

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MAUREEN STRATTON,

Plaintiff,

v.

LIFE INSURANCE COMPANY OF
NORTH AMERICA,

Defendant.

Case No.: 20-CV-2037 JLS (NLS)

**ORDER (1) GRANTING
PLAINTIFF’S MOTION FOR
JUDGMENT, (2) DENYING
PLAINTIFF’S REQUEST FOR
JUDICIAL NOTICE, AND
(3) DENYING DEFENDANT’S
MOTION FOR JUDGMENT**

(ECF Nos. 29, 30)

Presently before the Court are Plaintiff Maureen Stratton’s (“Pl.’s Mot.,” ECF No. 29) and Defendant Life Insurance Company of North America’s (“Defendant” or “LINA”) (“Def.’s Mot.,” ECF No. 30) cross-motions for judgment. Also before the Court are Plaintiff’s Request for Judicial Notice (“RJN,” ECF No. 29-1), Plaintiff’s Responsive Trial Brief (“Pl.’s Resp.,” ECF No. 41), Defendant’s Opposition to Plaintiff’s Motion (“Def.’s Opp’n,” ECF No. 42), Plaintiff’s Reply Trial Brief (“Pl.’s Reply,” ECF No. 43), Defendant’s Reply in Support of its Motion (“Def.’s Reply,” ECF No. 44), and the Parties’ Proposed Findings of Fact (ECF Nos. 50, 51). The Court took this matter under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). *See* ECF No. 52. Having carefully considered the Parties’ arguments, the Administrative Record (“AR,” ECF Nos.

26-1–6), as supplemented (ECF Nos. 27, 31, 40)—including the terms of Policy Number FLK-960750 (the “LTD Policy,” AR 3467–91)—and the law, the Court **GRANTS** Plaintiff’s Motion, **DENIES** Plaintiff’s RJN, and **DENIES** Defendant’s Motion.

FINDINGS OF FACT

I. The Plan and Its Relevant Terms

Effective January 1, 2014, LINA issued a group disability insurance policy to Gartner, Inc. (“Gartner”), governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* (“ERISA”). *See generally* LTD Policy.¹ LINA was the claim administrator of the LTD Policy. Def.’s Mot. at 1; AR 67. The LTD Policy provides for long-term disability (“LTD”) benefits for eligible Gartner employees who “become[] Disabled while covered under this Policy.” *See* AR 3476. To receive benefits, “[t]he Employee must . . . be under the Appropriate Care of a Physician, and meet all the other terms and conditions of the Policy.” *Id.*

The LTD Policy defines “Disability/Disabled” as follows:

The Employee is considered Disabled if, solely because of Injury or Sickness, he or she is:

1. unable to perform the material duties of his or her Regular Occupation; and
2. unable to earn 80% or more of his or her Indexed Earnings from working in his or her Regular Occupation.

After Disability Benefits have been payable for 24 months, the Employee is considered Disabled if, solely due to Injury or Sickness, he or she is:

1. unable to perform the material duties of any occupation for which he or she is, or may reasonably become, qualified based on education, training or experience; and
2. unable to earn 60% or more of his or her Indexed Earnings.

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¹ On January 1, 2014, LINA also issued group term life insurance policies to Gartner, Policy Numbers FLX-965544 and -965545. *See* AR 3367–453.

AR 3470. As relevant to this definition, the LTD Policy defines “Regular Occupation” as “[t]he occupation the Employee routinely performs at the time the Disability begins. In evaluating the Disability, [LINA] will consider the duties of the occupation as it is normally performed in the general labor market in the national economy. It is not work tasks that are performed for a specific employer or at a specific location.” AR 3487. As for the definition of “Indexed Earnings,” the LTD Policy provides: “For the first 12 months Monthly Benefits are payable, Indexed Earnings will be equal to Covered Earnings. After 12 Monthly Benefits are payable, Indexed Earnings will be an Employee’s Covered Earnings plus an increase” to account for inflation. AR 3486. The definition of “Covered Earnings” for a non-sales employee is “an Employee’s wage or salary as reported by the Employer for work performed for the Employer as in effect just prior to the date Disability begins It does not include amounts received as bonus, commissions, overtime pay or other extra compensation.” AR 3470.

Per the LTD Policy,

Appropriate Care means the Employee:

1. Has received treatment, care and advice from a Physician who is qualified and experienced in the diagnosis and treatment of the conditions causing Disability. If the condition is of a nature or severity that it is customarily treated by a recognized medical specialty, the Physician is a practitioner in that specialty.
2. Continues to receive such treatment, care or advice as often as is required for treatment of the conditions causing Disability.
3. Adheres to the treatment plan prescribed by the Physician, including the taking of medications.

AR 3486. The LTD Policy further provides that “[LINA], at its expense, will have the right to examine any person for whom a claim is pending as often as it may reasonably require.” AR 3482.

II. Plaintiff's Employment

Plaintiff began working for Gartner in April 2002 as a "Senior Executive Partner." AR 20; AR 3157. Her role was alternatively called "Technology Consultant." AR 1657. Plaintiff "[a]ct[ed] as a mentor, content-provider and business advisor for member CIOs [chief information officers]" and "senior IT [information technology] executives." *Id.* Her job responsibilities included "conduct[ing] on-site briefings for members at member locations," "selling to the C-Level," and "[m]aintain[ing], renew[ing] and grow[ing] a significant book of ExP business and [being] accountable for that set of members." *Id.* The role required an "[i]n-depth understanding of the IT industry and the role of the CIO." AR 3158. In August 2017, Gartner reported to Cigna² that "this role requires a substantial amount of travel and time meeting with clients." AR 3156.

In 2017, Plaintiff's base salary and bonus were \$275,486.98. AR 3462. Plaintiff's salary is recorded elsewhere in LINA's systems as \$229,572.48. *See, e.g.*, AR 981, AR 3057. Plaintiff reported her 2016 salary to the Social Security Administration ("SSA") as \$240,000. *See* AR 1486.

III. The Onset of Plaintiff's Disability

According to Plaintiff, "[she] started experiencing significant back pain" in 2011. AR 2532. She tried improving the condition by "leveraging homeopathic approaches, good diet, healthy supplements, varied exercises, acupuncture, chiropractic, physical therapy, etc.," but "there did not seem to be much improvement." *Id.* John Finkenberg, M.D., an orthopedic specialist, noted during a July 7, 2016 initial orthopedic spine consultation that an "MRI report taken in 2013 demonstrates a grade 1 spondylolisthesis at L4-5. There is most likely nerve root impingement of the left greater than right L4 and L5 nerve root.

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² Much of the correspondence contained within the Administrative Record is with Cigna. LINA is an operating subsidiary of Cigna. *See, e.g.*, AR 67. Throughout its briefing, Defendant refers to Cigna as LINA. *See generally, e.g.*, Def.'s Mot. Accordingly, the Court will do the same.

1 There are no vertebral fractures. Degenerative arthritic changes or moderate [sic].” AR
2 1672.

3 Plaintiff reports that, “[a]round the end of 2015, [her] doctor ordered an MRI because
4 this pain was affecting [her] ability to work.” AR 2532. Thereafter, Plaintiff pursued
5 “more specialized chiropractic, consults with surgeons, and regenerative medicine.” *Id.* A
6 July 2016 MRI ordered by Dr. Finkenberg showed the following:

7 **IMPRESSION:**

8 **1. Grade I anterolisthesis of L4 on L5. Severe central canal stenosis at L4-5 disc level relating to**
9 **anterolisthesis of L4, disc bulge/uncovering, and facet ligamentum flavum hypertrophy. Mild bilateral**
10 **neural foraminal stenosis at this level.**

11 AR 1569. At a July 15, 2016 appointment with Dr. Finkenberg, it was also noted that
12 “lateral flexion extension x-rays of the lumbar spine taken in the office today demonstrate
13 a grade 1-2 L4-5 spondylolisthesis.” AR 1669. Dr. Finkenberg noted that, “[i]f [Plaintiff]
14 notices increased pain or progressive weakness in the lower extremities then consideration
15 should be made for wide laminotomy bilaterally at L4-5 followed by L4-5
16 instrumentation/fusion.” *Id.* According to Plaintiff, she saw two surgeons, both of whom
17 “advised that [she] would most certainly eventually end up in surgery, but that [she] should
18 proceed with pain management because there would be ‘about a 50% chance [she] c[a]me
19 out of surgery feeling worse than when [she] went in.’” AR 2532.

20 On November 30, 2016, Plaintiff saw Jaclyn Jensen, D.O., a family practitioner, as
21 a new patient. AR 2305. Dr. Jensen noted that Plaintiff experienced “chronic LBP [low
22 back pain] with intermittent radiation down left leg” with “no weakness.” *Id.* She recorded
23 that Plaintiff “uses anti-inflammatories, not interested in other medications. Would like to
24 consider treatment options.” *Id.* Her examination of Plaintiff’s back revealed a range of
25 motion that was normal for both flexion and extension. *Id.* Plaintiff indicated a pain level
26 of 3 in her left hip and lower back. AR 2307. Dr. Jensen ordered x-rays of Plaintiff’s low
27 back. AR 2308. The x-rays, from January 2017, showed “[d]isc space narrowing at L4-5
28 with mild anterolisthesis as well. The other intervertebral disc spaces are preserved. Lower

1 lumbar spine facet arthropathy. . . . Oblique and lateral images show no evidence of
 2 spondylolysis.” AR 2317. The overall impression was “[n]o acute bony abnormality.
 3 Degenerative changes as described.” *Id.* An annotation from Dr. Jensen read: “Please let
 4 Maureen know that her low back xray shows degenerative/arthritis changes with a mild
 5 anterolisthesis (she already knows about this) at L4-5. I would recommend she see spine
 6 clinic like we discussed – referral is pending.” *Id.*

7 Pursuant to Dr. Jensen’s referral, Plaintiff saw Bianca Ashley Tribuzio, D.O., with
 8 a specialty in physiatry, on March 10, 2017. AR 2464. At that appointment, Plaintiff rated
 9 her pain as an 8 out of 10. *Id.* Dr. Tribuzio noted that the range of motion in Plaintiff’s
 10 spine had “no limitations secondary to pain except with extension has limitations.” AR
 11 2466. Plaintiff also had “tenderness to palpation in lumbar paraspinals.” *Id.* Dr. Tribuzio
 12 indicated that she “personally reviewed [Plaintiff’s] MRI report and set up does show
 13 spondylolisthesis stenosis and facet disease most significant at L4-5, but also facet disease
 14 at L5-S1,” and she “also reviewed her x-ray.” AR 2467. Dr. Tribuzio said she would order
 15 a “flexion-extension x-ray to rule out dynamic instability,” and that she and Plaintiff
 16 “discussed multidisciplinary approach.” *Id.* As for therapy, she said she “[e]ncourage[d]
 17 regular stretching exercises yoga” as well as “Tens.”³ *Id.* Regarding interventions, Dr.
 18 Tribuzio noted: “consider lumbar facet vs lumbar mbb/rfa.” *Id.* As for medications, Dr.
 19 Tribuzio indicated “[t]opicals such as menthol, capsaicin” and “NSAIDs [nonsteroidal
 20 anti-inflammatory drugs] as needed.” *Id.* She noted that “[Plaintiff] deferred other
 21 adjuvants such as SNRI or gabapentin.” *Id.* They also “discussed relationship between
 22 stress, depression, or anxiety and pain. [D]iscussed tools such as breathing, meditation,
 23 etc.” *Id.*

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 26 ³ “Transcutaneous electrical nerve stimulation (TENS) therapy involves the use of low-voltage electric
 27 currents to treat pain. A small device delivers the current at or near nerves. TENS therapy blocks or
 28 changes your perception of pain.” “Transcutaneous electrical nerve stimulation (TENS),” *Cleveland
 Clinic*, <https://my.clevelandclinic.org/health/treatments/15840-transcutaneous-electrical-nerve-stimulation-tens> (last visited Feb. 18, 2022).

1 At this point, “[Plaintiff] ventured into regenerative medicine which [she] paid for
2 out of pocket as insurance would not cover it.” AR 2532. “[Plaintiff’s] days were filled
3 with frequent walks, laying on ice, hanging on an inversion table [she] purchased, utilizing
4 a Tens unit, leveraging OTC pain medications, herbal supplements, anti-inflammatory
5 diets, and endless varied healthcare visits.” *Id.* She had to “work[] around the natural
6 demands/requirements of the job as best [she] could given the increased time needed to
7 simply seek care, manage the pain, and leverage sick days.” *Id.* “[She] knew that couldn’t
8 go on forever,” and eventually “[i]t was becoming impossible to function throughout a full
9 day of work,” and when she got home, “[she] was flat out on [her] back in pain,” unable to
10 even make dinner. *Id.*

11 In this vein, in early December 2016, Plaintiff began seeing Ron Brizzie, D.O., to
12 manage her condition. AR 1819. During her initial evaluation, she reported “progressive”
13 pain levels of “4 – 10 out of 10,” both with activities and in general. *Id.* She relayed that
14 “the pain is constantly present but waxes and wanes in severity”; “is worsened with
15 bending, lifting, walking, sitting, reaching, standing”; and is improved “with chiropractic
16 treatment, rest, ice, heat, walking, and traction.” *Id.* Dr. Brizzie noted that Plaintiff
17 “appear[ed] uncomfortable” during the evaluation. *Id.* His examination revealed:

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Lumbar spine exam:

Inspection - The lumbar lordosis is within normal limits. Lumbar region is symmetric without obvious abnormalities. Pelvic obliquity is not noted.

Palpation - tenderness to palpation of paraspinal and quadratus lumborum muscles, there was spasm present. There was pain to palpation over the sacroiliac joints. There was tenderness over the spinous facet regions. No masses were palpated.

<i>Range of Motion</i>	
Flexion	
Extension	

Provocative Testing - Straight leg test was negative bilaterally. Facet loading bilaterally did not exacerbate pain in the lumbar region. Piriformis was nontender to palpation bilaterally. FABER's test was negative bilaterally.

Neurologic exam:

Sensory - Sensation is intact to light touch and pin-prick throughout the upper extremity and lower extremities.

<i>Motor</i>	<i>Right</i>	<i>Left</i>		<i>Right</i>	<i>Left</i>
Elbow flexion	5/5	5/5	Hip flexor	5/5	5/5
Wrist extension	5/5	5/5	Knee extensor	5/5	5/5
Elbow extension	5/5	5/5	Dorsiflexion	5/5	5/5
Finger flexion	5/5	5/5	Long toe extensor	5/5	5/5
Finger abduction	5/5	5/5	Plantar flexion	5/5	5/5

AR 1820. Plaintiff received a total of six platelet-rich plasma ("PRP") injections in the lumbar and sacroiliac region during the appointment. AR 1821–22. Dr. Brizzie's five-page report concluded with the following:

Electrodiagnostics: I recommend electrodiagnostic testing including EMG and NCS to evaluate nerve symptoms if the patient does not respond to conservative treatment and/or for surgical planning.

Injections: I recommend diagnostic and therapeutic injections including epidural, facet, extremity, and/or trigger point injections as well as platelet rich plasma procedures if the condition persists.

Referrals: Patient may require referral to an orthopedic and/or spine surgeon for further evaluation.

AR 1823.

Plaintiff's pain increased over time and "the pace of decline . . . significantly accelerat[ed]" in 2016. AR 2532. "By late 2016 and early 2017, [she] was calling in sick/absent to meetings because [she] knew [she] could not tolerate the plane trip, the
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1 extended sitting, etc.” *Id.* “By early 2017, [Plaintiff] had to stop work to focus on the
2 situation with [her] health.” *Id.*

3 **IV. Plaintiff’s Claim for and Award of Short Term Disability Benefits**

4 Per a letter dated April 3, 2017, Plaintiff commenced a medical leave of absence
5 from Gartner effective April 4, 2017. AR 2444. Thereafter, Plaintiff filed a claim for short
6 term disability (“STD”) benefits with a disability date of April 4, 2017. AR 97.

7 Dr. Brizzie submitted a “Certification of Health Care Provider for Employee’s
8 Serious Health Condition (Family and Medical Leave Act).” AR 2445. The paperwork
9 noted his specialty as “PM + R,” or “physical medicine and rehabilitation.” *Id.* He
10 indicated Plaintiff was “unable to perform any of his/her job functions due to the
11 condition,” namely “Prolonged sitting/standing/walking, no lifting > 10 lbs.” AR 2446.
12 He indicated that Plaintiff suffered from “Moderate to severe low back pain,” that there
13 were “MRI findings,” that “lumbar surgery [was] recommended,” and that she was
14 “undergoing interventional injections.” *Id.* He estimated her condition would last for one
15 year, but that the duration was “TBD.” *Id.* Dr. Brizzie indicated that Plaintiff’s condition
16 would “cause episodic flare-ups periodically preventing [her] from performing his/her job
17 functions,” and that it was “medically necessary for [her] to be absent from work during
18 the flare-ups . . . [t]o reduce further exacerbations.” AR 2447.

19 Dr. Brizzie also submitted an “Attending Physician’s Statement” for Plaintiff’s STD
20 application. AR 2449. He indicated that she suffered from “Lumbar spondylolisthesis
21 with severe spinal stenosis,” causing “mod – severe low back pain,” and that “[t]his was a
22 gradually worsening condition.” *Id.* He noted the July 2016 MRI as an “Objective
23 Finding.” *Id.* He indicated that Plaintiff was “undergoing treatment program w/ PT,
24 injections, possible surgery,” and that he expected her to be able to return to work in “6
25 months to a year from today.” AR 2450.

26 Plaintiff was awarded STD benefits, which ultimately were extended through July
27 4, 2017, the six-month maximum period. AR 97, AR 110, AR 138, AR 163.

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V. Plaintiff's Claim for and Denial of Long Term Disability Benefits

Plaintiff subsequently applied for LTD benefits, and Dr. Brizzie again supported her application. AR 2293. On July 3, 2017, he signed a "Medical Request Form" indicating that Plaintiff's primary diagnosis was "lumbar spondylolisthesis"; that the "specific additional factors impacting return to work" were "ongoing level of pain & impairment in sitting/standing/walking/bending/lifting"; that he first treated Plaintiff for the condition on December 12, 2016; that Plaintiff's last visit was July 3, 2017; that Plaintiff's treatment plan included "pending" physical therapy, "pending/possible" surgery, and "Other: Injections"; that she was taking Tramadol 50 mg; that the restrictions he had placed on plaintiff for work were "N/A" and for at home were to "avoid prolong [sic] sitting/standing, avoid lifting over 10 lbs, minimize bending"; and that Plaintiff's condition was "permanent." *Id.*

Dr. Brizzie also submitted a "Physical Ability Assessment" dated July 3, 2017, that indicated his assessment was based on "Customer's report," "Observation," "Examination," and "A diagnosis that implies an increased risk of harm requiring physician imposed work activity restrictions." AR 2298. He noted that Plaintiff could sit, stand, walk, and reach "Occasionally: 0 – 2.5 Hrs/Day," and that these restrictions were "supported by clinical findings." *Id.* Specifically, Plaintiff could sit, stand, walk, reach overhead, and reach at desk level for less than one hour each and reach below her waist for less than 30 minutes. *Id.* Plaintiff could also "[o]ccasionally" (for less than an hour) lift a "Negligible Amount – 10 lbs.," carry a "Negligible Amount – 10 lbs.," push and pull up to 20 pounds, and climb stairs. AR 2299. Plaintiff could lift and carry for less than one hour each and push and pull for less than 30 minutes each. *Id.* She could climb two flights of stairs per day. *Id.*

Plaintiff's July 10, 2017 "Disability Questionnaire & Activities of Daily Living" noted that she regularly sees Dr. Brizzie, about every four to six weeks. AR 3044. She indicated she took Motrin OTC as needed daily and Tramadol as needed but "[a]s infrequently as possible," and that she lived in a two-story house. *Id.* She indicated she

1 was not currently working because of “Extreme Chronic Pain caused by issues noted in
2 MRI including severe spinal stenosis; L4/L5/ facet joints.” AR 3045. She said returning
3 to work was “not possible as [her doctor] and [she] discussed.” *Id.* Plaintiff noted that she
4 regularly cooks, shops, does laundry, and reads (mostly audiobooks). AR 3046. She said
5 her hobbies were “Walking/Decorating”; that she regularly exercised both at home and the
6 gym, doing “Yoga & Walking predominantly”; that she liked going for 1- to 3-mile walks
7 “daily if possible” for 10 minutes to one hour; that she drove as little as possible; and that
8 she used personal computers or mobile devices “All the time” for “email, google, amazon.”
9 *Id.*

10 On July 12, 2017, Melody Gehosky, the Nurse Case Manager reviewing Plaintiff’s
11 STD claim, indicated that she had “reviewed all medical noted above. Current medical
12 would not support the no work restriction. As evidenced by 7/3/17 ON indicating no loss
13 of strength, sensation, or reflexes. No ambulation deficit noted.” AR 1188. In a letter to
14 Dr. Brizzie dated July 13, 2017, Ms. Gehosky noted that “[c]urrent medical reviewed
15 would not support that Ms. Stratton is unable to work in any capacity on a permanent basis.
16 Please clarify the restrictions placed or provide quantifiable data that would support the
17 permanent no work restriction.” AR 292.

18 Associate Medical Director Richard Hall, a Board-certified M.D. with specialties in
19 neurosurgery and occupational medicine, conducted an internal medical review for LINA
20 on or around July 15, 2017. AR 1186. His file review indicated that “[c]linical notes from
21 7/11/16 through 7/3/17 indicate a grossly intact neurologic status,” with “[n]o current
22 electrodiagnostic study, EMG/NCV, or special imagery of the spine provided but those of
23 7/11/16 reveal degenerative changes consistent with age and an un graded listhesis at L4-
24 5 with no evidence of neural compromise.” AR 1185. His assessment was

25 that the position of the internal medical resource [i.e., the Nurse
26 Case Manager], which is in disagreement with the treating
27 provider, is correct. The treating providers opinion [sic] is not
28 well supported by medically acceptable clinical or laboratory
diagnostic techniques and is inconsistent with the other

1 substantial evidence in the claim file because of the factors
2 enumerated in the text within.

3 AR 1186. Accordingly, he concluded that Plaintiff was not functionally limited and that
4 no restrictions were necessary. *Id.* Per an addendum dated July 21, 2017, in which he
5 considered “the newly submitted medical data, clinical notes of 7/3/17 and 7/19/17,” he
6 indicated that the newly submitted evidence “fails to alter this reviewers [sic] prior
7 conclusion of 7/15/17.” AR 1177.

8 Per a letter dated July 27, 2017, Plaintiff was informed that LINA was “unable to
9 approve [her] claim for benefits.” AR 313. The letter indicated that Plaintiff’s “Senior
10 Executive” role “is considered a light level occupation according to the Dictionary of
11 Occupational Titles” (“DOT”). AR 315. It further noted that, following review of
12 Plaintiff’s medical records, the Nurse Case Manager and Dr. Hall “agreed that the medical
13 information on file was not well supported by medically acceptable clinical or laboratory
14 diagnostic techniques that would prevent [Plaintiff] from performing [her] occupational
15 duties.” *Id.* Plaintiff was informed of her right to seek an administrative appeal review.
16 *Id.*

17 **VI. Plaintiff’s Appeal and Grant of Long Term Disability Benefits**

18 Dr. Brizzie submitted further medical information on July 31, 2017. AR 330. His
19 July 31, 2017 “Medical Request Form” indicated a primary diagnosis of lumbar
20 anterolisthesis but otherwise noted similar information to the prior form. AR 3022. Case
21 notes for a July 31, 2017 appointment indicated that Plaintiff “notes no change of the
22 overall pain since the last appointment” and “feels no significant relief from the injection
23 performed at the previous evaluation.” AR 3023. Plaintiff graded her overall pain as a 9
24 out of 10 and her pain with activity at 8 out of 10. *Id.* Dr. Brizzie indicated that Plaintiff
25 “is taking the medications as directed” and “feels her pain has improved significantly since
26 she has stopped performing her work duties,” but that she “describes difficulty engaging
27 in previous recreational activities such as jogging/running, going for walks, spending time
28 with her daughter, and exercising.” *Id.* Plaintiff was administered a “Trigger

Point/Ligamentous Injection” in her lumbar region during the appointment. AR 3024–25. Dr. Brizzie diagnosed Plaintiff with “Lumbar discogenic pain,” “Lumbar spinal stenosis,”⁴ “Lumbar anterolisthesis of L4/5,”⁵ “Lumbar radiculopathy,”⁶ “Lumbar facet injury and pain,” and “Lumbar sprain and strain.” AR 3025. He conveyed that “[t]he patients [sic] overall prognosis is guarded to fair with the appropriate treatment.” *Id.* He again opined that Plaintiff’s inability to return to work was “permanent” and that she was “actively treating w/ HEP [home exercise program] and injections.” AR 3028. Per a letter dated August 11, 2017, LINA informed Plaintiff that “[her additional] information was reviewed and does not change our prior decision.” AR 334.

An October 16, 2017 letter to LINA indicated that Plaintiff had retained counsel for her appeal. AR 3030. Plaintiff appealed the LTD benefits denial on January 12, 2018. AR 2760. As part of her appeal, Plaintiff submitted a November 6, 2017 “Functional Capacity Examination” (“FCE”) performed by Carissa Beyer, RPT. AR 1680–97. The FCE concluded that, “[b]ased on the test results, the client gave maximum effort with testing. Test results indicate that the client had 100% consistency with coefficient of variance measurements below 15%. Intra-test reliability is evident for this test. The client’s physical behaviors correlated with her subjective complaints of pain.” AR 1682. The FCE noted that “[i]t is not conceivable at this time for the client to incorporate work activities while maintaining a posture; therefore, she is unable to work at any occupational level at

⁴ Stenosis is “a narrowing or constriction of the diameter of a bodily passage or orifice.” “Stenosis,” *Merriam-Webster*, <https://www.merriam-webster.com/dictionary/stenosis> (last visited Feb. 16, 2022).

⁵ “In anterolisthesis, the upper vertebral body is positioned abnormally compared to the vertebral body below it. More specifically, the upper vertebral body slips forward on the one below. The amount of slippage is graded on a scale from 1 to 4. Grade 1 is mild (20% slippage), while grade 4 is severe (100% slippage).” “Anterolisthesis,” *Cedars-Sinai*, <https://www.cedars-sinai.org/health-library/diseases-and-conditions/a/anterolisthesis.html> (last visited Feb. 16, 2022).

⁶ Radiculopathy means “irritation of or injury to a nerve root (as from being compressed) that typically causes pain, numbness, or weakness in the part of the body which is supplied with nerves from that root.” “Radiculopathy,” *Merriam-Webster*, <https://www.merriam-webster.com/dictionary/radiculopathy> (last visited Feb. 16, 2022).

this time.” *Id.* The FCE reported that “[Plaintiff’s] pain varies from day to day as well as throughout the day and she is very strategic about planning her daily activities accordingly.” *Id.* Plaintiff reported that “her pain is best managed when she changes postures regularly” and that “‘movement’—such as walking on a level, even path as well as modified yoga—helps her best to manage her pain,” but that “her ‘best’ pain level is . . . 5/10.” *Id.* The FCE concluded that Plaintiff’s “[r]ange of motion is limited at her lumbar spine especially in extension.” AR 1683. The ultimate “Recommended Physical Demands” were as follows:

RECOMMENDED PHYSICAL DEMANDS

Motion	Occasional(0-33%)	Frequent(34-66%)	Constant(>67%)
Sitting workday	x <40 min continuously – total of 1 hr 40 min/8 hr		
Standing(static)	x <30 min		
Walking	x <1.5 hours		
Bending(waist)	x <2 reps		
Squatting	x partial squat appropriate for daily functional transfers		
Kneeling	x appropriate for home use only		
Power grasping	x cont <1 min		
Simple grasping	x cont <5 min		
Precision grasping*	x cont <1 min		
Fingering**	x cont <1 min		
Reaching overhead	x cont <8 reps		
Reaching forward	x cont <19 reps		
Push	30 lbs (isometric)		
Pull	36 lbs (isometric)		
Lifting Capability: 5 lbs			

***Precision grasping: Item held away from palm, held with fingertips, pinching activities**

****Fingering: Reflects activities that would include keyboarding or other repetitive hand activity.**

AR 1681.

A December 12, 2017 medical note from Dr. Brizzie titled “FCE” indicates that the “[f]indings in the [FCE] are both consistent with [Plaintiff’s] objective MRI findings as

1 well as her described limitations and impairment level. I agree with these findings and feel
2 they provide an accurate reflection of her condition.” AR 1698. Plaintiff also provided, as
3 part of her appeal, a short personal statement relaying her health history, her lifestyle as a
4 result of her health, and her current treatment regimen. AR 1699–700.

5 On March 14, 2018, LINA informed Plaintiff’s counsel that it had scheduled a
6 Medical Review of Plaintiff’s file. AR 353. Chalonda K. Hill, M.D., Board certified in
7 Occupational Medicine, completed a “Specialist Review” on March 21, 2018. AR 2748.
8 As relevant to Plaintiff’s condition,⁷ Dr. Hill reviewed records from Dr. Brizzie from
9 December 2016 through December 2017; records from Dr. Jensen from November 2016
10 through June 2017; records from Dr. Triuzio from March 10, 2017; records from physical
11 therapy for the period from November through December 2017; and the November 6, 2017
12 FCE. *Id.*

13 Dr. Hill determined that the following were co-limiting conditions requiring
14 restrictions and limitations: “L4-L5 Lumbar Anterolisthesis, Central Canal Stenosis,
15 Lumbar Radiculopathy, Lumbar Discogenic Disc Pain, and Chronic Low Back Pain.” *Id.*
16 She further concluded that “[t]he internal medical reviewer’s opinion is not well supported
17 by medically acceptable clinical or laboratory diagnostic techniques and is inconsistent
18 with the other substantial evidence in the claim file.” *Id.* Specifically, Dr. Hill concluded
19 that “there is sufficient medical evidence to support functional limitations and the need for
20 restrictions and limitations during the referenced time period,” including “abnormal
21 clinical exam findings, imaging study, and functional capacity evaluation.” AR 2748–49.
22 Dr. Hill concluded that Plaintiff is functionally limited “due to chronic back pain, L4-L5
23 anterolisthesis, and lumbar radiculopathy.” AR 2749. She concluded Plaintiff’s medically
24 necessary activity restrictions included “Occasional – sitting, standing (static), walking,
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27 ⁷ No party contends that Plaintiff’s varicose veins are relevant to her disability and functional limitations,
28 and accordingly the Court ignores the portions of the Administrative Record concerned with this condition.

bending (waist), squatting, kneeling, power grasping, simple grasping, precision grasping, fingering, reaching overhead, reaching forward, push 30 lbs., pull 36 lbs. and lift 5 lbs.” *Id.*

Per a letter dated March 23, 2018, Plaintiff’s counsel was informed that, following Dr. Hill’s independent review, “a determination has been made that the prior decision should be overturned.” AR 363. “This means that your client is entitled to benefits payable under the[P]olicy so long as they continue to meet the terms and conditions of the [P]olicy.” *Id.*

VII. Plaintiff’s Life Insurance Waiver of Premium Claim and First Appeal Thereof

As noted *supra* at note 1, Plaintiff was also covered by Gartner group term life insurance policies. Through these policies, Plaintiff had company-paid life insurance coverage totaling \$551,000 and voluntary supplemental coverage of \$276,000. AR 3464. The life insurance policies contained waiver of premium (“WOP”) coverage provisions for employees who become disabled before the age of 60. *See* AR 3361–62; AR 3404–05. Per an April 12, 2018 letter, LINA informed Plaintiff that “[w]e have started the review of your Waiver of Premium claim under your Group Term Life Insurance policy . . . as you have applied for Long Term Disability Benefits and your Employer also offers Life Insurance with Waiver of Premium Coverage through [LINA].” AR 377.

In connection with Plaintiff’s WOP claim, LINA had a “Transferrable Skills Analysis” (“TSA”) performed. AR 3466. The May 3, 2018 TSA authored by Stacey Nidositko, MS, CRC, Rehabilitation Specialist, and reviewed by Eric Moyer, MS, CRC, Senior Vocational Coach, on its face took into account Plaintiff’s job description; her July 10, 2017 Disability Questionnaire; Dr. Hill’s March 21, 2018 Medical Review; the DOT; and OASYS. *Id.* It noted that Plaintiff’s work experience was as a “Program Manager,” a sedentary position with DOT code 189.167-030. *Id.* Based on Plaintiff’s work experience, education and training, diagnoses and limitations, and skills and abilities, it was determined that “[o]ccupations [she] can perform in the labor market of San Diego, CA, include” Consultant and Project Director, both sedentary positions that “allow for postural changes.”

1 *Id.* A DOT printout of the entry for “Program Manager” indicates that the strength
2 requirement is “sedentary” and the job includes “mostly sitting.” AR 3159.

3 Thus, per a May 31, 2018 letter, LINA denied Plaintiff’s WOP claim. AR 3456.
4 Specifically, after reviewing Plaintiff’s file with a Nurse Case Manager and Medical
5 Director specializing in Occupational Medicine, LINA “determined that [Plaintiff] could
6 occasionally sit, stand, walk, bend at the waist, squat, kneel, power grasp, simple grasp,
7 precision grasp, and finger, reach overhead, reach forward, push 30 pounds, pull 36 pounds
8 and lift 5 pounds.” AR 3457. Thus, “[b]ased on [her] physical abilities as noted by a
9 Medical Director, as well as [her] education, and work experience, a Transferable Skills
10 Analysis was performed by a certified Vocational Rehabilitation Specialist,” who
11 determined that “[Plaintiff’s] level of functionality is consistent with Sedentary work,”
12 which is defined by the DOT as follows:

13 *"Sedentary Work-Exerting up to 10 pounds of force occasionally or a negligible amount of force frequently to lift, carry,*
14 *push pull, or otherwise move objects including the human body. Sedentary work involves sitting most of the time, but*
15 *may involve walking, standing for brief periods of time. Jobs are Sedentary if walking and standing are required only*
occasionally and all other Sedentary criteria are met."

16 *Id.* LINA noted that “[t]his analysis yielded two occupations that would be compatible
17 from both an educational and medical standpoint,” namely “189.117-050, Consultant –
18 Sedentary,” and “189.117-030, Project Director – Sedentary.” *Id.*

19 On November 27, 2018, Plaintiff appealed the WOP denial, providing additional
20 medical records. AR 2339–43; AR 466; AR 484.⁸ As part of the appeal, Plaintiff submitted
21 a December 28, 2018 letter from Chris Elleraas, D.C., from Carmel Valley Chiropractic,
22 who examined Plaintiff⁹ and opined that “she is suffering from a chronic low back pain
23 [sic] and sciatica related from a L4/L5 spondylolisthesis. This is a degenerative disc
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26 ⁸ Although the WOP determination is not a part of the present action, the parties rely on various documents
27 submitted or generated as a part of the WOP determination and appeal process contained within the
28 Administrative Record.

⁹ Plaintiff had four chiropractic appointments at Carmel Valley Chiropractic in July 2018. AR 1970–71.

1 condition that does relate to significant reduction of abilities and functional limitations,”
 2 including “sitting, standing, walking, lifting, carrying, handling objects, and traveling, etc.”
 3 AR 1969. He noted that her “[p]rognosis based on medical findings are not good.” *Id.*

4 On January 23, 2019, LINA obtained a “Peer Review Report” from Mark V. Reecer,
 5 M.D., Board certified in Physical Medicine and Rehabilitation with a subspecialty
 6 certificate in Pain Medicine, from MES Peer Review Services. *See* AR 2248–54. Dr.
 7 Reecer noted that Plaintiff had obtained various injections from Dr. Brizzie in twelve
 8 separate appointments from December 2016 through October 2018, *see* AR 2249–50; he
 9 also summarized Plaintiff’s appointments from July 2016 through September 2018 with
 10 Drs. Finkenberg, Jensen, and Brizzie for her back pain, *see* AR 2250–52, and her physical
 11 therapy appointments in November and December 2017, *see* AR 2252. Following review
 12 of these and other materials, he concluded:

13 Yes, the claimant is limited and permanent restrictions are indicated from 04/04/2017 onward.

14 In this case, the claimant has history of anterolisthesis and severe stenosis noted L4-S1 most
 15 pronounced at L4-5. She has chronic low back pain that radiates into bilateral lower extremities.
 16 She has undergone multiple injections for pain relief that have included ESI injections, facet, medial
 17 branch block injections, trigger point injections and SI joint injections. She has also attended
 18 therapy and has been on long term pain medications for her complaints as well. It states that she
 19 has been evaluated by two surgeons, but it is unclear as to why she has not proceeded with
 20 surgical intervention, such as two level lumbar fusion L4-S1. She continues to treat with pain
 management monthly for her chronic low back pain with lower extremity radiculopathy.

21 The claimant had an FCE assessment completed per therapy which revealed she could perform
 22 with light duty restrictions.

23 Based on review of the provided medical records, in my opinion, permanent restrictions are
 24 indicated due to instability and severe stenosis from L4-S1 and to help reduce further degeneration,
 25 stenosis and adjacent segment disease. Permanent restrictions from 04/04/2017 onward would
 26 include the following:

27 The claimant may lift, carry, push, and pull up to 10 pounds frequently and up to 20 pounds
 28 occasionally; no reaching below waist level; no restrictions on reaching at waist level or above
 shoulder level; may sit for one hour intervals and up to 6 hours per shift; may stand for 30 minutes
 per hour and up to four hours per shift; may walk for 30 minutes per hour and up to four hours per
 shift; no climbing of ladders or crawling; occasional climbing of stairs, kneeling, squatting, stooping
 and crouching; no restrictions on gripping, grasping, fingering, keying or fine manipulation. May
 work 8 hour shifts and 40 hours per week, in a sustained capacity. Again, these would be
 considered permanent in nature.

1 AR 2253. He indicated he was “in agreement with providers that permanent light duty
2 restrictions are indicated as evidenced on FCE from 2017.” *Id.*

3 LINA also obtained a second TSA dated February 7, 2019. AR 3161–62. Relying
4 on Plaintiff’s job description, Plaintiff’s Disability Questionnaires, the DOT, OASYS, and
5 Dr. Reecer’s January 23, 2019 Peer Review Report, Darci Bakos, MS, CRC, Vocational
6 Rehabilitation Specialist, determined that Plaintiff could perform her own occupation of
7 Program Manager, DOT Code 189.167-030, or the occupation of Consultant, DOT Code
8 189.117-050. AR 3162. The February 7, 2019 TSA noted that these occupations “allow
9 for positional changes”; “meet [Plaintiff]’s skills, education attainment, and work history”;
10 and “give the customer reasonable functional capacity to perform” given “[t]he limitations
11 and restrictions outlined by Dr. Reecer.” *Id.* No wage analysis was performed as part of
12 the TSA. *See generally id.*

13 In February 2019, LINA requested Plaintiff’s records from the SSA. AR 526. It
14 appears LINA received those materials in April 2019. *See, e.g.,* AR 1052.

15 Plaintiff’s SSA file included an October 13, 2018 Complete Orthopaedic Evaluation
16 performed at the SSA’s request by Ibrahim M. Yashruti, M.D., Board certified in
17 Orthopaedic Surgery. *See* AR 2046–51. Dr. Yashruti indicated that Plaintiff was “in no
18 acute distress” and “ambulates without difficulty, without limp and without support or the
19 help of a cane. [She] is able to walk on toes and heels” and “squat fully and recover to a
20 standing position without help or support.” AR 2047–48. The examination revealed
21 reduced range of motion in both the cervical and lumbar spine but “grossly normal” range
22 of motion of the wrists and hips. AR 2048–49. Dr. Yashruti’s impression was as follows:

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1 The claimant is a 54-year-old female who describes developing
2 right wrist and hand pain, upper and lower back pain, left hip,
3 knee, ankle, and foot pain. Objectively, she has some limitation
4 of cervical motion. She has limitation of lumbar motion. She
5 complains of decreased sensation in the left calf. Straight-leg
6 raising on the right is 40 degrees. Cervical spine x-rays reveal
7 degenerative disc disease at C6-7. Lumbar spine x-rays reveal
8 moderate L5-S1 narrowing with grade 1 anterolisthesis at L4 on L5.
9 Her x-rays of the right wrist were reported as revealing
10 degenerative change. MRI of the lumbar spine reported grade 1
11 anterolisthesis of L4 on L5.

12 Based on today's evaluation, the claimant is able to sit six hours
13 a day, stand and walk on level ground two hours a day. She is able
14 to squat, kneel, crouch, and crawl occasionally. She is able to
15 lift 10 pounds occasionally and less than 10 frequently. She is
16 able to reach with the left arm and manipulate with the left hand
17 frequently. She is able to reach with the right arm and manipulate
18 with the right hand occasionally.

19 AR 2051.

20 The SSA file also included records from San Diego Sports Medicine & Family
21 Health Center, *see* AR 1595–1654, where Plaintiff received physical therapy per a referral
22 from Dr. Brizzie from November 7, 2017, through December 19, 2017.

23 The SSA file further contained records from an appointment with Choll W. Kim,
24 M.D. Ph.D., a Board-certified orthopedic surgeon at the Spine Institute of San Diego, from
25 on or around October 9, 2018. AR 1990–91. He indicated that Plaintiff was a “reliable
26 historian.” AR 1990. He reviewed her August 2018 spine x-rays and 2016 spine MRI and
27 determined that “Ms. Stratton has low back pain and bilateral L5 radiculopathy consistent
28 with her imaging studies.” AR 1991. He wrote that “[s]he maintains a relatively high level
of functioning as long as she continues non-operative treatments including chiropractic
treatments, core strengthening exercises, and PRP. Her pain scores represent her state
without these treatments.” AR 1991. He noted that “[v]arious treatment options, both
surgical and non-surgical, were discussed along with their pertinent pros and cons.” *Id.*
He wrote that her plan of care was to: “1. Continue exercise/fitness program 2. Consider
surgery if pain worsens/persistent via Right L4-5 MIS TLIF vs. Right L4-5 MIS
Hemilaminectomy (hemilaminectomy not recommended) 3. Follow up as needed.” *Id.*

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1 The SSA file indicates that on October 30, 2018, at the initial level, Plaintiff was
 2 determined to be not disabled for purpose of Social Security Disability Insurance (“SSDI”)
 3 benefits. *See* AR 2015–28. As to residual functional capacity (“RFC”), K. Sin, MD,
 4 opined that Plaintiff had exertional limitations, but could stand and/or walk for two hours
 5 and sit for about six hours in an eight-hour workday. AR 2024–25. Plaintiff’s Past
 6 Relevant Work (“PRW”) at Gartner was classified as “sedentary,” and thus it was
 7 determined that Plaintiff had the RFC to perform her PRW. AR 2027. On January 30,
 8 2019, at the reconsideration level, the SSA again determined Plaintiff was not disabled.
 9 AR 2029–44. A new RFC was performed by L. Naiman, MD. AR 2038–41. Dr. Naiman
 10 also determined that Plaintiff could stand and/or walk for about 2 hours and sit for about 6
 11 hours during the workday. AR 2039. Again, it was determined that Plaintiff had the RFC
 12 to perform her PRW. AR 2042. Plaintiff thereafter requested a hearing before an
 13 administrative law judge (“ALJ”). AR 1931.

14 At LINA’s request, Dr. Reecer provided a second Peer Review Report on May 3,
 15 2019. *See* AR 2240–46. He reviewed additional records, including the SSA file and further
 16 medical records. *See generally id.* He was asked to “review the additional information
 17 and advise if it changes your prior decision.” AR 2244. In response, Dr. Reecer indicated:

18 Additional records were reviewed. There are no new diagnostics provided for review. The claimant
 19 has continued conservative care without surgery. There is no documentation of worsening of
 20 symptoms or change in status since previous review was completed, therefore, she appears to
 21 have plateaued and is stable, so there is no change to the previous permanent restrictions that
 22 were assigned in the initial report

22 AR 2245.

23 Per an Addendum dated May 13, 2019, Dr. Reecer specifically was asked to opine
 24 on the November 6, 2017 FCE, prompting the following statement:

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ADDENDUM

Enclosed is a copy of the 11/06/2017 FCE that you referenced in your report. Restrictions and limitations were noted in the FCE and in your report. However, on pg 2 it is noted that “It is not conceivable at this time for the client to incorporate work activities while maintaining a posture; therefore, she is unable to work at any occupational level at this time.” Please advise if you agree with this statement and provide an explanation as to why or why not.

I do not; The FCE comment regarding posture is unclear regarding to what limitations are being adding to the claimant's posture. It appears to be a subjective comment of the evaluator without quantifying measurements which one could apply to activities and, without such, this comment could not relay into specific restrictions as would a clinically supported statement. The additional notes reveal the claimant is stable, without any worsening of symptoms and no new diagnostics revealing any worsening. Therefore, the claimant could work with the permanent restrictions previously assigned in the original review.

AR 2604.

Per a May 31, 2019 letter, after considering Plaintiff's complete file—including “new or additional evidence” comprising Plaintiff's SSA file, Dr. Reecer's Peer Review Reports, and the second TSA—LINA “concluded that an adverse benefit decision on [Plaintiff's WOP] claim is warranted.” AR 536. LINA indicated that Plaintiff's occupation was “sedentary”; that Dr. Reecer concluded she could sit up to six hours per shift; and that sedentary occupations meeting Plaintiff's functional limitations and requirements existed. AR 538–40. Thus, “[b]ased on our review, the medical information supports some functional limitations due to [Plaintiff's] physical condition. However, based on our review, she would not be totally disabled from any occupation.” AR 540. Plaintiff was given the opportunity to respond. *Id.* However, Plaintiff failed to do so, and LINA upheld the WOP denial on August 28, 2019. AR 570–72. In its August 28, 2019 letter, LINA granted Plaintiff the opportunity to submit a second appeal review. AR 574.

VIII. Denial of Long Term Disability Benefits Under “Any Occupation” Standard

Meanwhile, with regard to Plaintiff's LTD benefits, LINA requested and Plaintiff provided additional medical records and Disability Questionnaires to document her ongoing disability. *See, e.g.*, AR 2775–76 (April 18, 2018 Physical Ability Assessment signed by Dr. Brizzie); AR 2701 (July 31, 2018 Disability Questionnaire completed by Plaintiff); AR 2608–10 (August 7, 2018 Medical Request Form and Physical Ability

1 Assessment signed by Dr. Brizzie). In a letter dated January 30, 2019, LINA informed
2 Plaintiff's counsel that, "[a]s of today, [Plaintiff] ha[s] received 18 months of LTD benefits.
3 [Her] claim is approaching the point where the definition of Disability changes. The
4 change in definition of Disability starts on July 3, 2019. This means we need to review
5 [her] claim to determine if [she is] disabled from any occupation as required by [the
6 P]olicy." AR 498.

7 Plaintiff provided a further Disability Questionnaire on February 1, 2019. AR 2541–
8 44. When asked why she was not working, Plaintiff answered: "It's a full-time job
9 managing my condition so I can function at all. Core issue stems from extreme chronic
10 pain caused by severe central canal stenosis, etc as seen on MRI." AR 2543. She indicated
11 that she cooks, shops for groceries, does laundry, maintains an herb garden, watches the
12 news, and listens to audiobooks. AR 2544. She indicated that her hobbies "have become
13 Yoga, Pilates, Audiobook walking & Vegan Cooking." *Id.* She noted that she exercises
14 regularly at home and the gym doing "Yoga, Pilates, Walking." *Id.* When asked if she
15 likes to go for walks, she noted "I have to," and said she walks about a mile three times a
16 day for a half hour at a time ("sometimes less, sometimes more"). *Id.* She indicated she
17 drives approximately three miles a day and that she uses "a personal computer or a mobile
18 device" "[a]ll the time" for "email, google, Amazon." *Id.* She also indicated that she was
19 receiving approximately \$3,000 per month from a private disability insurance policy. *Id.*

20 In a June 20, 2019 letter, Plaintiff's counsel was informed that LINA had
21 "determined that [Plaintiff] no longer remain[s] disabled as defined by [the P]olicy." AR
22 542. LINA categorized Plaintiff's occupation as "sedentary" according to the DOT. *Id.*
23 LINA indicated that its review "specifically included" medical records submitted through
24 December 4, 2018, and Plaintiff's SSA file. AR 544. LINA also cited Plaintiff's February
25 1, 2019 Disability Questionnaire, the materials received in connection with the WOP
26 appeal, Dr. Reecer's Peer Review Reports and Addendum, and the second TSA. *Id.* LINA
27 informed Plaintiff that, based on the medical review, it was determined that Plaintiff could
28 perform sedentary work, and that the vocational department had identified "Program

1 Manager” as a sedentary occupation that was both “compatible with [her] work capacity”
 2 and “satisf[ied] the earnings requirement for [her] Indexed Covered Earnings under the
 3 contract.” *Id.* Accordingly, LTD payments were made through July 2, 2019, the end of
 4 the “regular occupation” period, but “no further benefits are due.” *Id.*

5 IX. Plaintiff’s Long Term Disability Benefits Appeal and Second Waiver of 6 Premium Appeal

7 Plaintiff’s counsel was granted until December 17, 2019 to file an LTD appeal. AR
 8 586. The same deadline was provided for Plaintiff’s second WOP appeal. *Id.*

9 On December 16, 2019, Plaintiff’s counsel submitted a letter as well as a compact
 10 disc containing additional medical records, a new FCE, and medical articles. AR 1269.
 11 Plaintiff’s counsel argued that the evidence in Plaintiff’s file “establishes that as a result of
 12 [Plaintiff’s] severe canal spinal stenosis, L4-L5 anterolisthesis, spondylolisthesis, chronic
 13 pain, and side effects of narcotic medication, Ms. Stratton is unable to perform with
 14 reasonable continuity the substantial and material duties of her occupation, nor is she able
 15 to perform, with reasonable continuity, the material and substantial duties of any
 16 occupation.” AR 1270.

17 Among the supplemental materials was an October 10, 2019 full-day FCE from
 18 Carissa Beyer, RPT. AR 1280. The FCE’s “recommended physical demands” were as
 19 follows:

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RECOMMENDED PHYSICAL DEMANDS:

Motion	Occasional(0-33%)	Frequent(34-66%)	Constant(>67%)
Sitting	x cont <45 min , total of <2 hours in an 8-hour day		
Standing(static)	x cont <1 hour with constant weight shifting & stretching		
Walking	x cont <20 min		
Bending(waist)	x appropriate for ADL completion		
Squatting	x partial squat appropriate for functional transfers		
Kneeling	reserved for home use only		
Power grasping	x occasional		
Simple grasping	x occasional		
Precision grasping*	x occasional		
Fingering**	x occasional		
Reaching overhead	x cont <5 reps		
Reaching forward	x cont <5 reps		
Push	24 lbs (isometric)		
Pull	24 lbs (isometric)		
Lifting Capability: 5 lbs with the left upper extremity only at waist height and carry (unable to safely lift from knee and floor height)			

*Precision grasping: Item held away from palm, held with fingertips, pinching activities

**Fingering: Reflects activities that would include keyboarding or other repetitive hand activity.

Id.

The FCE indicated that “[Plaintiff] gave maximum effort with testing” and “[her] physical behaviors correlated with his/her subjective complaints of pain.” AR 1279. The FCE concluded that “[Plaintiff] is not able to incorporate work activities while maintaining a work posture; therefore, she cannot sustain a full-time or part-time job.” AR 1281. Although Plaintiff lives in a two-story home, the FCE noted that she “has moved down to the main level to avoid climbing stairs,” although she “[h]as to climb stairs to do laundry.” AR 1284. Plaintiff reported that “cooking is limited but she loves to cook”; that she “does laundry”; that she “has a housekeeper to do heavy cleaning as [she] cannot do it anymore”; and “grocery shopping is manageable because she can lean on the cart.” AR 1284.

A December 2017 x-ray of Plaintiff’s right wrist resulted in findings that “[t]he STT and trapezium first metacarpal joints are degenerated,” and thus the impression was “Osteoarthritis right wrist.” AR 1300. An x-ray of Plaintiff’s left hip the same month showed “mild degenerative spurring along the femoral head,” but “no periarticular soft

1 tissue calcifications” and “joint space is maintained.” AR 1301. An annotation from Dr.
 2 Jensen, the ordering physician, indicated that “[she] can send [Plaintiff] to see our sports
 3 medicine doctors if [she] want[s].” *Id.* During a December 12, 2017 appointment, Dr.
 4 Jensen noted that the range of motion in Plaintiff’s right wrist and hand was “all normal
 5 except as noted,” strength was “normal,” and palpation was “tender diffuse.” AR 1304.
 6 Dr. Jensen’s assessment was that the x-ray done earlier that month “shows some OA,
 7 unclear if that is the etiology of her pain, will send to MSK [musculoskeletal].” *Id.* She
 8 also noted “trial of mobic,” with Plaintiff to take one to two 7.5-mg tablets daily. *Id.*

9 During a January 2018 physical, Plaintiff indicated pain of a 7 in her back. AR 1310.
 10 Dr. Jensen noted under “Left hip pain”: “Chronic, patient reports finding MRI results from
 11 a few years ago showing a labral tear, she would like to see MSK, referral placed.” AR
 12 1311. Plaintiff met with Dr. Stanley M. Besser, who specializes in musculoskeletal
 13 medicine, on February 27, 2018. AR 1322. During the appointment she “describe[ed] a
 14 chronic history of left iliofemoral pain, left lateral hip pain and chronic low back pain which
 15 [s]he states was previously diagnosed with lumbar degenerative disc with lumbar facet
 16 arthropathy. She apparently completed a prior epidural injection at the L4-5 level 2 years
 17 ago with only limited improvement in symptoms.” *Id.* Dr. Besser noted that “[Plaintiff]
 18 states she has had extensive courses of physical therapy without significant improvement.
 19 She states that she had been an avid runner and recently discontinued running associated
 20 with progression of discomfort.” *Id.* Plaintiff further conveyed that “she has not had any
 21 prior left hip or trochanteric bursal type cortisone injections and is not anxious to proceed
 22 with this modality of treatment. Just yesterday she was evaluated by Dr. Brisie [sic] an
 23 osteopathic physician and she received a left hip PRP joint injection. She . . . would like
 24 to know what her next step of management would be should her left hip be unresponsive
 25 to a course of PRP injections . . . over the next 6-12 months.” *Id.* He noted “[n]o described
 26 distal radicular pain.” *Id.* He also noted Plaintiff’s right wrist pain and that “X-rays
 27 obtained of the right wrist in December 2017 confirmed wrist DJD [degenerative joint
 28 disease],” but that “[Plaintiff] is not presently using meloxicam recently prescribed by her

1 PCP.” *Id.* Dr. Besser recorded that Plaintiff’s pain was “characterized as 8-10/10.” AR
 2 1323. Under “Physical Exam,” he indicated: “Pleasant female no acute distress.” AR
 3 1324. “Left hip: Neurovascular testing distally is grossly intact. Slight discomfort with
 4 palpation over the greater trochanter. Faber test negative. Patrick test positive. Hip flexion
 5 and external rotation guarded and restricted with deep iliofemoral pain. SLR sitting
 6 negative for distal radicular pain. Gait is nonantalgic.” *Id.* Under “Plan,” Dr. Besser
 7 wrote:

8 Results of recently obtained left hip x-rays were reviewed with patient in detail. I discussed with her that the x-ray
 9 result does show some mild degenerative spurring consistent with early degenerative changes. We unfortunately
 10 were unable to access her MRI of the left hip from 2015 although she did read to me the results that she had on
 11 her cell phone outlining significant degenerative labral pathology with no displaced labral flap or fragment. I
 12 discussed with her today that her left hip and history of lumbar back pathology is complicated with the potential for
 13 significant overlap of symptoms associated with multiple pathologies. I recommended that we obtain her prior left
 14 hip MRI scan report for more definitive review. At this juncture as she just received a PRP injection provided by
 15 another provider yesterday we would not be able to proceed with any type of diagnostic cortisone injection at this
 16 time in hopes of further defining the primary pain generator which I discussed with her can be hip DJD, labral
 17 degenerative pathology, trochanteric bursitis and/or lumbar spinal pathology. I discussed with her that should her
 18 symptoms be unresponsive to the PRP injection series that she wishes to proceed with I would be glad to further
 19 try to define the primary pain generator causing her persistent chronic hip/back symptoms which likely would
 20 involve a repeat hip and/or lumbar spine MRI scan. We discussed that the end stage of management for
 21 recalcitrant hip pathology can be orthopedic surgical consultation to discuss options of management which can
 22 include hip arthroplasty. In regards her right wrist associated with time limitations I only reviewed with her her right
 23 wrist x-rays which do show pre-existing degenerative pathology. I briefly discussed with her that osteoarthritis of
 24 the wrist is primarily treated with use of anti-inflammatories be that NSAID medications and/or imaging guided
 25 cortisone joint injection prior to considering any type of orthopedic surgical fusion type procedure. Patient
 26 expressed a desire to avoid any cortisone injections at this time. I did discuss with her that I would be glad to more
 27 definitively evaluate her wrist symptoms on a follow-up visit.

18 DISPOSITION: Patient to be reassessed on a as needed basis with persistent hip and/or wrist symptoms patient
 19 expressed a clear understanding and was in full agreement to disposition as stated.

20 AR 1325.

21 Plaintiff had a further appointment with Dr. Brizzie on October 11, 2018, during
 22 which she had a PRP procedure and trigger point/ligamentous injection in the lumbar
 23 region. AR 1342. On October 25, 2018, Plaintiff visited Dr. Brizzie for a first MCP joint
 24 injection on her left side and a trigger point injection in her trapezius. AR 1344.

25 Plaintiff additionally saw Debora Novick, DC (chiropractic), in October and
 26 November 2018 for her hip and low back pain. AR 1720–71.

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1 During a February 21, 2019 appointment with Dr. Brizzie, Plaintiff reported overall
2 pain of 8 to 9 out of 10. AR 1346. On February 22, 2019, Dr. Brizzie performed PRP
3 procedures in her lumbar spine and right wrist joint. AR 1350. Plaintiff returned to Dr.
4 Jensen for a physical exam on February 28, 2019. AR 1313. At that time, Dr. Jensen
5 recorded a pain scale rating of “0.” AR 1315.

6 Plaintiff saw Dr. Brizzie again on March 21, 2019. AR 1352. During that visit she
7 received a Hylgan injection in her left knee joint. AR 1354. She also received an injection
8 in her right wrist joint. AR 1354–55. She saw Dr. Brizzie on March 28, 2019, and received
9 another knee joint Hylgan injection at that time. AR 1360. Dr. Brizzie administered
10 another Hylgan injection in Plaintiff’s knee on April 4, 2019. AR 1362. On April 15,
11 2019, during a follow-up exam with Dr. Brizzie, Plaintiff “notes improvement of the
12 overall pain since the last appointment. The patient does describe continued left knee pain
13 ongoing pain. The patient has had improvement in knee pain with injections previously.”
14 AR 1363. She received another Hylgan injection in her left knee on that date. AR 1364–
15 65. Plaintiff saw Dr. Brizzie again on April 22, 2019. AR 1367. During that appointment
16 she “notes improvement in the left knee pain but a worsening of the right wrist pain of the
17 overall pain since the last appointment,” with an overall pain level of “6 out of 10 and a 8
18 out of 10 with activities.” *Id.* She received another Hylgan injection to the knee joint. AR
19 1369.

20 On April 26, 2019, Plaintiff had an appointment with Dr. Peter Lloyd at Seaside
21 Rheumatology. AR 1382. He noted with regard to Plaintiff’s lower back pain that “[s]he
22 was told not to have surgery and to conservatively manage [t]he pains. She did this for
23 several years Two years ago she developed severe lower back pain, MRI severe
24 central stenosis, degenerative disc disease, spondylolisthesis. She was seen by surge[ons]
25 who told her to wait. She has done ozone, prolo and prp therapy. She is [on an] inversion
26 table daily, yoga 5 days per week.” *Id.* He recorded that she developed left knee pain and
27 right wrist pain eight months ago, and that a series of five hyaluronic acid injections helped
28 the left knee pain and that “cortisone, prolo and prp helped a little” with the wrist. *Id.* Her

1 elbows started hurting three weeks ago. *Id.* She “[w]ant[ed] to know about blood test for
2 arthritis, MRT test.” *Id.* She is “[t]aking Mobic intermittently.” *Id.*

3 Plaintiff next saw Dr. Brizzie on July 18, 2019. AR 1371. During that appointment,
4 she “note[d] no change of the overall pain since the last appointment” and “no significant
5 relief from the injection performed at the previous evaluation.” *Id.* She noted pain levels
6 of 7 to 9 both overall and with activity. *Id.* Plaintiff returned to Dr. Brizzie’s offices on
7 September 12, 2019, for PRP injections in her left hip joint and her right wrist. AR 1375.

8 On February 27, 2020, by both fax and certified mail, Plaintiff’s counsel submitted
9 an “Appeal Supplement.” AR 1218. The Supplement contained Plaintiff’s December 2019
10 “Personal Statement on Managing Condition and Effects of Medication,” which indicated
11 that it was dictated rather than typed. AR 1219. In her Personal Statement, Plaintiff
12 reiterated that, “[b]ased on much research and input from the medical specialists (including
13 multiple surgeons), [she] was encouraged to ‘manage [her] condition’ as surgery carried
14 risks and there was a 50% chance [she] would end up in worse condition than when [she]
15 went in.” *Id.* Plaintiff noted that “[she] was told that [her] future would inevitably require
16 surgery based on the degenerative nature of [her] condition, but that the trick was to manage
17 it without getting addicted to opioids,” and that “the longer [she] could postpone surgery,
18 the greater chance of finding the balance of being ‘young enough to get through surgery
19 but old enough that the degenerative effects of fusion would have a shorter time to
20 manifest’.” *Id.* Plaintiff conveyed that “other joints have unexpectedly degenerated at a
21 pace that is shocking to [her] (eg: 40% reduction in [her] right wrist/hand strength over two
22 years due to severe triscaphe osteoarthritis, etc., (shown in an MRI).” *Id.*

23 Plaintiff notes that she has “daily personal responsibility for an anti-
24 inflammatory/plant-based diet; yoga, pilates, inversion, traction, extremely frequent
25 movement, minimal sitting/standing, ice, heat, massage, anti-inflammatory creams,
26 regenerative medicine (PRP, Prolotherapy, heat therapy, Ozone Gas), medical
27 interventions (steroid injections, nerve ablation, hyaluronic acid injections); naturopathic
28 solutions (countless herbal tinctures and supplements, Kaprex, Guna Flam, etc.),

1 pharmacological products such as NSAIDs and Tramadol and even neuroplasty review.”
 2 *Id.* Plaintiff writes that “[her] dependence on OTC NSAID’s grew to a frequency that was
 3 inconvenient,” and accordingly “[her] PCP prescribed Meloxicam.” *Id.* She started with
 4 one tablet daily, but eventually it “was not as effective and so [she] took 2.” *Id.* However,
 5 “[s]ide effects manifested (eg: heart, immunity, exhaustion, etc.).” *Id.* Also, “another PCP
 6 expressed significant concern relative to organ damage” given her daily use of Meloxicam
 7 supplemented with OTC NSAIDs as needed. *Id.* “[Plaintiff] ha[s] taken an approach of
 8 using [NSAIDs] selectively through the week in order to limit those side effects” and is
 9 “incorporating naturopathic options for the reduction of inflammation.” AR 1220.
 10 Plaintiff indicates that “Tradmadol was first prescribed to [her] when [she] was in such
 11 excruciating pain, [she] could not function at all. It helped when nothing else could.” *Id.*
 12 She still takes Tramadol when, for example, she needs “to break the increasing effect of
 13 the pain cycle.” *Id.* However, “[Tramadol] is not without a downside and side effects.”
 14 *Id.* “[Plaintiff] absolutely cannot drive a car with this drug. Even 1 Tramadol makes [her]
 15 spacey (like a drunk, light-headed, slow-responsiveness, ‘head-in-the-clouds’ feeling), and
 16 exhausted.” *Id.* With use, “1 was not always effective and so [she] took 2. For [her], the
 17 consequence of that is awful nausea.” *Id.*

18 The Appeal Supplement also included a January 14, 2020 cervical spine x-ray. AR
 19 1221. The findings were: “The vertebral bodies appear to be of normal height.
 20 Degenerative endplate osteophyte formation and disc space narrowing are present from C2
 21 through T1, with associated facet and uncovertebral joint arthropathy. The prevertebral
 22 soft tissues are normal. There is a mild retrolisthesis at C3-4.” *Id.* The impression was
 23 “[n]o acute bony abnormality. Degenerative changes as described.” *Id.*

24 Finally, the Appeal Supplement included a letter of support dated February 20, 2020
 25 from Dr. Brizzie. AR 1223. He offered the opinion “that [Plaintiff] is unable to participate
 26 in even part-time sedentary type work . . . based on a long history of physical examinations,
 27 response to treatment, record review, and objective diagnostic studies.” *Id.* “Despite a
 28 variety of treatments and her motivation to improve, I have not seen any signs of

1 improvement in her condition. Our goal for treatment is just to maintain her current
 2 functional status and try to prevent gradual progression of her pain and impairment.” *Id.*
 3 Regarding Dr. Reecer’s January 31, 2019 report, Dr. Brizzie indicated that he “feel[s] Dr.
 4 Reecer may have misinterpreted the results of th[e November 6, 2017] FCE report” when
 5 he quoted it as concluding that Plaintiff “‘could perform with light duties,’” as “this FCE
 6 report actually states ‘...she is unable to work at any occupational level at this time’.” *Id.*
 7 “Although the patient is able to perform certain limited tasks, there is no indication that she
 8 would be able to perform light duty restrictions on a full-time basis. As Dr. Mark Reecer
 9 himself described, this condition is at risk for further degeneration and it has been my
 10 experience that even light duty work would probably accelerate this process.” *Id.*

11 A March 6, 2020 Specialist Review obtained by LINA from Akhil Chhatre, M.D., a
 12 licensed physician with specialties in Physical Medicine & Rehabilitation, summarized
 13 Plaintiff’s treatment history, including all imaging and testing. AR 608–11. Dr. Chhatre
 14 determined, based on Plaintiff’s file:

15 The claimant has chronic low back pain secondary to moderate
 16 level spondylosis. This is medically stable as seen with exam
 17 findings with multiple AP, specifically with normal strength, no
 18 focal atrophy, no reflex changes, and no neural tension. I do not
 19 see any supported functional impairment in the setting of a
 20 generally normal neuromuscular exam over multiple year span
 and with multiple providers. As a result, there are no restrictions
 or limitations either.

21 AR 610. He found that “[t]he treating provider’s opinion is not well supported by
 22 medically acceptable clinical or laboratory diagnostic techniques and is inconsistent with
 23 the other substantial evidence in the claim file because the claimant has normal exam
 24 findings.” *Id.* Dr. Chhatre added that “[t]he FCE goes against the entire medical evidence
 25 provided. The absolute totality of the medical evidence provided except for the FCE
 26 demonstrates no impairment and no supported restrictions as a result.” AR 611.

27 Plaintiff’s counsel submitted a Second Appeal Supplement on March 18, 2020,
 28 which included a Spinal Impairment Questionnaire completed by Dr. Brizzie. AR 3500.

1 The Questionnaire indicated that Plaintiff's prognosis was "guarded – fair." AR 3501.
2 When asked what positive clinical findings supported his diagnosis, Dr. Brizzie noted that
3 Plaintiff had limited range of motion in the lumbar region, tenderness in the lumbar region,
4 muscle spasm in the lumbar region, muscle weakness in her lower extremities, and sensory
5 loss in the lateral calves. AR 3501–02. He identified the 2016 MRI as a
6 laboratory/diagnostic test result supporting his diagnoses. AR 3502. When asked to list
7 Plaintiff's symptoms, Dr. Brizzie wrote: "(see notes) – constant low back pain." *Id.* He
8 said that medication was not able to completely relieve Plaintiff's pain without
9 unacceptable side effects and that Plaintiff could not complete a five-day, 40-hour work
10 week on a sustained basis. AR 3503. He opined that Plaintiff could sit 2 hours and
11 stand/walk for 0 to 1 hours in an 8-hour workday, and that she could only sit for 30 minutes
12 at a time followed by 5 to 10 minute breaks. AR 3504. He further indicated Plaintiff had
13 received multiple injections in addition to medication, and that Plaintiff was not a
14 malingerer. AR 3505.

15 Plaintiff's counsel faxed a Third Appeal Supplement on April 15, 2020. AR 3508–
16 09. It appended the April 9, 2020 Notice of Fully Favorable Decision from the SSA. *See*
17 AR 3509. The ALJ found that Plaintiff had the RFC to perform sedentary work, as she
18 could "stand and/or walk 2 hours and sit 6 hours in an 8 hour workday with normal breaks."
19 AR 3514. However, the ALJ found that she was only able to "occasionally" "reach, handle
20 and finger with right upper extremity," with "no repeated or constant wrist flexion,
21 extension, supination/pronation or turning/twisting." *Id.* The ALJ found the opinions of
22 Drs. Brizzie and Yashruti, Ms. Beyer (as disclosed in the FCE), and the DDS consultants
23 (who opined in the earlier SSA proceedings) "partially persuasive." AR 3515. The ALJ
24 found that Plaintiff could not perform any PRW as a consultant, classified at a "sedentary
25 exertional level per the Dictionary of Occupational Titles, and actually performed at times
26 by the claimant at a light exertional level," as the demands of that occupation "exceed the
27 residual functional capacity." *Id.* Plaintiff was closely approaching advanced age as of the
28 date of her disability, and thus, "[e]ven if the claimant had the residual functional capacity

1 for the full range of sedentary work, a finding of ‘disabled’ would be directed by Medical-
 2 Vocational Rules 201.06 and 201.14.” *Id.*¹⁰

3 Per an April 20, 2020 addendum, Dr. Chhatre was asked “to outline any questions
 4 that would help clarify Dr. Brizzle’s [sic] position that Ms. Stratton is totally disabled” so
 5 that LINA could forward the questions to Plaintiff’s counsel. *Id.* Dr. Chhatre wrote the
 6 following in response: “1. If you think the claimant is impaired, what exam findings and
 7 diagnostic testing support impairment? 2. Can the claimant work in modified duty
 8 environment such as light or sedentary?” *Id.* In a letter dated April 27, 2020, Plaintiff’s
 9 counsel was provided with Dr. Chhatre’s review and his questions and granted 90 days in
 10 which to respond. *Id.*

11 On July 24, 2020, Plaintiff’s counsel faxed its “4th Appeal Supplement of Denial of
 12 Long-Term Disability Benefits.” AR 631. Plaintiff’s counsel included a Notice of Award
 13 from the Social Security Administration dated May 24, 2020, determining that Plaintiff
 14 “[is] entitled to monthly disability benefits from Social Security beginning October 2017.”
 15 AR 634.

16 The Fourth Appeal also included Progress Notes dated July 20, 2020, from Dr.
 17 Brizzie. AR 639. The Progress Notes indicated that Plaintiff expressed no change in her
 18 overall pain since her last appointment. *Id.* A physical examination revealed that
 19 “[Plaintiff] is alert with appropriate mood and affect but appears uncomfortable during
 20 exam.” AR 640. As to the cervical spine, a visual inspection was “within normal limits.”
 21 *Id.* Palpation revealed “mild tenderness” and “mild spasm” with “[n]o masses.” *Id.* Range
 22 of motion testing revealed reduced rotation right and left and reduced extension to lateral
 23 flexion due to pain. *Id.* Dr. Brizzie noted “Spurling’s test negative bilaterally.” *Id.* As to
 24 the lumbar spine, a visual inspection was “within normal limits.” *Id.* Palpation resulted in
 25

26
 27 ¹⁰ Defendant claims this document “was not received at the time it was submitted because it was sent to
 28 an office fax machine shortly after LINA employees started remote work due to the pandemic.” Def.’s
 Mot. at 12 n.7. Given that review is de novo, this fact has no bearing on the Court’s Analysis.

1 “mild to moderate” tenderness and/or pain with “mild spasm” and “[n]o masses.” *Id.*
 2 Range of motion was reduced due to pain, with a maximum flexion of 50 degrees and a
 3 maximum extension of 10 degrees. AR 640–41. Dr. Brizzie noted that both a bilateral
 4 straight leg test and FABER’s test were negative. AR 641. A neurologic exam noted
 5 decreased sensation “along the lateral left calf to pinwheel testing,” with test results of 4 to
 6 4+ out of 5. *Id.* Dr. Brizzie noted muscle tone “within normal limits throughout.” *Id.*
 7 Plaintiff was able to perform toe raises, scoring 10/10 (with difficulty) on the right and 4-
 8 5/10 on the left. *Id.* An examination of Plaintiff’s hand and wrist revealed “[n]o signs of
 9 gross abnormalities, infection, or swelling” or “signs of atrophy,” although there was some
 10 tenderness to palpation. *Id.* Range of motion in the fingers was not impaired, but there
 11 was a “[m]ild reduction of right wrist flexion and extension . . . secondary to pain.” *Id.*
 12 Although a grind test was positive “on the right first digit,” all other provocative testing
 13 was negative. *Id.* Dr. Brizzie indicated that a January 14, 2020 x-ray of the cervical spine
 14 “showed diffuse generative disc narrowing, spondylosis, and facet arthropathy.” AR 642.
 15 Further, a July 20, 2020 ultrasound “revealed arthritic changes with joint effusion on the
 16 right first CMC joint.” *Id.* Dr. Brizzie’s diagnoses were “Cervical sp[o]ndylosis (disc and
 17 facet degeneration)”; “Lumbar discogenic pain with radiculopathy”; “Lumbar spinal
 18 stenosis – severe”; “Lumbar anterolisthosis of L4/5”; “Probable lumbar facet pain”;
 19 “Lumbar myalgia”; “Left knee osteoarthritis”; “Right wrist joint pain (synovitis with
 20 severe triscaphe arthritis and TFCC perforation)”; and “Right first CMC OA (moderate).”
 21 *Id.* Plaintiff’s “overall prognosis is guarded to fair with the appropriate treatment.” *Id.*

22 Dr. Brizzie recommended continuation of “Tramadol 50 mg 1 to 2 tablets every eight
 23 hours as needed for pain” and “ibuprofen as needed.” *Id.* He also recommended an updated
 24 MRI of the lumbar spine and an EMG and NCS “to evaluate nerve symptoms if the patient
 25 does not respond to conservative treatment and/or for surgical planning.” *Id.* He noted
 26 that Plaintiff would “continue the physical therapy program once her pain stabilizes” and
 27 that she was “a candidate for acupuncture treatment.” AR 643. He indicated that Plaintiff
 28 “is performing a home exercise program and doing light yoga.” *Id.* “[He] recommend[ed]

1 diagnostic and therapeutic injections including epidural, facet, and/or trigger point
2 injections as well as platelet rich plasma procedures if the condition persists,” noting that
3 she “had a series of Hyalgan injections for the left knee.” *Id.* Plaintiff already had braces
4 for her right wrist and left knee. *Id.* He indicated that “[Plaintiff] will follow up with her
5 previous spine surgeon as needed” and “may require referral to another spine surgeon for
6 further evaluation.” *Id.*

7 The Fourth Appeal further contained a document authored by Dr. Brizzie dated July
8 21, 2020, titled “Specialist Review Requested Information.” AR 644. Dr. Brizzie
9 indicated that “[Plaintiff’s] cervical pain occurs intermittently” and that “traction seems to
10 help as well as medications.” *Id.* “Cervical xray revealed significant diffuse degenerative
11 disc narrowing, spondylosis, and facet arthropathy consistent with her pain complaints.”
12 *Id.* He noted:

13 Her lumbar pain is her primary issue and over the years
14 has mostly remained stable. However, on the 7/20/20 visit there
15 appears to be a worsening and progression of her lower extremity
16 strength and worsening numbness on the left. Her radiating
17 lumbar symptoms to the lower extremities, numbness, and
18 weakness are supported by her lumbar anterolisthesis and severe
19 spinal canal stenosis seen on MRI. The patient’s left leg feels it
20 will “give out” and she has episodes where she has significant
21 numbness which she has noticed more frequently which extends
22 into her foot. The patient was on crutches in early April for a
23 flare-up of her low back pain symptoms which she attributed to
24 sitting more secondary to virus restrictions. The patient uses an
25 inversion table 4 – 5 times per day for her lumbar pain. The
26 patient has been actively treating with injections, medications,
27 traction/inversion, pilates, and yoga. She is actively treating with
28 injection procedures, yoga, pilates, and movement therapies.
The patient also suffers from chronic right thumb (CMC) and
wrist pain also supported by an MRI showing moderate to severe
osteoarthritis.

The patient has difficulties with most activities secondary
to pain including sleeping, lifting, reaching, carrying, bending,
squatting as well as with prolonged standing, sitting, driving.

1 She . . . reports pain with cooking and doing household chores.
2 Her condition was difficult to manage when she was previously
3 working and gradually worsened. It is my opinion with the
4 activity modifications, injections, and her home exercise
5 program she would have required surgery. If her neurological
6 related symptoms continue to worsen it is more probable than not
7 she will require surgical intervention I have found her to be
8 genuine with no signs of malingering since treating her in 2016.
9 Her previous FCEs (2017 and 2019) have also been consistent
10 with her subjective complaints and the objective films that she is
11 unable to work at any occupational level.

12 *Id.*

13 In answer to Dr. Chhatre's first question, Dr. Brizzie's conclusion was that "[i]t is
14 [his] medical opinion, based on exam findings, history, and previous diagnostic studies that
15 the patient is impaired." *Id.* Regarding Plaintiff's cervical spine, he summarized his
16 findings from her July 20, 2020 exam and her January 14, 2020 x-ray. AR 645. As to her
17 lumbar spine, he again summarized the findings from the July 20, 2020 exam and relied on
18 her July 11, 2016 MRI. *Id.* Regarding her right wrist and hand, he summarized the July
19 20, 2020 exam findings and relied on a May 9, 2019 MRI and a July 20, 2020 ultrasound.

20 *Id.*

21 In answer to Dr. Chhatre's second question, Dr. Brizzie concluded, "[i]n light of the
22 subjective and objective findings . . . , it is my medical opinion that [Plaintiff] would be
23 unable to tolerate light or sedentary work." AR 646. He noted that "prolonged sitting . . .
24 causes numbness and pain in the bilateral legs," and therefore "[Plaintiff] is able to sit no
25 longer than thirty minutes at a time before having to stretch and change positions." AR
26 645. "[Plaintiff] can stand for 3-5 minutes," but she must "shift positions/weight frequently
27 secondary to discomfort." *Id.* "She can walk approximately one mile then would have to
28 stop secondary to pain." *Id.* "Her right hand pain interferes with her ability to grip, carry
and lift greater than 5 pounds as well as with repetitive use such as computer work." AR
645-46. "[Plaintiff's] constant pain level interferes with her ability to focus and
concentrate. She notes Tramadol helps reduce her pain but does cause cognitive issues."

1 AR 646. “It is more probable than not that light or sedintary [sic] work will worsen her
2 condition and pain level.” *Id.*

3 Dr. Brizzie also included a “Response to Report” in which he noted that “[t]he
4 strongest evidence in the reports reviewed were the functional capacity evaluations where
5 [Plaintiff] was found to be ‘unable to work at any occupational level at this time’.” *Id.* He
6 took issue with Dr. Chhatre’s conclusion that “the [treating provider] opinion is not well
7 supported by acceptable clinical or laboratory diagnostic techniques and is inconsistent
8 with the other substantial evidence in the claim because the patient has normal exam
9 findings.” *Id.* Dr. Brizzie countered that “[t]here were several reports that [Dr. Chhatre]
10 reviewed that did show abnormal (positive) exam findings,” and that “[Dr. Brizzie] feel[s]
11 the clinical exam findings in [his] reports are clear and were carefully repeated in the
12 7/20/20 visit with ‘acceptable clinical’ techniques.” *Id.* He also indicated that “the MRI’s
13 and xrays speak for themselves as far as objective diagnostic techniques.” *Id.* Dr. Brizzie
14 noted that “[Dr. Chhatre’s] assessment states ‘moderate level spondylosis’ is the cause of
15 [Plaintiff’s] chronic low back pain while the MRI states severe spinal canal stenosis which
16 appears to be the most probable etiology of her symptoms,” but “[Dr. Brizzie] realize[s]
17 not examining the patient in person can make recommendations difficult.” *Id.*

18 Dr. Chhatre’s July 30, 2020 Addendum to his Specialist Review noted that Plaintiff’s
19 July 20, 2020 visit with Dr. Brizzie was a “follow up visit with no changes in exam.” AR
20 652. While “[Dr. Chhatre] respect[s] the [attending physician’s (“AP”)] time and efforts
21 in the report, however, given the medical stability and lack of focal or acute findings, [he]
22 cannot agree with impairment nor agree with AP recommended work capacity.” AR 653.

23 Per an August 17, 2020 letter, LINA requested “Ms. Stratton’s complete Social
24 Security Administration (SSA) file relating to her recent award for Social Security
25 Disability (SSDI) benefits. This information is needed to consider the rationale utilized by
26 the SSA in making their determination, and whether the SSA had any additional medical
27 information in their file that had not been provided to our office previously.” AR 654.

28 ///

1 In an October 16, 2020 letter, LINA informed Plaintiff's counsel that "we have
 2 concluded that an adverse benefit decision on her claim is warranted." AR 688. LINA
 3 noted that, "[t]o remain eligible for LTD benefits beyond July 3, 2019, Ms. Stratton's
 4 medical records must demonstrate her continuous inability to perform the duties of any
 5 occupation. This can include alternative sedentary occupations where Ms. Stratton would
 6 have the ability to earn 60% of her earnings." AR 689. LINA indicated that "Dr.
 7 Chhatre[']s conclusion] that medically necessary work activity restrictions are not
 8 supported would result in Ms. Stratton's ability to perform the duties of her regular
 9 occupation, and subsequently any occupation. Therefore no further LTD . . . benefits
 10 would be payable as the medical records do not support a functional impairment that would
 11 prevent Ms. Stratton from performing any occupation." AR 691.

12 LINA indicated that, although it did not have Plaintiff's full SSA file on record,
 13 "[w]e are aware that Ms. Stratton has been awarded [SSDI] benefits by [SSA] in May 2020,
 14 and this fact has been considered and given significant weight in our determination." *Id.*
 15 LINA noted that "the SSA gives consideration to an individuals age [sic] at the time
 16 disability occurred, as well as whether or not jobs exist in significant numbers that an
 17 individual may be considered transferrable. These same considerations are not given under
 18 the LTD policy." AR 692.

19 Effective January 15, 2021, Plaintiff "ha[d] exhausted all administrative levels of
 20 appeal and no further appeals will be considered." AR 711.

21 **X. The Instant Litigation**

22 On October 15, 2020, Plaintiff filed her Complaint in the instant action. *See* ECF
 23 No. 1. The Parties jointly moved to dismiss Gartner as a defendant and for de novo review,
 24 *see* ECF Nos. 11, 13, which motions the Court granted, *see* ECF No. 15. The Parties filed
 25 the Administrative Record on April 23, 2021. *See* ECF Nos. 26, 27. The instant Cross-
 26 Motions were filed on June 17, 2021. *See* ECF Nos. 29, 30.

27 On July 2, 2021, LINA filed a supplement to the Administrative Record. *See* ECF
 28 No. 31. The Court requested briefing on the issue of supplementation of the Administrative

Record. *See* ECF No. 36. Subsequently, the parties jointly moved to stipulate to the scope of the Administrative Record, *see* ECF No. 37, which motion the Court granted, *see* ECF No. 39. Plaintiff filed her supplemental vocational report, permitted by the Parties' stipulation and the Court's order, on August 20, 2021. *See* ECF No. 40. The Parties thereafter completed briefing on the instant Cross-Motions.

XI. The Supplemental Administrative Record Documents

Defendant's supplemental document is a Transferrable Skills Analysis dated June 20, 2019 and prepared by LINA's Rehabilitation Specialist Nicole Surmacy, MS, CRC, CEAS. *See* ECF No. 31 at 1–2. The TSA is referenced in the Administrative Record, *see* AR 1042, but the TSA itself was inadvertently omitted therefrom, *see* ECF No. 31 at 2.

The June 20, 2019 TSA indicates that the resources consulted were Plaintiff's job description; her Disability Questionnaires from July 10, 2017, July 31, 2018, and February 1, 2019; the DOT and OASYS; and Dr. Reecer's January 23, 2019 Peer Review Report. AR 3513. The TSA identified Program Manager, DOT Code 189.167-030, as the only transferrable occupation Plaintiff could perform in the labor market of San Diego, California. *Id.* It noted that the position is sedentary. *Id.* The source of the reported monthly wage of \$19,313.04 for the identified occupation was "Customer's Demonstrated Earnings." *Id.* The TSA opined that the position "me[et] the customer's skills, education attainment, & work history," and that "[t]he limitations & restrictions outlined by Dr. Reecer give the Customer reasonable functional capacity to perform the occupation identified." *Id.* Further, "[t]he most appropriate & up to date wage sources available were utilized for identifying occupations." *Id.*

Plaintiff submitted a Supplemental Vocational Report ("SVR") in response to the June 20, 2019 TSA. AR 3514–43. The SVR was performed by Seacoast Rehabilitation and is dated August 13, 2021. AR 3514. The SVR opined that Plaintiff is unable to perform any occupation in light of the restrictions and limitations appearing in her two FCEs. AR 3515. The SVR also included a Labor Market Survey suggesting that it would

///

1 be highly unlikely that Plaintiff could earn the requisite salary in the sole transferrable
2 occupation identified by the TSA. *See* AR 3518; AR 3538–43.

3 **LEGAL STANDARD**

4 The Parties have both moved for judgment pursuant to Federal Rule of Civil
5 Procedure 52, which provides that:

6 In an action tried on the facts without a jury . . . , the court must
7 find the facts specially and state its conclusions of law separately.
8 The findings and conclusions may be stated on the record . . . or
9 may appear in an opinion or a memorandum of decision filed by
the court. Judgment must be entered under Rule 58.

10 Fed. R. Civ. P. 51(a)(1). Unlike a Rule 56 motion for summary judgment, in a Rule 52
11 motion the court does not determine “whether there is an issue of material fact, but instead
12 whether [the claimant] is disabled within the terms of the policy.” *See Kearney v. Standard*
13 *Ins. Co.*, 175 F.3d 1084, 1095 (9th Cir. 1999). In so doing, the Court is to “evaluate the
14 persuasiveness of conflicting testimony and decide which is more likely true” and make
15 specific findings of fact. *Id.*

16 **CONCLUSIONS OF LAW**

17 Plaintiff’s Complaint asserts a single claim for LTD benefits under 29 U.S.C.
18 § 1132(a)(1)(B) against Defendant. *See generally* Compl. Under Section 502 of ERISA,
19 a beneficiary or plan participant may sue in federal court “to recover benefits due to him
20 under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify
21 his rights to future benefits under the terms of the plan.” 29 U.S.C. § 1132(a)(1)(B); *see*
22 *also CIGNA Corp. v. Amara*, 563 U.S. 421, 425 (2011).

23 **I. Standard of Review**

24 “A denial of benefits challenged under 29 U.S.C. [§] 1132(a)(1)(B) ‘is to be
25 reviewed under a de novo standard unless the benefit plan gives the administrator or
26 fiduciary discretionary authority to determine eligibility for benefits or to construe the
27 terms of the plan.” *Polnick v. Liberty Life Assurance Co. of Boston*, No. C. 13-1478 SI,
28 2013 WL 6071997, at *2 (N.D. Cal. Nov. 18, 2013) (quoting *Firestone Tire & Rubber Co.*

1 *v. Bruch*, 489 U.S. 101, 115 (1989)). “Where the plan or policy grants such discretion, the
 2 standard of review is abuse of discretion.” *Cerone v. Reliance Standard Life Ins. Co.*,
 3 13CV184 MMA (DHB), slip op. at 3 (S.D. Cal. Mar. 28, 2014) (citing *Saffon v. Wells*
 4 *Fargo & Co. Long Term Disability Plan*, 522 F.3d 863, 866 (9th Cir. 2008)). Here, the
 5 Parties stipulated to and jointly moved for de novo review, *see* ECF No. 13, which motion
 6 the Court granted, *see* ECF No. 15.

7 Under the de novo standard, “[t]he court simply proceeds to evaluate whether the
 8 plan administrator correctly or incorrectly denied benefits, without reference to” procedural
 9 irregularities. *See Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 963 (9th Cir. 2006).
 10 “[W]hen the court reviews a plan administrator’s decision under the de novo standard of
 11 review, the burden of proof is placed on the claimant” to prove that she is disabled by a
 12 preponderance of the evidence. *Muniz v. Amec Const. Mgmt., Inc.*, 623 F.3d 1290, 1294
 13 (9th Cir. 2010) (collecting cases).

14 **II. Analysis**

15 As relevant to the instant action, the LTD Plan provides that a claimant who has
 16 received disability payments for a period of 24 months

17 is considered Disabled if, solely due to Injury or Sickness, he or
 18 she is:

- 19 1. unable to perform the material duties of any occupation for
 20 which he or she is, or may reasonably become, qualified
 based on education, training or experience; and
- 21 2. unable to earn 60% or more of his or her Indexed Earnings.

22 AR 3470. Plaintiff claims to be disabled due to severe central canal stenosis, lumbar
 23 anterolisthesis, lumbar radiculopathy, degenerative arthritis, and chronic low back pain.
 24 *See* Pl.’s Mot. at 1; *see also* Compl. ¶ 12 (“Plaintiff’s disabling conditions include but were
 25 not limited to severe spinal stenosis and associated debilitating pain.”). Among other
 26 things, the voluminous Administrative Record contains Plaintiff’s medical records;
 27 statements from Plaintiff and Plaintiff’s treating physicians; and reports from LINA’s
 28 independent medical consultants addressing these various symptoms. *See generally* AR.

1 ***A. Legal Principles Guiding the Court’s Review***

2 “ERISA does not contain a body of contract law to govern the interpretation and
3 enforcement of employee benefit plans Rather, Congress intended that courts apply
4 contract principles derived from state law but be guided by the policies expressed in ERISA
5 and other federal labor laws.” *Richardson v. Pension Plan of Bethlehem Steel Corp.*, 112
6 F.3d 982, 985 (9th Cir. 1997). The Court therefore “interpret[s] terms in ERISA insurance
7 policies ‘in an ordinary and popular sense as would a [person] of average intelligence and
8 experience.’” *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1441 (9th Cir. 1990) (quoting
9 *Allstate Ins. Co. v. Ellison*, 757 F.2d 1042, 1044 (9th Cir. 1985)) (second alteration in
10 original).

11 “‘That a person has a true medical diagnosis does not by itself establish disability.’”
12 *Jordan v. Northrop Grumman Corp. Welfare Benefit Plan*, 370 F.3d 869, 880 (9th Cir.
13 2004), *overruled on other grounds by Abatie*, 458 F.3d at 969. Rather, the claimant must
14 prove that her impairment is disabling. *See Matthew v. Shalala*, 10 F.3d 678, 680 (9th Cir.
15 1993) (“The mere existence of an impairment is insufficient proof of disability. . . . ‘A
16 claimant bears the burden of proving that an impairment is disabling.’”) (citation omitted).
17 As previously noted, a plaintiff must make that showing by a preponderance of the
18 evidence. *See Dykman v. Life Ins. Co. of N. Am.*, No. 3:20-CV-01547-IM, 2021 WL
19 5206666, at *8 (D. Or. Nov. 8, 2021).

20 “[I]t is unreasonable to reject ‘a claimant’s self-reported evidence where the plan
21 administrator has no basis for believing it is unreliable, and where the ERISA plan does
22 not limit proof to ‘objective’ evidence.’” *Shaw v. Life Ins. Co. of N. Am.*, 144 F. Supp. 3d
23 1114, 1128 (C.D. Cal. 2015) (collecting cases). “Similarly, [courts] have held it
24 unreasonable to reject Plaintiff’s treating/examining physician’s notes of Plaintiff’s self-
25 reporting and subjective observations, or other assertedly ‘subjective’ evidence, where, as
26 here, . . . the applicable Plan does not restrict the type of evidence that may be used to
27 demonstrate disability.” *Id.* (alterations in original). “At the same time, the prospect of
28 receiving disability benefits based on an ailment whose extent is objectively unverifiable

1 provides a strong incentive to falsify or exaggerate . . . [;] assessment of the claimant's
 2 credibility thus becomes exceptionally important' in such cases." *Id.* (quoting *Fair v.*
 3 *Bowen*, 885 F.2d 597, 602 (9th Cir. 1989)) (alterations in original).

4 "[T]he weight assigned to a physician's opinion will vary according to various
 5 factors, including '(1) the extent of the patient's treatment history, (2) the doctor's
 6 specialization or lack thereof, and (3) how much detail the doctor provides supporting his
 7 or her conclusions.'" *Biggar v. Prudential Ins. Co. of Am.*, 274 F. Supp. 3d 954, 968 (N.D.
 8 Cal. 2017) (quoting *Shaw*, 144 F. Supp. 3d at 1129). "[T]he more detail a physician
 9 provides concerning the bases for his or her diagnosis and opinion, the more weight his or
 10 her conclusions are afforded." *Id.* (quoting *Shaw*, 144 F. Supp. 3d at 1130–31). However,

11 the assumption that the opinions of a treating physician warrant
 12 greater credit than the opinions of plan consultants may make
 13 scant sense when, for example, the relationship between the
 14 claimant and the treating physician has been of short duration, or
 15 when a specialist engaged by the plan has expertise the treating
 physician lacks.

16 *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 832 (2003).

17 Narratives provided by the claimant and any family and friends are properly
 18 accorded less weight than medical evidence in the record given their potential for bias and
 19 inability to "diagnose . . . medical condition[s] or assess . . . functional capacity in the way
 20 individuals trained in the medical field can." *Shaw*, 144 F. Supp. 3d at 1136, 1139.
 21 Accordingly, "[r]eports from individuals with no medical background cannot overcome
 22 medical evidence." *Id.* at 1136.

23 Although governed by different standards, *see Montour v. Hartford Life & Acc. Ins.*
 24 *Co.*, 588 F.3d 623, 635–36 (9th Cir. 2009), "SSA rulings are highly relevant to an ERISA
 25 disability determination." *Bilyeu v. Morgan Stanley Long Term Disability Plan*, 711 Fed.
 26 App'x 380, 383 (9th Cir. 2017) (citing *Salomaa v. Honda Long Term Disability Plan*, 642
 27 F.3d 666, 679 (9th Cir. 2011); *Montour v. Hartford Life & Acc. Ins. Co.*, 588 F.3d 623,
 28 635–36 (9th Cir. 2009)); *see also Perryman v. Provident Life & Accident Ins. Co.*, 690 F.

1 Supp. 2d 917, 946–47 (D. Ariz. 2010) (noting that SSA disability determination
2 “constitutes evidence in [the plaintiff’s] favor”).

3 ***B. Application to the Facts***

4 As an initial matter, both Parties accuse one another of “selectively summarizing”
5 or “cherry picking” facts from the Administrative Record to support their respective
6 positions. *See* Pl.’s Resp. at 1–2; Def.’s Reply at 7–8. However, “[g]iven that the standard
7 of review here is de novo, the Court need not resolve this argument.” *Kopicko v. Anthem*
8 *Life Ins. Co.*, No. 20CV1524 DMS (MDD), 2021 WL 4739281, at *7 (S.D. Cal. Oct. 5,
9 2021).

10 Having carefully reviewed the nearly 3,600-page Administrative Record and the
11 Parties’ arguments, the Court finds it appropriate to accord significant weight to the
12 evaluations and opinions of Dr. Brizzie, who treated Plaintiff for a period of more than
13 three years, from December 2016 through the LTD appeal, and who repeatedly and
14 consistently opined that the physical abnormalities indicated in Plaintiff’s MRI and x-rays
15 were consistent with her subjective complaints of pain. *See Schramm v. CNA Fin. Corp.*
16 *Insured Grp. Ben. Program*, 718 F. Supp. 2d 1151, 1162–63 (N.D. Cal. 2010) (according
17 significant weight to treating physician’s consistent evaluations over a period of almost
18 two years). Dr. Brizzie repeatedly opined that Plaintiff’s subjective complaints of pain
19 and/or her reports of her limitations were consistent with or caused by the physical issues
20 reflected in her MRI and x-rays and his examination findings. *See, e.g.*, AR 3045; AR 644;
21 AR 1698. Further, he consistently opined, starting at least as early as July 2017, that
22 Plaintiff could only sit for two hours or less combined each day and stand or walk for an
23 hour or less combined each day. *See* AR 2298; AR 3504; *see also Bradford v. Life Ins.*
24 *Co. of N. Am.*, 49 F. Supp. 3d 789, 796–97 (E.D. Wash. 2014) (fully crediting treating
25 physician’s opinions because, among other things, “[h]is opinions about Plaintiff’s ability
26 to maintain full-time employment are internally consistent, well-supported by detailed
27 treatment notes, and grounded in personal observations of Plaintiff’s symptoms and
28 behaviors over an extended period of time.”).

1 Further, Dr. Brizzie’s opined limitations were consistent with the findings of both
 2 FCEs. *See* AR 1681 (November 6, 2017 FCE concluding Plaintiff could sit, at most, for 1
 3 hour and 40 minutes in an 8-hour workday, stand for less than 30 minutes, and walk for
 4 less than 1.5 hours); AR 1698 (December 12, 2017 letter from Dr. Brizzie agreeing with
 5 the FCE’s findings and endorsing them as consistent with Plaintiff’s MRI and subjective
 6 reports); AR 1280 (October 10, 2019 FCE concluding Plaintiff could sit, at most, for 2
 7 hours in an 8-hour workday, stand for less than one hour with constant shifting and
 8 stretching, and walk for less than 20 minutes). Dr. Brizzie also noted that “[he] h[as] found
 9 [Plaintiff] to be genuine with no signs of malingering since treating her in 2016.” AR 644;
 10 *see* AR 3505 (also indicating Dr. Brizzie’s conclusion Plaintiff was not a malingerer); *see*
 11 *also Bradford*, 49 F. Supp. 3d at 797 (“[T]he Court finds it significant that Dr. Skidmore
 12 went out of his way to explain that, unlike other patients he had treated for allegedly
 13 debilitating back pain, Plaintiff was fully credible and was not ‘faking it.’”).

14 The Court also accords significant weight to the two FCEs, which, as noted above,
 15 are consistent with Dr. Brizzie’s identified restrictions and the record as a whole. *See*
 16 *Bradford*, 49 F. Supp. 3d at 797. While the Court notes Defendant’s objection that both
 17 FCEs’ statements that Plaintiff cannot maintain a work posture is conclusory, the Court
 18 finds this argument unpersuasive given that Ms. Beyer is a trained evaluator and registered
 19 physical therapist who provided reasonable bases for her conclusions based on her own
 20 observations of Plaintiff. *Accord Sullivan v. Deutsche Bank Americas Holding Corp.*, No.
 21 08CV2370 L POR, 2011 WL 4961973, at *11 (S.D. Cal. Sept. 22, 2011); *see also Groch*
 22 *v. Dearborn Nat’l Life Ins. Co.*, 497 F. Supp. 3d 826, 839 (C.D. Cal. 2020) (finding FCE
 23 submitted on appeal proved disability as “[t]he Sixth Circuit held [a]n FCE is generally a
 24 reliable and objective method of gauging the extent one can complete work-related tasks,”
 25 and noting that “an FCE can, depending on the circumstances, provide
 26 an objective measurement of plaintiff’s physical limitations”) (citing *Caesar v. Hartford*
 27 *Life & Acc. Ins. Co.*, 464 F. App’x 431, 435 (6th Cir. 2012); *Holmstrom v. Metro. Life Ins.*
 28 *Co.*, 615 F.3d 758, 764 (7th Cir. 2010)) (internal quotation marks omitted).

1 The Court also finds the file review opinion of Defendant’s retained occupational
 2 medicine physician Dr. Hill persuasive. Although Defendant argues that “Stratton’s
 3 treating doctor stands alone as the only physician who opined that Stratton could not work
 4 in a sedentary occupation,” Def.’s Mot. at 17, that is belied by Dr. Hill’s conclusion that
 5 Plaintiff was limited to “[o]ccasional . . . sitting, standing (static), walking . . . [and]
 6 fingering.” AR 2749. This opinion corroborates Dr. Brizzie’s opinion and the other
 7 medical evidence in the Administrative Record. *See Lona v. Prudential Ins. Co. of Am.*,
 8 No. 07-CV-1276-IEGCAB, 2009 WL 801868, at *12 (S.D. Cal. Mar. 24, 2009) (noting
 9 that physician retained by the defendant corroborated the treating physician’s testimony
 10 and finding that this contributed to the Court’s conclusion that the treating physician’s
 11 opinion merited considerable weight).

12 The Court largely rejects the opinions of Defendant’s reviewing physicians Dr. Hall,
 13 Dr. Reecer, and Dr. Chhatre. The Court finds that “each of those reports misstates or
 14 selectively cites the relevant medical records, and none address the subjective evidence of
 15 disability.” *Dykman*, 2021 WL 5206666, at *8. For example, Dr. Hall contended that the
 16 medical records provided “no evidence of neural compromise.” AR 1185. But Dr.
 17 Finkenberg, an orthopedic specialist who examined Plaintiff, her MRI, and x-rays he
 18 himself ordered opined on July 7, 2016 that “[t]here is most likely nerve root impingement”
 19 in Plaintiff’s spine. AR 1672. Further, the impression noted in the July 2016 MRI
 20 concludes that there was “[m]ild bilateral neural foraminal stenosis at [L4-L5].” AR 1569.
 21 Dr. Hall also claims that the MRI shows “an un graded listhesis at L4-5.” AR 1185. But
 22 Dr. Finkenberg noted that Plaintiff’s 2013 MRI showed a grade 1 spondylolisthesis at that
 23 location, *see* AR 1672, and he indicated that the x-rays he ordered in July 2016
 24 “demonstrate a grade 1-2 L4-5 spondylolisthesis,” AR 1669. That the MRI showed a grade
 25 1 anterolisthesis was also noted by Dr. Yashruti, who evaluated Plaintiff in connection with
 26 her SSDI claim. AR 2051. In short, Dr. Hall appears to have misapprehended Plaintiff’s
 27 medical diagnoses, and accordingly his opinions concerning the functional limitations
 28 occasioned by those diagnoses are of limited value.

1 Dr. Reecer found that Plaintiff had permanent restrictions, but he appears to have
2 misread the November 6, 2017 FCE on which he relied in arriving at that conclusion.
3 Specifically, Dr. Reecer summarized the FCE as revealing that Plaintiff “could perform
4 with light duty restrictions.” AR 2253. However, the FCE was clear that “[i]t is not
5 conceivable at this time for the client to incorporate work activities while maintaining a
6 posture; therefore, she is unable to work at any occupational level at this time.” AR 1682.
7 When asked about this limitation, Dr. Reecer claimed it was unsupported by clinical
8 evidence. AR 2604. However, the FCE concluded that Plaintiff could only sit up to 1 hour
9 and 40 minutes per day, AR 1681; and Dr. Brizzie said, after months of evaluating Plaintiff,
10 that she could only sit for less than 1 hour per day, AR 2298. Dr. Reecer provides no
11 reasons for rejecting these restrictions and instead opining that Plaintiff was capable of
12 “sit[ting] for one hour intervals and up to 6 hours per shift” and “stand[ing] for 30 minutes
13 per hour and up to four hours per shift.” AR 2253. Rather, he says he was “in agreement
14 with providers that permanent light duty restrictions are indicated as evidenced on FCE
15 from 2017.” *Id.* But, as noted, both Dr. Brizzie and the FCE—and even LINA’s file
16 reviewer Dr. Hill, *see* AR 2749—clearly indicated that Plaintiff could perform at a less
17 than sedentary level, not a light duty level. Given that Dr. Reecer appears either to have
18 misread the FCE and other providers’ opinions and conclusions about Plaintiff’s
19 restrictions or to have rejected them without sufficient justification, the Court cannot give
20 Dr. Reecer’s opinion full credence, either.

21 Dr. Chhatre summarized Plaintiff’s records as showing “chronic low back pain
22 secondary to moderate level spondylosis.” AR 610. While spondylosis or
23 spondylolisthesis is certainly one of Plaintiff’s diagnoses—*see, e.g.*, AR 1669; AR 1672;
24 AR 2467; AR 2449; AR 642—it is not her *only* relevant diagnosis. In response to Dr.
25 Chhatre’s report, Dr. Brizzie wrote that while “[Dr. Chhatre’s] assessment states ‘moderate
26 level spondylosis’ is the cause of [Plaintiff’s] chronic low back pain,” “the MRI states
27 severe spinal canal stenosis which appears to be the most probable etiology of her
28 symptoms.” AR 646. Indeed, multiple treating practitioners—*see* AR 2467 (Dr. Tribuzio);

AR 2449 (Dr. Brizzie)—and even Defendant’s and the SSA’s reviewing physicians—*see* AR 2748 (Dr. Hill); AR 2253 (Dr. Reecer); AR 2051 (Dr. Yashruti)—corroborate that Plaintiff’s diagnoses include (severe) spinal canal stenosis. Dr. Chhatre then concluded that “[t]he treating provider’s opinion is not well supported by medically acceptable clinical or laboratory diagnostic techniques and is inconsistent with the other substantial evidence in the claim file because the claimant has normal exam findings.” AR 610. However, diagnostic techniques and abnormal findings in the record do offer support for Dr. Brizzie’s opinion—namely, the MRIs, x-rays, and examinations revealing reduced range of motion and tenderness to palpation, as noted *supra*. Further, as noted *infra* at 52, the LTD Policy does not require corroboration by objective diagnostic evidence in order for a claimant to be deemed disabled and entitled to benefits. In short, Dr. Chhatre did not take into consideration all of Plaintiff’s diagnoses in his assessment and appears to have discounted or not considered significant parts of Plaintiff’s medical file. The Court thus finds his opinion should be afforded minimal weight.

Even were the Court to credit these opinions fully—which, for the reasons identified above, it does not—the Court notes that the evaluations of Drs. Hall, Reecer, and Chhatre were based solely on their review of Plaintiff’s medical file rather than a personal examination of Plaintiff. Thus, the Court affords these opinions less weight than those of Dr. Brizzie and others who had the opportunity to personally observe Plaintiff’s condition. *See Lona*, 2009 WL 801868, at *13 (citations omitted); *see also Flores v. Life Ins. Co. of N. Am.*, No. SACV2000897DOCJDEX, 2021 WL 3206793, at *5 (C.D. Cal. July 29, 2021) (“LINA’s decision to deny Ms. Flores’ claim for STD benefits was incorrect because LINA selectively reviewed Ms. Flores’ medical records by improperly relying on less credible ‘paper reviews’ by nurse consultants . . . , when other more qualified attending physicians, including a board-certified medical doctor who had treated Ms. Flores regularly for years, each repeatedly concluded she was disabled based on their examination findings of and discussions with Ms. Flores.”) (internal citation omitted); *Elliott v. Life Ins. Co. of N. Am., Inc.*, No. 16-CV-01348-MMC, 2019 WL 2970843, at *6 (N.D. Cal. July 9, 2019) (finding

1 more credible the detailed notes of the plaintiff's treating physician than the opinions of
 2 the physicians retained by the defendant, none of whom examined the plaintiff "although,
 3 under the terms of the Group Policy, they could have done so") (citation omitted).
 4 Accordingly, contrary to Defendant's assertions otherwise, the weight of the medical
 5 evidence does not support its denial of Plaintiff's LTD benefits. *See* Def.'s Mot. at 15–17.

6 The Court also takes into account that Defendant had the right and opportunity under
 7 the LTD Policy to have Plaintiff examined but failed to exercise that right. *See* AR 3482.
 8 Although "[t]here is nothing inherently wrong with relying on in-house physicians or
 9 consultants and a paper only review of the record, . . . the Court nevertheless gives greater
 10 weight to [Plaintiff]'s treating physicians who have performed diagnostic tests, and have
 11 witnessed and assessed her condition over a significant period of time." *Curran v. United*
 12 *of Omaha Life Ins. Co.*, No. 12CV1935 JLS (BLM), 2015 WL 13827884, at *11 (S.D. Cal.
 13 May 5, 2015), *aff'd*, 697 F. App'x 558 (9th Cir. 2017); *see also Gonzales v. Unum Life Ins.*
 14 *Co. of Am.*, 861 F. Supp. 2d 1099, 1110–11 (S.D. Cal. 2012) (taking into account as one
 15 case-specific factor the fact that administrator relied on a paper review). This is particularly
 16 true given that Plaintiff's disability largely is dependent on making "critical credibility
 17 determinations" based on Plaintiff's self-reported symptoms of pain. *See Hinds v. Life Ins.*
 18 *Co. of N. Am.*, No. EDCV180775FMOSHKX, 2019 WL 4871471, at *6–7 (C.D. Cal. Sept.
 19 30, 2019) (citations omitted). Defendant's reviewers were not able to assess these
 20 credibility issues in the same way as Plaintiff's treating providers. Indeed, none of
 21 Defendant's reviewers raise any concerns about Plaintiff's credibility, yet they appear to
 22 have discounted, without reason, her subjective claims of pain. *Id.* at *8.

23 The Court affords Plaintiff's award of Social Security disability benefits minimal
 24 weight in its analysis. Defendant argues that this determination undercuts Plaintiff's
 25 entitlement to LTD benefits, as "[the ALJ] concluded that Stratton could '**stand and/or**
 26 **walk 2 hours and sit 6 hours in an 8 hour work day with normal breaks.**'" Def.'s Mot.
 27 at 21 (emphasis in original). LINA also claims that the SSA's decision was "based on
 28 federal regulations that do not apply to her claim. It was not until the SSA applied the

1 regulations, which required the payment of benefits based in large part on Stratton's
2 'advanced age,' that Stratton was finally awarded benefits." Def.'s Mot. at 22. While
3 Defendant is correct that the ALJ made a facial determination that Plaintiff had the RFC to
4 perform modified sedentary work, including sitting a total of six hours a day, the Court
5 believes that the ALJ's decision, like those of many of Defendant's reviewers, is based on
6 a faulty reading of and application of the medical opinions expressed in Plaintiff's medical
7 file. Notably, the ALJ determined that "the opinions of Dr. Brizzie, Dr. Yashruti, Ms.
8 Beyer,¹¹ and the DDS consultants" were "partially persuasive." AR 3515. The ALJ
9 indicated that Drs. Brizzie and Yashruti and Ms. Beyer all "assessed a less than sedentary
10 exertional level." *Id.* The ALJ further noted that the DDS medical consultants "assessed
11 a less than sedentary to light exertional level." *Id.* The ALJ concluded that "[t]hese
12 opinions are generally supported by and consistent with the record, including radiographic
13 scans and physical examinations, showing degenerative disc disease of the cervical and
14 lumbar spines and osteoarthritis of the right wrist," and "assessed additional limitations of
15 manipulative, environmental, and related to the neck to account for the claimant's reports
16 of symptoms." AR 3515. In short, the ALJ appeared to generally credit the finding that
17 Plaintiff was limited to an exertion level of "less than sedentary," and even imposed
18 additional limitations beyond those of the examiners who expressed those opinions, but
19 nonetheless made a finding that Plaintiff had the RFC to perform sedentary work, which
20 would appear to be an error. Further, elsewhere, the ALJ states that, "[e]ven if the claimant
21 had the residual functional capacity for the full range of sedentary work" *Id.* This
22 statement would appear to contradict the ALJ's earlier finding and suggests Plaintiff may
23 not have the ability to perform at a sedentary level after all. On the whole, the Court finds
24 the ALJ's opinion, which seems both internally inconsistent and inconsistent with
25 Plaintiff's file as a whole, to be of limited probative value.

26
27
28 ¹¹ The ALJ, in fact, erroneously interpreted Ms. Beyer's credentials to be those of a "registered
phlebotomy technician" rather than a "registered physical therapist." See AR 3505.

Defendant argues that Dr. Brizzie’s opinions are inconsistent, as “[h]e initially opined that [Plaintiff] would be able to return to work on October 4, 2017, after stopping working in April of 2017” and he initially only opined that “she should avoid prolonged sitting and standing, and heavy lifting,” only claiming that she was limited to two hours of sitting and one hour or less of walking or standing per day after Plaintiff’s “any occupation” claim was denied. Def.’s Opp’n at 9–10 (citing AR 3095–98, AR 3117–18, AR 2289, AR 2608). First, that Dr. Brizzie initially provided an estimate of when Plaintiff might be able to return to work “does not preclude [his] later conclusions regarding Plaintiff’s functioning.” *Schramm v. CNA Fin. Corp. Insured Grp. Ben. Program*, 718 F. Supp. 2d 1151, 1164 (N.D. Cal. 2010). Estimates are, by their very nature, only approximations and are subject to revision. Moreover, Defendant overlooks the fact that Dr. Brizzie’s “Physical Ability Assessment” of July 3, 2017, indicated that Plaintiff could sit, stand, walk, reach overhead, and reach at desk level for less than one hour each and reach below her waist for less than 30 minutes. AR 2298. This opinion largely is consistent with Dr. Brizzie’s subsequent opinions as to Plaintiff’s functional limitations. *See, e.g.*, AR 1698 (letter from Dr. Brizzie endorsing the November 6, 2017 FCE); AR 3504 (2020 Spinal Impairment Questionnaire opining as to similar limitations).

Defendant also makes much of the fact that Plaintiff continued to work after the onset of her disability. Def.’s Mot. at 17. However, “numerous courts have recognized that a disability claimant can still be found to be disabled even if he or she worked for some period after the onset of disability.” *Perryman*, 690 F. Supp. 2d at 950 (citations omitted). Indeed, “[s]ome people manage to work [with a disability] for months, if not years, only as a result of superhuman effort, which cannot be sustained Reality eventually prevails, however, and limitations that have been present all along overtake even the most determined effort to keep working.” *Ratnaweera v. Life Ins. Co. of N. Am.*, No. 2:11-CV-01908-MMD, 2013 WL 1293757, at *12 (D. Nev. Mar. 29, 2013) (quoting *Wuollet v. Short-Term Disability Plan of RSKCo*, 360 F. Supp. 2d 994, 1009 (D. Minn. 2005)) (internal quotation marks omitted) (alterations and ellipses in original). Plaintiff’s Personal

1 Statement evidences that such was the case here. *See* AR 2532 (“[Plaintiff] had to “work[]
 2 around the natural demands/requirements of the job as best [she] could given the increased
 3 time needed to simply seek care, manage the pain, and leverage sick days. [She] knew that
 4 couldn’t go on forever,” and eventually “[i]t was becoming impossible to function
 5 throughout a full day of work.”).

6 Defendant also takes issue with a lack of objective evidence of Plaintiff’s disability.
 7 However, “[t]he [LTD] Policy here does not require a diagnosis based on objective medical
 8 evidence in order to obtain medical disability benefits Defendants in ERISA actions
 9 cannot deny claims based on standards that are not contained in the policy.” *Sullivan v.*
 10 *Deutsche Bank Americas Holding Corp.*, No. 08CV2370 L POR, 2011 WL 4961973, at
 11 *10 (S.D. Cal. Sept. 22, 2011) (citations omitted). Here, Plaintiff need only be “Disabled,”
 12 be under the “Appropriate Care” of a physician, and satisfy all other terms and conditions
 13 in the LTD Policy. AR 3476. The LTD Policy contains no requirement that objective,
 14 diagnostic tests support Plaintiff’s claim. *See generally* LTD Policy. At any rate, the
 15 Administrative Record is replete with evidence of diagnostic testing and physical
 16 examinations corroborating spinal abnormalities that could result in Plaintiff’s reported
 17 pain. *See* AR 1669 (July 2016 x-rays indicating grade 1-2 L4-5 spondylolisthesis); AR
 18 2317 (January 2017 x-rays showing “degenerative/arthritis changes with a mild
 19 anterolisthesis”); AR 2466 (March 2017 appointment with Dr. Tribuzio indicating limited
 20 spine extension secondary to pain and tenderness to palpation); AR 639 (July 20, 2020
 21 appointment notes authored by Dr. Brizzie noting reduced lumbar range of motion and
 22 decreased sensation in Plaintiff’s lateral left calf); *see also Perryman v. Provident Life &*
 23 *Accident Ins. Co.*, 690 F. Supp. 2d 917, 945 (D. Ariz. 2010).

24 Moreover, the Ninth Circuit has consistently recognized that “individual reactions
 25 to pain are subjective and not easily determined by reference to objective measurements.”
 26 *Saffon v. Wells Fargo & Co. Long Term Disability Plan*, 522 F.3d 863, 872 (9th Cir. 2008)
 27 (citations omitted); *see also Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989) (“[D]espite
 28 our inability to measure and describe it, pain can have real and severe debilitating effects;

1 it is, without a doubt, capable of entirely precluding a claimant from working. Because
2 pain is a subjective phenomenon, moreover, it is possible to suffer disabling pain even
3 where the *degree* of pain, as opposed to the mere *existence* of pain, is unsupported by
4 objective medical findings.”) (emphasis in original). Plaintiff consistently complained of
5 pain during appointments and examinations devoted to her back condition. *See, e.g.*, AR
6 1819 (claiming pain levels of 4 to 10 out of 10 during December 2016 appointment with
7 Dr. Brizzie); AR 2466 (claiming pain of 8 out of 10 at March 2017 appointment with Dr.
8 Tribuzio); AR 1682 (November 6, 2017 FCE indicating that Plaintiff’s “best” pain level is
9 a five out of ten); AR 1367 (noting pain levels of 6 to 8 out of 10 at April 22, 2019
10 appointment with Dr. Brizzie); AR 639 (describing pain level as 7 to 9 out of 10 at July 20,
11 2020 appointment with Dr. Brizzie); *see also Schramm v. CNA Fin. Corp. Insured Grp.*
12 *Ben. Program*, 718 F. Supp. 2d 1151, 1163 (N.D. Cal. 2010) (“Plaintiff consistently
13 reported that she experienced pain. Although she reported some improvement in her level
14 of pain to Dr. Pattison, she never stated that she was free of it. Notably, Dr. Pattison, along
15 with other doctors, diagnosed Plaintiff with degenerative spinal conditions. Thus, it is
16 reasonable to infer that, over time, Plaintiff’s pain would increase.”). Although Plaintiff
17 may not have reported pain for other appointments—*e.g.*, AR 1315 (noting a pain scale
18 rating of “0” for a physical exam)—the Court does not believe that Plaintiff’s failure to
19 report her pain constitutes proof positive that she was not in chronic pain, particularly for
20 an appointment that was not devoted to the relevant condition. Ultimately, “the consistency
21 and severity of Plaintiff’s complaints and her pursuit of medical treatment over time
22 support her claim of disability.” *Sangha v. Cigna Life Ins. Co. of New York*, 314 F. Supp.
23 3d 1027, 1036 (N.D. Cal. 2018) (citing *Salomaa v. Honda Long Term Disability Plan*, 642
24 F.3d 666, 677–78 (9th Cir. 2011); *Diaz v. Prudential Ins. Co. of Am.*, 499 F.3d 640, 646
25 (7th Cir. 2007)). And Plaintiff’s subjective complaints are corroborated by the medical
26 evidence on file. *See, e.g.*, AR 644 (Dr. Brizzie opining that Plaintiff’s subjective
27 complaints are consistent with the FCEs and the “objective films”). Accordingly, “[t]he
28 ///

1 Court accepts Plaintiff's debilitating pain as true." *Brown v. Life Ins. Co. of N. Am.*, No.
2 CV-13-439-TUC-DCB, 2014 WL 11512603, at *8 (D. Ariz. Dec. 12, 2014).

3 Defendant also argues that "[t]he court here must consider the entire record,
4 including Stratton's own statements that she was able to drive, use her computer 'all the
5 time,' walk up to 3 miles per day, do yoga and Pilates, cook, shop, garden, and do laundry
6 and other household and personal tasks." Def.'s Reply at 8 (citing AR 3046, AR 2544).
7 However, Plaintiff was instructed by her treating physicians to engage in regular stretching,
8 yoga and a home exercise program. *See, e.g.*, AR 2467 (Dr. Tribuzio, physiatrist); AR
9 1991 (Dr. Kim, orthopedic surgeon); AR 644 (Dr. Brizzie). Plaintiff consistently indicated
10 that movement such as "walking on a level, even path as well as modified yoga" helped
11 "manage" the pain, but that even then her pain was, at best, a five out of ten. AR 1682; *see*
12 *also* AR 1219. Further, as noted by Ms. Beyer, "[Plaintiff's] pain varies from day to day
13 as well as throughout the day and she is very strategic about planning her daily activities
14 accordingly." AR 1682; *see also* AR 1819 (conveying during initial evaluation with Dr.
15 Brizzie that her pain "is constantly present but waxes and wanes in severity," and is
16 improved with, among other things, walking). The Court does not find that the activities
17 in which Plaintiff purportedly engaged mandate a finding that Plaintiff was not disabled.
18 *See, e.g., Lopez v. Life Ins. Co. of N. Am.*, No. SACV1601927AGDFMX, 2018 WL
19 5304854, at *5 (C.D. Cal. Oct. 12, 2018) ("Although Lopez does say that she can perform
20 some daily tasks, she is very limited in those abilities because of her pain and fatigue.");
21 *Mulhern v. Life Ins. Co. of N. Am.*, No. 6:17-CV-1758-AA, 2021 WL 1230560, at *9 (D.
22 Or. Mar. 31, 2021) ("The Court is also not persuaded that plaintiff's capacities statement
23 from June 5, 2015 prohibits a finding of disability. It is true that plaintiff did engage in
24 some ADLs such as driving or exercising. However, these were not performed for
25 recreation, and plaintiff reported that pain caused by h[er] underlying conditions always
26 resulted."); *Fagan v. Life Ins. Co. of N. Am.*, No. C 09-2658 PJH, 2010 WL 3293702, at
27 *9-11 (N.D. Cal. Aug. 19, 2010) (rejecting defendant's reliance on activities like driving,
28 Pilates, light exercise, etc., as not based on an accurate reading of the record). It is

1 conceivable that Plaintiff could engage in hobbies like gardening for short periods of time
2 during times when her pain is waning but still be disabled from engaging in full-time work.

3 In a similar vein, Defendant appears to argue that findings at various times that
4 Plaintiff's strength, range of motion, and/or reflexes were "normal" mean that Plaintiff is
5 not disabled. *See, e.g.*, Def.'s Mot. at 10–11. However, "to the extent that [LINA's]
6 findings were based on the well-supported evidence that . . . plaintiff's physical
7 examinations showed normal results (e.g., lack of muscle atrophy and a normal gait, etc.),
8 such facts are not determinative in this case. The fact that plaintiff's atrophy scores and
9 ability to walk are intact, for example, does not materially counter the fact of plaintiff's
10 degenerative disc problem, or more importantly, plaintiff's complaint that the severity of
11 the pain resulting from the disc problem itself causes disabling pain that prevents h[er]
12 from performing h[er] job duties." *Fagan v. Life Ins. Co. of N. Am.*, No. C 09-2658 PJH,
13 2010 WL 3293702, at *11 (N.D. Cal. Aug. 19, 2010). As the Court noted previously, pain
14 is less easily quantified by objective means. A lack of weakness does not per se equate to
15 a lack of debilitating pain precluding a person from working.

16 In addition, Defendant and its retained physicians at times question why Plaintiff has
17 not undergone surgery. *See, e.g.*, AR 538 (LINA's May 31, 2019 benefits rejection letter);
18 AR 2253 (Dr. Reecer: "It states that she has been evaluated by two surgeons, but it is
19 unclear as to why she has not proceeded with surgical intervention, such as two level
20 lumbar fusion L4-S1."). However, Plaintiff's file shows that a surgeon with whom Plaintiff
21 consulted in fact counseled against a surgical intervention during his consultation with
22 Plaintiff. *See* AR 1991 (orthopedic surgeon's October 2018 notation that
23 "hemilaminectomy not recommended"). Further, as repeatedly recorded by Plaintiff's
24 physicians and evaluators in the Administrative Record without question, Plaintiff was
25 advised to hold off on surgery for as long as possible. *See, e.g.*, AR 1382 (notes of
26 rheumatologist Dr. Lloyd); AR 2305 (Dr. Jensen noting "Anterolisthesis, as discussed with
27 2 surgeons, no surgery at this time"); AR 1686 (November 6, 2017 FCE). In her Personal
28 Statement, Plaintiff relays that this is because the surgical options available to her had an

1 apparent fifty percent chance of leaving her in *worse* condition. AR 1219. Accordingly,
 2 “the Court declines to find [Plaintiff]’s decision not to undergo such [spinal] surgery is
 3 indicative of a lack of credibility” as to her reported pain. *Elliott*, 2019 WL 2970843, at
 4 *7.

5 Finally, the Court finds persuasive Plaintiff’s argument that she had no motivation
 6 to malingering. *See, e.g.*, Pl.’s Reply at 1 n.1. Plaintiff had worked for Gartner for roughly
 7 15 years and objectively was successful, making in excess of \$200,000 per year. AR 20;
 8 AR 3462. She claimed to love her job. *See, e.g.*, AR 3530 (vocational report, recording
 9 Plaintiff’s statement that “I loved my career; my life was my career, but it got to a point
 10 where I couldn’t do my job because I was sitting there with a client, and I had to leave
 11 because I was in so much pain. This wasn’t something I left because I wanted it, I left
 12 because I had to leave. I interacted with a lot of cool people that I had a lot of respect for,
 13 and that’s why I put up with it for so long. The doctor said the thing that is pushing you
 14 into this is the thing you are doing”); *see also* AR 1700 (personal statement, relaying that
 15 “[m]y medical situation caused me to have to walk away from an extremely lucrative career
 16 where I was a high-performer and well-respected Nor did I desire to stop working in
 17 my highly lucrative role where I enjoyed independence, an expense account covering great
 18 hotels, restaurants, great clients and travel The fact is that no matter how much I want
 19 to work, I can’t”). Plaintiff’s consistent employment history also tends to support the
 20 conclusion that she ceased working due to a disability rather than a lack of motivation. *See*
 21 *Elliott v. Life Ins. Co. of N. Am., Inc.*, No. 16-CV-01348-MMC, 2019 WL 2970843, at *6
 22 (N.D. Cal. July 9, 2019) (citing *Schaal v. Apfel*, 134 F.3d 496, 502 (2nd Cir. 1998)
 23 (observing “a good work history may be deemed probative of credibility”); *Pearsall v.*
 24 *Massanari*, 274 F.3d 1211, 1218 (8th Cir. 2001) (noting “lack of work history may indicate
 25 a lack of motivation rather than a lack of ability”)).

26 Because the Court credits the evaluations of Dr. Brizzie and the FCEs, the Court
 27 finds that Plaintiff is incapable of performing even sedentary work due to her low back
 28 pain caused by, among other conditions, central canal stenosis, lumbar anterolisthesis, and

lumbar radiculopathy. “The Ninth Circuit held that an employee who cannot sit for more than four hours in an eight-hour workday cannot perform sedentary work that requires sitting most of the time. This holding derives from the logical conclusion that an employee who is unable to sit for more than half of the workday cannot consistently perform an occupation that requires sitting for most of the time.” *Reetz v. Hartford Life & Accident Ins. Co.*, 294 F. Supp. 3d 1068, 1084 (W.D. Wash. 2018) (quoting *Armani v. Nw. Mutual Life Ins. Co.*, 840 F.3d 1159, 1163 (9th Cir. 2016)) (internal quotation marks omitted). Indeed, Defendant concedes as much. *See* Def.’s Opp’n at 8 (citing *Armani*, 840 F.3d at 1163). The DOT description for “Program Manager,” the only transferrable occupation identified in Defendant’s June 20, 2019 TSA, *see* AR 3513, is clear that the job includes “mostly sitting,” AR 3159. Accordingly, Plaintiff, who could only sit for up to two hours per day, is unable to perform the only transferrable occupation identified by Defendant. Indeed, she is incapable of performing any sedentary job.¹² Because the Court finds that Plaintiff was incapable of performing any sedentary job, Plaintiff has met her burden of demonstrating that she is disabled under the terms of the LTD Policy. Accordingly, the Court need not reach the question of whether the 60% earnings requirement is satisfied on the record before it.¹³

However, the Court does note that the Parties dispute the appropriate earnings underlying Defendant’s calculation of Plaintiff’s LTD benefits. *Compare* Pl.’s Mot. at 4 (claiming annual earnings of \$275,486.98), *id.* at 23 (claiming indexed earnings of

¹² Given the Court’s finding that Plaintiff was disabled as a result of her low back pain, the Court need not assess whether Plaintiff’s alleged wrist pain, hip pain, or cognitive impairments rendered Plaintiff disabled, whether alone or in combination.

¹³ Because the Court need not reach the earnings threshold, the Court does not rely on the salary evidence provided by Plaintiff to which Defendant objects. *See* Def.’s Opp’n at 18 n.7. In light of the Court’s disposition, it also need not reach the issue of whether LINA was required to take into account the “real world marketplace” pursuant to its settlement agreement with the California Department of Insurance. Pl.’s Mot. at 3–4, 17. Because the Court did not rely on this evidence in the instant Order, the Court **DENIES** Plaintiff’s RJN (ECF No. 29-1).

\$172,002), *and* Pl.’s Resp. at 6 n.8 (contesting the requisite earnings threshold), *with* Def.’s Opp’n at 17 (arguing that the applicable earnings are \$229,572, and that Plaintiff reported income of \$240,000 in support of her SSDI claim). The Court lacks the necessary facts to make a final determination of the appropriate figure. Nonetheless, the Court notes that the LTD Policy provides in no uncertain terms that the definition of “Covered Earnings” for a non-sales employee, like Plaintiff, is “an Employee’s wage or salary as reported by the Employer for work performed for the Employer as in effect just prior to the date Disability begins ***It does not include amounts received as bonus***, commissions, overtime pay or other extra compensation.” AR 3470 (emphasis added). The Court also notes that the \$275,486.98 cited by Plaintiff include a bonus. AR 3462. Accordingly, the Court finds as a matter of law that \$275,486.98 is not the appropriate figure to use in computing Plaintiff’s LTD benefits under the plain terms of the LTD Policy.¹⁴

CONCLUSION

In light of the foregoing, the Court **GRANTS** Plaintiff’s Motion (ECF No. 29), **DENIES** Plaintiff’s RJN (ECF No. 29-1), and **DENIES** Defendant’s Motion (ECF No. 30). The Clerk of Court **SHALL ENTER** Judgment in favor of Plaintiff. The Court **OVERTURNS** Defendant’s denial of long term disability benefits to Plaintiff; thus, Defendant **SHALL REINSTATE** Plaintiff’s monthly disability benefits retroactive to its denial of benefits and **SHALL PAY** any and all back benefits to which Plaintiff is entitled pursuant to the LTD Policy, as well as post-judgment interest thereon. In making said payment of back benefits, Defendant shall be guided by the Court’s interpretation of the LTD Policy as to the relevant compensation figures, as set forth *supra* at 57–58.

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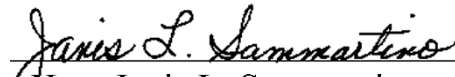
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¹⁴ Rather, it appears this figure was elicited from Gartner in connection with Plaintiff’s WOP claim. *See, e.g.*, AR 1107. The Court further notes that the definition of “Annual Compensation” applicable to the WOP claim includes bonuses. *See, e.g.*, AR 3364; AR 3406.

1 In her briefing, Plaintiff requests attorneys' fees. *See* Pl.'s Mot. at 25. Plaintiff
2 **SHALL FILE** a properly supported motion for attorneys' fees on or before April 7, 2022.
3 Defendant **SHALL FILE** its opposition, if any, on or before April 28, 2022. Plaintiff
4 **MAY FILE** a reply on or before May 12, 2022. Upon completion of this briefing, the
5 Court will decide any motion for attorneys' fees on the papers without oral argument
6 pursuant to Civil Local Rule 7.1(d)(1).

7 **IT IS SO ORDERED.**

8 Dated: March 8, 2022

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10 Hon. Janis L. Sammartino
11 United States District Judge
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