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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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12 JERRY THOMPSON,
13 Plaintiff,

NO. CIV. S-08-650 FCD/GGH

14 v.

MEMORANDUM AND ORDER

15 INSURANCE AND BENEFITS
16 TRUST/COMMITTEE PEACE OFFICERS
17 RESEARCH ASSOCIATION OF
18 CALIFORNIA, PEACE OFFICERS
19 RESEARCH ASSOCIATION OF
20 CALIFORNIA, and DOES 1 to 100,

Defendants.

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22 This matter is before the court on the parties' cross-
23 motions for judgment on the administrative record, pursuant to
24 Federal Rule of Civil Procedure 52,¹ arising out of defendants

25 ¹ Rule 52(a)(1) provides in pertinent part: "In an action
26 tried on the facts without a jury . . . , the court must find the
27 facts specially and state its conclusions of law separately. The
28 findings and conclusions may be stated on the record after the
close of the evidence or may appear in an opinion or a memorandum
of decision filed by the court;" see also Kearney v. Stnd. Insur.
Co., 175 F.3d 1084, 1094-95 (9th Cir. 1999) (recognizing in an
ERISA matter, the propriety of trying the case on the
administrative record).

1 Insurance and Benefits Trust of Peace Officers Research
2 Association of California and Peach Officers Research Association
3 of California's (collectively, "defendants" or "PORAC") denial of
4 plaintiff Jerry Thompson's ("plaintiff") claim for long-term
5 disability ("LTD") benefits.²

6 For the reasons set forth below, the court finds that the
7 proper standard of review of this matter is abuse of discretion,
8 as opposed to de novo, and thereunder, the court finds that PORAC
9 did not act arbitrarily or capriciously in denying plaintiff's
10 LTD benefits claim. As such, the court DENIES plaintiff's motion
11 for judgment in his favor and HEREBY GRANTS judgment in favor of
12 PORAC.

13 BACKGROUND

14 A. The Plan

15 Plaintiff is a participant in a long term disability benefit
16 plan (the "Plan") sponsored by the Insurance and Benefits Trust
17 of Peace Officers Research Association of California. The Plan
18 is governed by the Employee Retirement Income Security Act of
19 1974 ("ERISA"). (Pl.'s Compl., filed Mar. 25, 2008, ¶ 6.) PORAC
20 is responsible for payment of benefits during the "Self-Funded
21 Period," which is defined as "[t]he first 5 years of each period
22 of continuous Disability, and the period after the end of the
23 Maximum Benefit Period during which [long term disability]
24 Benefits are payable under the Lifetime Disability
25 Benefit provision." (Administrative Record ["AR"], Ex. A to

26
27 ² Because oral argument will not be of material
28 assistance, the court orders these matters submitted on the
briefs. E.D. Cal. L.R. 78-230(h).

1 Jimenez Decl. [Docket #29], filed Aug. 10, 2009, at P00434.) The
2 Plan is funded during the self-funded period by contributions
3 from Plan participants. (Jimenez Decl., ¶ 3.) PORAC derives no
4 financial benefit in the event of a denial of a participant's
5 claim for benefits under the Plan. (Id. at ¶ 4.) Standard
6 Insurance Company provides insurance benefits to the Plan, but
7 only for the period of time following the Self-Funded Period.
8 Under the Plan, PORAC is responsible for managing the Plan
9 and determining eligibility for benefits during the Self-Funded
10 Period. In connection with disabilities relating to
11 musculoskeletal and connective tissue, the Plan limits benefits
12 to a maximum of 24 months. (AR: P00436.)

13 In pertinent part, the Plan defines disability as follows:

14 You are Disabled if you meet one of the following
15 definitions during the period it applies:

- 16 A. Own Occupation Definition of Disability; [or]
17 B. Any Occupation Definition of Disability . . .

18 Own Occupation means any employment, business, trade,
19 profession, calling or vocation that involves Material
20 Duties of the same general character as your regular and
21 ordinary employment with the Employer. Your Own Occupation
22 is not limited to your job with your Employer.

23 Material duties means the essential tasks, functions and
24 operations, and the skills, abilities, knowledge, training
25 and experience, generally required by employers from those
26 engaged in a particular occupation.

27 A. Own Occupation Definition of Disability

28 During the Benefit Waiting Period and the Own
Occupation Period you are required to be Disabled only
from your Own Occupation.

You are Disabled from your Own Occupation if, as a
result of Physical Disease, Injury, Pregnancy
or Mental Disorder, you are unable to perform with
reasonable continuity the Material Duties of your Own
Occupation. However, you will not be considered to be
disabled from your Own Occupation if you are working in

1 a light duty position for the same employer for which
2 you were working when you became disabled, and your
3 employer is paying you the same wages paid to you
4 immediately before you became disabled.

5 B. Any Occupation Definition of Disability

6 During the Any Occupation Period you are required to be
7 Disabled from all occupations.

8 You are Disabled from all occupations if, as a result
9 of Physical Disease, Injury, Pregnancy or Mental
10 Disorder, you are unable to perform with reasonable
11 continuity the Material Duties of any gainful
12 occupation for which you are reasonable fitted by
13 education, training and experience. (AR: P00439-440.)³

14 B. Plaintiff's Medical History Leading Up to His Claim for
15 Plan Benefits

16 Plaintiff was employed by San Joaquin County as a
17 Correctional Officer. "Employees of this class are responsible
18 for following clearly established procedures in receiving
19 prisoners, maintaining discipline and preventing escapes." (AR:
20 P00244.) Employees in this position are required to have the
21 ability to:

22 Supervise inmates engaged in a variety of activities;
23 store, issue and account for recreation equipment, clothing,
24 cleaning supplies and other items; understand and interpret
25 rules and regulations; keep records and prepare reports;
26 remain alert at all times and react quickly and calmly in
27 emergency situations; follow oral and written instructions;
28 establish and maintain effective working relationships
with others; learn to utilize data terminals as required.

(AR: P00245.)

On July 15, 2004, plaintiff was injured while running to
break up a fight between prisoners at the county jail. (AR:
P0024, P00232.) Prior to this, plaintiff fell off a wall while

³ The "Own Occupation Period" is "the Benefit Waiting
Period and the next 24 months of continuous Disability." (AR:
P00435.) The "Any Occupation Period" is "[f]rom the end of the
Own Occupation Period to the end of the Maximum Benefit Period."
(Id.)

1 engaged in training activities in June 2004. He experienced some
2 minor pain at the lumbosacral portion of the spine at that time,
3 as well as a cramping sensation in his right lower extremity, but
4 he did not seek medical attention as a result of this incident
5 and continued to work. (AR: P00179.)

6 On July 15, 2004 while he was running, plaintiff fell and
7 landed on the right side of his body. More specifically, he
8 claims that while running, he experienced a cramp in his right
9 leg that caused him to fall to the concrete sidewalk. When he
10 rose, he reported severe pain on the back of his leg. (AR:
11 P00408.) On that same date, plaintiff filled out an "Employee's
12 Claim for Workers' Compensation Benefits," stating that his right
13 elbow and leg were injured. (AR: P00226.)

14 Plaintiff saw Dr. Gregory Rosellini for his claimed injuries
15 on July 15, 2004. In his "Doctor's First Report of Occupational
16 Injury or Illness" on that date, Dr. Rosellini diagnosed
17 plaintiff with a "muscle strain hamstring" and "abrasions-
18 multiple." (AR: P00408). Plaintiff was given an ACE wrap,
19 crutches, Tylenol #3 with codeine and Motrin. Future treatment
20 was noted as "possibly PT [physical therapy]". Dr. Rosellini
21 noted that plaintiff was authorized to return to work on July 19,
22 2004. (Id.)

23 A July 16, 2004 Primary Treating Physician's Progress Report
24 referred to a hamstring strain, with plaintiff reporting mild but
25 much improved pain. (AR: P00407.) Plaintiff was authorized to
26 return to full duty on July 22, 2004. (Id.)

27 Plaintiff was thereafter seen on August 9, 2004 by a Dr.
28 Zuniga. He reported that he was feeling better but still had

1 some pain in the right hamstring. (AR: P00403.) A Physician's
2 Verification of Employee Illness form dated November 2, 2004
3 authorized plaintiff to return to work with restrictions (no
4 running, jumping or altercations) on November 2, 2004, and to
5 return to work without restrictions starting December 2, 2004.
6 (AR: P00379, P00383.)

7 Plaintiff continued to report right knee pain and that his
8 knee was "giving out" during a December 14, 2004 doctor's visit.
9 He was authorized to return to work full time January 29, 2005.
10 (AR: P00377-378.) The return to work date was extended to
11 February 22, 2005 during a January 31, 2005 doctor's visit. (AR:
12 P00376.)

13 A magnetic resonance imaging ("MRI") test of the right knee
14 was recommended. (AR: P00368.) Plaintiff underwent the right
15 knee MRI on February 11, 2005. The radiologist opined that
16 plaintiff's right knee was normal. (AR: P00370.)

17 On March 28, 2005, plaintiff stated that he had started
18 "TRT" or "trauma release therapy." (AR: P00363, P00365.) His
19 subjective complaints at that time were that his right hip and
20 thigh went numb and that his right knee "pops." He also referred
21 to "mild back pain" and right calf cramps. (AR: P00365.) He was
22 nevertheless advised to continue on full work duty and to
23 continue with trauma release therapy. (AR: P00363.)

24 Plaintiff again complained of recurrent lower back pain in
25 an April 18, 2005 doctor's visit (as well as right knee pain).
26 An MRI of the lumbosacral spine was suggested and Naprosyn and
27 Soma were recommended for pain. (AR: P00362.) Light duty was
28 recommended during an April 22, 2005 doctor's visit. (AR:

1 P00360.) Plaintiff was allowed to return to work with
2 restrictions (no lifting over 10 pounds and no prolonged standing
3 over 3 hours) on April 22 and directed to return to work without
4 restrictions on May 23, 2005. (AR: P00357.)

5 On May 3, 2005, plaintiff underwent a lumbar spine MRI
6 without contrast. The MRI revealed "[m]inimal disc dehydration
7 at L4-5, but no disc herniation, protrusion, or osteophytes into
8 the spinal canal throughout the lumbar spine. [¶] Minimal disc
9 bulging at the neural foramina not impinging on the nerve roots
10 at L4-5 and L5-S1. [¶] Mild facet degenerative changes throughout
11 the lumbar spine." (AR: P00355.) That same report noted "good
12 alignment of the lumbar spine . . . vertebral bodies . . . normal
13 in height . . . normal signal of the vertebral bodies . . .
14 normal signal of the spinal cord . . . a generous-sized spinal
15 canal . . . disc spaces throughout the lumbar spine are well
16 maintained . . . normal disc hydration, except for minimal disc
17 dehydration at L4-5 . . . no posterior disc bulging, protrusion,
18 or osteophytes . . . no encroachment on the spinal canal . . .
19 minimal disc bulging at the neural foramina at L4-5 and L5-S1,
20 not impinging on the nerve roots . . ." and ". . . mild facet
21 degenerative changes throughout the lumbar spine." (Id.)

22 A May 13, 2005 progress report notes that plaintiff may
23 return to work with restrictions on May 13, 2005 (no lifting over
24 10 lbs and no prolonged standing over 3 hours) and may return
25 to work without restrictions on June 14, 2005. (AR: P00350.)

26 On August 4, 2005, plaintiff saw Dr. Moris Senegor.
27 Plaintiff reported that since July 15, 2004, he had been
28 experiencing low back pain and right leg pain radiating down the

1 leg towards the foot. He also reported tingling paresthesias
2 over the right lateral calf and in the foot. He indicated that
3 he had so far received only some massage therapy which had not
4 helped, that he worked full time from the time of his injury
5 until December 2004 and that he had worked on and off since then.
6 (AR: P00347.) Dr. Senegor's impression was that plaintiff's
7 symptoms were secondary to degenerative disc disease, and he
8 recommended physical therapy. He recommended temporary total
9 disability ("TTD") for worker's compensation purposes for six
10 weeks and stated that if physical therapy fails, epidural steroid
11 injections would be considered. Dr. Senegor also noted that the
12 MRI scan reflected "no nerve compression." (AR: P00338-339.)

13 Plaintiff again saw Dr. Senegor on October 19, 2005 and Dr.
14 Senegor's report noted that "[t]he patient's symptoms remain
15 unchanged." Dr. Senegor advised plaintiff that he would extend
16 plaintiff's TTD for six weeks at which time he would reevaluate
17 him. (AR: P00303.) Between that date and November 30, 2005,
18 plaintiff had four physical therapy sessions. Dr. Senegor stated
19 on November 30, 2005 that the outcome of that physical therapy
20 was "not quite clear as of yet." Plaintiff reported ongoing low
21 back pain and right leg pain and stated that he was taking
22 "narcotic medications." Dr. Senegor stated he would see
23 plaintiff in another six weeks. (Id.)

24 A December 29, 2005 Progress Report for the period November
25 22, 2005 through December 28, 2005, from Darlyne D. Giorgi, the
26 nurse consultant assigned to plaintiff's worker's compensation
27 case states, in relevant part, that: "Thompson was reevaluated by
28 Dr. Senegor on November 30, 2004 . . . Dr. Senegor is continuing

1 Mr. Thompson at TTD for an additional 6 weeks since he has only
2 completed four physical therapy sessions. Physical therapist at
3 Oak Valley Physical Therapy facility indicates that Mr.
4 Thompson's weight is a factor in his slow progress. He continues
5 to report low back discomfort, and his gains in physical therapy
6 are short lived I telephoned Dan Pipel at Oak Valley
7 Physical Therapy facility . . . He advised me that he had
8 discussed Mr. Thompson's weight issues with him and how he would
9 benefit from losing weight, which is causing additional
10 strain on his lumbar spine." (AR: P00288-289.)

11 On January 11, 2006, plaintiff visited Dr. Senegor. Dr.
12 Senegor's report indicates that plaintiff was "unimproved with
13 the physical therapy prescribed. He has also developed a right
14 upper quadrant pain that he feels that the physical therapy
15 somehow caused and a suspicion of a hernia has been raised. I
16 advised the patient that this should be worked up by a general
17 surgeon initially on a nonindustrial basis and if any industrial
18 causation is found, that this be brought back into the workers'
19 compensation system on a retroactive basis." Dr. Senegor
20 concluded that because physical therapy had not resulted in a
21 change of plaintiff's reported symptoms, he recommended epidural
22 steroid injections. (AR: P00295.)

23 On February 14, 2006, plaintiff underwent his first lumbar
24 epidural steroid injection at St. Joseph's Hospital. (AR:
25 P00281.) On March 2, 2006 he reported to Dr. Senegor that the
26 epidural injection made his back pain worse for several days and
27 he experienced no benefit. He elected not to repeat the
28 procedure. (AR: P0274.)

1 On March 13, 2006, plaintiff underwent a second lumbar spine
2 MRI scan. That scan showed "[m]inimal disc dehydration L4-5 but
3 no disc bulging, protrusion or osteophytes and no encroachment on
4 the spinal canal. The neural foramina demonstrate wide patency
5 at L1-2 with minimal disc bulging L2-3, L3-4 and mild at L4-5 and
6 L5-S1. These are slightly increased since the patient's previous
7 examination but do not appear to impinge on the nerve roots
8 within the neural foramina." The conclusion was "mild facet
9 degenerative changes throughout the lumbar spine the same
10 as on the patient's previously [sic] examination." (AR:
11 P00270-271.) Dr. Senegor reviewed the MRI scan on April 13,
12 2006. His report states that the MRI study "reveals
13 mild desiccation at the L4-5 level. There is no bulging, end
14 plate irregularities, or modic changes. The remainder
15 of the discs look ok. There is no significant nerve compression.
16 The radiologist read out mild facet changes, these are, in my
17 opinion, very mild." (AR: P00264.) Dr. Senegor advised
18 plaintiff that the MRI findings were "not sufficient to support
19 surgical management of the patient's condition." They discussed
20 the discography procedure which plaintiff declined, and Dr.
21 Senegor and plaintiff agreed "to manage the situation
22 conservatively from here on." (AR: P00264.)

23 On May 11, 2006, Dr. Senegor met with the nurse case manager
24 overseeing plaintiff's worker's compensation claim. The nurse
25 case manager asked questions relating to how plaintiff's case
26 (which began with a right knee and elbow injury) "went from
27 different body parts to his lumbar spine several months after the
28 industrial injury." Dr. Senegor responded that he was in "no

1 position to opine about causation since [he] did not
2 receive any documentation of the injury and treatment prior to
3 the patient's first consultation with [him]." Dr. Senegor also
4 pointed out that "the overall extent of the disability with
5 regards to the lumbar spine does not match the patient's
6 radiological findings which are rather scant (minimal
7 degeneration at L4-5)." (AR: P00263.) Nurse consultant Giorgi's
8 recitation of her meeting with Dr. Senegor was consistent: "I met
9 with Dr. Senegor on May 11, 2006 in an attempt to clarify how the
10 original injury of the right leg and right elbow changed to right
11 knee and now the lumbar spine. Dr. Senegor advised me that he
12 cannot answer that question, since he doesn't know the answer . .
13 . He indicated [that] Mr. Thompson had little pathology and the
14 length of his disability did not . . . match up to the few
15 medical findings." (AR: P00260.)

16 **C. Plaintiff's Claim for Benefits and PORAC's Initial**
17 **Denial of the Claim**

18 On May 7, 2006, plaintiff submitted to PORAC his completed
19 Long Term Disability Benefits Employee's Statement. (AR:
20 P00021-23.) The basis of the purported disability was "lower
21 lumbar spine injured."

22 On May 12, 2006, Dr. Senegor completed an Attending
23 Physician's Statement in support of plaintiff's claim. (AR:
24 P00240-241.) The primary diagnosis was degenerative lumbar disc
25 disease, with symptoms of low back and right leg pain. (AR:
26 P00240.) In a section of the form entitled "Assessment," Dr.
27 Senegor was asked to "[d]escribe the patient's physical, mental
28 and cognitive limitations and work activity limitations." Dr.

1 Senegor's response was "0." However, he made contrary statements
2 that he "never" expected to see a fundamental or marked change in
3 plaintiff's condition, and that he "never" anticipated plaintiff
4 to return to work. Dr. Senegor indicated that plaintiff was 5'8"
5 and 280 pounds at that time, as opposed to 220 pounds at the time
6 of the accident on July 15, 2004. (AR: P00241.) Related to
7 plaintiff's claim, the San Joaquin County Sheriff's Department
8 submitted an Employer's Statement to PORAC on May 16, 2006. (AR:
9 P00242-243.)

10 On June 2, 2006, PORAC sent plaintiff a letter acknowledging
11 receipt of his application for benefits under the Plan. That
12 letter stated, among other things, that PORAC had requested
13 copies of plaintiff's workers compensation file, was evaluating
14 the claim for benefits, and would keep him advised of the status
15 of the claim. (AR: P00230.) On June 13, 2006, PORAC notified
16 plaintiff that it was extending the time to decide his claim by
17 30 days, during which time PORAC would clarify plaintiff's long
18 term disability coverage from his employer. (AR: P00216.)

19 On July 31, 2006, Renee Lugo of PORAC wrote plaintiff and
20 advised him that PORAC had determined that the medical evidence
21 did not support a claim of disability. (AR: P00213-215.) That
22 letter advised plaintiff that PORAC's decision was based on the
23 claim file as a whole, including the Employer's Statement (AR:
24 P00242-243), plaintiff's Employee's Statement (AR: P00021-23),
25 the Attending Physician's Statement completed by Dr. Senegor
26 (AR: P00240-241), a copy of plaintiff's worker's compensation
27 claim file and a telephone conversation with Samantha Menor of
28 the San Joaquin County Sheriff's Department that took place on

1 July 31, 2006. (AR: P00213-214.)

2 The July 31, 2006 letter summarized PORAC's findings
3 regarding the claim file and discussion with plaintiff's employer
4 as follows:

- 5 • Plaintiff was off work from July 16, 2004 to July 21,
6 2004 at which time he returned to work full
7 duty until November 22, 2004. He was then placed on
8 modified duty but his employer was unable to
9 accommodate limitations. (AR: P00214.)
- 10 • The February 2005 MRI scan of the right knee showed
11 normal findings. (Id.)
- 12 • Plaintiff returned to work from February 23, 2005
13 through April 21, 2005. He was placed on modified duty
14 as of April 22, 2005 but his employer was unable to
15 accommodate his restrictions. He has not worked since
16 April 22, 2005. (Id.)
- 17 • Dr. Senegor's May 12, 2006 Attending Physician's
18 Statement reflects a diagnosis of degenerative
19 disc disease and recommended that he stop working
20 because his symptoms were unchanged and the anticipated
21 date for returning to work is "never." (Id.)
- 22 • An April 22, 2005 exam revealed a positive lumbosacral
23 paraspinal muscle spasm. The May 2005 lumbar spine MRI
24 showed minimal disc dehydration at L4-5 but no
25 herniations, protrusions, or osteophytes in the spinal
26 canal. A May 13, 2005 office note regarding a visit to
27 Dr. Zuniga noted that plaintiff no longer had right
28 knee complaints but did have complaints of low back

1 pain and radiculopathy. (Id.)

- 2 • Dr. Senegor became plaintiff's treating physician on
3 August 4, 2005. Plaintiff's gait was "belabored" on
4 August 4, 2005 but "normal" on August 12, 2005. He
5 attended physical therapy in November 2005 that was
6 discontinued due to lack of improvement. An epidural
7 steroid was injected in February 2006. Plaintiff did
8 not wish to repeat that procedure. (Id.)
- 9 • A March 2006 lumbar spine MRI showed minimal disc
10 bulging at L2-3 and L3-4, and mild disc bulging at
11 L4-5, but no impingement on the nerve roots within the
12 neural foramina. Dr. Senegor noted that plaintiff was
13 permanent and stationary with restrictions of no
14 lifting over 10 pounds, no excessive bending, twisting,
15 or stooping and no continuous sitting or standing over
16 30-45 minutes. Dr. Senegor concluded that plaintiff
17 was not able to return to work in his prior occupation.
18 (AR: P00214-215.)
- 19 • Dr. Senegor also concluded, to the contrary, that "the
20 overall extent of the disability with regards
21 to the lumbar spine did not match the patient's
22 radiological findings which are rather scant."
23 (AR: P00215.)
- 24 • PORAC concluded that the medical evidence in the long
25 term disability claim file did not reflect
26 that plaintiff was unable to perform the material
27 duties of his occupation and, thus, that no
28 long term disability benefits were payable. (Id.)

1 • PORAC advised plaintiff of his appeal rights. (Id.)

2 **D. Plaintiff's Initial Appeal and PORAC's Submission of**
3 **the Claim for an Independent Medical Review**

4 On or about August 8, 2006, plaintiff sent a letter to PORAC
5 asking it to reconsider the denial of his claim. He stated that
6 Dr. Senegor has found him permanently disabled as of April 13,
7 2006 and "[t]hough the radiological findings may be rather scant
8 [he has] not ceased to have pain in [his] right leg and lower
9 back since the injury [on July 15, 2004]." (AR: P00207-208.)

10 PORAC accepted the letter as plaintiff's request to appeal its
11 decision and it informed plaintiff that his file would be
12 submitted to an outside medical source for an independent review
13 of the medical evidence. Thereafter, on August 11, 2006,
14 plaintiff submitted a one page letter from Dr. Senegor
15 reiterating that: "[Plaintiff's] lumbar spine condition, which I
16 have been treating since 8/04/05, features low back and right leg
17 pain. The cause of the pain is industrial in origin related to a
18 7/15/04 injury at work." (AR: P00203-04.)

19 PORAC submitted plaintiff's file to HCE Next Care Management
20 for an independent medical review. (AR: P00195-96.) The claim
21 file was reviewed by a Clinical Advisor, Board Certified in
22 Orthopedics. (AR: P00195.) The reviewer was asked to answer the
23 following questions: "1) Does the objective medical evidence
24 support [the claimant's] inability to perform the Material Duties
25 of his Own Occupation? 2) Are the subjective complaints supported
26 by the objective medical documentation and do they prevent the
27 claimant from performing the Material Duties of his Own
28 Occupation? 3) If the evidence supports the claimant meeting the

1 plan document's definition of disability, please indicate as of
2 what date? When (if applicable) was he able to return to work,
3 full duty? 4) Is there evidence of malingering or exaggeration of
4 symptoms? 5) Is the claimant's ability to perform the Material
5 Duties of his Own Occupation impaired by the use of medications?
6 6) Please provide a detailed synopsis of your findings." (Id.)

7 In a letter dated August 16, 2006, those questions were
8 answered as follows:

- 9 1. The objective medical evidence does not support
10 plaintiff's inability to perform the material duties of
11 his occupation. His examinations repeatedly failed to
12 reveal clinical evidence of neurologic abnormalities
13 and two lumbar spine MRI scans were within normal
14 limits.
- 15 2. Plaintiff's subjective complaints are not supported by
16 the objective medical documentation and do not prevent
17 him from performing the Material Duties of his Own
18 Occupation.
- 19 3. The medical evidence does not [meet] the Plan's
20 definition of disability.
- 21 4. Plaintiff was able to return to work in a full-duty
22 capacity within 90 days of his July 15, 2004 injury.
23 There is no clinical evidence documenting the need for
24 ongoing treatment after the July 15, 2004 injury. In
25 the absence of such evidence, he was able to return to
26 work in an unrestricted capacity.
- 27 5. The clinical advisor was not able to determine whether
28 plaintiff was malingering or exaggerating his claim

1 without examining and interviewing him.

2 6. Plaintiff's use of medications did not impair his
3 ability to perform the material duties of his own
4 occupation. (AR: P00195-196.)

5 By letter dated August 28, 2006, Maria Jimenez of PORAC
6 advised plaintiff that it was "still [PORAC's] determination that
7 no benefits are payable." The letter summarized the findings of
8 the HCE Next Care Management clinical advisor and pointed out
9 that all of the injury studies were within normal limits and that
10 all physical examinations failed to exhibit neurologic
11 abnormality. The letter concluded that there were no objective
12 findings in the medical records supporting the claim of
13 disability. Finally, this letter notified plaintiff that he
14 now had the right to appeal the decision directly to the
15 Insurance and Benefit Board of Trustees of PORAC and invited him
16 to provide all additional documentation in support of the claim
17 of disability. (AR: P00175-176.)

18 **E. The Second Layer Of Appeal to the PORAC Board Of**
19 **Trustees and PORAC's Request For An Independent Medical**
20 **Examination Of Plaintiff**

21 In a September 6, 2006 telephone conversation, plaintiff
22 advised Ms. Jimenez of his intention to appeal the denial of his
23 appeal to the PORAC Board of Trustees. Ms. Jimenez confirmed
24 that conversation in a letter of the same date. The letter
25 enclosed a Physician's Report for plaintiff's physician to
26 complete. (AR: P00172-173.)

27 On October 12, 2006, PORAC received a "Qualified or Agreed
28 Medical Evaluator's Findings Summary Form (prepared in connection
with plaintiff's workers compensation case), which was completed

1 by Eric E. Bugna, M.D., a specialist in orthopedics (AR: P00171),
2 as well as a 15 page letter from Dr. Bugna (AR: P00177-191). As
3 part of his report, Dr. Bugna reviewed plaintiff's medical
4 records, including the May 2005 and March 2006 MRI studies. He
5 notes that with respect to the two lumbar spine MRIs, he
6 "agree[s] with the feelings of the interpreting radiologist," who
7 found "[p]lain at the lumbosacral spine with concomitant lower
8 extremity symptomatology, mechanical in etiology." (AR: P00186)
9 Dr. Bugna concluded that in his opinion, plaintiff "does exhibit
10 [a] disability precluding substantial work. It . . . appear[s]
11 that he has lost approximately 75% of his pre-injury capacity to
12 perform work activities including lifting, bending, stooping,
13 pulling, pushing, and the like." (AR: P00189.)

14 On October 20, 2006 PORAC notified plaintiff that his appeal
15 was accepted by the Insurance and Benefits Trust of PORAC and
16 that the appeal would be reviewed and discussed at the trustees'
17 meeting on October 26, 2006. Plaintiff was advised to provide a
18 telephone number if he wished to participate in the appeal
19 discussion. (AR: P00170.)

20 On October 23, 2006 PORAC received a Physician's Report-
21 Musculoskeletal, regarding plaintiff that was completed by Dr.
22 Senegor on October 20, 2006. (AR: P00168-169.) As stated on
23 that form, Dr. Senegor's primary diagnosis was lumbar
24 degenerative disc disease. He reported plaintiff's symptoms as
25 lower back and bilateral leg pain radiating down towards the feet
26 with numbness and tingling in the feet. The form claimed
27 plaintiff was temporarily totally disabled until December 21,
28 2006, with restrictions on lifting over ten pounds, excessive

1 bending, twisting or stooping and no continuous sitting or
2 standing over 30-45 minutes. (AR: P00168.)

3 The trustees of the PORAC Insurance and Benefit Trust met
4 and discussed plaintiff's appeal on October 26, 2006. Plaintiff
5 was contacted by telephone during that meeting. He advised the
6 trustees that he would not be able to return to work, had
7 submitted paperwork to apply for "disability retirement" and was
8 waiting for information that could take 6-9 months to approve.
9 After terminating the telephone conference with plaintiff, the
10 trustees further discussed his appeal and decided to ask
11 plaintiff to submit to an independent medical examination because
12 of conflicting medical reports in his claim file. (AR: P00166.)
13 Plaintiff was notified of this decision by letter dated October
14 27, 2006. (AR: P00164.)

15 On November 2, 2006, plaintiff faxed a one page note to Ms.
16 Jimenez of PORAC stating "human resources has advised me that I
17 can no long [sic] work in my hired position with the county."
18 (AR: P00162.)

19 On December 6, 2006, Renee Lugo of PORAC notified plaintiff
20 that it had scheduled an independent medical examination ("IME")
21 for plaintiff with Ernest Miller, M.D. for January 4, 2007. (AR:
22 P00153.) Dr. Miller reviewed plaintiff's medical records and the
23 IME went forward on January 4, 2007.

24 Thereafter, Dr. Miller submitted to PORAC a 14 page report
25 regarding his findings and conclusions. (AR: P00116-129.)
26 Dr. Miller's physical examination demonstrated a lumbar spine
27 range of motion that was 100% of normal. Lateral bending also
28 was 100% of normal. (AR: P00126.) Dr. Miller stated that in his

1 opinion, the MRI study of May 3, 2005 is "completely normal
2 considering age, weight, and sex. There is no evidence on the
3 MRI study to support an injury of the lower back." (AR: P00127.)
4 Dr. Miller's diagnoses were "1. Gross exogenous obesity. 2.
5 Hyperlipidemia. 3. Chronic lower back pain, with a normal MRI
6 study demonstrating age, weight, and sex appropriate degenerative
7 changes diffuse in lumbar spine. 4. History of fall with back
8 injury and chronic pain in lower back and right lower extremity.
9 5. Rule out avascular necrosis, arthritis, right hip. 6. Rule out
10 bone tumor, bone infection, stress fracture, right femur." (Id.)

11 Ultimately, Dr. Miller concluded that his "[e]valuation [of
12 plaintiff] is quite frankly unremarkable. Physical examination,
13 review of medical records, and understanding of oral history
14 provided no illustration of the nature of the industrial injury
15 and eight foot fall onto the lower back and right side." (Id.)

16 On January 25, 2007, PORAC notified plaintiff that it was
17 upholding the denial of his claim, based on a recap of the
18 original denial, the medical documentation that supported the
19 denial and the findings of Dr. Miller's IME. (AR: P00098.) On
20 March 2, 2007, plaintiff's attorney, David Allen, requested a
21 copy of plaintiff's claim file. On April 13, 2007, PORAC
22 provided the file.

23 Thereafter, Mr. Allen submitted additional documents to
24 PORAC by letter of October 24, 2007. (AR: P00061-74.) The
25 additional documents included plaintiff's final workers'
26 compensation determination finding a "permanent disability of
27 25%" (AR: P00065), a letter from the County of San Joaquin Human
28 Resources Division noting that Dr. Bugna found plaintiff to have

1 "permanent work restrictions" and a document on Mr. Allen's
2 letterhead but allegedly signed by Dr. Senegor, which reiterated
3 the diagnosis of lumbar degenerative disc disease. (AR:
4 P00069-72). PORAC acknowledged receipt of Mr. Allen's letter on
5 November 29, 2007, and provided Mr. Allen with copies of
6 plaintiff's initial application for long term disability
7 benefits, plaintiff's Employer's Statement and plaintiff's job
8 description. (AR: P00049.)

9 On October 19, 2007, plaintiff underwent an IME by Dr. Baer
10 I. Rambach, an orthopedic surgeon. Dr. Rambach reported that
11 plaintiff was currently 300 pounds and that in his opinion, he
12 was "substantially incapacitated from performing the usual
13 duties" of his job as a correctional officer as he would be
14 "unable to intervene in an altercation between inmates;" he could
15 not run, take down or control a combative inmate; "he is markedly
16 limited in his ability to bend, squat or stoop because of his
17 deconditioned state and obesity, which in turn as imposed an
18 extra load and stress on his body mechanics and particularly on
19 the lumbosacral spine and lower extremities." (AR: P00004-14.)

20 Dr. Rambach concluded that plaintiff's injuries were attributable
21 to the accidents in June and July 2004; he found that the
22 injuries were soft tissue in nature and "should have resolved
23 with appropriate treatment" but plaintiff "allowed himself to
24 gain weight, and become excessively deconditioned to the point
25 that he even uses a cane in his right hand when ambulating."
26 (AR: P00010.)

27 Thereafter, on February 11, 2008, Mr. Allen provided PORAC a
28 copy of a letter from the Chief Executive Officer of the San

1 Joaquin County Employees' Retirement Association ("SJCERA") to
2 plaintiff notifying him that the Board of Directors of SJCERA had
3 approved plaintiff's application for a service-related disability
4 retirement. (AR: P00048, P00018.) Mr. Allen stated that the
5 letter was submitted "to show the severity of Jerry Thompson's
6 condition." (AR: P00048.)

7 Plaintiff filed the instant action on March 25, 2008.

8 **STANDARD**

9 Before reaching the merits of the parties' motions, the
10 court must determine whether to apply de novo or abuse of
11 discretion review to PORAC's denial of plaintiff's LTD benefits.
12 The Plan at issue here is governed by ERISA. In Firestone Tire &
13 Rubber Co. v. Bruch, the United States Supreme Court held that a
14 challenge to the denial of benefits under an ERISA plan is
15 reviewed de novo "unless the benefit plan gives the administrator
16 or fiduciary discretionary authority to determine eligibility for
17 benefits or to construe the terms of the plan." 489 U.S. 101,
18 115 (1989). When a plan document gives an administrator such
19 discretionary authority, a court must apply the "abuse of
20 discretion" or "arbitrary and capricious" standard of review to
21 its decision to deny benefits. Id. at 111; see also Abatie v.
22 Alta Health & Life Ins. Co., 458 F.3d 955, 963 (9th Cir. 2006).

23 In this case, the Plan unambiguously grants PORAC discretion
24 when reviewing claims. The Plan expressly states PORAC has "full
25 and exclusive authority to control and manage the Plan, to
26 administer claims, and to interpret the Plan and resolve all
27 questions arising in the administration, interpretation, and
28 application of the Plan[,]" which includes the "right to

1 determine" eligibility for coverage, entitlement to benefits, the
2 amount of benefits payable and the sufficiency and amount of
3 information required of the claimant to permit PORAC to make
4 these determinations. (AR: P00455.)

5 Only where there are procedural violations "so flagrant as
6 to alter the substantive relationship between the employer and
7 employee, thereby causing the beneficiary substantive harm," does
8 the court apply de novo review despite the discretionary grant of
9 authority. Gatti v. Reliance Standard Life Ins. Co., 415 F.3d
10 978, 985 (9th Cir. 2005). As an example of what constitutes
11 "wholesale and flagrant violations of the procedural requirements
12 of ERISA," the Ninth Circuit in Abatie cited the facts in Blau v.
13 Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984), noting that in
14 Blau, "the administrator had kept the policy details secret from
15 the employees, offered them no claims procedure, and did not
16 provide them in writing the relevant plan information." Abatie,
17 458 F.3d at 971.

18 Plaintiff contends here that the following procedural
19 violations by PORAC mandate de novo review: (1) PORAC failed to
20 provide plaintiff with a copy of Dr. Miller's IME report; (2)
21 PORAC failed to provide plaintiff with a copy of his claim file
22 within 30 days of plaintiff's request; and (3) PORAC breached its
23 fiduciary duties by failing to investigate an inconsistency in
24 Dr. Miller's report of plaintiff's mechanism of injury (plaintiff
25 contends Dr. Miller inaccurately found that plaintiff's injuries
26 were attributable to his June 2004 fall from a wall as opposed to
27 his July 2004 fall while running). However, even assuming the
28 truth of these allegations, such failures by a plan administrator

1 do not constitute a complete failure "to comply with virtually
2 every applicable mandate of ERISA" as is required under Abatie to
3 apply de novo review, despite the discretionary grant of
4 authority. Id. At most, these errors represent mere
5 "procedural irregularities" which can be weighed by the court in
6 deciding whether the administrator abused its discretion. Id. at
7 972 (recognizing that a "procedural irregularity in processing an
8 ERISA claim does not usually justify de novo review," rather like
9 a conflict of interest, the procedural irregularity is a "matter
10 to be weighed in deciding whether an administrator's decision was
11 an abuse of discretion"). Only where the procedural violations
12 are so "flagrant" so as to "alter the substantive relationship
13 between the employer and employee, thereby causing the
14 beneficiary substantive harm" does the court apply de novo
15 review. Id. at 985. Here, plaintiff has not established that
16 any of these alleged violations by PORAC impacted the quality of
17 his review by the administrator nor prejudiced him.

18 Indeed, even if the allegations were legally sufficient to
19 raise a justification for application of de novo review, the
20 allegations are demonstrably false and/or irrelevant to the
21 court's inquiry. First, PORAC provided plaintiff a copy of the
22 IME by Dr. Miller; said copy was attached to PORAC's January 25,
23 2007 letter denying plaintiff's appeal. (AR: P00098.) It was
24 also provided to plaintiff's counsel on April 13, 2007. (AR:
25 P00084.) Additionally, while PORAC did not respond to
26 plaintiff's request for a copy of his claim file within 30 days
27 of the request, it did respond promptly--in just 36 days. As set
28 forth above, that procedural irregularity, if any, is immaterial

1 to this court's inquiry as plaintiff has failed to show that the
2 brief delay prejudiced him.⁴ Finally, even if Dr. Miller confused
3 plaintiff's alleged June 2004 fall with his July 2004 fall, that
4 mistake is not relevant to the pertinent inquiry before the plan
5 administrator and now this court. How plaintiff sustained his
6 injuries is not particularly relevant to this case. As opposed
7 to plaintiff's worker's compensation claim, where the
8 determination of whether plaintiff sustained an industrial injury
9 is critical, here what is relevant is whether the injuries
10 plaintiff sustained prevented him performing the material duties
11 of his occupation.

12 ANALYSIS

13 Applying the abuse of discretion standard of review, the
14 sole issue before the court is whether PORAC abused its
15 discretion, or in other words, acted arbitrarily and
16 capriciously, in denying plaintiff's LTD benefits claim. An
17 administrator's decision is an abuse of discretion only when it
18 is without reason, unsupported by substantial evidence or
19 erroneous as a matter of law. See Montour v. Hartford Life &
20 Accident Insur. Co., - F.3d -, No. 08-55803, 2009 WL 2914516, *4
21 (9th Cir. Sept. 14, 2009); Taft v. Equitable Life Ins. Co., 9
22

23 ⁴ Moreover, it is not clear that any provision of ERISA
24 requires PORAC to provide the claim file within 30 days of a
25 request by a claimant. The claim file is not among the documents
26 specifically enumerated by the statute (29 U.S.C.
27 § 1024(b)(4)), though admittedly, it is akin to those documents.
28 See Hughes Salaried Retirees Action Committee v. Administrator of
the Hughes Non-Bargaining Retirement Plan, 72 F.3d 686, 691 (9th
Cir. 1995) (holding that the term "other instruments under which
the plan is established or operated" refers to "documents that
are similar in nature to the documents specifically listed in
[ERISA § 104(b)(4)]").

1 F.3d 1469, 1472 (9th Cir. 1994). So long as the administrator's
2 decision has a rational basis, the court is not free to
3 substitute its own judgment for that of the administrator in
4 determining the eligibility for plan benefits even if the court
5 disagrees with that decision. Id. Under the abuse of discretion
6 standard, the only issue is whether, on the evidence considered,
7 the administrator's determination was "reasonable." Horan v.
8 Kaiser Steel Retirement Plan, 947 F.2d 1412, 1417 (9th Cir.
9 1991); see also Clark v. Wash. Teamsters Welfare Trust, 8 F.3d
10 1429, 1432 (9th Cir. 1993) ("Our inquiry is not into whose
11 interpretation of plan documents is most persuasive, but whether
12 the plan administrator's interpretation is unreasonable.")

13 Ultimately, in cases such as this one, where there is no
14 conflict of interest, structural or otherwise,⁵ judicial review of
15 a plan administrator's determination involves a "straight-forward
16 application of the abuse of discretion standard." Montour, 2009
17 WL 2914516 at *4. The plan administrator's decision can be
18 upheld if it is "grounded on any reasonable basis." Id.
19 (emphasis in original). "In other words, where there is no risk
20 of bias on the part of the administrator, the existence of a
21 'single persuasive medical opinion' supporting the
22 administrator's decision can be sufficient to affirm, so long as
23 the administrator does not construe the language of the plan
24 unreasonably or render its decision without explanation." Id.
25 (citations omitted).

26
27 ⁵ As set forth above, the Plan here is 100% funded during
28 the self-funded period by contributions from Plan participants.
PORAC derives no financial benefit in the event of a denial of a
participant's claim for benefits.

1 Moreover, the scope of review under the arbitrary and
2 capricious standard is very limited. The focus of an abuse of
3 discretion inquiry is the administrator's analysis of the
4 administrative record--it is not an inquiry into the underlying
5 facts. Alford v. DCH Found Group Long-Term Disability Plan, 311
6 F.3d 955, 957 (9th Cir. 2002). Thus, the court will not consider
7 information outside the administrative record, as it would be
8 improper to find a claims administrator abused its discretion
9 based on evidence not before it at the time the decision was
10 made. Taft, 9 F.3d at 1472.

11 Here, a review of the administrative record reveals that
12 PORAC did not abuse its discretion in denying plaintiff's LTD
13 benefits claim. The evidence shows that PORAC reasonably
14 concluded that plaintiff was not disabled, based on the materials
15 and records at its disposal, and PORAC's diligent and thorough
16 review of plaintiff's claim demonstrates that any minor
17 procedural irregularities, to the extent they occurred, did not
18 bias PORAC against plaintiff or otherwise prejudice him.

19 Plaintiff's primary argument is that PORAC abused its
20 discretion by ignoring plaintiff's subjective complaints of pain
21 and requiring "objective" medical evidence of plaintiff's
22 disability, when no such requirement exists in the Plan.
23 Plaintiff's argument is unavailing. A reasonable review of the
24 administrative record reflects that PORAC engaged in a thorough
25 review of plaintiff's medical records, and specifically
26 considered plaintiff's reports of pain. (See AR: P00214, P00176
27 [noting that plaintiff's symptoms are "low back pain and right
28 leg pain" and finding that his "subjective complaints are not

1 supported by objective medical documentation *nor do they prevent*
2 *[plaintiff] from performing the Material Duties of his Own*
3 *Occupation"*) (emphasis added). PORAC was justified in
4 considering the lack of "objective" medical evidence supporting a
5 finding of a disability. Safavi v. SBC Disability Income Plan,
6 493 F. Supp. 2d 1107, 1118 (C.D. Cal. 2007) (rejecting argument
7 that plan administrator should not be allowed to take lack of
8 objective evidence in to consideration at all).

9 In this case, plaintiff's medical records showed that his
10 initial complaint of knee pain subsided and an MRI of plaintiff's
11 knee was normal. (AR: P00307.) Two MRIs of plaintiff's lumbar
12 spine showed normal findings. Indeed, plaintiff's own treating
13 physician, Dr. Senegor, stated that the diagnostic tests revealed
14 only "very mild" facet changes (AR: P00264) and that the "overall
15 extent of the disability with regards to the lumbar spine does
16 not match the patient's radiological findings which are rather
17 scant." (AR: P00263.) Because of Dr. Senegor's contrary
18 findings, however, offered at times in support of plaintiff's
19 claimed disability, PORAC conducted an IME of plaintiff. That
20 IME by Dr. Miller confirmed that (1) plaintiff's lateral bending
21 was 100% of normal; (2) his lumbar spine range of motion was 100%
22 of normal; and (3) the evaluation of plaintiff's physical
23 capacity was otherwise "unremarkable."

24 Plaintiff places much emphasis on Dr. Senegor's ultimate
25 *conclusion* that plaintiff was disabled, notwithstanding the lack
26 of medical *evidence* to substantiate that conclusion. A plan
27 administrator is not required to accord special weight to the
28 opinions of a claimant's physician. Nor may this court impose on

1 the plan administrator a discrete burden of explanation when it
2 credits reliable evidence that conflicts with a treating
3 physician's evaluation. Black & Decker Disability Plan v. Nord,
4 538 U.S. 822, 834 (2003). PORAC properly questioned Dr.
5 Seneger's findings, many of which were internally inconsistent,
6 and it reasonably relied on the findings of the IME, particularly
7 considering that those findings were consistent with even some of
8 Dr. Senegor's own conclusions, as well as the two MRIs and the
9 independent file review performed by HCE Next Care Management.

10 Under abuse of discretion review, this court must uphold the
11 administrator's decision if it is based on "any reasonable
12 basis." Montour, 2009 WL 2914516 at *4. Where there is no risk
13 of bias on the part of the administrator, as is the case here,
14 "the existence of a 'single persuasive medical opinion'
15 supporting the administrator's decision can be sufficient to
16 affirm, so long as the administrator does not construe the
17 language of the plan unreasonably or render its decision without
18 explanation." Id. Here, Dr. Miller's IME report sufficiently
19 supports PORAC's denial of benefits to plaintiff. Moreover,
20 plaintiff does not argue that PORAC improperly interpreted any
21 Plan provisions, and PORAC adequately explained its decision to
22 deny benefits at each level--initial, appeal and board of
23 trustees.

24 As a final argument, plaintiff contends that PORAC acted
25 arbitrarily and capriciously in denying his claim because it
26 failed to consider the award of benefits by the Social Security
27 Administration ("SSA") and the SJCERA. However, PORAC had no
28 obligation to consider the SSA's award of benefits since there is

1 no evidence in the administrative record of any such award.
2 Indeed, in the claims process, plaintiff indicated that he had
3 not applied for SSA benefits. (AR: P00025.) The focus of an
4 abuse of discretion inquiry is the administrator's analysis of
5 the administrative record. Alford, 311 F.3d at 957. The court
6 may not consider information outside the administrative record,
7 as it would be improper to find a claims administrator abused its
8 discretion based on evidence not before it at the time the
9 decision was made. Taft, 9 F.3d at 1472. Thus, the court cannot
10 find any error by PORAC in failing to consider plaintiff's SAA
11 award.

12 Moreover, the court notes that even if evidence of an SSA
13 award was before PORAC, contrary to plaintiff's protestations,
14 PORAC would not have been *required* to accept the SSA's findings.
15 The Ninth Circuit has long recognized that there are critical
16 legal differences between disability determinations made in SSA
17 proceedings and ERISA actions, and an ERISA plan administrator is
18 not required to accept SSA findings. See Madden v. ITT Long Term
19 Disability Plan for Salaried Employees, 914 F.2d 1279, 1286 (9th
20 Cir. 1991) (upholding a denial of long-term disability benefits
21 under the "any occupation" standard even when social security
22 disability benefits had been awarded); Hamma v. Intel Corp., - F.
23 Supp. 2d -, No. 07-1795 GEB/CMK, 2009 WL 799283, *6 (E.D. Cal.
24 Mar. 23, 2009) (holding that "plan administrators are not
25 constrained by an award of Social Security benefits . . . because
26 'the test for Social Security disability is different than that
27 required under ERISA'" (citations omitted).

28

1 For the same reasons, PORAC did not err in failing to
2 consider the SJCERA's award of service-related disability
3 retirement benefits. While there is evidence in the record of
4 this award, plaintiff submitted said evidence in February 2008,
5 long after the claims and appeal decisions in this case.
6 Moreover, even if PORAC had access to these records previously,
7 it was not required to accept the association's findings.
8 Plaintiff has made no showing, here, that the association's
9 findings were made under standards akin to ERISA, and presumably,
10 like the SSA, the standards would differ. Therefore, the court
11 cannot find that PORAC acted arbitrarily and capriciously in
12 failing to consider plaintiff's SSA and SJCERA awards.

13 **CONCLUSION**

14 For the foregoing reasons, the court DENIES plaintiff's
15 motion for judgment in his favor and HEREBY GRANTS judgment in
16 favor of PORAC. The Clerk of the Court is directed to close this
17 file.

18 IT IS SO ORDERED.

19 DATED: September 30, 2009

20 

21 _____
22 FRANK C. DAMRELL, JR.
23 UNITED STATES DISTRICT JUDGE
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