UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 19-2903-JFW(AFMx)** Date: July 23, 2020

Title: Elaine Marie Walker Earle *-v-* UNUM Life Insurance Company of America, et al.

PRESENT:
HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS): FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Elaine Marie Walker Earl ("Plaintiff") brings this action under the Employee Retirement Income Security Act ("ERISA") against Defendant Unum Life Insurance Company of America ("Unum"). On May 19, 2020, Plaintiff and Unum filed their Opening Trial Briefs. On May 21, 2020, the Court found this matter appropriate for decision without a trial and with the consent of the parties, vacated the Court Trial calendared for June 2, 2020. On May 26, 2020, Plaintiff and Unum filed their Responsive Trial Brief and Post-Trial Findings of Facts and Conclusions of Law. After considering all of the admissible evidence,[1] the Court makes the following findings of fact and conclusions of law:

Findings of Fact[2]

This lawsuit involves the denial of Plaintiff's claim for accidental death and dismemberment ("ADD") benefits under her employer's, the University of Southern California ("USC"), Plan.[3] The

[1] To the extent that the Court has relied on evidence to which the parties have objected, the Court has considered and overruled those objections. As to the remaining objections, the Court finds that it is unnecessary to rule on those objections because the disputed evidence was not relied on by the Court.

[2] The Court has elected to issue its decision in narrative form because a narrative form more fully explains the reasons for the Court's conclusions. Any finding of fact that constitutes a conclusion of law is hereby adopted as a conclusion of law, and any conclusion of law that constitutes a finding of fact is hereby adopted as a finding of fact.

[3] The University of Southern California Plan provides both group life and ADD benefits.

Plan, which is governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, et seq., is funded by insurance issued by Unum and USC is the Plan Administrator and the Named Fiduciary. AR 892-93. Plaintiff filed a claim for benefits on November 17, 2017 for the loss of sight in her right eye due to a macular hole. Plaintiff claimed that the macular hole was caused by the violent jerking of her head when she tripped and fell while walking up a flight of stairs at USC Keck Medical Center ("Keck") on March 15, 2017. On September 19, 2018, Unum denied Plaintiff's claim because the loss of sight in her right eye was not the result of an accidental bodily injury as defined by the Plan. Unum denied Plaintiff's appeal and on March 25, 2019, Plaintiff filed this action against Unum for benefits pursuant to 29 U.S.C. § 1132(a).

A. The Relevant Provisions of the Summary of Benefits

The governing Master Insurance Policy No. 292000 (the "Master Policy") was issued by Unum to the Select Group Insurance Trust ("Trust"), effective August 12, 1988, and provides group life and ADD insurance for the benefit of the participating members' (employers) employees. The Master Policy was issued in the State of Maine, where Unum is headquartered. The Maine Bureau of Insurance reviewed and approved the Master Policy and the Trust. To participate in the Trust, an employer must submit an application. Once the application is approved, an employer receives life and ADD coverage under the Master Policy through issuance of a Summary of Benefits bearing a unique identification number. Each Summary of Benefits details the benefits available under the life insurance plan and the ADD plan. In addition, each Summary of Benefits states that it is governed by the laws of the State of Maine and neither the Master Policy nor individual Summary of Benefits are submitted for approval by insurance officials of states other than Maine. The Trust provides life and ADD insurance coverage to employers in thirty-nine states and Washington, DC. In fact, Unum has issued tens of thousands of Summaries of Benefits to employers participating in the Trust, and there are hundreds of thousands of employees insured by the Master Policy through these Summaries of Benefits.

USC is a participating employer of the Trust and Unum provides life and ADD coverage for approximately 1,316 eligible employees at USC pursuant to the Summary of Benefits, Group No. 134781 001, effective April 1, 2009. AR 833-901. As with all other Summaries of Benefits, the USC Summary of Benefits provides that it was "delivered in and is governed by the laws of the governing jurisdiction [Maine] and to the extent applicable by the Employee Retirement Income Security Act of 1974 (ERISA) and any amendments." AR 834. The Summary of Benefits also instructs insureds to contact Unum in Portland, Maine for general questions or complaints. AR 887. Unum provides Certificates of Coverage to USC to give to employees, such as Plaintiff, who are covered under the Plan.

The Summary of Benefits grants Unum discretion in making benefit determinations on any claims submitted. Specifically, the Summary of Benefits provides that: "When making a benefit determination under the Summary of Benefits, Unum has discretionary authority to determine your eligibility for benefits and to interpret the terms and provisions of the Summary of Benefits." AR 857. The "Discretionary Acts" provision provides that "[t]he Plan, acting through the Plan Administrator, delegates to Unum and its affiliate Unum Group discretionary authority to make benefit determinations under the Plan." AR 897.

In addition, the Summary of Benefits provides that ADD benefits "will be paid only if an

accidental bodily injury results in one or more of the covered losses listed below within 365 days from the date of the accident." AR 876. One of the covered losses is "Sight of One Eye," which provides for the payment of "One Half The Full Amount" of benefits.[4] AR 876-77. "Accidental Bodily Injury" is defined as "bodily harm caused by accident and not contributed to by any other cause." AR 888. The Summary of Benefits specifically excludes from coverage "accidental losses caused by, contributed to by, or resulting from . . . disease of the body or diagnostic, medical or surgical treatment." AR 881-882.

B. The History of Plaintiff's Claim

1. Plaintiff Trips While Walking Up a Flight of Stairs on March 15, 2017

On March 15, 2017, Plaintiff, who was an operating room nurse at Keck, was returning from her morning break when she tripped and fell while walking up the stairs to the surgery department. Although she tried to break her fall by grabbing the handrail, she only caught it with her left pinky finger. In grabbing the handrail, Plaintiff tore the webbing between her pinky and index fingers, which required three sutures. Plaintiff also experienced pain and swelling in her left hand, arm, and shoulder as well as her neck, back, and knees.

Because she was at work at the time of the accident, on March 15, 2017, Plaintiff's supervisor completed a Manager's Report of Incident Form ("Incident Form"). AR 195-96. In the March 15, 2017 Incident Form, Plaintiff reported she "cut her finger on the rail when she tried to break her fall in the stair case." *Id.* There were no witnesses identified in the Incident Form. *Id.* In addition, Dr. Glen John Apramian ("Apramian") completed a First Report of Occupational Injury or Illness on March 15, 2017, and reported that Plaintiff advised "while walking up some stairs she dropped and caught herself on the rail, tearing her pinky wrong way." AR 190-91. Apramian also reported that Plaintiff's only subjective complaints at the time of the examination were "L small finger soreness," and his physical examination findings were limited to Plaintiff's left hand.[5] *Id.* In addition, Plaintiff's workers' compensation claim described her injury as "[l]eft baby finger/fourth finger webspace tore open while grabbing handrail to break fall, baby finger caught on hands and bent backward." AR 197.

In the months after her fall, Plaintiff continued working light duty until approximately July 10, 2017.[6] AR 150 and 702. During this same time, Plaintiff was taking classes online for her Bachelor of Science in Nursing ("BSN"), which she completed on August 21, 2017.

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[4] "Loss of Sight" is defined as "the eye is totally blind and that no sight can be restored in that eye." AR 889.

[5] Plaintiff developed neck, left shoulder, left arm, lower back, and knee pain the weekend after her fall. AR 702.

[6] Plaintiff stopped working on July 10, 2017 and did not return due to her continued musculoskeletal pain. AR 702.

2. A Macular Hole is Discovered in Plaintiff's Right Eye in August 2017

On August 23, 2017, Plaintiff had an eye examination by her ophthalmologist Dr. Rui Zhang ("Zhang"). AR 449. Plaintiff reported to Zhang that her vision in her right eye had decreased, but did not report when the decreased vision began and did not inform Zhang about her March 15, 2017 fall.[7] AR 447-52. At the time of her exam, Plaintiff's visual acuity was 20/50 in her right eye and 20/30 in the left eye. *Id.* During his examination, Zhang found a full thickness macular hole in the right eye and an epiretinal membrane ("ERM")[8] and vitreomacular traction ("VMT")[9] with impending hole in the left eye. AR 450. Zhang also determined that Plaintiff had other eye conditions, including cataracts, a choroidal nevus in the right eye[10], and bilateral nuclear sclerosis[11], which was greater in the right eye than the left. AR 447. Zhang concluded that all of Plaintiff's conditions were "[s]table." *Id.* Zhang explained to Plaintiff that part of her decreased vision in the right eye was due to the macular hole. *Id.* Zhang recommended surgery to remove the cataract in Plaintiff's right eye and advised Plaintiff that she should be examined by a retinal specialist regarding the macular hole in her right eye. AR 450.

On August 31, 2017, Plaintiff saw ophthalmologist Dr. Sara Haji Abdollahi ("Abdollahi"), who confirmed Plaintiff had a right eye macular hole, a lamellar hole in the left eye, and VMT, but Abdollahi was unable to determine how long Plaintiff had had these conditions. AR 378-379. At the time of the appointment, Plaintiff's right eye visual acuity was 20/80 and her left eye visual

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[7] Although Plaintiff did not report her decrease in vision in her right eye to anyone prior to her appointment on August 23, 2017 with Zhang, according to Plaintiff, Plaintiff and her family members noticed after her fall and before her appointment with Zhang on August 23, 2017 that she was experiencing vision problems. AR 150. Specifically, Plaintiff went from using the lowest level over the counter reading glasses prior to the accident to the strongest level over the counter readers in order to do computer work at both home and work. Plaintiff also noticed that she needed more light in order to see things, especially fine print. In addition, Plaintiff noticed that she was having trouble seeing print on television with her right eye and mentioned to her husband in April 2017 that she needed to get her eyes checked. However, according to Plaintiff, because of her busy work and school schedule and because she was able to function at both work and school with the strongest level of over the counter readers, Plaintiff delayed making an eye appointment until after she completed her BSN program in August 2017.

[8] An ERM is the formation of a thin, fibrotic membrane over the retina that contracts, wrinkling the underlying retina and interfering with vision.

[9] The middle of the eye is filled with vitreous, a gel-like substance that is attached to the retina and the macula by microscopic fibers. If the vitreous shrinks and pulls away from the retina, the vitrous pulls and tugs on the macula, causing VMT, which can damage the macula and cause vision loss if left untreated. In some cases of VMT, the vitreous detaches from the macula without injury or surgical intervention, which is known as "spontaneous release."

[10] A nevus is a colored growth on or in the eye, which is sometimes referred to as a freckle of the eye.

[11] Nuclear sclerosis is increased refractivity of the central portion of the lens of the eye.

acuity was 20/50. *Id.* Abdollahi referred Plaintiff to an eye surgeon. *Id.*

According to Plaintiff, her August 31, 2017 appointment with Abdollahi was the first time she realized that her eye problems began after her March 15, 2017 fall. During the appointment, Abdollahi asked Plaintiff if she had experienced head trauma in light of the fact that she had similar problems with both eyes:

> I was asked by Dr. Hagi Abdollhai [*sic*] if I had had a trauma to my eyes because as she stated, it is very unusual for both eyes to be affected as I had been diagnosed. I had told Dr. Hagi Abdollahi that I had a trip up the stairs in which I jerked by head back violently in March 15, 2017.

AR 151.

3. Plaintiff Loses Sight in Her Right Eye Following Surgery

On September 5, 2017, Plaintiff saw eye surgeon Dr. Daniel Esmaili ("Esmaili"). In her Medical History Questionnaire, Plaintiff reported a history of choroidal nevus, macular holes bilaterally, cataracts bilaterally, chronic/acute back pain/numbness of the bilateral legs, knee pain, and shingles/meningitis (viral) in 2010. AR 256-57. Plaintiff also reported a family history (maternal) of macular degeneration. *Id.* During the examination, Plaintiff complained of having suffered decreased vision for approximately four months, with a greater decrease in the right eye than the left. *Id.* At the time of her examination, Plaintiff's visual acuity in her right eye was 20/50 and 20/25 in her left eye. *Id.* Esmaili diagnosed Plaintiff with a full thickness macular hole in the right eye and VMT in the left eye. *Id.* In addition, Esmaili noted that although the macular hole in Plaintiff's right eye was large, she "still maintain[ed] reasonable vision at 20/50." Esmaili discussed treatment options with Plaintiff, including vitrectomy[12], membrane peeling, and gas with positioning. *Id.* Esmaili also advised Plaintiff that "VMT can be a risk factor for macular hole formation." *Id.* Esmaili and Plaintiff decided to proceed with surgery on the macular hole in the right eye first and continue to observe the left eye. AR 264-65. Esmaili warned Plaintiff that the vision in her right eye would not fully recover from the surgery for approximately three months:

> I was told that my vision would be strange post operatively because of the gas injection (put in during a surgery) in my eye affects vision, and it would take up to three months to a year for my vision to be the best that it can be, given my diagnosis.

AR 151.

On September 29, 2017, Esmaili performed surgery to repair the macular hole in Plaintiff's right eye. AR 151. On September 30, 2017, Plaintiff met with Dr. Jeffrey Tan ("Tan") for a post operative appointment, and Tan noted that Plaintiff's vision in her right eye had been reduced to "HM" or "hand motion." AR 253. Plaintiff expressed concern that her vision was "worse than it was before surgery," but Tan reminded Plaintiff that this was a temporary effect of the gas in her eye.

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[12] A type of eye surgery that removes the vitreous replaces it with saline or a bubble made of gas or oil.

AR 151.

On October 3, 2017, Plaintiff had another post operative appointment with Esmaili, who noted that Plaintiff was "[d]oing [w]ell!" AR 263. Esmaili also noted that the macular hole in Plaintiff's right eye was closed and that the left eye VMT had spontaneously released. AR 273. Plaintiff again expressed concern that the vision in her right eye was not good and Esmaili assured her that she "was doing okay, and that the macular hole was healing, and that it takes a while for swelling to go down and the eyesight to recover after the gas is absorbed." AR 151. On October 11, 2017, Plaintiff had another post operative appointment with Esmaili and reported that her vision was worse than before the surgery. AR 250. Plaintiff's vision in her right eye had shown some improvement – from "hand motion" to "counting fingers" or "CF" at two feet. *Id.* However, during that appointment, Esmaili noted that there was some whitening in Plaintiff's right retina, which led Esmaili to conclude that there had been "a blockage of a branch of an artery" to her macula and that the blockage might be the cause of some of Plaintiff's vision loss. AR 152 and 250. Esmaili concluded that Plaintiff's loss of vision may have been caused by a BRAO.[13] AR 152 and 250. On October 17, 2017, during a follow up appointment, Plaintiff reported to Esmaili that she was entirely unable to see in the right eye and Esmaili again observed the whitening of Plaintiff's right retina. Esmaili again concluded that Plaintiff's loss of vision was due to a BRAO in her right eye. AR 249.

During an October 26, 2017 appointment, Zhang determined that Plaintiff's vision in her right eye had shown significant improvement from "counting fingers" and that the visual acuity in her right eye, corrected, was 20/80, which was almost as good as it had been pre-surgery. AR 377 and 801. However, Plaintiff's vision continued to deteriorate after her appointment with Zhang. During Plaintiff's November 14, 2017 and December 6, 2017 appointments with Esmaili, Plaintiff's vision in her right eye was back to "counting fingers" at two feet. AR 247-48. During her January 12, 2018 appointment, Esmaili determined that Plaintiff's "top" right eye vision had deteriorated to 20/500.[14] AR 246.

4. Plaintiff Submits a Claim to Unum for The Loss of Sight in Her Right Eye

On November 17, 2017, Plaintiff submitted a claim for ADD benefits to Unum as a result of the loss of sight in her right eye, claiming that her March 15, 2017 fall on the stairs had caused her to become legally blind. AR 18-23 and 148-52. Specifically, Plaintiff claimed that prior to the fall, she required the lowest level of over the counter readers to help with computer work, but that after the fall she needed the strongest level of readers. AR 150. Plaintiff claimed that "due to lack of time" she "put off getting [her] eyes examined" until after she finished her BSN in August 2017. *Id.* Plaintiff also claimed that following her surgery to correct the macular hole in her right eye, she lost all vision in her right eye. *Id.* Plaintiff reported that she had been treated by Zhang, Abdollahi, and Esmaili. AR 148. In support of Plaintiff's claim, Esmaili submitted an Attending Physician Statement ("APS") on December 14, 2017, which stated that Plaintiff's loss of vision was "caused

[13] A BRAO, or branch retinal artery occlusion, is a blockage of one or more of the small arteries in the retina. The blockage is caused by a clot or occlusion in an artery, or a build up of cholesterol in an artery, and is similar to a stroke.

[14] The parties agree that, given her visual acuity of 20/500, Plaintiff is legally blind in her right eye.

by an accident independent of all other causes" and illness and disease did not "in any way, cause or contribute to the loss." AR 120-21. Esmaili also stated that '[p]atient fell, violent jerking of head causing ocular injury," which he described as a "macular hole right eye." AR 120. In addition, Esmaili stated that Plaintiff's right eye vision, both corrected and uncorrected, was "count fingers 2 feet" and that Plaintiff had reached "maximum medical improvement." SR 121.

5. Unum Denies Plaintiff's Claim

Plaintiff's claim and Esmaili's APS were reviewed by one of Unum's nurses, Marnie Webb ("Webb"). In her January 12, 2018 report, Webb disagreed with Esmaili and concluded that there was no evidence that Plaintiff's vision loss was caused by an accident because "macular holes can occur spontaneously without any apparent cause." AR 199-200. In response to Webb's report, Unum's Tracy McKenzie ("McKenzie") asked her supervisor, Christine Reid ("Reid"), if "an adverse decision [would] be appropriate at this time." AR 204. Reid recommended that Unum should first obtain and review Plaintiff's medical records. AR 205.

On March 7, 2018, Unum received Esmaili's treatment records. AR 241. Esmaili's records included a December 6, 2017 letter by Esmaili to Plaintiff's regular treating physician, Dr. Jason Groomer ("Groomer"), regarding her loss of sight in her right eye and its cause:

> As you know, on March 15, 2017, she had an injury in which she tripped on some stairs which required stitches to repair a laceration on her hand. During this fall, her head violently jerked backwards.

AR 259. In addition, Esmaili stated that both eyes had VMT issues and because of that "I do believe it is probable that the nature of her bilateral macular findings could be related to the head violently jerking backwards." AR 259. After reviewing Esmaili's medical records, Webb concluded that the records "do not change the conclusion of my previous review." AR 284. However, Webb suggested that before any determination regarding Plaintiff's claim was made, Unum should obtain and review "records from the providers who treated her for her vision loss prior to Dr. Esmaili to determine the symptoms and exam findings at initial presentation and to further assess correlation, if any with the 3/15/17 trip incident." AR 284. Specifically, Webb suggested that Unum should obtain and review Plaintiff's medical records from Zhang, Abdollahi, and Dr. Mark Kislinger ("Kislinger"), an ophthalmologist. AR 285-85.

On April 2, 2018 Unum obtained Abdollahi's records, including an APS in which Abdollahi agreed with Esmaili that Plaintiff's vision loss was "caused by an accident independent of all other causes" and that Plaintiff's vision loss was caused by a "fall from the stairs." AR 298. Unum also obtained records from other eye specialists who had treated Plaintiff, including Dr. Ron Gutmark ("Gutmark") and Zhang. AR 361 and 416.

On July 17, 2018 Unum referred Plaintiff's claim file to one of its doctors, Dr. Renee Chervenak ("Chervenak"). AR 469. Chervenak concluded that Plaintiff's claim should be denied because although "the claimant's vision in the right eye is consistent with legal blindness," Plaintiff "has sufficient vision to count fingers at a distance of 3 feet." AR 450. On July 18, 2018, Webb again reviewed Plaintiff's claim file and although she acknowledged that "[m]acular holes can be caused by eye trauma," she concluded that it was impossible to determine the cause in Plaintiff's

case because macular holes "also can occur spontaneously without any apparent cause and are commonly seen in people over age 55 and more often in women." AR 471. Webb also noted that Plaintiff did not seek any treatment for her eyes until her August 23, 2017 "annual eye exam" and that Plaintiff's medical records did not document any violent jerking of the head or blunt trauma to the eye or visual signs or symptoms at the time of the March 15, 2017 fall. AR 471-72.

On August 24, 2018, Dr. Frank Reed ("Reed"), one of Unum's ophthalmologists, reviewed Plaintiff's claim file. AR 587. Read noted the lack of any evidence in Plaintiff's medical records supporting Plaintiff's contention that she had jerked her head during her March 15, 2017 fall: "[s]he had an injury to her left hand and was seen as an emergency when sutures were done on her left had. At the time, she complained of no head injury or jerking of her head to avoid hitting it on the stairs. She only made this claim a good deal later." *Id.* In addition, Read stated that "[t]he fact that [Plaintiff] did not seek an eye evaluation following her fall is certainly an indication that she did not notice anything that bothered her significantly from her fall as far as her eyes were concerned." *Id*. Read also stated that epiretinal membranes with traction on the macula "most commonly separate from the retina spontaneously" and that "[b]y simply jerking the head around, it is very unlikely that that is a cause of epiretinal membrane separation and the development of a macular hole." *Id.* Read concluded that it was "highly likely" Plaintiff "had an epiretinal membrane with VMT in the right eye, as she was noted to have in the left eye, prior to her fall." AR 585. Read also concluded that Zhang's assessment that the macular hole was "stable" at the time of his August 23, 2017 examination of Plaintiff's eyes "strongly suggest[ed] that [Plaintiff] at least had an epiretinal membrane in the right eye prior to her fall and may well have had a macular hole dating from before her fall." *Id.* With respect to her vitrectomy, Read explained that as part of the vitrectomy, Plaintiff "had gas injected into her vitreous and, on occasion, that gas expands and causes an increased ocular pressure sufficient to close down the circulation in the retina." AR 586. Thus, Read concluded that the reduction in Plaintiff's vision in her right eye was "in all likelihood, a surgical complication" based on the fact that Plaintiff's visual acuity in that eye reduced from 20/50 prior to surgery to finger counting one day after surgery. *Id.* In summarizing his findings regarding Plaintiff's loss of sight in her right eye, Read stated that:

> I completely disagree with Dr. Esmaili's evaluation that her visual decrease was due to the jerking of her head during her accident. She almost certainly had a preexisting condition and may well have had a spontaneous hole development prior to her injury. I think her decreased vision to finger counting is entirely due to complications of her retinal surgery. I do not see any evidence that her visual decrease is due to her fall on the stairs.

Id.

Based on Read's report, Unum concluded that there was "no evidence that fall on stairs on 3/15/17 resulted in macular hole in eyes due to violent head jerking when she tripped on stairs at work and injured her hand." AR 596. Accordingly, on September 19, 2018, Unum informed Plaintiff that it had concluded that the loss of sight in her right eye was not the result of an accidental bodily injury as defined by the Summary of Benefits and Unum denied Plaintiff's claim. AR 598-602. Unum stated that the medical evidence did not support her claim that her vision problems resulted from the March 15, 2017 fall. AR 600. Instead, Unum relied on Read's conclusion and stated that Plaintiff's VMT and the surgical complication due to a BRAO contributed

to the loss of sight in her right eye. AR 599-600.

6. Plaintiff Appeals Unum's Denial of Benefits

On March 1, 2019, Plaintiff appealed Unum's denial of benefits. AR 635-643. With her appeal, Plaintiff submitted a personal statement (AR 786-88) as well as statements from her husband (AR 789-90), her two sons (AR 791-92), her brother (AR 793), and a friend (AR 794-95).[15] Plaintiff also submitted a March 8, 2018 report from ophthalmologist Dr. Alan Shabo ("Shabo"), who examined Plaintiff at the request of the defendant in Plaintiff's workers' compensation case. AR 672-75. Shabo did not offer an opinion on the cause of Plaintiff's loss of sight in her right eye, but did conclude that Plaintiff was legally blind in her right eye and that there was no possibility of recovery of sight in that eye. AR 674.

In addition, Plaintiff submitted a November 12, 2018 report by ophthalmologist Dr. Marta Recasens ("Recasens"), who was the "agreed medical examiner" in Plaintiff's workers' compensation case. AR 679-712. Recasens's research indicated that the combination of vitreomacular adhesion and traction are well recognized causes of macular holes: "Vitreomacular adhesions and traction had been well described precursors to macular hole formation." AR 711. Based on her research, Recasens concluded that:

> Ms. Walker-Earle presents signs and symptoms that correlate with her history. Her ocular physical findings are consistent with her history and current conditions.
>
> With reasonable medical probability, her conditions of Macular Hole in the right eye, Vitreomacular Traction in the left eye, and Macular Branch Retinal Artery Occlusion in the right eye, arose out of or in the course of her employment injury on 3/15/17.

AR 711. Although Recasens explained that "[t]raumatic macular holes can be observed after a whiplash separation of the vitreous the macula," she did not explain why she believed Plaintiff's fall was severe enough to cause Plaintiff's macular hole. *Id.* Regarding Plaintiff's BRAO, Recasens concluded it was a "compensable consequence of the surgery." AR 712.

Plaintiff also submitted the February 21, 2019 report of ophthalmologist Dr. Paul Tornambe ("Tornambe"), who stated that he had been asked to opine on whether Plaintiff's March 15, 2017 fall had caused her loss of sight in her right eye. AR 726-729. Tornambe explained that macular holes "form by traction on the central macular region by the vitreous body as it ages and pulls away from the macula. A vitreous separation is very common and develops in 50% of people over 50 years old, 60% over 60 etc. The adhesion force between the vitreous and macula is likely a genetic trait and interestingly more common in women than men." AR 727. In explaining VMT, Tornambe noted that "people genetically prone to develop a macular hole, the vitreous traction on the central macula is stronger than the adhesion in normal eyes . . . As the vitreous liquefies with age (when you are born it is a solid gel) it will pull on the retina splitting it into several layers." *Id*. Tornambe also explained that macular holes form when the vitreous pulls away from the retina,

[15] These statements generally discuss how the loss of sight in her right eye had affected Plaintiff's life as well as her mental, emotional, and physical well being.

causing a portion of the retina to be pulled with the vitreous. *Id.* Tornambe concluded that "[w]hile [Plaintiff] was working she likely had VMT in each eye, but more severe in the right eye." AR 728. In addition, Tornambe concluded that the slow deterioration in vision that Plaintiff experienced was consistent with the process by which macular holes typically develop:

> If we draw a time line, Ms. Walker Earle's hole was 600 microns when she presented to the retina specialist in late August 2017. This is consistent with her recollection that her vision declined about 4 months prior (early May 2017) to the routine visit, while she was on disability leave.

AR 728. Tornambe also described the process by which Plaintiff's March 15, 2017 fall caused the injury to her right eye:

> The whip lash event that occurred during the accident on March 15, 2017 more likely than not, suddenly pulled on the vitreous, aggravating the preexisting VMT in the right eye, which resulted in vitreous quickly pulled from the retinal surface creating a small defect which over the next 5-6 weeks enlarged and became more symptomatic. The VMT in the fellow eye was not as advanced and tolerated the trauma without immediate separation.

AR 728. In describing Plaintiff's surgery, Tornambe concluded that it was "the complication of the artery occlusion which resulted in a severe loss of central vision and legal blindness in that eye." AR 728. Tornambe explained that Plaintiff "unfortunately sustained a partial artery occlusion after the surgery, or a stroke in the eye," which he acknowledged is a recognized complication of macular hole surgery." AR 728-729. Tornambe concluded that "Ms. Walker Earle's serious fall in March 2017 did cause legal blindness in the right eye." AR 726.

On March 6, 2019, Unum referred Plaintiff's appeal to ophthalmologist Dr. Richard Eisenberg ("Eisenberg"), and asked him to opine on two specific questions: (1) "[d]o the available medical records support that the insured's loss of sight in the right eye, as defined above, was caused by an accident and not contributed to by any other cause" ; and (2) "[d]o the available medical records support the insured's loss of sight was caused by, contributed by, or resulted from a disease of the body or diagnostic, medical or surgical treatment." AR 799.

On March 7, 2019, Eisenberg submitted his report and concluded that:

> I do not find evidence in the medical records to support the contention that the insured's loss of sight in the right eye is solely caused by an accident, as I do believe that there are additional contributing factors. It is conceivable that the development of the macular hole OD was causally related to the fall, if, in fact, there was a significant whiplash injury at the time. This is not clearly demonstrated by the record, as no documentation of "violent jerking of the head" was present in the medical record immediately after the fall. It was not observed by others, but rather, was entirely based on the insured's self-reported symptoms expressed in retrospect. Furthermore, a significant whiplash injury forceful enough to cause ocular damage would be reasonably expected to have other, accompanying ramifications, e.g. post-concussive syndrome (dizziness, headache, diplopia). That these possible

> components of whiplash injury were not reported or investigated in the immediate aftermath of the fall on the stairs does not add support to the direct casual relationship between the fall and macular hole formation.

AR 801. In addition, Eisenberg concluded that even if there was a casual relationship between Plaintiff's fall and the macular hole in her right eye, Plaintiff's loss of sight in that eye "was significantly contributed to by the surgical procedure." AR 802. Eisenberg noted that prior to surgery, Plaintiff's visual acuity in her right eye, even with the macular hole, was 20/50, which "does not qualify as 'total loss of vision,' or even legal blindness." AR 801-802. Eisenberg concluded that the Plaintiff's post-operative loss of vision was due to a BRAO, which "is not a feature of the natural history of macular hole formation, but rather, is most likely a surgical complication." AR 802.

On March 25, 2018, Unum informed Plaintiff that it had completed its review and had "determined the decision on [Plaintiff's] claim is correct" and, thus, "[i]t is appropriate to uphold the prior decision on appeal." AR 805-10. In its decision, Unum stated that:

> We have determined there is no evidence within the available information to support [Plaintiff's] loss of sight in the right eye is solely caused by an accidental bodily injury.
>
> While there is evidence of vision loss, it is not solely due to an accident; therefore, an accidental dismemberment benefit is not payable.

AR 806.

Conclusions of Law

I. Jurisdiction and Venue

This action involves a claim for medical benefits under an employee welfare benefit plan that is subject to ERISA. Accordingly, the Court has original jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e). *See e.g.*, *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). Venue in the United States District Court for the Central District of California is appropriate under 29 U.S.C. § 1132(e)(2) because the acts that gave rise to this lawsuit took place in this district.

II. Standard of Review

"Section 502 of ERISA entitles a participant or beneficiary of an ERISA-regulated plan to bring a civil action to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 724 (9th Cir. 2000) (quoting 29 U.S.C. § 1132 (a)(1)(B)). A plan administrator's decision to deny benefits is reviewed *de novo*, unless the Plan provides the administrator with discretionary authority to determine eligibility for benefits or to construe the terms of the Plan. *Firestone Tire & Rubber Co. v. Brunch*, 489 U.S. 101, 115 (1989). Generally, where the plan grants discretionary authority to the administrator, the Court reviews the denial of benefits under the plan for an abuse of discretion. *Id* .

In this case, the parties do not dispute that the Summary of Benefits provides Unum with discretionary authority to determine eligibility for benefits. However, Plaintiff argues that in 2011 California enacted California Insurance Code § 10110.6, which invalidates the discretionary clause in the Summary of Benefits. Unum argues that Section 10110.6 does not apply because the Summary of Benefits contains a Maine choice of law provision and Maine allowed discretionary clauses at all times relevant to Plaintiff's claim.[16]

Section 10110.6 provides, in relevant part:

> (a) If a policy, contract, certificate, or agreement offered, issued, delivered, or renewed, whether or not in California, that provides or funds life insurance or disability insurance coverage for any California resident contains a provision that reserves discretionary authority to the insurer, or an agent of the insurer, to determine eligibility for benefits or coverage, to interpret the terms of the policy, contract, certificate, or agreement, or to provide standards of interpretation or review that are inconsistent with the laws of this state, that provision is void and unenforceable.
>
> (b) For purposes of this section, "renewed" means continued in force on or after the policy's anniversary date.
>
> (c) For purposes of this section, the term "discretionary authority" means a policy provision that has the effect of conferring discretion on an insurer or other claim administrator to determine entitlement to benefits or interpret policy language that, in turn, could lead to a deferential standard of review by any reviewing court.
>
> (d) Nothing in this section prohibits an insurer from including a provision in a contract that informs an insured that as part of its routine operations the insurer applies the terms of its contracts for making decisions, including making determinations regarding eligibility, receipt of benefits and claims, or explaining policies, procedures, and processes, so long as the provision could not give rise to a deferential standard of review by any reviewing court.
>
> (e) This section applies to both group and individual products.
>
> (f) The commissioner may adopt regulations reasonably necessary to implement the provisions of this section.
>
> (g) This section is self-executing. If a life insurance or disability insurance policy, contract, certificate, or agreement contains a provision rendered void and unenforceable by this section, the parties to the policy, contract, certificate, or agreement and the courts shall treat that provision as void and unenforceable.

The Ninth Circuit has consistently held that "[w]here a choice of law is made by an ERISA contract, it should be followed, if not 'unreasonable or fundamentally unfair." *Wang Labs., Inc. v.*

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[16] Maine Insurance Code § 2847-V now bans discretionary clauses in group insurance policies, but the statute was not in effect during the relevant time period in this action.

Kagan, 990 F2d 1126, 1128 (9th Cir. 1993) (holding that because the company and most of its employees were housed in Massachusetts, choosing Massachusetts law at the time the contract was made "was fair and reasonable" and, thus, the Massachusetts statute of limitations would apply even though the plaintiff was a California resident, the plaintiff had been injured in California, and the action had been filed in California); *see also Buce v. Allianz Life Ins. Co.*, 247 F.3d 1133, 1149 (11th Cir. 2001) (holding that choice of law clause in ERISA contract should be followed if it is "'not unreasonable or fundamentally unfair'") (*quoting Wang Labs*., 990 F.2d at 1128–29). For example, in *Fenberg v. Cowden Auto. Long Term Disability Plan*, 259 Fed. Appx. 958, 959 (2007), the Ninth Circuit, relying on *Wang*, concluded that because the ERISA policy was issued and delivered in Rhode Island to a Rhode Island trust ten years before the California employer became a participant, the ERISA plan's choice of law provision designating Rhode Island as the governing jurisdiction was not "unreasonable or fundamentally unfair." Therefore, the Ninth Circuit concluded that the ERISA policy's discretionary clause should be enforced because Rhode Island law permitted discretionary clauses.[17] *Id.*; *see also Bain*, 2016 WL 4529495 (holding that the discretionary clause in the ERISA policy was not subject to Section 10110.6 because there was a New York choice of law provision in the policy).

In this case, the Court concludes that it would not be "unreasonable or unfair" to enforce the Maine choice of law provision in the Summary of Benefits. When USC subscribed to the Trust twenty-one years after it was formed, it agreed that Unum would have discretionary authority to make benefit determinations and that the provisions of the Summary of Benefits would be construed consistent with ERISA and Maine law. In addition, Maine has a continuing substantive interest in seeing that its laws are applied to a contract that was entered into by Maine entities – the Trust and Unum – in Maine. The purpose of the Trust's structure is to support consistent life and ADD coverage for hundreds of thousands of employees who are employed by tens of thousands of employers across thirty-nine states and Washington, D.C. Moreover, by applying the laws of one governing jurisdiction, Maine, Unum ensures that the life and ADD benefits insured by the Master Policy are uniformly administered, which is consistent with the intentions of the Trust. Therefore, the Court concludes that Maine law applies and, thus, Section 10110.6 does not apply to the Summary of Benefits' discretionary clause. *See, e.g., Aviation W. Charters v. UnitedHealthCare Insurance Company*, 2017 WL 5526569, at *2 (E.D. Cal. Nov. 16, 2017) (holding that Virginia law applied to the plan pursuant to the choice of law provision and that Section 10110.6 was inapplicable and did not defeat discretionary clause); *see also Stefan v. Life Ins. Co. of N. Am.*, 2018 WL 748163, at *5 (C.D. Cal. Feb. 6, 2018) ("[T]he Court is not persuaded that § 10110.6 is applicable here because the Policy was issued in Delaware and its terms state Delaware law applies").

Accordingly, because the Summary of Benefits provides Unum with discretionary authority, the Court concludes that Unum's denial of benefits to Plaintiff should be reviewed under the abuse of discretion standard.

III. Discussion

[17] Although *Fenberg*, 259 Fed. Appx. 958, was decided prior to the passage of Section 10110.6, it was decided after California had announced its policy of forbidding discretionary clauses. *See Bain v. United Healthcare, Inc.*, 2016 WL 4529495, *6 n. 6 (N.D. Cal. Aug. 30, 2016).

A. The Language of the Summary of Benefits is Conspicuous and, Thus, the "Substantially Caused" Standard Applies

In her appeal, Plaintiff argues that the restrictive definition of "accidental bodily injury" in the Summary of Benefits is not conspicuous, and, thus, in making its benefit determination, Unum should have applied the proximate cause standard to determine if Plaintiff's March 15, 2017 fall caused the loss of sight in her right eye. Unum argues that the definition of "accidental bodily injury" is conspicuous and, thus, the substantial contribution, and not the proximate cause, standard applies.

1. Legal Standard

When making a coverage determination under ERISA, the Ninth Circuit has generally applied federal common law to questions of insurance policy interpretation. *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1125 (9th Cir. 2002); *see also Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1439 (9th Cir. 1990). Although courts may "borrow 'from state law where appropriate, and be guided by the policies expressed in ERISA and other federal labor laws" (*Babikian v. Paul Revere Life Ins. Co.*, 63 F.3d 837, 840 (9th Cir. 1995)), the general rule is that state common law rules related to employee benefit plans are preempted.[18] 29 U.S.C. § 1144(a); *Evans*, 916 F.2d at 1439; *see also Shaw v. Delta Air Lines, Inc*., 463 U.S. 85, 98 (1983) (holding that federal common law of ERISA preempts state law in the interpretation of ERISA benefit plans).

In addition, in interpreting ERISA insurance policies, the Ninth Circuit has held that the doctrine of reasonable expectations applies. *Saltarelli v. Bob Baker Group Med. Trust*, 35 F.3d 382 (9th Cir. 1994). The doctrine provides that "[a]n insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured." *Id.* at 386.

Moreover, in *McClure*, the Ninth Circuit adopted a modified version of the Fourth Circuit's "substantially caused" test for determining if there is coverage under an ERISA policy. *McClure*, 84 F.3d at 1136. Under the Ninth Circuit's approach, the threshold inquiry is whether the policy language regarding coverage is conspicuous. *Id.* If the language is conspicuous, the "substantially caused" standard applies. *Id.* at 1136. For example, the policies in *McClure* insured "against loss resulting directly and independently of all other causes from bodily injuries caused by accident." *McClure*, 84 F.3d at 1132 (emphasis added). The Ninth Circuit noted that other federal circuits, including the Fourth Circuit, refused to enforce this "directly and independently" language on public policy grounds, given that this language, if interpreted literally, would "nullify the benefits an insured could expect from a policy in a large number of instances." *Id*. at 1135. Thus, the Ninth

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[18] ERISA contains a savings clause that exempts from preemption "any law of any State which regulates insurance." 29 U.S.C. § 1144(b)(2)(A). The Ninth Circuit has held that "state laws of insurance policy interpretation do not qualify for the savings clause exception and are preempted." *McClure v. Life Ins. Co. of N. Am.*, 84 F.3d 1129, 1133 (9th Cir. 1996) (*quoting Evans*, 916 F.2d at 1440 (1990)); *see also Williams v. Nat'l Union Fire Ins. Co.*, 792 F.3d 1136, 1140 (9th Cir. 2015).

Circuit held that as long as such policy language is conspicuous to the insured, recovery of benefits under the policy would be barred if a preexisting condition "substantially caused" or "substantially contributed" to the disability.[19] *Id*. at 1136.

Therefore, under the Ninth Circuit's "substantially caused" test, for a pre-existing condition to be considered a "substantial" contributing factor for the purpose of restricting coverage to "direct and sole causes" of the injury, the pre-existing condition "must be more than merely a contributing factor," and that a relationship of "undetermined degree is not enough." *Dowdy*, 890 F.3d at 809 (*quoting Adkins v. Reliance Standard Life Ins. Co.*, 917 F.2d 794 (4th Cir. 1990)). In *Dowdy*, the Ninth Circuit, citing to the *Restatement (Second) of Torts*, observed that a "substantial cause" denotes the "idea of responsibility." *Id*. To ascertain a substantial cause, the Ninth Circuit held that:

> The word "substantial" is used to denote the fact that [the condition] has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred.

Id. (*quoting Restatement (Second) of Torts* § 431 cmt a (Am. Law. Inst. 1965)). In addition, the Ninth Circuit held that:

> For a court to distinguish between a responsible cause and a "philosophic," insignificant cause, there must be some evidence of a significant magnitude of causation. Such evidence need not be presented with mathematical precision, but must nonetheless demonstrate that a causal or contributing factor was more than merely related to the injury, and was instead a substantial catalyst.

Id. Thus, in *Dowdy*, the Ninth Circuit concluded that the plaintiffs were entitled to ADD benefits for the amputation of the insured's leg because his diabetes did not "substantially contribute" to the amputation:

> [T]he record with respect to the role of diabetes in Mr. Dowdy's recovery is notably thin. The car accident resulted in a severe injury that came close to amputating his lower leg. Dr. Coufal opined that when attempts were made properly to correct the lower leg, subsequent wound issues were complicated by diabetes, and the fracture itself was slow to heal. Ultimately, however, Mr. Dowdy suffered a deep infection that Dr. Coufal considered "related to the original injury." In light of this evidence, and giving the Exclusion the required strict reading, MetLife cannot meet its burden of showing that diabetes substantially caused or contributed to the loss.[20]

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[19] However, if the language is inconspicuous, the "policy holder reasonably would expect coverage if the accident were the predominate or proximate cause of the disability." *Id.* at 1135-36.

[20] However, in *Estate of Maurice v. Life Insurance Company of North America*, 792 Fed. Appx. 499 (Feb. 5, 2020), the Ninth Circuit recently held that the plaintiff was not entitled to ADD

Id.

2. The Terms and Provisions Regarding Coverage Are Conspicuous

In this case, the Court concludes that the Summary of Benefits' specific terms and provisions, including the definition of "accidental bodily injury," are conspicuous. The Table of Contents follows immediately after the Summary of Benefit's cover page and it clearly directs participants to the page numbered AD&D-BEN-1 for AD&D Benefit Information. AR 835. On the AD&D-BEN-1 page, the Summary of Benefits uses a question and answer format to inform insureds of their benefits. Specifically, on AD&D-BEN-1, it asks "***HOW MUCH WILL UNUM PAY YOUR BENEFICIARY IN THE EVENT OF YOUR ACCIDENTAL DEATH OR YOU FOR YOUR DEPENDENT'S ACCIDENTAL DEATH OR FOR CERTAIN OTHER COVERED LOSSES***" and answers that the "benefit will be paid only if an **accidental bodily injury** results in one or more of the covered losses listed below." AR 876 (emphases in original). Bolding the phrase "accidental bodily injury" indicates that it is a specially defined term, and its definition appears as the first definition in the Glossary, which the Table of Contents indicates is on the page numbered GLOSSARY-1. AR 888. In addition, in the AD&D Benefit Information section, immediately after the provisions describing the various types of ADD benefits available, is the ***"WHAT ACCIDENTAL LOSSES ARE NOT COVERED UNDER YOUR PLAN"*** question. The answer that immediately follows the question states that there are exclusions for losses "caused by, contributed to by, or resulting from . . . disease of the body or diagnostic, medical or surgical treatment." AR 881-82.

Plaintiff argues that the Summary of Benefits' language is inconspicuous because "accidental bodily injury" is only defined in the Glossary. However, the Summary of Benefits' organization, bolding of terms, and Table of Contents ensures that the definition of "accidental bodily injury" is prominently displayed and easy to find. In addition, the exclusionary clause appears directly after the provisions for the types of benefits offered under a boldfaced, italicized, and all-capital letter heading. *See, e.g., Erisman v. Unum Life Ins. Co. of Am.*, 2006 WL 516752, at *4 (W.D. Wash. Mar. 1, 2006) (holding that the use of an "easy-to-read question and answer format" rendered provision conspicuous and consistent with insured's reasonable expectations).

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benefits for the amputation of his leg because his diabetes did "substantially contribute" to the amputation. In explaining the difference between its holding in *Dowdy* and the case before it, the Ninth Circuit explained as follows:

> The district court found that Maurice cut his feet on glass in a swimming pool; that finding is supported by the record. However, Maurice's own medical expert explained that diabetes prevented the cuts from healing properly and exacerbated the risk of infection. Once the cuts became infected, diabetes made it more difficult to fight the "bacterial onslaught" – even with the assistance of antibiotics – allowing the infection to reach the bone. Eventually, the only way to stop the infection from spreading was amputation. The effect of diabetes is far more extensive and better-documented here than it was in *Dowdy*. The conclusion is inescapable that Maurice's diabetes "substantially contributed" to the amputation.

Therefore, the Court concludes that the language regarding both coverage and exclusions in the Summary of Benefits are conspicuous and, thus, the "substantially caused" standard should apply. *See, e.g., Winters v. Costco Wholesale Corp.*, 49 F.3d 550 (9th Cir. 1995) (holding that the exclusionary clauses at issue were "conspicuous, plain and clear" when they were "clearly numbered, placed under underlined headings, and set off in separate paragraphs")

B. Unum's Denial of Plaintiff's Claim Was Not an Abuse of Discretion

"An ERISA administrator abuses its discretion only if it (1) renders a decision without explanation, (2) construes provisions of the plan in a way that conflicts with the plain language of the plan, or (3) relies on clearly erroneous findings of fact." *Boyd v. Bert Bell/Pete Rozelle NFL Players Ret. Plan*, 410 F.3d 1173, 1178 (9th Cir. 2005). "The mere fact that the plan administrator's decision is directly contrary to some evidence in the record does not show that the decision is clearly erroneous." *Snow v. Standard Ins. Co.*, 87 F.3d 327, 331 (9th Cir. 1996). A court should not overturn an administrator's decision "where there is 'relevant evidence [that] reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence.'" *Id.* (*quoting Maynard v. City of San Jose*, 37 F.3d 1396, 1404 (9th Cir. 1994).

In this case, the Court concludes that it was not an abuse of discretion for Unum to conclude that Plaintiff's loss of sight in her right eye was not substantially caused by her March 15, 2017 fall and to deny her claim.[21] As Unum correctly argues, there are no contemporaneous records indicating that Plaintiff suffered any head trauma or whiplash injury during her March 15, 2017 fall. *See, e.g, Parra v. Life Ins. Co. of North America*, 258 F.Supp. 2d 1058 (N.D. Cal. 2003) (upholding denial of benefits by insurance company and noting that "[b]ecause of his refusal to seek medical attention, there is no emergency room or ambulance report concerning any injuries Mr. Parra may have suffered during the accident"). The contemporaneous medical records do not contain any notation by the doctors or other medical staff treating Plaintiff that she reported hitting her head on the stairs or that she suffered any sort of whiplash injury during her fall on March 15, 2017. In addition, the contemporaneous medical records do not indicated that the doctors or other medical staff observed any post-concussive symptoms that could be associated with head trauma or a whiplash injury, such as dizziness, headaches, or diplopia.[22] Instead, at the time of her fall, Plaintiff only reported injury to and sought treatment for her left hand, which required sutures. AR 190-91 and 197. Moreover, between March 2017 and August 2017, Plaintiff continued to work as a nurse (albeit on light duty due to the injury to her left hand), completed an online BSN program, and received treatment for other musculoskeletal complaints that she attributed to her fall. AR 151 and 685-95. However, Plaintiff did not report any vision problems to a medical provider until five months later, during her August 23, 2017 eye examination by Zhang. AR 449. Furthermore, at the

[21] Plaintiff also argues that Unum abused its discretion because its doctors only conducted a review of Plaintiff's medical records and claim file and did not interview or examine Plaintiff. However, a "pure paper" review of a claim file does not constitute an abuse of discretion where, as in this case, there is no question regarding whether Unum's doctors reviewed "all of the relevant evidence" in Plaintiff's claim file. *See, e.g., Corby v. Unum Life Ins. Co. of America*, 2010 WL 3768040 (N.D. Cal. Sept. 21, 2010) (internal citation omitted).

[22] Diplopia is commonly referred to as double vision.

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time of her eye examination, Plaintiff was not legally blind, but, instead, Zhang found that her visual acuity in her right eye was 20/50 and that her condition was "stable." *Id*.

In addition, although Plaintiff argues that her providers each provided an "unqualified conclusion" that her fall was the "initiating event" that caused her loss of sight in her right eye loss of sight, each of these providers agreed that: (1) Plaintiff had VMT that predated her fall; (2) Plaintiff's visual acuity before her surgery was intact despite the macular hole; and (3) Plaintiff's loss of sight in her right eye was ultimately the result of the BRAO, which was a complication of her surgery. In addition, any opinions that Plaintiff's providers offered that linked the macular hole in Plaintiff's right eye with her March 15, 2017 fall were speculative and based on the assumption that her fall involved severe whiplash trauma, not based on clinical findings. *See, e.g.,* AR 259 (on December 6, 2017, Esmaili speculated that it was "probably that the nature of her bilateral macular findings could be related to the head violently jerking backwards"). Abdollahi's opinion that the macular hole in Plaintiff's right eye was caused by her March 15, 2017 fall was submitted to Unum seven months after Abdollahi's last examined of Plaintiff. AR 299. Moreover, Abdollahi's notes regarding her examination of Plaintiff are silent as to Plaintiff's March 15, 2017 fall or alleged whiplash injury. Although Abdollahi noted on August 31, 2017 that Plaintiff had a macular hole in her right eye of an unknown duration and had right eye visual acuity of 20/50, Abdollahi made no reference to Plaintiff's fall. AR 378. Furthermore, although Tornambe stated on February 21, 2019 that Plaintiff had VMT in both eyes prior to her fall, which was more "severe" in the right and that the fall "pulled on the vitreous, aggravating the preexisting VMT in the right eye" (AR 728), Tornambe also opined that the post-operative right eye "disabling blind area" was a "recognized complication" of her surgery. AR 729. After reviewing Plaintiff's medical records, Unum's ophthalmologists, Read and Eisenberg, concluded that there was no medical evidence to support a finding that Plaintiff's fall on March 15, 2017 was severe enough to contribute to the formation of a macular hole in her right eye.

Moreover, even if Plaintiff's March 15, 2017 fall contributed to the formation of a macular hole in her right eye, Unum did not abuse its discretion in concluding that Plaintiff's preexisting VMT and subsequent surgery substantially contributed to her loss of sight. *See, e.g., Estate of Maurice v. Life Ins. Co. of N. Am.*, 792 F. App'x 499, 500 (9th Cir. 2020) ("We reject the argument that diabetes had to be the predominant cause of the amputation. It is an incorrect statement of federal common law. Our cases expressly note that where, as here, the policy language is conspicuous, a preexisting condition can bar coverage 'even though the claimed injury was the predominant or proximate cause of the disability'") (*quoting Dowdy*, 890 F.3d at 808). If a preexisting condition is more than a mere "'philosophic,' insignificant cause," coverage is precluded. *Dowdy*, 890 F.3d at 808. Furthermore, if a preexisting condition predisposes an insured to a particular type of loss, that preexisting condition can be found to be a "substantial contribution" to the loss. *Estate of Maurice*, 792 F. App'x 499 at 500 (holding that there was no coverage where pre-existing diabetes "substantially contributed" to insured's leg amputation and the evidence showed that the diabetes "prevented the cuts from healing properly and exacerbated the risk of infection"); *Goetz v. Life Ins. Co. of N. Am.*, 272 F. Supp. 3d 1225, 1238 (E.D. Wash. 2017) (holding that coverage was precluded where a seizure was a "substantial contribution" to the insured's death from drowning given insured's pre-existing history of epilepsy and lack of evidence of head/neck trauma).

In this case, it is undisputed that Plaintiff's VMT existed in both eyes prior to her March 15,

2017 fall and that there is a direct causal relationship between VMT and the formation of macular holes. It is also undisputed that VMT is a progressive condition caused by eye aging or eye disease that creates the traction between the vitreous and the macular portion of the retina, which ultimately causes the vitreous to separate from the macula, causing a hole. As Tornambe explained, Plaintiff had an approximately fifty to sixty percent chance of a vitreous separation based solely on her age of fifty-eight at the time of her March 15, 2017 fall, and Plaintiff was more predisposed to vitreous separation as a woman. AR 727. As a result, Read concluded that Plaintiff could have developed a macular hole even if she had not tripped on the stairs. In addition, Read concluded that Plaintiff would not have developed a macular hole in her right eye simply by tripping up the stairs, even if her fall was as severe as she described it, if she had not had VMT in her right eye prior to the fall. AR 586. Therefore, VMT was a "substantial cause" of Plaintiff's loss of vision in her right eye.[23]

Accordingly, because Plaintiff's VMT "substantially contributed" to Plaintiff's loss of sight in her right eye, Unum did not abuse its discretion in denying Plaintiff's claim.[24]

IV. Conclusion

For all of the foregoing reasons, the Court finds that Unum correctly denied Plaintiff's ADD benefits. Accordingly, the Court enters judgment in favor of Unum. The parties are ordered to meet and confer and agree on a joint proposed Judgment which is consistent with this Order. The parties shall lodge the joint proposed Judgment with the Court on or before July 29, 2020. In the unlikely event that counsel are unable to agree upon a joint proposed Judgment, the parties shall each submit separate versions of a proposed Judgment along with a Joint Statement setting forth their respective positions on or before July 29, 2020.

IT IS SO ORDERED.

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[23] In addition, the BRAO suffered by Plaintiff, which was a complication of her vitrectomy, directly and immediately caused Plaintiff's loss of sight in her right eye. *See, e.g.,* AR 586 (Read concludes that Plaintiff's post-operative vision decline was due to a surgical complication of the vitrectomy); AR 712 (Recasens concludes that the BRAO was a direct consequence of her eye surgery); and AR 728-29 (Tornambe stated that Plaintiff's "complication of the artery occlusion" is a "recognized complication of macular hole surgery"). Where a condition "directly and immediately" causes an injury, it is considered to have "substantially contributed" to it. *See, e.g., Creno v. Metro. Life Ins. Co.*, 2014 WL 4053410, at *8 (D. Ariz. Aug. 15, 2014).

[24] Plaintiff argues that Unum applied the wrong standard because it found that her March 15, 2017 fall was not the sole cause of the loss of vision in her right eye. However, Read and Eisenberg both concluded that there was no medical evidence to support the conclusion that Plaintiff's loss of sight in her right eye was casually related to her March 15, 2017 fall. In addition, Read and Eisenberg both concluded that even if the loss of sight and the fall were casually related, other factors, such as VMT and the BRAO substantially contributed to or substantially caused her loss of sight. *See, e.g.,* AR 802 (Eisenberg concluded that Plaintiff's loss of sight was "significantly contributed to by" her vitrectomy).