IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs,

v. Case No. 17-CV-0264

STATE OF WISCONSIN DEPARTMENT
OF EMPLOYEE TRUST FUNDS, et al.,

Defendants.

DEFENDANTS' MOTION IN LIMINE (NOS. 4–5) TO EXCLUDE CERTAIN TESTIMONY OF DRS. BUDGE AND SCHECHTER

Defendants' move to exclude testimony from two of Plaintiffs' retained experts under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). Defendants' Motion in Limine No. 4 seeks to exclude testimony and opinions offered by Plaintiffs' psychological expert, Stephanie Budge, Ph.D., as to the cost effectiveness of the Exclusion to insurance plans. Defendants' Motion in Limine No. 5 seeks to exclude testimony and opinions offered by Plaintiff's medical expert, Loren Schechter, M.D., on the medical efficacy of surgical treatment for gender dysphoria. The bases for these motions are as follows.

I. Overview of the law on the admissibility of expert testimony.

The admissibility of expert testimony is governed by Federal Rule of Evidence 702 and the Supreme Court's seminal opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 607 (7th Cir. 2006).[1] Rule 702 provides that an expert with scientific, technical or other specialized knowledge may testify in the form of an opinion or otherwise "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. of Evid. 702. The party who retained the expert must demonstrate that the expert's testimony would satisfy the *Daubert* standard. *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 705 (7th Cir. 2009).

The "gatekeeping" responsibility of ensuring that all expert evidence admitted is both relevant and reliable falls to the district court. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); *Daubert*, 509 U.S. at 589. "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is . . . valid and of whether that reasoning or

[1] "*Daubert* interpreted an earlier version of Rule 702, but it remains the gold standard for evaluating the reliability of expert testimony and is essentially codified in the current version of Rule 702." *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013).

methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592–93. And in making an assessment of relevance and reliability, the "focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 594–595.

In evaluating the reliability of expert testimony, a court must consider whether "an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152. Failure to properly connect existing data and accepted methodologies with the ultimate expert opinion can lead to exclusion of expert testimony.

"Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." *Carroll v. Otis Elevator Co.,* 896 F.2d 210, 212 (7th Cir. 1990). "The court should also consider the proposed expert's full range of experience and training in the subject area, as well as the methodology used to arrive at a particular conclusion." *Gayton v. McCoy*, 593 F.3d 610, 616 (7th Cir. 2010). An expert's "work is admissible only to the extent that it is reasoned, uses the methods of the discipline, and is founded on data. Talking off the cuff—deploying neither data nor analysis—is not an acceptable

methodology." *Lang v. Kohl's Food Stores, Inc.*, 217 F.3d 919, 924 (7th Cir. 2000).

With regard to medical experts, "simply because a doctor has a medical degree does not make him qualified to opine on all medical subjects." *Gayton*, 593 F.3d at 617. The question the district court asks "is not whether an expert witness is qualified in general, but whether his 'qualifications provide a foundation for [him] to answer a specific question.'" *Id.* at 617 (alteration in original) (quoting *Berry v. City of Detroit,* 25 F.3d 1342, 1351 (6th Cir. 1994)).

II. Defendants' Motion in Limine No. 4: Exclude testimony offered by Dr. Budge regarding the costs to insurance plans of covering transition-related care for transgender individuals.

In her expert report, Dr. Budge, offered the following opinion:

> In addition, there is no evidence to support a policy of excluding coverage for all transition-related care for transgender individual. As well, the evidence indicates that the cost to insurance plans of covering transition-related care for transgender individuals is minimal and may well be offset by reduction in other health care expenses that arise from failure to provide such care.

(Dkt. 89:1 (Budge Report).) Her report goes on to offer the following opinions:

> **Blanket Exclusions for Transition-Related Care**
>
> In the above sections, I discuss the substantial body of literature indicating the medical necessity of transition-related care for transgender individuals and have listed citations for that literature in Appendix B. As noted in the Plaintiffs' Amended Complaint and in the Employee Trust Funds (ETF) *Uniform Benefits: Exclusions and Limitations* document, ETF excludes all "procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment." Padula, Heru, & Campbell (2016) report that, even though many insurance policies prohibit coverage for transgender

individuals for transition-related care, in 2014 the U.S. Department of Health and Human Services lifted a ban on these exclusions for the Centers for Medicare and Medicaid Services (CMS) beneficiaries for two reasons: (1) that the literature demonstrates gender confirmation surgery is efficacious, safe, and effective, and that (2) because it is efficacious, safe, and effective, "exclusions of coverage are not reasonable" (p. 395).

Instead of excluding all procedures, services, and supplies related to transgender care, the WPATH SOC indicate that all treatment plans for transgender individuals should be individualized to the patient (Coleman et al., 2012). In the most recent iteration of their guidelines, the Center of Excellence for Transgender Health at the University of California-San Francisco released recommendations based on their *Guidelines for the Primary and Gender- Affirmation Care of Transgender and Nonbinary People* (2016). Specifically, these guidelines outline how providers can create individualized treatment plans with transgender patients, noting specific health care concerns that might interact with transition-related care and how to best approach treatment plans with patients. Given the overwhelming evidence and precedent for offering transition-related care pursuant to individualized plans, there is no evidence to support insurance policies that exclude coverage for all transition-related care for transgender individuals.

Costs of Transition-Related Care

Along with transition-related care being considered medically necessary by medical and mental health experts, it is also considered cost effective for insurance companies to cover transition-related care. Padula et al. (2016) analyzed the Grant et al. (2011) dataset that sampled over 6,000 transgender individuals in the United States. Their statistical analysis indicates that it is cost-effective for the patient, the other persons insured, and the insurance company itself to cover transition-related care. They found that coverage would cost members approximately $0.016 a month. When comparing this data to the current case, the differences appear negligible. In a memo dated 9/28/2005, ETF was provided with the cost impact of covering "all surgical procedures and hormone therapies" for the state insurance. The cost impact per paying member was estimated to be $0.05 per month, indicating that the costs estimated per member are similar.

Regarding the cost to the insurance company, results also indicate that it is in the insurance company's financial interest to cover transition-related care. Padula et al. (2016) note that a reason to consider transition-related care cost-effective is that denial of coverage

> could be costly to payers due to morbidity of failing to provide the care. Padula & Baker (2017) note that it is more costly to deny coverage to transgender patients because denial of care is associated with increased disparities in depression, drug abuse, HIV, and additional conditions that are costly to treat. In fact, analyses indicate that without transition-related care, the costs related to treating depression, anxiety, drug abuse, etc. are estimated to be $10,712 a year (Beck, 2015) indicating the economic benefit of insurance companies covering transgender-related care. In our study (dickey, Budge, Katz-Wise, & Garza, 2016) we discuss the disparities in health insurance coverage between transgender and cisgender individuals; we found that transgender individuals will often avoid seeking health care when they need it because they are worried about discrimination by providers or that their insurance will deny certain claims (Grant et al., 2011) and thus some health issues may be exacerbated by the lack of preventative or immediate care. This avoidance of health care has been shown to have deleterious health effects in marginalized populations (Becker, 2004)—which in turn would likely have economic consequences.

(Dkt. 89:22–23 (Budge Report).) Dr. Budge lacks any specialized knowledge, skill, experience, or education in the area of insurance coverage and assessing the cost-effectiveness of exclusion provisions for insurance plans. Therefore, the testimony she offers in the above-excerpts from her expert report, along with any testimony she intends to offer at trial regarding these opinions should be excluded.

Dr. Budge is a licensed psychologist. (Dkt. 89-1:2.) By her own admission, Dr. Budge does not have "any specialized education or training or experience with insurance coverage issues." (Dkt. 158 (Budge Dep. 110:2–6).) More specifically, Dr. Budge lacks any education, training, or experience in the cost effectiveness of insurance coverage for specific benefits; insurance premium rate setting; projecting long-term costs for insurance coverage of

specified benefits; value-based insurance design; forecasting and budgeting health plans; or medical claims data. (Budge Dep. 110:7–111:5.) Further, Dr. Budge is not personally aware of the actual amount of healthcare costs incurred by individuals who suffer from depression, suicidal thoughts, or other conditions they attribute to a denial in insurance coverage for transition-related care. (Budge Dep. 115:19–24.) She is also "not aware exactly how [the studies she cites] came to that actual conclusion" that without transition-related care, the costs related to treating depression, anxiety, drug abuse, etc. are estimated to be $10,712 a year. (Budge Dep. 115:19–24.)

Dr. Budge clearly is not qualified to testify as to the above excerpts of her expert report on the cost-effectiveness of the Exclusion for an insurance plan. She has no education, training, or experience regarding the insurance industry and how to assess the cost-effectiveness of an exclusion for a health plan. There is no indication that she used a methodology that is accepted and reliable in the actuarial field, or that she made appropriate use of available data. She also has no personal knowledge of the costs associated with any of the treatments discussed in the challenged excerpts of her report. And her report lacks any foundation to support the costs and figures she attributes to insurance companies with an Exclusion.

Both the Plaintiffs and the State Defendants have submitted reports from health insurance actuarial experts regarding the cost savings of the Exclusion. (*See* Dkt. 91; 105.) Nothing in Dr. Budge's expert report comes close to incorporating the accepted and standard methodology utilized by either of these experts, applying sound actuarial principles to an appropriate data set. Essentially, Dr. Budge just recites what a few studies have found, citing data that is inconsistent with what true experts in the field have assessed as the costs. She admits that she did not know the basis for the data in her cited study or any information regarding how that figure was adduced. (Budge Dep. 115:19–24.) There is no indication that Dr. Budge undertook any investigation or economic analysis independently to determine what the costs of treatment would be for any of the health issues that she theorizes could result with the Exclusion, such as depression, anxiety, or drug abuse, and if the $10,712 a-year-figure cited in her report was consistent with data available from ETF.

In fact, Dr. Budge's report relies on studies that are not used in the actuarial sciences for benefit pricing purposes. (Dkt. 91:18.) These types of studies lack sufficiently detailed information to match the costs with the associated benefit descriptions for a specific time period. (Dkt. 91:18.) For example, the measured outcome in the Padula, et al. (2016) study is a Quality Adjusted Life Year at 5 year and 10 year horizons, which are too far out for

benefit pricing purposes. (Dkt. 91:18.) The estimated costs are derived from an ad hoc survey, and procedures were weighted in an undisclosed fashion by procedure prevalence with a publication reference of 2007. (Dkt. 91:18.) Inputs with attached costs also include measures not included in standard health benefits including cost utilities for items such as job loss, depression, and attempted suicide. (Dkt. 91:18.) None of these study design elements would be used in a current pricing of medical benefits. (Dkt. 91:18.)

Under Fed. R. Evid. 702, an expert's testimony must be "based upon sufficient facts or data" and must be "the product of reliable principles and methods" which have been "reliably applied . . . to the facts of the case." Fed. R. Evid. 702(a)–(d). Under *Daubert*, any step that renders the analysis unreliable renders the expert's testimony inadmissible. *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 782 (10th Cir. 1999). This is true whether the step completely changes a reliable methodology or merely misapplies that methodology. *Id.* "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). As noted in *General Elec. Co. v. Joiner*, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." 522 U.S. at 146.

Here, Dr. Budge has stepped outside her area of expertise to offer an opinion regarding the cost effectiveness of the Exclusion to ETF's health plan. Dr. Budge's report fails to provide any meaningful data, methodology, or analysis necessary to establish the reliability of her opinions. The studies she cites are do not employ a reliable methodology used in the actuarial sciences for benefit pricing purposes. And, regardless, merely reciting what another expert has found in a conclusory way, without any personal knowledge of the data or methodology, is not reliable and insufficient to survive *Daubert*. *See TK–7 Corp. v. Estate of Barbouti,* 993 F.2d 722, 732 (10th Cir. 1993) (expert who adopted the projections of another expert did not reasonably rely on those projections when "he knew little or nothing at all about" the other expert and the record did not reveal what efforts the expert independently made to corroborate the projections).

As such, Dr. Budge's opinions set forth in the above excerpts from her expert report are unreliable and unhelpful to the trier of fact, and she should be precluded from testifying regarding these excerpts and the cost effectiveness of the Exclusion.

III. Defendants' Motion in Limine No. 5: Exclude testimony offered by Dr. Schechter regarding the medical efficacy of surgical treatments on patients suffering from gender dysphoria.

Dr. Schechter opines that gender confirming surgery "is effective in alleviating gender dysphoria." (Dkt. 106:9–10, 14–15, 19–20.) While

Dr. Schechter classifies himself as a recognized expert in the field of plastic surgery (Dkt. 106:1), that does not mean he is an expert qualified to opine on the efficacy of those surgeries as treatment for the underlying mental health disorder of gender dysphoria. Dr. Schecter has neither the knowledge, skill, experience, training, nor education to expertly opine that gender confirming surgical treatments are effective in treating gender dysphoria—a mental health condition. As a result, at trial Dr. Schechter should not be permitted to express this opinion and the following sections of Dr. Schechter's expert witness reports should not be allowed to be referenced either: Section III.B. (Dkt. 106:9–10) and other statements throughout his expert witness report (Dkt. 106:1, 4, 12–19, 20), and paragraph 3 of his supplemental expert witness report (Dkt. 116:4).

Dr. Schechter's first basis for his opinion are merely references to peer-reviewed articles of studies that he did not author. (Dkt. 106:9–10, 16.) But an "expert is not entitled to testify to opinions that rely on the opinion of another expert, simply because the other is an expert." *Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771, 789 (7th Cir. 2017) (quoting *Mooring Capital Fund, LLC v. Knight*, 388 Fed. Appx. 814, 820 (10th Cir. 2010)). Moreover, one of the studies he cites based its outcomes on the Body Uneasiness Test, a test which Dr. Schechter has no personal knowledge. (Dkt. 159 (Schechter Dep. 41:16–24).) Further, none of these studies he read,

to his knowledge, were administered with a patient control group—a reason *he* used in criticizing Defendants' expert witness' opinion. (Dkt. 106:16 n.31; Schechter Dep. 53:24–54:22.)

In addition, while Dr. Schechter has authored journal articles and book chapters, these focus on the techniques of the surgical procedures themselves, not on their effectiveness in treating gender dysphoria. (Dkt. 106.3; Schechter Dep. 13:5–14:14.) And Dr. Schechter can cite no journal articles he authored that perform a literature-review of the medical efficacy of surgical treatment for gender dysphoria. (Schechter Dep. 47:20–48:7.)

Dr. Schechter next supports his purported expert opinion simply by referencing the opinion of the medical community in general. (Dkt. 106:12, 19.) But this is just more of the same that is insufficient to qualify as an expert—solely relying on the opinions of others. *Gopalratnam*, 877 F.3d at 789.

The last basis of Dr. Schechter's alleged expert opinion is his 18 years of clinical experience. (Dkt. 106:2, 19.) It is true that Dr. Schechter is and has been a board-certified plastic surgeon. (Dkt. 106:1.) However, this experience is nothing more than performing plastic surgeries. He is not a psychiatrist, psychologist, or counselor of any kind. (Schechter Dep. 10:10–15.) And he has no specialized education or training in the field of mental health disorders, let alone gender dysphoria. (Dkt. 106-1:2; Schechter Dep. 9:15–24.) Indeed, he

does not even diagnose gender dysphoria in his practice. (Schechter Dep. 19:20–22, 33:13–15.) Dr. Schechter may point to his post-operative follow-up with his transgender patients as support for his supposed expert opinion, but that follow-up merely consists of speaking with and examining them.[2] (Schechter Dep. 64:3–21.) This action of his deploys neither data nor analysis; it is not the required methodology necessary to qualify him as an expert. *See Lang,* 217 F.3d at 924 (7th Cir. 2000). In short, Dr. Schechter neither has the proper experience or training, nor has used accepted methodology, to allow his opinion regarding effective mental health treatment to be a qualified expert opinion.

Dr. Schechter is an expert in the field of plastic surgery, but he is not qualified to provide expert witness testimony on the medical efficacy of gender confirming surgical treatments on transgender persons suffering from gender dysphoria. All such opinion testimony from him should be excluded at trial.

[Signature page follows]

[2] Only recently has Dr. Schechter begun to conduct a pre-operative and post-operative patient survey study of patients receiving gender confirming surgeries, but it is ongoing and not yet published, so it cannot be reliable. (Schechter Dep. 42:10–16, 43:1–17.)

Dated this 7th day of September, 2018.

Respectfully submitted,

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