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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Russell Keith Howard,
Plaintiff,
v.
Blue Cross Blue Shield of Arizona,
Defendant.

No. CV-16-03769-PHX-JJT

ORDER

15 At issue is Plaintiff’s Motion to Admit Certain Non-Record Documents (Doc. 78,
16 Mot.). Defendant filed a Response in Opposition to the motion (Doc. 80, Resp.).

17 **I. FACTUAL BACKGROUND**

18 Plaintiff is an employee of Sunstate Equipment Co., LLC (Sunstate). (Doc. 1,
19 Compl. ¶ 6.) Defendant is the medical insurance provider for Sunstate employees,
20 including Plaintiff. (Compl. ¶ 6.) After Defendant denied Plaintiff’s claims for coverage
21 related to cancer treatment, Plaintiff filed an action under the Employee Retirement
22 Income Security Act (“ERISA”). (Doc. 1, Compl.)¹

23 On June 13, 2018, Plaintiff filed an Opening Brief (Doc. 77, Pl. OB) and a Motion
24 for Admission of Documents (Mot.). Plaintiff seeks to admit the following: Blue Cross
25 Blue Shield of Arizona’s (“BCBSAZ”) Appeal Guidelines and Procedures manual

26
27 ¹ Plaintiff’s original complaint was based on state law contract claims. In his
28 subsequent amended complaints, Plaintiff made clear that his claim is governed by
ERISA. (Docs. 21, 26, 33). Defendant moved to dismiss Plaintiff’s state law claims due
to ERISA preemption and this Court granted the motion on July 12, 2017 (Doc. 47). The
issue before the Court is now governed solely by ERISA.

1 (Doc. 77-1); discovery responses served on Plaintiff (Docs. 77-2 and 77-3); proof of
2 payment by Plaintiff of the cost of treatment for which he seeks recovery of benefits
3 (Doc. 77-4); two public website materials posted by Harvard Pilgrim Health Care and
4 Health Care Service Corporation (Docs. 77-5 and 77-6); and all documents produced by
5 Defendant in response to discovery requests. (Mot.) In response, Defendant objects only
6 to admission of the BCBSAZ Appeal Guidelines and Procedures manual (Doc. 77-1) and
7 the materials from the public websites of Harvard Pilgrim and Health Care Service
8 Corporation (Docs. 77-5 and 77-6). (Resp.)

9 II. LEGAL STANDARD

10 In ERISA cases, whether evidence outside the administrative record may be
11 admitted depends on the whether the court reviews the benefits decision under an abuse
12 of discretion or de novo standard. *See Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955
13 (9th Cir. 2006). The Ninth Circuit recognized that “in general, a district court may review
14 only the administrative record when considering whether the plan administrator abused
15 its discretion, but may admit additional evidence on de novo review.” *Id.* at 970.

16 When a plan grants the administrator discretion in approving or denying a claim,
17 courts apply an abuse of discretion review to the administrator’s decision. *Id.* at 969. The
18 more lenient abuse of discretion standard is limited to the evidence in the administrative
19 record. *Id.* at 970 (“[I]n general, a district court may review only the administrative
20 record when considering whether the plan administrator abused its discretion”). However,
21 a potential conflict of interest may be proven through evidence outside the administrative
22 record, as long as the evidence is used to show “the nature, extent, and effect on the
23 decision-making process of any conflict of interest.” *Id.* at 970. The most obvious conflict
24 of interest occurs when the plan administrator “both administers the plan and funds it,”
25 therefore acting as both administrator and fiduciary. *Id.* at 967. When that is the case, the
26 plaintiff “will have the benefit of an abuse of discretion review that always considers the
27 inherent conflict . . . even in the absence of ‘smoking gun’ evidence of conflict.” *Id.* at
28 969. In any case of potential conflict of interest, even when the administrator is not a

1 fiduciary but may have some other conflict, the court may look outside the record to
2 determine whether such a conflict exists and ultimately “must decide in each case how
3 much or how little to credit the plan administrator’s reason for denying insurance
4 coverage.” *Id.* at 968. While this limited exception allows extrinsic evidence under the
5 abuse of discretion standard when necessary to determine whether a conflict of interest
6 affected the administrator’s decision, “the decision on the merits, though, must rest on the
7 administrative record once the conflict (if any) has been established.” *Id.*

8 On the other hand, when a plan confers no discretion on the administrator, a court
9 will review the decision de novo. *Id.* at 969. Under this standard, the court is permitted to
10 examine evidence outside of the administrative record. *Id.* at 970 (“While under an abuse
11 of discretion standard our review is limited to the record . . . this limitation does not apply
12 to de novo review.”) (quoting *Jebian v. Hewlett-Packard Co. Emp. Benefits Org. Income*
13 *Prot. Plan*, 349 F.3d 1098, 1110 (9th Cir. 2003)). Courts are not required to accept
14 extrinsic evidence, and should review it only “when circumstances clearly establish that
15 additional evidence is necessary to conduct an adequate de novo review.” *Jebian*, 349
16 F.3d at 1110 (quoting *Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan*,
17 46 F.3d 938, 944 (9th Cir. 1995)).

18 As a default, the Ninth Circuit applies a de novo review, and in order to trigger
19 “the more lenient abuse of discretion, the plan must unambiguously provide discretion to
20 the administrator.” *Abatie*, 458 F.3d at 963. In deciding whether the plan administrator
21 has discretion, “[t]he essential first step of the analysis . . . is to examine whether the
22 terms of the ERISA plan unambiguously grant discretion to the administrator.” *Id.* While
23 “[t]here are no ‘magic’ words that conjure up discretion . . . the Supreme Court has
24 suggested that a plan grants discretion if the administrator has the ‘power to construe
25 disputed or doubtful terms’ in the plan.” *Id.* (quoting *Firestone Tire & Rubber Co. v.*
26 *Bruch*, 489 U.S. 101, 111 (1989)). The Ninth Circuit has held that wording “granting the
27 power to the interpret plan terms and to make final benefits determinations” is sufficient
28 to confer discretion on the administrator. *Id.* But plans “are insufficient to confer

1 discretionary authority on the administrator when they do not grant any power to construe
2 the terms of the plan.” *Id.* at 964.

3 III. ANALYSIS

4 Here, Plaintiff wishes to admit several documents outside of the
5 administrative record, only some of which are contested. Defendant does not object to the
6 admission of discovery responses served on Plaintiff (Docs. 77-2 and 77-3), proof of
7 Plaintiff’s payment for his medical treatment (Doc. 77-4), or documents produced in
8 response to discovery requests. (Resp.) Those documents are therefore admitted.

9 As to BCBSAZ’s manual (Doc. 77-1) Defendant argues that the manual Plaintiff
10 seeks to admit is the 2017 version, which is inapplicable to Plaintiff’s 2014 claim. (Resp.)
11 Defendant also points out that the 2014 manual is currently part of the administrative
12 record. (Resp. at 1.) Indeed, Plaintiff cites to the 2014 version throughout his Opening
13 Brief (Pl. OB). The Court finds no need to admit the 2017 manual when it has no bearing
14 on Plaintiff’s case. Thus, Plaintiff’s motion is denied as to Doc. 77-1.

15 The only remaining evidence which Plaintiff seeks to admit from outside the
16 administrative record are two public website materials posted by Harvard Pilgrim Health
17 Care and Health Care Service Corporation. (Mot.) Specifically, these pages describe the
18 coverage that those two insurance companies provide for Plaintiff’s cancer treatment.
19 (Resp. at 1.) Presumably, Plaintiff seeks to admit them to show that other insurers cover
20 his treatment and that it was unreasonable for Defendant not to. Defendant argues that the
21 extrinsic evidence goes to the merits of Plaintiff’s claim—not to any alleged conflict of
22 interest. (Resp. at 2.)

23 Unsurprisingly, Plaintiff argues in his Opening Brief that the plan administrator
24 failed to exercise discretion and thus the Court should apply a *de novo* review standard,
25 which would permit extrinsic evidence. (Pl. OB at 5–12.) Plaintiff also argues that
26 decisions about his cancer treatment were the product of a conflict of interest because
27 Defendant is a fiduciary to Sunstate’s medical plan and those covered by the plan. (Pl.
28 OB at 12–13.) Also unsurprisingly, Defendant argues the opposite—that the abuse of

1 discretion standard should apply and there was no conflict of interest, meaning the Court
2 should not examine any evidence outside the administrative record. (Doc. 60 at 8–9.)

3 By its plain language, the plan at issue gives its administrator, Defendant,
4 “discretionary authority to determine extent of coverage.” (Doc. 65-1 at 14). Specifically,
5 Defendant determined that Plaintiff’s treatment was not “medically necessary,” which it
6 has discretion to decide under the plan. (Doc. 65-1 at 14) (“BCBSAZ, or BCBSAZ’s
7 contracted vendor, in its sole and absolute discretion, decides whether a service is
8 medically necessary.”). Based on the plain terms of the plan, abuse of discretion review
9 applies. *See Ingram v. Martin Marietta Long Term Disability Income Plan for Salaried*
10 *Emps. of Transferred GE Operations*, 244 F.3d 1109, 1113 (“it is ‘easy enough’ to confer
11 discretion unambiguously” by using the word “discretion”) (quoting *Sandy v. Reliance*
12 *Standard Life Ins. Co.*, 222 F.3d 1202, 1206 (9th Cir. 2000)).

13 But while Plaintiff does not seem to dispute that the plan on its face confers
14 discretion, he argues that the administrator nonetheless failed to exercise that discretion.
15 (Pl. OB at 6.) Plaintiff claims that Defendant’s administrator “merely quoted” the
16 applicable medical guidelines to determine that his treatment was not medically
17 necessary, and that Defendant never “analyzed his health, life expectancy, lifestyle or
18 treatment objectives . . . [and] [n]either did they compare the likely effectiveness of
19 [Plaintiff’s] therapy to any other forms of treatment.” (Pl. OB at 6.) It is true that all the
20 administrator had to do was reference the applicable Medical Coverage Guidelines
21 (“MCGs”) for a conclusion that, under the plan, Plaintiff’s “therapy is considered not
22 medically necessary . . . based upon insufficient evidence to support improvement of the
23 net health outcome.” (Doc. 63-1 at 6). But even if the administrator’s discretion was
24 limited, the plan’s unambiguous language keeps it within abuse of discretion review.
25 *Abatie*, 458 F.3d at 963 (“we have repeatedly held that similar plan wording—granting
26 the power to interpret plan terms and to make final benefits determinations—confers
27 discretion”). *Abatie* acknowledges one case where extremely limited discretion made de
28 novo review appropriate, but there, the plan’s “provisions merely identified the plan

1 administrator's tasks and bestowed no power to interpret the plan." *Id.* Here, the plan
2 unambiguously bestowed the power of discretion on the plan administrator, and in
3 choosing and applying the correct guidelines, the administrator exercised some minimal
4 amount of discretion. Thus, absent a conflict of interest, the Court will apply an abuse of
5 discretion standard.

6 The Court also finds no discernible conflict of interest which would allow the
7 court "in its discretion, [to] consider evidence outside the administrative record to decide
8 the nature, extent, and effect on the decision-making process of any conflict of interest."
9 *Abatie*, 458 F.3d at 970. As Defendant points out, there is no sign of the inherent conflict
10 that occurs when a plan administrator "both administers a plan and funds it" because
11 Defendant does not fund the plan and thus had no financial incentive to deny Plaintiff's
12 claims. (Doc. 72 at 11.) While *Abatie* recognizes the risk of potential conflicts outside
13 this most elementary one and dictates that courts should consider those conflicts "even in
14 the absence of 'smoking gun' evidence," parties raise no such conflict. *Abatie*, 458 F.3d
15 at 967. Further, even if the plan administrator had a conflict of interest, the Court fails to
16 see how introduction of the plans of other health insurers would bear on that conflict of
17 interest. It is always within the Court's discretion to admit evidence outside the
18 administrative record. *Abatie*, 458 F.3d at 970 ("The district court may, in its discretion,
19 consider evidence outside the administrative record.") The Court is not required to admit
20 any extrinsic evidence, particularly when the proposed evidence has no bearing on an
21 alleged conflict of interest.

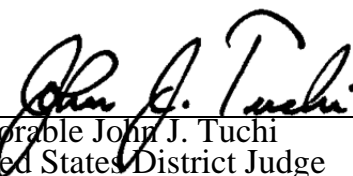
22 IV. CONCLUSION

23 In denying Plaintiff's claim, the plan administrator was granted discretion and
24 used that discretion to select and apply the correct listings from the MCGs. Without any
25 discernible conflict of interest or any evidence that would assist the Court in evaluating
26 the effect of such a conflict, the Court will review the administrator's decision for abuse
27 of discretion. Under that standard, the Court may not admit evidence outside the
28 administrative record.

1 IT IS SO ORDERED denying Plaintiff's Motion to Admit Certain Non-Record
2 Documents (Doc. 78) as to the 2017 Appeal Policies (Doc. 77-1) and the public website
3 materials of Harvard Pilgrim Health Care and Health Care Service Corporation (Docs.
4 77-5 and 77-6).

5 IT IS FURTHER ORDERED granting undisputed portions of Plaintiff's Motion to
6 Admit Certain Non-Record Documents (Doc. 78) as to the discovery responses served on
7 Plaintiff (Docs. 77-2 and 77-3), proof of payment by Plaintiff of the cost of his treatment
8 (Doc. 77-4), and all documents produced by Defendants in response to discovery requests
9 and cited by Plaintiff, including the Record at 1058–1061, 1072, 1077, 1145–1266,
10 1283–1285, 1334, 1337, 1340, 1434, 1482, 1487, and 1491–1494.

11 Dated this 2nd day of November, 2018.

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13 
14 Honorable John J. Tuchi
United States District Judge