "the disc abnormalities actually produce neurologic
14 deficits or for that matter, cause the need for additional treatment," there was no support for
15 the concept that "this young patient is unemployable." AR 889.

16 On March 31, 2010, LINA sent a letter to plaintiff's counsel advising that defendant
17 was upholding its prior decisions to deny plaintiff's claim for LTD benefits. AR 810-12.

18 C. The Instant Action

19 Plaintiff filed the instant action on June 15, 2009. The complaint alleges a single
20 cause of action under ERISA. See generally Complaint.

21 Plaintiff and LINA have now filed cross-motions for summary judgment.

22 **DISCUSSION**

23 A. Legal Standard

24 Summary judgment shall be granted if "the pleadings, depositions, answers to
25 interrogatories, and admissions on file, together with the affidavits, if any, show that there is
26 no genuine issue as to any material fact and that the moving party is entitled to judgment
27 as a matter of law." FRCP 56(c). Material facts are those which may affect the outcome of
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1 the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

2 Where an ERISA action claiming wrongful denial of benefits is reviewed under a de
3 novo standard on summary judgment,² the court must determine whether benefits were
4 correctly denied based on the evidence in the administrative record. See Firestone Tire &
5 Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989); Abatie v. Alta Health & Life Ins. Co., 458
6 F.3d 955, 963 (9th Cir. 2006)(en banc). The court must grant summary judgment if the
7 administrative record reveals no genuine issue of material fact.

8 B. Analysis

9 In order to properly evaluate LINA's denial of plaintiff's claim for disability benefits,
10 the court must resolve the following issues raised by the parties in their cross-motions: (1)
11 whether plaintiff was disabled during the Elimination Period, pursuant to the terms of the
12 Policy; (2) whether, if so, the Limited Benefits Period provision of the Policy applies to limit
13 plaintiff's entitlement to benefits; and (3) whether an award of attorney's fees and costs is
14 appropriate. Plaintiff seeks summary judgment with respect to the first and third of these
15 issues, while LINA cross-moves for summary judgment with respect to all three.

16 Applying the de novo standard of review, the court's role is to "evaluate whether the
17 plan administrator correctly or incorrectly denied benefits, without reference to whether the
18 administrator operated under a conflict of interest." See, e.g., Abatie v. Alta Health & Life
19 Ins. Co., 458 F.3d 955, 963 (9th Cir. 2006).

20 1. Whether Plaintiff was Disabled During the Elimination Period

21 The heart of the parties' dispute comes down to whether plaintiff was disabled under
22 the terms of the Policy throughout the requisite Elimination Period, as defined therein – i.e.,
23 from March 1, 2008 through August 28, 2008. As noted, the Policy provides that an
24 employee is considered disabled "if, solely because of Injury or Sickness, he or she is: (1)
25 Unable to perform the material duties of his or her Regular Occupation; and (2) Unable to
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27 ² The parties previously stipulated that the appropriate standard of review to be
28 applied is de novo review. See Docket No. 25.

1 earn 80% or more of his or her Indexed Earnings from working in his or her Regular
2 Occupation.” See AR 0298. Thus, here, if plaintiff was unable to perform the material
3 duties of his regular occupation as a software developer/engineer,³ plaintiff was entitled to
4 LTD benefits.

5 Plaintiff’s papers suggest that plaintiff’s disability manifests via two separate but
6 related means: a physical disability caused by his diagnosed back condition; and a
7 cognitive impairment. With respect to the former, plaintiff’s disability claim is rooted in his
8 diagnosed back condition, the severity of pain inflicted because of it, and its effects on
9 plaintiff’s functional abilities. With respect to the latter, plaintiff’s claim appears to be rooted
10 in the effects of the drugs he took for his pain, on his resulting ability to function cognitively.

11 In pointing to evidence that his back condition rendered him unable to perform the
12 material duties of his regular occupation, plaintiff highlights, among other facts, the
13 following: that the MRI report in October 2007 showed a “central protrusion of disk of 5-
14 mm size at L4-L5 with annular tear;” that Dr. Park examined plaintiff and found “sharp pain”
15 at the L4-L5 intervertebral space; that Dr. Park then recommended and plaintiff had an
16 epidural steroid injection at L5, with no reduction in pain; that plaintiff underwent a
17 discography of his lumbar spine in April 2008 that revealed degenerative disc disease “with
18 posterior annular degeneration with reproducible pain at the L5-S1;” that Dr. Park deemed
19 plaintiff a candidate for disc replacement procedure; that Dr. Talwar examined plaintiff and
20 found “tenderness to palpation” over plaintiff’s lower back from L4 through S1; that Dr.
21 Talwar concurred that plaintiff had “significant degenerative disc disease at L5-S1”; that Dr.
22 Talwar opined that options included fusion surgery, disc replacement, or radiofrequency
23 ablation and facet injections; that Dr. Schonwald at Stanford’s pain management clinic also
24 concurred that plaintiff had a disc condition that produced “concordant lower back pain and
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26 ³ Plaintiff’s official employment title was “Lead Specialist, Informatics.” AR 0601-
27 602. Defendant notes that this position is characterized as ‘sedentary,’ pursuant to the
28 Department of Occupational Training. Plaintiff, too, appears to acknowledge the sedentary
nature of the position. See, e.g., Pl. MSJ Br. at 8:16-19; AR 472.

1 are the sources of lower back pain condition;” and that CT and MRI scans taken in
2 December 2009 reconfirmed that plaintiff’s back condition was bad and increasing, with a
3 “L5-S1 left posteriolateral disc hernia” that “increased in size with new posterior deflection”
4 that was not previously detected. See, e.g., Pl. MSJ Br. at 23-24.

5 Plaintiff contends that his back condition causes him constant, severe pain requiring
6 medication, all of which makes it impossible for plaintiff to perform the material duties of his
7 occupation. Plaintiff points to Dr. Somkin’s January 22, 2009 letter submitted in connection
8 with plaintiff’s appeal as evidence that his back treatment led to excruciating pain that in
9 turn rendered plaintiff unable to perform his occupational functions. Dr. Somkin’s letter
10 contains a detailed analysis of all material duties of plaintiff’s job (based on information and
11 materials provided by plaintiff). AR 471. Dr. Somkin concluded, based on his personal
12 observations and examination of plaintiff, that in his professional opinion, plaintiff’s back
13 condition prevented him from sitting for more than 20 minutes at a time, after which he
14 must spend an extended period lying down (at least an hour). See AR 469-75. As such,
15 even a sedentary job like software developer – which requires sitting, standing, reaching,
16 bending, turning, twisting and the like throughout the work day – was too much for plaintiff.
17 AR 472. Dr. Somkin also noted that, although plaintiff could perform some or even all of his
18 job-related tasks on a particular day, plaintiff would pay the price at the end of the day
19 when he would require such an extensive recovery as to exacerbate his symptoms and
20 preclude plaintiff from continuing. AR 472-73.

21 In response, defendant does not dispute that plaintiff had a diagnosed back
22 condition. Rather, defendant in essence advances the argument that plaintiff’s
23 demonstrated pain level was not so great so as to render plaintiff unable to perform the
24 material functions of his job. Defendant highlights its own physician testimony based upon
25 review of plaintiff’s medical records, and highlights, among other things: that plaintiff’s
26 physical examinations by several doctors demonstrated that plaintiff had good strength and
27 sensation in his muscles and had no weakness in his extremities; that his gate was normal;
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1 that plaintiff suffered no neurologic symptoms; that it was recommended that plaintiff
2 engage in activities like pilates and light exercise; that plaintiff himself stated he could drive
3 for 20 minutes, played online poker and was planning on traveling to England; and that Dr.
4 Somkin himself originally reported that plaintiff had an initial return to work date of June 30,
5 2008, and that plaintiff was capable of occasionally lifting up to 20 lbs. AR 440, 565, 579,
6 584, 586, 606, 902-05.

7 Having reviewed the administrative record, and weighed the parties' competing
8 interpretations of the evidence, it is plaintiff, on balance, who has the better argument. As
9 noted, plaintiff has submitted objective documentation of a degenerative disc problem
10 experienced by plaintiff; evidence by his treating physicians of at least some significant
11 manifestations of that pain; and evidence of the manner in which plaintiff's pain has, since
12 2008, been preventing plaintiff from being able to sit long enough to perform the material
13 duties of plaintiff's job. Defendants, by contrast, have failed to mount a persuasive showing
14 that effectively contradicts plaintiff's and his doctors' proof that plaintiff's back condition and
15 pain levels render plaintiff's unable to sit for more than 20 minutes at a time, or otherwise
16 adequately perform his job duties.

17 To be sure, defendants have marshaled their own physician testimony that peer-
18 reviewed plaintiff's medical records, and which at least facially supports defendants' finding
19 of no disability. However, defendants' physician testimony, and the denial letters based on
20 them, rather conclusorily determined that plaintiff could simply perform "light duty work,"
21 without engaging in any detailed analysis demonstrating how. See AR 240, 261-62.
22 Furthermore, to the extent that defendants' findings were based on the well-supported
23 evidence that plaintiff exhibited no neurological defects, and that many of plaintiff's physical
24 examinations showed normal results (e.g., lack of muscle atrophy and a normal gait, etc.),
25 such facts are not determinative in this case. The fact that plaintiff's atrophy scores and
26 ability to walk are intact, for example, does not materially counter the fact of plaintiff's
27 degenerative disc problem, or more importantly, plaintiff's complaint that the severity of the
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1 pain resulting from the disc problem itself causes disabling pain that prevents him from
2 performing his job duties.

3 Moreover, even looking at the findings that LINA relied upon that *were* related to
4 plaintiff's ability to perform the material functions of his job, LINA's conclusions are not
5 always based on an accurate reading of the supporting documentation. LINA's original
6 denial of benefits, for example, noted that the Department of Occupational Training rates
7 plaintiff's job as sedentary – defined as a mostly sitting job that consists of lifting, carrying,
8 pushing and pulling up to 10 lbs occasionally, as well as standing and walking for brief
9 periods of time. LINA then noted that, according to plaintiff's own statement that he could
10 drive for 20 minutes, take a 10-15 minute walk and use a laptop computer, he could
11 perform his occupation. AR 262. However, what plaintiff's statement actually disclosed
12 was that he could drive for *up to* 20 minutes, that he could use a laptop computer from
13 certain comfortable positions, and that he was just attempting to start a program that would
14 allow him to work up to walking 10-15 minutes, twice a week. And while LINA's initial
15 denial letter also noted that Dr. Somkin had issued an evaluation on July 25, 2008 that
16 purportedly supports plaintiff's ability to lift 11-20 pounds occasionally, and to engage in the
17 sitting that all parties agree is a material requirement of plaintiff's job, this is misleading. In
18 actuality, what Dr. Somkin said is that plaintiff can "occasionally" – defined as less than 2.5
19 hours a day – sit, stand, and walk (Dr. Somkin did, however, state that plaintiff could lift
20 between 11-20 pounds). AR 434.

21 This last point is critical. LINA concedes that the Novartis definition of what a
22 software employee does is to sit between 2.5 to 5.5 hours a day, and to stand for less than
23 2.5 hours. Yet, even according to the July 25 Somkin evaluation upon which defendant
24 places great weight, plaintiff would not be capable of 'sitting' in accordance with the hours
25 required by Novartis (since Dr. Somkin said plaintiff could only sit for less than 2.5 hours).
26 AR 559, cf. 434.

27 In sum, what the court's review of the administrative record makes apparent is that
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1 (1) plaintiff had a well-documented history of degenerative disc disease and reproducible
2 physical pain, although plaintiff's physical examinations proved that plaintiff's muscles and
3 extremities were otherwise healthy; (2) plaintiff and Dr. Somkin conveyed to LINA that
4 plaintiff was unable to perform the primary function of sitting for more than 20 minutes at a
5 stretch, and without requiring great periods of rest and lying down; and (3) LINA failed to
6 undertake any detailed analysis of plaintiff's ability to perform the actual material functions
7 of his job; and (4) and when it did, LINA relied on incomplete information.

8 Defendant seeks to explain away any deficiency in its assessment by arguing that
9 plaintiff failed to attend an IME, and arguing that this failure should be counted against
10 plaintiff. However, this issue is not as clear cut as defendant would have the court believe.
11 Rather, what is clear is that plaintiff wanted to audio record the IME, and that the parties
12 engaged in an ultimately unfruitful discussion over a compromise that would allow plaintiff
13 to attend the IME, but preserve his right to object to the IME in the event plaintiff took
14 exception to it. And ultimately it was defendant, and not plaintiff, that called off the IME.
15 Thus, both parties contributed to the absence of an IME. At any rate, as plaintiff correctly
16 points out, the plan administrator did not base the denial of benefits on plaintiff's failure to
17 attend the IME. See *Jebian v. Hewlett-Packard Co. Employee Benefits Organization*
18 *Income Protection Plan*, 349 F.3d 1098, 1104-05 (9th Cir. 2003)(noting ERISA rules
19 parallel the general rule that "an agency's order must be upheld, if at all, on the same basis
20 articulated in the order by the agency itself," not a subsequent rationale articulated by
21 counsel"). As such, the IME issue is ultimately a non-dispositive one.

22 In sum, insofar as plaintiff's ability to perform the material functions of his own
23 occupation, based on his back condition and the pain it occasioned, plaintiff has discharged
24 his burden to show that he was disabled. Defendant has thus wrongfully denied plaintiff
25 LTD benefits under the Policy, and summary judgment on this ground is accordingly
26 GRANTED in plaintiff's favor. Defendant's cross-motion for summary judgment on this
27 ground is DENIED.

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1 It should be noted that, while the court is persuaded by plaintiff's evidence of a
2 physical impairment, plaintiff does not fare so well in connection with his claim of cognitive
3 impairment. With the exception of Dr. Somkin's January 22, 2009 report, plaintiff presents
4 no credible objective evidence of his cognitive impairment. And defendant has correctly
5 pointed out that Dr. Kirz at the Stanford Pain Management Clinic remarked that plaintiff's
6 cognitive abilities were "intact" upon examination. Nonetheless, the court decides the
7 disability issue based upon the documented existence of plaintiff's physical impairment.

8 2. Whether the "Limited Benefit Period" Provision Applies

9 Defendants contend that, even if the court disagrees with LINA's finding that plaintiff
10 was not disabled under the Policy, the court should nonetheless decline to award more
11 than 24 months of LTD benefits to plaintiff, because any disability was caused or
12 contributed to by depression and anxiety. As such, the Policy's "Limited Benefit Periods" –
13 which states that only limited benefits will be paid for a Disability "caused by, or contributed
14 to by," a depressive or anxiety disorder – applies. AR 305.

15 In support of their argument that plaintiff's disability was "contributed to by" a
16 depressive or anxiety disorder, defendants highlight the fact that Dr. Kirz administered
17 psychological tests and found a GAF score of 50 – which denotes serious symptoms and
18 serious impairment in social, occupational, or school functioning; that Dr. Schonwald saw
19 plaintiff and thought that plaintiff's psychological condition "seems to be an overriding issue"
20 with respect to plaintiff's inability to work; and that Dr. Schonwald thought that plaintiff could
21 benefit from seeing a psychiatrist or pain psychologist. AR 580-81, 565-66.

22 As these facts highlight, there is support for the conclusion that plaintiff did, in fact,
23 suffer from some form of psychological impairment in conjunction with his physical
24 disability. However, defendants' citation to the record does *not* clearly establish that a
25 depressive or anxiety disorder was an objective source of plaintiff's physical disability.
26 Indeed, as plaintiff points out, defendants have only selectively cited the administrative
27 record. Defendants fail to note the critical fact that Dr. Kirz' report, for example, also states:
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1 “subsequent to his injury, [plaintiff] appears to have developed a significant reactive
2 depression, which could be characterized as a major depressive episode or an adjustment
3 disorder with depressed mood.” AR 580-81. In other words, plaintiff’s depression was in
4 *reaction to* his physical condition. This is distinct from a finding that plaintiff’s depression
5 was a contributing factor to plaintiff’s physical condition. While defendants note that the
6 depressive disorder need not be the initial or sole cause of the alleged disability in order for
7 the Limited Benefits Period provision to apply, they do not dispute that the depressive
8 disorder must nonetheless be a contributing cause of the disability.

9 In sum, the evidence simply does not support such a conclusion here. And since
10 there is no other evidence linking plaintiff’s depressive symptoms to a contributing cause of
11 his disability, the court can find no basis upon which to apply the Limited Benefit Period
12 provision to plaintiff’s claim.

13 Accordingly, defendants’ motion for summary judgment on this ground is DENIED.

14 3. Attorney’s Fees and Costs

15 An award of fees and costs is authorized pursuant to 29 U.S.C. § 1132(g)(1). As
16 plaintiff notes, an award of fees and costs is generally made absent special circumstances
17 that make such an award unjust. See Conseco v. Constr. Laborers Pension Trust, 93 F.3d
18 600 (9th Cir. 1996).

19 No such circumstances are present here, and defendant presents no persuasive
20 argument in opposition. Accordingly, the court hereby GRANTS plaintiff’s request for an
21 award of reasonable attorney’s fees, and costs. The parties shall first attempt to negotiate
22 a reasonable amount of fees and only if unsuccessful, plaintiffs shall file a motion for fees
23 and costs pursuant to Civil Local Rule 54-5.

24 C. Conclusion

25 For the foregoing reasons, the court hereby GRANTS plaintiff’s motion for summary
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1 judgment, and DENIES defendants' cross-motion for summary judgment.

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3 **IT IS SO ORDERED.**

4 Dated: August 19, 2010



PHYLLIS J. HAMILTON
United States District Judge

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