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United States District Court, C.D. California.

Paul **Luu**

v.

First Unum Life Insurance Company

Case No. SACV 18-00970-JVS(JDEx)

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Attorneys and Law Firms

Lisa Bredahl, Deputy Clerk, Attorneys Present for Plaintiffs: Not Present

Not Present, Court Reporter, Attorneys Present for Defendants: Not Present

Proceedings: [IN CHAMBERS] Order Regarding Motion to Augment the Administrative Record

The Honorable James V. Selna

***1** Plaintiff Paul **Luu** ("**Luu**") filed a motion to augment the administrative record in his case. (Mot., Docket No. 20-1.) Defendant **First Unum Life Insurance** Company ("**First Unum**") opposed the motion and filed a motion to strike certain evidence submitted in support of **Luu's** motion. (Opp'n, Docket No. 24; Mot., Docket No. 25.) **Luu** filed a reply and a response to the motion to strike. [1] (Reply, Docket No. 27; Response, Docket No. 28.)

For the following reasons, the Court **grants in part Luu's** motion to augment the administrative record.

I. BACKGROUND

This case involves **Luu's** claim to entitlement to long-term disability benefits under ERISA. **First Unum** is the insurer of benefits under the MUFG Union Bank Long-Term Disability Plan (the "LTD Plan"), employee welfare benefits plans under ERISA, and acted in a fiduciary capacity as a plan administrator and claims administrator responsible for paying benefits under the Plan and making decisions regarding eligibility for benefits under the Plan. (Complaint, Docket No. 1 ¶ 5.) **Luu** was employed by Union Bank, where he held the position of Sr. Software Engineer on his last day of work, February 12, 2015. (Id. ¶ 7.) **Luu** claims that he is and has been suffering from persistent and disabling neck and arm symptoms, chronic cervical radiculopathy, and ulnar and median nerve neuropathy. (Id.)

Under the LTD Plan, **Luu** was, and is, entitled to receive monthly long-term disability benefits if, after the expiration of an elimination period, and due to sickness or injury, he is unable to perform the substantial and material duties of his occupation for the **first** 24 months of disability, and thereafter if unable to perform the duties of any occupation for which he is reasonably fitted by education, training, or experience. (Id. ¶ 8.)

Luu timely submitted a claim for long-term disability benefits. (Id. ¶ 9.) **Unum** denied the long-term disability benefits on November 5, 2015 ("initial denial" or "initial denial letter"). (Id.) The initial denial letter stated that **Luu** had 180 days from his receipt of the letter in which to request an appeal. (Initial Denial, Docket No. 20-4, Ex. 2 at p. 6.) **Unum's** claims policy, as set forth in its Claims Manual, is to allow for an additional 10 days for mailing time. (Docket No. 20-5, Ex. 3.) **Luu** indicates that as a layperson, he did not have the knowledge of how he was supposed to present an appeal. (Complaint, Docket No. 1 ¶ 10.)

On January 27, 2016, **Luu** mailed a letter appealing the decision to **First Unum**. (Appeal, Docket No. 20-6, Ex. 4.) **Luu** enclosed the following with his appeal letter: (1) Attending Physician Statement dated 1/13/2016; (2) Primary Treating Physician's Progress Report (PR-2) dated 12/23/2015 by Dr. Max Matos; (3) Secondary Treating Physician's Progress Report (PR-2) dated 9/10/2015 by Dr. Max Matos. (Id. at p. 2.) **Luu's** appeal letter stated the following:

> ***2** Documents you obtained from Dr. Hao Thai, M.D. and Dr. Nelson Flores, PhD indicate that I am undergone treatment for my physical and mental impairment, respectively, and both of them placed me on temporary total disability, meaning that I am not able to work and that I need further treatment. You, however, denied my disability benefits, seemingly opining that my impairments do not meet the criteria for eligible benefits. It appears that your decision was based on your opinion that my impairments

> were not severe enough to be eligible for benefits. Apparently, your decision was in contrast with medically professional expertise of Dr Thai and Dr. Flores.
>
> Due to the severity, intensity and persistency of pain on both my shoulders, right wrist, neck and lower back. I am currently under medical care of Dr Max Matos, orthopedic surgeon, at Southland Spine and Rehabilitation Medical Center.... I underwent cortisone injections to my left shoulder on January 04, 2016 and my right shoulder and my right wrist on January 11, 2016. Dr. Matos recommended surgery of my cervical spine and lumbar spine. On February 19, 2016, I will have an appointment with Dr Arash Yaghoobian, orthopedic surgeon, for second opinion.

(Id. at 1–2) (emphasis added).

On February 3, 2016, First Unum sent Luu a letter acknowledging receipt of his appeal and stated its willingness to make an appeal decision within 45 days of receipt of his written appeal. (Letter, Docket No. 24-18, Ex. K.) On February 9, 2016, First Unum Appeals Specialist Amy Williams ("Williams") spoke with Luu and informed him that she had reviewed his claim file and records submitted on appeal and that the next step was appellate medical review. (Claim Document, Docket No. 24-19, Ex. L.) Luu indicated that he understood the steps for the appeals process and asked if he could submit his upcoming orthopedic evaluation because he believed that a recommendation for surgery would support his claim of impairment. (Id.)

On February 29, 2016, Dr. Wade Penny ("Dr. Penny") reviewed Luu's records and concluded that there was no support for impairment from the sedentary physical demands of the vocational review. (Dr. Penny Report, Docket No. 20-11, Ex. 9 at p. 5.) On March 9, 2016, Luu submitted an Initial Neurosurgical Consultation report by Dr. Ali H Mesiwala ("Dr. Mesiwala") dated February 11, 2016. (Dr. Mesiwala Report, Docket No. 20-9, Ex. 7.) On March 10, 2016, Dr. Penny wrote an addendum to his prior report after reviewing Dr. Mesiwala's report and indicated that his prior opinion had not changed. (Addendum, Docket No. 20-12, Ex. 10 at p. 2–3.) On March 14, 2016, Williams informed Luu that First Unum expected to have the appeal decision by the end of the week. (Claim Document, Docket No. 24-20, Ex. M.) On March 18, 2016, First Unum denied Luu's appeal of the claim for benefits on the basis that Luu was able to perform the duties of his occupation ("final denial" or "final denial letter"). (Complaint, Docket No. 1 ¶ 11.)

On April 12, 2016, Luu's current counsel wrote a letter to First Unum requesting documents that First Unum relied on in its denial. (Metzger Letter, Docket No. 24-22, Ex. O.) On April 21, 2016, First Unum sent Luu's attorney a copy of Luu's claim file. (Response, Docket No. 24-23, Ex. P.)

On May 4, 2018, Luu's attorney submitted another appeal, claiming that Luu had never been provided a full and fair review previously due to First Unum's failure to comply with ERISA regulations regarding notice. (Complaint, Docket No. 1 ¶ 12.) Luu's appeal included information that he claims could have been previously provided in the first appeal had First Unum provided the necessary notifications and disclosures pursuant to the ERISA regulations. (Id.) Luu's attorney asked that First Unum consider additional medical records including: (1) EMG report, March 18, 2015; (2) Dr. Glousman's March 7, 2016 recommendation for surgery; (3) Functional Capacity Evaluation ("FCE"), May 11, 2016; (4) reports and treatments from Dr. Matos dated January 4, 2016, January 11, 2016, February 1, 2016, April 12, 2016, and June 30, 2016; (5) Dr. Mesiwala's report indicating compression of the spinal cord and recommending surgery, steroid injections, and physical therapy. (Docket No. 20-13, Ex. 11 at p. 2–3.) Luu's attorney likewise requested review of Dr. Bliss's December 2, 2016 supplemental QME report, Dr. Mesiwala's April 13, 2017 report, and an October 2017 EMG revealing evidence of radiculopathy and neuropathy. (Id. at p. 3–4.) First Unum refused to review this information and maintained that Luu's administrative remedies were exhausted in 2016. (Complaint, Docket No. 1 ¶ 13.)

***3** On June 3, 2018, Luu brought suit against First Unum for (1) breach of plan and clarification of rights to future benefits under the terms of the plan and (2) breach of fiduciary duty and claim for injunctive relief. (Id. at 5, 7.) Luu now moves the Court for an order to admit additional medical records, including (1) EMG report, March 18, 2015; (2) Dr. Glousman's March 7, 2016 recommendation for surgery; (3) FCE, May 11, 2016; and (4) a report from Dr. Matos dated June 30, 2016. (Mot., Docket No. 20-1 at 18.) In addition, he seeks to admit a rebuttal letter from Dr. Matos dated December 31, 2018 that responds

to First Unum's medical review upon which it based its final decision, either as part of the administrative record or under the Court's discretion as necessary for a *de novo* review. (Mot., Docket No. 20-1 at 2; Dr. Matos Letter, Docket No. 20-19, Ex. 17.)

II. LEGAL STANDARD

Under ERISA regulations on claims procedure, plan administrators must follow certain practices when processing and deciding plan participants' claim. Abatie, 458 F.3d at 971. Ordinarily, an administrator's failure to comply with such procedural requirements does not alter the standard of review. Id. However, when a plan administrator has failed to follow a procedural requirement of ERISA, the court may consider evidence outside the administrative record. Id. at 972; Burke, 544 F.3d at 1028. "[T]he court may take additional evidence when the irregularities have prevented full development of the administrative record. In that way the court may, in essence, recreate what the administrative record would have been had the procedure been correct." Abatie, 458 F.3d at 972.

Under ERISA, adequate notice in writing must be provided to any participant whose benefit claim has been denied. 29 U.S.C. § 1133(1). Specifically, ERISA mandates that every employee benefit plan shall:

> (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth specific reasons for such denial, written in a manner calculated to be understood by the participant, and
>
> (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

29 U.S.C. § 1133 (emphasis added). Furthermore, under the ERISA regulations for claims procedure, 29 C.F.R. § 2560.503–1(g)(iii), upon an adverse benefit determination, the notification should set forth "[a] description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary."

III. DISCUSSION

A. Two Year Delay

First Unum argues first that Luu's motion should be denied because he unreasonably delayed more than two years after the March 2016 Final Decision on Appeal to attempt to submit the 2015 and 2016 additional records. (Opp'n, Docket No. 24 at 10.) First Unum points out that although Luu had an attorney involved in the case since April 2016 —when Luu's counsel sent a request for the file related to Luu's appeal, he waited until May 4, 2018 to inform First Unum of the additional records. (Id. at 11.) Moreover, First Unum highlights the fact that some of the records were available to Luu prior to the date of the March 2016 Final Decision; yet, Luu chose not to submit those records during his appeals process when he submitted other evidence. (Id.) First Unum contends that augmenting the administrative record under these circumstances would be inappropriate, particularly in light of the fact that Luu had never requested any extensions related to his appeal when his attorney got involved in the case in April of 2016 and when extensions theoretically may have been available. [2] (Id. at 12–13.) See Micha v. Sun Life Assur. Co. of Canada, 789 F. Supp. 2d 1248, 1266 (S.D. Cal. 2011) (emphasizing that the regulations permit only a 90 day extension for results of reviews). Since two years has now passed, First Unum states that it has been prejudiced because it could not "further investigate or clarify Plaintiff's functionality during that 2015 snapshot in time and allowing the late submission of evidence "bypasses the administrative process" such that "claimants could constantly submit new information through litigation to counter information the administrator relied upon in its denial," which would "frustrate the purpose of ERISA." (Opp'n, Docket No. 24 at 13.)

***4** Luu disputes the availability of any theoretical extension, citing the 2018 letter as evidence that First Unum considered the Final Decision to preclude additional evidence in the administrative record; thus, Luu argues that it would not have mattered if Luu had attempted to submit additional evidence one day after the Final Decision or two years later. (Reply, Docket No. 27 at 1.) Luu likewise disputes First Unum's contention that it would be prejudiced by the augmentation of the administrative record because the records, doctors, and Luu are all currently available. (Id. at 5.)

While there may be circumstances in which First Unum could have been prejudiced by a two-year delay in attempting to file an appeal, the First Unum has not shown that it was prejudiced in this case, particularly when the doctors and records are still available; thus, the Court will consider Luu's motion.

B. Standard for Considering the Evidence

The parties disagree about the standard that should apply for considering the evidence that Luu seeks to add to the administrative record. First Unum cites Opeta for the proposition that "the district court should exercise its discretion to consider evidence outside of the administrative record '*only* when circumstances *clearly establish* that additional evidence is *necessary* to conduct an adequate de novo review of the benefit decision.' " Opeta v. Nw. Airlines Pension Plan for Contract Employees, 484 F.3d 1211, 1217 (9th Cir. 2007) (quoting Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan, 46 F.3d 938, 944 (9th Cir.1995); Quesinberry v. Life Ins. Co. of N. Am., 987 F.2d 1017, 1025 (4th Cir.1993) (en banc)) (emphasis in original).

In Opeta, the Ninth Circuit held that the district court abused its discretion by admitting extrinsic evidence submitted by defendant at trial to support its denial of disability benefits. 484 F.3d 1213. In making its determination, the Ninth Circuit cited a "nonexhaustive list of exceptional circumstances where introduction of evidence beyond the administrative record could be considered necessary," including: (1) "claims that require consideration of complex medical questions or issues regarding the credibility of medical experts;" (2) "the availability of very limited administrative review procedures with little or no evidentiary record;" (3) "the necessity of evidence regarding interpretation of the terms of the plan rather than specific historical facts;" and (4) "circumstances in which there is additional evidence that the claimant could not have presented in the administrative process." Id. at 1217 (quoting Quesinberry, 987 F.2d at 1027).

Luu contends that First Unum's reliance on Opeta is misplaced because Luu's motion seeks relief under Abatie, not under Opeta. (Reply, Docket No. 27 at 18; Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955 (9th Cir.2006) (en banc)). According to Luu, the Opeta standard for admitting only that extrinsic evidence necessary for conducting a *de novo* review does not apply because this "is not a motion seeking to admit extrinsic evidence outside the administrative record; rather, this is a motion that seeks to add additional documents *to the administrative record* ... as the remedy for Defendant's procedural violation of ERISA." (Reply, Docket No. 27 at 18) (emphasis in original).

The Court agrees that Abatie is applicable. Opeta involved the defendant's submission of extrinsic evidence to *support* its decision for denial, factual circumstances that are much different from the present case in which Luu argues that additional evidence should be added to the administrative record due to procedural irregularities in the decision to deny benefits. Notably, Opeta cites Abatie throughout the decision, including with regard to appropriate standards of review. See Opeta, 484 F.3d at 1216–17, 1219 (citing Abatie, 458 F.3d 955, 963–65). Abatie makes clear the following:

> ***5** [W]hen an administrator has engaged in a procedural irregularity that has affected the administrative review, the district court should 'reconsider [the denial of benefits] after [the plan participant] has been given the opportunity to submit additional evidence.
>
> ... [I]f the plan administrator's procedural defalcations are flagrant, de novo review applies. And ... when de novo review applies, the court is not limited to the administrative record and may take additional evidence.
>
> Even when procedural irregularities are smaller, though, and abuse of discretion review applies, the court may take additional evidence when the irregularities have prevented full development of the administrative record. In that way the court, may, in essence, recreate what the administrative record would have been had the procedure been correct.

Abatie, 458 F.3d at 973 (quoting VanderKlok v. Provident Life & Accident Ins. Co., 956 F.2d 610, 617 (6th Cir. 1992). While procedural irregularities are not specifically enumerated in the "nonexhaustive list" of circumstances for considering extrinsic evidence quoted in Opeta, the Abatie decision suggests that when procedural irregularities exist, district courts can consider additional evidence on *de novo* review. Particularly when procedural "irregularities have prevented full development of the administrative record," the Court may

find that "circumstances clearly establish that additional evidence is necessary to conduct an adequate *de novo* review of the benefit decision." Abatie, 458 F.3d at 973; Opeta, 484 F.3d at 1217.

C. Procedural Violations

Luu argues that **First Unum** violated the ERISA regulations' notice and disclosure requirements by (1) failing to describe in the denial letter the documents necessary to perfect his claim and why such documents were necessary and (2) failing to provide **Luu** with the medical review it used as a basis to deny **Luu's** administrative appeal. Mot., Docket No. 20-1 at 1.

1. Documents Necessary to Perfect the Claim

First Unum contends that while the existence of procedural violations could permit consideration of extra-record evidence, no such procedural violations exist in this case because **First Unum's** initial denial letter clearly explained how **Luu** could perfect his claim in a way that was "calculated to be understood by [**Luu**]" and which included "examples of information that [**Luu**] could submit with [his] appeal to help support [his] claimed loss of functionality." (Opp'n, Docket No. 24 at 14) (citing 29 C.F.R. § 2560.503-1(g)(1); Brown v. Connecticut Gen. Life Ins. Co., No. C 13-5497 PJH, 2014 WL 7204936, at *13 (N.D. Cal. Dec. 17, 2014)). **First Unum** includes the following chart specifying the types of evidence that **First Unum** referenced in the initial denial letter, which it argues clearly conveyed to **Luu** they types of evidence he needed to present in his appeal:

Claimed Condition	**First Unum's Description of Additional Material or Information Necessary**
Neck Pain Lower Back Pain Shoulder Pain Right Wrist Pain Headaches and Gastrointestinal Symptoms Depression Memory Problems	• EMG/nerve conduction study to show radiculopathy, plexopathy, neuropathy • prescription of opioids • EMG/nerve conduction study of the lower extremities to support radiculopathy, plexopathy, neuropathy • physical exams showing neurological deficits • surgical recommendation • physical therapy treatment • abnormal physical exams • EMG/nerve conduction study to support degree of neuropathy • surgical referral • treatment with steroids • restrictions and limitations from a treating physician • evidence of functional impairment • referral to psychiatric evaluation or treatment • weekly psychotherapy to address symptoms • OVNs documenting treatment plan • exam findings showing memory difficulties

***6** (Opp'n, Docket No. 24 at 15.) **First Unum** further argues that **Luu** understood the initial denial letter to provide such examples because he later submitted additional medical records, including a surgical consultation, with his January 27, 2016 appeal. (Id. at 16.) Moreover, **First Unum** states that **Luu's** understanding of the appeals process and the evidence he needed to submit is evidenced by his conversation with Williams, in which he indicated that he understood the process and had only one question related to consideration of his surgical orthopedic evaluation. (Id.) Thus, **First Unum** contends that the initial letter properly explained what information was needed for the appeal, and **Luu** understood what was required of him such that it met its duties under the regulations.

Luu instead argues that **First Unum's** chart indicating the documents necessary to perfect the claim is misleading because it confuses **First Unum's** duty to provide the reasons for an adverse determination with the separate requirement to describe what is necessary to perfect the claim. (Reply, Docket No. 27 at 5–6.) Rather than state what additional material or information is needed, the chart lists the specific reasons for the adverse determination. (Id. at 8.) **Luu** distinguishes the two ERISA notice requirements, arguing that the specific reasons for the adverse determination shed light on the past record as it exists, not on what must be done in the future to perfect the claim. (Id.) In addition, **Luu** argues that the fact that he submitted some relevant documents in the course of his appeal does not establish that he fully understood what documents were needed to perfect his claim; rather, the omission of some relevant documents demonstrates

that he did not have a full understanding of what he could have or should have submitted. (Id. at 10.) Luu suggests that it would not have been difficult for First Unum to include a subsection in the "Next Steps Available To You" that specifically states something to the effect of "we would need to see the following in order to establish your disability because ..." (Id.) The absence of such a statement is, according to Luu, proof that First Unum failed to comply with its obligations under the ERISA regulations and thus a procedural violation entitling Luu to expand the administrative record. (Id.)

Moreover, Luu points out that Long Term Disability Benefit Plan Document states:

> In the event the Claim Administrator determines that the Participant is not entitled to disability benefits, such written notice shall set forth the specific reasons for such determination, specific provisions of the Plan upon which the denial is based; and, any additional material or information reasonably necessary for the claimant to complete the claim and a statement of the reason such information is needed.

(Plan Document, Docket No. 27-3 at p. 27) (emphasis added.) Luu suggests that no such required statement of the reason for the required information is given. (Reply, Docket No. 27 at 6.) Similarly, in a section titled "Claims Procedures," the policy states: "If your claim for benefits is wholly or partially denied, the notice of adverse benefit determination under the Plan will ... describe additional material or information necessary to complete the claim and why such information is necessary." (Docket No. 27-4 at 1–2.)

Even assuming that First Unum's initial denial letter put Luu on notice of additional material that he could provide, as opposed to just the reason for denial, it does not explain why such additional material is necessary to perfect his claim. First Unum's opposition brief is noticeably silent on this point. (See Opp'n, Docket No. 24 at 14–16.) In addition, the final denial letter lists additional forms of documentation that Luu had not submitted with his appeal and which were never mentioned in the first denial. The record shows that the following additional information or materials were listed in the final denial letter:

> *7 **Claimed Condition** Conditions of the spine Conditions of the shoulder Conditions of the right wrist Depression **First Unum's Description of Additional Lacking Information After Reviewing the File on Appeal** • spine examinations indicating the presence of radicular deficits or gait abnormalities • epidural steroids for symptom management • interventional procedures beyond trigger point injections in the neck region • radiology readings that describe herniated disks that compress the cord or nerve roots • findings of hyperreflexia, diminished sensation, lower extremity weakness, proximal upper extremity weakness, gait ataxia, or Babinksi signs • findings of signal abnormality in the cord • evidence of cervical myelopathy • formal dynamometer testing with validity assessments • record indicating that Luu currently desires to pursue surgical intervention • medical record indicating the Luu pursued recommended treatment options for conditions of his lumbar spine • records of prior shoulder injections • findings of wrist instability or a frank tear of the TFCC • positive clinical examination finding for CTS • record indicating that electrodiagnostic studies have established support for a CTS diagnosis with the degree of study positivity noted • history of acute injury • exam findings that show the presence of ligamentous instability

> or acute inflammation • significant adjustments and consultation

(Final Denial Letter, Docket No. 24-21at p. 4–8.) For the Court to accept **First Unum's** argument that its statements regarding the absence of certain evidence from **Luu's** record amounted to a description of the information or materials necessary to perfect his claim, then the numerous additions of evidence lacking in the final denial letter suggests that **First Unum** had not truly described the information "necessary" to perfect the claim in any meaningful way. While **First Unum** argues that the additional information described in the final denial letter merely responds to the materials submitted on appeal, but bases the denial on the same reasons, such a view is inconsistent with its position that similar language in the initial denial letter effectively put **Luu** on notice of the information necessary to perfect his claim. (Opp'n, Docket No. 24 at 16–17.) **First Unum** emphasizes that **Luu** provided some relevant information in his appeal letter and stated that he understood the appeal process in a phone call with Williams, but **Luu's** appeal letter indicates that he believed the current record did not show that his condition was severe enough, not that he knew what specifically he had to establish with respect to his condition nor why particular types of evidence were necessary. Although **First Unum** need not enumerate every potential examination or document that could support **Luu's** claim in order to satisfy the regulatory requirements, it still needed to include a description of the information or materials necessary along with an accompanying explanation of *why* those materials are necessary. **First Unum's** failure to do so demonstrates that a procedural violation occurred in this case.

This Court's decision in Ramirez v. **Unum Life Insurance** Company of America, SACV 11-529-JVS(JPRx) (C.D. Cal. December 3, 2012), supports this conclusion. In Ramirez, the Court held that some additional evidence should be added to the plaintiff's administrative record due to procedural irregularities. Id. at 6. The **first** of these procedural irregularities involved a new "reason" for denial because the plaintiff's initial denial letter concluded that "the medical information does not support the restrictions and limitations of no ... carrying up to 20 pounds," while the final denial letter stated that plaintiff's "back condition and pain complaints would support limiting him to lifting 20 to 30 pounds and avoid constant bending, kneeling, and stooping," but that it received information that the occupation would not require lifting over 20 pounds. (Id.) Thus, plaintiff "was without notice that the duties of his occupation were an issue," and the administrative record could be expanded to include declarations regarding job requirements. (Id.)

The second procedural irregularity in Ramirez involved a failure to provide ERISA disclosures. The Court determined that a general provision in the **first** denial letter indicating that the plaintiff could submit additional information to support the claim was deficient because it did not "specify what additional information would be helpful to perfect his claim." (Id. at 8.) This Court also determined that the language in the denial letters was not specific enough to provide the plaintiff with notice of what evidence to include, as "the letters merely list examples of possible support" and amount to "ambiguous general lists." (Id.) Finally, the Court pointed out that the letters did not clearly advise the plaintiff of his right to reasonable access to all relevant documents free of charge. (Id.) As a result of these conclusions regarding the deficiencies of the denial letters, the Court admitted to the administrative record two declarations related to the plaintiff's job requirements written after the final denial and a doctor's report that was available prior to the submission of the appeal because the plaintiff "may not have known that the report, which was prepared for his worker's compensation case, would be helpful to his disability claim." (Id. at 9.)

***8** **First Unum** argues that this case differs from this Court's decision in Ramirez because in Ramirez: (1) there was no two-year delay in the submission of additional medical records, (2) the initial denial letter contained only "general provisions" regarding additional information that could be considered, as opposed to specific evidence and a clear statement that **Luu** was entitled to request documents related to his claim, and (3) the insurer included a new reason for denying benefits that does not exist in this case. (Opp'n, Docket No. 24 at 22–23.)

Although the denial letter in Ramirez contained additional regulatory violations that are not at issue in this case, Ramirez still stands for the proposition that a plaintiff like **Luu**, who has encountered procedural irregularities in his appeals process, is entitled to admit additional documents to the administrative record that could have been admitted but for the procedural

irregularity. Like the plaintiff in Ramirez, **Luu's** initial denial letter included a general provision regarding additional information he could submit and did not clearly set forth the information needed to perfect his claim and why it was needed in any section regarding the next steps in the appeals process. Ramirez at *8. Accordingly, the Court finds that there was a procedural violation. See Olive v. Am. Exp. Long Term Disability Benefits Plan, 183 F. Supp. 2d 1191, 1197 (C.D. Cal. 2002) (observing that the absence of "a singularly unambiguous and precise notice .... may have the consequence of encouraging the practice of providing marginal notice followed by a detailed and precise final letter denying a claim," particularly when the claimant is only afforded a single level of review).

2. Production of Dr. Penny's Report

Luu contends that **First** **Unum** also committed a procedural violation by failing to produce Dr. Penny's report before it made the final decision in **Luu's** case. (Mot., Docket No. 20-1 at 11.) **Luu** cites Salomaa for the proposition that ERISA required **First** **Unum** to give **Luu** and his physicians access to the medical reports of its own physicians that it relied upon. Salomaa v. Honda Long Term Disability Plan, 642 F.3d 666, 679 (9th Cir. 2011). **Luu** suggests that if he had received a copy of Dr. Penny's report, his own physicians could have provided additional comments or conducted additional examinations and tests to support his disability claim. Id. Thus, according to **Luu**, **First** **Unum's** failure to provide the report denied him the opportunity for a fair review. (Mot., Docket No. 20-1 at 11.) See Yancy v. United of Omaha Life Ins. Co., No. CV149803PSGPJWX, 2015 WL 5132086, at *4 (C.D. Cal. Aug. 25, 2015) ("Under binding Ninth Circuit authority, the failure to provide a claimant with a physician's report relied on during the administrative appeal of a denied benefits claim violates ERISA's guarantee for 'full and fair review' of a denied claim.")

First **Unum** instead argues that it was not required to produce Dr. Penny's report prior to the final denial because **Luu** never requested the report before the decision was made. (Opp'n, Docket No. 24 at 17.) See 29 C.F.R. § 2560.503-1(h)(2)(iii) ("[C]laimant shall be provided, *upon request* and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant to the claimant's claim for benefits.") (emphasis added). In the absence of such a request, **First** **Unum** indicates that the insurer has no obligation to provide records. See Masuda-Cleveland v. Life Ins. Co. of N. Am., No. CV 16-00057 LEK-RLP, 2017 WL 427497, at *4 (D. Haw. Jan. 31, 2017) (finding that case law in Salomaa and Yancy, as well as the regulations, demonstrates that a plan need only provide a claimant with copies of his record "upon request" and thus there was no procedural irregularity when the plaintiff did not request a copy of a report or a general request for information relied on in the course of deciding the appeal). **First** **Unum** points out that in both Salomaa and Yancy, the plaintiffs had requested information regarding the record prior to a final decision, and that procedural violations occurred because they received no response. Salomaa v. Honda Long Term Disability Plan, 642 F.3d 666, 679–80 (9th Cir. 2011); Yancy v. United of Omaha Life Ins. Co., No. CV149803PSGPJWX, 2015 WL 5132086, at *2, *4 (C.D. Cal. Aug. 25, 2015).

***9** While **Luu** argues that the Ninth Circuit case law supports his contention that **First** **Unum** was required to make Dr. Penny's report available to him regardless of whether he requested it prior to the final decision, the Court is unpersuaded. (Reply, Docket No. 27 at 12.) The initial denial letter plainly states: "Upon your written request, we will provide you with all documents, records and other information relevant to your claim for benefits." (Initial Denial, Docket No. 24-16 at p. 7.) **Luu** states that "there is nothing in the regulations that allows for a claimant to obtain documents upon which the plan administrator will rely for its determination on a claimant's appeal before the final denial that will arguably close the record." (Reply, Docket No. 27 at 13.) But, according to Yancy, the regulations and current Ninth Circuit case law allow a claimant to obtain such documents *upon request.* Importantly, the Court in Yancy notes "Plaintiff requested the opportunity to review and respond to [the doctor's] report during the appeal process on two occasions, but United did not provide Plaintiff with the report until it had completed its appellate review." Yancy, 2015 WL 5132086, at *2. Since **Luu** did not request Dr. Penny's report until after the determination was made, the Court finds that **First** **Unum** did not commit a procedural violation with respect to production of Dr. Penny's report.

D. Documents Impacted By Alleged Procedural Irregularities

First **Unum** contends that even if there were procedural irregularities involved in **Luu's** appeal, such irregularities

would not have prevented Luu from submitting the documents that he now seeks to add to the administrative record. (Opp'n, Docket No. 24 at 20.) The key inquiry is not whether the evidence was created after the final denial, but rather "whether the procedural irregularities prevented a full development of the record." Ramirez, SACV 11-529-JVS(JPRx), at *8; see Abatie, 458 F.3d at 972. Each additional piece of evidence will be examined below.

1. March 18, 2015 EMGs

According to First Unum, the March 18, 2015 EMGs were unaffected by any alleged procedural violations because the initial denial letter repeatedly mentioned the absence of EMG testing, suggesting the important role they could have played in supporting his claim. (Opp'n, Docket No. 24 at 20.) Since those EMGs were available to him as evidence during the appeals process, First Unum indicates that Luu should have submitted the EMG evidence at that time. (Id. at 20–21.)

The Court disagrees. Because Luu's initial denial letter did not adequately explain what information was necessary to perfect his claim and why the information was necessary, Luu was not properly on notice of the importance of including the EMG testing. Although the evidence was available during the appeal process, there is no indication that Luu understood the importance of this specific record based on the initial denial letter. Thus, the Court admits the EMG testing to the administrative record.

2. Dr. Glousman's March 7, 2016 Consultation Report

Second, First Unum states that the March 7, 2016 consultation report by Dr. Glousman should have been submitted during the appeals process since it was created before the final decision was made. (Id.) Since the initial denial letter highlighted the absence of recommendations of surgery for Luu's shoulder tears and the report recommended surgery, First Unum indicates that Luu was properly on notice that he could have submitted such evidence, particularly since Luu had contacted First Unum about the appeal wanting to ensure that evidence of his surgical consultation with Dr. Mesiwala in February 2016 could be considered. (Id.)

The Court agrees. This consultation occurred prior to all of the following events: (1) the March 18, 2016 final decision, (2) the March 14, 2016 phone call between Luu and Williams, and (3) Luu's submission of a second doctor's opinion related to neck and back surgery on March 10, 2016. Luu had ample opportunity to submit evidence relating to the consultation and could have alerted Williams of the additional evidence. Since the recommendation for surgery was something that Luu acknowledged that he believed was important to his case in his February 2016 phone call with Williams, the Court does not find that his failure to submit this evidence was due to any procedural irregularity. Thus, the Court denies Luu's motion to admit Dr. Glousman's consultation report to the administrative record. See Ramirez, SACV 11-529 JVS(JPRx) at *11.

3. May 11, 2016 FCE and June 30, 2016 Report

***10** Third, First Unum contends that the May 11, 2016 FCE should not be considered because the initial denial letter emphasized that his claim was denied due to an absence of evidence regarding preclusion from occupational duties, and Luu did not attend the FCE until two months after the final denial was issued. (Opp'n, Docket No. 20 at 20–21.)

Likewise, First Unum argues that Dr. Matos' June 30, 2016 report should not be added to the administrative record because it postdates the final denial by three months and does not contain new information about Luu's functional abilities during the time period at issue (February until August 2015) that he was unable to submit during the appeals process. (Id. at 21–22.)

The Court disagrees. As the Court noted with respect to the March 2015 EMGs, the procedural irregularity bears on the urgency of attending the FCE or getting the second opinion report because it affects the clarity of the types of information and material that he needed to submit in order to perfect his claim. Thus, the Court admits the FCE and the June 2016 report to the administrative record despite the fact that these records postdate the final denial because their omission is tainted by the procedural irregularity. [3] See Ramirez, SACV 11-529 JVS(JPRx) at *10 ("Documents created after a final claim decision can be admitted into the administrative record due to procedural irregularities.").

4. December 31, 2018 Letter

Finally, First Unum contends that the December 31, 2018 letter from Dr. Matos explaining the absence of certain

information from **Luu's** records repeats information that is already contained in the administrative record and could have been submitted before the final denial. (Id. at 22.) The Court agrees. The December 2018 letter was written after Dr. Matos reviewed Dr. Penny's comments about his evaluation. (Letter, Docket No. 20-19, Ex. 17.) Since the letter is written as a rebuttal to Dr. Penny's report, which **Luu** was not entitled to prior to the final decision since he failed to request it, the Court finds that the omission of the evidence was not due to the procedural irregularities of the notice. Thus, the Court denies **Luu's** request to admit the December 31, 2018 letter to the administrative record.

IV. CONCLUSION

For the foregoing reasons, the Court **grants in part Luu's** motion to augment the administrative record as the March 18, 2015 EMG, the May 11, 2016 FCE, and the June 30, 2016 Report. The Court **denies** the motion to admit the remaining evidence. In addition, the Court **stays** the case pending the Ninth Circuit's decision in Masuda-Cleveland, which is scheduled for oral argument on April 15, 2019.

IT IS SO ORDERED.

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Footnotes

1 The Court grants the motion to strike paragraphs 2, 4, 5, and 6 of the Metzger declaration. The Court strikes paragraphs 2, 5 , and 6 on the basis of a lack of personal knowledge as to the communications and review processes that take place within insurance companies of which it is not a part. See Fed. R. Evid. 602. The Court strikes paragraph 4 on relevance grounds because the statement concerns other cases and does not indicate whether the time extensions described took place during any time period relevant to this case. See Fed R. Evid. 401, 402.

2 **First Unum** represents that since it **first** received **Luu's** appeal on February 2, 2016, the latest it could have issued its decision was May 2, 2016, as it was required to comply with the regulations that require insurers to notify claimants within 45 days of receipt of notice of an appeal, except that a 45 day extension may be available in "special circumstances." (Opp'n, Docket No. 24 at 12.) See 29 C.F.R. § 2560.503-1(i)(1)(i), (3)(i).

3 The Court notes that the weight of such evidence may still be influenced by the timing of the evaluation and report, as the evaluations and diagnoses that postdate the final denial may not be reflective of **Luu's** condition during the relevant time period of the disability claim.