

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MARILYN McILHANEY,
Plaintiff(s),

vs.

ANTHEM LIFE INSURANCE
COMPANY LONG TERM DISABILITY
PLAN; ANTHEM LIFE INSURANCE
COMPANY LIFE INSURANCE PLAN,
ANTHEM LIFE INSURANCE
COMPANY IN ITS CAPACITY OF
ADMINISTRATOR OF THE ANTHEM
LIFE INSURANCE COMPANY LONG
TERM DISABILITY PLAN,
Defendant(s).

Case No. CV 09-3887 CAS (PJWx)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

INTRODUCTION

This matter came on for trial to the Court on June 11, 2010. Tracy Collins, of the Law Offices of Tracy Collins appeared for plaintiff Marilyn McIlhaney, and Brian M. Stolzenbach of Seyfarth Shaw LLP appeared for defendants Anthem Life Insurance Company Long Term Disability Plan, Anthem Life Insurance Company Life Insurance Plan, Anthem Life Insurance Company, in its capacity of Administrator of the Anthem Life Insurance Company Long Term Disability Plan.

1 This case involves two separate claims under the Employee Retirement Income
2 Security Act, 29 U.S.C. 1001, et seq. (“ERISA”). The first is a claim for benefits under
3 an ERISA plan pursuant to Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B).
4 The second is a claim for monetary penalties under Section 502(c)(1) of ERISA, 29
5 U.S.C. § 1132(c)(1), for an alleged failure to provide plan documents to a plan
6 participant as required by the statute.

7 Plaintiff seeks recovery of long term disability benefits and continued life
8 coverage under waiver of the premium under ERISA-governed, self-funded employee
9 benefit plan sponsored by Anthem Insurance Companies, Inc. Although plaintiff was
10 approved for short term disability work after she left work on September 28, 2007, she
11 was denied long term disability benefits.

12 At issue are four plan documents, a certificate for LTD benefits (AR 1-35), a
13 certificate for life coverage (AR 36-58), a Summary Plan Description (“SPD”) for STD
14 (AR 769-782) and an SPD for the Wellpoint Flexible Benefits Plan, which incorporates
15 LTD and life benefits, but not STD (AR 448-480).

16
17 **FINDINGS OF FACT**

18 **I. Plaintiff Marilyn McIlhaney and the WellPoint Flexible Benefits Plan.**

19 1. Plaintiff Marilyn McIlhaney was employed by WellPoint as a Senior
20 Project Manager and, as a result of that employment, was a participant in the WellPoint
21 Flexible Benefits Plan ("the Plan").¹ (AR 207.)

22 2. The Plan provides various benefits through various component Benefit
23 Programs, including, among several others, a Long Term Disability (LTD) Benefit
24

25 ¹Although the Complaint alleges two separate benefit plans called the “Anthem Life
26 Insurance Company Life Insurance Plan” and the “Anthem Life Insurance Company Long
27 Term Disability Play,” the parties have stipulated that there is but one single benefit plan
28 at issue and that its correct name is the “WellPoint Flexible Benefits Plan.” (Dkt. Entry
No. 25.).

1 Program ("the LTD Program") and an Associate Group Life, Accidental
2 Death/Disability Benefit, and Dependent Life Program ("the Life Program"). (AR 453.)
3 This lawsuit involves claims by plaintiff for LTD benefits and life insurance benefits
4 under the Plan; therefore, only the LTD and Life Programs are relevant to the case.

5 3. The terms of the LTD and Life Programs are described in separate
6 documents, which (along with descriptions of the various other component benefit
7 programs) are incorporated into the overarching plan document by reference. (AR 453
8 ["Each of the component Benefit Programs . . . is described in its summary plan
9 description. The summary plan descriptions for the Benefit Programs are incorporated
10 into this Plan and are available on the HR intranet site."]; AR 1-35 [LTD Program
11 summary plan description]; AR 36-58 [Life Program summary plan description].)

12 4. The LTD Program provides for disability payments to eligible participants
13 beginning only after the individual has been continuously disabled for an "elimination
14 period" of 180 days. (AR 4, 17.)

15 5. The LTD Program requires a claimant to submit "objective" medical
16 evidence of the cause of her disability and initially defines "disability" as follows:
17 "You are not able to perform some or all of the material and substantial duties of you[r]
18 regular occupation, and you have at least a 20% loss in your pre-disability earnings."
19 (AR 16, 29.) That is, at the outset of the LTD period, the individual need be disabled
20 only from her own occupation to qualify for LTD benefits.

21 6. The LTD Program further states that the Plan "will continue payment to
22 you beyond 24 months if due to the same sickness or injury . . . [y]ou are not able to
23 perform the material and substantial duties of any gainful occupation. . . . OR . . . while
24 you are not able to perform some or all of the material and substantial duties of your
25 regular occupation, you are working in any occupation and have at least a 20% loss in
26 your pre-disability earnings." (AR 16, 29.) In other words, after the first two years, the
27 individual generally must be disabled from all occupations to continue receiving LTD
28 benefits.

1 7. In addition, the LTD Program does not pay benefits after 24 months in
2 cases of disability "due to mental illness, substance abuse, or self-reported symptoms."
3 (AR 25.) The Plan states that "[e]xamples of self-reported symptoms include, but are
4 not limited to headaches, pain, [and] fatigue." (AR 26.)

5 8. The Life Program contains a "waiver of premium" provision that allows a
6 person who is "totally disabled" to continue life insurance coverage under Plan without
7 paying premiums. (AR 46.) A "total disability" for this purpose is defined by the Plan
8 as a "condition which, as certified by a physician . . . is due to an illness or injury [that]
9 prevents the [individual] from performing the material and substantial duties of any
10 occupation for wage or profit." (AR 46.)

11 9. Unlike disability benefits under the LTD Program, the waiver of premium
12 provision is not capped at two years for mental illnesses or self-reported symptoms.
13 (AR 36-58.)

14 **II. The Plan Administrator.**

15 10. Anthem Insurance Companies, Inc. is the Plan Sponsor and Plan
16 Administrator, and it funds the Plan benefits relevant to this lawsuit. (AR 454.)

17 11. The Plan gives the Plan Administrator "discretionary authority to interpret
18 the Plan in order to make eligibility and benefit determinations as it may determine in
19 its sole discretion. The Plan Administrator also has the discretionary authority to make
20 factual determinations as to whether any individual is entitled to receive any benefits
21 under the Plan." (AR 463.)

22 12. Anthem Insurance Companies, Inc. has delegated its responsibility for
23 making benefit determinations under the LTD and Life Programs to defendant Anthem
24 Life Insurance Company ("Anthem Life"). (AR 463, 479.) In fact, by the express terms
25 of the Plan, Anthem Life is designated as the "Benefit Program Plan Administrator" for
26 those two aspects of the Plan. (Id.)

27 **III. The Short Term Disability Plan.**

28 13. During her employment with WellPoint, plaintiff was also a participant in

1 the WellPoint Short Term Disability Plan ("the STD Plan"), which is completely
2 separate from the WellPoint Flexible Benefits Plan. (AR 448-80; AR 769-82.)

3 14. The STD Plan provides disability benefits for a maximum of 180 days to
4 participants afflicted by "a condition which renders the [participant] unable to perform
5 substantially all of the normal duties of his or her job." (AR 774, 775.)

6 15. Decisions on claims for benefits under the STD Plan are made by the
7 Leave of Absence (LOA) Team within WellPoint's Human Resources Department. (AR
8 771-74, 777; see also, e.g., AR 433-34.)

9 **IV. Plaintiff's Initial Absence and Her Claim for STD Benefits.**

10 16. Plaintiff's last day at work was September 28, 2007, after she was
11 diagnosed with Legionnaire's disease, a type of pneumonia (i.e., lung infection) caused
12 by Legionella bacteria. (AR 207, 259.)

13 17. Plaintiff was initially treated for her pneumonia by pulmonologist Ronald
14 Popper, who saw her in his office on September 27, October 1, 11, and 29, and
15 November 19, 2007. (AR 389-90, 393-96, 407.)

16 18. Based on information from plaintiff and Dr. Popper, Robin Moody of the
17 WellPoint Human Resources Department initially approved plaintiff for disability
18 benefits under the STD Plan from the day she had left work through November 30,
19 2007. (AR 399, 410.)

20 19. Because plaintiff continued to experience an unexplained low-grade fever,
21 Dr. Popper eventually referred plaintiff to infectious disease specialist Jeffrey Galpin,
22 who first saw her for this problem on November 30, 2007. (AR 429.)

23 20. On December 13, 2007, Moody, who was managing plaintiff's absence
24 from an employee relations perspective as well as a benefits perspective, referred her
25 file to Leave of Absence Clinical Consultant Lynn Vincz, R.N., to "review for [her]
26 thoughts on the [diagnosis] of [Legionnaire's] disease so [Moody could] advise local
27 [human resources]." (AR 412.)

28 21. On December 18, 2007, Vincz prepared a memorandum for Moody

1 generally discussing the nature of Legionnaire's disease and suggesting that plaintiff's
2 STD benefits be extended from December 1, 2007, until Dr. Galpin cleared her to return
3 to work. (AR 418-19.)

4 22. On December 27, 2007, Moody approved plaintiff for an extension of
5 disability benefits under the STD Plan through December 28, 2007. (AR 423.)

6 23. On January 23, 2008, Dr. Galpin submitted a form in support of plaintiff's
7 claim for a further extension of her STD benefits, and on February 21, 2008, Dr. Galpin
8 faxed Moody a copy of his notes from plaintiff's November 30 and December 28, 2007,
9 January 15, and February 15, 2008 office visits. (AR 426-28, 430-31.)

10 24. The documentation submitted by Dr. Galpin asserted that plaintiff had
11 recovered from Legionnaire's disease, but reported that she was tired, weak and unable
12 to return to work. (AR 426-28, 430-31.)

13 25. On February 22, 2008, Moody approved plaintiff for disability benefits
14 under the STD Plan from the day she had left work until March 28, 2008-the maximum
15 180-day period allowable. (AR 433-34.)

16 **V. Plaintiff's Initial LTD and Waiver of Premium Claim.**

17 26. From the date-stamp on the documents, it appears that Anthem Life
18 received copies of all the foregoing letters from Moody and submissions from Dr.
19 Popper, Dr. Galpin and plaintiff (among various other items) on February 26, 2008.

20 27. The next day, Anthem Life sent plaintiff a letter informing her that she
21 could be eligible for LTD benefits beginning on March 29, 2008, enclosing an LTD
22 claim packet, and encouraging her to complete the forms in the packet and submit them
23 (if she believed she would have a claim) as soon as possible. (AR 387-88.)

24 28. Plaintiff did not immediately respond to that letter, so Anthem Life
25 informed her in another letter dated April 2, 2008, that if she did not submit the
26 completed forms by April 14, 2008, it would assume she did not wish to pursue a claim
27 for LTD benefits. (AR 385-86.)

28 29. Plaintiff completed the paperwork and sent it to Anthem Life by letter

1 dated May 14, 2008. (AR 208.)

2 30. Because plaintiff's claim for waiver of premium under the Life Program
3 largely overlapped her LTD claim, the two claims were considered together by Anthem
4 Life during its claim process. (AR 61, 236.)

5 31. In her initial May 14, 2008 submission, plaintiff included an "Employee's
6 Statement" and an "Activities of Daily Living [ADL] Form." In the "Employee's
7 Statement," plaintiff described her alleged disability as follows: "terrible headache,
8 body pain, extre[me] fatigue and fever, plus concentration problems + memory
9 problems + depression," as well as "immune system problems." (AR 207.) In her ADL
10 form, plaintiff described her medical condition as "extreme fatigue, debilitating pain,
11 memory loss, problems with concentration and continued fever." (AR 214.) At the
12 same time, plaintiff noted that she had been "diagnosed with sleep apnea prior to going
13 out on disability" with Legionnaire's disease. (AR 215.)

14 32. Plaintiff also stated in her ADL form that she was able to drive and did not
15 usually need any assistance to travel. (AR 214.) She further stated that she went
16 shopping twice a week for 1-2 hours. (AR 216.) In addition, she explained that she
17 engaged in child care activities for 4-8 hours per day, including helping her daughter
18 with homework, supervising her and transporting her. (AR 216.) Finally, she noted
19 that she spent time reading magazines, books (including the Bible), and newspapers for
20 thirty minutes to an hour per day. (AR 216.)

21 33. On May 22, 2008, Anthem Life received records from psychologist
22 Stephen Fitch, who first began treating plaintiff on May 1, 2008, more than a month
23 after the end of her elimination period. (AR 364-79.)

24 34. On May 27, 2008, Dr. Galpin faxed Anthem Life a Physician's Statement
25 for specific use in processing plaintiff's claim for LTD benefits. (AR 339-40.) In that
26 statement, contrary to Dr. Galpin's own notes from the previous winter (Compare AR
27 340 with AR 431), he asserted that plaintiff was unable to work, but he responded to a
28 request for objective findings to support this assertion by writing "N/A" and wrote that

1 plaintiff had the following "subjective" symptoms: "chronic fatigue, high blood
2 pressure, fever, Legionellosis, and [illegible]." Although Dr. Galpin had previously
3 reported that plaintiff had recovered from Legionellosis, the record does not
4 demonstrate that he was ever asked to explain this comment.

5 35. In the same form, Dr. Galpin wrote that plaintiff continued to be able to
6 perform "sedentary daily activities" but that she needed six to nine hours' sleep and
7 should not be performing "any heavy, prolonged, or emotional capacity work." (AR
8 340.) Dr. Galpin again stated that plaintiff was unable to return to work. Id. In
9 response to a request to identify any mental impairments afflicting plaintiff, he
10 identified none. Id.

11 36. On May 29, 2008, Anthem Life received medical records from neurologist
12 Paul Dudley, who treated plaintiff in 2002, 2003, 2006, and early 2007 prior to
13 plaintiff's last day at work. (AR 341-63.) Those records reflected a diagnosis of carpal
14 tunnel syndrome and back problems, but plaintiff was able to work with these
15 conditions, and neither plaintiff nor her doctors ever claimed to Anthem Life that these
16 conditions were the cause of her alleged disability. (AR 341-63.)

17 37. Subsequently, Anthem Life obtained an initial review and analysis of
18 plaintiff's claim from Karen Greenleaf, R.N., who was employed by a third party,
19 Custom Disability Solutions (CDS). (AR 326-28.) Greenleaf concluded that plaintiff
20 did not submit any objective data to support her claim of disability. (AR 328.) In
21 reaching this conclusion, Greenleaf noted that Dr. Galpin-an infectious disease
22 specialist-never referred plaintiff to anyone or performed any tests to confirm any
23 alleged limitations on her cognitive functions or memory or any other mental or
24 psychological problems and that plaintiff did not even see anyone for a mental
25 impairment until May 1, 2008, which was after her last day at work and the end of her
26 elimination period. (AR 327.) Greenleaf further noted that plaintiff reported in her
27 ADL form that she was reading, driving, watching movies and assisting her daughter
28 with homework, all of which was inconsistent with her claims of significant memory

1 loss, concentration problems or cognitive deficits. (AR 327.) Greenleaf similarly noted
2 that a claim of severe fatigue would be inconsistent with various reports of plaintiff's
3 recent activities, and she observed that plaintiff had been able to work with her sleep
4 apnea, plaintiff herself having stated that she was diagnosed with the disorder before
5 she went out on disability. (AR 327.) Finally, Greenleaf noted that plaintiff had a long
6 history of non-disabling joint and upper extremity pain, as reflected in the records of
7 Dr. Dudley, and that there was no suggestion that these issues worsened into a disabling
8 condition. (AR 327.)

9 38. After Greenleaf's review, Anthem Life commissioned an independent
10 medical review by two doctors associated with another third party, Behavioral Medical
11 Interventions (BMI). (AR 244-50.) The BMI doctors who reviewed the case were
12 Michael Silverman, a board certified internist, and John Shallcross, a licensed
13 psychologist. (AR 250.)

14 39. In a joint report dated June 30, 2008, Dr. Shallcross and Dr. Silverman
15 concluded that the medical records submitted by plaintiff, along with an oral report
16 provided to Dr. Shallcross by Dr. Fitch, did not include any clinical evidence to support
17 a claim that plaintiff's physical and mental health conditions were severe enough to
18 prevent her from working. (AR 244-50.) The doctors noted, in particular, the absence
19 of any objective testing to verify plaintiff's own self-reports of functional impairment.
20 (AR 244-50.)

21 40. On July 1, 2008, Dr. Galpin wrote a letter to Dr. Silverman in response to
22 certain questions Dr. Silverman had sent him. (AR 291-94.) Dr. Galpin's letter
23 repeated the information found in Dr. Galpin's office visit notes from plaintiff's office
24 visits (which Dr. Silverman had already seen). (Compare AR 293-94 with AR 317-18;
25 see also AR 244.) Dr. Galpin's letter also discussed a new office visit on June 27, 2008.
26 (AR 291-94.) Dr. Galpin identified a few medications plaintiff was taking and then
27 asserted "[i]t is clear that [plaintiff] still has many of the findings of a myofascial pain
28 disorder or a post-viral encephalopathy, a homeostatic abnormality in terms of stressed

1 systems within the limbic system of her brain that make her functionally impaired, that
2 include, again, palpitations, marked fatigue, cognitive dysfunction, and severe aches
3 and pains that increase with activity. At this point, she clearly is too impaired for
4 working as an auditor" (AR 294.)

5 41. After reviewing Dr. Galpin's July 1, 2008 letter, Dr. Silverman informed
6 Anthem Life that the letter did not change his previous conclusion that there was no
7 objective medical evidence to support a finding of disability. (AR 251-52.)

8 42. On August 8, 2008, Anthem Life denied plaintiff's claim for LTD benefits.
9 (AR 240-43.) Relying largely on the report from Drs. Shallcross and Silverman,
10 Anthem Life noted, among other things, that the psychotherapy notes provided by
11 plaintiff "[did] not provide sufficient evidence of a mental/nervous condition that would
12 preclude [plaintiff] from working." (AR 242.) Anthem Life also noted that there was
13 "no objective medical evidence submitted to support [plaintiff's] memory complaints
14 such as neuropsychological testing or even a basic assessment of [plaintiff's] memory,
15 concentration, ability to focus, executive ability, or attention." (AR 242.) Similarly,
16 Anthem Life observed that there was no documentation in plaintiff's medical records to
17 support her claim that her pain was disabling. (AR 242.)

18 43. Anthem Life's denial letter did include one statement evincing a
19 misinterpretation of one section in plaintiff's ADL form. Specifically, the denial letter
20 improperly noted that plaintiff "coached her daughter's softball and soccer teams [and]
21 went camping." (AR 241.) In fact, plaintiff stated: "Have not done much . . . camping
22 since I don't feel good so don't participate. Last year, I coached my daughter's softball
23 and soccer teams. I would have liked to do this again this year but I am unable to
24 physically and mentally." (AR 216.) While this error may have been inadvertent, in the
25 Court's view, it is an error that contributed to the conclusion that plaintiff was not
26 entitled to LTD benefits.

27 44. On September 2, 2008, Anthem Life denied plaintiff's claim for waiver of
28 premium under the Life Program. (AR 326-28.) Because plaintiff was determined not

1 to be disabled from her own occupation for purposes of the LTD Program and the Life
2 Program required plaintiff to be disabled from all occupations, Anthem Life simply
3 referenced its denial on the LTD claim as the rationale for its decision. (AR 236-38.)

4 **VI. Plaintiff's Administrative Appeal.**

5 45. Plaintiff retained counsel, Tracy Collins, to assist with an administrative
6 appeal to Anthem Life of the denial of her LTD and waiver of premium claim. (AR
7 62-63.) On October 6, 2008, Collins wrote to Anthem Life to announce her retention
8 and to request, among other things, a copy of the relevant plan documents. (AR 62-63.)

9
10 46. On October 20, 2008, Anthem Life Appeal Coordinator Kristie Woods sent
11 Collins a letter stating that she was enclosing the requested documentation. (AR 61.)

12 47. Collins wrote back on November 5, 2008, asserting that the LTD Program
13 document had not been enclosed with Woods's letter and notifying Woods that the
14 Social Security Administration (SSA) had approved plaintiff for disability benefits
15 some time before October 25, 2008, but after Anthem Life had initially denied
16 plaintiff's claim. (AR 178-84.) With her letter, Collins enclosed the SSA's Notice of
17 Award, which set forth the amounts plaintiff would be receiving from SSA but included
18 no discussion of the basis for its decision. (AR 178-84.)

19 48. In a February 2, 2009 letter to Woods, Collins presented plaintiff's
20 substantive appeal, which raised three main points. (AR 120-22.) First, Collins noted
21 that Dr. Galpin had not yet released plaintiff to return to work and argued that this was
22 inconsistent with Vincz's December 18, 2007 memorandum stating that plaintiff should
23 be approved for STD benefits until Dr. Galpin released plaintiff to return to work. (AR
24 120-21.) Second, she argued that Anthem Life should find plaintiff to be disabled
25 because the SSA found her to be disabled. (AR 121.) Third, she pointed out the
26 misreading of plaintiff's ADL form found in Anthem Life's denial letter. (AR 121.)

27 49. With her February 2, 2009 letter, Collins also submitted records from
28 neurologist Martin Levine and rheumatologist Allan Metzger, as well as a new letter

1 from Dr. Fitch. Dr. Levine did not see plaintiff until November 2008. (AR 151-58.)
2 Plaintiff provided records from a September 2008 office visit with Dr. Metzger and
3 stated that she also saw him in July and November 2008. (AR 122, 177k-p.) As noted
4 previously, plaintiff did not see Dr. Fitch until May 1, 2008. (AR 288, 366, 375-77.)
5 Accordingly, none of them could speak to plaintiff's condition during or at the end of
6 her elimination period.

7 50. In the February 2, 2009 letter, Collins also repeated her assertion that she
8 had not been provided with the LTD Program document. (AR 120.)

9 51. On March 2, 2009, in response to this assertion, Woods sent Collins a copy
10 of the LTD Program document. (AR 767-817.)

11 52. Plaintiff did not present any testimony at trial on the subject of who
12 actually received and opened the initial October 20, 2008 letter from Woods to Collins
13 or otherwise addressing the question of whether the LTD Program document was
14 enclosed with that letter.

15 53. As it did during the initial claim process, Anthem Life once again referred
16 the case to an independent medical review service-this time to Reliable Review Services
17 (RRS). (AR 107-09.) The file was reviewed by two doctors associated with RRS: Dr.
18 Bartholomew Bono (board certified in infectious diseases) and Dr. Mark Schroeder
19 (board certified in psychiatry). (AR 96-106.)

20 54. According to a curriculum vitae submitted by plaintiff, Dr. Schroeder has
21 served the SSA as a consultative examiner since 1994, has served the Mansfield Probate
22 Court as a psychiatric evaluator since 1994, provides care to patients at a nursing home
23 in his local community, works as a staff psychiatrist at the Perception House residential
24 dual-diagnosis treatment program, and serves on the medical staffs of two other mental
25 health facilities, including Natchaug Hospital. (Dkt. Entry No. 28-9.)

26 55. According to a curriculum vitae submitted by plaintiff, Dr. Bono is on the
27 medical staffs at Albert Einstein Medical Center, Northeastern Hospital and Moss
28 Rehabilitation Hospital and served on three other hospital medical staffs before that.

1 (Dkt. Entry No. 28-10.)

2 56. Dr. Schroeder and Dr. Bono have provided independent medical reviews
3 for Anthem Life only in connection with appeals by claimants, not in connection with
4 initial claims. (Dkt. Entry No. 28-8 at p.4 of 5.)

5 57. Dr. Schroeder provided independent medical reviews for Anthem Life in
6 only 25 cases over the course of two years and nine months, and in 16% of those
7 appeals, the initial denial was overturned in favor of the claimant. (Dkt. Entry No. 28-8
8 at p.4 of 5.)

9 58. Dr. Bono provided independent medical reviews for Anthem Life in only
10 five cases over the course of a year and seven months, and the appeal involving plaintiff
11 is the only one of those instances in which the initial denial was upheld in its entirety.
12 (Dkt. Entry No. 28-8 at p.4 of 5.)

13 59. Although he agreed that plaintiff was incapacitated by her Legionnaire's
14 disease at the outset of her elimination period, Dr. Bono concluded that there was no
15 objective medical evidence to support a finding of continuing disability beyond January
16 2008. (AR 97-98.) As Dr. Bono explained in his report: "Chronic Legionellosis does
17 not exist. Legionellosis is an acute to subacute illness; none of the claimant's ongoing
18 complaints may be attributed to legionellosis." (AR 98.)

19 60. Dr. Schroeder noted that Dr. Galpin's records, by and large, did not include
20 any evidence to corroborate plaintiff's own complaints of depression or memory
21 dysfunction, such as "corroborating observations or test results . . . such as detailed
22 mental status examinations or psychological or neuropsychological testing with validity
23 scales." (which, perhaps, is not surprising, given that Dr. Galpin is an infectious disease
24 specialist and not a mental health professional). (AR 103.) Dr. Schroeder further noted
25 that while Dr. Metzger's notes from September 2008 stated that plaintiff was "doing
26 poorly and depressed," this was merely a description of plaintiff's self-report, and there
27 were no "objective medical findings" to support it (which, again, is probably
28 unsurprising, given that Dr. Metzger is a rheumatologist). (AR 103; see also AR 177k.)

1 Dr. Schroeder, however, did observe objective medical assessments by Dr. Fitch,
2 plaintiff's psychologist, reflecting mental impairment around the time when she was
3 first seen by him on May 1, 2008, and for some time thereafter. (AR 104.) Finally, Dr.
4 Schroeder observed that the records from plaintiff's November 6, 2008 visit with Dr.
5 Levine, a neurologist, strongly contradicted any suggestion of notable mental
6 impairment, and Dr. Schroeder explained that he confirmed plaintiff's "significant
7 improvement" in this area with Dr. Fitch, who also informed Dr. Schroeder that
8 plaintiff's mental condition, standing alone, probably would not prevent her from
9 working. (AR 103, 104; see also AR 151-58.) Ultimately, Dr. Schroeder concluded
10 that there was sufficient objective medical evidence in the record to support a finding of
11 psychiatric disability from the time when plaintiff began seeing Dr. Fitch.²

12
13 ² Specifically, Dr. Schroeder found "this impairment consisted of difficulty in
14 sustaining attention and concentration, and engaging in detailed work and in significant
15 learning and processing of information; and difficulty performing more stressful work tasks
16 such as working under deadlines or quotas, planning tasks, or multitasking. The record did
17 not contain a detailed description of the employee's job duties as an Auditor, so this
18 reviewer cannot comment on whether these restrictions/limitations would preclude the
19 employee from performing her own occupation. The limited information in the medical
20 record did not, however, show that this impairment was so severe as to preclude the
21 employee from performing simpler, routine and repetitive work duties during this time
22 frame.

23 The record as of 11/06/2008 noted improvement in the employee's cognitive and
24 psychiatric condition. Dr. Fitch opined in the teleconference and that the employee's
25 psychiatric condition would not in itself to prevent her from working at this time. (AR
26 105.)

27 * * * *

28 Assessment/Rationale:

This reviewer concluded that the limited objective medical evidence in the claim file
(described above) did adequately support the presence of psychiatric impairment from on
or about 05/08/2008 (when the employee first saw psychotherapist Dr. Fitch) until on or
about 11/06/2008 (when neurologist Dr. Levine noted an intact mental status examination.)
This information is consistent with the report of Dr. Fitch, who stated in the teleconference

(continued...)

1 61. Woods reviewed the reports from Dr. Bono and Dr. Schroeder and
2 prepared an "appeal summary and recommendation" on April 23, 2009. (AR 83-85.)
3 The recommendation was to deny the appeal, and the summary briefly explained the
4 basis for her conclusion. (AR 83-85.)

5 62. Later that day, Woods faxed the reports to Kelly Tillotson at CDS and
6 asked Tillotson if she would be available to discuss the reports on April 24, 2009. (AR
7 94-106.)

8 63. On April 27, 2009, Collins faxed a letter to Woods asserting that if the
9 medical reviews of the RRS doctors were adverse to plaintiff's position on appeal, then
10 she should be given an opportunity to rebut those findings "before proceeding to
11 litigation" and suggesting that Collins had informed Woods of her position in this
12 regard during a telephonic discussion earlier that day. (AR 93.)

13 64. On April 28, 2009, CDS provided Woods with a draft of a denial letter to
14 plaintiff formalizing the decision prepared by Woods on April 23, 2009. (AR 86-92.)

15 65. On April 29, 2009, M. Catherine Pruitt (a higher-level manager at Anthem
16 Life) approved the initial summary and recommendation prepared by Woods on April
17 23, 2009. (AR 83-85.)

18 66. Anthem Life sent plaintiff a letter officially denying her LTD appeal on
19 April 29, 2009. (AR 73-82.) The final letter used the format of CDS's draft. (AR
20 73-82.) The letter relied on the conclusions of Dr. Bono and Dr. Schroeder that there
21 was no objective medical evidence to support a claim of disability, at least during the

22 _____
23 ²(...continued)

24 that the employee's psychiatric condition had improved significantly over the last four to
25 five months. The reviewer concluded that this psychiatric impairment consisted of
26 difficulty performing more sustained and higher-level cognitive tasks, but would not have
27 precluded the employee from performing simpler, routine and repetitive work duties. The
28 reviewer concluded that the recent mental health treatment has been optimal, and that the
employee has reached maximum medical improvement, as Dr. Fitch opined that the
employee's psychiatric condition would not in itself preclude her from working at this
time." (AR 106.)

1 pertinent time (as noted above and explained in the denial letter, Dr. Schroeder
2 concluded that plaintiff may have been disabled by her psychiatric condition "for a
3 closed period of time following the elimination period"). (AR 75-79.) Anthem Life
4 also responded to plaintiff's arguments regarding the alleged inconsistency between its
5 decision and those of the SSA and the STD Plan, explaining that neither of those
6 decisions was binding, noting that the other decision makers did not have the benefit of
7 the independent medical reviews Anthem Life had commissioned, and observing that
8 the rules governing claims to the SSA are not the same as those governing claims to the
9 Plan. (AR 76, 78.)

10 67. Anthem Life also sent plaintiff a separate letter on April 29, 2009, denying
11 her claim for waiver of premium under the Life Program. (AR 80-82.) Although it
12 contains a shorter discussion of the issues, that letter, like the LTD letter, relies heavily
13 on the conclusions of Dr. Bono and Dr. Schroeder in determining that plaintiff was not
14 disabled during the pertinent period. (AR 80-82.)

15 **VII. The Reasonableness of Anthem Life's Decision.**

16 68. The Court finds that Anthem Life's decision on plaintiff's claim for LTD
17 benefits was unreasonable based on the evidence presented during the administrative
18 claim and appeal process. First, even though plaintiff first saw Dr. Fitch on May 1,
19 2008, that does not mean plaintiff was not disabled from performing the duties of an
20 auditor earlier. The concession by Dr. Schroeder that the evidence in the record
21 supports a finding of psychiatric disability from the time she commenced seeing Dr.
22 Fitch at least through November 2008, strongly suggests that she was disabled at an
23 earlier date. Dr. Galpin's reports, stating that plaintiff was suffering from depression
24 associated with her recovery from Legionnaire's disease and was unable to return to
25 work are totally consistent with Dr. Fitch's diagnosis, and Dr. Galpin at no time
26 released plaintiff to return to work. Moreover, contrary to defendants' suggestion, Dr.
27 Dudley's earlier medical records, which show that plaintiff could work notwithstanding
28 a variety of ailments, suggest that the onset of plaintiff's depression and inability to

1 work as an auditor occurred in connection with and as a consequence of her
2 Legionnaire's disease. Moreover, while not dispositive, the fact that plaintiff was
3 approved for disability benefits by SSA in or about October 2008 is a factor, when
4 considered with the statements of Drs. Galpin, Fitch and Schroeder, which suggests that
5 denial of LTD benefits without further inquiry was inappropriate.

6 7 CONCLUSIONS OF LAW

8 **I. The Court Reviews Anthem Life's Decision for Abuse of Discretion.**

9 1. Plaintiff asserts that she is entitled to de novo review because the LTD
10 Plan gives discretionary authority to determine benefits to Anthem Life Insurance
11 Company, and instead, the decision to deny plaintiff benefits was made by Wellpoint,
12 the parent corporation of Anthem Life Insurance Company, acting in concert with
13 totally unrelated entity, Custom Disability Solutions.

14 2. Defendants respond that plaintiff has waived any claim that de novo
15 review applies in this case because plaintiff stated in the Rule 26 report that it appeared
16 that "judicial review shall be for abuse of discretion," and although plaintiff reserved
17 the right to bring a motion regarding the standard of review, she failed to do so. Opp.
18 At 6. Defendant alternatively argue that even if plaintiff did not waive her right to
19 argue that de novo review applies, the fact remains that the decision to deny LTD
20 benefits was made by Kristie Woods, with the approval of her manager Catherine Pruitt,
21 both employees of Anthem Life Insurance Company. (AR 73-85.)

22 3. Because the Plan gives Anthem Life discretion to interpret the Plan and
23 evaluate the facts when making claims decisions, the Court reviews Anthem Life's
24 decision to deny plaintiff's claim for benefits only for an abuse of discretion. See
25 Metropolitan Life v. Glenn, 554 U.S. 105, 128 S. Ct. 2343, 2348, 2350 (2008) (citing
26 Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 111, 115, 109 S. Ct. 148 (1989)).
27 This is a deferential standard of review. See Glenn, 128 S. Ct. at 2348 ("Where the plan
28 . . . grant[s] 'the administrator . . . discretionary authority to determine eligibility for

1 benefits . . . [t]rust principles make a deferential standard of review appropriate.")
2 (emphasis in original) (quoting Firestone, 489 U.S. at 111, 115).

3 4. In any event, plaintiff has not established that the Plan Administrator
4 forfeited its discretion via improper delegation of authority. The Plan itself states that
5 the duties, responsibilities and powers of the Plan Administrator (Anthem Insurance
6 Companies, Inc.) have been delegated to Anthem Life for purposes of administering
7 claims under the LTD Program and the Life Program. First, the Plan defines the term
8 "Plan Administrator" as "Anthem Insurance Companies, Inc. or its designated appointee
9 which shall have those duties, responsibilities, and powers set forth in Article 6 of the
10 Plan." (AR 452, emphasis added.) Then, Article 6 states that Exhibit B to the Plan
11 identifies the various "Benefit Program Plan Administrators"-i.e., the "designated
12 appointees" referenced in the Plan's definition of the term "Plan Administrator." (AR
13 452, 463.) Finally, Exhibit B identifies Anthem Life as the entity that exercises the plan
14 administrator's authority with respect to claims under both the LTD Program and the
15 Life Program. (AR 479.)

16 5. Nor did Anthem Life lose this discretionary authority merely because it
17 consulted with CDS about plaintiff's claim and appeal. The administrative record
18 reflects that individuals working for CDS offered their opinions and other assistance to
19 Anthem Life during the decision-making process (just as did various doctors associated
20 BMI and RRS), but there is no evidence in the administrative record that CDS, rather
21 than Anthem Life, made the decision to deny plaintiff's claim for benefits. To the
22 contrary, the record reflects that the decision was made by Anthem Life's Kristie
23 Woods, with the approval of her manager, M. Catherine Pruitt. (AR 73-85.)

24 6. Similarly, the mere fact that the individuals involved in the claim and
25 appeal process for Anthem Life use a "wellpoint.com" e-mail address or sometimes use
26 letterhead or fax cover sheets containing the WellPoint logo (facts reflected in the
27 administrative record) does not mean that WellPoint, Inc. (Anthem Life's parent
28 company, see Dkt. Entry No. 7) made the decision to deny plaintiff's claim.

1 7. On the other hand, Anthem’s status as both the underwriter of the Policy
2 and the claims administrator gives rise to a structural conflict of interest, which affects
3 the applicable standard of review. Mitchell v. Metro. Life Ins. Co., 523 F. Supp. 2d
4 1132, 1143 (C.D. Cal. 2007) (entity that was both the claims administrator and the
5 insurer had an inherent conflict of interest); cf. Abatie v. Alta Health & Life Ins. Co.,
6 458 F.3d 955, 965 (9th Cir. 2006) (en banc) (“an insurer that acts as both the plan
7 administrator and the funding source for benefits operates under what may be termed a
8 structural conflict of interest.”).

9 8. Where, as here, a person’s claim to ERISA plan benefits has been denied
10 by an administrator which (1) has been conferred discretion under the terms of the plan
11 and which (2) has a conflict of interest, the applicable standard of review is that set
12 forth in Abatie. See Saffon v. Wells Fargo & Co. Long Term Disability, 522 F.3d 863
13 (9th Cir. 2008) (treating claims administrators in the same manner as plan
14 administrators for the purposes of Abatie). In Abatie, the court held that, in these
15 circumstances, a court must review the administrator’s determination for abuse of
16 discretion, but that this review is “informed by the nature, extent, and effect on the
17 decision-making process of any conflict of interest that may appear in the record.” Id.
18 at 968. This standard, the court stated, “applies to the kind of inherent conflict that
19 exists when a plan administrator both administers the plan and funds it, as well as to
20 other forms of conflict.” Id.

21 The court advocated a case-by-case approach to weighing an administrator’s
22 conflict of interest as part of its abuse of discretion analysis. Id. “A district court, when
23 faced with all the facts and circumstances, must decide in each case how much or how
24 little to credit the plan administrator’s reason for denying insurance coverage. An
25 egregious conflict may weigh more heavily (that is, may cause the court to find an
26 abuse of discretion more readily) than a minor, technical conflict might.” Id. The court
27 elaborated,

28 [t]he level of skepticism with which a court views a conflicted

1 administrator's decision may be low if a structural conflict of
2 interest is unaccompanied, for example, by any evidence of
3 malice, of self-dealing, or of a parsimonious claims-granting
4 history. A court may weigh a conflict more heavily if, for
5 example, the administrator provides inconsistent reasons for
6 denial, fails adequately to investigate a claim or ask the
7 plaintiff for necessary evidence, fails to credit a claimant's
8 reliable evidence, or has repeatedly denied benefits to
9 deserving participants by interpreting plan terms incorrectly
10 or by making decisions against the weight of evidence in the
11 record.

12 courts are familiar with the process of weighing a conflict of
13 interest. For example, in a bench trial the court must decide
14 how much weight to give to a witness' testimony in the face
15 of some evidence of bias. What the district court is doing in
16 an ERISA benefits denial case is making something akin to a
17 credibility determination about the insurance company's or
18 plan administrator's reason for denying coverage under a
19 particular plan and a particular set of medical and other
20 records.³

21 Id. at 968-69 (citations omitted).

22 Here, the Court finds that a structural conflict existed in connection with the
23 decision on appeal to affirm the denial of LTD benefits. Anthem's own expert, Dr.
24 Schroeder, conceded that plaintiff was psychiatrically disabled from May 1, 2008, until
25

26 ³ Abatie also set forth rules regarding what materials a court may consider in
27 conducting the foregoing analysis. The court noted the prevailing rule in the Ninth Circuit
28 and elsewhere that, under an abuse of discretion standard of review, a court is limited to
considering the materials before the plan administrator. Id. at 970; see Jebian v.
Hewlett-Packard Co. Empl. Benefits Org. Income Prot. Plan, 349 F.3d 1098, 1110 (9th
Cir. 2003). It adopted a different rule for those circumstances in which a court must
determine what weight to accord a plan administrator's conflict of interest. In such cases,

[t]he district court may, in its discretion, consider evidence
outside the administrative record to decide the nature, extent,
and effect on the decision-making process of any conflict of
interest; the decision on the merits, though, must rest on the
administrative record once the conflict (if any) has been
established, by extrinsic evidence or otherwise.

29 Id. at 970.

1 November 6, 2008. For Anthem to state that any long term disability could not be
2 found prior to May 1, 2008, is disingenuous, particularly in light of Dr. Galpin's
3 repeated reports that plaintiff was unable to return to work, and the disability
4 determination by SSA. To assert that the disability arose only when plaintiff first saw
5 Dr. Fitch, without further investigation, shows the exact sort of self-interested decision-
6 making that Abatie addresses. Accordingly, the Court concludes that the decision to
7 deny LTD benefits on the record before it constitutes an abuse of discretion. On the
8 other hand, because no evidence suggests that plaintiff was totally disabled from any
9 occupation, the Court concludes that plaintiff is not eligible for "waiver of premium"
10 under the Life Plan.

11 **III. Plaintiff's Post-Lawsuit Letters From Her Doctors Are Inadmissible.**

12 9. Plaintiff has submitted to the Court three letters signed by her doctors in
13 September, October and November 2009 (months after her administrative appeal was
14 decided by Anthem Life and after this lawsuit was commenced) in an effort to
15 demonstrate that plaintiff is disabled. The Court concludes that these letters are
16 irrelevant and inadmissible.

17 10. As an initial matter, plaintiff's health in the fall of 2009 is irrelevant. The
18 question presented to Anthem Life (and the decision on review here) is whether plaintiff
19 was disabled throughout and at the end of her elimination period from September
20 2007-March 2008. To be sure, if plaintiff had been found disabled for the duration of
21 that elimination period, then her continuing status would be important because she
22 could not have continued receiving benefits without remaining disabled, but that is not
23 what happened here.

24 11. In any event, these letters were not before Anthem Life during the
25 administrative process, and the Court's role is to review Anthem Life's decision based
26 on the administrative record, not based on additional evidence created well over a year
27 after her claim for benefits was made and produced to counsel for Anthem Life months
28 after her administrative appeal was denied and this lawsuit had commenced. See Burke

1 v. Pitney Bowes Inc. Long-Term Disability Plan, 544 F.3d 1016, 1027-28 (9th Cir.
2 2008) ("It is the general rule, of course, that when applying an abuse of discretion
3 standard to an ERISA plan, the district court's review is limited to the administrative
4 record.") (noting exceptions not here applicable).

5 12. Plaintiff argues that "extrinsic evidence" is properly considered where the
6 plan administrator has "precluded 'the full development of the administrative record,'" (Pl. Trial Brief at 20, quoting Burke, 544 F.3d at 1028), but in Burke, the Ninth Circuit
7 observed that the plan administrator had articulated a new basis for denying the
8 plaintiff's claim on appeal that was not mentioned during the initial claim
9 process-namely, the timeliness of her claim-and had given the plaintiff no indication
10 that it was considering that issue on appeal, so she had no opportunity to provide her
11 position on the issue, see *id.* Accordingly, the court held that the plaintiff should be
12 allowed to submit evidence to the district court on that issue.

13 13. Plaintiff also cites Saffon v. Wells Fargo & Co. Long Term Disability
14 Plan, 522 F.3d 863, 873 n.4 (9th Cir. 2008), for the proposition that the Court should
15 consider her post-lawsuit doctors' letters because the administrative record was closed
16 even though her doctors never returned Dr. Bono's telephone calls. (See Pl. Trial Brief
17 at 16, 20.) In Saffon, the plaintiff had been approved for LTD benefits and received
18 them for a year, at which point the plan administrator determined that she was no longer
19 disabled based on an independent doctor's review of her medical records. See 522 F.3d
20 at 866. Before making this decision, the plan administrator gave claimant's doctor ten
21 days to notify it of any disagreement with the independent doctor's conclusions (without
22 notifying the claimant); the doctor did not reply, and benefits were terminated. See *id.*
23 at 869. Plaintiff appealed, and during the appeal process submitted a letter from her
24 doctor rebutting the independent doctor's earlier conclusions. See *id.* The Ninth Circuit
25 did not say that this course of events allowed the plaintiff to submit evidence outside the
26 administrative record; rather, it suggested that the plan administrator's failure to notify
27 the claimant of its inability to reach her doctor under these circumstances-along with
28

1 numerous other factors-should be considered by the district court in determining how to
2 weigh the structural conflict present in that case. See *id.* at 873, 873 n.4.

3 14. In sum, plaintiff has not cited any legal authority supporting her attempt to
4 supplement the administrative record with post-lawsuit letters from her doctors, and the
5 Court concludes that these letters are both irrelevant and inadmissible.

6 **IV. Plaintiff Is Not Entitled To Statutory Penalties.**

7 15. Plaintiff bears the burden of proof on her claim for penalties under Section
8 502(c)(1) of ERISA, 29 U.S.C. § 1132(c)(1). In particular, she must prove: (I) that she
9 requested the document in question from the Plan Administrator in writing and (ii) that
10 the Plan Administrator failed to provide it. See Kerr v. Charles F. Vatterott & Co., 184
11 F.3d 938, 947 (8th Cir. 1999).

12 16. In this case, plaintiff has not submitted any admissible evidence to show
13 that the Plan Administrator failed to provide her with the plan document she requested.
14 She has submitted only a declaration from her counsel to that effect. Whereas a
15 declaration could be offered in support of a motion for summary judgment on this issue,
16 plaintiff did not file such a motion. Consequently, if plaintiff wished to establish the
17 facts necessary to her claim for penalties, then her counsel would have needed to testify
18 at trial. See FED. R. EVID. 801(c), 802. Although, as noted above, the ordinary rules
19 of evidence are somewhat relaxed in certain respects in claims for benefits under
20 Section 502(a)(1)(B) of ERISA, the Federal Rules of Evidence apply as usual to a claim
21 for monetary penalties under Section 502(c)(1).

22 17. In any case, even accepting plaintiff's view of the facts without admissible
23 evidence, she was able to prepare an appeal without the document she requested, (see
24 AR 120-22), she was provided with the requested document before the appeal was
25 decided, (see AR 767-817), and she offered no new arguments after being provided
26 with the document. Under these circumstances, plaintiff suffered no harm. There is
27 also no evidence of intentional malfeasance by Anthem Life.

28 18. For all these reasons, the Court does not award plaintiff any statutory

1 penalties under Section 502(c)(1) of ERISA.

2
3 **CONCLUSION**

4 For all the foregoing reasons, the Court finds that plaintiff is entitled to twenty-
5 four months of LTD benefits. The Court otherwise denies plaintiff's request. The
6 amount of plaintiff's costs and reasonable attorney's fees shall be determined by motion
7 to the Court to be filed within thirty days of entry of judgment herein, rather than the
8 fourteen day period prescribed by statute, so as to allow the parties opportunity to
9 discuss a voluntary resolution of this case, as well as plaintiff's fees and costs.

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11
12 Dated: August 9, 2010

Christina A. Snyder
13 CHRISTINA A. SNYDER
14 UNITED STATES DISTRICT JUDGE
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