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**UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA**

Maurice K. Mason,
Plaintiff,
vs.
Federal Express Corporation, et al.,
Defendants.

3:14-cv-0107 JWS
ORDER AND OPINION
[Re: Motions at dockets 55 and 57]

I. MOTIONS PRESENTED

At docket 55 plaintiff Maurice K. Mason (“Mason”) moves for judgment after a trial on the record pursuant to Federal Rule of Civil Procedure (“Rule”) 52 or, alternatively, summary judgment pursuant to Rule 56. Defendants Federal Express Corporation, FedEx Trade Networks Transport & Brokerage, Inc., Aetna Life Insurance Company, Federal Express Corporation Short Term Disability Plan, and Federal Express Corporation Long Term Disability Plan (collectively, “Defendants”) oppose Mason’s motion at docket 58 and cross-move for summary judgment at docket 57. These two filings are supported by a memorandum at docket 59. Mason replies in support of his motion at docket 66 and opposes Defendants’ cross-motion at docket 67. Mason’s memorandum in support of these two filings is at docket 64, and his

1 declaration is at docket 65. At docket 73 Defendants reply in support of their cross-
2 motion.

3 Oral argument was not requested and would not assist the court.

4 **II. BACKGROUND**

5 While he was employed by defendant FedEx Trade Networks Transport &
6 Brokerage, Inc. (“FedEx Trade”) Mason was diagnosed with a rare autoimmune disease
7 known as Stiff Person Syndrome (“SPS”). SPS is “manifested clinically by the
8 continuous isometric contraction of many of the somatic muscles; contractions are
9 usually forceful and painful and most frequently involve the trunk musculature, although
10 limb muscles may be involved.”¹ After defendant Aetna Life Insurance Company
11 (“Aetna”) denied his claim for short-term disability benefits, he filed suit under the
12 Employee Retirement Income Security Act of 1974, as amended (“ERISA”).² His
13 complaint alleges: (1) wrongful denial of his claim for short-term disability benefits;
14 (2) wrongful refusal to consider his claim for long-term disability benefits; (3) breach of
15 fiduciary duty; and (4) failure to provide requested plan documents. Although the
16 parties style their cross-motions as summary judgment motions, they would be more
17 accurately described as partial summary judgment motions because they only address
18 the merits of the first of Mason’s four causes of action: whether Aetna abused its
19 discretion in denying Mason’s short-term disability claim.

20 Mason argues that Aetna abused its discretion by ignoring objective medical
21 evidence in the record that shows that his SPS and the side effects of his medications
22 prevent him from performing the duties of his former job. The following is a summary of
23 the evidence in the record.

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¹STEDMAN’S MEDICAL DICTIONARY (2014). See also doc. 32-2 at 9.

28 ²29 U.S.C. §§ 1001-1461.

1 **A. Initial Treatment from Medical Park Family Care**

2 Beginning in early 2008 Mason repeatedly complained about muscle spasms to
3 his primary care physicians at Medical Park Family Care,³ but the physicians were
4 unable to determine their cause.⁴ For example, Mason saw Dr. James R. Lord on
5 May 8, 2009, complaining of “continuing very unusual symptoms,” including “various
6 types of body spasms in the hands, legs, feet”; “some cramping”; swollen joints; and
7 blurred vision.⁵ Dr. Lord stated that Mason’s symptoms were “very difficult to explain.”⁶

8 **B. SPS Diagnosis from the VA**

9 In February 2010 Mason saw neurologist Gregg Meekins, M.D. with the VA
10 Medical Center. Dr. Meekins noted Mason’s lengthy history “of severe spasms
11 affecting hands, feet, torso, etc.,” and the multiple medications that Mason was taking
12 “without benefit or intolerable side effects of excessive sedation.”⁷ Dr. Meekins ordered
13 laboratory testing, which “came back positive for very high anti-glutamic acid

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15 ³Doc. 32-2 at 122. See also Mason’s November 26, 2008 chart note, *id.* at 126 (“This
16 44-year-old male is having unusual symptoms that continue, which include this type of cramping
17 sensation of his extremities associated with some tremors. . . . He is noting increased
18 intensity and frequency recently.”); his April 21, 2009 chart note, *id.* at 127 (“[H]as had an
19 increase in his muscle spasm. . . . Primarily they are in the hands, forearms, lower legs and
20 feet.”); his October 15, 2009 notes, *id.* at 130 (“This 45-year-old male presents with a long
21 history of cramping in the extremities and neck as well. It has been going on for greater than a
22 year.”); his November 11, 2009 notes, *id.* at 132 (“45-year-old male presents for a constant
23 cramping pain in his neck for the past 3-4 days. . . . Pain intermittently down both arms,
24 tingling or burning and somewhat painful, associated w/ hand and finger spasms or locking
25 up.”); his February 4, 2010 notes, *id.* at 136 (“Chief Complaint: Cramping in stomach, arms, and
26 legs that will not stop, and along with headaches (since Monday.”); his February 12, 2010
27 notes, *id.* at 138; and his February 15, 2010 notes, *id.* at 140 (“This patient returns with
28 continued spasms of the extremities and cramping with headaches of concern it may have been
related to anxiety a full work up has been done with no etiology determined at this time.”).

24 ⁴See, e.g., Mason’s November 26, 2008 chart note, *id.* at 126 (“Extremity cramping,
25 tremors, and weakness. The etiology is not clear.”); and his February 4, 2010 note, *id.* at 137
26 (“Unclear etiology of patient’s symptoms . . .”).

26 ⁵*Id.* at 129.

27 ⁶*Id.*

28 ⁷*Id.* at 57.

1 decarboxylase [“GAD”] 65 antibody level consistent with the diagnosis of stiff-person’s
2 syndrome.”⁸ After diagnosing Mason with SPS, he prescribed baclofen to treat Mason’s
3 condition.⁹ Although a subsequent laboratory test in July 2010 came back normal,¹⁰
4 Mason’s blood was retested in December 2010 and the results were positive for SPS
5 (“although not as high a level” as the February result).¹¹ Defendants do not contest the
6 validity of Mason’s SPS diagnosis.

7 **C. Consult with Neurologist Wayne Downs, M.D.**

8 Mason met with neurologist Wayne Downs, M.D. in April 2010. Mason described
9 his history of cramping, which he said had gotten gradually worse.¹² He also explained
10 that he was being treated with several “potentially sedating drugs” which caused a “lack
11 of focus and short-term memory loss.”¹³ Mason told Dr. Downs that he was not able to
12 perform his job and in “the last few days he [had] been found asleep at his desk on two
13 occasions.”¹⁴

14 Dr. Downs assessed Mason as having “anti-GAD65 stiff person syndrome.” As
15 to Mason’s lack of focus and memory loss, Dr. Downs stated that Mason’s
16 encephalopathy¹⁵ was “worse on his current medications” and suspected that this was
17 because of the baclofen he was taking. At the time Mason was taking 60 mg of
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20 ⁸*Id.*

21 ⁹*Id.*

22 ¹⁰*Id.* at 101.

23 ¹¹*Id.* at 108.

24 ¹²*Id.* at 146.

25 ¹³*Id.*

26 ¹⁴*Id.*

27 ¹⁵Encephalopathy is a disorder of the brain. STEDMAN’S MEDICAL DICTIONARY (2014).
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1 baclofen daily.¹⁶ Dr. Downs wrote that “[w]ere I treating him I would taper the baclofen
2 off relatively rapidly and then start pushing the Valium.”¹⁷ “If we can get him off his
3 sedating medications and he is still having an encephalopathic problem,” Dr. Downs
4 wrote, “then I think a neuropsych[ological] test would be indicated to quantitate [sic] this
5 as this may be a source of employment difficulties.”¹⁸

6 **D. Follow-Up Treatment**

7 Following his consult with Dr. Downs, Mason returned to Medical Park Family
8 Care complaining about the side effects of his medications. On May 7, 2010 Dr. Lord
9 ordered Mason to taper off baclofen but stated that he would still “likely need high
10 doses of muscle relaxants for the muscle cramps and stiffness.”¹⁹

11 On July 8, 2010 Mason saw Dr. Lord again, complaining that his SPS was
12 worsening and that the tapering of the dosage of his muscle relaxants was not
13 helping.²⁰ The notes from Dr. Lord’s physical examination state that Mason was in
14 “moderate pain/distress” and “[v]isibly uncomfortable, some palpable spasms on chest
15 wall, discomfort with walking and changing positions.”²¹

16 On July 15, 2010, Mason was admitted to the emergency department of
17 Providence Alaska Medical Center, complaining of cramps and muscle spasms with
18 pain that he described as a 10 on a scale of 0 to 10.²² The emergency department
19 physician noted that Mason did not appear to be in distress or discomfort despite his
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21 ¹⁶Doc. 32-2 at 146.

22 ¹⁷*Id.* at 148.

23 ¹⁸*Id.* at 149.

24 ¹⁹*Id.* at 153.

25 ²⁰*Id.* at 163.

26 ²¹*Id.*

27 ²²*Id.* at 52.

1 stated pain level, and that he was alert and oriented. Mason was given morphine and
2 Ativan for his pain and instructed to follow up with his primary care physician.²³

3 The next morning Mason met with Dr. Lord, who noted in his physical exam that
4 Mason was suffering from “moderate pain/distress.”²⁴ Later that day Mason was again
5 admitted to the emergency room complaining of pain.²⁵ The emergency department
6 physician noted that Mason’s inability to control his SPS-related pain was “unfortunately
7 par for this unfortunate malady,” which he described as “ultimately . . . very difficult to
8 treat.”²⁶

9 In the following months Mason sought medical treatment repeatedly for his SPS,
10 including the following visits:

- 11 • Dr. Lord’s July 27, 2010 physical exam notes state that Mason was
12 suffering from “mild pain/distress” and had a “depressed affect.”²⁷
13 Dr. Lord concluded that Mason’s SPS had deteriorated.²⁸
- 14 • The next day Mason met with Dr. Meekins, complaining of painful spasms
15 and stiffness in his trunk and extremities. Dr. Meekins described Mason’s
16 SPS as “progressive.”²⁹

21 ²³*Id.* at 53.

22 ²⁴*Id.* at 164.

23 ²⁵*Id.* at 55.

24 ²⁶*Id.*

25 ²⁷*Id.* at 168.

26 ²⁸*Id.*

27 ²⁹*Id.* at 61.

- 1 • On August 16, 2010, Dr. Lord again examined Mason, assessed Mason's
2 SPS had deteriorated, and noted that he was suffering from "mild
3 pain/distress" and "[c]ontinued diffuse muscle spasms."³⁰
4 • Dr. Lord examined Mason again on August 25, 2010, and again noted that
5 Mason was suffering from "mild pain/distress" and had a "depressed
6 affect."³¹
7 • On September 22, 2010, Mason was referred to VA internist Madeleine M.
8 Grant, M.D., who addressed Mason's reports that his medicine was
9 causing him to be too sedated to drive or work.³² Dr. Grant listed Mason's
10 treatment goal as "find[ing] medication that worked and did not affect him
11 cognitively."³³ She recommended tapering Mason's baclofen usage and
12 gradually increasing diazepam.
13 • In Dr. Lord's notes to Mason's September 29, 2010 visit, Dr. Lord states
14 that he discussed Mason's SPS with the VA and they agreed to "maximize
15 the dosing of Valium to try and treat his spasms" and "[s]lowly titrate down
16 the baclofen."³⁴
17 • On October 6, 2010, Mason complained to Dr. Lord that his body cramps
18 had "worsened especially the feet and arms since tapering off of the
19 baclofen" but he noticed less sedation.³⁵
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22 ³⁰*Id.* at 173.

23 ³¹*Id.* at 175.

24 ³²*Id.* at 68.

25 ³³*Id.* at 69.

26 ³⁴*Id.* at 181.

27 ³⁵*Id.* at 183.

- 1 • On October 28, 2010, Dr. Lord again noted that Mason’s SPS had
2 deteriorated, he was suffering “moderate pain/distress,” and had a
3 “depressed affect.”³⁶
- 4 • On November 15, 2010, Mason complained to Dr. Lord about “pain and
5 discomfort and depression” from SPS. Dr. Lord’s physical exam noted
6 that Mason was suffering from “moderate pain/distress” and had a
7 “depressed affect.”³⁷
- 8 • On December 23, 2010, Mason told another Family Park Medical Care
9 physician, Jeffrey Kim, M.D., that he was doing “okay” on Valium but it
10 made him “very sleepy and very poor functioning.”³⁸
- 11 • On January 9, 2011, Mason was admitted to the emergency department
12 at the hospital complaining of severe abdominal pain, which he graded as
13 a 9 on a scale of 0 to 10.³⁹ The emergency department physician noted
14 that Mason alleviated his pain by taking his medication at home, but within
15 about 20 minutes of presenting himself at the hospital Mason had already
16 fallen asleep.⁴⁰

17 **E. Neuropsychological Exam**

18 Because Mason was complaining of memory decline, Dr. Meekins referred
19 Mason to neuropsychologist Paul D. Dukarm, Ph.D. for testing in September 2010. In
20 his summary of his findings Dr. Dukarm states that Mason was “exhibiting variable
21 neurocognitive performance deficits in the areas of executive functioning. Specifically,
22 he [was] demonstrating impaired performance in the area of visuospatial organization

23 ³⁶*Id.* at 188.

24 ³⁷*Id.* at 190.

25 ³⁸*Id.* at 192.

26 ³⁹*Id.* at 48.

27 ⁴⁰*Id.* at 49.

1 and planning during problem solving and impaired response flexibility under changing
2 conditions.”⁴¹ In addition, Dr. Dukarm found that Mason was “borderline deficient” with
3 regard to “[d]eductive logic as it relates to attribute identification and concept formation,”
4 and he showed “deficiencies for learning and retaining uncontextualized verbal
5 information, such as a word list.”⁴² Dr. Dukarm noted, however, that Mason’s
6 “recognition [was] intact as well as his learning efficiency and retention of other forms of
7 verbal information (prose) and non-verbal information.”⁴³ And although Mason’s “[b]asic
8 auditory attention and working memory” were “low average,” he was in the average
9 range with regard to “visual working memory,” “verbal fluency under time pressure,
10 sequencing and alternating attention under time pressure, and inhibiting automatic
11 responses under time pressure.”⁴⁴

12 Dr. Dukarm concluded that the findings of his exam were “compatible with a
13 diagnosis of Cognitive Disorder, NOS.”⁴⁵ “Etiology of neurocognitive deficits is unclear
14 and likely multifactorial. . . . The most likely contributing factors to this patient’s
15 performance deficits include medication effects, pain, and sleep disturbance. Other
16 contributing factors include the autoimmune disease of which he is diagnosed, but the
17 cognitive effects are unclear as to the nature and source of the impact from this
18 condition.”⁴⁶

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23 ⁴¹*Id.* at 77.

24 ⁴²*Id.*

25 ⁴³*Id.*

26 ⁴⁴*Id.*

27 ⁴⁵*Id.*

28 ⁴⁶*Id.* at 77-78.

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F. Psychotherapy

On September 1, 2010, Mason was seen by Camilla A. Madden, Ph.D., a psychologist at the VA, who diagnosed Mason with severe depression related to his struggles at work and with his family because of the side effects of his medications and the limitations of his disorder.⁴⁷ Mason continued to see Dr. Madden regularly for treatment of his depression.⁴⁸

G. Mason Applies For Short-Term Disability Benefits

Mason applied for short-term disability benefits in December 2010, stating that he was no longer able to work due to his SPS and described his symptoms as follows: “Muscle spasms all over, cramps all over, dystonia⁴⁹ in the hands and feet, chronic fatigue, unable to concentrate and chronic headache.”⁵⁰ In order for employees to qualify for short-term disability benefits under the Short Term Disability Plan (“the Plan”) administered by defendant Federal Express Corporation (“FedEx”), they must show that they suffer from an “occupational disability,” which the Plan defines as “the inability of a Covered Employee, because of a medically-determinable physical impairment or Mental Impairment, to perform the duties of his regular occupation.”⁵¹

⁴⁷*Id.* at 64-65.

⁴⁸*See, e.g., id.* at 66-67; 71-72; 79-82; 83-84; 88-89, 90-91; 94-85; 97-98.

⁴⁹Dystonia is defined as “[a] syndrome of abnormal muscle contraction that produces repetitive involuntary twisting movements and abnormal posturing of the neck, trunk, face, and extremities.” *STEDMAN’S MEDICAL DICTIONARY* (2014).

⁵⁰Doc. 32-3 at 32-33.

⁵¹*See* the Plan § 1.1(s), doc. 32-6 at 50. *See also* Doc. 59 at 4.

1 **H. Mason’s Supervisor States that Mason is Unable to Work**

2 Mason worked as a manger for FedEx Trade who oversaw a group of 26
3 employees.⁵² His former supervisor, Linda Combs (“Combs”), wrote an email stating
4 that Mason “would suffer from severe muscle cramping” at work “and his limbs would
5 ‘lock up.’”⁵³ For example, Combs reported that she had observed Mason not being able
6 to get up from a meeting table “because his legs locked up” and “his hands cramp up
7 and lock where he could not open his hand.”⁵⁴ Combs also stated that she saw Mason
8 “fall to the ground with leg spasms at an employee picnic.”⁵⁵

9 Combs stated that Mason started “really declining in the fall of 2009,” when he
10 had “spasms much more frequently and more severely.”⁵⁶ Mason started taking
11 medication but it was “very sedating,” causing him to take most of March and some of
12 April 2010 off from work so that he could “try[] to cope on these medications.”⁵⁷ When
13 he returned to work, he “struggled with staying awake and alert through an 8 hour work
14 day,” had a bad limp, and experienced difficulty walking around the two-floor office.⁵⁸
15 Combs reported that Mason had “trouble focusing and remembering things,” and “many
16 times” on the job “was falling asleep, slurring his words and making very little sense.”⁵⁹
17 Combs stated that she “would send him things that he didn’t ever remember seeing”
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20 ⁵²Doc. 32-2 at 235.

21 ⁵³*Id.* at 236.

22 ⁵⁴*Id.*

23 ⁵⁵*Id.*

24 ⁵⁶*Id.*

25 ⁵⁷*Id.* at 237.

26 ⁵⁸*Id.*

27 ⁵⁹*Id.*

1 and that he “could not keep up with his deadlines.”⁶⁰ “I finally told him that this was
2 getting way out of control,” Combs wrote. “We wouldn’t allow any other employee to
3 come in and pass out at their desk. I felt like I was dealing with a situation that
4 presented the company with a grave liability.”⁶¹

5 Combs’ report is consistent with a December 13, 2010 entry in Aetna’s claim
6 records which states that Mason’s “HR Advisor” called Aetna because she wanted to
7 help Mason with his claim. The advisor stated that she would “make [Mason]
8 understand” what Aetna needed and would “ask [Mason’s] girlfriend to help him,
9 because he is in a lot of pain and many times he is [on] pain medicine and cannot
10 understand what he is being asked.”⁶²

11 **I. Mason’s Treating Physicians Opine That He Is Unable to Work**

12 In June 2010 Dr. Lord filled out a FedEx form indicating that Mason was unable
13 to perform any of his job functions due to his SPS, and his condition was permanent.⁶³
14 Dr. Lord elaborated on his opinion in a July 29, 2010 letter, in which he stated that
15 Mason’s medical concerns—including “uncontrollable muscle spasms throughout the
16 body, irritable bowel-like symptoms, generalized anxiety and depression, restless legs,
17 circulatory conditions, hypertension, spontaneous tendon ruptures and sleep
18 disorder”—can be attributed to his “definitive diagnosis” of SPS.⁶⁴ Dr. Lord wrote that
19 Mason’s “symptoms have progressively worsened and his symptoms are currently
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24 ⁶⁰*Id.*

25 ⁶¹*Id.*

26 ⁶²Doc. 32-3 at 45.

27 ⁶³Doc. 32-2 at 159-62.

28 ⁶⁴*Id.* at 172.

1 poorly controlled. He is medically disabled at this time and would benefit from
2 evaluation by a leading expert on stiff person syndrome.”⁶⁵

3 The physician responsible for Mason’s primary care shifted from Dr. Lord to
4 Dr. Kim.⁶⁶ Dr. Kim wrote a letter on December 23, 2010, stating that Mason’s SPS
5 diagnosis had been confirmed by two separate neurologists and rendered him
6 permanently disabled.⁶⁷ Dr. Kim also completed an “Attending Physician Statement” on
7 January 21, 2011, that states Mason is unable to work in any capacity due to his
8 disease and the effects of his medications and lists the objective data upon which this
9 opinion relies, including physical exams that reveal spasms in Mason’s chest and
10 abdomen and cramps in his extremities, and various diagnostic tests that were
11 performed on Mason that confirm his SPS diagnosis.⁶⁸ Dr. Kim expanded on this
12 opinion in the following two notes in Mason’s file: (1) on January 21, 2011, Dr. Kim
13 wrote that “[f]or reasons related to medication side effects as well as symptoms
14 associated with his condition, [Mason] is unable to function adequately at work and
15 should certainly be considered disabled;”⁶⁹ and (2) on January 26, 2011, Dr. Kim wrote
16 that Mason was “currently, and for the foreseeable future, significantly disabled and
17 unable to function at any effective level in a work capacity.”⁷⁰

18 **J. Aetna Denies Mason’s Claim**

19 Aetna denied Mason’s claim on March 28, 2011. In the denial notice Aetna
20 Nurse Consultant Patricia Karns (“Karns”) writes that she reviewed Mason’s file and
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22 ⁶⁵*Id.*

23 ⁶⁶Doc. 55 at 11.

24 ⁶⁷Doc. 32-2 at 194.

25 ⁶⁸*Id.* at 198.

26 ⁶⁹*Id.* at 196.

27 ⁷⁰*Id.* at 199.

1 presented his claim to “an independent peer physicians [sic] specializing in internal
2 medicine, neurology, and neuropsychology.” She informs Mason that Aetna
3 determined that “the clinical data received and reviewed fails to support a functional
4 impairment from [Mason’s] sedentary occupation.”⁷¹

5 Aetna did find that some unspecified “data indicates that [Mason was] unable to
6 work related to side effects of [his] medications.”⁷² “However,” Aetna continued, “the
7 office visit notes from Dr. Kim and Dr. Grant do not document any objective findings to
8 indicate a functional impairment such as significant sleepiness or disorientation *during*
9 *office visits*. The documentation also noted that you are alert and oriented.”⁷³ Aetna
10 also concluded that there was “no documentation of any cognitive impairment”⁷⁴ despite
11 the apparent contrary conclusion of Dr. Dukarm, because Dr. Dukarm “did not record
12 any significant sedation *during the interview or testing*.”⁷⁵ Aetna also discounted the
13 results of Dr. Dukarm’s test that supported a disability finding, stating that “there was no
14 consistency or validity testing results.”⁷⁶

15 Aetna’s notice states that Mason needed to submit, among other things,
16 “medical documentation that clearly states the significant objective findings that
17 substantiate a disability.”⁷⁷ Aetna defined “significant objective findings” as “signs,
18 which are noted on a test or medical exam and are considered significant anatomical,
19 physiological, or psychological abnormalities that can be observed by a practitioner
20

21 ⁷¹*Id.* at 4.

22 ⁷²*Id.*

23 ⁷³*Id.* (emphasis added).

24 ⁷⁴*Id.*

25 ⁷⁵*Id.* (emphasis added).

26 ⁷⁶*Id.*

27 ⁷⁷*Id.* at 5.

1 apart from your description of your symptoms.” Aetna provided examples of such data:
2 (1) “[p]hysician exam reports, office notices, progress notes;” (2) “[o]ther Healthcare
3 provider reports;” and (3) “[d]iagnostic test results, i.e. lab tests, radiographic tests.”⁷⁸
4 Aetna informed Mason in bold print that “[p]ain, without significant objective findings, is
5 not proof of disability.”⁷⁹

6 Mason appealed on June 24, 2011.⁸⁰

7 **K. Mason Submitted Additional Information**

8 Between the date of Aetna’s denial and the date Mason filed his appeal, Mason
9 was admitted to the emergency department three times related to SPS spasms: on
10 April 27,⁸¹ May 11,⁸² and May 28, 2011.⁸³ Mason submitted to Aetna the medical
11 records related to these admissions.⁸⁴

12 On May 23, 2011, the Social Security Administration determined that Mason was
13 disabled under the rules of its disability insurance program (“SSDI”).⁸⁵ The SSDI
14 program “provides benefits to a person with a disability so severe that she is ‘unable to
15 do [her] previous work’ and ‘cannot . . . engage in any other kind of substantial gainful
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19 ⁷⁸*Id.*

20 ⁷⁹*Id.* at 4.

21 ⁸⁰Doc. 32-3 at 19.

22 ⁸¹Doc. 32-2 at 32-39 (Mason was suffering from “still present,” severe, “whole body
23 spasms” and listed his pain level at 10 on a scale of 0 to 10).

24 ⁸²*Id.* at 22-31 (Mason was taken to the emergency room in an ambulance complaining of
25 whole body muscle spasms and listed his pain level at 10).

26 ⁸³*Id.* at 15-21 (Mason had fallen after suffering a spasm in his right leg, and was
27 diagnosed with a left ankle sprain and right quadriceps strain).

28 ⁸⁴*Id.* at 11.

⁸⁵*Id.* at 12.

1 work which exists in the national economy.”⁸⁶ Mason submitted to Aetna his Notice of
2 Award of SSDI benefits.⁸⁷

3 Mason also submitted to Aetna letters from three of his treating doctors:
4 Dr. Grant, Dr. Downs, and Dr. Madden. Dr. Grant wrote a letter dated March 3, 2011,
5 stating that it was her opinion that Mason was unable to work on account of his
6 disability “both due to severe discomfort from his stiff man syndrome, and also from
7 side effects of the medication, which affects him cognitively.”⁸⁸

8 Dr. Downs wrote a letter dated June 10, 2011, stating that Mason’s “symptoms
9 are consistent with [SPS] and blood work has been positive for the relevant antibodies.
10 The diagnosis is not in question.”⁸⁹ Dr. Downs provided Aetna with the following
11 information about SPS:

12 The disease is extremely rare and poorly understood. There seem to be
13 several etiologies, but the final result is significant loss of inhibition of
14 spinal motor neurons which results in extreme excessive firing of these
15 motor neurons and contraction of the innervated muscles. This is similar
16 to but very much more severe than what is seen in spasticity after a
stroke, and the spasms can in fact be severe enough to break bones.
Symptoms can sometimes be controlled by medications, but the
medications are extremely sedating, and we have as of yet been unable
to give [Mason] any significant relief.⁹⁰

17 In addition, Dr. Downs provided Aetna with a copy of the section from Goetz Textbook
18 of Clinical Neurology that discusses SPS and directed its attention to the final section,
19 “Prognosis and Future Perspectives.” That section reads as follows: “Without
20 treatment, SPS progresses to total disability related to generalized rigidity and
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23 ⁸⁶*Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 797 (1999) (citing § 223(a) of the
24 Social Security Act, as set forth in 42 U.S.C. § 423(d)(2)(A)).

25 ⁸⁷Doc. 32-2 at 11.

26 ⁸⁸*Id.* at 121.

27 ⁸⁹*Id.* at 8.

28 ⁹⁰*Id.*

1 secondary musculoskeletal deformities. The pathogenetic autoimmune mechanisms
2 remain to be elucidated.”⁹¹

3 Finally, Dr. Madden wrote a letter dated July 13, 2011, in which she describes
4 how the side effects of Mason’s medications impair his ability to function. She notes
5 that Mason’s medications make him “very tired to the point of not being able to stay
6 awake while engaged in an appointment. There have been therapy sessions with me
7 when Mr. Mason has fallen asleep despite a valiant effort to stay awake and to benefit
8 from the therapeutic encounter.”⁹² Dr. Madden states that she “repeatedly noted that
9 [Mason’s] insight and judgment is good when not impaired due to the effects of
10 medication which alters his cognitive faculties,” but “neuropsychological testing has
11 indicated that he has a severe degree of intellectual loss from one and a half years ago
12 when he was still able to function as a manger at Federal Express.”⁹³ Further, Dr.
13 Madden states that the side effects of Mason’s medications “are so serious that Mr.
14 Mason and his wife have frequently told me that he does not take his medication so that
15 he will be able to stay awake and alert enough so that he can communicate,
16 understand and remember what has taken place in a health care appointment or in
17 appointments with other agencies and physicians.”⁹⁴

18 **L. Aetna’s Appeals Committee Upholds the Denial of Mason’s Claim**

19 The Plan provides that if an “adverse benefit determination is appealed on the
20 basis of medical judgment, the appeal committee shall consult with an independent
21 health care professional who is qualified in the areas of dispute who shall not have
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24
25 ⁹¹*Id.* at 9.

26 ⁹²*Id.* at 13.

27 ⁹³*Id.*

28 ⁹⁴*Id.*

1 been involved in the initial claim denial.⁹⁵ In October 2011 Aetna’s Appeals Committee
2 upheld the denial of Mason’s claim. The denial letter states that the Committee
3 reviewed “all appeal information submitted, all medical documentation and the Peer
4 Physician Reviews dated 02/10/11, 02/24/11, 03/07/11, 03/08/11, 03/24/11, 08/06/11,
5 08/09/11, and 09/14/11.”⁹⁶ These Peer Physician Reviews included reviews from the
6 original three specialists in internal medicine, neurology, and neuropsychology, as well
7 as second opinions from three different physicians in those fields. Based on their
8 review, the Committee concluded that there were “no significant objective findings to
9 substantiate that a functional impairment exists that would render [Mason] unable to
10 perform [his] sedentary job duties as a Tax Analyst from 12/01/10 through current.”⁹⁷

11 **1. Aetna’s Internal Medicine Peer Reviews**

12 **a.) Wendy Weinstein, M.D.**

13 Dr. Weinstein, who is board-certified in internal medicine, submitted a
14 February 11, 2011 Peer Physician Review that states she reviewed various medical
15 reports and concludes that “none of the examination findings by multiple providers have
16 documented abnormalities that would preclude the claimant from performing a
17 sedentary occupation.”⁹⁸ Dr. Weinstein submitted a second Peer Physician Review on
18 March 9, 2011, after receiving additional medical reports to review. In neither of these
19 reviews did Dr. Weinstein engage in a “peer-to-peer consultation” with any of Mason’s
20 treating physicians.⁹⁹

21 With regard to the effects of Mason’s SPS, Dr. Weinstein’s February 11 report
22 states that Mason was noted to “walk stiffly” at “one point,” “but there has been no

23 ⁹⁵Doc. 32-6 at 72.

24 ⁹⁶Doc. 32-1 at 1.

25 ⁹⁷*Id.* at 2.

26 ⁹⁸Doc. 32-2 at 260.

27 ⁹⁹*Id.* at 255, 260.

1 documentation of abnormal muscle tone on specific muscle testing or other
2 musculoskeletal or neurologic examination abnormalities.” She acknowledges that
3 Dr. Meekins diagnosed Mason with SPS in February 2010, but adds that “there was no
4 documentation of any change in the claimant’s physical examination and no
5 documentation of specific functional impairments that would preclude the claimant from
6 performing his sedentary occupation as of 12/1/10.”¹⁰⁰ Dr. Weinstein’s March 9 report
7 reaches the same conclusion, but adds the fact that on November 15, 2010, Dr. Lord
8 observed Mason in “moderate pain and distress.” Dr. Weinstein discounted this
9 observation, however, because “no details of specific observations were presented.”¹⁰¹

10 With regard to the side effects of Mason’s medications, Dr. Weinstein discounts
11 Dr. Dukarm’s neuropsychological test’s conclusion that Mason was likely suffering from
12 a cognitive defect caused in part by the effects of his medications. Dr. Weinstein writes
13 that the test’s “findings were non-specific and it was noted they could be attributed to
14 medication affects, pain, and sleep disturbance as well as depression.”¹⁰² Although
15 Mason “complained of somnolence from his medications,” Dr. Weinstein writes, “there
16 has been no documentation of pathologic hypersomnolence, difficulty with
17 communication in the office visits, or significant cognitive impairments. Progress notes
18 have described that claimant as alert and intelligent.”¹⁰³ Dr. Weinstein was not provided
19 with any of Dr. Madden’s records.

20 Dr. Weinstein’s second review indicates that she was provided with a copy of
21 Dr. Dukram’s neuropsychological test and Combs’ email.¹⁰⁴ Despite Dr. Dukram’s
22 finding that Mason had a cognitive impairment on September 27, 2010, Dr. Weinstein

23 ¹⁰⁰*Id.* at 255.

24 ¹⁰¹*Id.* at 260.

25 ¹⁰²*Id.* at 256.

26 ¹⁰³*Id.*

27 ¹⁰⁴*Id.* at 258.

1 writes that “it appears the claimant was still able to perform his own occupation with the
2 first date of absence being listed as 11/10/10.”¹⁰⁵ (Dr. Weinstein claims that she
3 reviewed all of Mason’s records, including Combs’ email, before reaching this
4 conclusion).¹⁰⁶

5 **b.) Second Opinion From Dennis Mazal, M.D.**

6 Dr. Mazal, who is board certified in pulmonology and internal medicine,
7 submitted an August 8, 2011 Peer Physician Review that states that he cannot “discuss
8 functionality” based on Mason’s SPS diagnosis because neurological diagnoses are
9 “not within the scope of [his] specialty.”¹⁰⁷

10 With regard to the side effects of Mason’s medications, Dr. Mazal wrote without
11 further explanation that “[t]here is no documentation that any of those medications
12 caused any clinically significant side effects or adverse reactions that impact the
13 claimant’s ability to perform the duties of a sedentary demand occupation during the
14 time period under consideration.”¹⁰⁸ Dr. Mazal did not engage in a peer-to-peer
15 consultation with any of Mason’s treating physicians.

16 **2. Aetna’s Neuropsychology Peer Reviews**

17 **a.) Elana Mendelsohn, Phy.D.**

18 Dr. Mendelsohn, who is board certified in clinical psychology and
19 neuropsychology, submitted a February 24, 2011 Peer Physician Review.
20 Dr. Mendelsohn prefaced her report by noting that most of the records she reviewed
21 pertain to Mason’s “physical complaints” related to SPS, and therefore she deferred “to
22 the appropriate medical specialists to determine the impact of [Mason’s] medical
23

24
25 ¹⁰⁵*Id.* at 260.

26 ¹⁰⁶*Id.* at 259.

27 ¹⁰⁷Doc. 32-3 at 1.

28 ¹⁰⁸*Id.*

1 complaints on his functionality.”¹⁰⁹ Dr. Mendelssohn proceeded to evaluate Mason’s
2 neurological complaints in the records she reviewed. She ultimately concluded that
3 “clinical documentation does not support a functional impairment that would preclude
4 [Mason] from performing the essential duties of his own occupation from 12/1/10 to
5 forward.”¹¹⁰ Dr. Mendelssohn submitted a second Peer Physician Review on March 7,
6 2011, after receiving Combs’ email to review. In neither of these reviews did
7 Dr. Mendelssohn engage in a “peer-to-peer consultation” with any of Mason’s treating
8 physicians.¹¹¹

9 With regard to the side effects of Mason’s medications, Dr. Mendelssohn noted
10 that “various treating providers included sporadic reports of [Mason’s] emotional and
11 cognitive difficulties,” but discounted this by concluding that none of those providers
12 “included specific measurements of [Mason’s] cognition or a description of direct and
13 observed behaviors to corroborate the presence of impairment in neuropsychological
14 functioning.”¹¹²

15 Dr. Mendelssohn noted that Dr. Dukarm’s neuropsychological exam diagnosed
16 Mason with a cognitive disorder secondary, in part, to the side effects of his
17 medications. But she then offered four reasons for why she discounted the results of
18 this test: (1) Mason continued to work afterward; (2) “there was no indication that
19 [Dr. Dukarm] utilized symptom validity measures to ensure adequate effort and
20 motivation and valid test findings; (3) “office visits just prior to and after the
21 neuropsychological examination noted that the claimant presented as alert and oriented
22 with normal attention and concentration;” and (4) “none of [Mason’s] providers indicated
23

24
25 ¹⁰⁹Doc. 32-2 at 242.

26 ¹¹⁰*Id.* at 245.

27 ¹¹¹*Id.* at 245, 249.

28 ¹¹²*Id.* at 245.

1 that the claimant was unable to work in relation to his neuropsychological status.”¹¹³
2 Dr. Mendelssohn made these four findings without the benefit of Dr. Madden’s records
3 or Combs’ email.

4 After reviewing Combs’ email that outlined Mason’s problems at work,
5 Dr. Mendelssohn maintained that Mason had not shown that he is disabled because:
6 (1) Combs’ report of Mason slurring words was not reflected in the documents that she
7 reviewed previously; (2) although Combs reported that Mason was falling asleep at
8 work, “there was no indication that [Mason] fell asleep during [Dr. Dukarm’s]
9 evaluation;” (3) “[a]lthough [Dr. Dukarm] noted that [Mason] appeared lethargic, more
10 specific description was not included;” and (4) there was no indication from Mason’s
11 various office visit notes that he was “falling asleep during his office visits nor did the
12 provided information include . . . description of overt cognitive difficulties.”¹¹⁴ Again,
13 Dr. Mendelssohn lacked Dr. Madden’s records when she made these findings.
14 Dr. Mendelssohn concluded that, although Combs’ report indicates “both physical and
15 cognitive difficulties,” “there continues to be a lack of clear and consistent description of
16 direct and observable behaviors to substantiate the presence of a functional
17 impairment.”¹¹⁵

18 **b.) Second Opinion From Leonard Schnur, Phy.D.**

19 Dr. Schnur, who is board certified in psychology, submitted an August 9, 2011
20 Peer Physician Review. He was provided with Dr. Madden’s July 13, 2011 letter. With
21 regard to the side effects of Mason’s medications, Dr. Schnur’s report states that the
22 documentation he reviewed “referenced possible side effects from [Mason’s]
23 medication regimen for treatment of stiff-man syndrome, which apparently results in
24 drowsiness, sedation, and reduced concentration and attention.” Dr. Schnur declined
25

26 ¹¹³*Id.*

27 ¹¹⁴*Id.* at 249-50.

28 ¹¹⁵*Id.* at 250.

1 to comment on how these side effects impact Mason’s ability to work, however, stating
2 that Mason’s “medication regimen and any adverse medication side effects . . . would
3 go beyond the scope of [his] expertise and should be addressed by the appropriate
4 peer specialty.”¹¹⁶

5 **3. Aetna’s Neurology Peer Reviews**

6 **a.) Vaughn Cohan, M.D.**

7 Dr. Cohan, who is board certified in neurology, submitted a March 26, 2011 Peer
8 Physician Review. After describing the records he reviewed, Dr. Cohan states that
9 “[t]he neuropsychological and neurocognitive aspects of this case would fall outside the
10 scope of general medical neurology” and therefore he deferred to Dr. Mendelsohn
11 regarding those issues.¹¹⁷

12 Dr. Cohan describes a “peer-to-peer consultation” he had with Dr. Kim, who is a
13 family practitioner and not a neurologist, despite noting that Mason’s treating
14 neurologists are Dr. Downs and Dr. Meekins.¹¹⁸ According to Dr. Cohan, Dr. Kim stated
15 that Mason reported “that his cramping diminishes while on medications, but his
16 medications cause him to experience undesirable adverse sedative effect.”¹¹⁹ When
17 Dr. Cohan asked Dr. Kim “about his notes indicating that [Mason] appears in office to
18 be alert and oriented with no evidenced signs of over-sedation[,] Dr. Kim stated that the
19 claimant has reported to him that he does not take his medications prior to office visits
20 so that he may interact with medical provider optimally.”¹²⁰ According to Dr. Cohan,
21 Dr. Kim stated that he had never observed Mason overly sedated or cognitively
22

23 ¹¹⁶Doc. 32-3 at 6.

24 ¹¹⁷Doc. 32-2 at 265.

25 ¹¹⁸*Id.* at 245, 249.

26 ¹¹⁹*Id.* at 265.

27 ¹²⁰*Id.*

1 impaired and indicated “that there is no apparent physical impairment that would
2 preclude performance of desk work.”¹²¹

3 Dr. Cohan relied heavily on Dr. Kim’s statements in his report. He states that
4 “[a]lthough there are references to over-sedation in the medical record and as
5 submitted by one of the claimant’s coworkers/managers, nevertheless, there is no
6 independent medical verification or substantiation to that effect. When the claimant has
7 been seen medically by medical providers, there has been no report of objective excess
8 sedative or medication effect.”¹²² (Dr. Cohen was provided with Dr. Madden’s records
9 and he claims that he reviewed them.)¹²³ Dr. Cohen concluded that “the documentation
10 provided fails to demonstrate objective evidence of a functional impairment for the
11 claimant’s own sedentary occupation from 12/1/10 to the present.”¹²⁴

12 **b.) Second Opinion From Andrew J. Gordon, M.D.**

13 Dr. Gordon, who is board certified in neurology, submitted an August 11, 2011
14 Peer Physician Review. Mason asserts that “Dr. Gordon was the only reviewer hired by
15 Aetna that did not appear to be ‘in house.’ He apparently works for MES.”¹²⁵ After
16 reviewing Mason’s records, including those from Dr. Madden, Dr. Gordon concluded
17 that “there is significant objective clinical documentation that reveals a functional
18 impairment that would preclude [Mason] from performing the essential duties of [his]
19 own occupation which is a sedentary demand level from 12/01/10 through current.”¹²⁶
20 He supported this conclusion with the following evidence:

21
22 ¹²¹*Id.*

23 ¹²²*Id.* at 266.

24 ¹²³*Id.* at 264.

25 ¹²⁴*Id.* at 266.

26 ¹²⁵Doc. 55 at 23.

27 ¹²⁶Doc. 32-3 at 11.

1 The claimant is described by numerous doctors including two neurologists
2 as having Stiff Man Syndrome. He tests positive twice (blood work).
3 There are numerous notes indicating refractory spasms, cramping and
4 poor work performance resulting from these symptoms. Evaluation and
5 testing has excluded other diagnoses. The claimant is described as
6 responding poorly to usual treatment and he is described as suffering
7 from side effects with treatment which include lethargy and sleepiness. A
8 supervisor at work documents his inability to properly perform his duties
9 and gives numerous examples of his impairments that have occurred as a
10 result of Stiff Man Syndrome. Finally, the treating neurologist notes that
11 the claimant cannot work due to refractory symptoms and resultant
12 functional impairment.¹²⁷

13 In response to this report, Aetna sent Dr. Gordon the following message:

14 “Dr. Gordon please clarify: You found the claimant to be impaired from 12/01/10
15 through current however; [sic] your report and findings were based on the medical data
16 dated prior to the disability date under consideration of 12/01/10. Please review and
17 comment on the medical data, physical exam findings that demonstrate a functional
18 impairment for the time period under review (12/01/10 through current).”¹²⁸

19 About one month later, Dr. Gordon submitted a second review in which he states
20 that Aetna’s request for “clarification” changed his prior recommendation, and he now
21 concludes that Mason has not shown that he is disabled. Dr. Gordon asserts that
22 “records from earlier periods (early 2010 and before) document more significant
23 difficulties with spasticity, gait impairment and altered mental status,” but “the more
24 recent records from 12/1/10 onward do not demonstrate functional impairment from a
25 neurologic perspective.”¹²⁹ Dr. Gordon did not engage in a peer-to-peer consultation
26 with any of Mason’s treating physicians.

27 ¹²⁷*Id.*

28 ¹²⁸*Id.* at 14-15.

¹²⁹*Id.* at 15.

1 **III. STANDARD OF REVIEW**

2 **A. The Abuse of Discretion Standard Applies**

3 To determine which standard of review applies in an ERISA benefits case, the
4 court must determine whether the ERISA plan unambiguously grants discretion to the
5 administrator.¹³⁰ “[B]y default, review of denial of ERISA benefits is de novo” and for
6 the administrator “to obtain the more lenient abuse of discretion standard of review, a
7 plan must unambiguously so provide.”¹³¹ Here, the parties agree that the benefit plan at
8 issue gives the administrator, Aetna, discretionary authority to determine benefits
9 eligibility.¹³² The court will therefore review Aetna’s determination for abuse of
10 discretion.¹³³ Under the abuse of discretion standard, courts consider all of the relevant
11 circumstances and defer to the administrator’s decision so long as it is reasonable.¹³⁴
12 That is, courts defer “to the administrator’s benefits decision unless it is ‘(1) illogical,
13 (2) implausible, or (3) without support in inferences that may be drawn from the facts in
14 the record.’”¹³⁵

15 Determining that the abuse of discretion standard applies “is only the first step” in
16 determining the standard by which courts review an administrator’s denial of benefits.¹³⁶
17 Even where the court must “nominally review for abuse of discretion, the degree of
18 deference” that the court will accord to an administrator’s decision can vary significantly

19 _____
20 ¹³⁰*Pac. Shores Hosp. v. United Behavioral Health*, 764 F.3d 1030, 1039 (9th Cir. 2014).

21 ¹³¹*Salomaa v. Honda Long Term Disability Plan*, 642 F.3d 666, 673 (9th Cir. 2011).

22 ¹³²Doc. 55 at 28; Doc. 59 at 16.

23 ¹³³*Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 963 (9th Cir. 2006) (citing
24 *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)).

25 ¹³⁴*Pac. Shores Hosp.*, 764 F.3d at 1042.

26 ¹³⁵*Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917, 929 (9th Cir. 2012) (quoting
27 *Salomaa*, 642 F.3d at 676).

28 ¹³⁶*Saffon v. Wells Fargo & Co. Long Term Disability Plan*, 522 F.3d 863, 867 (9th Cir.
2008).

1 depending on the presence of a conflict of interest¹³⁷ or procedural irregularities¹³⁸ in the
2 record. Here, on account of the significant conflict of interest and procedural
3 irregularities presented, the court concludes that Aetna’s decision is entitled to little
4 deference.

5 **1. Conflict of Interest**

6 “[T]he degree of skepticism with which [courts] regard a plan administrator’s
7 decision when determining whether the administrator abused its discretion varies based
8 upon the extent to which the decision appears to have been affected by a conflict of
9 interest.”¹³⁹ Where an administrator operates under a conflict of interest, that conflict
10 does not alter the standard or review itself, but it “must be weighed as a factor in
11 determining whether there is an abuse of discretion.”¹⁴⁰ In evaluating a conflict of
12 interest, the court must consider not only the terms of the underlying plan and the
13 medical evidence in the record,¹⁴¹ but also the “nature, extent, and effect on the
14 decision-making process of any conflict of interest” and decide on the record as a whole
15 “how much or how little to credit the plan administrator’s reason for denying insurance
16 coverage.”¹⁴² Thus, if all of the other factors are “closely balanced,” a conflict of interest
17 “will act as a tiebreaker.”¹⁴³

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19
20 ¹³⁷*Id.* at 868.

21 ¹³⁸*Abatie*, 458 F.3d at 972.

22 ¹³⁹*Stephan*, 697 F.3d at 929.

23 ¹⁴⁰*Abatie*, 458 F.3d at 965 (quoting *Firestone*, 489 U.S. at 115).

24 ¹⁴¹*Montour v. Hartford Life & Acc. Ins. Co.*, 588 F.3d 623, 630 (9th Cir. 2009).

25 ¹⁴²*Abatie*, 458 F.3d at 967-68. *See also Salomaa*, 642 F.3d at 681 (Hall, J., dissenting)
26 (“Although this standard’s dualism between skepticism and deference may seem strange, it is
27 the proper standard and must be applied carefully.”).

28 ¹⁴³*Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 117 (2008).

1 Mason argues that Aetna operates under a conflict of interest because its
2 behavior is similar to the behavior of the administrators in *Abatie*,¹⁴⁴ *Saffon*,¹⁴⁵
3 *Montour*,¹⁴⁶ and *Salomaa*.¹⁴⁷ Those cases are not on all fours, however, because they
4 each involved a disability determination made by the same entity that funded the ERISA
5 plan. In *Firestone*, the Supreme Court “did not catalogue the full range of types of
6 conflicts of interest, but it suggested that a conflict exists when a plan administrator
7 (which acts as a fiduciary toward the plan participants, who are beneficiaries) is also the
8 sole source of funding for an unfunded plan.”¹⁴⁸ Administrators who operate under this
9 structural conflict of interest have an incentive “to pay as little in benefits as possible to
10 plan participants because the less money the insurer pays out, the more money it
11 retains in its own coffers.”¹⁴⁹ This specific conflict is not present here because the Plan
12 is self-funded and maintained by FedEx.¹⁵⁰ Aetna is the Plan’s “Claims Paying
13 Administrator”¹⁵¹ and, in that role, determines eligibility for Plan benefits.¹⁵²

14 But that is not the end of the story. Mason also argues that a conflict of interest
15 exists here because “Aetna’s contract with FedEx depends on providing favorable
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17
18

19 ¹⁴⁴*Abatie*, 458 F.3d at 959.

20 ¹⁴⁵*Saffon*, 522 F.3d at 866.

21 ¹⁴⁶*Montour*, 588 F.3d at 626-27.

22 ¹⁴⁷*Salomaa*, 642 F.3d at 674.

23 ¹⁴⁸*Abatie*, 458 F.3d at 965 n.5 (citing *Firestone*, 489 U.S. at 105).

24 ¹⁴⁹*Abatie*, 458 F.3d at 966.

25 ¹⁵⁰Doc. 59 at 3 ¶¶ 3-4.

26 ¹⁵¹Doc. 32-6 at 1.

27 ¹⁵²*Id.* at 3.

1 financial results for FedEx.”¹⁵³ Aetna responds by calling this a “scandalous allegation”
2 that is “completely unfounded and not supported by any evidence in the record.”¹⁵⁴

3 Defendants do not dispute that FedEx pays benefits claims out of its own
4 undedicated funds. FedEx therefore has an obvious incentive to hire a Claims Paying
5 Administrator that minimizes benefits awards. According to the Supreme Court in
6 *Glenn*, an employer’s own conflict may “extend to its selection of an insurance company
7 to administer its plan.”¹⁵⁵ In fact, it has been noted that “[a] so-called independent
8 administrator may have much more of an incentive to decide against claimants” than
9 either an employer or “an insurance company spending ‘its own money.’”¹⁵⁶ These
10 “independent” administrators may have an incentive to “show how tough they are on
11 claims to better market their services to self-insured employers,” whereas insurance
12 companies “may have an incentive to be more liberal than is appropriate because its
13 experience-based premiums amount to a cost-plus contract, such that the more it
14 spends, the more it makes.”¹⁵⁷ Similarly, an employer might “wish to slant its decisions
15 in favor of coverage in close cases” in order to “make working there attractive by means
16 of a reputation for good medical coverage,” among other reasons.¹⁵⁸

17 It is apparent from the record that FedEx’s (and by extension, Aetna’s) conflict of
18 interest significantly colored the decision-making process. Nowhere is this conflict more
19 evident than with Aetna’s response to Dr. Gordon’s initial finding that Mason is disabled.
20 Aetna’s treatment of Dr. Gordon’s disability finding suggests bias for at least five

21
22 ¹⁵³Doc. 55 at 37.

23 ¹⁵⁴Doc. 59 at 23.

24 ¹⁵⁵*Glenn*, 554 U.S. at 114.

25 ¹⁵⁶*Abatie*, 458 F.3d at 977 (Kleinfeld, J., concurring).

26 ¹⁵⁷*Id.*

27 ¹⁵⁸*Id.*

1 reasons. First, Aetna's request for "clarification" misleadingly implies that Dr. Gordon's
2 initial report only considered medical data dated before December 1, 2010.¹⁵⁹ This is
3 not so: Dr. Gordon's report also relies on Mason's second blood test that came back
4 positive for SPS (dated December 7, 2010)¹⁶⁰ and Dr. Downs' June 10, 2011 letter.¹⁶¹

5 Second, Mason asserts and Aetna does not deny that the Plan does not forbid
6 consideration of medical records that predate the date of the claim.¹⁶² It would be
7 illogical for it to do so.

8 Third, Aetna asked Dr. Gordon to submit a new report, ostensibly because he
9 relied on pre-December 2010 data, but it did not ask the same of its doctors who found
10 that Mason was not disabled, even though they, too, relied on such data.¹⁶³ It is unclear
11 why Aetna needed "clarification" from Dr. Gordon, but not Drs. Weinstein or
12 Mendelssohn.

13 Fourth, the date restriction that Aetna imposed on Dr. Gordon is inconsistent with
14 the scope of records upon which Aetna itself relied. For example, Aetna's initial denial
15 letter references Mason's September 2010 neuropsychological exam, and its final
16 denial letter relies on exam reports from July 16, 2010 and November 24, 2010.

17 Finally, Dr. Gordon's supplemental report indicates that he was influenced by
18 Aetna's suggestive request for "clarification." Dr. Gordon's second report concludes
19 that "[w]hile records from earlier periods (early 2010 and before) document more
20 significant difficulties with spasticity, gait impairment and altered mental status; the
21

22 ¹⁵⁹Doc. 32-3 at 15.

23 ¹⁶⁰See *id.* at 11 (noting that Mason tested "positive twice (blood work)" for SPS); *id.* at 10
24 ("Anti-GAD antibodies (diagnostic test for Stiff Man Syndrome) are positive (slightly elevated)
on 12/7/10 and significantly elevated on 2/24/10 and negative from 7/28/10.").

25 ¹⁶¹*Id.* at 11 ([T]he treating neurologist notes that the claimant cannot work due to
26 refractory symptoms and resultant functional impairment.").

27 ¹⁶²Doc. 64 at 31.

28 ¹⁶³See Doc. 32-2 at 243-45, 252-256, 259-60.

1 more recent records from 12/1/10 onward do not demonstrate functional impairment
2 from a neurologic perspective.”¹⁶⁴ Dr. Gordon does not state what might have changed,
3 from a neurologic perspective or otherwise, that could explain this significant
4 improvement in Mason’s condition. Nor does he attempt to reconcile his conclusion
5 with the conclusion of Mason’s treating doctors that Mason’s disability was permanent
6 and progressive in nature.¹⁶⁵

7 **2. Procedural Irregularities**

8 “A procedural irregularity, like a conflict of interest, is a matter to be weighed in
9 deciding whether an administrator’s decision was an abuse of discretion.”¹⁶⁶ If the
10 administrator “can show that it has engaged in an ‘ongoing, good faith exchange of
11 information between [itself] and the claimant” and the evidence shows only a minor
12 procedural irregularity, the court should continue to give the administrator’s decision
13 broad deference.¹⁶⁷ If the administrator’s “procedural defalcations are flagrant, de novo
14 review applies” and “the court is not limited to the administrative record and may take
15 additional evidence.”¹⁶⁸ Most of the time, the procedural errors “are not sufficiently
16 severe to transform the abuse-of-discretion standard into a de novo standard” and in
17

18
19 ¹⁶⁴Doc. 32-3 at 15.

20 ¹⁶⁵Doc. 32-2 at 160 (“Probable duration of condition: life long”); *id.* at 161 (“[E]stimate the
21 beginning and ending dates for the period of incapacity: permanent”); *id.* at 194 (stating that
22 Mason’s SPS “has rendered him permanently disabled.”); *id.* at 198 (“I anticipate significant
23 clinical improvement by (date): never.”). See *also id.* at 8-9. These prognoses are consistent
24 with Dr. Meekins’ assessment of Mason’s SPS as progressive on July 28, 2010. *Id.* at 61. See
25 *also id.* at 172 (Dr. Lord noted on July 29, 2010, that Mason’s symptoms have “progressively
26 worsened and his symptoms are currently poorly controlled.”); *id.* at 173 (Dr. Lord noted on
27 August 16, 2010, that Mason’s SPS had “deteriorated”); *id.* at 188 (Dr. Lord noted on
28 October 28, 2010, that Mason’s SPS had “deteriorated”).

25 ¹⁶⁶*Abatie*, 458 F.3d at 972.

26 ¹⁶⁷*Id.* (quoting *Jebian v. Hewlett-Packard Co. Employee Benefits Org. Income Prot.*
27 *Plan*, 349 F.3d 1098, 1107 (9th Cir. 2003)).

28 ¹⁶⁸*Id.* at 973.

1 such instances the court must “weigh any procedural errors as a factor in determining
2 whether [the administrator] abused its discretion.”¹⁶⁹

3 *Saffon* is instructive. In *Saffon* the claimant was receiving disability benefits on
4 account of degeneration of her cervical spine.¹⁷⁰ When MetLife, her plan administrator,
5 commissioned a doctor to review her medical records, the doctor determined that the
6 claimant’s file lacked “detailed, objective, functional findings or testing which would
7 completely preclude” the claimant’s return to work.¹⁷¹ MetLife forwarded its doctor’s
8 report to the claimant’s treating neurologist, who then submitted to MetLife a note
9 explaining why the claimant’s previous MRI was objective evidence of her cervical
10 pathology. MetLife’s doctor was unpersuaded by this submission, and MetLife
11 terminated the claimant’s benefits. The termination letter stated that the claimant could
12 appeal this determination by providing, among other things, “objective medical
13 information to support [her] inability to perform the duties of [her] occupation.”¹⁷²

14 Although the claimant submitted additional evidence on appeal, Metlife’s second
15 reviewing doctor reached the same conclusion as its first: there was “not enough
16 objective medical findings and office notes” showing that the claimant’s “self-reported
17 headache and chronic pain syndrome has been enough to preclude her from’
18 working.”¹⁷³ MetLife affirmed the termination.

19 The Ninth Circuit held that MetLife’s termination was riddled with procedural
20 errors. It held that MetLife’s termination letter was insufficient for at least three reasons.
21 First, although the letter notes that “[t]he medical information provided no longer
22 provides evidence of disability that would prevent [the claimant] from performing [her]

23
24 ¹⁶⁹*Pac. Shores Hosp.*, 764 F.3d at 1040. See also *Abatie*, 458 F.3d at 972.

25 ¹⁷⁰*Saffon*, 522 F.3d at 866.

26 ¹⁷¹*Id.* at 869.

27 ¹⁷²*Id.*

28 ¹⁷³*Id.* at 869-70.

1 job or occupation,” it does not “explain why that is the case, and certainly does not
2 engage [the claimant’s treating neurologist’s] contrary assertion.” Second, although the
3 letter suggests that the claimant can “appeal by providing ‘objective medical information
4 to support [her] inability to perform the duties of [her] occupation,” it “does not explain
5 why the information [she] has already provided is insufficient for that purpose.”¹⁷⁴ And
6 third, if MetLife believed that it was necessary for the claimant to present some means
7 for objectively testing the claimant’s ability to perform her job, such as a “Functional
8 Capacity Evaluation,” MetLife “was required to say so at a time when [the claimant] had
9 a fair chance to present evidence on this point.”¹⁷⁵ In addition to these errors related to
10 the notice, the court also faulted MetLife for communicating directly with the claimant’s
11 doctors without advising her of the communication and taking “various of her doctors’
12 statements out of context or otherwise distorted them in an apparent effort to support a
13 denial of benefits.”¹⁷⁶

14 The procedures that Aetna followed in this case are even more flawed than those
15 at issue in *Saffon*.

16 **a. Aetna’s Notices Are Deficient**

17 ERISA plan administrators “must follow certain practices when processing and
18 deciding plan participants’ claims.”¹⁷⁷ For example, 29 C.F.R. § 2560.503-1 provides
19 that an ERISA plan administrator investigating a claim must engage in “a meaningful
20 dialogue” with the beneficiary.¹⁷⁸ “If benefits are denied in whole or in part, the reason
21

22 ¹⁷⁴*Id.* at 870.

23 ¹⁷⁵*Id.* at 871.

24 ¹⁷⁶*Id.* at 873.

25 ¹⁷⁷*Abatie*, 458 F.3d at 971.

26 ¹⁷⁸*Booton v. Lockheed Med. Ben. Plan*, 110 F.3d 1461, 1463 (9th Cir. 1997) (citing
27 former 29 C.F.R. § 2560.503-1(f)). The pertinent language is now codified at 29 C.F.R.
28 § 2560.503-1(g).

1 for the denial must be stated in reasonably clear language, with specific reference to
2 the plan provisions that form the basis for the denial; if the plan administrators believe
3 that more information is needed to make a reasoned decision, they must ask for it.”¹⁷⁹

4 Aetna’s March 28, 2011 denial notice analyzes hundreds of pages of Mason’s
5 medical records in one paragraph containing a series of disjointed sentences.¹⁸⁰ Like
6 the notice in *Saffon*, it does not clearly explain to the claimant what was necessary to
7 perfect the claim. Although Aetna informs Mason that he was required to submit
8 “medical documentation that clearly states the significant objective findings that
9 substantiate [his] disability,” such as physician exam reports, office notes, or diagnostic
10 test results such as lab tests,¹⁸¹ it does not clearly inform him of the specific reasons
11 why its reviewers found that the evidence he already submitted was insufficient. For
12 example, it does not clearly state that Aetna would disregard his diagnostic test results
13 if they do not contain “consistency or validity testing results.”¹⁸² If Aetna believed that
14 validity testing results were necessary, it was required to say so “in a manner calculated
15

16 ¹⁷⁹*Booton*, 110 F.3d at 1463. See also 29 C.F.R. § 2560.503-1(g)(1) (requiring, among
17 other things, that notices of adverse benefit determinations must set forth “in a manner
18 calculated to be understood by the claimant:” (i) “[t]he specific reason or reasons for the
19 adverse determination;” (ii) “[r]eference to the specific plan provisions on which the
20 determination is based;” and (iii) “[a] description of any additional material or information
21 necessary for the claimant to perfect the claim and an explanation of why such material or
22 information is necessary.”).

21 ¹⁸⁰Doc. 32-2 at 4.

22 ¹⁸¹*Id.* at 5.

23 ¹⁸²See Dr. Mendelssohn’s first report, *id.* at 243-44 (“Dr. Dukarm noted that the claimant
24 appeared lethargic, and the claimant reported having a headache and experiencing pain.
25 There was no indication that formal measures of validity were utilized to ensure valid test
26 results.”); *id.* at 245 (rejecting Dr. Dukarm’s cognitive disorder diagnosis in part because “there
27 was no indication that the examiner utilized symptom validity measures to ensure adequate
28 effort and motivation and valid test findings.”); Dr. Mendelssohn’s second report, *id.* at 249 (“[I]n
my previous review I questioned the presence of whether the claimant’s test performance was
reflective of valid test findings. However, validity could not be determined given that there was
no indication that the examiner administered symptom validity measures to ensure optimal
effort and motivation and validity of the neuropsychological evaluation.”).

1 to be understood by”¹⁸³ Mason at a time when he had a meaningful opportunity to
2 present evidence on this point.

3 The record is replete with similar examples. Aetna’s denial notice does not
4 disclose to Mason that Dr. Mendelssohn discounted his doctors’ observations of his
5 emotional and cognitive difficulties because those doctors did not include “specific
6 measurements of [Mason’s] cognition or a description of direct and observed behaviors
7 to corroborate the presence of impairment in neuropsychological functioning.”¹⁸⁴ Nor
8 does it disclose to him that Dr. Weinstein discounted an exam finding that he had an
9 irregular gait because there was “no documentation of abnormal muscle tone on
10 specific muscle testing or other musculoskeletal or neurologic examination
11 abnormalities.”¹⁸⁵ Or that Dr. Weinstein discounted his somnolence complaints
12 because there was “no documentation of pathologic hypersomnolence, difficulty with
13 communication in the office visits, or significant cognitive impairments.”¹⁸⁶ Or that
14 Dr. Weinstein found that Mason’s file was lacking “documentation of consistently
15 abnormal musculoskeletal or neurologic examination findings.”¹⁸⁷ Aetna’s failure to
16 disclose these alleged deficiencies to Mason, “a maneuver that has the effect of
17 insulating [its] rationale from review, contravenes the purpose of ERISA.”¹⁸⁸

18 Further, when Dr. Kim filled out Aetna’s “Attending Physician Statement” form,
19 he listed numerous diagnostic test results that, in his opinion, were “objective data” that
20 document Mason’s disability, including the lab tests that confirmed Mason’s
21

22 ¹⁸³29 C.F.R. § 2560.503-1(g)(1).

23 ¹⁸⁴Doc. 32-2 at 245.

24 ¹⁸⁵*Id.* at 255.

25 ¹⁸⁶*Id.* at 256.

26 ¹⁸⁷*Id.* 32-2 at 260.

27 ¹⁸⁸*Cf. Abatie*, 458 F.3d at 974.
28

1 diagnosis.¹⁸⁹ If Aetna believed that these test results did not contain “significant
2 objective findings that substantiate” his disability, it was required to say so and explain
3 why not. Aetna’s denial letter makes no mention of Mason’s lab tests; it vaguely
4 concludes that Dr. Kim “was unable to provide any objective findings or clinical
5 observations to correlate with your subjective complaints due to diagnosis of stiff person
6 syndrome.”¹⁹⁰

7 **b. Aetna Failed to Engage in a Good Faith Exchange of**
8 **Information**

9 In determining the degree of deference to which an administrator is entitled,
10 courts must also consider its course of dealing with the claimant and her doctors.¹⁹¹ In
11 *Saffon* the Ninth Circuit chided the plan administrator for only communicating the
12 results of its reviewing physician’s findings with the claimant’s doctor and not also the
13 claimant herself. Aetna did substantially worse here by providing none of its reviewing
14 doctors’ reports to either Mason or his physicians at any point during the administrative
15 process.¹⁹² Aetna’s initial denial letter fails to provide Mason with even its reviewers’
16 names, identifying them only as “independent peer physicians specializing in internal
17 medicine, neurology, and neuropsychology.”¹⁹³ Without any way for his treating doctors
18 to confer with Aetna’s doctors, or to submit reports that respond to Aetna’s reports,
19 Aetna significantly hindered Mason’s ability to develop the administrative record.
20
21
22

23 ¹⁸⁹Doc. 32-2 at 198.

24 ¹⁹⁰*Id.* at 4.

25 ¹⁹¹*Saffon*, 522 F.3d at 873.

26 ¹⁹²Doc. 55 at 36.

27 ¹⁹³Doc. 32-2 at 4.

1 Defendants argue that Mason had no right to review and rebut its peer review
2 reports “generated during the appeal process.”¹⁹⁴ Even assuming this is true,
3 Defendants confuse the issue. The problem is not that Aetna failed to disclose to
4 Mason the reports that Drs. Mazal, Schnur, and Gordon generated during the appeal
5 process, but rather the reports from Drs. Weinstein, Mendelssohn, and Cohan upon
6 which Aetna relied when it initially denied Mason’s claim.¹⁹⁵ The Ninth Circuit has held
7 that where an administrator does not give the claimant, her attorney, or her physicians
8 access to the medical reports of its own physicians upon which it relied, this violates the
9 claimant’s statutorily right to a “full and fair” review of the denial.¹⁹⁶

10 What is more, Aetna even failed to provide its own reviewers with pertinent
11 records. As Mason observes, Aetna failed to provide Dr. Weinstein or Dr. Mendelssohn
12 with any records from his treating psychologist, Dr. Madden.¹⁹⁷ Defendants dispute this,
13 and assert that “Dr. Mendelssohn’s report specifically states that Dr. Mendelssohn
14 reviewed at least fourteen medical notes from [Dr. Madden]. Dr. Mendelssohn also
15 commented on these records directly in her report.”¹⁹⁸ This is false. Defendants
16 support their factual assertions with a citation to Aetna’s March 28, 2011 denial letter,
17

18
19 ¹⁹⁴Doc. 73 at 8 (citing *Midgett v. Washington Grp. Int’l Long Term Disability Plan*, 561
20 F.3d 887, 896 (8th Cir. 2009); *Metzger v. UNUM Life Ins. Co. of Am.*, 476 F.3d 1161, 1166
21 (10th Cir. 2007); *Warming v. Hartford Life & Acc. Ins. Co.*, 663 F. Supp. 2d 10, 20 (D. Me.
2009); *Winz-Byone v. Metro. Life Ins. Co.*, No. EDCV 07-238-VAP, 2008 WL 962867, at *8
(C.D. Cal. Mar. 26, 2008)).

22 ¹⁹⁵See *Metzger*, 476 F.3d at 1166 (holding that although plan administrators must
23 release documents relied upon during the initial benefit determination, they need not release
24 “documents generated during the appeal process itself.”); *Midgett*, 561 F.3d at 896 (“[T]he full
25 and fair review to which a claimant is entitled under 29 U.S.C. § 1133(2) does not include
reviewing and rebutting, prior to a determination on appeal, the opinions of peer reviewers
solicited on that same level of appeal.”) (emphasis added).

26 ¹⁹⁶*Salomaa*, 642 F.3d at 679 (citing 29 U.S.C. § 1133).

27 ¹⁹⁷Doc. 32-2 at 247-48.

28 ¹⁹⁸Doc. 73 at 7.

1 not Dr. Mendelssohn's reports.¹⁹⁹ Neither of Dr. Mendelssohn's reports state that she
2 reviewed any records from Dr. Madden²⁰⁰, and Dr. Mendelssohn does not comment on
3 any of Dr. Madden's records in either of her two reports.²⁰¹

4 This particular deficiency was likely significant to Dr. Weinstein's and
5 Dr. Mendelssohn's findings. Dr. Mendelssohn concludes that none of the records that
6 Aetna provided her show that Mason "was falling asleep during his office visits nor did
7 the provided information include . . . description [sic] of overt cognitive difficulties."²⁰²
8 Similarly, Dr. Weinstein states that "there has been no documentation of pathologic
9 hypersomnolence, difficulty with communication in the office visits, or significant
10 cognitive impairments."²⁰³ If Drs. Weinstein and Mendelssohn had been provided with
11 Dr. Madden's records, they would have learned that for each of Mason's 14 visits with
12 Dr. Madden, spanning approximately six months, Dr. Madden's mental status exams
13 noted that Mason was "lethargic."²⁰⁴ Had they followed up with Dr. Madden about what
14 she meant, Dr. Madden would have likely informed them that Mason was "very tired"
15 during his therapy sessions and had fallen asleep "despite a valiant effort to stay
16 awake."²⁰⁵

20 ¹⁹⁹Doc. 32-2 at 4.

21 ²⁰⁰*Id.* at 241-42, 247-48.

22 ²⁰¹*Id.* at 241-46, 247-50.

23 ²⁰²*Id.* at 249-50.

24 ²⁰³*Id.* at 256.

25 ²⁰⁴*Id.* at 63, 66, 72, 81, 83, 88, 91, 94, 97, 103, 106, 110, 113, and 117.

26 ²⁰⁵*Id.* at 13. Although Defendants correctly note that Dr. Schnur was provided with
27 Dr. Madden's records, he made no findings regarding the side effects of Mason's medications,
28 stating that he lacked necessary expertise to do so. Doc. 32-3 at 6.

1 Finally, Aetna’s physicians erred by not engaging in peer-to-peer consultations
2 with Mason’s physicians to resolve perceived ambiguities in Mason’s records.²⁰⁶ For
3 example, Dr. Weinstein noted that Dr. Lord observed Mason in “moderate pain and
4 distress,” but discounted this finding because Dr. Lord provided “no details of specific
5 observations.”²⁰⁷ Yet Dr. Weinstein’s report does not indicate that she contacted
6 Dr. Lord to obtain more details about what he observed, despite the fact that Dr. Lord
7 invited Aetna to contact him with “any further concerns or questions.”²⁰⁸ Similarly,
8 Dr. Mendelssohn noted that Dr. Dukarm observed that Mason “appeared lethargic”
9 during his neuropsychological test, yet she discounted this observation because “more
10 specific description [sic] was not included.”²⁰⁹ Dr. Mendelssohn’s report does not
11 indicate that she contacted Dr. Dukarm to obtain clarification of what he specifically
12 meant by “lethargic.” The Ninth Circuit’s description of Aetna’s efforts in *Booton* is
13 equally apt here: “Lacking necessary- and easily-obtainable information, Aetna made its
14 decision blindfolded.”²¹⁰

15 **B. A Bench Trial on the Record Would be Improper**

16 The parties dispute whether the proper vehicle for determining Mason’s benefit
17 claim is a “bench trial on the record” followed by a judgment that complies with Rule 52
18 or summary judgment under Rule 56. Relying on *Kearney v. Standard Insurance*
19 *Company*,²¹¹ Mason argues that “the proper procedure in ERISA cases involving the
20

21 ²⁰⁶The only Aetna physician that reached out to one of Mason’s treating physicians was
22 Dr. Cohan, but this was not a true “peer-to-peer” consultation because Dr. Cohan, a
23 neurologist, inexplicably did not consult with Mason’s neurologists but instead Dr. Kim, a
24 general practitioner. Doc. 32-2 at 265.

24 ²⁰⁷*Id.* at 260.

25 ²⁰⁸*Id.* at 172.

26 ²⁰⁹*Id.* at 249.

27 ²¹⁰*Booton*, 110 F.3d at 1463.

28 ²¹¹175 F.3d 1084 (9th Cir. 1998) (en banc).

1 review of the denial of benefits is a ‘trial on the record.’”²¹² Mason asserts that, “[s]ince
2 *Kearney*, the Ninth Circuit has reaffirmed [that] a ‘trial on the record’ is the correct
3 approach” in *Thomas v. Oregon Fruit Products Co.*²¹³ Under this approach, Mason
4 argues, the court can “decide what the facts are.”²¹⁴

5 Mason is essentially seeking to transform this abuse-of-discretion case into one
6 involving de novo review. But, because the cases upon which his argument relies
7 involve de novo review, his argument misses the mark.²¹⁵ It is true that in ERISA cases
8 decided under the de novo standard courts may conduct trials on the record. This is
9 because those courts are tasked with evaluating evidence and making credibility
10 determinations anew.²¹⁶ Such trials are not appropriate in abuse-of-discretion cases,
11 however. As the Ninth Circuit explained in *Bendixen v. Standard Ins. Co.*, “it is
12 important to keep in mind that the remand and reversal of the summary judgment in
13 [*Kearney*] depended upon the application of de novo review by the district court.”²¹⁷ In
14

15 ²¹²Doc. 55 at 2.

16 ²¹³228 F.3d 991, 996 (9th Cir. 2000) (“*Kearney* clarifies that participants and
17 beneficiaries claiming benefits under ERISA are not entitled to ‘full trial[s] de novo’ because
18 such trials would undermine the policies behind ERISA. Rather, *Kearney* created a ‘novel form
19 of trial,’ in which the district court, subject to its discretion to consider additional evidence under
20 limited circumstances, is to conduct ‘a bench trial on the record.’”) (citing *Kearney*, 175 F.3d at
21 1094, 1095 & n.4).

22 ²¹⁴Doc. 64 at 2.

23 ²¹⁵See *Kearney*, 175 F.3d at 1095-96; *Thomas*, 228 F.3d at 994 (“As in *Kearney*, the
24 district court should have reviewed *Thomas*’ claim de novo.”); *O’Neal v. Life Ins. Co. of N. Am.*,
25 10 F. Supp. 3d 1132, 1135 (D. Mont. 2014). But see *Tapley v. Locals 302 & 612 of Int’l Union
26 of Operating Engineers-Employers Const. Indus. Ret. Plan*, 728 F.3d 1134, 1139 (9th Cir. 2013)
27 (the district court conducted a trial on the record despite the fact that the abuse of discretion
28 standard of review applied). Because the Ninth Circuit did not address the propriety of the
district court’s procedural choice on appeal and, in any event, reversed the court’s judgment,
Tapley is not binding authority on this issue. *Id.* at 1139-43.

²¹⁶*Kearney*, 175 F.3d at 1095.

²¹⁷185 F.3d 939, 942-43 (9th Cir. 1999) (overruled on other grounds by *Abatie*, 458 F.3d
at 965).

1 cases where the abuse of discretion standard applies, whether the administrator
2 abused its discretion is a question of law, not fact, based on a review of the
3 administrative record, as opposed to a trial.²¹⁸ Because a motion for summary
4 judgment is “the conduit to bring [that] legal question before the district court,”²¹⁹
5 Mason’s motion for a post-trial judgment under Rule 52 will be denied.

6 **C. Summary Judgment Principles Have Limited Application**

7 Because of the limited nature of review, “[t]raditional summary judgment
8 principles have limited application in ERISA cases governed by the abuse of discretion
9 standard.”²²⁰ Thus, “the usual tests of summary judgment, such as whether a genuine
10 dispute of material fact exists,” generally do not apply.²²¹

11 **IV. DISCUSSION**

12 **A. FedEx Trade Is Not a Proper Party**

13 Defendants argue that Mason’s employer, FedEx Trade, is not a proper party to
14 this action because it is only a “Controlled Group Member” and “Sponsoring Employer,”
15 and it does not exercise any control over the plan as an administrator or otherwise.²²²
16 In *Cyr v. Reliance Standard Life Ins. Co.*, the Ninth Circuit held that “liability under 29
17 U.S.C. § 1132(a)(1)(B) is not limited to a benefits plan or the plan administrator,”²²³ but
18 did not define the precise limitations of ERISA liability. In *Spindex Physical Therapy v.*
19 *United Healthcare of Arizona*, the court provided some guidance: “proper defendants
20 under § 1132(a)(1)(B) for improper denial of benefits at least include ERISA plans,
21

22 ²¹⁸*Nolan v. Heald Coll.*, 551 F.3d 1148, 1154 (9th Cir. 2009).

23 ²¹⁹*Bendixen v. Standard Ins. Co.*, 185 F.3d 939, 942 (9th Cir. 1999)

24 ²²⁰*Stephan*, 697 F.3d at 929.

25 ²²¹*Nolan*, 551 F.3d at 1154.

26 ²²²Doc. 59 at 16-17.

27 ²²³642 F.3d 1202, 1207 (9th Cir. 2011).

1 formally designated plan administrators, insurers or other entities responsible for
2 payment of benefits, and de facto plan administrators that improperly deny or cause
3 improper denial of benefits.”²²⁴

4 Mason responds by stating that he is not pursuing a § 1132(a) claim against
5 FedEx Trade, but rather a claim that arises under § 1132(c) for FedEx Trade’s violation
6 of 29 U.S.C. § 1024(b)(4) and 29 C.F.R. § 2560.503-1(h)(2)(iii).²²⁵ This argument fails
7 because, as Defendants point out, § 1132(c) actions may only be brought against plan
8 administrators.²²⁶ Mason does not dispute that FedEx Trade is not the Plan’s
9 administrator. Summary judgment will be granted in FedEx Trade’s favor.

10 **B. Aetna Abused Its Discretion**

11 The court finds that, based on the record that Aetna had before it, Aetna abused
12 its discretion in denying Mason’s claim. The evidence in the record shows that Mason
13 suffers from a permanent disability that prevents him from working. Aetna’s conclusion
14 to the contrary is illogical, implausible, and not supported by the facts.

15 **1. Evidence of Mason’s Medical Conditions**

16 As noted above, the fundamental basis of Mason’s claim is his contention that he
17 can no longer work because he suffers from a combination of (1) painful spasms and
18 (2) the negative side effects from the medication he takes for those spasms.

19 **a.) SPS Symptoms**

20 There is ample objective evidence in the record showing that Mason suffers from
21 painful spasms, including Mason’s blood tests that came back positive for SPS and
22 exam notes that show Mason has been repeatedly observed suffering from symptoms
23

24 ²²⁴770 F.3d 1282, 1297 (9th Cir. 2014).

25 ²²⁵Doc. 64 at 27.

26 ²²⁶29 U.S.C. § 1132(c) (“Any *administrator* . . . who fails or refuses to comply with a
27 request for any information which such administrator is required by this subchapter to furnish to
28 a participant or beneficiary . . . may in the court’s discretion be personally liable to such
participant or beneficiary . . .”) (emphasis added).

1 typical of this disease: spasms, pain, and stiffness.²²⁷ Mason's April 27, 2011
2 emergency department physical exam notes, for example, state that Mason's
3 extremities were stiff and he was suffering from painful spasms.²²⁸ And his May 11,
4 2011 emergency room notes state that Mason was observed suffering from "severe"
5 "whole body spasms."²²⁹ Contrary to Aetna's conclusion, these are "objective findings"
6 that substantiate Mason's self-reported symptoms.

7 Inexplicably, both of Aetna's denial notices fail to mention Mason's positive lab
8 results. Aetna's final denial notice also does not connect his spasms with his SPS
9 diagnosis, stating only that the data show that Mason "had stiffness and muscle
10 pain."²³⁰ Although that notice does summarize the two emergency room records
11 mentioned above, Aetna distorts their significance and omits reference to relevant facts
12 in an apparent effort to support a denial. The only aspect of Mason's April 27
13 emergency department notes that Aetna mentions is that they do not "reveal any
14 neurological defects."²³¹ And with regard to Mason's May 11 emergency department
15 notes, Aetna states only that they show Mason "had stiffness and muscle pain," but his
16 "motor power and sensation were normal."²³² Aetna selectively ignores the objective
17 evidence that shows Mason was suffering from painful spasms. Selective consideration
18 of evidence is a hallmark of arbitrary and capricious decision-making.²³³

20 ²²⁷ See, e.g., Doc. 32-2 at 23, 49, 56, 163, 173.

21 ²²⁸ *Id.* at 36.

22 ²²⁹ *Id.* at 23.

23 ²³⁰ Doc. 32-1 at 1.

24 ²³¹ Doc. 32-1 at 2.

25 ²³² *Id.*

26 ²³³ See *Glenn*, 554 U.S. at 118 (holding that selective consideration of evidence is a
27 proper grounds for setting aside an administrator's decision); *Holmstrom v. Metro. Life Ins. Co.*,
28 615 F.3d 758, 777 (7th Cir. 2010).

1 **b.) Medication Side Effects**

2 Aetna does not dispute that Mason's medications can potentially cause side
3 effects of sedation and cognitive impairment; it does dispute that Mason was in fact
4 suffering from them.²³⁴ But, again, Aetna selectively ignores evidence in the record.

5 Ample evidence in the record shows that Mason's medication had a sedative
6 effect, including all 14 visit notes from Dr. Madden, various visit notes from other
7 doctors,²³⁵ notes from Dr. Kim,²³⁶ Dr. Madden,²³⁷ and Dr. Grant,²³⁸ and Combs' email.
8 Aetna's final denial letter mostly fails to mention this evidence. It does mention
9 Dr. Madden's November 24, 2010 office visit note, but selectively omits Dr. Madden's
10 description of Mason's consciousness as lethargic,²³⁹ and instead focuses solely on
11 Dr. Madden's other observations that do not support a disability finding.²⁴⁰ Aetna's
12 initial denial letter concludes that there is no objective proof that Mason suffers from
13

14 ²³⁴See Dr. Cohan's report, doc. 32-2 at 266 ("Although the claimant does take
15 medications which have potential adverse side effects, including sedation, nevertheless there is
16 no objective data in the medical records provided to substantiate that the claimant has
experienced those adverse medical side effects.").

17 ²³⁵See Dr. Dukarm's report, doc. 32-2 at 75 ("His affect appeared obtunded The
18 patient appeared lethargic"); Dr. Downs' April 29, 2010 note, *id.* at 148 ("His attention span
19 and concentration are slightly reduced, and he appears somewhat somnolent."); Dr. Lord's May
20 5, 2010 office note, *id.* at 150 (physical exam describes Mason as "fatigued"); Dr. Lord's May 7,
21 2010 office note, *id.* at 152 (same); Providence Alaska Medical Center's January 11, 2011
22 emergency report, *id.* at 48 ("He did take diazepam and Zanaflex that has improved his
symptoms. When he initially checked in, his pain [was] 9/10. Currently, he has minimal pain
and is sleeping."); *id.* at 49 ("He is sleeping upon my arrival into the room, which was about 20
minutes after presentation.").

23 ²³⁶Doc. 32-2 at 196, 198.

24 ²³⁷*Id.* at 13.

25 ²³⁸*Id.* at 121.

26 ²³⁹*Id.* at 94.

27 ²⁴⁰Doc. 32-1 at 1 (noting only that Dr. Madden described Mason's mood as depressed,
28 his thought process as normal and coherent, his language as intact, and his speech as
spontaneous).

1 somnolence because it focuses only on the notes from Dr. Kim and Dr. Grant, which,
2 according to Aetna, did not “document any objective findings to indicate a functional
3 impairment such as significant sleepiness or disorientation during office visits.”²⁴¹ Not
4 only does this conclusion ignore the contrary evidence in the record noted above, but
5 also ignores an explanation for why Dr. Kim and Dr. Grant did not observe Mason’s
6 sleepiness. Both Dr. Madden and Dr. Kim stated that Mason did not take his
7 medication before his doctors’ visits so that he could be awake and alert enough to
8 communicate, understand, and remember what was going on.²⁴²

9 Dr. Dukram’s neuropsychological test is also objective evidence that Mason
10 suffers from a cognitive disorder. Over the course of this four-hour exam, Dr. Dukram
11 subjected Mason to a litany of tests,²⁴³ the results of which led him to conclude that
12 Mason was exhibiting “variable neurocognitive performance deficits in the areas of
13 executive functioning” and diagnosed him with “Cognitive Disorder, NOS.”²⁴⁴ Aetna’s
14 final denial letter does not even mention these tests. Aetna’s initial denial letter does
15 mention them, but only to discount their medical significance based on dubious factual
16 grounds²⁴⁵ and naked speculation that Mason might not have been putting forth his best
17 effort during the exam.

22 ²⁴¹Doc. 32-2 at 4.

23 ²⁴²*Id.* at 13, 265.

24 ²⁴³*Id.* at 75.

25 ²⁴⁴*Id.* at 77.

26 ²⁴⁵Although Aetna concludes that Dr. Dukarm did not note “significant sedation” during
27 testing, Dr. Dukarm described Mason as “lethargic” and his affect “obtunded.” Aetna’s
28 interpretation of Dr. Dukarm’s remarks is questionable.

1 **2. Evidence of Mason’s Disability**

2 As Defendants point out, just because someone has a medical condition does
3 not by itself establish disability.²⁴⁶ Sometimes the person’s medical conditions are so
4 severe that the person cannot work, but other times “people are able to work despite
5 their conditions; and sometimes people work to distract themselves from their
6 conditions.”²⁴⁷ There is ample evidence here, however, that shows that the combined
7 effects of Mason’s conditions are severe enough to prevent him from working as a
8 manager for FedEx Trade.

9 Dr. Lord, Dr. Kim, and Dr. Grant each concluded that Mason is unable to work on
10 account of his medical conditions. Aetna’s denial notices do not consider these
11 significant opinions, let alone explain why these three treating physicians got it wrong.
12 Aetna also failed to consider Mason’s SSDI award as evidence of his disability. “Social
13 Security disability awards do not bind plan administrators, but they are evidence of
14 disability. Evidence of a Social Security award of disability benefits is of sufficient
15 significance that failure to address it offers support that the plan administrator’s denial
16 was arbitrary, an abuse of discretion. Weighty evidence may ultimately be
17 unpersuasive, but it cannot be ignored.”²⁴⁸

18 Finally, Aetna failed to consider the only evidence in the record regarding
19 Mason’s actual performance at work: Combs’ email. In her email Combs states that
20 Mason fell asleep on the job “many times,” had difficulties focusing and remembering
21 things, and had become a “grave liability” for the company. Aetna’s two denial notices
22 completely ignore this probative evidence.

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25 ²⁴⁶*Jordan v. Northrop Grumman Corp. Welfare Benefit Plan*, 370 F.3d 869, 880 (9th Cir.
2004).

26 ²⁴⁷*Id.*

27 ²⁴⁸*Salomaa*, 642 F.3d at 679. See also *Bennett v. Kemper Nat. Servs., Inc.*, 514 F.3d
28 547, 555 (6th Cir. 2008).

1 Before receiving Combs' email, Drs. Mendelssohn and Weinstein each
2 concluded that the side effects of Mason's medications must not have been so bad
3 because he was still able to work.²⁴⁹ But, when Aetna presented Combs' email to
4 Drs. Mendelssohn and Weinstein, showing otherwise, each doctor's opinion remained
5 the same. Dr. Mendelssohn dismisses Combs' description of Mason's troubles at work
6 as not credible for dubious reasons, including her incorrect findings that the record
7 contained "no indication that [Mason] was falling asleep during his office visits"²⁵⁰ and
8 that there were no medical findings that Mason suffers from "overt cognitive
9 difficulties."²⁵¹ Dr. Weinstein's second report is even less defensible. After providing
10 Dr. Weinstein with Combs' email, Aetna asked her whether "the clinical data correlate[s]
11 with the symptoms exhibited at work to support an inability to perform his job
12 functions."²⁵² It appears that Dr. Weinstein did not even read Combs' email because
13 her response begins: "It is not clear what symptoms were exhibited at work"²⁵³
14 Instead of asking Dr. Weinstein to clarify her answer, as it did with Dr. Gordon, Aetna
15 simply accepted her response.
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19 ²⁴⁹Doc. 32-2 at 245 (Dr. Mendelssohn's first report states, "It was opined [on
20 Dr. Dukarm's report] that the claimant's cognitive difficulties were multifactorial in nature
21 secondary to medications, pain, sleep disturbance, and depression. However, it is important to
22 note that the claimant continued to work despite findings from this evaluation."); *id.* at 255-56
23 (Dr. Weinstein's first report discounts Mason's SPS symptoms because he had been suffering
24 from them "for over 15 years and this has not precluded him from working." It also discounts
25 Dr. Dukarm's findings because, "[d]espite the fact that this study was done on 9/27/10, it
26 appears the claimant was still able to perform his own occupation with the first date of absence
27 being listed as 11/10/10.").

25 ²⁵⁰*Id.* at 250.

26 ²⁵¹*Id.*

27 ²⁵²*Id.* at 260.

28 ²⁵³*Id.*

1 **V. CONCLUSION**

2 For the reasons set forth above, Plaintiff's motion at docket 55 for judgment
3 pursuant to Rule 52 is **DENIED**. Summary judgment is **GRANTED** in favor of FedEx
4 Trade Networks Transport & Brokerage, Inc. In all other respects, Plaintiff's motion for
5 partial summary judgment at docket 55 is **GRANTED**, and Defendants' cross-motion for
6 partial summary judgment at docket 57 is **DENIED**. Defendants are hereby **ORDERED**
7 to grant Plaintiff's claim for short-term disability benefits.

8 DATED this 22nd day of February 2016.

9
10 /s/ JOHN W. SEDWICK
11 SENIOR UNITED STATES DISTRICT JUDGE
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