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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 10-1469 AHM (CWx)	Date	December 20, 2011
Title	STACEY SHANE v. ALBERTSON'S, INC. EMPLOYEES' DISABILITY PLAN		

Present: The Honorable	A. HOWARD MATZ, U.S. DISTRICT JUDGE	
Kendra Bradshaw	Not Reported	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys **NOT** Present for Plaintiffs: Attorneys **NOT** Present for Defendants:

Proceedings: IN CHAMBERS (No Proceedings Held)

Defendant Albertson's Inc., Employees' Disability Plan ("the Plan") determined that Plaintiff Stacy Shane no longer qualifies for long-term disability benefits under the Plan's terms. Plaintiff appeals the Plan's termination of her long-term disability benefits as provided for by 29 U.S.C. §§ 1132(a), (e)–(g) of the Employee Retirement Income Security Act of 1974 ("ERISA").

On September 26, 2011, after circulating a tentative order, the Court heard oral argument in this case. After considering the administrative record, the trial briefs, and the parties' oral arguments,[1] the Court changes its tentative decision and REVERSES the Plan's denial of Plaintiff's long-term disability benefits, for the reasons stated below.

I. PROCEDURAL BACKGROUND

The parties are familiar with the lengthy history of this matter, and the Court does not recount it here. Instead, the Court will provide a short summary of the case's procedural history.

[1] Each party has filed three briefs for the Court to consider in this appeal. The Court uses the following abbreviations to refer to these moving papers: Plaintiff's Opening Trial Brief ("POTB"); Defendant's Opening Trial Brief ("DOTB"); Plaintiff's Opposition to Defendant'‘s Trial Brief ("Pl.'s Opp."); Defendant's Responsive Trial Brief ("DRTB"); Defendant's Supplemental Brief ("DSB"); Plaintiff's Reply Brief ("PRB"). Citations to the Administrative Record will be referred to as "AR."

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This is not the first time these parties have been before this Court. *See Shane v. Albertson's Inc. Employees' Disability Plan* (*Shane I*), 381 F. Supp. 2d 1196 (2005). In July 1999, Plaintiff suffered injury to her left knee. *Id.* at 1206. She submitted a claim for long-term disability benefits, which was approved by the Plan. *Id.* Two years later, she was diagnosed with "lumbar disc disease." *Id.* at 1207. In August 2002, the Plan terminated Plaintiff's benefits, and Plaintiff appealed the Plan's decision to this Court. In *Shane I* this Court overturned the Plan's denial of long-term benefits and found Plaintiff disabled under the terms of the plan. *Id.* at 1198. As relevant to this case, in *Shane I*, this Court held that under the terms of the plan a claimant capable of performing "part-time work" could be denied benefits. *Id.* at 1203–06. The Ninth Circuit subsequently upheld this Court's decision overturing the Plan's denial of long-term benefits. *Shane v. Albertson's Inc.*, 504 F.3d 1166 (9th Cir. 2007).

On June 25, 2009, the Plan determined that Plaintiff had "ceased to meet the requirements for Total Disability as defined in the Plan as of January 1, 2008 (if not earlier)" and had consequently "ceased to be eligible for long term disability benefits . . . as of January 1, 2008." AR at 26. The Plan's determination was based primarily on the report of a consulting doctor—Dr. Robert H. Friedman—who reviewed Plaintiff's medical history but did not personally examine Plaintiff. AR at 30.

Plaintiff administratively appealed the Plan's denial of benefits. As part of this appeal, the Plan had Plaintiff's medical records reviewed by a company called National Medical Review ("NMR"). Petti Decl., Ex. E at 14. NMR had two physicians review Plaintiff's records and submit their opinions on Plaintiff's condition. The physicians concluded that Plaintiff was not totally disabled. *Id.* On January 14, 2010, the Plan upheld its initial denial of Plaintiff's long-term disability benefits. *Id.* at 1.

After the Plan upheld its denial of benefits, Plaintiff filed this lawsuit in federal court. Plaintiff appeals the Plan's June 25, 2009 denial of benefits and the January 14, 2010 upholding of that denial by the Plan's internal appeals process. Compl. at 12. Plaintiff seeks the payment of all disability benefits due to her, a declaration that she is disabled under the terms of the Plan and is entitled to receive benefits, and injunctive relief requiring the payment of all disability benefits and employment benefits owed to her under the Plan. Compl. at 12. In the alternative, Plaintiff seeks an order overturning the denial and remanding to the Plan for a "proper investigation, creation of a complete

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[r]ecord, and a decision made on legally proper grounds." *Id*.

II. STANDARD OF REVIEW

In its June 29, 2011 order, the Court determined the applicable standard is *de novo* review. Dkt. No. 42.

III. DISCUSSION

There are two threshold issues: First, who has the burden of proof on this appeal? Second, what standard should the Court apply to determine whether Plaintiff is disabled under the Plan? As to the first question, the Court concludes that Plaintiff has the burden to demonstrate that she is totally disabled. And as to the second question, the Court determines that a person is disabled under the terms of the Plan if she is incapable of part-time or full-time employment that would provide her with a living wage, even a wage not necessarily as large as she earned before the disability.

After addressing these questions, the Court, based on a *de novo* examination of the administrative record, concludes that Plaintiff has presented sufficient evidence showing that she was disabled under the terms of the plan. Defendant fails to adequately rebut this evidence.

A. Plaintiff has the burden to demonstrate disability

"[W]hen the court reviews a plan administrator's decision under the *de novo* standard of review, the burden of proof is placed on the claimant." *See Muniz v. Amec Const. Management, Inc.*, 623 F.3d 1290, 1294 (9th Cir. 2010). "That benefits had previously been awarded and paid may be evidence relevant to the issue of whether the claimant was disabled and entitled to benefits at a later date, but that fact should not itself shift the burden of proof." *Id*. at 1296. Plaintiff's burden is "to show that [s]he was entitled to the benefits under the terms of h[er] plan." *Id*. at 1296 n.1 (citing *Farley v. Benefit Trust Life Ins. Co.*, 979 F.2d 653, 658 (8th Cir. 1992) (internal modifications and quotation marks omitted)).

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In *Muniz*, the plaintiff began receiving total disability benefits in 1992 from his long-term disability insurance plan. *Id.* at 1292. In 2005, the insurance plan terminated the plaintiff's benefits after concluding that he was capable of sedentary employment. *Id.* The plaintiff appealed and argued that the plan administrator has the burden of proof when "the claim administrator terminates disability benefits without providing any evidence that the claimant's condition has improved or changed since its initial award of benefits." *Id.* at 1296. The Ninth Circuit disagreed and held that the fact that benefits had previously been awarded was "evidence relevant to the issue of whether the claimant was disabled and entitled to benefits at a later date," but did not shift the burden of proof. *Id.*

At the hearing on this matter, Plaintiff's counsel argued that *Muniz* is inapposite because in that case the insurance company *voluntarily* began paying benefits but in this case there is a Court order specifically finding Plaintiff disabled. Plaintiff's argument, as the Court understands it, is that once this Court found that Ms. Shane was disabled, the Defendant should have the burden to show that something has changed—that there has been some improvement in Ms. Shane's condition.

Plaintiff misinterprets the scope of the previous order. That order simply determined that, based on the evidence before the Court, Ms. Shane was disabled *at that point in time*. It did not establish that Ms. Shane would always be disabled or that Defendant would have to continue benefits forever. As the Court previously explained "there is nothing in this Court's 2005 decision that bars Albertson's from re-evaluating Plaintiff's actual condition at a later date to determine whether she [is] 'totally disabled' within the meaning of the Plan." June 28, 2010 Order Denying Summary Judgment, Dkt. No. 41, at 7. As in *Muniz*, a prior determination of total disability is not perpetual and does not shift the burden from Plaintiff.[2]

All this is not to say, however, that the Court's prior finding of disability has no

[2] Plaintiff also claims that *Saffon v. Wells Fargo & Co. Long Term Disability Plan*, 522 F.3d 863, 871 (9th Cir. 2008) establishes that the Court ought to place the burden of demonstrating non-disability on the Plan. But *Muniz* addressed *Saffon* and explained that "*Saffon* did not shift the burden to the defendant, but rather held under the abuse-of-discretion standard that the defendant must conduct a 'meaningful dialogue' with the beneficiary regarding his or her claim before a final denial of the claim." *Muniz*, 623 F.3d at 1296 n.3.

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effect on this case. To the contrary, as in *Muniz*, a prior finding of disability is relevant evidence as to whether Ms. Shane is still disabled. In addition, if Plaintiff can show that her condition has not improved since this Court's 2005 decision, then she will meet her burden of proving disability.

B. Standard for determining Plaintiff's eligibility for LTD benefits

Plaintiff's long-term disability plan contains two definitions of Total Disability—a definition that applies to the first twenty-four months of disability and a definition that applies thereafter. There is no dispute that the post-twenty-four month definition applies. That definition states:

> Total Disability shall mean the complete inability of the Employee to perform any and every duty of any *gainful occupation* for which he or she is reasonably fitted by training, education or experience, or may reasonably become qualified based on his or her training, education or experience, subject to the application of Rehabilitative Employment.

AR at 26 (emphasis added).

The parties dispute the meaning of "gainful occupation." Plaintiffs argue that the word "gainful" modifies the word "occupation" and requires that the occupation provide for a reasonable living wage. In response, Defendant contends that the Court has previously determined that "gainful occupation" includes part-time work and therefore *any* occupation satisfies this definition. The Court does not agree with Defendant. Defendant is correct that this Court did previously determine that "gainful occupation" includes both full-time and part-time work. *Shane I*, 381 F. Supp. 2d at 1203–06. That decision, however, did not address whether work that merely provides nominal income qualifies as "gainful."

In *Demirovic v. Building Service 32 B–J Pension Fund*, 467 F.3d 208, 209–10 (2nd Cir. 2006), the Second Circuit considered an insurance plan that defined total disability as the inability to perform "any *gainful* employment" (emphasis added). The Court explained:

> The phrase 'any gainful employment' in the context of [the] insurance plan may not reasonably be read as denying benefits to

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> a person who is *physically* capable of any employment whatsoever, so long as it earns a nominal profit. . . . To do so would render the plan's promise of a disability pension hollow for all but the most grievously incapacitated claimants.

Id. at 215 (internal citations and alterations omitted). The court concluded that "gainful employment" is employment that "permits [an individual] to earn a reasonably substantial income from her employment, rising to the dignity of an income or livelihood." *Id.*

Other Courts have reached the same conclusion as the Second Circuit. *See Helms v. Monsanto Co.*, 728 F.2d 1416, 1420 (11th Cir. 1984) ("Gainful has been defined by these courts as profitable, advantageous or lucrative. Therefore, the remuneration must be something reasonably substantial . . . ."); *Tracy v. Pharmacia & Upjohn Absence Payment Plan*, 195 Fed. App'x 511, 514 (6th Cir. 2006) (same); *Torix v. Ball Corp.*, 862 F.2d 1428, 1431 (10th Cir. 1988).

In *Pannebecker v. Liberty Life Assurance Co. of Boston*, 542 F.3d 1213, 1218 (9th Cir. 2008), however**,** the Ninth Circuit considered a plan that defined disability as being "unable to perform . . . all of the material and substantial duties of his own or *any other occupation* . . . ." In that case, based on the plan's "any other occupation" language, the Ninth Circuit refused to apply a minimum income requirement. *Id.* at 1220 The Court explained that its decision was based on the plan's "plain terms." *Id.*

Pannebecker does not control this case. In that case, the court relied on the plain terms of a plan to conclude that the plan's definition of disability did not contain an income component. In this case, however, the plan's "plain terms" are different—they define total disability as the inability to perform a "*gainful* occupation." The Court agrees with the many courts that have concluded that a "gainful occupation" is employment that "permits [an individual] to earn a reasonably substantial income from her employment, rising to the dignity of an income or livelihood." *Demirovic*, 467 F.3d at 215.

C. Plaintiff has presented significant evidence of total disability

Plaintiff presents significant evidence that she was disabled during the relevant

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period—January 2008 to April 2009.

1. Knee and Back problems

In *Shane I*, this Court found Plaintiff disabled due to her knee and back injuries. *Shane I*, 381 F. Supp. 2d at 1206 ("Ms. Shane suffered from lumbar disc disease and from the continuing effects of the damage and surgery to her left knee."). This decision was based, in part, on reports provided by one of Plaintiff's physicians, Dr. Citek. *Id.* at 1207. Dr. Citek's reports in *Shane I* indicated that Plaintiff had a "class 3" physical impairment which corresponded with "Moderate limitation of functional capacity; capable of clerical/administrative (sedentary) activity ([impairment level of] 35-55%)." *Id.* The report also listed a "class 2" mental impairment, which corresponded to "slight limitations." *Id.*

In this case, Plaintiff provides a report by Dr. Citek that indicates that her knee and back problems have not improved since *Shane I*. On July 17, 2008, Dr. Citek completed a "Report of Attending Physician," which states that Plaintiff still suffers from lumbar disc disease and an injury to her knee. AR at 96–97. The report also notes that Plaintiff is "unable to sit, stand [for] prolonged periods, u/a [unable] to carry[,] bend, lift." *Id.* Dr. Citek concluded that Plaintiff has a "Class IV" physical impairment, which corresponded with "Moderate limitation of functional capacity" and "capable of clerical/administrative sedentary activity ([impairment level of] 60 - 70%). " *Id.* The doctor also noted that Plaintiff would be unable to return to work or light duty.

Dr. Citek's July 17, 2008 report also mentioned that Plaintiff has a "Class III" mental impairment, which corresponds with being able to "engage in only limited stress situations and engage in only limited interpersonal relations. *Id.*"

A comparison of Dr. Citek's report in *Shane I* and his report in this case is evidence that Plaintiff's condition has not improved. In fact, in *Shane I* Dr. Citek gave Plaintiff an impairment level of "35-55%," but later assessed her at an impairment level of "60-70%."

Dr. Citek's report is supported by his numerous treatment records from his examinations of Plaintiff. The administrative record contains nine reports from Dr. Citek

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spanning November 2007 to October 2008. AR at 197–200, 256–57. These notes indicate that Plaintiff continued to suffer from back pain to the point of requesting epidural injections for the pain. AR at 197 (October 16, 2008 Notes). Dr. Citek was unable to give Plaintiff these injections because of an open wound on her back. *Id.* Instead of epidurals, Ms. Shane had to rely on prescription painkillers and muscle relaxants to control her pain. AR at 218 (Prescription Log).

2. Additional Complications

From February to April 2007, less than a year before the Plan claims that Plaintiff ceased being disabled, Plaintiff was hospitalized for two months due to acute respiratory failure, septic shock, and multi-organ failure. AR at 861. She was in a coma for approximately one month. AR 848. Her hospital discharge indicates that at times her condition was "tenuous" and "extremely critical" and that it was a "pleasant surprise" that she recovered. AR at 861.

As a consequence of the hospitalization and coma, Ms. Shane developed additional complications that support her claim that she is totally disabled. First, Plaintiff was afflicted with a serious back wound—a "stage IV decubitus ulcer." AR 839, 1337. The National Institutes of Health explains that Stage IV is the worst rating of an ulcer and that when an ulcer reaches stage IV it "has become so deep that there is damage to the muscle and bone, and sometimes tendons and joints." National Institutes of Health, MedlinePlus, Pressure ulcer, http://www.nlm.nih.gov/medlineplus /ency/article/007071.htm

Plaintiff required home care for this wound until approximately March 20, 2008. On November 9, 2007, just two months before the Plan claims Plaintiff ceased being disabled, Plaintiff was certified for continued home care. At that time Dr. Citek noted that Plaintiff was permitted to be "up as tolerated" and a Registered Nurse, D. Felkner, noted that it was "[d]ifficult for [Ms. Shane] to leave home without increased comfort measures." AR at 262. On January 24, 2008, after the Plan claims that Plaintiff was no longer totally disabled, Dr. Chalekson, a wound care specialist, re-certified Plaintiff for continued home care. Petit Decl., Ex. H.[3] Dr. Chalekson's re-certification report noted

[3] Exhibit H is not paginated, but the report can be found on page 141 of Dkt. 15-1.

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that Ms. Shane had "difficulty sitting for both short and long periods of time" *Id.* And of October 16, 2008, Dr. Citek's notes indicated that Plaintiff's wound had not completely healed. AR at 197.

In addition to causing the ulcer, Plaintiff's one-month long coma in early 2007 damaged her vision. Dr. Arnold, a vision specialist noted in October 2007: "her visual fields performed June 26, 2007 show severe abnormality on the right and less prominent on the left." AR at 461. Another eye specialist, Dr. Baldwin, confirmed the damage to Plaintiff's vision. AR at 259. According to an April 2008 report by Dr. Anthony, Plaintiff had "double vision." AR 848. As late as December 2010, Dr. Anthony noted the impact of the damage to Plaintiff's vision: "Reading is very problematic for her given her double vision related to her third nerve palsy."[4] Petti Supp. Decl., Ex. I.

D. Defendant has not rebutted Plaintiff's evidence.

The Plan attempts to rebut Plaintiff's evidence in four ways: First, the Plan points to statements made by Plaintiff's physicians that, in the Plan's view, show that Plaintiff was not totally disabled. Second, the Plan points to the fact that Plaintiff was able to attend school. Third, the Plan relies on a report by Dr. Friedman, who reviewed Plaintiff's medical records and determined that she was not totally disabled. And fourth, the Plan offers a report prepared by the National Medical Review, a private company that reviews medical records.

The Plan's attempts to rebut Plaintiff's evidence are not persuasive. In addition, the Plan fails to present any evidence of the types of "gainful occupations" that Plaintiff

[4] Even though Dr. Anthony's December 2010 report was not before the Plan, the Court may consider it. In *Mongeluzo v. Baxter Travenol Long Term Disability Plan*, 46 F.3d 938, 943–44 (9th Cir. 1995) the Ninth Circuit held that a Court may consider extrinsic evidence when it is necessary for adequate *de novo* review. One circumstance that calls for the consideration of extrinsic evidence is where the plan applies an incorrect definition of disability. *See id* at 944 ("where the original hearing was conducted under a misconception of the law . . . it is necessary for the case to be reevaluated in light of the proper legal definitions."). In this case, the Plan applied an incorrect definition of "gainful occupation." Dr. Anthony's report is necessary for adequate *de novo* review because it explains whether Plaintiff's vision problems would allow her to engage in a "gainful occupation."

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could engage in. In light of Plaintiff's significant evidence of total disability, the Plan's failure to point out any job that Plaintiff could realistically accomplish is fatal.

1. Statements made by Plaintiff's physicians

Defendant points to a number of statements made by Plaintiff's physicians to rebut Plaintiff's claim that she was disabled during the relevant period. These statements are often taken out of context and do not rebut Plaintiff's evidence. Although the Court has considered all these statements, this order need not separately address each and every one. Instead, the Court discusses three representative statements that illustrate why Defendant's arguments are not persuasive.

According to the Plan, Dr. Citek's July 17, 2008 report states that Plaintiff had only a "moderate limitation of functional capacity" and was capable of "clerical/administrative (sedentary) activity." DOTB at 1. This is true, but the Plan fails to provide the context in which this statement was made. Dr. Citek filled out a form provided by the Plan. *See* AR at 97–98. That form required him to select, using a check mark, one of five possible classes of disability. A "Class V" disability—the worst possible level—is consistent with a person who is "incapable of minimal (sedentary) activity." *Id.* The Court need not find, and does not find that Ms. Shane is incapable of even *minimal* sedentary activity. The next possible choice is a Class IV impairment, which Dr. Citek selected. Dr. Citek also stated in the report that Plaintiff was "unable to sit, stand [for] prolonged periods, u/a [unable] to carry[,] bend, lift." AR at 98. And his report states that Plaintiff would not be able to return to work. *Id.*

Dr. Citek's report, when considered in its entirety, actually cuts against Defendant and tends to prove that Plaintiff was totally disabled. This conclusion is consistent with the Court's decision in *Shane I*, where it relied on a very similar report to conclude that Plaintiff was disabled.

Similarly the Plan quotes the following language from a report by Dr. Arnold to claim that Plaintiff had no significant physical disabilities:

> Review of Systems: Constitutional symptoms: negative. Ears, nose, mouth and throat: negative. Cardiovascular: negative.

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> Respiratory: negative. Gastrointestinal: negative. Genitourinary: negative. Hematologic/Lymphatic: negative. Musculoskeletal: muscle weakness. Integumentary: negative. Neurological: negative. Psychiatric: negative. Endocrine: negative. Allergic/Immunologic: negative.

DOTB at 4. It is true that Dr. Arnold's report does not mention any physical disabilities but as Plaintiff persuasively points out, Dr. Arnold was treating Plaintiff for her *vision* and not for orthopaedic or physical disabilities. Pl.'s Opp. at 15; AR at 457–62.

The Plan also repeatedly refers to the fact that in February 2008, Dr. Citek released Plaintiff to attend school with only a "seating accommodation." DOTB at 3. This statement is misleading. Dr. Citek filled out a "Verification of Disability" form issued by Cuesta College's Disabled Student Programs and Services. AR at 258. That form specifies that "only one disability" should be described on each form and it asks the person completing the form to indicate how the disability will limit the student. *Id.* On the form, Dr. Citek listed Ms. Shane's lumbar disc disease and knee injury, and he noted that she required a "seating accommodation." *Id.*

The fact that other disabilities and limitations are not listed on the form proves little, if anything. The form does not purport to be an evaluation of Plaintiff's overall condition. It appears to be nothing more than a verification that permitted Plaintiff to be given a seating accommodation she needed.

2. Plaintiff's attendance at school

Although the record is not entirely clear on the exact dates, Plaintiff attended college from some point in 2008 to some point in 2009. Defendant relies *heavily* on Plaintiff's college attendance to support its contention that she was not disabled. In fact, Ms. Shane's college attendance is mentioned at least twenty-four times in Defendant's opening trial brief. Furthermore, the two medical reports that Defendant primarily relies on—Dr. Friedman's report and the NMR report—also significantly rely on Plaintiff's college attendance. The Court finds that although evidence of college attendance does weigh against a finding of disability it does not rebut Plaintiff's evidence in this case.

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School attendance can be evidence that rebuts a claim of disability. For example, in the context of social security disability claims, the Ninth Circuit has found that an administrative judge is entitled to rely on this evidence. *See Matthews v. Shalala*, 10 F.3d 678 (9th Cir. 1993).

However, evidence of school attendance does not automatically establish that a person is capable of work. *See Cohen v. Secretary of Dept. Of Health and Human Services*, 964 F. 2d 524, 530 (6th Cir. 1992). As the Sixth Circuit has explained, school is often significantly less demanding than work. *Id.* A student may often miss classes without penalty and homework can be accomplished at the times the student feels best. *Id.* If a specific class proves too strenuous, a student can drop the class with little consequence.

In contrast, in most employment scenarios, an employee may not skip work without consequence, work cannot be scheduled at the employees' convenience, and the employee cannot "drop" a part of the job if it proves too demanding. The Ninth Circuit recognized this principle in the social security disability context when it found that the fact that a claimant obtained a real estate license "does not suggest the claimant is capable of sustaining substantial gainful employment in the national economy." *Blau v. Astrue*, 263 F. App'x 635, 637 (9th Cir. 2008).

In *Hawkins v. First Union Corporation Long-Term Disability Plan*, 326 F.3d 914, 918 (7th Cir. 2003) (Posner, J.), the Seventh Circuit explained that a totally disabled person may be able to force himself to work for a short period of time. *Id.* The fact that a disabled person is able to sustain a heightened effort for a short period of time, the court noted, does not mean that the same person could sustain this effort indefinitely.

Similarly, the fact the Ms. Shane attempted to attend school for a short period of time does not necessarily mean that she could have sustained this effort on a regular basis. And it is certainly not strong evidence that she could have sustained the greater level of effort typically required for gainful employment.

The record in this case supports this conclusion. Ms. Shane attempted to attend three classes. But even with accommodation, she had to eventually drop one of these classes. AR 274. And, as Dr. Citek's progress reports indicate, Plaintiff's attempts to

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attend class flared her back pain. AR at 273. Given these facts, the Court cannot conclude that Plaintiff's school attendance shows that she is not totally disabled.

3. Dr. Friedman's report

The Plan submitted Plaintiff's records to Dr. Friedman, a physician with Idaho Physical Medicine and Rehabilitation. AR at 75. After reviewing the records, Dr. Friedman concluded that Plaintiff was not totally disabled from January 1, 2008 to April 26, 2009. AR at 76. His report states that Ms. Shane was able to tolerate at least sedentary activities and was capable of reading. Dr. Friedman concludes that Ms. Shane was not disabled as defined in by the Plan.

Dr. Friedman's conclusion as to Plaintiff's capabilities relies in large part on the fact that Plaintiff attended school and on the "Verification of Disability" form that Dr. Citek completed for Cuesta College. AR at 75–76. As the Court has previously explained, these facts do not persuasively indicate that Plaintiff was not physically disabled. Moreover, although Dr. Friedman's conclusions are entitled to some weight, they are insufficient to rebut Plaintiff's substantial evidence of serious physical impairment, including the reports of her treating physicians, Dr. Citek and Dr. Anthony.

4. The National Medical Review report

The Plan also relies on a report provided by the National Medical Review. NMR Report at 1.[5] This report has a number of significant issues and the Court cannot give it much weight.

The NMR report includes the reports of two physicians who purportedly reviewed Plaintiff's file and concluded that she was not disabled. One of the physicians, Dr. Menendez, does not remember this case. Petti Supp. Decl., Ex. J. at 11–12. In fact, he has no recollection of doing *any* disability determinations for NMR. When presented with the NMR report his recollection was not refreshed, and he initially denied writing the report at all. Petti Supp. Decl., Ex. J. at 14. In addition, although the report claims

[5] The NMR report can be found on page 13 of Exhibit E of the April 13, 2010 Declaration of Plaintiff's counsel, Russell Petti. Dkt. 15-1.

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that the physicians received 172 medical records comprising Plaintiff's case, Dr. Menendez does not recall ever receiving a large volume of records from NMR. Petti Supp. Decl., Ex. J. at 14.

The report also claims that Dr. Menendez was "familiar with the clinical indications for long term disability." NMR Report at 1. But in his deposition, the doctor stated that this did not accurately reflect his qualifications and experience. Petti Supp. Decl., Ex. E. at 21.

Although this evidence does not entirely discredit the conclusions of the NMR report, it does raise serious questions as to its thoroughness and reliability.

In any event, the content of the report is not particularly persuasive. Dr. Menendez's opinion provides four reasons why Plaintiff is not totally disabled. NMR Report at 10. Two of these reasons involve Plaintiff's college attendance and the "Verification of Disability" document provided by Dr. Citek. The Court has already discussed this evidence at length and explained why it is not persuasive. A third reason is that Ms. Shane was on a stable dose of painkillers and did not required an increase in medication. But as already discussed previously, Dr. Citek's notes indicate that Plaintiff was experiencing significant additional back pain due to her college attendance. Finally, Dr. Menendez notes that Plaintiff's vision problems "did not interfere with her ability to participate in school . . . ." NMR Report at 10. Although this conclusion is entitled to some weight, it does not rebut Dr. Anthony's conclusion that Plaintiff's vision problems make it difficult for her to read.

The second opinion in the NMR report is entirely conclusory. It consists of three short paragraphs that do not provide any explanation for the conclusion that Plaintiff is not disabled. NMR Report at 11–12.

5. Lack of a vocational analysis

The Plan's failure to specify what "gainful occupation" Plaintiff could engage in leaves it unable to rebut her evidence of disability. Without evidence of a viable occupation, the Court is left with evidence that Plaintiff is significantly disabled and no evidence that, given these disabilities, Plaintiff could find gainful work.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 10-1469 AHM (CWx)	Date	December 20, 2011
Title	STACEY SHANE v. ALBERTSON'S, INC. EMPLOYEES' DISABILITY PLAN		

Defendant argues that in the Ninth Circuit, vocational evidence is unnecessary. This is not quite true. The Ninth Circuit has explained that such evidence is not required where "the evidence in the administrative record supports the conclusion that the claimant does not have an impairment that would prevent him from performing some identifiable job." *McKenzie v. General Telephone Co. of Cal.*, 41 F.3d 1310, 1317 (9th Cir. 1994) *overruled on other grounds by Pannebecker v. Liberty Life Assurance Co. of Boston*, 542 F.3d 1213 (9th Cir. 2008) ; *Goodberry v. Northrop Grumman Long Term Disability Income Plan*, 1999 WL 1011915, at *1 (9th Cir. 1999) (unpublished).

In this case, the evidence in the administrative record supports a finding that Plaintiff is significantly disabled. Given this evidence, the lack of a vocational analysis means that the Court cannot reach the conclusion that Plaintiff could engage in "some identifiable" gainful occupation.

Without evidence that, despite her disabilities, Plaintiff could engage in some identifiable gainful occupation, the Court must conclude that she is totally disabled under the terms of Albertson's Long-Term Disability Plan.

IV. CONCLUSION

For the reasons stated above, the Court REVERSES the Plan's denial of Plaintiff's long-term disability benefits.

Plaintiff shall serve and lodge a [Proposed] Judgment by December 29, 2011.

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