

Docket No. 10-16035

In the
United States Court of Appeals
For the
Ninth Circuit

RICHARD KLUDKA,

Plaintiff-Appellant,

v.

QWEST DISABILITY PLAN,
QWEST COMMUNICATIONS INTERNATIONAL, INC.,
QWEST COMMUNICATIONS INTERNATIONAL INC. HEALTH INSURANCE PLAN,
and QWEST EMPLOYEE BENEFITS PLANS,

Defendants-Appellees.

*Appeal from a Decision of the United States District Court for Arizona (Phoenix)
No. 08-CV-01806 · Honorable David G. Campbell*

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

1. ***Similar to the court's decision in Glenn, a conflict of interest is irrelevant to a conclusion that Kludka did not receive a Full or Fair review and that QDS abused its discretion***

Kludka spent considerable effort in his Opening Brief [OB pages 10-16] because *Sznewajs* is distinguishable from the instant case such that it is not relevant - most critically because a financial conflict of interest did not exist in *Sznewajs*.

However, based on the facts in *Glenn*, the court held that whether a conflict of interest existed or tainted the decision was not outcome determinative but simply one of many factors to be considered:

"We believe that Firestone means what the word "factor" implies, namely, that when judges review the lawfulness of benefit denials, they will often take account of several different considerations of which a conflict of interest is one."

Metro. Life Ins. Co. v. Glenn, 128 S. Ct. 2343, 2351 (U.S. 2008).

In *Glenn* the court provided direction on how to conduct the "combination of factors" approach:

"The Court of Appeals' opinion in the present case illustrates the combination-of-factors method of review. The record says little about MetLife's efforts to assure accurate claims assessment. The Court of Appeals gave the conflict weight to some degree; its opinion suggests that, in context, the court would not have found the conflict alone determinative."

128 S. Ct. at 2351.

It is critical to note that similar to Metlife's failure in *Glenn*, neither Qwest or QDS have ever offered a shred of evidence that a *Glenn* "claims accuracy" process was in place in Kludka's claim and specifically objected to providing this evidence in discovery; it is clear a process did not exist [OB page 64].

In its brief, QDS in numerous places argues, "If any anything, Reed/QDS has a financial incentive to make careful, correct claims decisions..." [AB pages 12, 42], but this argument is based on performance terms in the Administrative Services Agreement and is not a "claims accuracy" process contemplated by *Glenn* such as one that imposes "management checks" or a mechanism where QDS penalizes "inaccurate decision making." 128 S. Ct. at 2351.

Kludka submits that given the numerous procedural violations [OB pages 20-65] which precluded a full and fair review, a *Glenn* "claims accuracy" process should have discovered these ERISA violations and if one did exist - Kludka's decision would have been different because it should have been obvious to QDS, particularly Ms. Dodson who made the final decision, that Kludka's evidence was not considered and QDS completely failed to meet Glenn's "higher than market place standards."

Qwest and QDS's failure to ensure the accuracy of the claims process, coupled with Ms. Dodson's deposition testimony that she "emphasized and accepted 100% QDS's peer review physicians' opinion" [OB pages 62-65] and that

she did not know how the Qwest Plan defined "Objective Medical Documentation" notwithstanding the fact this was a primary reason Kludka's benefits were terminated, raises serious concern and should allow heightened scrutiny regarding the impact these ERISA violations had in Kludka's case. 128 S. Ct. at 2352.

Thus, even if this Court concludes Qwest or QDS did not operate under a conflict of interest; or that if a conflict existed but it did not taint the decision, this determination is but one factor in the broader context of whether Kludka received a full and fair review and whether QDS met *Glenn's* "higher than market place standards:"

"ERISA imposes higher-than-marketplace quality standards on insurers. It sets forth a special standard of care upon a plan administrator, namely, that the administrator "discharge [its] duties" in respect to discretionary claims processing "solely in the interests of the participants and beneficiaries" of the plan, § 1104(a)(1); it simultaneously underscores the particular importance of accurate claims processing by insisting that administrators "provide a 'full and fair review' of claim denials."
128 S. Ct. at 2350.

When one reviews the numerous ERISA violations in Kludka's case in total with any level of skepticism coupled with Ms. Dodson's eyebrow-raising testimony [OB pages 62-64 and ER 174-212] that she in fact engaged in a one sided review which favored Qwest; it is clear QDS did not meet *Glenn's* higher than market place standards and the special standard of care required by *Glenn* and ERISA. In summary, QDS's failures were unreasonable, unlawful and an abuse of discretion.

2. *Sznewajs' "Reasonable Basis" review must be applied consistently with Glenn's combination of factors approach*

Sznewajs' “reasonable basis” standard must be applied in context with *Glenn's* combination of factors approach - regardless of whether any conflict of interest tainted Kludka's decision, *Sznewajs* cannot supplant *Glenn's* combination of factors approach or its requirement that QDS meet higher than market place standards.

Glenn did not limit its holding only to *conflicted* fiduciaries or insurance companies; indeed, the court agreed with the Sixth Circuit that Metlife's *structural conflict alone was not determinative* to a finding that Metlife abused its discretion.

The district court erred in Kludka's case because it failed to engage in the *Glenn* combination of factors approach and instead provided what amounted to a one dimensional review applying scant scrutiny while looking for any reasonable basis.¹

Given the numerous ERISA and *Abatie* procedural violations Kludka alleges precluded a full or fair review and his extrinsic evidence which allowed a conclusion that these various conflicts or simple error tainted the decision [OB

¹ ER 2-22.

pages 20-61] and with very limited discovery allowed regarding conflict,² and that QDS completely failed to provide evidence of any *Glenn* claim accuracy procedure [OB page 64] notwithstanding the fact *Glenn, Abatie*³ and the district court invited this evidence along with *Sznewajs*' irrelevance [OB pages 10-16] - the district court erred by applying minimal scrutiny and "reasonable basis" review.⁴

To be sure, the district court erred because QDS's decision was not *Sznewajs* reasonable and given the facts in Kludka's case - *Glenn, Abatie* and ERISA require more judicial scrutiny which QDS's decision cannot withstand.

3. ***ERISA, specifically 29 C.F.R. § 2560.503-1(h)(2)(iv), requires a "review" which considers all evidence - Kludka's extrinsic Abatie evidence proves QDS's review was marred by a litany of procedural violations and that Kludka's evidence was not considered on review***

QDS's statement in footnote 6, page 22 of its brief is revealing regarding its failure to understand its ERISA fiduciary duty to Kludka and what was required to meet *Glenn's* high standards on appeal:

² OB page 59, fn. 59. which is the discovery order from a prior case issued by the district court in *Wilcox v. Metro. Life Ins. Co.*, 2009 U.S. Dist. LEXIS 2977 (D. Ariz. 2009). The *Wilcox* Order was issued following remand from the Ninth Circuit. The district court ordered the parties to follow *Wilcox*. In addition are Kludka's discovery requests and Qwest's Answers, Objections thereto, ER 91-97.

³ "For example, the administrator might demonstrate that it used truly independent medical examiners or a neutral, independent review process; that its employees do not have incentives to deny claims; that its interpretations of the plan have been consistent among patients; or that it has minimized any potential financial gain through structure of its business (for example, through a retroactive payment system)." *Abatie*, 458 F.3 at 969.

⁴ ER 14.

"All of the evidence submitted by Kludka was considered even though some of it related to events which occurred subsequent to the benefit denial...even going so far as to retain Dr. Sonne to review Kludka's records pertaining to his heart attack and bypass surgery - *even though those events happened after the February 5, 2007 and were arguably irrelevant*" (emphasis added).

QDS is correct, Kludka's evidence on appeal *was irrelevant to its review* as it was QDS claims manager Ms. Dodson who made the final denial⁵ confirmed in her deposition.

To be clear, in response to the district court⁶ and QDS's argument [AB page 20] related to Kludka's evidence, with regard to Ms. Dodson and Ms. Mackin's testimony, the district erred by not fully considering this *Abatie* extrinsic evidence because it either failed to understand or did not care *why* Kludka proffered the same.⁷

Kludka offered the evidence because it undeniably "exposed" QDS's procedural irregularities and its one-sided, flawed review as well as how QDS failed to meet the standards set by *Glenn* - Kludka proffers the evidence because it proves QDS violated ERISA and that he did not receive a full and fair review.

Kludka has never argued that additional evidence is missing from the administrative record due to QDS's procedural irregularities - but rather if the

⁵ ER 178.

⁶ ER 21.

⁷ ER 21.

irregularities did not occur his evidence would have been properly considered and he should have been found disabled.

To begin, Ms. Dodson's testimony is notable in that contrary to what she led Kludka to believe in QDS's final denial that an "Appeals Board" reviewed his claim,⁸ she confirmed the statement was at best misleading and at worst, not true - such a board does not exist:

Q: There's no actual appeals board, in other words?

A: No, there's not.

Is honesty too much to ask from a fiduciary?

Is QDS's misrepresentation regarding the existence of an Appeals Board, "unreasonable" or the work of a fiduciary making every effort to meet *Glenn's* "higher than market place quality standards?"

Moreover, contrary to what 29 C.F.R. § 2560.503-1(h)(2)(iv) requires, that *all evidence be considered on appeal* for a full and fair review, Ms. Dodson testified nothing of the sort happened in Kludka's claim - the final denial reveals it was not a "fresh review" of Kludka's claim but rather a cut and paste job where language was lifted from the February 5, 2007 denial coupled with an adoption of Reliable Review Services physicians, Drs. Goldman and Sonne's opinions in their peer reports:

⁸ ER 376.

Q: So when I look at the October 9th, 2007 denial that you wrote, it appears to me that it draws upon the prior denials and the language that was used ---

A: Yes.

Q: ---- is that true?

And, then, what was new on the appeal, the new information was basically the peer review report.

A: Yes.⁹

Ms. Dodson confirmed she essentially outsourced the decision to Drs. Goldman and Dr. Sonne and emphasized their opinions:¹⁰

Q: Do you view your role or is your role at Reed Group, is it to gather the information?

A: Yes, to facilitate the claim.

Q: But you're not really actually involved in the decision making process?

A: No, I'm not.¹¹

. . .

Q: Okay. It sounds to me, and correct me if I am wrong, but it sounds to me like what you are saying is that you pretty much rely 100 percent on what you get back from the peer review doctors. Is that a fair statement?

A: Yes.¹²

⁹ ER 211.

¹⁰ ER 191.

¹¹ ER 194.

¹² ER 191.

. . .
Q: Is it fair to say that, based on what you have already testified to, Reed Group emphasized the peer review reports that it got?

A: Yes.¹³

. . .
Q What was the basis that you made for upholding the denial in Mr. Kludka's case, what were the reasons?

A: Both physician reviews came back saying he was not disabled.¹⁴

Incredibly, Ms. Dodson testified she did not review Kludka's evidence of disability such as Dr. Semino's or Mr. Golden's Qwest physician forms opining he was disabled,¹⁵ or their medical records:¹⁶

Q: What is your understanding of how the Reed Group¹⁷ is supposed to consider other evidence of disability like attending physician statements or medical records?

A: When we send it for a physician review, we pay them to review that information and make a decision.¹⁸

¹³ *Id.*

¹⁴ ER 193.

¹⁵ ER 219, 227-228, 230, 232, 404-405, 406-407.

¹⁶ ER 408-439.

¹⁷ Kludka's counsel used the term "Reed Group" during the deposition which is another name for QDS.

¹⁸ ER 191.

As Kludka's Opening Brief addressed in detail [OB 51-61] and in this Reply *infra*, QDS peer review Drs. Goldman and Sonne did not review, analyze or weigh any of Kludka's evidence; Kludka agrees it was "referenced or listed" but not seriously considered or weighed.

The absurdity of QDS's flawed one-sided review and the fact it is *Glenn* "unlawful" ¹⁹ and *Sznewajs* "unreasonable" is perhaps best illustrated by Ms. Dodson's final denial on October 9, 2007, ²⁰ which was based in large part on an alleged lack of "Objective Medical Documentation" per the Qwest Plan. ²¹

However, Ms. Dodson testified she did not actually know how the Plan defined the term and never looked at whether Kludka's claim was documented by objective findings. For clarity, the Plan defines "Objective Medical Documentation" as follows:

"Objective Medical Documentation" means written documentation of observable, measurable and reproducible findings from examination and supporting laboratory or diagnostic tests, assessment or diagnostic formulation, such as, but not limited to, x-ray reports, elevated blood pressure readings, lab test results, functionality assessments, psychological testing, etc. ²²

¹⁹ "We believe that Firestone means what the word 'factor' implies, namely, that when judges review the lawfulness of benefit denials, they will often take account of several different considerations of which a conflict of interest is one. This kind of review is no stranger to the judicial system." *Glenn*, 128 S. Ct. at 2351.

²⁰ ER 376-377.

²¹ ER 444.

²² ER 323.

When asked about objective findings in Kludka's claim, Ms. Dodson testified:

Q Did you look at the issue yourself as to whether or not there were objective medical findings per the plan document?

A: That would not be part of my process.

When asked what "objective medical" would be in Kludka's case, Ms. Dodson testified:

Q: Have you been trained on what the term means and what's acceptable?

A: I do know what it is, yes.

Q: What is it?

A: Objective medical would be his ability to take care of himself. If he needed help doing things. If he was able to take a shower, go shopping, taking care of his grandkids, doing things, everyday living that he can do by himself. That is the kind of things I would be looking for....I would be looking for reasons he was not able to take care of himself.

Q: How does the Plan define objective medical findings, do you know?

A: No.²³

Q: In a case involving psychological issues like Mr. Kludka, depression, anxiety, post-traumatic stress disorder, what are the objective medical findings you would be looking for as the claim manager?

A: I do not review the medical. I don't make that decision. So if I questioned it, I would talk to my supervisor about it.²⁴

²³ ER 196.

²⁴ *Id.*

Ms. Dodson also testified that she talked with Kludka approximately ten (10) times²⁵ during his appeal but never discussed the importance of his providing objective evidence on appeal:

Q: You don't believe that you discussed with him the issue of the objective medical findings or the treatment plan?

A: No.²⁶

The import of Ms. Dodson's testimony regarding Kludka's alleged failure to provide "Objective Medical Documentation" is obvious - QDS denied his claim twice - including Ms. Dodson's final denial on October 9, 2007 because Kludka did not meet this Plan requirement.

Given *Glenn's* higher than market place standards as well as this Court's requirement in *Booton*,²⁷ *Saffon*²⁸ and *Montour*²⁹ that QDS engage Kludka in a dialogue so he could perfect his claim and who QDS clearly knew suffered from well documented psychiatric limitations and because Kludka specifically informed QDS when he appealed he did not understand medical terminology,³⁰ Ms. Dodson's complete failure assist to Kludka on this issue is totally unreasonable.

²⁵ ER 181-182.

²⁶ ER 186.

²⁷ 110 F.3d at 1465.

²⁸ 522 F.3d at 872-873.

²⁹ 582 F.3d at 946.

³⁰ ER 223.

Indeed, not only were QDS's denials *inconsistent* with regard to whether Kludka's claim was documented by objective medical evidence [OB pages 25-32], but QDS compounded Ms. Dodson's silence on the issue with Kludka by *never* providing him with the Plan's definition in its denials so he had an opportunity to perfect his claim.³¹

Booton, Saffon and Montour make it clear since QDS believed Kludka's claim was not documented or perfected on a critical issue, it was QDS's fiduciary duty pursuant to ERISA to engage Kludka in a dialogue so he could perfect his claim - *not vice versa*.

To be sure, if Ms. Dodson did not know how the Plan defined "Objective Medical Documentation" and she never communicated the importance of it to Kludka over the course of ten (10) different phone calls - how on earth was Kludka supposed to figure it out?

³¹ ER 366-371, 376-388.

QDS's argument on page 33, footnote 10, of its Brief that "Kludka clearly understood what evidence was needed" is amusing considering QDS knew Kludka was not represented by counsel during its administrative review and QDS's citation of the actual Plan definition now before this Court is curious given that QDS *never gave* Kludka the actual definition in its two (2) denials, or by way of a simple telephone call to him, Dr. Semino or Mr. Golden, or in any letter during administrative review when it really mattered.

Even more unreasonable and unlawful than Ms. Dodson's testimony regarding Kludka's alleged failure to submit objective medical documentation was Ms. Mackin's testimony - QDS's Rule 30(b)(6) deponent.³²

Ms. Mackin testified Kludka's claim was denied in part due to a lack of objective medical documentation and also that the Plan *does not* consider "subjective" complaints³³ - an admission which violates *Saffon*.³⁴

Q: Do you know whether or not the Plan is supposed to consider subjective complaints by a beneficiary such as Mr. Kludka?

A: ...We do not look at subjective complaints.³⁵

Given that Kludka's claim was based primarily on psychiatric diagnoses and Qwest had paid him benefits for seven (7) years for those diagnoses and that psychiatric diagnoses and limitations are laced with subjective complaints and findings - how could any review of Kludka's claim be full or fair and meet *Glenn's* higher than market place standards or be considered "reasonable" under *Sznewajs* if these critical limitations were never considered?

With regard to objective medical documentation, counsel asked Ms. Mackin to review Dr. Semino's medical records, including the January 15, 2007³⁶ record

³² ER 106-168.

³³ ER 136.

³⁴ 522 F.3d at 872-873.

³⁵ ER 134.

³⁶ ER 428-429.

which was Kludka's last visit *only three (3) weeks before* QDS's February 5, 2007

denial for any evidence of those findings:

Q: Now, as you reviewed...that's the January 15th, 2007 office visit with Mr. Kludka's psychiatrist, Dr. Semino, and this appears to be just, I think the last visit before the February 2007 denial, is there any documentation by Dr. Semino in there that you would find to be an objective medical finding?

A: Yes...the mental status exam, the results of that.

Q: Now, one of the findings under "Cognition" was "Concentration is impaired"; that box is checked.

A: That is correct.

Q: Did you see that?

A: Yes.

Q: Is that an objective finding, in your opinion, that the doctor is making on examination?

A: Yes. Can I add more to that?³⁷

Ms. Mackin was then asked to review Dr. Semino's medical record dated February 26th, 2007, the next visit following QDS's February 5, 2007 denial:

Q: And if it is true that Dr. Semino had evaluated Mr. Kludka that day and found that his concentration was impaired, that would be an objective medical finding for the Plan, wouldn't it?

A: Like I said, it is considered an objective finding but it does not describe the level of severity.³⁸

³⁷ ER 137-138.

³⁸ ER 139-140.

After realizing her testimony regarding Kludka's objective medical documentation did not help QDS's case, Ms. Mackin tried to dance around the testimony by playing naive and falling back on not knowing the alleged "severity" of Kludka's level of psychiatric functioning - but Dr. Semino provided a DSM Axis V GAF score on every visit which was an assessment of his functioning.

As addressed in detail in Kludka's Opening Brief [OB pages 36-45 and page 28, footnote 62], before and during the entire time Kludka's claim was on appeal, Dr. Semino consistently assessed his GAF Score at "**50**"³⁹ - but neither QDS in its denials⁴⁰ or its psychiatrist, Dr. Goldman in his cursory two (2) paragraphs of analysis in his peer report *ever addressed* this critical fact.⁴¹

Q: And what's covered in the DSM Axis V? I realize you're not a medical professional, but you're familiar with what the Axis V global assessment of functioning score is?

A: Yes.

Q: Do you know what a score of 50 translates into?

A: Yes.

Q: What?

A: **Severe.** (emphasis added).

³⁹ ER 70. An *Axis V GAF Score of "50"* translates into ***Serious symptoms*** (e.g., suicidal ideation, ***severe*** obsessional rituals, frequent shoplifting) OR any ***serious impairment*** in social, occupational or school functioning (e.g., no friends, unable to keep a job)(emphasis added) and see OB, page 28 footnote 62.

⁴⁰ ER 366-371, 376-388.

⁴¹ ER 259-265.

Kludka argued in his Opening Brief [OB pages 36-45] that because his medical condition deteriorated from Dr. Bevan's IME and never improved before QDS's final denial, it was unreasonable and unlawful for QDS to terminate benefits pursuant to *McOsker*, 279 F.3d at 589.

After reviewing Dr. Semino's medical records, Ms. Mackin agreed that based on Dr. Semino's medical records [OB pages 39-43], Kludka's medical condition did not improve:

Q: Would you agree that based on the prior three medical evaluations by Dr. Semino, the ones that we looked at in January and March and August during the time the appeal was being reviewed that at least in Dr. Semino's opinion, if we look at the Axis V as an indicator of functioning, Mr. Kludka's medical condition had not improved?

A: Based on the GAF score, that is correct.

The import of Dr. Semino and Kludka's therapist, Mr. Golden's opinions and the documentation of Kludka's deterioration in their medical records as well as Ms. Mackin's acknowledgement - is that Dr. Semino and Mr. Golden are the only psychiatric professionals who actually saw, evaluated and treated Kludka for the *fourteen (14) months that transpired* following Dr. Bevan's IME and before QDS's denial. As addressed *infra*, Dr. Goldman only provided an incomplete review of the records.

In summary, Kludka provides compelling *Abatie* extrinsic evidence regarding a plethora of ERISA procedural irregularities which precluded a full and fair review.

Ms. Dodson testified she did not make the decision in Kludka's case; it was outsourced to QDS's peer review physicians who were not ERISA fiduciaries and their reports were the only new evidence considered on appeal.

Ms. Dodson testified she never engaged Kludka in a dialogue regarding his need to provide objective medical documentation to perfect his claim - a clear violation of *Booton*, *Saffon* and *Montour*.

Ms. Dodson testified she did not even know how the Plan defined "Objective Medical Documentation" and never looked to see if Kludka's claim contained objective medical findings - a clear *Abatie* failure to investigate.

Ms. Dodson testified she emphasized and accepted 100% the opinions from QDS's reviewing physicians, Drs. Goldman and Sonne - given Kludka's voluminous evidence on appeal supporting his claim [OB pages 32-45] this is a clear *Glenn* violation.

Incredibly, Ms. Mackin testified the Plan did not consider Kludka's "subjective" complaints in violation of *Saffon* and that contrary to the two (2) reasons QDS denied his claim, Kludka's records did in fact contain objective

medical documentation and Dr. Semino's repeated Axis V GAF scores of "50" indicated his psychiatric condition was "severe."

Kludka proffers this *Abatie* extrinsic evidence to this Court to prove that a litany of ERISA procedural irregularities precluded a full and fair review.

Contrary to the district court's erroneous conclusion⁴² as well as that court's clear failure to consider this extrinsic evidence and QDS's repeated assertions throughout its brief [AB pages 20, 32] that Kludka does not indicate what evidence he would have offered if the irregularity did not occur - the fact is Kludka does not need to submit additional evidence, this Court simply needs to consider this evidence pursuant to *Glenn* and *Abatie's* combination of factors approach along with Kludka's evidence which proves he is disabled, but for the unlawful, unreasonable decision QDS made which was neither full or fair.

4. Since QDS reviewing physicians Drs. Goldman and Sonne are the only QDS medical professionals who could have reviewed all of Kludka's evidence on appeal - QDS's decision can only be reasonable if their reviews meet Glenn and Montour's standards

The only QDS doctors who reviewed Kludka's claim on appeal are Drs. Goldman and Sonne - they are the only QDS doctors who had access to all of Kludka's evidence and their reports which "list or reference" most of Kludka's evidence are in fact, seriously flawed because ***they only*** "list or reference" Kludka's

⁴² ER 21.

evidence but never address the evidence, weigh it, stated why they rejected it or stated why it was not reliable.

Moreover, Drs. Goldman and Sonne's reports are flawed particularly with regard to addressing the combination of Kludka's psychiatric issues coupled with the *exacerbation* his heart attack and resulting triple bypass surgery had on his psychiatric functioning.

As addressed below, Drs. Goldman and Sonne never considered this evidence.⁴³

Although QDS did, this Court cannot allow QDS to rely on Dr. Bevan's IME, Dr. Clark's medical records review or the Genex vocational report because as addressed in Kludka's Opening Brief [OB pages 45-51], those individuals did not review any of Kludka's evidence on appeal which ensued for well over a year after they reviewed his case.

Glenn makes it clear QDS could not lawfully or reasonably rely on Dr. Bevan's IME, the Genex report or Dr. Clark's review for the obvious reason they did not review the entire case.

And the court furthermore observed that MetLife had emphasized a certain medical report that favored a denial of benefits, had deemphasized certain other reports that suggested a contrary conclusion, and had failed to provide its independent vocational and medical experts with all of the relevant evidence.

⁴³ ER 252-258, 259-265.

Glenn, 128 S. Ct. at 2352.

Ms. Dodson's testimony above regarding the fact she "emphasized" and "relied 100%" on Drs. Goldman and Sonne's reports is most troubling given the obvious flaws in both reports which any reasonable *Glenn* accuracy measure should have detected - but none existed.

As addressed in Kludka's Opening Brief, *Glenn* also requires QDS to meet "higher than market place standards" in its review which applies to the evidence it based its decision on and *Montour* requires the consideration of a number of factors *in addition* to a conflict, by noting:

Under this rubric, the extent to which a conflict of interest appears to have motivated an administrator's decision is *one among potentially many relevant factors that must be considered*. Other factors that frequently arise in the ERISA context include the quality and quantity of the medical evidence, whether the plan administrator subjected the claimant to an in-person medical evaluation or relied instead on a paper review of the claimant's existing medical records, whether the administrator provided its independent experts "with all of the relevant evidence[.]" and whether the administrator considered a contrary SSA disability determination, if any (emphasis added).

Montour v. Hartford Life & Accident Ins. Co., 582 F.3d 933, 940 (9th Cir. 2009).

The district court's finding that QDS's decision did not abuse its discretion because it met *Montour's* "quality and quantity of evidence" ⁴⁴ requirement is

⁴⁴ ER 22.

therefore erroneous because the only doctors to have access to all of Kludka's evidence were Drs. Goldman and Sonne, and in particular, Dr. Goldman's review cannot survive even minimal scrutiny.

A. Close scrutiny of Drs. Goldman and Sonne's reports reveals most of Kludka's evidence was never addressed:

1. Medical Opinions from Dr. Semino and Mr. Golden that Kludka is disabled

The following disability forms from Kludka's treating therapist, Mr. Golden,⁴⁵ were "referenced" as being reviewed by Drs. Goldman and Sonne, but were not discussed, weighed or analyzed in their reports:

- 05/17/06 Owen Golden, Jr., CISW Statement of Disability – Found Kludka totally disabled from any occupation, condition unimproved.⁴⁶
- 12/28/06 Owen Golden, Jr., CISW Statement of Disability – Found Kludka totally disabled from any occupation.⁴⁷

Although Dr. Goldman "briefly summarizes" the following statements from Kludka's board certified psychiatrist, Dr. Semino and Mr. Golden in his report, he does not weigh the opinions, accept them or provide an explanation for why he obviously rejected them.

⁴⁵ Mr. Golden is a licensed clinical social worker and was therefore an "Approved Provider" pursuant to the Qwest Plan, see definition in Plan at ER 318.

⁴⁶ ER 221.

⁴⁷ ER 405.

Dr. Sonne, an internal medicine physician who reviewed Kludka's cardiac condition, did not address any of these opinions in his report which is critical since Kludka's records document the fact that his heart attack and triple bypass surgery exacerbated his psychiatric conditions:

- 01/11/07 Dr. Semino Psychiatric Statement of Disability – Found Kludka currently totally disabled, condition unimproved. ⁴⁸
- 01/11/07 Dr. Semino Mental Health Functional Capacities Evaluation - GAF 50, overwhelmed by anxiety, not suicidal. ⁴⁹
- 09/18/07 Owen Golden, Jr., LCSW Narrative Letter - GAF 55, Mr. Golden opines, “it is my opinion Mr. Kludka is permanently disabled due to his psychiatric symptoms.” ⁵⁰

In Dr. Goldman’s report, he confirms he reviewed the affidavit authored by Kludka’s brother, Mr. Roman Kludka. Dr. Goldman briefly summarizes Roman’s opinions, but does not offer an explanation as to why they were rejected, not accurate or unreliable and Dr. Sonne never discussed the affidavit.

- 09/18/07 Letter from Roman Kludka – he can barely get out of bed and cannot focus. He has a strong work ethic. ⁵¹

⁴⁸ ER 219.

⁴⁹ ER 227.

⁵⁰ ER 406.

⁵¹ ER 226.

2. *Medical records that do not appear to have ever been provided to Drs. Goldman and Sonne*

The following medical records which were critical to Kludka's case because they illustrated the severity of his psychiatric conditions and proved he continued to treat regularly with Dr. Semino and Mr. Golden and that are contained in the Administrative Record, *do not appear to have ever been provided* to Drs. Goldman or Sonne:

- 01/15/07 Dr. Semino Office Note – Kludka rates depression 5/10, anxiety 7/10, concentration poor, GAF 50, continue meds. ⁵²
- 02/26/07 Dr. Semino Office Note – Kludka states he cannot work because he is too anxious, cannot concentrate, panics, shakes, no SI, GAF 50, continue medications - Klonopin, Cymbalta, Neurontin. ⁵³
- 12/07/06 Owen Golden, Jr., LCSW Office Note - Moderate to severe anxiety, anxious. ⁵⁴

3. *Medical Records from Dr. Semino and Mr. Golden that were "referenced" but never analyzed*

Although the following medical records were "listed or referenced" as being reviewed by Drs. Goldman and Sonne, neither physician provided an analysis of

⁵² ER 428.

⁵³ ER 430.

⁵⁴ ER 438.

the records, or weighed them or explained why they were not reliable, accurate, rejected or ignored:

- 02/03/06 Dr. Semino Office Note - Kludka rated depression 5/10, anxiety 5/10, GAF 55, concentration decreased.⁵⁵
- 10/02/06 Owen Golden, Jr., LCSW Office Note - Moderate depression, anxiety severe.⁵⁶
- 11/01/06 Owen Golden, Jr., LCSW Office Note- Moderate depression, anxiety severe, denies SI.⁵⁷
- 11/06/06 Dr. Semino Office Note – Kludka references daily panic attacks, GAF 50, continue meds.⁵⁸
- 03/19/07 Dr. Semino Office Note – Kludka quit smoking, having palpitations, continue meds, GAF 50.⁵⁹

Dr. Goldman offers a brief summary of the following office notes in his peer review report, but fails to explain why the opinions and findings were rejected and these records were never addressed by Dr. Sonne:

- 05/04/07 Owen Golden, Jr., LCSW Office Note - Depression moderate, anxiety moderate, denies SI.⁶⁰

⁵⁵ ER 424.

⁵⁶ ER 436.

⁵⁷ ER 437.

⁵⁸ ER 426.

⁵⁹ ER 432.

- 08/29/07 Dr. Semino Office Note - Multiple health problems, MI last May, had bypass surgery, diagnosed with COPD, uses supplemental O2 if he goes out, high anxiety, sleeps many hours per day, no SI, Anxiety 8.5/10, depression 10/10, GAF 50, off Neurontin.⁶¹

Dr. Goldman's actual review is a scant two (2) paragraphs or 15 lines of actual analysis where none of Kludka's evidence is analyzed, addressed, credited or rejected for any reason.

Dr. Goldman also never addresses the impact Kludka's increased stress resulting from his heart attack and triple bypass surgery had on his psychiatric condition even though Mr. Kludka referenced the increased stress in his September 18, 2007 appeal letter⁶² and Mr. Golden also references it in his narrative letter dated September 18, 2007, only three (3) short weeks before QDS's final denial:

"Of significant note is Mr. Kludka's fear of dying has intensified since his recent cardiac symptoms/surgery."⁶³

Although Dr. Sonne⁶⁴ did address Kludka's cardiac problems and even found Kludka disabled for a period of time following his triple bypass surgery, an opinion never addressed or accepted by QDS on review - Dr. Sonne's report is fatally flawed because it is clear he did not have all the records to review and he

⁶⁰ ER 439.

⁶¹ ER 434.

⁶² ER 222-225, specifically at page ER 225.

⁶³ ER 406.

⁶⁴ ER 252-258.

never addresses the obvious fact Kludka suffered from a combination of problems after suffering the heart attack and bypass surgery, which included increased psychiatric stress and limitations and for this reason the analysis in his report is marred.

In summary, contrary to QDS's repeated argument in its brief that "Reed/QDS reviewed all the documentation provided by Kludka's treating providers" [AB page 24] and "The record plainly reflects that the Reed/QDS conducted a full and fair review of Kludka's claim. Each of the reviews is comprehensive, based on a thorough review of the medical records provided, and reasonable in its conclusions" [AB page 27] even minimal scrutiny proves otherwise.

It is for this reason that QDS's review fails *Glenn's* "higher than market place standards" requirement and the "quantity and quality" of Drs. Goldman and Sonne's reviews also fails the *Montour* test because their reports do not amount to even a "modicum" of evidence and QDS's reliance on their reports to deny Kludka's claim was not reasonable.

Moreover, as noted in Kludka's Opening Brief [OB pages 51-61] Drs. Goldman and Sonne's reviews cannot survive the scrutiny required by ERISA, specifically 29 C.F.R. § 2560.503-1(h)(2)(iv) and other circuits in *Willcox*, *Conger*,

Norris, Love, Majeski, Calvert, the Six Circuit decision in *Glenn*, and for this reason QDS's decision should be reversed.

5. *Kludka did treat consistently with Dr. Semino and Mr. Golden, QDS never addressed why his failure to obtain a sleep study or attend vocational rehabilitation were relevant*

In its October 9, 2007 final denial, QDS denied Kludka's claim in part because he failed to "follow the recommended treatment plan, and your treatment requires continuing care. You did not follow through on the treatment recommendation of your provider and or Qwest Disability Services." ⁶⁵

QDS stated "Kludka ignores this reason for denial in his brief" [AB page 30]. QDS is correct, Kludka did not address this in his brief because the reasons proffered by QDS for denying his claim are totally irrelevant.

First, Kludka did treat consistently with Dr. Semino and Mr. Golden and neither of them ever stated that Kludka failed to do so. Specifically, Kludka was personally evaluated by Dr. Semino on February 3, 2006, November 6, 2006, January 15, 2007, February 26, 2007, March 19, 2007 and August 29, 2007 - every 3 months. ⁶⁶ Kludka saw Mr. Golden on October 2, 2006, November 1, 2006, December 7, 2006 and May 4, 2007. ⁶⁷

⁶⁵ ER 377.

⁶⁶ ER 424, 426, 428, 430, 432, 434.

⁶⁷ ER 436-439.

Critically, neither Dr. Semino or Mr. Golden ever stated in their medical records that Kludka was not following a recommended treatment plan or not seeing them as frequently as was necessary. Dr. Semino suggested at one time for Kludka to obtain a sleep study which he never did. In her February 26, 2007 office note, Dr. Semino documents Kludka did not obtain the sleep study "because of fear"⁶⁸ and she never opined the sleep study was a significant issue in his care, never pressed Kludka to get the test done or suggested that Kludka could return to work if he had the study done.

Furthermore, in his IME report Dr. Bevan never addressed that a sleep study was necessary and neither Drs. Goldman or Sonne addressed the sleep study, stated it was necessary or called either Dr. Semino or Mr. Golden to ask about the importance of the sleep study and never opined Kludka could return to work if he had undergone the study. It is important to also note that Dr. Sonne is a Member of the American College of Sleep Medicine.⁶⁹

The other reason QDS offered for its denial is that Kludka did not attend vocational rehabilitation. First, Mr. Golden addressed why Kludka never attended in his narrative letter dated September 18, 2007:

During the course of his treatment, Mr. Kludka's symptoms have precluded him the opportunity to return to employment on any level. Given this, the topic of returning to work has not been addressed in

⁶⁸ ER 430.

⁶⁹ ER 258.

his treatment, nor was it a goal of his treatment. It is my opinion Mr. Kludka is permanently disabled due to his psychiatric symptoms.⁷⁰

Dr. Semino in her January 11, 2007, Qwest Health Care Provider's Statement of Disability when asked about whether Kludka would benefit from vocational rehabilitation she answered, "possibly" in addition to the fact Kludka "cannot tolerate stress of any kind."⁷¹ Hardly an affirmation of QDS's argument that Kludka did not attend as requested.

It is important to note the Qwest Plan did not even reference vocational rehabilitation and does not even define the term.⁷²

For her part, Ms. Dodson testified the reason QDS provided that Kludka did not participate in a recommended treatment plan was "cut and pasted from the original denial letter"⁷³ and she never talked to Kludka about the issue.⁷⁴ Ms. Dodson also provided the following testimony with regard to Kludka and vocational rehabilitation:

Q: Did you ever talk to him about whether or not he had gone to vocational rehabilitation?

A: No.

Q: Okay. And did you ever offer to see what you could do to get him into vocational rehabilitation?

⁷⁰ ER 407.

⁷¹ ER 219.

⁷² ER 313-316.

⁷³ ER 198.

⁷⁴ ER 199.

A: No.

Q: Okay. Do you know whether or not he was even able to afford to go to vocational rehabilitation?

A: No.⁷⁵

Given that Kludka's sole source of income was his Social Security disability benefit after QDS terminated his benefits and he was struggling to survive financially, even if one assumes he could have emotionally participated in vocational rehabilitation - Ms. Dodson's testimony raises serious questions regarding whether QDS acted as his fiduciary or met *Glenn's* higher than market place standards when it terminated benefits for his failure to do something that it had the ability to assist him in but offered nothing.

⁷⁵ ER 199.

II. CONCLUSION WITH RELIEF SOUGHT

For all the foregoing reasons, QDS did not provide a full and fair review as required by ERISA and it abused any discretion afforded by the Qwest Plan.

Kludka again respectfully asks this court to reverse the district court's denial of his motion for summary judgment and to grant his appeal.

Kludka also respectfully requests an award of pre-judgment interest on any benefits due in addition to an order awarding his reasonable attorney's fees pursuant to 29 U.S.C. § 1132(g) and costs incurred.

Respectfully Submitted,

Dated: February 22, 2011

By: /s/Scott E. Davis

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 6,529 words.

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore