

Kopicko v. Anthem Life Ins. Co.

United States District Court for the Southern District of California

October 5, 2021, Decided; October 5, 2021, Filed

Case No.: 20cv1524 DMS (MDD)

Reporter

2021 U.S. Dist. LEXIS 193864 *

JEFFREY KOPICKO, Plaintiff, v. ANTHEM LIFE INSURANCE COMPANY; BEYOND BENEFITS LIFE SCIENCE ASSOCIATION TRUST LONG TERM DISABILITY PLAN; and DOES 1 to 10, Inclusive Defendants.

Core Terms

disabled, records, psychiatric, benefits, disorder, impairment, agoraphobia, diagnosed, major depressive disorder, medical record, severe, claimant, mental status, depression, documents, anxiety, opined, major depression, de novo review, occupation, performing, timeframe, coverage, earnings, illness

Counsel: [*1] For Jeffrey Kopicko, Plaintiff: Kevin M. Zietz, LEAD ATTORNEY, Law Offices of Kevin M. Zietz, PC, Encino, CA.

For Anthem Life Insurance Company, Defendant: Chad R Fuller, LEAD ATTORNEY, Troutman Pepper Hamilton Sanders LLP, San Diego, CA; Jenna Uyen Nguyen, LEAD ATTORNEY, Troutman Sanders LLP, Irvine, CA.

Judges: Hon. Dana M. Sabraw, Chief United States District Judge.

Opinion by: Dana M. Sabraw

Opinion

MEMORANDUM OF DECISION AND ORDER

Plaintiff Jeffrey Kopicko filed the Complaint in this case on August 6, 2020. The Complaint alleges one claim for damages and benefits under a long-term disability plan issued by Defendant Anthem Life Insurance Company to the Beyond Benefits Life Science Association Trust. Plaintiff seeks an award of disability benefits from at least May 8, 2018, through March 24, 2019, including

pre- and post-judgment interest, and attorneys' fees and costs. Defendant argues its decision to deny Plaintiff benefits during this timeframe was correct, and therefore, it is entitled to judgment.

I. FINDINGS OF FACT

1. Plaintiff Jeffrey Kopicko is a forty-seven (47) year old man who was formerly employed as the Vice President, Biometrics, at Fate Therapeutics. (Administrative Record ("AR") at 164.)

2. Plaintiff [*2] began working at Fate Therapeutics on May 15, 2017, and last worked at Fate Therapeutics on September 8, 2017. (*Id.*)

3. On December 21, 2017, Plaintiff filed a claim for long term disability benefits with Defendant under the Group Policy it provided to the Beyond Benefits Life Science Association Trust. (*Id.* at 164-169.)

4. The provisions of the Policy relevant to this case are as follows:

a. **Disabled** and **Disability** mean during the Elimination Period and the next 24 months because of Your Injury or Illness, all of the following are true:

- You are unable to do the Material and Substantial Duties of Your Own Occupation; *and*

- You are receiving Regular Care from a Physician for that injury or illness; *and*

- Your Disability Work Earnings, if any, are less than or equal to 80% of Your Indexed Monthly Earnings.

(*Id.* at 125.)

b. You are not covered for a Disability caused or substantially contributed to by a Pre-Existing Condition or medical or surgical treatment of a Pre-Existing Condition. You have a Pre-Existing

Condition if:

1. You received medical treatment, care or services for a diagnosed condition or took prescribed medication for a diagnosed condition in the 3 months prior to Your effective [*3] date of coverage under the Policy; and,
2. The Disability caused or substantially contributed to by the condition begins in the first 12 months after Your effective date of coverage under the Policy.

(*Id.* at 146.)

c. Coverage under the Policy ends on "The date You cease to be Actively at Work." (*Id.* at 120.)

Actively at Work means that You are performing the normal duties of Your Own Occupation, and working Your normal hours. You must be working the minimum number of hours per week required for the Plan Sponsor on a permanent full-time basis and must be paid regular earnings.

Your work site must be:

- at the Plan Sponsor's usual place of business; *or*
- at a location to which the Plan Sponsor's business requires You to travel.

You are not considered Actively at Work when You are off work or lose time due to Illness, Injury, Leave of Absence, strike or layoff.

(*Id.* at 112.)

5. As part of his claim for benefits under the Policy, Plaintiff submitted an Employee Statement wherein he stated severe psychological abuse by his spouse led to major depression and anxiety, and that he was unable to leave his house unless absolutely necessary for medical reasons. (*Id.* at 168.)

6. Plaintiff also submitted [*4] an Attending Physician's Statement from Preeti Mathur, M.D. in which she diagnosed Plaintiff with generalized anxiety disorder ("GAD"), major depressive disorder ("MDD"), and post-traumatic stress disorder ("PTSD"). (*Id.* at 165.)

7. Because Plaintiff submitted his claim within twelve months of the effective date of coverage, Defendant began a pre-existing condition investigation into Plaintiff's claim. (*Id.* at 189-90.) The temporal focus of that investigation was March 1, 2017, through May 3, 2017 ("the lookback period"). (*Id.* at 176.)

8. As part of that investigation, Plaintiff completed a Supplemental Information Questionnaire listing his treating physicians. (*Id.* at 184-88.) Based on the information provided in that Questionnaire, Defendant sought records from one of Plaintiff's treating physicians, Jason R. Kornberg, M.D. (*Id.* at 175-77.)

9. Dr. Kornberg did not provide the requested records to Defendant, and Defendant thereafter denied Plaintiff's claim. (*Id.* at 176) ("Since the necessary medical records from Dr. Kornberg have not been received we are unable to determine your eligibility for Long Term Disability benefits and your claim is denied.")

10. On October 11, 2018, Plaintiff [*5] appealed Defendant's denial of his claim. (*Id.* at 472.)

11. By November 20, 2018, Plaintiff had retained his current counsel, and counsel notified Defendant of that representation. (*Id.* at 456.)

12. On March 28, 2019, Plaintiff filed a supplement to his appeal. (*Id.* at 386-430.) In that letter, counsel indicated that the basis for Plaintiff's claim was "Major Depressive Disorder or Agoraphobia[.]" (*Id.* at 387.) Although Dr. Kornberg had previously submitted a letter to Defendant outlining Plaintiff's treatment during the lookback period, (*id.* at 171-74), counsel submitted Dr. Kornberg's complete medical records, which, according to Plaintiff's counsel, indicated that Dr. Kornberg did not treat or diagnose Plaintiff with major depressive disorder or agoraphobia during the lookback period. (*Id.* at 387.) Counsel also submitted a report from a forensic psychiatrist Suzanne Dupée, M.D., who had conducted an independent medical examination ("IME") of Plaintiff. (*Id.*) Dr. Dupée opined that "Major Depressive Disorder and Agoraphobia are new psychiatric diagnoses that have caused [Plaintiff] to be severely disabled to the point where he cannot leave the house or function at his previous job as [*6] a biostatistician." (*Id.* at 430.)

13. After receiving Plaintiff's supplement to his appeal, Defendant referred Plaintiff's claim to Mark Schroeder, M.D. for a records review. (*Id.* at 330-337.) Dr. Schroeder reviewed Dr. Kornberg's records and spoke with Dr. Dupée, and noted "Dr. Kornberg did not diagnose Major depressive disorder, Panic disorder with agoraphobia, or Alcohol use disorder." (*Id.* at 333.) He concluded "that the evidence did not support that the psychological conditions treated by Dr. Kornberg during the look-back timeframe are the same conditions that impaired the claimant later." (*Id.*) Dr. Schroeder also concluded that:

from 11/9/17 through 5/7/18, and from 3/25/19 until the present, the claimant was experiencing psychiatric impairment in the ability to: complete tasks without interruption by symptoms, sustain attention and concentration, maintain energy and motivation, interact appropriately with others, and adapt to even minor stressors productively and without worsening of symptoms. This level of impairment would be expected to preclude the claimant from performing even simple, routine, and repetitive work duties reliably and consistently during the timeframe as described [*7] above.

(*Id.*)

14. Despite this conclusion, Dr. Schroeder concluded that Plaintiff was *not* disabled from May 8, 2018, through March 24, 2019, because there was "insufficient information ... to establish or support psychiatric functional impairment" during that time. (*Id.* at 332-33.) Specifically, Dr. Schroeder noted that Plaintiff had received treatment during that time, but those treatment records were not made available to him. (*Id.*)

15. Thereafter, Defendant received Plaintiff's missing treatment records from Dr. Mathur, (*id.* at 195-206), and UC San Diego Health,¹ (*id.* at 362-83), and forwarded those records to Dr. Schroeder for his review. (*Id.* at 335.)

16. After reviewing those records, Dr. Schroeder maintained his original conclusion that Plaintiff was not disabled from May 8, 2018, through March 24, 2019. (*Id.* at 336.) In an addendum report, Dr. Schroeder stated: "The additional records did not describe severe mental status abnormalities, psychiatric functional impairment of the claimant's daily activities, or participation in intensive mental health treatment. The treating provider stated that the claimant was more focused on obtaining disability benefits rather than on treatment [*8] for his psychiatric condition." (*Id.*)

17. Based on Dr. Schroeder's findings, Defendant overturned its original denial of Plaintiff's claim, but only for the period of November 9, 2017, through May 7, 2018. (*Id.* at 328.) For the period of May 8, 2018, through March 24, 2019, Defendant found Plaintiff was not disabled. (*Id.*) Defendant also found that although

Plaintiff was again disabled as of March 25, 2019, he did not have coverage at that time because he was not "Actively at Work." (*Id.*)

18. Approximately six months after that decision, Plaintiff filed a second appeal. (*Id.* at 56-59.)

19. With that appeal, Plaintiff submitted a supplemental report from Dr. Dupée. (*Id.* at 61-66.) Dr. Dupée reviewed Plaintiff's medical records, Dr. Schroeder's reports, and Defendant's decision on Plaintiff's appeal, (*id.* at 63), and opined that Plaintiff was disabled from September 8, 2017, through the date of her supplemental report, January 10, 2020. (*Id.* at 65.) She wrote:

It is not logical that Mr. Kopicko's disability would suddenly start and stop given his extensive psychiatric history documented in the medical records and from my evaluation. He was not functioning the day, week, month, or year before [*9] he came to my office in February 2019. The records from three psychiatrists, Dr. Kornberg, Dr. Mathur, and Dr. Matialeu all noted similar findings of severe anxiety. He had deteriorated because his agoraphobia spiraled, he was unable to access mental health treatment, and his disability was denied, thereby causing him further emotional and financial stress. Mr. Kopicko is a highly intelligent man who previously functioned at a high level professionally, albeit with [] a long history of anxiety, alcohol abuse, and suicide attempts in the context of a severely dysfunctional family of origin. When I evaluated him, I opined that he was disabled from his work due to the severity of his mental health diagnoses. He is in dire need of psychiatric treatment.

(*Id.* at 65-66.)

20. After receipt of Plaintiff's second appeal, Defendant referred Plaintiff's claim to another psychiatrist Thomas Gratzer, M.D. for a records review. (*Id.* at 95-99.) Dr. Gratzer reviewed Plaintiff's records for the period of May 8, 2018, through March 24, 2019 (the "period of review"), (*id.* at 96), and opined there was "a lack of medical evidence to support impairment during [that period]." (*Id.* at 98.)

21. Based on Dr. [*10] Gratzer's review, Defendant denied Plaintiff's second appeal and upheld its determination that Plaintiff was not disabled from May 8, 2018, through March 24, 2019. (*Id.* at 75-79.)

¹ At UCSD, Plaintiff received treatment primarily from a psychiatry resident, Leopoldine Matialeu, M.D., along with attending physicians Lawrence Malak, M.D., Jessica Thackaberry, M.D., and Priti Ohja, M.D.

II. CONCLUSIONS OF LAW

1. The Court has jurisdiction over this matter pursuant to [28 U.S.C. § 1331](#) and [29 U.S.C. § 1132\(e\)\(1\)](#).

2. The parties agree Defendant's decision to deny Plaintiff's claim is subject to de novo review. (ECF No. 23.)

3. "When conducting a de novo review of the record, the court does not give deference to the claim administrator's decision, but rather determines in the first instance if the claimant has established that he or she is disabled under the terms of the plan." [Muniz v. Amec Const. Management, Inc., 623 F.3d 1290, 1295 \(9th Cir. 2010\)](#). "The de novo standard requires the court to make findings of fact and weigh the evidence." [Anderson v. Liberty Mut. Long Term Disability Plan, 116 F.Supp.3d 1228, 1231 \(W.D. Wash. 2015\)](#). It also requires the Court to make "reasonable inferences where appropriate." [Bigham v. Liberty Life Assurance Co. of Boston, 148 F.Supp.3d 1159, 1166 \(W.D. Wash. 2015\)](#) (quoting [Oldorp v. Wells Fargo & Co. Long Term Disability Plan, 12 F.Supp.3d 1237, 1251 \(N.D. Cal. 2014\)](#)).

4. On de novo review, "the district court has discretion, subject to the guidelines set forth in [Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan, 46 F.3d 938 \(9th Cir. 1995\)](#), to consider additional evidence." [Thomas v. Oregon Fruit Products Co., 228 F.3d 991, 997 \(9th Cir. 2000\)](#). "Under *Mongeluzo*, such evidence should be considered 'only when circumstances clearly establish that additional evidence is necessary to conduct an adequate de novo review of the benefit decision.'" *Id.* (quoting [Mongeluzo, 46 F.3d at 944](#)). In [Opeta v. Northwest Airlines Pension Plan for Contract Employees, 484 F.3d 1211 \(9th Cir. 2007\)](#), the court set out:

a non-exhaustive [*11] list of exceptional circumstances where introduction of evidence beyond the administrative record could be considered necessary: "claims that require consideration of complex medical questions or issues regarding the credibility of medical experts; the availability of very limited administrative review procedures with little or no evidentiary record; the necessity of evidence regarding interpretation of the terms of the plan rather than specific historical facts; instances where the payor and the administrator are the same entity and the court is

concerned about impartiality; claims which would have been insurance contract claims prior to ERISA; and circumstances in which there is additional evidence that the claimant could not have presented in the administrative process."

Id. at 1217 (quoting [Quesinberry v. Life Ins. Co. of N. Am., 987 F.2d 1017, 1027 \(4th Cir. 1993\)](#) (en banc)).

5. In this case, Plaintiff requests that the Court consider a number of documents outside the AR in resolving his claims.² Those documents are: (1) a glossary of medical terms, (2) portions of the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition ("DSM-5"), (3) portions of an American Psychiatric Association ("APA") document highlighting the changes in the DSM-4 to the DSM-5, [*12] (4) a copy of a sample Generalized Anxiety Disorder 7-Item ("GAD-7") test, and (5) a copy of a sample Patient Health Questionnaire ("PHQ-9") test. (See Req. for Judicial Notice, Attachments 1-4.) Defendant objects to the admission of this evidence on the grounds it is unnecessary under *Mongeluzo*.

6. The Court agrees with Defendant that Plaintiff's glossary of medical terms, the APA document, and the GAD-7 test are not necessary for the Court to conduct an adequate de novo review, and thus the Court declines to consider those documents.

7. However, the Court will consider the two other documents. The first of those documents is the DSM-5. Dr. Gratzler referenced that document in his review of Plaintiff's records, (AR at 97), and he opined that Plaintiff did not meet the DSM-5 criteria "for major depression, generalized anxiety disorder, agoraphobia, and/or substance abuse." (*Id.*) Plaintiff disputes that opinion, and thus consideration of the DSM-5 is relevant to Dr. Gratzler's credibility.³

8. The sample PHQ-9 test is also relevant to the Court's evaluation of Plaintiff's medical records and Dr.

² Plaintiff argues the Court may take judicial notice of these documents pursuant to [Federal Rule of Evidence 201](#), and that the documents are admissible under *Mongeluzo*. Defendant disputes both of these arguments. Because judicial notice is unnecessary to the Court's consideration of these documents, the Court considers only whether the documents are admissible under *Mongeluzo*.

³ Although not necessary for admission, the Court also notes "[t]he DSM-IV is a proper subject of judicial notice." [Shaw v. Life Ins. Co. of N. Am., 144 F.Supp.3d 1114, 1126 \(C.D. Cal. 2015\)](#).

Gratzer's opinions. The record reflects Dr. Matialeu employed this test at each [*13] of Plaintiff's visits on September 7, 2018, October 4, 2018, and November 5, 2018, (AR at 365), and that test appears to be based on the depression diagnostic criteria in the DSM-4. (Req. for Judicial Notice, Attachment 4.) Thus, the Court will consider that document.

9. With the legal standard in mind, and the record now established, the Court turns to the central issue in this case, which is whether Plaintiff is entitled to benefits under the Policy from May 8, 2018, through March 24, 2019.⁴

10. As indicated above, Plaintiff bears the burden of proving he was disabled under the Policy. Sabatino v. Liberty Life Assurance Co. of Boston, 286 F.Supp.2d 1222, 1232 (N.D. Cal. 2003).

11. To meet that burden in this case, Plaintiff must prove that because of an injury or illness: (1) he was unable to do the material and substantial duties of his occupation, (2) he was receiving regular care from a physician for the injury or illness, and (3) his disability work earnings, if any, were less than or equal to 80% of his indexed monthly earnings.

12. Plaintiff met this burden for the period of November 9, 2017, through May 7, 2018. Specifically, Defendant found, based primarily on the opinion of Dr. Schroeder, that Plaintiff was suffering from Major Depressive Disorder and Panic Disorder [*14] with Agoraphobia, and that those conditions precluded him from performing the duties of his occupation during that timeframe. (AR at 328.)

13. Dr. Schroeder also found Plaintiff was suffering from Major Depressive Disorder and Panic Disorder with Agoraphobia, both of which precluded him from performing the duties of his occupation from March 25, 2019, onward.

14. Dr. Schroeder's opinion that Plaintiff was not disabled from May 8, 2018, to March 24, 2019, but was again disabled on March 25, 2019, is problematic for two primary reasons. First, the date of Plaintiff's

"recurrent" disability, March 25, 2019, does not appear to have been triggered by any event or incident in Plaintiff's life. Rather, March 25, 2019, was the date of Dr. Dupée's initial IME report. (*Id.* at 421.) Because Dr. Dupée actually examined Plaintiff on February 7, 2019, Dr. Schroeder should have determined Plaintiff was again disabled as of that date, not March 25, 2019. It was at that time Plaintiff reported he rarely left his house, (*id.* at 424), and had limited social interaction. (*Id.*) And it was during that February 7, 2019 visit that Plaintiff reported his mood as "anxious," (*id.* at 426), and that Dr. Dupée noted [*15] "evidence of obsessions and compulsions" and poor insight and judgment. (*Id.*) Thus, to the extent Plaintiff experienced a recurrence of his previous disability, the date of that recurrence was, at a minimum, February 7, 2019, not March 25, 2019.

15. The second problem with Dr. Schroeder's opinion concerns his interpretation of Plaintiff's records from UCSD. In reviewing those records, Dr. Schroeder noted that Plaintiff did not describe severe psychiatric symptoms and Dr. Matialeu's mental status examination was "largely intact". (*Id.* at 336.) Dr. Schroeder also stated Plaintiff's "primary purpose" for meeting with Dr. Matialeu "was to obtain assistance with disability paperwork rather than for management of his psychiatric symptoms." (*Id.*)

16. Dr. Matialeu's records from September 6, 2018, confirm that Plaintiff did "request[] assistance with getting state disability filled out as well as getting records from previous psychiatrist to help appeal his denied long term disability." (*Id.* at 379.) However, the records also reflect that Dr. Matialeu took a comprehensive history from Plaintiff, starting with the circumstances then-occurring in Plaintiff's life, his past psychiatric history, [*16] his substance history, his medical history, his medications, his social history and his family history. (*Id.* at 375-78.) Dr. Matialeu also provided Plaintiff with supportive psychotherapy during that visit. (*Id.* at 380.) Medical records from October 4, 2018, and November 5, 2018, also reflect Dr. Matialeu had Plaintiff fill out both the PHQ-9 Questionnaire and the GAD-7 Questionnaire during his September 6, 2018 visit. (*Id.* at 365-66, 371-72.) Plaintiff's score on the PHQ-9 Questionnaire was 19, (*id.* at 371), which indicates a provisional diagnosis of Major depression, moderately severe, (Req. for Judicial Notice, Attachment 4), which is consistent with Dr. Matialeu's assessment of Plaintiff's psychiatric/behavioral systems as "[p]ositive for depression and substance abuse." (*Id.* at 378.) Notably, none of this information is included in Dr. Schroeder's review of Plaintiff's records from Dr.

⁴It is unclear whether the parties agree on Plaintiff's entitlement to benefits after March 24, 2019. It appears there may be agreement that if Plaintiff is entitled to benefits from May 8, 2018, through March 24, 2019, then he is also entitled to benefits after that date. However, to clarify any uncertainty, the Court requests supplemental briefing from the parties on this issue, as set out below.

Matialeu.

17. Dr. Schroeder also failed to mention anything about Plaintiff's October 4, 2018 visit to Dr. Matialeu. That visit is significant because Plaintiff told Dr. Matialeu "he need[s] to get a job but does not feel like he is able to at this time because *it is difficult to leave the house [*17] and interact with people.*" (*Id.* at 369) (emphasis added). That complaint is consistent with Dr. Dupée's diagnosis of agoraphobia and Dr. Schroeder's own opinion that Plaintiff was suffering from "Panic disorder with agoraphobia" from November 9, 2017, through May 7, 2018.

18. The October 4, 2018 visit is also notable as it reflects Plaintiff completed a second PHQ-9 Questionnaire, and his score increased to 20, (*id.* at 371), which indicates a provisional diagnosis of Major depression, severe. (Req. for Judicial Notice, Attachment 4.) Unlike on September 6, 2018, Dr. Matialeu included this diagnosis in his October 4, 2018 report. (AR at 370.) None of this information was included in Dr. Schroeder's review.

19. In reviewing the November 5, 2018 visit, Dr. Schroeder mentioned that Plaintiff was "working on projects at the house and enthusiastic about getting things nice. Has been very active around the house painting and replacing the floor." (*Id.* at 336 (quoting *id.* at 363).) Dr. Schroeder found these activities suggested Plaintiff was not "severely impaired by a psychiatric disorder at that time." (*Id.*) Dr. Schroeder also noted Plaintiff "declined to accept more intensive mental health [*18] treatment such as regular psychotherapy or an intensive outpatient program[.]" which one might expect to see "[i]n a case of more severe psychiatric impairment[.]" (*Id.*)

20. However, as with his review of Plaintiff's previous visits with Dr. Matialeu, Dr. Schroeder failed to mention the results of Plaintiff's PHQ-9 Questionnaire, which resulted in another increase in Plaintiff's score to 24. He also failed to mention Dr. Matialeu's comment that Plaintiff "[r]eports not being fit to look [for] a job at this time because of *difficulty leaving the house and interacting with people.*" (*Id.* at 366) (emphasis added).

21. Plaintiff argues Dr. Schroeder cherry-picked information from Plaintiff's UCSD records to justify his denial of Plaintiff's claim for the relevant time period, May 8, 2018, through March 24, 2019. Defendant disputes this argument, and asserts Dr. Schroeder's opinion was fair and supported by the record. Given that the standard of review here is *de novo*, the Court need

not resolve this argument.

22. However, the Court disagrees with Dr. Schroeder's opinion that the records from UCSD do not support a finding of disability during the relevant timeframe, particularly given Dr. Schroeder's [*19] opinion that Plaintiff was disabled from November 9, 2017, to May 7, 2018, and again disabled as of March 25, 2019. As set out above, the March 25, 2019 restart date for Plaintiff's disability appears to be tied solely to the date of Dr. Dupée's initial IME report. Neither Dr. Schroeder, Defendant, nor Defendant's counsel provide any explanation as to how that date otherwise factors into Plaintiff's "recurrent" disability. And to the extent Dr. Schroeder credited Dr. Dupée's opinion of Plaintiff's condition, that condition was present on February 7, 2019, the date of Dr. Dupée's examination of Plaintiff. It did not simply appear out of nowhere on March 25, 2019. Indeed, based on the records from UCSD, it appears Plaintiff's condition had been ongoing since at least October 4, 2018. (*Compare id.* at 369 (October 4, 2018 progress note from UCSD) *with id.* at 424 (Dr. Dupée's report)) (both reporting Plaintiff's difficulty leaving the house and socializing with others). Contrary to Dr. Schroeder's opinion, the Court finds the medical records from UCSD support a finding that from May 8, 2018, to March 24, 2019, Plaintiff had a continuing psychiatric impairment that precluded him from performing [*20] full-time work.

23. The contrary opinion from Dr. Gratzler, Defendant's other medical records reviewer, does not change that finding. He opined the DSM-5 criteria for major depression was not delineated in Plaintiff's records from May 8, 2018, to March 24, 2019. However, both Dr. Matialeu, who examined and treated Plaintiff during that time, and Dr. Dupée, who also examined Plaintiff during that time,⁵ diagnosed Plaintiff with depression. (*See id.* at 363 (Dr. Matialeu) (noting Plaintiff had "Depression, unspecified depression type"), 428 (Dr. Dupée) (diagnosing Plaintiff with "Major Depressive Disorder, single episode, severe")). Although the opinions of these doctors are not entitled to special weight, the Court notes both doctors had "a greater opportunity to know and observe" Plaintiff than Dr. Gratzler, who simply reviewed Plaintiff's records. *Jebian v. Hewlett-Packard Co. Employee Benefits Organization Income Protection*

⁵ Dr. Gratzler stated Plaintiff's IME with Dr. Dupée was "done at a much later date," (*id.* at 98), but, as explained above, that statement is incorrect. Dr. Dupée examined Plaintiff on February 7, 2019, which was well within the period of review.

Plan, 349 F.3d 1098, 1109 n.8 (9th Cir. 2003) (quoting [Black & Decker Disability Plan v. Nord](#), 538 U.S. 822, 832, 123 S. Ct. 1965, 155 L. Ed. 2d 1034 (2003)).

24. Dr. Gratzner also relied on Plaintiff's "benign" mental status exams in concluding that Plaintiff was not disabled from May 8, 2018, to March 24, 2019. (AR at 98.) It is unclear what Dr. Gratzner meant by "benign" mental status exams, but a comparison of Plaintiff's mental status exams during his first period of disability [*21] (November 9, 2017, through May 7, 2018) and the period in question here (May 8, 2018, through March 24, 2019) reveals significant similarities. (Compare *id.* at 379 (stating, *e.g.*, Plaintiff had "good grooming and hygiene," "normal rate" of speech, and his thought process was "Coherent, logical") with *id.* at 394 (stating, *e.g.*, Plaintiff was "well groomed", his speech was "normal", his thought process was "intact")). There is no explanation for why these similar results would compel a finding of disability for one period but not the other. This is especially so where, in certain respects, Plaintiff's mental status examinations reflect a worsening of Plaintiff's condition over time, not an improvement. (Compare *id.* at 379 with *id.* at 394) (reflecting a change in mood from "Good, but I'm nervous a lot of the time, now." to "depressed", and a change in insight/judgment from "good" to "poor").

25. The Court is also unpersuaded by Dr. Gratzner's opinion that lack of "objective psychological testing" suggested Plaintiff was not disabled from May 8, 2018, to March 24, 2019. As set out in [Gonzalez v. Astrue](#), No. ED CV 08-1253 JEM, 2009 U.S. Dist. LEXIS 67859, 2009 WL 2390843 (C.D. Cal. Aug. 3, 2009): "Psychiatric impairments are not as amenable to substantiation by objective laboratory testing as are physical [*22] impairments. The diagnostic techniques necessarily will be less tangible. Mental disorders cannot be 'ascertained and verified' like physical ailments." [2009 U.S. Dist. LEXIS 67859, \[WL\] at *7](#).

26. In sum, based on this Court's review of the record, Plaintiff has met his burden to show he was disabled under the Policy from May 8, 2018, to March 24, 2019. Accordingly, Plaintiff is entitled to an award of benefits during that time.

III. CONCLUSION AND ORDER

Based on the foregoing findings of fact and conclusions of law, the Court orders as follows:

1. Plaintiff shall recover past benefits from the period

May 8, 2018, to March 24, 2019.

2. As stated above, it is unclear to the Court whether this finding entitles Plaintiff to recover benefits beyond March 24, 2019. It appears this finding may render the denial of benefits based on the "Actively at Work" provision a nullity, but it is unclear whether the parties agree on that issue.

3. The amount of benefits owing to Plaintiff is also unclear. Plaintiff alleges in his Complaint, (Compl. ¶137), and confirms in his opening trial brief, (ECF No. 24 at 3), that he is entitled to benefits at the rate of \$15,000 per month, less appropriate or applicable offsets, but he fails to explain what [*23] those offsets are.

4. The rate of any prejudgment interest is also unclear.

5. To resolve these uncertainties, the Court requests supplemental briefing from the parties on these issues. Those briefs shall be no more than five pages, and they shall be filed on or before **October 12, 2021**.

6. The Court also refers the parties to the Magistrate Judge for a settlement conference to occur on **November 8, 2021**, at **9:30 a.m.** Details about that conference will be provided in a separate order from the Magistrate Judge.

IT IS SO ORDERED.

Dated: October 5, 2021

/s/ Dana M. Sabraw

Hon. Dana M. Sabraw

Chief United States District Judge

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