

APR 13 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLOW RORABAUGH,  
  
Plaintiff-Appellee,  
  
v.  
  
CONTINENTAL CASUALTY  
COMPANY, et al.,  
  
Defendants-Appellants.

Nos. 07-55286, 07-55492

D.C. No. CV-05-03612-ABC

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Audrey B. Collins, Chief District Judge, Presiding

Argued and Submitted March 5, 2009  
Pasadena, California

Before: FERNANDEZ and PAEZ, Circuit Judges, and HOGAN,\*\* District  
Judge.

Defendants Continental Casualty Company et al. appeal the judgment of the  
district court in favor of plaintiff Willow Rorabaugh on her claim for long term  
disability plan benefits under the Employee Retirement Income Security Act

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\* This disposition is not appropriate for publication and  
may not be cited except as provided by 9th Cir. R. 36-3.

\*\* The Honorable Michael R. Hogan, United States District  
Judge for the District of Oregon, sitting by designation.

("ERISA"), 29 U.S.C. § 1001, et seq.

1. Defendants waived their right to appeal the district court's choice of the de novo standard of review by filing a stipulation to the standard and reiterating the stipulation in their trial memorandum. *Ritchie v. United States*, 451 F.3d 1019, 1026 & n.12 (9th Cir. 2006). Defendants' authority, *Regula v. Delta-Family Care Disability Survivorship Plan*, 266 F.3d 1130, 1138 (9th Cir. 2001), *judgment vacated on other grounds*, 539 U.S. 901 (2003), does not require that we ignore the stipulation. In *Regula* we declined to adhere to the parties' stipulation to abuse of discretion review because the stipulation did not disclose whether the parties intended highly deferential or less deferential abuse of discretion review. *Id.* at 1139. Defendants' stipulation to de novo review presents no such concern.

2. Defendants waived their right to appeal the admission of Dr. Marks's deposition testimony by failing to raise an objection in the district court, and by relying on the evidence in their trial memorandum. *Ritchie*, 451 F.3d at 1026 & n.12.

3. On de novo review, the district court permissibly credited the opinions of Rorabaugh's treating physicians. Defendants are correct that "plan administrators are not obliged to accord special deference to the opinions of treating physicians." *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 825 (2003). Contrary to

defendants' argument, however, the record does not show that the district court gave "special deference to the opinions of [Rorabaugh's] treating physicians." *Id.*

4. The district court's determination that Rorabaugh is totally disabled within the meaning of the long term disability plan is not clearly erroneous. *See Deegan v. Cont'l Cas. Co.*, 167 F.3d 502, 508-09 (9th Cir. 1999). The medical records (including the functional assessment tool completed by Dr. Dyes), the physical demands analysis submitted by Rorabaugh's employer, and the plan summary's definition of "total disability," constitute reasonable bases for the determination of total disability.

5. By failing to raise the matter before the district court, defendants waived their right to appeal the award of benefits through the date of the judgment. *Ritchie*, 451 F.3d at 1026 & n.12.

6. Rorabaugh's request for attorney fees is premature. Rorabaugh may file a separate request for attorney fees under 9th Cir. R. 39-1.6.

AFFIRMED.