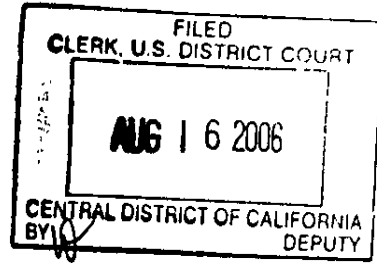
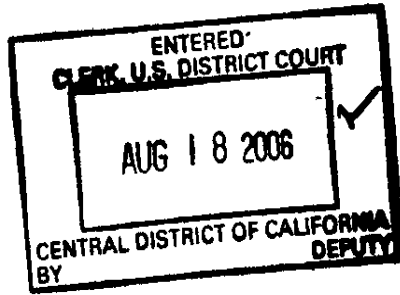


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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SAMUEL MALEK,

Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE
COMPANY; IBM LONG TERM
DISABILITY PLAN; IBM MEDICAL PLAN;
IBM LIFE INSURANCE PLAN; IBM
PENSION/RETIREMENT PLAN;

Defendants.

Case No. CV 04-4224-GPS (Mcx)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW;
JUDGMENT**

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

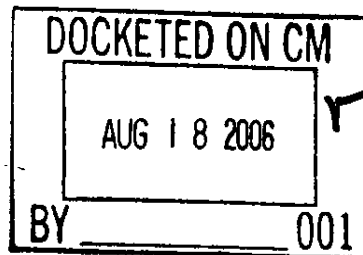
FINDINGS OF FACT

1. Prior to his leaving work on a disability, Mr. Malek worked for IBM. Because of his work with IBM, he was covered under a long term disability insurance policy issued by Metropolitan Life Insurance Company ("Met Life").

2. This Policy states that, for the first 12 months of disability payments—which is the period currently at issue—Mr. Malek would be disabled if he was unable to perform the duties of his specific job with IBM:

Under the Long-Term Disability Plan, totally disabled means that during the first 12 months after you complete the waiting period, you cannot perform the important duties of your regular occupation with IBM because of a sickness or injury.

(AR at 355).



47

1 3. The Policy is specific that, in determining whether Mr. Malek is disabled, Met
2 Life must determine whether he was capable of the actual tasks that Mr. Malek required
3 in the performance of his job with IBM. "Your regular occupation with IBM' means the
4 regular occupation you had with IBM as of your last day of active status." (AR at 355).

5 4. Since 1997 Mr. Malek has been working as a project manager for IBM.

6 5. Mr. Malek's occupation with IBM was high stress, high pressure job, requiring
7 60 hour work weeks, continuous travel, and the ability to transport 80 pounds of luggage
8 and equipment through airports. (AR at 170).

9 6. According to IBM, Mr. Malek "could be required to travel 100% of time, with
10 weekly trips home". (AR at 288).

11 7. Mr. Malek's cardiac problems first began to manifest while on a business trip
12 to Seattle in June of 2002, when he suffered a heart attack while sitting in his hotel room.
13 (AR at 273).

14 8. Mr. Malek immediately flew back to Los Angeles, where an EKG confirmed
15 his condition. He had a cardiac catheterization and angiography within a matter of days.
16 (AR at 039).

17 9. On June 21, 2002 Mr. Malek had cardiac surgery, and had four coronary
18 stents inserted. (AR at 039). Unfortunately this did not solve Mr. Malek's problems, as he
19 continued to suffer from shortness of breath, sleep problems and chest pain. (AR at 039,
20 137). On August 14, 2002 Mr. Malek's treating physician, Dr. Schatz opined that he was
21 no longer capable of working. (AR at 236-37).

22 10. In October of 2002 Mr. Malek sought evaluation from the Cleveland Clinic.
23 On October 28, 2002 he underwent another angiography, which showed that he continued
24 to have significant obstructions in his arteries, both at locations where stents had
25 previously been placed and also at different locations. (AR at 039). He had another
26 procedure, however he continued to suffer from fatigue, sleep disorders, swelling, and
27 chest and arm pain. (AR at 040; 220;192)).

28 11. Mr. Malek went on employer-funded short term disability, which was granted.

1 However, by April of 2003 those benefits were running out, so he filed a claim for long term
2 disability benefits. (AR at 022). His diagnosis was "recurrent angina" (i.e. chest pain or
3 discomfort that occurs when the heart muscle does not get sufficient blood). (AR at 280).

4 12. Mr. Malek's claim was supported by objective factors, including the two
5 angiograms (June, 02 and October, 02), the insertion of his stents (June, 02), the re-
6 stenting that was necessary (October, 02), the angioplasty (October, 02) and a pending
7 problem with an occlusion. (AR at 280). Mr. Malek suffered from "shortness of breath",
8 "internal bleeding", "muscle fatigue", "dizziness, drowsiness, stomach discomfort" and
9 "recurred angina." (AR at 280). Dr. Schatz opined that Mr. Malek had a "moderate
10 limitation of functional capacity", and a "marked limitation" in his cardiac condition, and that
11 he was "totally disabled" from "any occupation". (AR at 282).

12 13. On April 23, 2003, Mr. Malek submitted his claim for LTD benefits to Met Life.
13 (AR at 022).

14 14. On April 30, 2003, Mr. Malek sent Met Life the Attending Physician Statement
15 filled out by Dr. Schatz (AR at 280), as well as Dr. Schatz's reports of September 4, 2002
16 (AR at 283) and July 31, 2002 (AR at 286), both of which concluded that Mr. Malek was
17 disabled. On his facsimile cover sheet, Mr. Malek invited Met Life to contact Dr. Schatz
18 with any questions, and volunteered to assist in obtaining information from him. "If you
19 encounter difficulties, I'd be glad to help (he's available Wednesdays only in this office)!"
20 (AR at 278).

21 15. On May 12, 2003 there was a phone conversation between Ms. Martin of Met
22 Life and Mr. Malek. Ms. Martin said that if any additional medical information was needed
23 it would be requested directly from Dr. Schatz. Ms. Martin promised to keep Mr. Malek
24 informed. (AR at 002).

25 16. Later that day Ms. Martin sent Dr. Schatz a facsimile requesting some
26 additional medical information, specifically, recent office notes and testing results. (AR at
27 323). This document was supposedly copied to Mr. Malek, but the facsimile transmission
28 report shows only that it was sent to Dr. Schatz (AR at 322), and there is no evidence that

1 Mr. Malek was informed of the request.

2 17. Met Life did not follow up with its May 12th request to Dr. Schatz, either with
3 another facsimile or a phone call. It also did not ask Mr. Malek to assist in getting the
4 information, and it never informed Mr. Malek that it would deny his claim if Dr. Schatz's
5 failed to comply with Met Life's request.

6 18. Nonetheless, on June 17, 2003, Met Life decided to deny Mr. Malek's claim
7 due to Dr. Schatz's failure to respond. Mr. Malek was informed of the denial on June 18th,
8 in response to his chance inquiry about the status of his claim. (AR at 003).

9 19. Mr. Malek informed Met Life that he had never been informed of the request
10 to Dr. Schatz (AR at 003), and he provided the requested information by facsimile the
11 following day. (AR at 292-306). Met Life's internal records show that the receipt of this
12 information was docketed on June 20, 2003 (AR at 004).

13 20. In spite of the fact that it had already received the information it was
14 requesting, on June 23, 2003 Met Life issued a letter denying Mr. Malek's claim. (AR at
15 331).¹ There was a single ground for the denial, that Dr. Schatz hadn't provided the
16 medical information Ms. Martin had requested. (AR at 331-32).

17 21. After Met Life realized that it had already received the information it was
18 requesting, it re-activated Mr. Malek's claim and provided his file to a "nurse consultant".

19 22. Specifically, on July 3, 2003 Ms. Martin had a "walk up" consultation with an
20 in-house nurse, Blenda Wilson. (AR at 004). Nurse Wilson opined that she could see "no
21 indication of continued problems." (AR at 004).

22 23. Based entirely on this nurse's brief review, on July 7, 2003 Met Life denied
23 Mr. Malek's claim for a second time. (AR at 324). Met Life did not have a cardiologist, or
24 even a non-specialist physician, review the denial, and there is no indication that Nurse
25 Wilson had any training at all in cardiology, much less training sufficient for her to override
26

27
28 ¹ In spite of the date of the letter, the decision to release the denial letter
was apparently made the following day, on June 24, 2003.

1 the decision of Mr. Malek's treating physician. (AR at 004).

2 24. Facing financial pressures and with his short term benefits running out, on
3 June 23, 2003 Mr. Malek returned to work. (AR at 310).

4 25. On July 30, 2003 Mr. Malek asked Met Life to "identify any medical or
5 vocational experts whose advice was sought in connection with my claim." (AR at 314).

6 26. On September 8, 2003 Mr. Malek, through his counsel, filed a notice of
7 appeal (AR at 316), and provided additional medical evidence on February 9, 2004. (AR
8 at 020).

9 27. The new medical evidence included the opinion of a second physician,
10 cardiologist Marc Ehrich, that Mr. Malek was disabled. (AR at 039-42). Dr. Ehrich noted
11 Mr. Malek's condition as follows:

12 This 66-year-old male presents with an 18-month history of symptomatic
13 multivessel coronary artery disease requiring multivessel stenting, and
14 subsequent PTCA for in-stent restenosis. Current complaints include
15 fatigue, shortness of breath or dyspnea on exertion particularly when
16 carrying luggage on business trips, and frequent or nightly episodes of
17 nocturnal dyspnea or air hunger.

18 (AR at 041).

19 28. In order to issue his opinion, Dr. Ehrich obtained an understanding of Mr.
20 Malek's job, and tied his opinion regarding Mr. Malek's disability to that job description:

21 In my opinion, at the present time, it appears he is not able to comfortably or
22 (possibly) safely comply with the travel-related demands or stress of his job
23 at least until the above conflicting data and symptoms can be further
24 evaluated and a more definitive diagnosis determined.

25 (AR at 041-42).

26 29. Met Life submitted the new medical evidence for another medical review, this
27 time by an unidentified nurse consultant.

28 30. The review by Met Life's unknown nurse identified Mr. Malek's job—which
require 60 hour weeks, continuous travel and handling heavy luggage—as "sedentary" (AR
at 017).

31. The nurse noted the symptoms that Mr. Malek reported, but discounted them
as being unsupported by "objective" evidence. (AR at 017).

1 32. She (or he) found Mr. Malek not disabled largely on the basis that (he or she
2 believed) most persons suffering from a condition like Mr. Malek's would have recovered
3 in less time. (AR at 017).

4 33. There is no evidence in the record as to this nurse's qualifications, or the
5 extent of her knowledge as to the treatment and care of cardiac patients.

6 34. Met Life chose not to rely on this opinion. Rather, when the nurse reviewer
7 was going through Mr. Malek's medical records she came across indications that Mr. Malek
8 had returned to work. (AR at 017). This prompted Met Life to inquire of IBM whether Mr.
9 Malek was back working. (AR at 310).

10 35. The medical record that Met Life's nurse reviewed contained evidence that
11 Mr. Malek's medical condition made it difficult for him to do his job. In fact shortly after Mr.
12 Malek's return to work he described it to Dr. Schatz as "Hell". (AR at 082).

13 36. These records also show attempts by the treating physician to get IBM to
14 accommodate his job, for example suggesting a 4 day work week on November 5, 2003.
15 (AR at 059).

16 37. On January 28, 2004 Mr. Malek told his doctor that he was "still fatigued",
17 causing the physician to ask once again for a four day work week. (AR at 071; 043; 059).

18 38. Met Life ignored this evidence and also abandoned further medical review,
19 and utilized the fact that Mr. Malek had returned to work as the sole basis for denying Mr.
20 Malek's claim. In its April 23, 2004 letter it stated the following:

21 IBM advised our office that you returned to work on June 23, 2003. Since
22 your [short term benefits] expired on June 25, 2003 and your Long Term
23 Disability effective date was June 26, 2003, you are not eligible for LTD
24 benefits.

25 (AR at 329).

26 39. There was no other reason given for the denial. The letter required Mr. Malek
27 to appeal yet again before he could seek judicial relief. (AR at 329).

28

CONCLUSIONS OF LAW

1
2 40. This Court has original jurisdiction of this action pursuant to 28 U.S.C. §1337
3 and 29 U.S.C. §1332(e) because Mr. Malek is claiming disability under the Employee
4 Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a).

5 41. ERISA is a "comprehensive and reticulated statute," *Nachman Corp. v.*
6 *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361-62 (1980), designed to make the
7 regulation of employee benefit plans "exclusively a federal concern," *Pilot Life Ins. Co. v.*
8 *Dedeaux*, 481 U.S. 41, 46 (1987) (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S.
9 504, 523 (1981)).

10 42. Venue is properly laid within the Central District of California pursuant to 29
11 U.S.C. §1332(e)(2) because the acts complained of have occurred within this district.

12 43. Both parties have presented evidence from outside the Administrative
13 Record. The Court finds that none of this evidence is necessary for it to properly decide
14 this case, and the Court will therefore decide this case on the Administrative Record alone.
15 *Taft v. Equitable Life Assurance Soc'y*, 9 F.3d 1469, 1472 (9th Cir. 1993); *Mongeluzo v.*
16 *Baxter Travenol Long Term Disability Benefit Plan*, 46 F.3d 938, 943-44 (9th Cir. 1995).

17 44. Met Life's request that Mr. Malek's claim be dismissed for failure to exhaust
18 administrative remedies is denied. Prior to the final denial Met Life had denied Mr. Malek's
19 claim twice before, on differing grounds, requiring Mr. Malek to appeal. But DOL
20 regulations, specifically 29 C.F.R. § 2560.503-1(c)(2) (made applicable to disability plans
21 under 29 C.F.R. § 2560.503-1(d)) state that claims procedures requiring more than two
22 appeals prior to permitting a judicial remedy are unreasonable as a matter of law. By
23 purporting to require that Mr. Malek appeal from this third denial, Met Life was acting in
24 violation of that regulation.

25 45. The parties agreed that the only substantive issue before this Court is the
26 validity of the third denial, which is Met Life's determination that Mr. Malek could not be
27 disabled because he was able to show up at work. This was the only basis listed in the
28 final denial, and the DOL regulation expressly requires the denial notification to state "[t]he

1 specific reason or reasons for the adverse determination." 29 CFR § 2560.503-1. See
2 also *Juliano v. Health Maintenance Org. of New Jersey, Inc.*, 221 F.3d 279, 287 (2d Cir.
3 2000) ("The purpose of the 'full and fair review' requirement is to provide claimants with
4 enough information to prepare adequately for further administrative review or an appeal
5 to the federal courts."); *Booton v. Lockheed Medical Ben. Plan*, 110 F.3d 1461, 1463 (9th
6 Cir. 1997) ("If benefits are denied in whole or in part, the reason for the denial must be
7 stated in reasonably clear language, with specific reference to the plan provisions that form
8 the basis for the denial").

9 46. Met Life's "logical leap" from Mr. Malek's return to work to the conclusion that
10 Malek was not disabled is fatally flawed. Numerous Courts have rejected the conclusion
11 that attendance at work equates with no disability. In *Radford Trust v. First Unum Life Ins.*
12 *Co. of Am.*, 321 F.Supp.2d 226, 246 (D. Mass. 2004) (*abrogated on other grounds by*
13 *Orndorf v. Paul Revere Life Ins. Co.*, 404 F.3d 510, 517 n.8 (1st Cir. 2005)), the Court
14 referred to this argument as "pure sophistry:"

15 First Unum tried to trap Doe in a Catch-22, arguing that because Doe
16 maintained that he continued to work full time through at least May 21, 1999,
17 he could not have been "disabled" during that period. This was pure
18 sophistry.

19 *Id.*

20 47. As the *Radford* court noted, the issue in making a disability determination is
21 whether the claimant can perform his or her material duties, not whether he or she is
22 showing up for work:

23 First Unum conflated the definitions of "disability" and "active employment."
24 "Active employment" merely required that the employee work full-time at
25 regular pay, or at least thirty hours per week at [the employer's] office or any
26 place [the employer] required an employee to travel. The definition in no way
27 required that work done during this time be satisfactory, or that the employee
28 be productive.

29 *Radford*, 321 F.Supp.2d at 247.

30 48. Numerous other courts have agreed that a claimant's return to work by itself
31 does not support a finding that the claimant is not disabled. *Gen. Am. Life Ins. Co. v.*
32 *Yarbrough*, 360 F.2d 562, 566 (8th Cir. 1966) (the law does not "require one to perform

1 duties at the peril of his life or health; nor to perform them if their performance entails pain
2 and suffering which a person of ordinary prudence and fortitude would be unwilling and
3 unable to endure"); *Whatley v. CNA Ins. Companies*, 189 F.3d 1310 (11th Cir. 1999)
4 (rejecting insurer's argument "that appellant could not have been totally disabled if he was
5 able to come to work, perform some of the tasks assigned, and obtain a paycheck");
6 *Wilcox v. Sullivan*, 917 F.2d 272, 277 (6th Cir. 1990) ("Wilcox should not be penalized
7 because he had the courage and determination to continue working despite his disabling
8 condition").

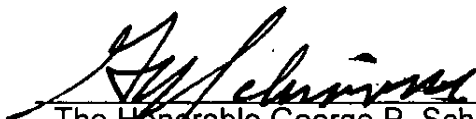
9 49. The key to whether Mr. Malek was entitled to disability benefits was whether,
10 because of his heart condition, he was unable to "perform the important duties of [his]
11 regular occupation with IBM." When it denied his claim Met Life made no attempt to
12 determine this issue. Further, the basis on which Met Life did rely on denying Mr. Malek's
13 claim, that he could not be disabled because he had returned to work, is flawed as a matter
14 of law.

15 50. Accordingly, Met Life's denial of Samuel Malek's claim for disability benefits
16 is **REVERSED**. However, the Court is not, by this Order, deciding that Mr. Malek is entitled
17 to benefits - rather, the matter is **REMANDED** to Met Life for handling consistent with these
18 Findings of Fact and Conclusions of Law.

19 51. The Court finds that Samuel Malek is the prevailing party. Mr. Malek is
20 entitled to the costs of this lawsuit, and he may make application for an award of attorney
21 fees within 20 days of the filing date of these Findings of Fact and Conclusions of Law.

22
23 LET JUDGMENT BE ENTERED ACCORDINGLY.

24
25 DATED: August 16, 2006

26 
27 The Honorable George P. Schiavelli
28 United States District Judge