

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CARRIE ADKINS,

Plaintiff,

v.

LIFE INSURANCE COMPANY OF
NORTH AMERICA,

Defendant.

NO. 4:20-CV-5104-TOR

ORDER DENYING PLAINTIFF'S
MOTION FOR JUDGMENT AND
GRANTING DEFENDANT'S
MOTION FOR JUDGMENT

BEFORE THE COURT are the parties' cross-motions for judgment on the administrative record (ECF Nos. 17, 19). This matter was submitted for consideration without oral argument. The Court has reviewed the record and files herein, and is fully informed. For the reasons discussed below, Plaintiff's Motion for Judgment (ECF No. 17) is DENIED and Defendant's Motion for Judgment (ECF No. 19) is GRANTED.

//
//

1 **BACKGROUND**

2 This is an action to recover long-term disability benefits allegedly owing to
3 Plaintiff under Section 502(a) of the Employee Retirement Income Security Act
4 (“ERISA”), 29 U.S.C. § 1132(a). In the instant cross-motions, the parties ask the
5 Court to review the administrative record *de novo* and resolve any factual disputes
6 concerning Plaintiff’s entitlement to benefits pursuant to Federal Rule of Civil
7 Procedure 52(a). The parties are seeking judgment with regard to Plaintiff’s claim
8 arising under § 1132(a)(1)(B); Plaintiff’s remaining claim under § 1132(a)(3) is not
9 presently before the Court.

10 For the reasons discussed below, the Court finds that Plaintiff is not
11 “disabled” within the meaning of Defendant’s policy and is therefore not entitled
12 to payment of benefits.

13 **STANDARD OF REVIEW**

14 The default standard of review in ERISA cases is *de novo*, “unless the
15 benefit plan gives the administrator or fiduciary discretionary authority to
16 determine eligibility for benefits or to construe the terms of the plan.” *Firestone*
17 *Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). Where the plan
18 administrator or fiduciary retains discretionary authority to interpret the plan and
19 determine benefits, then an abuse of discretion standard applies. *Id.* Here, LINA
20 is the plan fiduciary and has discretionary authority to interpret the terms of the

1 plan, determine eligibility, and make findings of fact. AR 1988. Under Supreme
2 Court and Ninth Circuit precedent, this would ordinarily trigger an abuse of
3 discretion standard. *See Firestone*, 489 U.S. 101; *Abatie v. Alta Health & Life Ins.*
4 *Co.*, 458 F.3d 955 (9th Cir. 2006).

5 However, Washington state insurance regulations prohibit disability
6 insurance plans from containing discretionary clauses. *See* WAC 284-96-012.
7 Although ERISA broadly preempts state law and regulation, courts have concluded
8 WAC 284-96-012 invalidates discretionary clauses in disability insurance plans.
9 *See, e.g., Mirick v. Prudential Ins. Co. of Am.*, 100 F. Supp. 3d 1094 (W.D. Wash.
10 2015). The parties agree, *de novo* review is the standard here. *De novo* review
11 affords no deference to the plan administrator’s determination. *McDaniel v.*
12 *Chevron Corp.*, 203 F.3d 1099, 1108 (9th Cir. 2000). The plaintiff has the burden
13 of proving disability. *Muniz v. Amec Const. Mgmt., Inc.*, 623 F.3d 1290, 1294 (9th
14 Cir. 2010).

15 The parties agree the challenged benefits decision under § 1132(a)(1)(B)
16 should be resolved pursuant to Federal Rule of Civil Procedure 52(a). ECF No. 13
17 at 7. Where a court reviews an ERISA action under Rule 52(a), the court conducts
18 “a bench trial on the record” using the material considered by the plan
19 administrator. *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095 (9th Cir. 1999).
20 Evidence outside the administrative record may only be considered when

1 “circumstances clearly establish that it is necessary to conduct an adequate *de novo*
2 review of the benefit decision.” *Ingram v. Martin Marietta Long Term Disability*
3 *Income Plan for Salaried Emp. of Transferred GE Operations*, 244 F.3d 1109,
4 1115 (9th Cir. 2001) (quotation and citation omitted). In an ERISA action, the
5 relevant inquiry under Rule 52(a) is not whether there are genuine issues of
6 material fact, but whether the plaintiff “is disabled within the terms of the policy.”
7 *Kearney*, 175 F.3d at 1095. The court must necessarily weigh conflicting evidence
8 and resolve disputed factual issues. *Id.* Rule 52(a) further requires the court to
9 “find the facts specially and state its conclusions of law separately.” Fed. R. Civ.
10 P. 52(a)(1).

11 SUMMARY OF ADMINISTRATIVE RECORD

12 A. Plaintiff’s Symptoms

13 At all times relevant to these proceedings, Plaintiff Carrie Adkins
14 (“Plaintiff”) was insured under a disability insurance plan issued by Defendant Life
15 Insurance Company of North America (“Defendant”). This plan provides for long-
16 term disability (“LTD”) benefits to an insured who becomes “disabled.” The plan
17 defines “Disability/Disabled” as follows:

18 The Employee is considered Disabled if, solely because of Injury or
19 Sickness, he or she is:

- 20 1. unable to perform the material duties of his or her Regular
Occupation; and

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

3 AR 44. The plan defines “Regular Occupation” as:

4 The occupation the Employee routinely performs at the time the
5 Disability begins. In evaluating the Disability, the Insurance Company
6 will consider the duties of the occupation as it is normally performed
7 in the general labor market in the national economy. It is not work
8 tasks that are performed for a specific employer or at a specific
9 location.

8 AR 116.

9 Plaintiff alleges she began experiencing neck, back, and shoulder pain, as
10 well as traumatic brain injury symptoms, following a car accident in January 2016.
11 ECF No. 17 at 4; AR 644. Imaging of Plaintiff’s cervical spine taken on January
12 19, 2016 showed “mild degenerative disc disease,” “mild spondylolisthesis,” and
13 suspected “mild facet arthritis.” AR 3438. The administrative record does not
14 contain any other medical records from 2016; however, later medical evaluations
15 reference Plaintiff’s symptoms during that timeframe.

16 A psychological report conducted in 2018 summarized a Speech Therapy
17 Initial Plan of Care from February 24, 2016 as follows:

18 [Plaintiff] presented with mild to moderage [sic] cognitive and
19 communication deficits secondary to concussion. Cognitive
20 communication assessment revealed reduced complex attention, speed
 of processing, working memory, verbal fluency and cognitive
 endurance. All affect her daily functioning. She is unable to track
 details and information and to express herself effectively. She would

1 like to return to work. She reports moderate impairment in her life.
2 She has vision and balance changes that adversely affect her
3 cognitive-linguistic performance. OT and PT orders are being
4 requested.

5 AR 633. Another psychological report conducted in September 2019 indicated
6 Plaintiff attempted to return to work part-time following the accident, but “was
7 forced to leave” due to “severe headaches, confusion, poor concentration, visual
8 impairments, and other sequelae of the presumable head injury.” AR 629. At the
9 time of the 2016 accident, Plaintiff worked full-time as an office manager for a
10 medical practice in Portland, Oregon. *Id.*

11 In May 2107, Plaintiff moved from Portland, Oregon to Walla Walla,
12 Washington because she “found it easier to manage in the smaller town.” AR 644.
13 Plaintiff began working for Providence Medical Center part-time as a receptionist
14 in October 2017. AR 629, 644. Plaintiff alleged continued symptoms relating to
15 her brain injury, such as “severe migraines, nausea, vomiting, dizziness, balance
16 problems, light sensitivity” and was “easily over-stimulated.” AR 644. Plaintiff
17 also reported chronic fatigue and chronic pain. *Id.*

18 It is unclear what, if any, medical care Plaintiff received between January
19 19, 2016 and February 4, 2018. Medical records for that timeframe are not
20 presently before the Court.

On February 5, 2018, Plaintiff was referred by a disability adjudicator to

1 licensed psychologist N.K. Marks, Ph.D., for a “psychodiagnostics memory
2 assessment.” AR 633. Dr. Marks reviewed two medical records, including the
3 February 2016 Speech Therapy Initial Plan of Care and a June 2017 evaluation
4 from Insight Osteopathic Medicine, in addition to conducting an in-person exam of
5 Plaintiff. *Id.* Dr. Marks diagnosed Plaintiff with the following conditions: “Mild
6 neurocognitive disorder due to traumatic brain injury; Major depressive disorder,
7 Single episode, Moderate; and Unspecified anxiety disorder, moderate.” AR 639.

8 Regarding Plaintiff’s ability to work, Dr. Marks opined Plaintiff could
9 “manage simple directions that she sees and hears, but not complex directives” and
10 that Plaintiff’s concentration became “tangential at times.” AR 639-40. Dr. Marks
11 also found Plaintiff’s “[m]ental fatigue may be worsened with intense social
12 interactions” and Plaintiff’s brain injury made “it hard to process things,” which
13 could lead to Plaintiff becoming “stressed with increased work demands.” AR
14 640. Dr. Marks recommended counseling to assist with Plaintiff’s depression and
15 anxiety. *Id.* It does not appear Plaintiff saw Dr. Marks again.

16 At some point, Plaintiff began seeing Justin Olswanger, D.O., for her
17 chronic pain and anxiety. The first record available to the Court is dated March 15,
18 2018. AR 357. On that date, Dr. Olswanger adjusted Plaintiff’s pain medications
19 and assessed Plaintiff as “alert, cooperative, dressed appropriately” and not in
20 acute distress. AR 357-58. Dr. Olswanger also noted Plaintiff’s reported

1 improvement with anxiety after a reduction in driving and increased walking. AR
2 357. Plaintiff continued to see Dr. Olswanger on a regular basis throughout 2018.
3 AR 347-56. Plaintiff regularly reported stable anxiety but continued to have daily
4 headaches with varying degrees of severity, and chronic neck and back pain. AR
5 355, 353, 351, 349, 347. Dr. Olswanger never observed Plaintiff to be in acute
6 distress. AR 354, 352, 350, 348. Generally, Plaintiff's complaints of pain
7 remained unchanged and Dr. Olswanger regularly noted "no other symptoms to
8 report." AR 355, 353, 351, 349, 347. Plaintiff's medical history with Dr.
9 Olswanger did not note any memory deficiencies.

10 On March 23, 2019, Plaintiff alleges she woke up and found she was unable
11 to lift her head off her pillow due to severe neck pain. AR 644. She described her
12 neck feeling as though "it had permanently twisted to the left, and had a stabbing
13 pain." *Id.* She reported numbness in her thumbs and first two fingers and vision
14 changes. *Id.* Plaintiff reportedly went to the emergency room where a cervical x-
15 ray was taken but did not reveal any acute symptoms. AR 645, 667. Plaintiff
16 stopped working on March 30, 2019. AR 1759.

17 Plaintiff saw neurosurgeon Michael Schlitt, M.D., on June 26, 2019. AR
18 714. Plaintiff reported gradually worsening pain symptoms in her neck with "some
19 degree of numbness radiating down both arms." *Id.* Plaintiff stated her
20 "symptoms improve with nothing" despite having tried physical therapy, massage

1 therapy, chiropractic therapy, traction therapy, various medications, acupuncture,
2 and lifestyle modification. *Id.* Plaintiff indicated opioids and muscle relaxers
3 helped, “but less so than before.” *Id.* Dr. Schlitt noted “kyphosis of the cervical
4 region,” found Plaintiff could follow simple and complex commands, did not have
5 any “apparent deficits with short or long term memory,” and was not in acute
6 distress, although she did appear uncomfortable throughout the exam. AR 717.
7 Dr. Schlitt reviewed a CT scan performed on April 30, 2019, which revealed
8 “reversal of the normal cervical lordosis with the center of the reversal at C5-C6
9 where the disc is partially collapsed and there are marginal osteophytes.” AR 718.
10 Dr. Schlitt was unable to “say whether there is any significant canal narrowing.”
11 *Id.* Ultimately, Dr. Schlitt diagnosed Plaintiff with “symptomatic cervical
12 degenerative disc disease.” AR 720. Plaintiff was advised of her surgical options,
13 namely an anterior cervical discectomy and fusion at C5-6. *Id.* Plaintiff was also
14 advised of the lengthy and difficult recovery that often follows surgery, and that
15 Dr. Schlitt did “not necessarily expect 100% complete pain control” afterwards.
16 *Id.*

17 Plaintiff saw Dr. Schlitt again on July 31, 2019. AR 721. Her symptoms
18 had not improved, so she and Dr. Schlitt revisited Plaintiff’s surgical options and
19 the risks. AR 726. Plaintiff elected to have the surgery and underwent the
20 procedure on August 13, 2019. AR 735. One week after surgery, a care provider

1 noted Plaintiff was “doing as expected.” AR 739. Three weeks post-operation, on
2 September 3, 2019, Plaintiff saw Dr. Schlitt who noted Plaintiff was “doing about
3 as expected” and “congratulated [Plaintiff] on improvements in her numbness and
4 tingling as these tend to be the last to improve.” AR 745. Dr. Schlitt also noted
5 Plaintiff seemed “to sill have significant neck shoulder and right arm pain.” *Id.*

6 Plaintiff continued to see Dr. Olswanger after her surgery. On September
7 17, 2019, Plaintiff reported some improvement in hand numbness, but believed
8 there was “[l]ots of room for improvement in regards to pain.” AR 657. On
9 October 3, 2019, Plaintiff expressed concerns about MS. AR 683. Dr. Olswanger
10 ordered an MRI to rule out the possibility. *Id.* In the meantime, Plaintiff saw Dr.
11 Olswanger’s colleague, Derek E. Sucharda, PA-C, on October 7, 2019 for a postop
12 follow-up exam. AR 746. Plaintiff reported ongoing pain and numbness;
13 nonetheless, PA-C Sucharda found Plaintiff was “doing as expected” as she
14 continued to recover from surgery. AR 752. PA-C Sucharda also reviewed
15 Plaintiff’s postop x-rays, noting a screw tip approximately 2.5mm posterior to the
16 C5 vertebral body, but did not believe the screw could account for Plaintiff’s
17 global upper extremity symptoms. *Id.* PA-C Sucharda did not believe there were
18 any underlying cervical spinal cord pathologies but ordered nerve conduction
19 studies of Plaintiff’s upper extremities to rule out the possibility. *Id.* The resulting
20 electromyography (EMG), conducted on November 4, 2019, was “normal without

1 electrical evidence of cervical radiculopathy or focal neuropathy.” AR 686, 688.

2 Plaintiff’s MRI was performed on December 20, 2019. AR 647. It revealed
3 generally normal and unremarkable findings. *Id.* Overall, there were “no definite
4 findings to suggest the source of the patient’s symptoms.” *Id.*

5 **B. Plaintiff’s LTD Benefits Application**

6 *1. Initial Determination*

7 Plaintiff applied for Long Term Disability (“LTD”) benefits under the policy
8 held by her new employer. AR 241. Defendant received Plaintiff’s application on
9 August 6, 2019. *Id.* After the requisite 180-day elimination period during which a
10 claimant must continuously be disabled as defined by the policy, Defendant
11 determined Plaintiff was entitled to 60 days of disability benefits beginning
12 September 27, 2019 and ending November 12, 2019. AR 307.

13 In reaching this determination, Defendant reviewed “all information on file,”
14 which included, but was not limited to, the following: a Behavioral Health
15 Questionnaire and Medical Request Form from Dr. Olswanger dated October 25,
16 2019; office visit notes from Dr. Olswanger from March 4, 2019 through October
17 24, 2019; Providence Neuroscience Institute records from June 25, 2019 through
18 October 7, 2019; and a Peer Review conducted by Dr. Ryan S. Trombly dated
19 September 4, 2019. AR 308.

20 Defendant also obtained expert opinions from two neurosurgeons and one

1 psychiatrist who each reviewed and assessed Plaintiff's claim file. The first expert,
2 Ryan S. Trombly, M.D., reviewed Plaintiff's file on June 12, 2019, July 8, 2019,
3 and again on September 4, 2019. AR 3406. Dr. Trombly considered Plaintiff's
4 occupation as a Patient Services Representative, which he described as "a
5 sedentary job position at which [Plaintiff] must check in patients and answer
6 phones and schedule patients and perform clerical tasks. [Plaintiff] must attend
7 meetings and show concern for efficiency and cost effectiveness and must
8 complete clerical and sedentary duties." AR 3409. Dr. Trombly noted Plaintiff's
9 "cervical radiculopathy, cervical dystonia, [and] disc osteophyte complex" were
10 known conditions dating back to at least 2016. *Id.* Since 2016, Plaintiff had not
11 developed any "new fracture or focal neurologic deficit[s]" that would support
12 functional restrictions. *Id.* Initially, Dr. Trombly concluded that even though
13 Plaintiff experienced chronic pain and some discomfort, the clinical records did not
14 support an inability to carry out her normal sedentary job duties. AR 3408-09. In
15 his final review, Dr. Trombly concluded Plaintiff would "need 8 weeks out of work
16 in order to make a full recovery However, between 03/21/19 and 08/12/19,
17 the records do not support any restrictions from a neurological point of view." AR
18 3418.

19 Defendant's second expert, neurosurgeon David E. Gutierrez, D.O., opined
20 on October 11, 2019 that Plaintiff was functionally limited, but only from August

1 13, 2019 through November 13, 2019 following Plaintiff's surgery. AR 3492. Dr.
2 Gutierrez noted Plaintiff's clinical records reflected only some limited range of
3 motion in the cervical regions; no deficits in the upper or lower extremities; no
4 reflex or sensory changes that would be consistent with radiculopathy; no
5 significant stenosis in the cervical spine; or any other findings that would support
6 functional limitations. AR 3491.

7 Finally, psychiatrist David P. Yuppa, M.D., also concluded Plaintiff was not
8 functionally limited. AR 3611. Dr. Yuppa opined that "[t]he treating provider's
9 opinion of no work is not well supported by medically acceptable clinical
10 diagnostic techniques including mental status examinations, psychological and/or
11 neuropsychological testing and is inconsistent with the other substantial evidence
12 in the claims file" AR 3610. To support his opinion, Dr. Yuppa noted that
13 Plaintiff was primarily treated for her physical conditions and found that Dr.
14 Olswanger's opinion regarding Plaintiff's mental limitations was not supported by
15 the medical evidence in the record. AR 3610-11. Specifically, Dr. Yuppa noted
16 the stable condition of Plaintiff's anxiety, the lack of psychiatric complaints in the
17 record, and the normal psychiatric test results. AR 3611.

18 Defendant ultimately determined Plaintiff's medical documentation did not
19 support a finding of disability within the meaning of the LTD insurance policy.
20 AR 310. Plaintiff's Regular Occupation as a Medical Clerk required sedentary

1 demand activities, which might include “exerting up to 10 pounds of force
2 occasionally or a negligible amount of force frequently to lift, carry, push, pull, or
3 otherwise move objects including the human body,” according to the Dictionary of
4 Occupational Titles. *Id.*; *see also* AR 227-28. Defendant further explained
5 Sedentary work generally “involves sitting most of the time, but may involve
6 walking or standing for brief periods of time.” AR 310. Defendant found that
7 other than the post-operation recovery period between August 13, 2019 and
8 November 18, 2019, Plaintiff’s alleged physical limitations were not supported by
9 the medical records. AR 309. Defendant also concluded Plaintiff’s alleged
10 anxiety remained stable throughout her medical history and was not reported as a
11 “primary restricting diagnosis.” AR 310. Plaintiff was deemed not disabled within
12 the meaning of the LTD insurance policy as it applied to Plaintiff’s Regular
13 Occupation.

14 After receiving Defendant’s initial determination letter, Plaintiff sent
15 supplemental materials to Defendant for review, including declarations from Dr.
16 Olswanger and Plaintiff. AR 322, 326. Defendant responded, noting the
17 supplemental information was either duplicative or did not reveal any new
18 information not already considered. AR 457-58. Defendant did not change its
19 determination regarding Plaintiff’s LTD benefits claim. AR 458.

20 //

1 2. *Plaintiff's Appeal*

2 Plaintiff appealed Defendant's decision on March 5, 2020. AR 615.

3 Plaintiff submitted new records in her appeal, including the post-surgical MRI,
4 additional exam notes from Dr. Olswanger, and the EMG (electromyography) test.
5 ECF No. 19 at 13 (citing AR 647, 649-54, 688). Plaintiff also submitted a 2019
6 psychological exam conducted by Ronald D. Page, Ph.D. AR 627-31. Defendant
7 obtained two additional experts to review Plaintiff's claim file: Lucien J. Parrillo,
8 M.D., a physician board-certified in pain management and occupational medicine,
9 and Elana S. Mendelssohn, Psy.D., a clinical psychologist who specializes in
10 psychological and neuropsychological disability claims. ECF No. 19 at 13-14
11 (citing AR 883-86, 887-89).

12 Dr. Parrillo concluded the record did not support a finding of physical
13 impairment outside the eight-week post-surgery recovery period. AR 854. Dr.
14 Parrillo focused primarily on the CT scans and x-rays of Plaintiff's cervical spine,
15 and the December 2019 MRI. *Id.* Dr. Parrillo noted the CT scans taken prior to
16 Plaintiff's surgery did not reveal any direct impingement on exiting nerve roots
17 that would have resulted in demonstrable motor or sensory deficits nor did they
18 reveal direct compression of the exiting nerve roots. *Id.* Following the surgery, x-
19 ray imaging revealed the healing fusion at C5-6 but no other remarkable findings.
20 *Id.* The EMG testing was interpreted as normal without electrical evidence of

1 cervical radiculopathy/focal neuropathy. *Id.* Finally, Dr. Parrillo noted the MRI
2 did not reveal any definite findings regarding the source of Plaintiff's symptoms.

3 *Id.*

4 Dr. Mendelsohn reviewed Plaintiff's claim file and conducted peer-to-peer
5 interviews with Dr. Oslwanger and Dr. Page regarding their assessments of
6 Plaintiff's ability to work. ECF No. 19 at 14; AR 870. Dr. Mendelsohn
7 concluded the record did not support a finding of cognitive or psychological
8 impairment, particularly because Plaintiff's anxiety was generally secondary to her
9 physical ailments and because the record did not indicate any behavioral
10 abnormalities or cognitive deficits. AR 870-71. Dr. Mendelsohn noted a 2019
11 social security disability evaluation cited a "cognitive disability" and PTSD, but
12 the same report also indicated Plaintiff was able to work from a psychiatric
13 standpoint. AR 871. Notably, the "evaluation did not include cognitive test
14 findings to substantiate the presence of cognitive impairment." *Id.*

15 Dr. Mendelsohn's peer-to-peer interviews with Dr. Oslwanger and Dr. Page
16 confirmed her conclusions. Dr. Oslwanger stated that Plaintiff's primary medical
17 issues related to her neck pain. *Id.* He further stated Plaintiff's reported anxiety
18 and cognitive problems were difficult to "put into objective findings." *Id.* Dr.
19 Page indicated his diagnosis of a "cognitive disability" was based on another care
20 provider's analysis of Plaintiff, as Dr. Page himself did not perform any cognitive

1 testing. *Id.* Dr. Page also confirmed he did not perform any validity testing on
2 Plaintiff but based his diagnosis of PTSD on his own observations of Plaintiff. *Id.*
3 Dr. Mendelsohn pointed out that PTSD was not present in any other medical
4 records for Plaintiff. *Id.* Finally, Dr. Page stated Plaintiff was able to work despite
5 her PTSD and possible cognitive issues, but that her pain and life changes caused
6 her distress. *Id.*

7 Based on Dr. Parrillo's and Dr. Mendelsohn's opinions, Defendant upheld
8 its decision regarding Plaintiff's disability claim. ECF Nos. 17 at 12, 19 at 16.

9 Plaintiff responded to Defendant's decision on May 26, 2020. ECF Nos. 17
10 at 12-13, 19 at 16. Plaintiff's response focused primarily on Dr. Mendelsohn's
11 past work in reviewing disability claims, arguing Dr. Mendelsohn's approach was
12 biased. ECF No. 17 at 12-16. To support her argument, Plaintiff submitted
13 additional documents that she argued "reveal a clear pattern" in which Dr.
14 Mendelsohn disregards subjective symptom testimony, disregards the conclusions
15 and clinical findings of a claimant's treatment providers, and discredits treatment
16 providers where they failed to provide detailed objective measurements or validity
17 testing of the claimant's symptoms. AR 895. The additional materials included
18 discovery responses from another case demonstrating the volume of reviews Dr.
19 Mendelsohn conducted for another insurance company (AR 924-25) and 37
20 reports written by Dr. Mendelsohn for other disability benefits cases (AR 940-

1 1179). Plaintiff also provided analyses from three district courts criticizing the
2 adequacy of Dr. Mendelssohn’s reviews. AR 898-99. Finally, Plaintiff included
3 new declarations from Dr. Olswanger (AR 1187-88), Dr. Page (AR 1195-99), and
4 Dr. Marks (AR 1201-02), each challenging Dr. Mendelssohn’s findings.

5 Defendant did not consider the discovery responses from other cases or the
6 37 reports written by Dr. Mendelssohn because they did not relate to Plaintiff’s
7 claim. AR 880. Plaintiff continued to challenge Defendant’s denial of her claim.
8 AR 1740-44. On June 23, 2020, Defendant obtained updated reviews from Dr.
9 Mendelssohn (AR 1476-78) and Dr. Parrillo (AR 1736-37).

10 In her addendum, Dr. Mendelssohn maintained the record did not support a
11 finding of functional impairment. AR 1477. She pointed out the declaration
12 submitted by Dr. Marks was a review of his 2018 evaluation, which predated the
13 timeframe under consideration, and did not contain more recent data. *Id.* She
14 further noted the additional documents submitted by Plaintiff did not contain
15 “clinical data to substantiate how the claimant’s reported symptoms/diagnoses
16 impact functionality.” *Id.* Dr. Mendelssohn concluded her addendum by noting
17 that despite Plaintiff’s alleged level of anxiety, her medical records did not contain
18 any referrals to behavioral health treatment, which was inconsistent with an
19 impairing psychological condition. *Id.*

20 Dr. Parrillo likewise found no new clinical evidence to support workplace

1 restrictions or limitations. AR 1737. Specifically, Dr. Parrillo noted there were no
2 clinical findings of new focal neurological deficits that would impede physical
3 movement nor were there any new diagnostic tests or imaging that showed
4 significant neurocompression that would result in physical limitations. *Id.* Dr.
5 Parrillo concluded there was no additional information that would change his
6 original assessment of Plaintiff's claim file. *Id.*

7 Based on the addenda provided by Dr. Mendelssohn and Dr. Parrillo,
8 Defendant upheld its determination that Plaintiff was not entitled to benefits after
9 November 18, 2019. AR 1464.

10 **FINDINGS OF FACT**

11 Having thoroughly reviewed the record *de novo*, the Court makes the
12 following findings of fact pursuant to Rule 52(a)(1):

13 1. Plaintiff began working as a receptionist for Providence St. Joseph
14 Health in October 2017. AR 644. Plaintiff's Regular Occupation as a
15 receptionist/medical clerk is generally defined in the Dictionary of Occupational
16 Titles as follows: the position is mostly sedentary with occasional lifting, carrying,
17 pushing, and pulling of up to 10 pounds; the position requires interaction with
18 patients for intake purposes; the position does not involve exposure to
19 environmental conditions such as extreme heat or cold, moving mechanical parts,
20 or exposure to toxic chemicals; and the position requires moderate aptitude in areas

1 such as general learning and verbal, numerical, and clerical skills. AR 227-28.

2 2. Plaintiff was involved in a car accident in 2016 but did not begin
3 seeking regular medical care for her neck pain and anxiety until 2018. *See, e.g.*,
4 AR 329-58.

5 3. The Court rejects the February 5, 2018 opinion of Dr. Marks because
6 the examination predates the timeframe covered by Plaintiff's claim for disability
7 benefits and thus, raises questions as to whether it is an accurate assessment of
8 Plaintiff's more recent cognitive state. The letter submitted by Dr. Marks in May
9 2020 to support Plaintiff's disability claim is also unpersuasive because it did not
10 contain any new information or analyses to update Dr. Marks' prior findings. *See*
11 AR 1201-02. Plaintiff's argument that Dr. Marks opinion is more credible solely
12 because he examined Plaintiff in-person is without merit. The "treating physician"
13 rule imposed in Social Security cases does not apply to ERISA benefits
14 determinations. *See Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834
15 (2003). Dr. Marks' one-time assessment is contrary to the weight of the medical
16 evidence, which does not indicate Plaintiff was cognitively or psychologically
17 disabled.

18 4. The Court rejects Dr. Olswanger's declarations indicating that, as of
19 April 3, 2019, Plaintiff was unable to fulfill the essential duties of her Regular
20 Occupation as a medical receptionist or that she was unable to return to work

1 following her neck surgery. AR 623-25; 642; 1187-88. As Plaintiff's treating
2 physician since at least 2018, Dr. Olswanger was best suited to render opinions
3 regarding Plaintiff's functional abilities. However, his declarations regarding
4 Plaintiff's functional abilities do not comport with his own treatment notes for
5 Plaintiff or the medical record as a whole.

6 To illustrate, throughout 2018 and the majority of 2019, Dr. Olswanger
7 regularly noted Plaintiff was alert, cooperative, dressed appropriately, and not in
8 acute distress despite complaints of chronic debilitating pain. AR 358, 356, 354,
9 352, 350, 348, 346, 342, 340, 338, 336. Following Plaintiff's neck surgery, Dr.
10 Olswanger continued to report Plaintiff was alert, cooperative, dressed
11 appropriately, and not in acute distress. AR 334, 332, 330. Additionally, post-
12 operation cervical imaging, nerve testing, and an MRI revealed generally normal
13 and unremarkable results. AR 647, 686, 688, 752.

14 Regarding Plaintiff's cognitive limitations, Dr. Olswanger's notes
15 consistently reflect stable or even improved anxiety symptoms. AR 357, 355, 353,
16 351, 337, 331, 329. Dr. Olswanger did not indicate Plaintiff suffered from
17 memory deficiencies nor did he refer her to a mental health specialist. Notably,
18 Dr. Olswanger stated Plaintiff's physical issues were the primary concerns during
19 her care visits, not her anxiety. AR 870. Dr. Olswanger's assessments regarding
20 Plaintiff's inability to fulfill her Regular Occupation due to cognitive and

1 psychological impairments are inconsistent with the factual record.

2 5. The Court rejects Dr. Page's conclusion that Plaintiff was unable to
3 return to work due to anxiety and PTSD. AR 627-31. Dr. Page's single evaluation
4 of Plaintiff in 2019 is not consistent with the record as a whole. Dr. Page
5 diagnosed Plaintiff with PTSD, yet no other medical records indicate such a
6 diagnosis. Furthermore, Dr. Page stated his assessment of Plaintiff's cognitive
7 disability was based exclusively on Dr. Marks' 2018 memory assessment; Dr. Page
8 did not conduct any independent testing. AR 1197. Finally, none of Plaintiff's
9 other care providers, including her primary care physician, Dr. Olswanger, noted
10 cognitive deficiencies. Dr. Page's findings are inconsistent with the factual record.

11 6. The Court fully credits Dr. Parrillo's conclusion that Plaintiff was not
12 physically disabled outside the eight-week post-surgical recovery period. Dr.
13 Parrillo noted the objective medical evidence prior to Plaintiff's surgery,
14 specifically CT scans from April 2019 and July 2019, did not demonstrate any
15 direct nerve impingement or compression that would result in motor or sensory
16 deficiencies. AR 854. That analysis is consistent with Dr. Trombly's initial
17 review of Plaintiff's claim in which he considered Plaintiff's mostly sedentary job
18 duties compared to the objective medical evidence, concluding Plaintiff's
19 relatively stable cervical back condition would not have supported a finding of
20 disability within the meaning of the insurance policy. AR 3409. Dr. Parrillo's

1 analysis also aligns with Dr. Gutierrez's opinion. AR 3491. Additionally, Dr.
2 Parrillo's analysis is consistent with Plaintiff's own neurosurgeon's assessment of
3 Plaintiff's imaging results, which indicated only a partial disc collapse and
4 inconclusive results regarding the narrowing of the spinal canal. AR 718.

5 Dr. Parrillo also reviewed Plaintiff's post-surgery records and maintained his
6 assessment that there was no neuromuscular impairment that would have
7 functionally impaired Plaintiff. AR 854. That analysis is consistent with other
8 medical records that indicated Plaintiff's post-surgical recovery was going as
9 expected (AR 739, 745, 752) and no underlying spinal or nerve pathologies
10 revealed a definite source of Plaintiff's symptoms (AR 647, 686, 688). Moreover,
11 Plaintiff was warned of the possibility that her pain symptoms would not
12 completely subside with surgery. AR 720. Dr. Parrillo's review of Plaintiff's
13 claim is consistent with the totality of the medical records.

14 7. The Court fully credits Dr. Mendelsohn's findings that Plaintiff was
15 not cognitively or psychologically disabled. Dr. Mendelsohn noted Plaintiff's
16 records indicated a history of anxiety but did not reflect any mental status
17 abnormalities. AR 871. Notably, Plaintiff was not under the care of a mental
18 health professional. *Id.* Dr. Mendelsohn also noted Plaintiff's psychiatric issues
19 were not the primary concern during her medical evaluations nor was she restricted
20 from work due to her psychiatric conditions. *Id.* Dr. Mendelsohn's analyses align

1 with Dr. Yuppa's initial review of Plaintiff's claim, in which he found Plaintiff's
2 psychological conditions were not her primary issue and her reported anxiety
3 remained stable throughout her medical history. AR 3610-11. Dr. Mendelsohn's
4 assessment remained the same in her addendum following Plaintiff's appeal. AR
5 1477.

6 8. Plaintiff's allegations of Dr. Mendelsohn's bias are unpersuasive.
7 Plaintiff points to the sheer volume of reviews Dr. Mendelsohn conducts for
8 insurance companies to support her argument. ECF No. 17 at 12. However, the
9 fact that Dr. Mendelsohn conducts a significant number of insurance claim
10 reviews is insufficient on its own to demonstrate bias. *Mitchell v. Aetna Life Ins.*
11 *Co.*, 359 F. Supp. 2d 880, 890-91 (C.D. Cal. 2005); *Lee v. Kaiser Found. Health*
12 *Plan Long Term Disability Plan*, 812 F. Supp. 2d 1027, 1039 (N.D. Cal. 2011).
13 Plaintiff has not proffered any evidence to demonstrate Dr. Mendelsohn is biased
14 against Plaintiff in particular or that Dr. Mendelsohn's findings in favor of
15 insurance companies are directly tied to a financial incentive (*e.g.*, her pay is
16 increased for favorable determinations or her pay is contingent solely upon
17 favorable determinations).

18 Moreover, the non-binding district court cases Plaintiff cited in her appeal
19 criticizing Dr. Mendelsohn are distinguishable from Plaintiff's case. In *Sisk v.*
20 *Gannet Co.*, No. 3:11-CV-1159, 2014 WL 1575628, at *15 (M.D. Tenn. Apr. 21,

1 2014), the court found Dr. Mendelsohn’s review “clearly inadequate” because she
2 failed to address a care provider’s conclusions, which were not provided in the
3 claimant’s file. *Id.* at *16. Here, Dr. Mendelsohn provided a detailed and
4 thorough review of Plaintiff’s complete claim file. Plaintiff has not offered any
5 evidence that the file reviewed by Dr. Mendelsohn was incomplete.

6 In *Stephens v. Aetna Life Ins. Co.*, No. 1:11-CV-513, 2012 WL 2711378, at
7 *9 (S.D. Ohio July 9, 2012), the court questioned Dr. Mendelsohn’s
8 “thoroughness and reliability” because she failed to analyze treatment notes that
9 contained check-box evaluations of the claimant’s psychological symptoms and
10 because she did not contact treatment providers regarding the validity of their test
11 results. Here, Dr. Mendelsohn reviewed all evidence provided in Plaintiff’s file
12 and contacted two of Plaintiff’s care providers regarding their assessments. Dr.
13 Mendelsohn provided clear explanations as to why she rejected the assessments
14 and supported her reasons with evidence in Plaintiff’s file. *See* AR 870-71, 1477.

15 Finally, in *Carey v. Bellsouth Short Term Disability Plan*, No. 1:06-CV-
16 2589WSD, 2008 WL 178714, at *12 (N.D. Ga. Jan. 17, 2008), the court
17 questioned Dr. Mendelsohn’s objectivity, finding the record raised issues of fact
18 as to whether the insurance company made a good-faith determination or merely
19 tried to deconstruct the record to justify their denial. Here, the record speaks for
20 itself: Plaintiff’s medical history simply does not reflect the degree of

1 psychological impairment necessary for a finding of disability.

2 9. Plaintiff's criticism of Dr. Mendelsohn's review techniques is also
3 unpersuasive. ECF No. 17 at 19-20. Plaintiff argues that Dr. Mendelsohn
4 improperly focuses on "what was not" rather than existing contradictory evidence.
5 However, Plaintiff's argument does not overcome the fact that the bulk of
6 Plaintiff's medical records do not reflect a significant psychological or cognitive
7 impairment. Regular notations of stable or improved anxiety and a single
8 diagnosis of PTSD do not prove disability. Therefore, Dr. Mendelsohn correctly
9 concluded that Plaintiff was not disabled by her psychological condition based on
10 the weight of the evidence.

11 **CONCLUSIONS OF LAW**

12 Based upon the findings of fact above, the Court makes the following
13 conclusions of law pursuant to Rule 52(a)(1):

- 14 1. Plaintiff has not satisfied her burden of proving disability.
- 15 2. Plaintiff is not "disabled" as that term is defined in the policy because
16 the record as a whole does not support a finding that she is "unable to perform the
17 material duties of . . . her Regular Occupation" and that she is "unable to earn 80%
18 or more of . . . her Indexed Earnings from working in . . . her Regular Occupation."
- 19 3. By virtue of not being disabled, Plaintiff is not entitled to additional
20 benefits under the policy.

1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

2 1. Plaintiff’s Motion for Judgment (ECF No. 17) is **DENIED**.

3 2. Defendant’s Motion for Judgment (ECF No. 19) is **GRANTED**.

4 The District Court Executive is directed to enter this Order and furnish
5 copies to counsel.

6 **DATED** March 1, 2021.



7 *Thomas O. Rice*
8 THOMAS O. RICE
9 United States District Judge

10
11
12
13
14
15
16
17
18
19
20