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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUSAN BEACH, Plaintiff-Appellant, v. LIBERTY LIFE ASSURANCE COMPANY OF BOSTON, Defendant-Appellee.	No. 17-16492 D.C. No. 5:15-cv-04737-BLF MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
Beth Labson Freeman, District Judge, Presiding

Argued and Submitted February 6, 2019
San Francisco, California

Before: THOMAS, Chief Judge, PAEZ, Circuit Judge, and FEINERMAN,[**] District Judge.

Susan Beach appeals the district court's denial of long-term disability benefits under the terms of the Leland Stanford Junior University Long Term Disability Plan (the "plan"), which is administered by Liberty Life Assurance

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

Company ("Liberty"). We affirm the denial of benefits under the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. § 1001 *et seq*. We review a denial of benefits under an ERISA plan *de novo* and mixed questions of law and fact, including whether the appellant was disabled, for clear error. *Deegan v. Cont'l Cas. Co.*, 167 F.3d 502, 506 (9th Cir. 1999). Because the parties are familiar with the history of this case, we need not recount it here.

The district court did not clearly err in its determination that Beach was not disabled under the terms of the policy, nor did it commit any legal errors. To succeed on her claim, Beach was required to establish that she is disabled under the terms of the plan. *Muniz v. Amec Constr. Mgmt., Inc.*, 623 F.3d 1290, 1295–96 (9th Cir. 2010). The relevant plan provision—the "any occupation" standard—provides that an individual is entitled to long-term benefits only when she is "unable to perform, with reasonable continuity, all of the material and substantial duties of [her] own or any other occupation for which [she] is or becomes reasonably fitted by training, education, experience, age and physical and mental capacity." Ample evidence in the record supports the determination that Beach retained the ability to sustain employment, including the opinion of Beach's treating physician that she was not disabled, Beach's own self-reported ability to sit for five to six hours and stand for three hours, and multiple medical opinions

stating that Beach could sustain at least part-time work. In light of this evidence, the district court did not clearly err in denying benefits under the "any occupation" standard.

Harlick v. Blue Shield of California, 686 F.3d 699 (9th Cir. 2012), does not compel the opposite conclusion. *Harlick* holds that a plan administrator must rely on a consistent reason throughout its initial denials and subsequent litigation in order to permit a claimant to adequately challenge the denial of benefits. *Id.* at 719–20. Thus, a plan administrator cannot assert a new reason for the denial of benefits during litigation upon which it had not relied in its initial determinations. *Id*.

Before the district court, Liberty consistently relied on the "any occupation" standard as the basis for denial. In addition, Liberty continuously supported its denial with the opinions and reports of Beach and her physicians—many of which were explicitly summarized in the initial determinations, and all of which were properly incorporated in the record. Liberty did advance some new factual arguments, but these did not constitute a new reason prohibited by *Harlick*. The reason advanced by Liberty was founded solely on information in the record and adequately permitted Beach to pursue her appeals and litigation.

AFFIRMED.