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**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TERRELL ARMSTRONG,)	No. 04-15061
)	
Plaintiff-Appellant,)	D.C. No. CV-03-01386-CRB
)	
v.)	MEMORANDUM*
)	
LAB ONE, INC.,)	
)	
Defendant-Appellee.)	
)	
_____)	

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted October 17, 2005
San Francisco, California

Before: BEEZER, KOZINSKI, and FERNANDEZ, Circuit Judges.

Terrell Armstrong appeals the district court’s grant of summary judgment to Lab One, Inc., in Armstrong’s action for long-term disability benefits from Lab One’s Employee Retirement Income Security Act¹ plan, which was administered

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

¹ See 29 U.S.C. §§ 1001–1461.

and insured by Unum Life Insurance Company of America. We affirm.

Because it is agreed that the plan conferred discretion upon Unum and because no serious conflict of interest was shown, the administrator's denial of benefits to Armstrong is reviewed for an abuse of discretion. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S. Ct. 948, 956–57, 103 L. Ed. 2d 80 (1989); Boyd v. Bert Bell/Pete Rozelle NFL Players Retirement Plan, 410 F.3d 1173, 1178 (9th Cir. 2005); Jordan v. Northrop Grumman Corp. Welfare Benefit Plan, 370 F.3d 869, 875–76, 878 (9th Cir. 2004).

Unum did not abuse its discretion when it determined that Armstrong's knee condition was preexisting within the meaning of the plan's terms. The history prior, during and after the relevant preexisting condition period supports and permits that determination.²

AFFIRMED.

² Armstrong's argument that Unum's reliance upon opinions of non-examing physicians and nurses violated Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589–91, 113 S. Ct. 2786, 2795–96, 125 L. Ed. 2d 469 (1993) principles was waived when he failed to raise it before the district court. See United States v. Alisal Water Corp., 370 F.3d 915, 923 (9th Cir. 2004); Crawford v. Lungren, 96 F.3d 380, 389 n.6 (9th Cir. 1996).