NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANNE M. KAY, Plaintiff-Appellant, v. HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY, a Connecticut Corporation, Defendant-Appellee.	No. 21-55463 D.C. No. 3:19-cv-00209-MMA-AHG MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, District Judge, Presiding

Argued and Submitted July 29, 2022
Pasadena, California

Before: PAEZ and WATFORD, Circuit Judges, and BENNETT,** District Judge.

Appellant Anne Kay ("Kay") was employed as a Clinical Specialist for Candela Corporation, a cosmetic dermatology practice in San Diego, California. Through Candela, Kay was covered for long-term disability under an ERISA-backed

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

** The Honorable Richard D. Bennett, United States Senior District Judge for the District of Maryland, sitting by designation.

policy administered by Appellee Hartford Life and Accident Insurance Company. ("Hartford"). Kay stopped working in August 2015 due to escalating back pain. Subsequently, she applied for and received disability benefits under Candela's long-term disability plan (the "Hartford Plan"). Hartford terminated her benefits in July 2016 and upheld its termination in an administrative appeal. Kay now appeals a district court decision upholding Hartford's termination of her benefits and the district court's denial of her motion to augment the administrative record. We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand.

As an initial matter, the district court abused its discretion by denying Kay's motion to augment the record. In an ERISA case, a court may 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." *Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan*, 46 F.3d 938, 944 (9th Cir. 1995) (quoting *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1025 (4th Cir. 1993) (en banc)). As ERISA guarantees plan participants a statutory right to "full and fair review" of a disability claim, 29 U.S.C. §§ 1133(2), this Court has held that additional evidence is necessary "[w]hen an administrator tacks on a new reason for denying benefits in a final decision, thereby precluding the plan participant from responding to that rationale for denial at the administrative level." *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 974

(9th Cir. 2006); *see also id.* ("[S]ection 1133 requires an administrator to provide review of the specific ground for an adverse benefits decision." (quoting *Robinson v. Aetna Life Ins. Co.*, 443 F.3d 389, 393 (5th Cir. 2006))).

By adjusting its definition of Kay's occupation, Hartford offered a new rationale based on new supporting evidence to support its denial of Kay's administrative appeal. As a Clinical Specialist, Kay was required to travel up to 80% of the time, to work over 40 hours per week, and to move equipment that weighed upwards of 270 pounds. Hartford's initial termination was based on a finding that Kay was not disabled from these duties. In its July 2016 termination letter, the insurer concluded that the medical evidence no longer demonstrated that Kay could not perform the essential functions of her occupation—and defined those duties to include sales support and travel, requiring Kay to sit or stand for up to 8 hours, push or pull up to 270 pounds, lift 25 pounds, and carry 20 pounds.

However, in its denial of Kay's appeal, the administrator concluded that the travel and lift requirements imposed by Candela were not essential to her occupation in the "general workplace," functionally redefining her occupation for the first time. To support this new rationale, the insurer produced (1) a new occupational report defining the essential duties of Kay's role as a hybrid of two definitions from the Department of Labor's Dictionary of Occupational Titles ("DOT"); and (2) a medical report from an independent physician concluding that Kay was not disabled

from performing these duties. This evidence was not available to Kay prior to the denial of her appeal. In these circumstances, additional evidence was clearly "necessary to conduct an adequate *de novo* review of the benefit decision." *Mongeluzo*, 46 F.3d at 944 (quoting *Quesinberry*, 987 F.2d at 1025). By denying Kay's motion to augment the record with evidence intended to refute Hartford's new rationale, the district court effectively insulated the insurer's decision from "full and fair review." *See Abatie*, 458 F.3d at 974 (quoting 29 U.S.C. § 1133(2)); *see also* 29 C.F.R. § 2560.503-1(h)(4).

Additionally, both the insurer and the district court erred by defining Kay's position to omit the 80% travel and 270-pound lifting requirements that formed the gravamen of her disability claim. The Hartford Plan defines "occupation" to include the employee's vocation "as it is recognized in the general workplace," and not "the specific job [she was] performing for a specific employer or at a specific location." Valerie Allen, Hartford's occupational specialist, derived a definition of "Clinical Product Specialist" from the DOT occupational titles for "General Duty Nurse [DOT 075.364-010]" and "Training Representative [DOT 166.227-010]." The essential duties of this amalgamated occupation included no travel or lifting requirements, and only limited exertion requirements at "a range Light to Medium, occasionally lifting/carrying, pushing or pulling up to 50 pounds."

This Court has held that the DOT are an appropriate source for an employee's occupational duties. *Lamear v. Berryhill*, 865 F.3d 1201, 1205 (9th Cir. 2017). However, although insurers applying a "general workplace" or "national economy" standard may extrapolate definitions from the DOT, "a proper administrative review requires [the insurer] to analyze, in a reasoned and deliberative fashion, what the claimant actually does before it determines what the [essential duties] of a claimant's occupation are." *Salz v. Std. Ins. Co.*, 380 F. App'x 723, 724 (9th Cir. 2010) (citing *Lasser v. Reliance Std. Life Ins. Co.*, 344 F.3d 381 (3d Cir. 2003); *Gallagher v. Reliance Std. Life Ins. Co.*, 305 F.3d 264 (4th Cir. 2002); *Kinstler v. First Reliance Std. Life Ins. Co.*, 181 F.3d 243 (2d Cir. 1999)). The record reflects that Hartford's occupational specialist defined her occupation by matching DOT titles to generic job descriptions from Indeed.com and failed to select DOT titles that approximated her actual responsibilities with Candela, including her position's extensive travel and lifting requirements. As the district court erred by adopting this definition, we need not address the remaining issues in this appeal.

REVERSED AND REMANDED.