

1 Mental or Nervous Disorder Limitation would apply under the circumstances.

2 **BACKGROUND**

3 On April 19, 2010 Plaintiff commenced this action by filing a complaint for relief
4 under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C.
5 §1001 et seq. Plaintiff seeks disability income insurance benefits under the Plan that
6 were allegedly wrongfully terminated by Defendants. MetLife paid disability benefits
7 to Plaintiff from October 9, 2007 to November 20, 2008 when it determined, based
8 largely upon a neuropsychological examination prepared by Dr. Mark McDonough, that
9 Lacy was not disabled within the meaning of the Policy.

10 Plaintiff argues that MetLife abused its discretion when it terminated benefits
11 under the Policy. Plaintiff seeks an award of back benefits and reinstatement of
12 monthly benefits or, alternatively, a remand to the Plan administrator for further
13 consideration and inquiry. MetLife responds that the decision is supported by
14 substantial evidence and, alternatively, seeks remand to the Plan administrator for
15 further consideration, including application of the 24-month limitation for mental or
16 nervous disorders.

17 **The Policy**

18 The policy provides that Lacy will be paid a monthly benefit of 60% of his pre-
19 disability earnings, less any offsets for other qualifying income, up to age 65 if disabled,
20 defined as:

21 “Disabled” or “Disability” means that, due to sickness, pregnancy or
22 accidental injury, you are receiving Appropriate Care and Treatment from
23 a Doctor on a continuing basis and you are unable to earn more than 80%
of your Predisability Earnings of Indexed Predisability Earnings at your
Own Occupation for any employer in your Local Economy.

24 (Administrative Record, “AR” 709). The Plan also contains a 24-month limitation for
25 certain conditions, defined as:

26 **Limitation for Disabilities Due to Particular Conditions.** Monthly
27 Benefits are limited to 24 months during your lifetime if you are Disabled
28 due to a Mental or Nervous Disorder or Disease, unless the Disability
results from:

1. schizophrenia;

- 1 2. bipolar disorder;
- 2 3. dementia; or
- 3 4. organic brain disease.

4 “Mental or Nervous Disorder or Disease means a medical condition of
5 sufficient severity to meet the diagnostic criteria established in the current
6 Diagnostic And Statistical Manual of Mental Disorders. You must be
receiving Appropriate Care and Treatment for your condition by a mental
health Doctor.

7 (AR 718).

8 The Policy also grants the administrator discretionary authority over the Plan.

9 The pertinent provision provides:

10 **Discretionary Authority of Plan Administrator and Other Plan**
11 **Fiduciaries**

12 In carrying out their respective responsibilities under the Plan, the Plan
13 Administrator and other Plan fiduciaries shall have discretionary authority
14 to interpret the terms of the Plan and to determine eligibility for and
entitlement to Plan benefits in accordance with the terms of the Plan. Any
interpretation or determination made pursuant to such discretionary
authority shall be given full force and effect, unless it can be shown that
the interpretation or determination was arbitrary and capricious.

15 (AR 732-33).

16 **The Administrative Record**

17 By way of general background, Lacy graduated high school with a 4.0 grade
18 point average, served as president of his high school class, and graduated from
19 Oklahoma State University with a 3.2 grade point average. At relevant times, Lacy
20 was a territory sales manager for American Biltrite, Inc., Tape Products Division (high-
21 tech tape products). The job description for the territory sales manager is extensive.
22 The responsibilities include maintaining customer relationships, obtaining and
23 maintaining the confidence of customers, development of new customers, achieving
24 sales quotas, working jointly in a team with sales personnel, and participation in trade
25 shows. (AR 679-681). The three-page job description also requires the territory sales
26 managers to engage in extensive administrative duties including the preparation of
27 weekly call and expense reports, monthly reports, sales forecasts, and detailed travel
28 plans.

1 On August 9, 2002, while entertaining clients on the golf course, Lacy suffered
2 a traumatic head injury when struck in the right temple by an errant golf shot. (AR
3 534). A CT Scan on August 13, 202 revealed a contusion in the right temple area and
4 some free blood noted in the fissure. (AR 536). Lacy experienced post-concussive
5 symptoms, including memory loss, word-finding and concentration difficulties,
6 emotional lability, and aches and pains. (AR 254).

7 In 2004, having not fully recovered from his post-concussive symptoms, Lacy
8 sought and received biofeedback treatment for his pain. (AR 254). By 2006, Lacy
9 continued to experience pain, anxiety, and depression and was admitted to St. Jude
10 Medical Center Pain Management Program complaining of daily headaches. (AR 660-
11 61). He reported difficulties with distractability, diminished endurance, attention, and
12 information processing. On April 21, 2006 Lacy was admitted to Mission Hospital for
13 three days for “intractable headache with nausea and vomiting. (AR 532). Two days
14 later, he returned to the hospital with similar headaches that had not been relieved by
15 Vicodin, Imitrex, or Demerol. (AR 528). He was then admitted to the Progressive Care
16 and Stroke Unit for pain control. Shortly thereafter, on May 11, 2007, Lacy’s condition
17 worsened and he stopped working. He has been unable to return to work since that
18 time.

19 In October 2007 Lacy underwent a comprehensive neuropsychiatric evaluation
20 that included neuropsychological testing and SPECT Imaging studies. The
21 neuropsychological testing demonstrated problems in oral expressive language,
22 abstraction, organization, sensory integration issues, writing, memory and receptive
23 language. (AR 206-08). The evaluating physician, Alexis Meshi, M.D., then referred
24 Lacy to neurologist Marc Kosins, M.D.

25 Dr. Kosins, who had seen Lacy on about 14 occasions for 30-45 minutes each
26 visit, diagnosed Lacy with “closed head injury - depression - pain - anxiety” and noted
27 that he was restricted from “sustained concentration, multitasking.” (AR 542). Dr.
28 Kosins noted that Lacy suffers from chronic head pain and it intensifies if subjected to

1 stress - "He could not work with a supervisor, be persistent or deal with a schedule."

2 Dr. Kosins provided the following summary of Lacy's condition:

3 "What is really relevant is that he was functioning normally until he was
4 hit in the head. Since that time he has been hospitalized, in chronic pain,
5 unable to process information well and is so easily overwhelmed that he
6 now depends on his wife to help make even the simplest life decisions. He
can't socialize or be in a room with more than 4 friends. He becomes
overwhelmed in crowds of people and does not go out with people or try
to engage in conversations that are complex for fear of going crazy. . ."

7 (AR 451).

8 **The Request for Disability Benefits**

9 On November 8, 2007 Lacy completed MetLife's Long Term Disability Claim
10 Form. Lacy's claim was accompanied by an Attending Physician's Statement prepared
11 by Janet Yazdi, M.D., Lacy's primary care physician. (AR 525-27). Identifying both
12 physical and psychological functional limitations, Dr. Yazdi concluded that Lacy "is
13 so debilitated by his headaches he would be unable to concentrate enough to carry out
14 a regular job." Based upon Dr. Yazdi's extensive treatments of Lacy, she concluded
15 that he suffers from severe limitations due to psychological, physiological, and social
16 adjustment issues. (AR 526).

17 Following review by a physician consultant, on March 18, 2008 MetLife
18 concluded that Lacy was disabled within the meaning of the policy and commenced
19 monthly payments to Lacy. (AR 471). On July 22, 2008 MetLife informed Lacy that
20 it had determined that his claim should be considered a limited disability benefit subject
21 to the 24-month payment limitation because it was due to a mental or nervous disorder
22 as those terms are defined in the Policy. (AR 446-47).

23 In light of the 24-month limitation identified by MetLife in its letter, on August
24 2, 2008 Dr. Kosins responded by letter to indicate that he disputed MetLife's
25 classification of Lacy's disability as a mental or nervous disorder. (AR 444-45). Dr.
26 Kosins indicated that the primary reason for Lacy's disability was a closed head injury,
27 and not depression. Id.

28

The Independent Medical Examination

On August 29, 2008 MetLife requested that Lacy undergo an Independent Medical Examination (“IME”) to clarify his primary diagnosis. (AR 390). Dr. Mark McDonough, a neuropsychologist at Scripps Hospital, conducted an IME on September 15, 2008 and issued a report four days later. (AR 367-77). Dr. McDonough made the following findings: On tests for attention and concentration, Lacy scored in the 21st percentile, which is within the lower range of normal; on tests for memory functioning, Lacy scored in the 3rd to the 42nd percentile; on tests for intellectual functioning, Lacy scored within the 3rd and 32nd percentile, which is within the lower average range; and on IQ tests, Lacy scored an 89, which is also within the low average range.¹ Based upon the Test of Malingered Memory, Dr. McDonough opined that the results “suggest that Mr. Lacy was misportraying his memory impairment.” (AR 373). Dr. McDonough expressed concern regarding the patient’s memory endorsements but added that Lacy’s symptoms were not believed to be intentionally produced or feigned. (AR 375). In making his diagnosis, Dr. McDonough did not consider Lacy’s history of severe pain arising from the injury: “It is the patient’s contention that physical pain is a significant barrier to his return to his occupation and I am not qualified to comment expertly on his pain per se.” (AR 377).

MetLife then provided Dr. Kosins with a copy of the IME. Dr. Kosins disagreed with many of the conclusions reached by Dr. McDonough. Dr. Kosins noted that Lacy scored in a less than the 50th percentile bracket on the most important tests and, in several instances, less than the 25th percentile. Accordingly to Dr. Kosins, these low scores were overlooked, disregarded, or dismissed. The scores were consistent with cognitive deficits that he had observed and diagnosed over several visits. While the IME noted that Lacy could drive and travel, Dr. Kosins noted that Lacy “can’t do his check book, can’t shop for a meal, can’t prepare a whole meal for the family, needs his

¹ In evaluating Lacy’s psychiatric functioning, Dr. McDonough noted, “To his credit, the patient’s endorsements on the Validity Indicator Profile suggested both valid overall subtest performances across both nonverbal and verbal areas as well as compliant response style.” (AR 349).

1 wife's help for most any complicated and even basic tasks that he used to do with no
2 assistance." (AR 217). In Dr. Kosins' opinion, Lacy is incapable of performing his
3 previous position as a territory sales manager or any other job for that matter. (AR
4 221).

5 On October 23, 2008 Dr. McDonough responded to Dr. Kosins' comments. In
6 large part, Dr. McDonough reiterates that Lacy functions in the low average range for
7 attention and concentration, IQ, and possesses borderline verbal fluency. (AR 318-24).
8 Dr. McDonough also highlighted that Lacy could play tennis about 90 minutes per week
9 without debilitating pain. In his assessment, Dr. McDonough noted one major
10 limitation:

11 Lastly, it should be clarified that I did not opine that the patient could
12 return in his prior job and/or without any compensations. Rather, the last
13 paragraph of my report notes that pain is a significant barrier and deferred
14 to experts in that field. I believe that although he may be able to return to
15 work in some capacity, that there would be necessary compensations and
diminished work load as a part of that consideration. Moreover, the
addition of his psychological issues will thwart a successful return until
these issues are successfully addressed and treated; apparently the very
area that Dr. Kosins is working on with Mr. Lacy.

16 (AR 324).

17 On November 19, 2008 MetLife informed Lacy that it was terminating all
18 benefits as it had concluded that Lacy was not disabled within the meaning of the
19 Policy. (AR 301)

20 **The Administrative Appeal**

21 On January 26, 2009 Lacy appealed MetLife's adverse claim determination.
22 Lacy submitted a report from a reexamination by Dr. Sterman, a neurologist, provided
23 an updated EEG, and submitted a report by Dr. Amen. Dr. Sterman, who had treated
24 Lacy in 2004, opined that the results of his testing in February 2009

25 . . . revealed a significant behavior and physiological regression at the
26 present time. . . The most likely explanation of This (sic) regression is the
27 possibility of progressive pathology. Recent findings indicate clearly that
28 progressive molecular changes associated with cell damage in head injury
cases are common and can contribute to continued physical and behavioral
change.

Dr. Sterman also opined that the EEG demonstrates localized cortical disturbances,

1 consistent with Lacy's head injury. "Comparison with our earlier final evaluation of
2 Mr. Lacy revealed a significant behavioral and physiological regression at the present
3 time." (AR 291).

4 The Amen report, dated October 8, 2007, notes that Lacy was taking several
5 medications for his medical conditions: Methadone, Norco, Cymbalta, Valium,
6 Celebrex, Amerge, and Imitrex. (AR 203). The report indicated that Lacy suffered
7 from anxiety disorder, blood disorder, attention deficit disorder, and suffered from head
8 trauma. (AR 202-16). The report also noted that Lacy had been hospitalized on four
9 separate occasions and received treatment five times in the emergency room for
10 convulsions and pain.

11 MetLife also referred the file for review by an Independent Physician Consultant,
12 Keven Anne Murphy, Ph.D. (licensed psychologist with a specialty in
13 neuropsychology). In large part, Dr. Murphy opined that the medical records
14 demonstrate some exaggeration in Lacy's condition and that "there is not sufficient
15 evidence to support functional limitations from a cognitive or psychiatric perspective."
16 (AR 192). MetLife also requested another Independent Physician Consultant, Steven
17 McIntire, M.D. (a board-certified neurologist), to review Lacy's file. Based upon a
18 review of the records, Dr. McIntire concluded that there was a "paucity of treatment
19 records from 2008 and 2009 . . . to substantiate an intractable headache disorder." (AR
20 181). Based upon this record, on June 29, 2009 MetLife denied Lacy's appeal. (AR
21 171-73).

22 DISCUSSION

23 Legal Standard

24 The standard for judicial review of decisions by plan administrators under ERISA
25 is set forth in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). In the case
26 where the plan grants the administrator discretionary authority to determine eligibility
27 for benefits, the review is for abuse of discretion. Taft v. Equitable Life Assurance
28 Soc., 9 F.3d 1469, 1473 (9th Cir. 1993).

1 While both parties agree that the abuse of discretion standard applies to the
2 administrator's determinations, the parties dispute the degree of deference owed to the
3 administrator's determinations. The Ninth Circuit recently addressed the amount of
4 discretion afforded the plan administrator's determinations where there is a conflict of
5 interest arising from the insurer's dual role as both plan administrator and funding
6 source for benefits.

7 [E]xactly how much discretion is afforded under the abuse of discretion
8 standard for ERISA claims varies if a plan administrator faces a "structural
9 conflict of interest: since it is also the insurer, benefits are paid out of the
10 administrator's own pocket, so by denying benefits, the administrator
11 retains money for itself." Montour v. Hartford Life & Accident Ins. Co.,
12 588 F.3d 623, 630 (9th Cir. 2009). When a conflict exists, review is still
13 performed under an abuse of discretion standard, but the analysis is more
14 complex. Id. at 631 ("These cases should not be mistaken to imply that
15 the existence of a conflict of interest alters the standard of review itself,
16 rather than merely its application."); Abatie v. Alta Health & Life Ins. Co.,
17 458 F.3d 955, 965 (9th Cir. 2006) (en banc) ("[T]he existence of a conflict
18 of interest is relevant to how a court conducts abuse of discretion
19 review.").

20 "[T]he court must consider numerous case-specific factors,
21 including the administrator's conflict of interest, and reach a decision as
22 to whether discretion has been abused by weighing and balancing those
23 factors together." Montour, 588 F.3d at 630. The weight assigned to the
24 conflict of interest factor depends on the circumstances of each case, as
25 explained by the Supreme Court in MetLife:

26 The conflict of interest at issue here, for example, should
27 prove more important (perhaps of great importance) where
28 circumstances suggest a higher likelihood that it affected the
benefits decision, including, but not limited to, cases where
an insurance company administrator has a history of biased
claims administration. It should prove less important
(perhaps to the vanishing point) where the administrator has
taken active steps to reduce potential bias and to promote
accuracy, for example, by walling off claims administrators
from those interested in firm finances, or by imposing
management checks that penalize inaccurate decisionmaking
irrespective of whom the inaccuracy benefits.

554 U.S. at 117 (internal citations omitted). Thus, we are to treat the
existence of a conflict of interest as "a factor to be weighed, adjusting the
weight given that factor based on the degree to which the conflict appears
improperly to have influenced a plan administrator's decision." Montour,
588 F.3d at 631.

27 Renfro v. The Funky Door Long Term Disability Plan, - F.3d - , 2012WL2216727 (9th
28 Cir. June 18, 2012).

1 A plan administrator abuses its discretion where, among other things, (1) a
2 decision is rendered without explanation, (2) the plan is construed in a manner that
3 conflicts with the plain language of the plan, or (3) a decision relies on clearly
4 erroneous findings of fact. See, Wells v. Reliance Std. Life Ins. Co., 285 Fed.Appx.
5 343 (9th Cir. 2009); Snow v. Standard Ins. Co., 87 F.3d 327., 3331 (9th Cir. 1996).

6 **The Benefits Determinations**

7 The court concludes that the Plan administrator abused its discretion in two
8 material respects. First, the record does not indicate that the administrator considered
9 the well-documented and considerable evidence presented by Lacy's treating physicians
10 that he suffered, both subjectively and objectively, significant and debilitating pain.
11 The administrative record reveals that Lacy has been hospitalized on three different
12 occasions and treated in the emergency room five times for convulsions and pain. The
13 record also reveals that Lacy was taking significant pain medications, including
14 Vicodin, Imitrex, Demerol, Methadone, Celebrex, Percocet, Tylenol and Depakote.
15 (AR 203, 528). The record also reveals that Lacy was admitted to the Progressive Care
16 and Stroke Unit for pain control for six months (outpatient), (AR 530), and has
17 repeatedly been treated for pain. (AR 450-52).

18 The court notes that the IME prepared by Dr. McDonough, and relied upon by
19 MetLife in concluding that Lacy was not disabled, specifically did not consider the
20 extensive evidence of pain. The IME report stated: "It is the patient's contention that
21 physical pain is a significant barrier to his return to his occupation and I am not
22 qualified to comment expertly on his pain per se." (AR 377). Finally, the court notes
23 that an Independent Physician Consultant hired by MetLife, Dr. McIntyre, noted the
24 extensive pain medications taken by Lacy, but did not opine on the impact of Lacy's
25 disabling and chronic pain resulting from his injuries. (AR 178-182). Nor did Dr.
26 McIntyre address Dr. McDonough's finding that disabling pain was Lacy's "greatest
27 area of impairment in terms of occupation and social functioning." (AR 349). Where
28 the administrator fails to consider and address the substantial evidence of disabling

1 pain, like that identified in the administrative record, discretion is abused.

2 Second, there is no evidence in the administrative record concerning Lacy's
3 physical and psychological limitations on his ability to perform his work-related
4 responsibilities as a territory sales manager. The court highlights that the issue is not
5 whether Lacy may be gainfully employed, but whether, under the terms of the Policy,
6 he is able to earn more than 80% of his salary as a territory sales manager "for any
7 employer." (AR 709). The overwhelming weight of the record demonstrates that Lacy
8 was not capable of performing his duties as a territory sales manager because of his
9 disability.

10 In November 2007, Lacy's primary care physician, Dr. Yazdi, opined that Lacy
11 was so debilitated that he could not concentrate or perform a regular job, let alone the
12 duties of a territory sales manager. (AR 525-27). In June 2008, another treating
13 physician, Dr. Kosins, indicates that Lacy is unable to perform relatively simple tasks
14 like keeping appointments without the assistance of his wife. (AR 450-52). Moreover,
15 as established by the neurological testing performed under the direction of Dr.
16 McDonough, Lacy performed relatively poorly on standardized tests. In attention and
17 concentration, Lacy scored in the 21st percentile, which is within the lower range of
18 normal; on tests for memory functioning, Lacy scored in the 3rd to the 42nd percentile;
19 on tests for intellectual functioning, Lacy scored within the 3rd and 32nd percentile,
20 which is within the lower average range; and on IQ tests, Lacy scored an 89, which is
21 within the low average range.²

22 Lacy's occupational duties demand a highly functional, organized, concentrated,
23 and multitasking individual. (AR 679-81). The job description for a territory sales
24 manager requires the sales manager to interact with potential distributors and analyze
25 potential markets, availability of credit, and other factors. The sales manager must
26 conduct annual sales meeting with distributors, train sales representatives, and assist

27
28 ² The court notes that Dr. McDonough opined that the results "suggest that Mr. Lacy was misportraying his memory impairment." (AR 373). However, Dr. McDonough added that Lacy's symptoms were not believed to be intentionally produced or feigned. (AR 375).

1 them in closing sales and obtaining orders. At all times, the sales managers must
2 provide the distributors with sales support, participate in trade shows, deal with quality
3 issues, identify new markets, communicate effectively with company management,
4 resolve product issues as they arise and follow up on sales leads. Further, the sales
5 manager possesses significant administrative duties. Significant travel is also required.

6 Id.

7 Lacy's treating physicians, as discussed above, uniformly agree that Lacy is
8 simply not capable of functioning at the level required of a territory sales manager. (AR
9 525-27; 450-52). Moreover, Dr. McDonough opined that Lacy is not capable of
10 performing the duties of a territory sales manager.

11 I believe that although he may be able to return to work in some capacity,
12 that there would be necessary compensations and diminished work load
13 as a part of that consideration. Moreover, the addition of his psychological
14 issues will thwart a successful return until these issues are successfully
15 addressed and treated; apparently the very area that Dr. Kosins is working
16 on with Mr. Lacy.

17 (AR 324). To say that Lacy "may be able to return to work in some capacity" does not
18 come close to establishing that Lacy is capable of carrying out the duties and
19 responsibilities of a territory sales manager. The court notes that there is not a scintilla
20 of evidence in the administrative record that Lacy is capable of performing at the high
21 functional level demanded of a territory sales manager position. Under these
22 circumstances, the Plan administrator abuses its discretion in failing to address whether
23 Lacy is capable of performing his occupation as a territory sales manager.

24 In sum, the court finds that the administrator abused its discretion in determining
25 that Lacy was not disabled within the meaning of the Policy.

26 **The Remedy**

27 Lacy seeks a retroactive award of benefits to the present time. Where "an
28 administrator terminates benefits as a result of arbitrary and capricious conduct, the
claimant should continue receiving benefits until the administrator properly applies the
plan's provisions." Pannebecker v. Liberty Life Asur. Co. of Boston, 542 F.3d 1213,
1221 (9th Cir. 2008). Here, in light of the arbitrary and capricious termination of

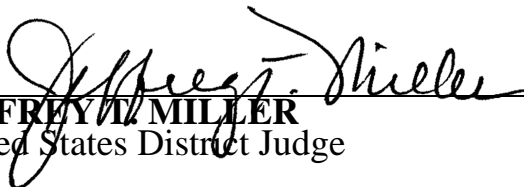
1 benefits, the court awards benefits to Lacy through, at least, the date of entry of this
2 order. The court notes that MetLife terminated benefits not because of the 24-month
3 limitation but, rather, on account of the determination that Lacy was not disabled within
4 the meaning of the Policy. Whether Lacy is subject to the Mental or Nervous Disorder
5 Limitation is an issue for the Plan administrator to determine in the first instance, and
6 not this court.³

7 Finally, the court notes that Lacy requests an award of attorney's fees. (Ct. Dkt.
8 1 at p.4:22). Pursuant to 29 U.S.C. §1132(g)(1), the court may award reasonable
9 attorney's fees and costs. The court informs the parties that any motion for an award
10 of attorney's fees and costs must be presented within 30 days of entry of this order.

11 In sum, the court finds that the Plan administrator abused its discretion in
12 terminating disability benefits to Lacy, awards benefits through, at least, the date of
13 entry of this order, remands for purposes of determining (1) whether Lacy is under an
14 on going disability and (2) whether the Mental or Nervous Disorder Limitation applies
15 under the present circumstances, and instructs the Clerk of Court to close the file.

16 **IT IS SO ORDERED.**

17 DATED: July 2, 2012

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19 
20 **JEFFREY M. MILLER**
United States District Judge

21 cc: All parties

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³ In awarding benefits through the present date, the court notes that the present record is woefully inadequate to support a finding that the closed head injury suffered by Lacy falls within the Mental or Nervous Disorder Limitation.