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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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Case No.: CV 04-6377-GHK (FMOx)

Date: November 2, 2005

Title: Ruth Willick v. Continental Casualty Co., et al.

===== DOCKET ENTRY =====

===== PRESENT: Hon. George H. King, United States District Judge =====

Beatrice Herrera  
Deputy Clerk

None  
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:

ATTORNEYS PRESENT FOR DEFENDANTS:

None

None

PROCEEDINGS: Parties' Integrated Joint Briefing: ERISA

This matter is before the Court on the above-entitled proceeding jointly brought by Plaintiff Ruth Willick and Defendants Continental Casualty Company ("CNA") and Countrywide Financial Corporation Group Disability Plan ("Countrywide") (together "Defendants"). This proceeding is appropriate for resolution without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15 (formerly Local Rule 7.11). After carefully considering all pertinent papers, we rule as follows:

**I. Summary of Facts**

Beginning in 1999, Plaintiff worked for Countrywide, which had established a disability employee benefit plan ("Plan"). The Plan purchased a group policy of disability insurance, policy no. SR-83121741, issued by CNA to Countrywide as a policyholder, effective January 1, 2001. Administrative Record ("AR") 1-34. Plaintiff's last day of work at Countrywide was May 19, 2003. Thereafter, on June 10, Plaintiff filed a claim with CNA for short term disability ("STD") benefits. AR 507-09. The claim was fully paid from May, 2003 through its maximum amount on November 17, 2003. AR 299, 491. Once the STD claim was paid to its maximum, it became a long term disability ("LTD") claim, on December 17, 2003. AR 345.

On December 19, 2003, Willick received a letter from CNA advising her of the change in her claim status, and requesting

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further medical information. AR 299-301. On February 6, 2004, CNA wrote to Willick informing her that her disability claim had been rejected. AR 78.

Willick appealed her claim via formal letter dated April 19, 2004. AR 267. She received a response from Hartford dated January 31, 2005 [hereinafter the "Uphold Letter"], upholding the original denial of benefits. AR 510-15. This letter referenced and relied heavily upon an independent medical record review conducted by Dr. Shipko. AR 94-100.

## II. The Uphold Letter

The Uphold Letter adopts Dr. Shipko's conclusion that Willick had a "lack of ability to work through August 4, 2003, . . . [however] The evidence in the file beyond August 4, 2003 does not support severe psychiatric illness that would preclude functional capacity." AR 514. In other words, Willick was disabled until August 4, 2003, but thereafter she recovered sufficiently to be able to return to work.

The Uphold Letter focuses on four pieces of evidence cited by Dr. Shipko to justify his conclusion. They are: (1) the 8/4/03 office visit note of Ms. Ostrove-Greenberg, Plaintiff's therapist; (2) the 8/29/03 office visit note of Dr. Wong, Plaintiff's internist; (3) the 8/14/03 Report of Dr. Curtis, Plaintiff's psychiatrist, which was based on an examination on 8/6/03; and (4) the 4/8/04 report of Dr. Curtis.

Taken together, these four pieces of evidence were selectively cited out of context. All of Plaintiff's health care providers, Ostrove-Greenberg, Wong, and Curtis concluded prior to this evidence that Plaintiff was disabled. None of this evidence points to any changes in these conclusions. Instead, they paint a picture of one reviewing doctor, Dr. Shipko, nitpicking about what kind of evidence he would like to see. However, based on the Administrative Record, there is no evidence that Plaintiff recovered after 8/4/03 and is no longer disabled.

### A. The 8/4/03 Ostrove-Greenberg Note

The Uphold Letter claims that "[s]tarting in August of 2003, the records indicate improvement. The 8/4/03 OV [office visit] note of Ms. Ostrove-Greenberg indicates that the claimant was improving at that visit." AR 512.

However, all this note actually says is that "Pt. seemed a little less dysphoric." AR 446. This observation should be

understood in context; at the prior visit, on 7/28/03, Ostrove-Greenberg noted that Willick "had not been out of the house in four days. She did not take care of daily living activity (i.e. Shower). She cannot remember feeling this way before. . . . Walks when she is able to." AR 445. Ostrove-Greenberg, who had been treating Plaintiff since May 29, 2003, did not suggest that she had recovered to a level where she was capable of returning to work.

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**B. The 8/29/03 Wong Note**

After citing the 8/4/03 Ostrove-Greenberg note out of context, the Uphold Letter does the same in reference to a note from Dr. Wong, Plaintiff's internist. "The 8/29/03 OV note by Dr. Wong indicates improvement in mood as well." AR 512. Just as with the OV note from Ostrove-Greenberg, this note proves nothing. Along with noting a change in medications and a lab review, Dr. Wong simply wrote "Mood somewhat better" on the OV note. AR 176. This does not suggest a medical conclusion that Willick was ready to return to work. Furthermore, as her internist, Dr. Wong did not purport to treat Plaintiff for her psychiatric ailments.

**C. The 8/14/03 Report by Dr. Curtis Based on the 8/6/03 Examination**

After citing to the office visit notes by Ms. Ostrove-Greenberg and Dr. Wong, the Uphold Letter discusses a report by Dr. Curtis in some detail:

The 8/14/03 report based on an examination dated 8/6/03 indicates appropriate grooming and hygiene. The prolonged tearfulness noted by Ms. Ostrove-Greenberg was not present. Dr. Curtis provides a diagnosis of a lesser degree of depression. On the 8/14/03 report Dr. Curtis opines that the claimant had abnormal cognition but the report does not indicate that a formal mental status examination or neuropsychological testing has been performed . . . . AR 512. Emphasis added.

Upon examination, however, it is clear from the 8/14/03 report that there was indeed a mental status examination, along with significant testing. AR 386-401. Indeed, Dr. Shipko's observation that Plaintiff presented herself as "casually and appropriately dressed and groomed," is lifted from a section of the report entitled "Mental Status Examination." AR 391.

According to the report, this examination revealed that Plaintiff "exhibited abnormal behavior with manifestations of

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emotional withdrawal and ill-composed and depressive facial expressions." *Id.* Furthermore, Plaintiff "demonstrated diminished cognitive functioning in the clinical interview situation . . . . It appeared most likely that Ms. Willick's cognitive deficits were caused by overwhelmed psychological coping mechanisms." *Id.*

Additionally, despite Dr. Shipko's conclusions (repeated in the Uphold Letter), there were almost three full pages exploring psychological test results in the 8/14/03 report. AR 391-94 ("Overall, Ms. Willick's psychological test results were highly abnormal. The psychological testing revealed abnormality in all of the tests measuring emotional functioning."). According to this report, Plaintiff's Beck Depression Inventory score of 30 placed her in the "severe" range of subjective depression. The Beck Scale for Suicidal Ideation indicated that Plaintiff had "a need for emotional treatment to reduce or remove suicidal ideation." AR 392. Plaintiff was also evaluated under the Neuroticism Scale Questionnaire ("NSQ") and the Minnesota Multiphasic Personality Inventory ("MMPI-2"), the later of which indicated "highly abnormal" results. *Id.*

Finally, while apparently ignoring all of these data, Dr. Shipko again "cherry-picks" observations from the report which support his conclusion that Plaintiff had recovered by August 4, 2003, while ignoring observations which run counter to this conclusion. For instance, as noted earlier, Shipko and the Uphold Letter cite the 8/14/03 report as indicating "appropriate grooming and hygiene," (AR 512, 391), but ignores Dr. Curtis's conclusion elsewhere in the report that "[a]t present, it would not be possible to estimate, on a psychiatric basis, a return-to-work date for regular or modified work . . . . These estimates will be provided as soon as possible, presumably when Ms. Willick's psychiatric condition becomes closer to reaching permanent and stationary status." AR 397. No reasonable reading of Dr. Curtis's 8/14/03 report could suggest that Plaintiff had recovered from her condition by 8/4/03.

**D. The 4/8/04 Report by Dr. Curtis**

The last piece of evidence cited by the Uphold Letter and Dr. Shipko is a report from Dr. Curtis dated April 8, 2004, which according to the Uphold Letter, "indicates impairment in [Plaintiff's] ability to comprehend and follow instructions, to perform simple, routine, and repetitive tasks." However Shipko (and Hartford) state that "[i]t is inconsistent that [Curtis] describes the claimant as impaired in following simple, routine and repetitive tasks yet she was able to read and reply to the

567 questions on the MMPI scale,<sup>1</sup> as well as to complete the other testing."

While focusing on Plaintiff's ability to complete this very testing as evidence of her recovery, Dr. Shipko and the Uphold Letter ignore not only the results of the testing, but also Dr. Curtis's conclusions elsewhere in the report.

Curtis states that "[i]t would appear from the history and examination that Ms. Willick has been temporarily totally disabled on a psychiatric basis from her last day of work at Countrywide [] on or about 5/19/03 to the present and continuing." AR 230. Discussing test results, Curtis states that Plaintiff evinces "residual abnormal levels of anxiety, somatization, hopelessness and depression with fatigue, cognitive impairment, quick-temperedness [sic] and feelings of sadness. All of these factors would correlate with an overall marked degree of emotional impairment at about the 60% standard level." AR 231. Finally, Curtis predicts that if Plaintiff were to return to Countrywide, her "psychiatric condition would rapidly degenerate into worsened mental disorder in the areas of anxiety, depression, confusion, stress-related medical symptoms and panic attacks such that she would not be able to stay on the job for long." AR 234. Neither Dr. Shipko nor the Uphold Letter discuss any of these conclusions.

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<sup>1</sup>It is unclear which set of MMPI testing Shipko and the Uphold Letter are referring to. There is no discussion of MMPI testing in the 4/8/04 Curtis report (which the Uphold Letter purports to be discussing), however the Administrative Record indicates that Willick underwent MMPI testing on at least two occasions: first on August 6, 2003, in connection with the earlier 8/14/03 Curtis report, AR 392 ("The MMPI-2 . . . scores were highly abnormal."), and again on December 1, 2003, when a Dr. Kalechstein conducted the test in connection with an appeal of Plaintiff's denial of eligibility for State Disability Insurance. Kalechstein found that the "test resulted in a valid profile indicating that the claimant approached the test in a straight forward manner and was not intentionally exaggerating her symptoms or approaching the test in a dishonest way." AR 226. While Kalechstein concluded that Plaintiff "had recovered sufficiently . . . to enter the labor market," (*id.*), it was ultimately determined that Plaintiff "remains disabled and entitled to receive benefits," reversing the departmental denial of benefits. Of course, neither Dr. Shipko nor the Uphold Letter discuss any of this testing at all.

Defendants have pointed to no evidence to show that Plaintiff had improved (from a disability conceded by Dr. Shipko to have existed prior to August, 2003) sufficiently to be not disabled under the applicable definition. Instead, they sift through the record, selectively looking for statements to justify their conclusion while ignoring other contrary evidence, and disregarding the context of the statements made. Because it was based on a clearly erroneous finding of fact, Defendants' determination is an abuse of discretion. See Zavora v. Paul Revere Life Ins. Co., 145 F.3d 1118, 1123 (9th Cir. 1998) (holding plan administrator abused its discretion in finding plaintiff's disability was caused by "pre-existing condition" where such finding lacked "sufficient evidentiary basis").

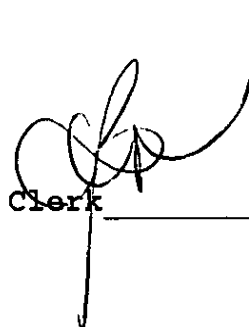
### III. Conclusion

Defendants' denial of Plaintiff's benefits is **REVERSED**.<sup>2</sup> Defendants shall pay Plaintiff the Long Term Disability benefits for the 24-month period. This case is **REMANDED** to the Plan Administrator for a determination, on a complete administrative record, whether Plaintiff is entitled to any further benefits under the Plan.

**IT IS SO ORDERED.**

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<sup>2</sup>In light of our determination that Defendants abused their discretion in denying benefits, we need not decide whether the appropriate standard of review is de novo.