

**COURT RULES DOCUMENTS PRODUCED AFTER DEADLINE
ADMISSIBLE UPON *DE NOVO* LTD REVIEW**

The U.S. District Court of Central California ruled that the plaintiff, Mr. Barteau, had his long term disability benefits wrongfully terminated by Prudential and that in a *de novo* review of an insurance claim by the courts new evidence that was left out of the administrative record is admissible.

In this case Prudential had granted Mr. Barteau long-term disability benefits for several years due to partial blindness, chronic pain, and cognitive deficiencies. Prudential then decided to review the claim file and alerted Mr. Barteau that they would need certain updated documentation within a month for him in order to maintain his benefits. Despite his best efforts the short notice given by Prudential did not allow Barteau to submit these records on time and his benefits were subsequently terminated. Barteau appealed but because these records were not submitted before the first decision they were technically not a part of the "administrative record" that could be reviewed up on appeal. Thus, the appeal failed due to a lack of documentation of disability. Barteau then filed this suit against Prudential which alleged the termination of his benefits was arbitrary and capricious under ERISA standards and that he should be reinstated and awarded back benefits.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CARL BARTEAU,
Plaintiff,
VS.
PRUDENTIAL INSURANCE
COMPANY OF AMERICA and LONG
TERM DISABILITY COVERAGE
FOR ALL EMPLOYEES LOCATED
IN UNITED STATES OF DEVRY,
INC.,
Defendants.

CASE NO: CV08-02733 RSWL
(FMOx)
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

1 Plaintiff Carl Barteau filed a complaint against the Long Term Disability Coverage
2 for All Employees Located in United States of DeVry, Inc. (the “Plan”) and Prudential
3 Insurance Company of America (“Prudential”) alleging a failure to provide long term
4 disability benefits in accordance with the Plan and the Employee Retirement Income
5 Security Act of 1974. Prudential administers and insures the Plan. Both sides submitted
6 their Opening Trial Briefs on March 17, 2009, and their Responsive Trial Briefs on
7 April 1, 2009. Upon the filing of these briefs, on April 21, 2009, the Court conducted a
8 bench trial and heard the arguments of both sides. The matter was taken under
9 submission and the parties were Ordered to submit findings of fact and conclusions of
10 law by May 5, 2009. Having received, reviewed, and considered the evidence, both
11 parties briefs, the parties arguments at trial, and the parties findings of fact and
12 conclusions of law, the Court has reached its decision.

13 **I. FINDINGS OF FACT¹**

14 **A. Mr. Barteau’s Age, Education, Training and Experience**

15 1. Mr. Barteau was just shy of his 60th birthday when Prudential terminated
16 the disability benefits Mr. Barteau had been receiving for the prior four years. (592).

17 2. Prior to becoming disabled, Mr. Barteau had been an Assistant Professor of
18 Mathematics at DeVry Institute of Technology for almost eight years. (179, 271-72).

19 3. Mr. Barteau was qualified to be a teacher based on his Post Graduate degree
20 from the University of Vermont where his area of concentration was computer
21 applications of mathematics. (542).

22 4. Mr. Barteau’s education, training, and experienced focused on utilizing
23 superior cognitive abilities, including the ability to read, write, and think clearly and
24 logically. (272).

25 **B. Mr. Barteau is Hospitalized and Short Term Disability Benefits Are**
26 **Approved**

27 _____
28 ¹ Unless otherwise noted, citations are to the record lodged by Prudential on March 17, 2009,
and bates stamped AR ####. For ease of reference the “AR” and any intervening zeros have
been omitted.

1 5. Mr. Barteau suffered problems with his right eye since he was a child. (179).
2 At that time he sustained an injury when a steel fragment became lodged in his eye. (179).
3 At around age 20 he had cataract surgery in his right eye and regained fairly normal
4 vision. (179). As time passed, Mr. Barteau’s eye degenerated. (179).

5 6. In September of 2002, Mr. Barteau had surgery for glaucoma in his right
6 eye. (179). He was told at that point that the glaucoma surgery had been complicated by
7 a scratched cornea. (179). The result was that Mr. Barteau was instructed to wear a
8 replaceable contact lens. (179). His physician reassured him that the eye would
9 spontaneously heal. (179).

10 7. The contact lens Mr. Barteau was instructed to wear needed to be replaced
11 every few days, a process that left Mr. Barteau in “excruciating pain.” (179). Because the
12 pain had reached a point that it was unbearable, Mr. Barteau sought alternative treatment
13 through UCLA. (179).

14 8. Treatment at UCLA commenced on January 7, 2003, the date which proved
15 to be Mr. Barteau’s date of disability. (271).

16 9. On January 7, 2003 and January 10, 2003, to determine the cause of Mr.
17 Barteau’s pain, biopsies of his eye were taken from which cultures showed evidence of
18 an eye fungus. (179). Two more biopsies followed, each growing fungus cultures. (179).

19 10. On January 17, 2003, Mr. Barteau was admitted to the hospital because there
20 had been worsening of the inflammation in the anterior chamber of his eye. (179). During
21 his hospitalization Mr. Barteau continued to experience eye pain. (179). This was “clearly
22 a very serious eye infection with serious risk of loss of vision or loss of the eye entirely.”
23 (180).

24 11. Mr. Barteau’s medical records continually noted the eye pain from which he
25 suffered. Pain management medications were prescribed, including oxycontin, vicodin,
26 and morphine injections. (177, 181, 216).

27 12. In a letter dated January 30, 2003, Dr. Anthony J. Aldave, ophthalmology,
28 memorialized that Mr. Barteau remained hospitalized. (228). A surgical procedure had

1 been performed to remove a large part of the infection from Mr. Barteau's right eye,
2 however, he was to remain in the hospital for several more days and it was anticipated he
3 would require frequent visitations after his discharge. (228).

4 13. In a letter dated February 14, 2003, Dr. Aldave documented that Mr. Barteau
5 had been released from the hospital on February 4, 2003, but Mr. Barteau continued to
6 be followed closely. (252). Mr. Barteau was experiencing significant discomfort
7 associated with his eye infection which Dr. Aldave hoped was "finally under control."
8 (252). Dr. Aldave documented the possibility that further surgery might be necessary.
9 (252).

10 14. Further surgery was conducted on February 22, 2003 when Mr. Barteau
11 elected to proceed with patch penetrating keratoplasty OD in an attempt to seal his globe.
12 (255).

13 15. Following the February 22, 2003 surgery, Dr. Aldave opined that Mr.
14 Barteau experienced a lack of useful vision in his right eye and disabling light sensitivity
15 in both eyes. (259). Dr. Aldave estimated that Mr. Barteau would be able to return to
16 work in July 2003. (259).

17 16. Mr. Barteau was an enrolled member of his employer's short and long term
18 disability plans. On July 6, 2003, Mr. Barteau's claim for short term disability benefits
19 was approved through the maximum period. (267).

20 **C. Mr. Barteau's Attempt at Returning to Work is Unsuccessful and**
21 **Prudential Determines Mr. Barteau is Totally Disabled**

22 17. As Mr. Barteau's short term disability benefits were expiring, he attempted
23 to create a lecture in an effort to return to work. (96). This proved difficult for Mr.
24 Barteau as his vision became blurry and he could not handle the pain. (96).

25 18. On July 2, 2003, Mr. Barteau submitted a claim for long term disability
26 ("LTD") benefits through Prudential. (281). Mr. Barteau claimed he was prevented from
27 working due to "loss of vision right eye, eye strain to left eye, headaches, blurry vision."
28 (281).

1 19. Dr. Dirk Ruffin, Mr. Barteau's general medical treatment provider, certified
2 Mr. Barteau's disability on the basis of Mr. Barteau's difficulty with focus and headaches
3 along with his right eye blindness. (284).

4 20. In a letter dated August 27, 2003, Prudential informed Mr. Barteau that
5 Prudential had analyzed Mr. Barteau's medical records, found him to be totally disabled
6 from his own job as a professor, and approved LTD benefits. (287-89).

7 **D. Prudential Recommends Mr. Barteau Apply for Social Security**
8 **Disability Benefits and Hires Him Professional Assistance to Advocate**
9 **For His Disability**

10 21. Prudential advised Mr. Barteau to apply for Social Security Disability
11 benefits because Prudential "expect[ed] him to be (out of work) for an extended period."
12 (97).

13 22. Mr. Barteau applied for Social Security Disability benefits and in a letter
14 dated December 16, 2003, Mr. Barteau was denied Social Security Disability benefits.
15 (299).

16 23. After Mr. Barteau advised Prudential that he had been denied Social Security
17 Disability benefits, Prudential wrote to Mr. Barteau and informed him that "according to
18 the information in our files," Prudential felt it was in his best interest to appeal the denial.
19 (297). Prudential offered to make the services of Allsup Inc. Social Security Consultants
20 ("Allsup") available to Mr. Barteau at "absolutely no cost to you, as Prudential will pay
21 their entire fee." (297). Prudential was offering to pay for professionals to pursue benefits
22 that were only available to Mr. Barteau if he was unable to work any work. (297).

23 24. If Mr. Barteau received Social Security Disability benefits, these benefits
24 were a dollar for dollar offset to the benefits Prudential had to pay Mr. Barteau. (27, 297).

25 25. Mr. Barteau accepted Prudential's offer to hire Allsup to advocate for Mr.
26 Barteau's disability. (398).

27 26. In February 2004, Allsup contacted Dr. Ruffin and asked him to complete
28 a functional capacity assessment for Mr. Barteau. (398).

1 27. Allsup provided Dr. Ruffin with forms tailored to Mr. Barteau's disabling
2 conditions. (399-401). These personalized forms included questions regarding Mr.
3 Barteau's headaches, attention and concentration. (399).

4 28. On March 30, 2004, Prudential sought an update from Mr. Barteau on his
5 condition. (98-99). Prudential was informed that Mr. Barteau had no vision in his right
6 eye and his left eye vision was blurry. (99). Mr. Barteau had suffered permanent nerve
7 damage and his vision would not get any better. (99). Further, Prudential was informed
8 that Mr. Barteau was experiencing migraine headaches frequently. (99). These headaches
9 came on when Mr. Barteau tried to read or when he tried to watch TV during the day.
10 (99). Mr. Barteau took amitriptyline to treat the migraines. (99). Prudential was also
11 informed that Mr. Barteau continued to try to maintain some level of usefulness and thus
12 he helped his fiancé manage her rental properties. (99). There is no indication that Mr.
13 Barteau was paid for any assistance he provided to his fiancé, nor did Prudential ask Mr.
14 Barteau what help he was providing to his fiancé.

15 29. In April 2004, Dr. Ruffin completed the tailored forms Allsup had provided
16 Dr. Ruffin and documented therein that Mr. Barteau experienced headaches "[a]ll day
17 long if not taking Amitriptyline." (399). Mr. Barteau's headaches were "Severe," having
18 the impact of precluding the attention and concentration required for even simple,
19 unskilled work tasks. (399).

20 30. Dr. Ruffin also documented that Mr. Barteau's headaches and visual
21 adjustments provided a "reasonable medical basis" for the fatigue Mr. Barteau suffered
22 from. (361). This fatigue was disabling to the extent that it prevented Mr. Barteau from
23 working full time at even a sedentary position. (361).

24 **E. Prudential Continues To Investigate Mr. Barteau's Disability**

25 31. Prudential followed up on Mr. Barteau's condition in August of 2004. (99).
26 Prudential discovered that Mr. Barteau's condition remained the same – including that
27 he experienced very bad headaches for which he took pain medicine at night (which made
28 him sleepy) and over the counter medicine during the day. (99).

1 32. In September of 2004, Prudential followed up on Mr. Barteau's condition.
2 (100). Prudential learned that Mr. Barteau was still blind in his right eye and that his
3 migraines caused blurry vision in his left eye. (100). These migraines were constant.
4 (100). To lessen the pain, Mr. Barteau took Tylenol, Aleve and Motrin during the day and
5 amitriptyline, a prescription medication, at night to sleep. (100). These conditions resulted
6 in Mr. Barteau not being able to do much. (100). His driving was limited and watching
7 TV and reading caused migraines. (100).

8 33. Also in September of 2004, Prudential reviewed Mr. Barteau's claim for
9 disability benefits. (402). Prudential presumed that Mr. Barteau's right eye blindness
10 alone "should not preclude (Mr. Barteau) from working." (402). Thus Prudential
11 requested updated visual acuity notes from Dr. Aldave. (402).

12 34. Prudential received two reports. The first, from a November 14, 2003 office
13 visit, documented that Mr. Barteau was experiencing headaches with eye pain. (410). Mr.
14 Barteau was to return in one year. (410). The second, from a September 17, 2004 office
15 visit, documented that Mr. Barteau was experiencing frequent headaches which increased
16 with eye strain. (409). It was again recommended that Mr. Barteau return the following
17 year. (409).

18 35. Prudential never again requested visual acuity notes from Dr. Aldave nor
19 would Prudential ask Mr. Barteau for such information.

20 36. Prudential requested updated treatment notes from Dr. Ruffin. (418).
21 Prudential received these records in November 2004. (431).

22 37. Having received this combination of records, Prudential determined that Mr.
23 Barteau continued to be disabled under the terms of the Plan and thus disability benefits
24 continued to be paid to Mr. Barteau. (440).

25 38. On December 27, 2004, Prudential wrote to Mr. Barteau and informed him
26 that on July 5, 2005 the definition of disability would change from the own job definition
27 to the any job definition. (440). Thus, for Mr. Barteau to receive disability benefits from
28 Prudential on and beyond July 5, 2005, Mr. Barteau needed to be unable to perform, for

1 wage or profit, the material and substantial duties of any job for which he was reasonably
2 fitted by his education, training, or experience. (440). To determine if Mr. Barteau met
3 this any job definition of disability, Prudential informed Mr. Barteau that it would
4 conduct a “thorough evaluation to determine your eligibility for benefits to and beyond
5 that date.” (440).

6 39. As part of the any job review, Prudential received from Allsup another
7 functional capacity evaluation completed by Dr. Ruffin. (457). On January 24, 2005, Dr.
8 Ruffin again documented that Mr. Barteau suffered from severe headaches which
9 precluded the attention and concentration required for even simple, unskilled work tasks.
10 (457). Along with the disabling cognitive impact caused by Mr. Barteau’s headaches, Dr.
11 Ruffin documented that Mr. Barteau suffered from disabling fatigue. (460).

12 **F. Mr. Barteau is Awarded Social Security Disability Benefits Due to His**
13 **Inability to Work in Any Occupation**

14 40. On February 18, 2005, Allsup contacted Prudential with an update on Mr.
15 Barteau’s Social Security Disability appeal. (483). Allsup represented that it had
16 submitted a written brief to the Office of Hearing and Appeals and was waiting for a
17 hearing date. (484).

18 41. On March 15, 2005, Allsup again contacted Prudential, this time informing
19 Prudential that its efforts had been successful and Mr. Barteau had been awarded Social
20 Security Disability benefits. (488). Mr. Barteau had been found to be disabled from any
21 work. (488; 20 C.F.R. § 404.1520).

22 **G. Prudential Determines Mr. Barteau is Disabled from Any Job**

23 42. Having encouraged Mr. Barteau to pursue Social Security Disability
24 benefits, Prudential did not indicate that it considered the Social Security Administration
25 finding to be evidence of disability. Rather, Prudential continued, in its own words, to
26 “conduct[] a thorough evaluation to determine Mr. Barteau’s eligibility for benefits”
27 under the any job definition of disability. (485).

28 43. On May 6, 2005, as part of this evaluation, Prudential referred Mr. Barteau’s
claim to a Vocational Rehabilitation Specialist, Douglas Palmer, MS, CRC, CDMS, for

1 evaluation of Mr. Barteau's employment options. (505). This review took into
2 consideration Mr. Barteau's education and training along with his headaches, right eye
3 blindness, and blurred vision in his left eye. (505). Vocationally, Prudential determined
4 that Mr. Barteau "continues to have medical complications that would impact his ability
5 to work." (505). It was Prudential's conclusion that Mr. Barteau "would not be able to
6 identify employment options without extensive vocational intervention." (505).
7 Prudential never again had Mr. Barteau's ability to work examined by a vocational
8 specialist of any type and Mr. Barteau never underwent extensive vocational intervention.

9 44. On May 11, 2005, Prudential contacted Mr. Barteau and inquired how he
10 was doing. (104). Mr. Barteau expressed that he "is alive" but was still getting headaches.
11 (104). These headaches were constant "due to nerve damage in his eye." (104). To treat
12 this pain, during the day Mr. Barteau got by using Tylenol and at night he took
13 amytriptaline. (104).

14 45. On June 2, 2005, Prudential wrote to Mr. Barteau to express the results of
15 Prudential's through evaluation of his continued eligibility for benefits against the any
16 job standard of disability. (517). Prudential stated:

17 We have completed our evaluation of your claim based on the definition of
18 disability as stated above. We have determined that you meet the
19 requirements for eligibility for benefits under this definition of disability.
20 We have determined that you are totally disabled as required. Benefits will
21 continue provided you remain totally disabled.... (517).

22 Prudential's plan for the administration of Mr. Barteau's claim was to follow up for
23 continued updates and to "check for progress." (519). If *progress* was noted, then
24 Prudential would re-visit the possibility of Vocational Rehabilitation Counselor services.
25 (519). The facts in the record show that Prudential recognized Mr. Barteau was disabled
26 from any job and would remain disabled absent "progress" (519) or "extensive vocational
27 intervention" (505). The claim file is devoid of evidence that either of these events
28 occurred.

46. The permanent nature of Mr. Barteau's disability caused his claim to be
referred to Prudential's "Mature Unit for minimal handling." (520).

1 **H. After Finding Mr. Barteau Disabled From Any Job, Prudential**
2 **Terminates Mr. Barteau's Disability Benefits Without Evidence of**
3 **Improvement or Progress**

4 47. Prudential's next review came in March 2006, when Prudential determined
5 an update on treatment was warranted "[a]lthough it appears[] there has been little or no
6 change in EE's condition, it is somewhat unclear as to what are appropriate R+L's and
7 possibility of improvement to work capacity when if ever." (522).

8 48. Prudential asked Mr. Barteau to complete an activities of daily living
9 questionnaire. (529).

10 49. Mr. Barteau completed this questionnaire in April 2006. (538). Mr. Barteau
11 stated that his current medical conditions included extremely bad headaches, blindness
12 in his right eye, and blurred vision in his left eye. (531). He treated for headaches, neck
13 aches, and shoulder aches. (531). His headaches caused him trouble with sleeping and he
14 needed to take naps. (532). Mr. Barteau could drive, but was limited to distances of 2
15 miles or less, and for anything greater he used a bus service for the disabled or his fiancé.
16 (533). Mr. Barteau did not perform any type of housework as this was performed by a
17 cleaning woman and his fiancé. (534). Mr. Barteau did like to play the guitar, but he was
18 no longer able to play for "more than just a few minutes." (535). Mr. Barteau had
19 attempted working since his disability, but found that he could not work for more than
20 5 or 10 minutes due to headaches and blurred vision. (537).

21 50. Prudential also requested medical records from Dr. Ruffin in May of 2006.
22 Prudential specifically requested only the two most recent treatment records. (544). This
23 created an artificial gap in Mr. Barteau's medical records of almost a year and a half.
24 Prudential also sent Dr. Ruffin a "Work Status Form" for completion. (544).

25 51. Unlike the Allsup forms, the questions Prudential asked on this form were
26 not tailored to Mr. Barteau's conditions, which further created an information gap. (555).
27 This generic form did not request information on Mr. Barteau's headaches, fatigue, or
28 cognitive abilities, as had the tailored forms from Allsup. (555). The form addressed only
physical abilities such as carrying, pushing, and pulling objects. (555). Thus, many of the

1 disabling aspects of Mr. Barteau's conditions went unaddressed when Dr. Ruffin
2 completed the form in June 2006. (555).

3 52. When Prudential reviewed this limited form, Prudential formed the opinion
4 that Mr. Barteau "has work capacity." (107).

5 53. On September 8, 2006, Prudential informed Mr. Barteau of this impression
6 and advised him that there "is no objective evidence in file of any disabling condition...."
7 (107).

8 54. The Plan does not contain the requirement that proof of disability be
9 "objective." (1-49).

10 55. Mr. Barteau informed Prudential that in addition to Dr. Ruffin he was also
11 seeing an orthopedic specialist for spine pain (which he believed was a result of nerve
12 damage caused by the antibiotics Mr. Barteau took to treat his fungal infection), and was
13 seeing a bio-feedback psychiatrist, Dr. Evan Landrum. (107). Prudential asked for proof
14 of disability from all these treatment providers in 30 days or his claim would be
15 terminated. (107).

16 56. Mr. Barteau attempted to comply with Prudential's request, however, the
17 orthopedic specialist declined to comment on his disability until further treatment had
18 been performed and Dr. Landrum stated he would not opine on disability unless he
19 performed neuropsychological testing. (107).

20 57. On September 15, 2006, Prudential again reminded Mr. Barteau of its need
21 for "something to objectively support his disability" if Prudential was going to continue
22 paying his claim. (107). Prudential did not, and never would, offer examples of what type
23 of information Prudential considered to constitute "objective support." Further, Prudential
24 did not inform Mr. Barteau why objective support was now required when the LTD Plan
25 did not require objective evidence. Prudential had found Mr. Barteau to be disabled for
26 the prior three years when, in Prudential's words, there was "no objective evidence" to
27 support this finding. (107).

28

1 58. Mr. Barteau obtained medical records from Dr. Ruffin, scheduled further
2 treatment with the orthopedic specialist, and provided documentation that he had
3 developed a mood disorder, generalized anxiety, and cognitive dysfunction due to his
4 severe head pain. (560-65).

5 59. On October 3, 2006, Mr. Barteau informed Prudential that he was to undergo
6 neuropsychological testing which would commence that day, and that he was going to
7 undergo three MRI's the following day to evaluate his spine. (108). In response,
8 Prudential stated it "would gladly work with him to allow for necessary time to obtain all
9 pertinent info prior to any decision. He thanked me repeatedly." (108).

10 60. On October 5, 2006, Dr. Landrum wrote to Prudential and informed them
11 that Mr. Barteau was currently undergoing a neuropsychological evaluation to determine
12 the extent of his reported disabilities and his ability to function due to blindness in one
13 eye, severe headaches, anxiety and depression. (567). Dr. Landrum indicated that he
14 would forward the findings of the neuropsychological evaluation when it was completed,
15 but the evaluation had to be conducted in stages as Mr. Barteau "becomes quickly
16 fatigued because of his constant headaches." (567).

17 61. Contrary to its express assurances, Prudential did not wait for the results of
18 the neuropsychological evaluation or the MRIs before it commenced the evaluation of
19 Mr. Barteau's claim and made the decision to terminate his benefits. (108).

20 62. On October 9, 2006, six days after telling Mr. Barteau that it would allow
21 the necessary time to obtain the pertinent information Prudential knew was forthcoming,
22 Prudential reviewed the available records (which did not include the evidence Mr.
23 Barteau was obtaining) and determined that Mr. Barteau's blindness and headaches did
24 not provide restrictions or limitations impacting his functional capacity. (569). Prudential
25 felt it was "[u]nclear exactly what (Mr. Barteau) is suffering from currently. He has had
26 multiple conditions in the past that seem to have resolved...." (570).

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1 63. There existed no evidence in the claim file that any of the conditions
2 Prudential had previously deemed disabling had resolved or gone away. In fact, there was
3 some evidence showing the opposite. (531, 556, 560, 562, 564, 567).

4 64. Mr. Barteau continued to suffer from all prior disabling conditions and
5 symptoms, and he had undergone an MRI which showed he also suffered from bulging
6 discs in his cervical spine. (580).

7 65. By letter dated October 25, 2006, after having deemed Mr. Barteau to be
8 totally disabled for almost four years, and without the neuropsychological or MRI testing
9 it knew was forthcoming shortly, Prudential terminated Mr. Barteau's benefits. (592).
10 Prudential based the termination on the conclusion that "[b]ased on conditions noted
11 above, it is unclear what is restricting you from your light work activities." (596). After
12 four years of deeming him totally disabled, and without any evidence of improvement,
13 Prudential found Mr. Barteau to be able to work.

14 **I. Neuropsychological Testing Proves Mr. Barteau is Cognitively**
15 **Impaired by Pain and Unable to Work in Any Job**

16 66. No later than November 4, 2006, Prudential received the neuropsychological
17 evaluation of Mr. Barteau. (608).

18 67. As noted, Prudential was aware the neuropsychological evaluation had
19 commenced on October 3rd (evaluations stopped on October 18th), but Dr. Landrum's
20 report was not completed until October 30, 2006. (621). In Dr. Landrum's report he
21 documented the results of the testing he had performed on Mr. Barteau. (621). Based on
22 objective test results and personal observation, Dr. Landrum found that it was "apparent
23 that Mr. Barteau's cognitive and physical functioning is severely affected by his chronic,
24 debilitating headaches." (621).

25 68. Dr. Landrum documented that Mr. Barteau attempted to give his best at
26 every task, however, Dr. Landrum observed that Mr. Barteau's "ability to function
27 changes dramatically as headache pain increased or decreased and/or he felt rested
28 enough to attempt to ignore the pain." (610).

1 69. In performing the tests, Mr. Barteau would work for as long as possible, but
2 would have to lie down and rest every 20 minutes or so. (610). Pursuant to his
3 observation, it was apparent to Dr. Landrum that on many occasions Mr. Barteau was
4 struggling to concentrate and focus on the task at hand. (610).

5 70. These observations supported the accuracy of the objective tests
6 administered by Dr. Landrum. (611). All of the objective test scores were valid, except
7 for the visual stimuli testing, which was invalid due to Mr. Barteau's visual problems.
8 (617).

9 71. The test results showed that Mr. Barteau was "extremely impaired" in his
10 ability to regulate his responses and respond to stimuli appropriately. (617). Mr. Barteau
11 was "extremely impaired" in his auditory attention, limiting his ability to make accurate
12 responses, stay focused and sustain his attention even under low demand conditions.
13 (617). Mr. Barteau was "extremely impaired" in his ability to be flexible when things
14 change under high demand conditions. (617). The testing showed Mr. Barteau was likely
15 to overreact to and/or be distracted by auditory stimuli in his environment; indicative of
16 problems shifting mental sets and inhibiting his responses to changes in environments.
17 (617). These findings showed that Mr. Barteau was likely to have "significant functional
18 problems in his life." (617).

19 72. The objective testing showed that Mr. Barteau was likely to have difficulties
20 learning new tasks in the work environment. (617). Mr. Barteau demonstrated erratic
21 information processing and a delay in his optimum response time which was likely to
22 significantly impact his ability to process information. (617). The testing showed Mr.
23 Barteau had significant problems with his general auditory attentional functioning which
24 was "likely to have a major impact on his ability to perform successfully in many areas
25 of his life....[c]onsequently, he is likely to have problems in the work environment in
26 maintaining his auditory attention...." (618). Once distracted, the objective tests showed
27 that Mr. Barteau had problems being able to quickly get "back on track." (618). This was
28 a problem for Mr. Barteau because the testing showed he frequently "drifted off." (618).

1 73. The types of problems the tests showed Mr. Barteau suffered from were
2 “likely to manifest in the school or work environment as difficulty following directions
3 accurately and/or the misunderstanding of verbal instructions.” (618). The objective
4 testing reflected a very slow mental processing speed. (618). Mr. Barteau was likely to
5 be extremely impaired in his ability to listen to and comprehend instructions, recall verbal
6 information, take accurate and detailed notes in meetings, and understand key information
7 during conversations. (618-19).

8 74. Based on the objective testing Dr. Landrum determined that, “[i]n the work
9 setting, (Mr. Barteau) may have difficulty getting assigned tasks done on time.” (619).
10 Mr. Barteau showed difficulty setting priorities, staying on task, and following work
11 through to completion. (619). When pressed to perform, Mr. Barteau was not likely to
12 respond well. (619).

13 75. The MicroCog subtests indicated “strong support” for Mr. Barteau’s
14 problems with general cognitive functioning and proficiency, including slowed
15 information processing, accuracy and spatial processing, as well as “severe” problems
16 with attention and reaction time. (619).

17 76. The Trail-Making Test showed that Mr. Barteau also had “significant
18 problems with visual attention and speed of visual processing.” (620). These problems
19 showed that Mr. Barteau “will have problems working effectively in employment
20 settings.” (620).

21 77. Mr. Barteau’s Pin Test indicated major problems with his motor speed.
22 (619).

23 78. Dr. Landrum’s diagnosis was that Mr. Barteau suffered from the physical
24 pathology (Axis III) of Migraine/Cluster Headaches, Severe, which caused the mental
25 pathology (Axis I) of Cognitive Disorder and Mood Disorder. (621). Dr. Landrum
26 determined that Mr. Barteau suffered from “Occupational Problems.” (621).

27 79. Considering all the objective test results and his personal observations, Dr.
28 Landrum formed the conclusion that:

1 It seems apparent that Mr. Barteau's cognitive and physical functioning is
2 severely affected by his chronic, debilitating headaches. He has learned to
3 live with the headaches, but must give much time and effort to working
around them and in keeping them from isolating him from family and the
world in general.

4 ...

5 It is my opinion, given the results of these assessment instruments that Mr.
6 Barteau cannot at this time maintain enough focus for a long enough period
to satisfy virtually any requirements for work or work-like situations. It is
7 unlikely that this will change as long as he cannot reduce his headaches.
(621).

8 80. Dr. Landrum's findings and conclusions were based on objective test results.
9 (608-21).

10 **J. Prudential Uses its Own Reviewers to Review the Objective
11 Neuropsychological Test Results**

12 81. Without a formal appeal from Mr. Barteau, Prudential had Dr. John
LoCascio review Dr. Landrum's report. (650).

13 82. Dr. LoCascio addressed Mr. Barteau's headaches, but concluded that the
14 only place the headaches were mentioned was in Dr. Landrum's report. (653). Dr.
15 LoCascio felt there was "no support" for the severity of the headaches, or for "any
16 impairment" related to the headaches, other than that contained in Dr. Landrum's
17 objective neuropsychological data. (653). Dr. LoCascio seemed to simply dismiss Drs.
18 Aldave and Ruffin's multiple statements regarding the existence and severity of Mr.
19 Barteau's headaches. (399, 409-10, 457). Moreover, Dr. LoCascio did not address why
20 Dr. Landrum's objective findings and observations were not sufficient support for
21 impairment due to headaches. Dr. LoCascio did state that the "data indicate[s] significant
22 impairment on the basis of one interview and testing done on 10/18/06...." (653-54). Dr.
23 LoCascio concluded that this was a complex case and referred the case *by name* to a Dr.
24 Stephen N. Gerson. (654).

25 83. Prudential followed Dr. LoCascio's direction and sent Mr. Barteau's file for
26 review to Dr. Gerson, psychiatrist. (689).

27 84. On December 22, 2006, Dr. Gerson sent his review findings to Prudential.
28 (676). Dr. Gerson had reviewed the records and found that Dr. Joseph Peck's records

1 documented disk bulges and spurs in Mr. Barteau's cervical spine and Dr. Ruffin's
2 records documented Mr. Barteau's headaches were severe, which precluded attention and
3 concentration for even simple unskilled work tasks, and that these migraine headaches
4 were occurring frequently. (682). Dr. Gerson recognized that Mr. Barteau "remained out
5 of work due to reported daily 'migraine' and 'cluster' headaches, which reportedly
6 interfered with his ability to adequately pay attention and concentrate, and caused
7 extreme fatigue." (686). Yet Dr. Gerson went on to say "[i]n general, medical
8 records...did not note that the claimant reported or demonstrated any...substantial
9 difficulty with concentration and attention." (688).

10 85. It cannot be discerned from the record what Dr. Gerson felt Dr. Ruffin's
11 records and the neuropsychological evaluation reported or demonstrated as those reports
12 directly demonstrated Mr. Barteau's substantial difficulty with concentration and
13 attention. This becomes clear as when Dr. Gerson spoke to the results from the tests
14 performed during the neuropsychological evaluation, he stated: "all scores...fell into the
15 extremely impaired range, which is incompatible with medical record documentation."
16 (688).

17 86. Dr. Gerson's perceived incompatibility (Prudential and Social Security had
18 already found Mr. Barteau to be disabled from any job based on the medical record
19 documentation in existence before the neuropsychological evaluation) cannot be
20 reconciled with the objective, medical evidence in the Administrative Record. Plaintiff
21 has offered evidence that Dr. Gerson is not an independent medical reviewer. Rather, an
22 internet search of Dr. Gerson shows he broadcasts that he "has done over 1500
23 Psychiatric Disability File reviews for Disability Insurance Companies such as
24 Prudential." [<http://www.jurispro.com/stephengerson>] Plaintiff also has provided
25 information purportedly showing that, in the past, Dr. Gerson has shown that his
26 motivation is not to facilitate a fair evaluation of a claimant's disability, but to facilitate
27 not paying a claim. *See* Plaintiff's Supplemental Initial Disclosures, Exhibit "A" at PID
28 004 ("[Dr. Gerson] said if we do that we run the risk that they will find a doctor who will

1 be an advocate....he said he will not put these suggestions in the report from the
2 information that he has ee is not impaired.”).

3 87. Five days after sending Prudential his file review findings Dr. Gerson called
4 Dr. Landrum to discuss Mr. Barteau’s disability. (670). In this forty-five minute
5 conversation, Dr. Gerson confirmed that Mr. Barteau was in fact providing full effort
6 during the neuropsychological evaluation and that Mr. Barteau was not a malingerer.
7 (670). Dr. Gerson was also informed that Dr. Landrum treats Mr. Barteau weekly for
8 biofeedback and pain management. (671). Having commenced this weekly treatment, Dr.
9 Landrum felt Mr. Barteau was impaired by a combination of pain and depression, with
10 the depression being an outgrowth of the chronic pain. (671).

11 88. Dr. Gerson’s opinion following the conversation was that he “[did] not think
12 (Mr. Barteau was) disabled by depression alone,” and “claimant needs a consultation with
13 a psychologist who is an expert on management of chronic pain.” (668). Dr. Gerson did
14 not dispute that Mr. Barteau was experiencing disabling pain, and Dr. Gerson went so far
15 as to postulate that Mr. Barteau may benefit from “a low dose of opiate” (668) and “needs
16 more aggressive pain...management.” (669).

17 89. Following the prolonged conversation with Dr. Landrum, the most Dr.
18 Gerson was willing to assert was his observation that the neuropsychological testing was
19 not validated by specific alternative testing. (668). Significantly, even though the validity
20 testing Dr. Gerson noted as having not been performed, Dr. Gerson’s opinion was that
21 he was “not convinced psychological testing needs to be repeated.” (668). Thus, Dr.
22 Gerson opined: “I don’t feel (Mr. Barteau’s) level of depression alone is substantially
23 impairing the claimant at this point.” (669). Mr. Barteau had never claimed, nor had
24 Prudential previously determined, that Mr. Barteau was substantially impaired by
25 depression alone.

26 **K. Mr. Barteau Continues to Treat for His Disabling Conditions and**
27 **Appeals Prudential’s Termination by Providing to Prudential the**
28 **Opinions of Three Treating Doctors That Mr. Barteau is Disabled from**
Any Job

1 90. As Prudential was performing its review of the neuropsychological
2 evaluation, Mr. Barteau was treating with Dr. Landrum, Dr. Ruffin and Dr. Joseph C.
3 Peck, Board Certified Pain Medicine & Board Certified Physical Medicine and
4 Rehabilitation. On January 23, 2007, Prudential informed Mr. Barteau that he had not
5 provided a formal appeal. (701).

6 91. Prudential received the formal appeal from Mr. Barteau on February 10,
7 2007.² (110). Mr. Barteau enclosed with his appeal letters from Drs. Peck, Landrum, and
8 Ruffin, all of which supported Mr. Barteau's inability to work any job. (628).

9 92. On December 15, 2006, Dr. Peck wrote that "Mr. Barteau has been under
10 my care since September 28, 2006 for complaints of chronic severe headaches, neck pain,
11 right arm pain, low back pain, and right leg pain." (664). Dr. Peck noted that Mr. Barteau
12 had undergone an MRI of the cervical spine which demonstrated multilevel disc
13 herniations, and an MRI of the lumbar spine which demonstrated a right lateral disc
14 herniation. (664). Mr. Barteau had also been the subject of electrodiagnostic studies of
15 the upper extremities, which demonstrated acute cervical radiculopathy and
16 electrodiagnostic studies of the lower extremities showed chronic right lumbar
17 radiculopathy. (664). Based on this objective and subjective evidence, Dr. Peck stated
18 "[i]n my opinion, this patient continues to suffer from severe and incapacitating
19 headache, neck pain, low back pain, and leg pain that interferes with his ability to
20 perform any type of work at this point in time." (665).

21 93. Dr. Landrum's January 15, 2007 letter reiterated his findings from the
22 neuropsychological testing and responded to Dr. Gerson's conversation. (694). Dr.
23 Landrum stated that Mr. Barteau sought the neuropsychological testing because Mr.
24 Barteau had been told that he was not disabled and would be losing his disability
25 compensation. (694). Dr. Landrum pointed out that the testing was done to support Mr.

27
28 ² Mr. Barteau's formal appeal letter is erroneously dated November 9, 2006. There is no
indication that this is an accurate date and information provided with the appeal letter post-dates
this clearly erroneous date.

1 Barteau's claim of disability, not to establish one. (694). Dr. Landrum clarified that Mr.
2 Barteau's

3 pain is so severe that it takes all of his effort to have limited periods of
4 functionality during the day. It is during these very brief periods that he
5 tries to take care of financial matters or other matters of import. He depends
6 on his financé to review anything important before he makes decisions.
7 Much of his time is spent lying down or isolated from others because he is
8 in such pain that he cannot even hold a conversation. (694).

9 Dr. Landrum's opinion, following weekly treatment, was that until Mr. Barteau's pain
10 was brought under control "Mr. Barteau will not be able to function cognitively in a
11 manner that will allow him to hold any kind of job that requires even a minimum of
12 attention and concentration for longer than a few minutes at a time." (695).

13 94. On January 26, 2007, Dr. Ruffin wrote:

14 Mr. Barteau has been a patient of mine for several years. Over the past few
15 years Mr. Barteau has shown increased depression, decreased ability to
16 concentrate, increased headaches, trouble focusing, increased neck and back
17 pain secondary to herniated discs. I believe it would be very difficult for
18 Mr. Barteau to maintain a consistent work performance. (703).

19 95. Prudential also obtained substantial amounts of treatment records. These
20 records continued to document Mr. Barteau's reports of and treatment for high pain and
21 poor cognitive function. (e.g. 623, 648, 658, 721).

22 96. The continued treatment for Mr. Barteau's pain included a prescription for
23 an opioid, Propoxy (a form of Darvocet), and referral to a new pain management
24 specialist, Dr. Kamran Ghadimi. (880, 884).

25 **L. Prudential Has A Doctor Review Some of Mr. Barteau's Medical
26 Records**

27 97. Prudential had portions of Mr. Barteau's records reviewed by Dr. Joyce
28 Bachman. (722). Dr. Bachman only reviewed medical records back to October of 2006
and came to the conclusion that

[t]he primary complaint is headache pain for which the claimant is seeing
pain mgt weekly. So the frequency is more than usual for headaches.
However the level of care is inconsistent with the alleged severity of
symptoms by his providers and the claimant." (723).

Dr. Bachman did not clarify why headache pain treatment that was more than usual
would support any other conclusion than the fact that the severity of Mr. Barteau's
headache pain symptoms were more than usual. What is evident is that for Dr. Bachman -

1 Prudential's Medical Director - weekly pain management treatment was not frequent
2 enough treatment to substantiate severe symptoms.

3 **M. Prudential Has a Reviewing Agency Review Mr. Barteau's Medical
4 Records**

5 98. Following Dr. Bachman's review, Prudential sent Mr. Barteau's medical
6 records to MLS National Medical Evaluation Services Inc. ("MLS") for an "independent"
7 review. (730).

8 99. Plaintiff has submitted evidence of MLS's possible bias, including
9 deposition testimony which alleges that in the past MLS has altered medical reports to
10 support denying a claim. (990-1122).

11 100. Dr. Gill Lichtshein, performed the review for MLS. (730). Dr. Lichtshein
12 reviewed Mr. Barteau's responses contained in the neuropsychological testing and opined
13 that "[o]bservations and results of the assessment appeared to be an accurate description
14 of the claimant's current level of functioning." (737). Dr. Lichtshein went on to state:
15 "Though neuropsychological testing indicated that the claimant had difficulties and
16 struggles with concentrating, no objective evidence of substantial cognitive function was
17 delineated." (745). Dr. Lichtshein did not offer what type of evidence constituted
18 "objective evidence" of cognitive function to him nor did Dr. Lichtshein delineate why
19 this purported subjective evidence (which he deemed to be accurate) was not sufficient
20 to support disability.

21 101. MLS's Jack Denver, Physical Medicine and Rehabilitation, also performed
22 a review of the records. (758). Dr. Denver restricted his assessment to physical
23 functioning, without consideration of Mr. Barteau's ophthalmological dysfunction. (762).
24 With this narrow focus, Dr. Denver concluded, "[a]s it related to physical functioning
25 particularly in relation to Mr. Barteau's complaints of headaches, chronic neck and low
26 back pain and arm and leg pain, the available medical records as described...do not
27 support that as of November 1, 2006 he is in any way impaired physically." (763). Dr.
28 Denver made clear that he was not offering an opinion on Mr. Barteau's cognitive
functionality as Dr. Denver specified his assessment related to "sitting, standing, walking,

1 lifting, carrying, pushing, pulling, reaching, and/or performing repetitive and fine motor
2 hand activities.” (763). Dr. Denver also evaded the question regarding Mr. Barteau’s
3 “self-reported chronic pain.” (764). Dr. Denver recognized the continual documentation
4 of Mr. Barteau’s complaints and treatment for pain, but felt that “[d]espite his self
5 reported chronic pain complaints, there was no objective findings supporting the presence
6 of chronic pain complaints.” (764).

7 102. It is axiomatic that pain is subjective and often cannot be objectively
8 verified.

9 **N. Based on its Own Reviews, Prudential Upholds the Termination of Mr.
10 Barteau’s Benefits**

11 103. By letter dated June 30, 2007, Prudential upheld the termination of Mr.
12 Barteau’s benefits on appeal. (777). This termination letter quoted block passages from
13 the reviews performed by Drs. Bachman, Lichtshein, and Denver. (778-79). There is no
14 evidence Prudential considered any other evidence other than these reviews. (777-80).
15 Further, Prudential did not offer any explanation as to what type of evidence Prudential
16 deemed necessary to perfect Mr. Barteau’s claim. (777-80).

17 **O. Mr. Barteau Appeals and Again Presents Significant, Reliable and
18 Objective Evidence of His Continued Disability**

19 104. On January 25, 2008, Mr. Barteau appealed Prudential’s determination with
20 the help of Kantor & Kantor. (1137).

21 105. Included with his appeal, Mr. Barteau provided documentation of at least 45
22 individual office visits to treat his disabling pain, headaches, shoulder and spine related
23 conditions. (e.g. 708-09, 719-21, 726-28, 771, 960). These visits documented treatment
24 for 15 months from November 2006 through January 2008, including multiple cervical
25 and lumbar epidural steroid injections and facet blocks under fluoroscopy. (785, 801, 811,
26 814, 827).

27 106. In a letter dated December 6, 2007, Dr. Landrum confirmed that Mr.
28 Barteau’s condition and functional capacity had not changed. (1124). Mr. Barteau
remained unable to focus and/or concentrate long enough to become employed. (1124).

1 107. On January 23, 2008, Dr. Ghadimi assessed Mr. Barteau's spinal condition.
2 (979). Dr. Ghadimi asserted that Mr. Barteau was not a malingerer, that Mr. Barteau's
3 symptoms and functional limitations were reasonably consistent with Mr. Barteau's
4 physical evaluations, and that Mr. Barteau could sit/stand/walk for two hours each in an
5 eight hour work day. (976).

6 108. Mr. Barteau provided testimonial letters from his daughter, Laurie Bunch,
7 and fiancé, Marilyn Amato. (1130-32).

8 109. Ms. Bunch observed that Mr. Barteau "had to constantly deal with his visual
9 and physical disabilities as well as dealing with constant pain management." (1130). Ms.
10 Bunch also confirmed Mr. Barteau's limited life-style:

11 He cannot work on the computer, watch television or even watch my two
12 children (ages 1 and 4) for more than an hour because he would then have
13 to spend hours everyday recovering from the strain and pain that would
14 result from the activity. My dad spends at least 8 to 10 daytime hours
15 everyday resting and dealing with constant pain—laying on heating pads,
16 doing his physical therapy movements, and sleeping. (1130).

17 110. Ms. Amato observed and experienced the same. Since Mr. Barteau's release
18 from the hospital to treat his eye,

19 He has not been the same. He has been in constant pain through out his
20 whole body. He has complained of constant head aches and body aches and
21 he continually takes various medications to try and relieve his constant
22 pain....He would take medication and then rest six to eight times a day with
23 heat on his neck and shoulders and back for 20 to 30 minutes at a time. He
24 still is trying to control the pain with pills and the heat. He still has, at this
25 present time, excruciation head aches, back, arm, shoulder and neck pain.
26 (1131).

27 **P. Prudential Again Relies on the Same Reviewers to Uphold the
28 Termination of Benefits**

111. Prudential had Drs. Lichtshein and Denver review the documents submitted
on the second appeal.

112. Dr. Lichtshein's opinion was not altered. (1156).

113. Prudential paid \$1,260.00 for Dr. Lichtshein's additional opinion. (1173).

114. Dr. Denver's opinion was altered, but only to include restrictions and
limitations on the basis of cervical range of motion impairments. (1162). Dr. Denver

1 concluded these new restrictions and limitations “would not prevent sustainable work
2 capacity.” (1163).

3 115. Prudential paid \$2,380.00 for Dr. Denver’s additional opinion. (1176).

4 116. In performing the second appeal, Prudential considered only Drs. Lichtshein
5 and Denver’s additional opinions and did not have Mr. Barteau’s claim reviewed by a
6 vocational specialist to determine if he was able to return to work. (1169).

7 117. In a letter dated March 21, 2008, Prudential upheld the termination of Mr.
8 Barteau’s benefits. (1166).

9 118. On April 25, 2008, Mr. Barteau filed a Complaint with this Court seeking
10 review of Prudential’s termination of Mr. Barteau’s long term disability benefits.

11 **Q. Summary and Factual Conclusions**

12 1. Prior to the onset of headaches and pain, Mr. Barteau had been a Professor
13 of Mathematics; when Prudential terminated Mr. Barteau’s disability benefits Prudential
14 deemed Mr. Barteau capable of returning to this occupation, and thus any occupation as
15 well. (1168).

16 2. Prudential’s termination of benefits, and Prudential’s upholding that
17 termination through the appeals, is not supported by the weight of the evidence in the
18 record. Mr. Barteau remained disabled under the terms of the Plan.

19 3. The neuropsychological examination showed that Mr. Barteau’s ability to
20 regulate his responses and respond to stimuli appropriately was defective, as was his
21 ability to make accurate responses, stay focused and sustain his attention even under low
22 demand conditions. The neuropsychological examination also showed that Mr. Barteau
23 was likely to have difficulties learning new tasks in the work environment and he
24 demonstrated erratic information processing along with delay in his optimum response
25 time. These dysfunctions were likely to significantly impact his ability to process
26 information. Mr. Barteau had significant cognitive problems which were likely to have
27 a major impact on his ability to perform successfully in many areas of his life.
28

1 Consequently, Mr. Barteau was likely to have problems in the work environment in
2 maintaining his auditory attention. (617-18).

3 4. For Mr. Barteau, his cognitive dysfunction was likely to manifest in the
4 school or work environment as difficulty following directions accurately and/or the
5 misunderstanding of verbal instructions. Mr. Barteau demonstrated a very slow mental
6 processing speed and he was likely to be extremely impaired in his ability to listen to and
7 comprehend instructions, recall verbal information, take accurate and detailed notes in
8 meetings, and understand key information during conversations. (617-19).

9 5. Based upon the neuropsychological examination, it is apparent to the Court
10 that Mr. Barteau's cognitive and physical functioning was severely affected by his
11 chronic, debilitating headaches. Simply put, the evidence showed Mr. Barteau was not
12 able to maintain enough focus for a long enough period to satisfy virtually any
13 requirements for work or work-like situations.

14 6. The Court finds the neuropsychological testing was valid, presented an
15 accurate description of Mr. Barteau's level of functioning, and verified that Mr. Barteau
16 continued to meet the Plan's definition for disability when Prudential wrongfully
17 terminated Mr. Barteau's disability benefits. The Court finds support for this conclusion
18 both from reviewing the neuropsychological test report and from the physicians who
19 reviewed the report. Dr. Lichtshein stated that the "[o]bservations and results of the
20 assessment appeared to be an accurate description of the claimant's current level of
21 functioning;" (737) and that "neuropsychological testing indicated that the claimant had
22 difficulties and struggles with concentrating." (745). Dr. LoCascio stated that the
23 neuropsychological "data indicate[s] significant impairment." (653). Dr. Landrum stated
24 that these results "appear to be an accurate description of [Mr. Barteau's] current level
25 of functioning." (611).

26 7. The Court finds the neuropsychological examination was alone sufficient for
27 a finding that Mr. Barteau continued to be disabled when Prudential terminated his
28

1 benefits; however, the Court finds additional evidence supported Mr. Barteau's continued
2 disability.

3 8. Prior to, and following the termination of benefits, Dr. Peck, who is Board
4 Certified in Pain Medicine and Physical Medicine and Rehabilitation, had been treating
5 Mr. Barteau for complaints of chronic severe headaches, neck pain, right arm pain, low
6 back pain, and right leg pain. In treating Mr. Barteau's pain, Dr. Peck performed a
7 diagnostic work up. Based on the findings from the diagnostic work up and Dr. Peck's
8 personal experience treating Mr. Barteau, Dr. Peck determined Mr. Barteau continued to
9 suffer from severe and incapacitating headache, neck pain, low back pain, and leg pain
10 that interfered with Mr. Barteau's ability to perform any type of work. (664-65). The
11 Court finds Dr. Peck's determinations to be credible, supported by the evidence in the
12 record, and an accurate description of Mr. Barteau's functional capacity.

13 9. Dr. Ruffin, who had been treating Mr. Barteau for several years both prior
14 to and following the termination of benefits, was able to personally observe fluctuations
15 in Mr. Barteau's abilities. Based on Dr. Ruffin's treatment and longstanding personal
16 knowledge of Mr. Barteau, Dr. Ruffin observed that in the years leading up to the
17 termination of benefits, Mr. Barteau had shown a decreased ability to concentrate,
18 increased headaches, trouble focusing, and increased neck and back pain secondary to
19 herniated discs. Based on this longstanding treatment, Dr. Ruffin determined it would be
20 very difficult for Mr. Barteau to maintain a consistent work performance. (703). The
21 Court finds Dr. Ruffin's continuous determinations to be credible, supported by the
22 evidence in the record, and an accurate description of Mr. Barteau's functional capacity.

23 10. Dr. Landrum, who began treating Mr. Barteau on a weekly basis
24 contemporaneously with the termination of benefits, assessed and diagnosed Mr. Barteau
25 as suffering from problems with cognitive functioning due to severe pain. Dr. Landrum
26 described Mr. Barteau's pain as relentless and so severe that it took all of Mr. Barteau's
27 effort to have limited periods of functionality during the day. Mr. Barteau's chronic pain
28 exacerbated all other problems in Mr. Barteau's life. After a year of treating Mr. Barteau

1 on a weekly basis, Dr. Landrum documented Mr. Barteau's prognosis had not changed
2 significantly. (694, 1124). The Court finds Dr. Landrum's determinations to be credible,
3 supported by the evidence in the record, and an accurate description of Mr. Barteau's
4 functional capacity.

5 11. Dr. Ghadimi asserted that Mr. Barteau was not a malingerer, that Mr.
6 Barteau's symptoms and functional limitations were reasonably consistent with Mr.
7 Barteau's physical evaluations, and that Mr. Barteau could sit/stand/walk for two hours
8 each in an eight hour work day. (976). The Court finds Dr. Ghadimi's determinations to
9 be credible, supported by the evidence in the record, and an accurate description of Mr.
10 Barteau's functional capacity.

11 12. This summary, as well as the Court's other findings, reveal that defendants
12 had ample and compelling evidence of Mr. Barteau's disability as defined by the Plan on
13 and after October 26, 2006.

14 13. The only support for defendants' position comes not from affirmative
15 medical evidence, but rather reviews of the medical records performed by various nurses
16 and physicians. The Court does not find these reviews, or the opinions expressed therein,
17 to overcome the evidence in the record supporting Mr. Barteau's continued disability
18 under the Plan's terms.

19 14. To the extent there exists conflicting opinions of the medical practitioners
20 with regard to Mr. Barteau's functional capacity, the Court gives the greatest weight to
21 Drs. Ghadimi, Landrum, Peck, and Ruffin, who have spent some amount of time with Mr.
22 Barteau, performed diagnostic tests on Mr. Barteau, and had the opportunity to assess Mr.
23 Barteau's symptoms over time. The determinations of these Doctors are consistent with
24 regard to the symptoms Mr. Barteau experienced as well as the effect that those
25 symptoms would have on Mr. Barteau's ability to perform any occupation.

26 15. The Court notes that the only vocational assessment of Mr. Barteau's
27 employability found Mr. Barteau would not be able to identify employment options
28 without extensive vocational intervention. The record does not reflect that Mr. Barteau

1 underwent extensive vocational intervention, further evidence that Mr. Barteau remained
2 disabled when Prudential terminated Mr. Barteau's benefits.

3 16. The clear weight of the evidence under the *de novo* standard therefore
4 establishes Mr. Barteau's disability under the terms of the Plan, which is whether, due to
5 the same sickness or injury, Mr. Barteau was unable to perform the duties of any gainful
6 occupation for which Mr. Barteau was reasonably fitted by education, training or
7 experience.

8 17. Accordingly, the Court concludes that Mr. Barteau met the definition of
9 disability under the Plan at the time that his benefits were terminated effective October
10 26, 2006. Therefore, Prudential's decision to terminate benefits was wrongful, as was
11 Prudential's upholding that decision on appeal.

12 18. Mr. Barteau is entitled to reinstatement of his benefits for the period from
13 October 26, 2006 until the date of judgment.

14 19. Mr. Barteau is entitled to continued payment of those benefits for as long as
15 is appropriate under the Plan.

16 **II. CONCLUSIONS OF LAW**

17 **A. Jurisdiction And Venue**

18 1. This action involves a claim for long term disability benefits under an
19 employee welfare benefit plan regulated by the Employee Retirement Income Security
20 Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA"). As such, the Court has original
21 jurisdiction over this matter under 28 U.S.C. § 1331 and 29 U.S.C. § 1132 (e).
22 *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343, 2346 (2008).

23 2. Venue in the United States District Court for the Central District of
24 California is invoked pursuant to 29 U.S.C. § 1132 (e)(2). The parties do not dispute the
25 facts requisite to federal jurisdiction or venue.

26 **B. Standard of Review**

27 3. Plaintiff and defendants agree that the applicable standard of review is that
28 of *de novo*; the default under ERISA. Def. Opening Trial Brief at 16:14-18; Plaintiff's

1 Opening Trial Brief at 21:15-17; *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343,
2 2348 (2008). The Court finds this standard of review appropriate and will review the
3 claims decision under a *de novo* standard of review.

4 4. In a *de novo* review, the Court undertakes an independent and thorough
5 inspection of the administrator's decision without affording any deference at all to the
6 plan administrator's decision. *Silver v. Executive Car Leasing Long-Term Disability Plan*,
7 466 F.3d 727, 728 (9th Cir. 2006). The Court will ask whether plaintiff is disabled within
8 the terms of the policy, and after evaluating the persuasiveness of conflicting evidence,
9 decide which is more likely to be true. *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095
10 (9th Cir. 1999) (*en banc*).

11 5. Following the termination of his benefits, Mr. Barteau submitted evidence
12 that he remained disabled as defined by the Plan. (*e.g.* 609-21, 664-5). Therefore, on *de*
13 *novo* review, Mr. Barteau has already made a strong showing that he was disabled and
14 entitled to continuing disability benefits under the Plan. *See Levinson v. Reliance*
15 *Standard Ins. Co.*, 245 F.3d 1321, 1331 (11th Cir. 2001) (holding that once claimant
16 makes *prima facie* showing of disability burden is on insurance company to produce
17 evidence showing that claimant was no longer disabled); *Gunderson v. W.R. Grace & Co.*
18 *Long Term Disability Income Plan*, 874 F.2d 496, 498-500 (8th Cir. 1989) (after benefits
19 had been paid under the any occupation definition of disability the court looked to see if
20 there was substantial evidence to support the determination that claimant was no longer
21 totally disabled); *Onofrieti v. Metropolitan Life Ins. Co.*, 320 F.Supp.2d 1250, 1254
22 (M.D.Fla. 2004) (holding the *Levinson* court did not shift the burden "because the
23 defendant had been paying benefits previously, but because the plaintiff had presented
24 evidence that he met the definition of disabled under the plan.").

25 6. Upon *de novo* review of the entire record, the Court finds that the evidence
26 Prudential relied upon is not sufficient to overcome the evidence in the record which
27 supports Mr. Barteau's continued disability on and beyond Prudential's termination of
28 benefits. The weight of the evidence in the record was sufficient to find that Mr. Barteau

1 continued to be disabled as defined by the Plan on and beyond October 26, 2006, the date
2 Prudential's termination became effective. (593, 609-21, 664-5).

3 **C. Consideration Of Evidence "Outside The Record" Is Appropriate**
4 **Under The *De Novo* Standard Of Review**

5 7. In Mr. Barteau's Opening Trial Brief, the Court's attention was directed to
6 information not contained in the record, but known to Prudential - evidence that
7 Prudential knew Dr. Gerson was biased in Prudential's favor. Plaintiff's Opening Trial
8 Brief at 15:19-23. While this information was not technically in the record generated,
9 compiled and produced by Prudential in this action, this information was certainly before
10 Prudential when it was administering Mr. Barteau's claim. This information was either
11 generated by or directly involved Prudential. In the Court's discretion, such information
12 from outside the record may be considered. *Mongeluzo v. Baxter Travenol Long Term*
Disability Ben. Plan, 46 F.3d 938, 943-944 (9th Cir. 1995).

13 8. Under the *de novo* standard of review, the Court, in its discretion, is allowed
14 to consider evidence "that was not before the plan administrator," *Id.* Moreover, when
15 the evidence in question pertains to the bias of the reviewing physician, such evidence
16 is permitted under a *de novo* standard of review. *Opeta v. Northwest Airlines*, 484 F.3d
17 1211, 1217 (9th Cir. 2007) (Extrinsic evidence is permitted in a *de novo* case where there
18 are issues regarding the credibility of a medical expert). However, the information Mr.
19 Barteau proffered regarding the known bias of Dr. Gerson was not only known to
20 Prudential, it was *generated* by Prudential.

21 9. The information offered by Mr. Barteau calls into question whether Dr.
22 Gerson provided full and fair assessments of the evidence, or whether he was an advocate
23 for Prudential. Reliance on such skewed assessments renders any determination
24 unreliable, whether made by Prudential or a reviewing court, and therefore this Court has
25 considered the evidence offered by Mr. Barteau regarding Dr. Gerson to the extent it
26 reflects the bias and credibility of Dr. Gerson.

27 **D. Mr. Barteau Continued to be Disabled Under the Terms of the Plan**
28 **when Prudential Terminated His Disability Benefits**

1 10. The Ninth Circuit has made clear that to justify a termination decision, one
2 would expect to see an improvement in a claimant's medical condition. *Saffon v. Wells*
3 *Fargo & Co. Long Term Disability Plan*, 522 F.3d 863, 871 (9th Cir. 2008) ("In order to
4 find [a claimant] no longer disabled, one would expect the [medical records to show
5 *improvement*, not a lack of degeneration"); *McOsker v. Paul Revere Life Ins. Co.*, 279
6 F.3d 586, 589 (8th Cir. 2002) ("[U]nless information available to an insurer alters in some
7 significant way, the previous payment of benefits is a circumstance that must weigh
8 against the propriety of an insurer's decision to discontinue those payments"); *see Lang*
9 *v. Long-Term Disability Plan of Sponsor Applied Remote Technology, Inc.*, 125 F.3d 794,
10 798-9 (9th Cir. 1997) (citing termination of claim where there has been no significant
11 change in the claimants conditions as material, probative evidence of the existence of self
12 serving termination of benefits)..

13 11. Without any improvement in the symptoms Prudential had already
14 determined made Mr. Barteau disabled from any occupation (particularly his headaches,
15 fatigue and difficulty concentrating due to pain), Prudential determined that Mr. Barteau
16 no longer met the definition of disability under the Plan and Prudential terminated Mr.
17 Barteau's disability benefits. Prudential's determination is not supported by the weight
18 of the evidence in the record, and the Court finds Mr. Barteau remained disabled under
19 the terms of the Plan.

20 12. Maintaining employment in any occupation requires more than physical
21 ability, it also requires cognitive abilities - Mr. Barteau lacked both abilities. *Sabatino*
22 *v. Liberty Life Assn. Co. of Boston*, 286 F.Supp.2d 1222, 1231 (N.D. Cal. 2003) (finding
23 error in denial of benefits when cognitive impairment was not properly considered
24 because "[s]imply being able to perform sedentary work does not necessarily enable one
25 to work" in an occupation that requires "careful thought and concentration."), *Moon v.*
26 *UnumProvident Corp.*, 405 F.3d 373, 379 (6th Cir. 2005) (denial defective when
27 evidence of cognitive impairment showed it was unlikely claimant could perform
28 identified position); *Adams v. Prudential Ins. Co. of Am.*, 280 F.Supp.2d 731, 741 (N.D.

1 Ohio 2003) (decision to deny benefits was arbitrary and capricious when cognitive
2 deficits were ignored).

3 13. The determination that Mr. Barteau was disabled was shared by the Social
4 Security Administration, who determined Mr. Barteau was unable to perform any work,
5 a standard of disability of the same type as that in the Plan. *Metropolitan Life Ins. Co. v.*
6 *Glenn*, 128 S.Ct. 2343, 2347 (2008). Prudential's failure to even consider the award of
7 Social Security Disability benefits as evidence that Mr. Barteau was disabled from any
8 occupation is of concern. This rises to a matter of serious concern because Prudential
9 hired an advocate for Mr. Barteau to pursue these benefits, Prudential received a direct
10 financial benefit from Mr. Barteau's receipt of these benefits, and then Prudential
11 disregarded the Social Security Administrations findings when Prudential terminated Mr.
12 Barteau's benefits. *Glenn*, 128 S.Ct at 2352.

13 14. For almost four years Prudential found Mr. Barteau to be disabled. Yet in
14 support of the termination of Mr. Barteau's benefits, and in litigation, Prudential has not
15 identified any affirmative medical evidence which showed an improvement in Mr.
16 Barteau's conditions and disabling symptoms or vocational evidence which identified
17 employment options. The compelling evidence in the record corroborates the continued
18 and stable severity of Mr. Barteau's symptoms and deficits, and, upon *de novo* review of
19 the entire record, supports a finding that Mr. Barteau continued to be disabled under the
20 terms of the Plan.

21 15. Mr. Barteau was suffering from a disability under the terms of the Plan at
22 the time that his benefits were terminated by Prudential.

23 16. Prudential wrongfully terminated Mr. Barteau's benefits.

24 17. Under ERISA Mr. Barteau is entitled to recover benefits due to him under
25 the terms of the Plan. 29 U.S.C. § 1132 (a)(1)(B). Mr. Barteau's damages with respect
26 to his benefits are equal to the missed disability benefits over the period from October 26,
27 2006 to the date of judgment.

28

1 18. Mr. Barteau is also entitled to a declaration of his right to future benefits
2 under the terms of the Plan. 29 U.S.C. § 1132 (a)(1)(B). The Court has determined that
3 Mr. Barteau was disabled under terms of the Plan when Prudential wrongfully terminated
4 his benefits effective October 26, 2006. Mr. Barteau is therefore entitled to benefits
5 under the Plan as determined by its terms.

6 19. Mr. Barteau also seeks an award of pre-judgment interest on the award
7 pursuant to the Court's discretion under ERISA. The Court finds that the equities balance
8 in favor of an award of pre-judgment interest to Mr. Barteau.

9 20. Mr. Barteau has been deprived of the value of the benefits to which he was
10 entitled for the entire period from October 26, 2006 to the date of judgment. As such,
11 Prudential, and not Mr. Barteau, has derived benefit from those funds (including interest),
12 and Mr. Barteau has been forced to bring the present action to recover funds to which he
13 was entitled. As the Supreme Court has often stated, "prejudgment interest is an element
14 of [plaintiff's] complete compensation." *Osterneck v. Ernst & Whitney*, 489 U.S. 169,
15 175 (1989) (internal quotation and citation omitted). There is no evidence that an award
16 of prejudgment interest would unduly burden defendants, or their respective policy-
17 holders. As such, the Court holds that such an award is appropriate.

18 21. Mr. Barteau is the "prevailing party" in the instant suit, and may therefore
19 be entitled to recovery of reasonable attorneys' fees and costs. *See* 29 U.S.C. § 1132
20 (g)(1); *Barnes v. Indep. Auto. Dealers Assoc. of Cal. Health & Benefit Plan*, 64 F.3d
21 1389, 1397 (9th Cir. 1995).

22 22. The amount of attorneys' fees and costs to be awarded will be determined
23 on a separate motion therefor to be filed by Mr. Barteau in accordance with Rule 54-12
24 of the Local Rules.

25 23. Prior to filing any motion, counsel for Mr. Barteau and defendants should
26 meet and confer on the amount of a total award for benefits due Mr. Barteau consistent
27 with both the findings and conclusions of the Court and the terms of the Plan,
28 prejudgment interest upon those benefits, and on reasonable attorneys' fees and costs.

1 Thereafter, the parties must submit to this Court a stipulation regarding the award of
2 benefits and prejudgment interest. This may be in the form of a [Proposed] Final
3 Judgment. If, following the meet and confer, the parties are not able to agree upon the
4 amount of reasonable attorneys' fees and costs, Mr. Barteau may make a motion for an
5 award of attorneys' fees and costs.

6 **III. CONCLUSION**

7 For the foregoing reasons, the Court will enter judgment in Mr. Barteau's favor,
8 reinstate him to the Plan, with payment of back benefits to date of judgment including
9 prejudgment interest.

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11 **IT IS SO ORDERED.**

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13 DATED: May 26, 2009



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HON. RONALD S. W. LEW
SENIOR, U.S. DISTRICT COURT JUDGE