IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:23-CV-897

IN RE: CAMP LEJEUNE WATER LITIGATION	)	**PLAINTIFF LEADERSHIP GROUP'S REPLY IN SUPPORT OF MOTION TO EXCLUDE CERTAIN OPINIONS OF DEFENDANT'S PHASE III ECONOMIC EXPERTS DUBRAVKA TOSIC, TRICIA YOUNT, AND ANDREW BROD [D.E. 864]**
This Pleading Relates to: *Bruce Hill v. USA*, 7:23-CV-028 *Jimmy Laramore v. USA*, 7:23-CV-594 *Frank Mousser v. USA*, 7:23-CV-667 *Jacqueline Tukes v. USA*, 7:23-CV-1553 *Gary McElhiney v. USA*, 7:23-CV-1368 *Edgar Peterson v. USA*, 7:23-CV-1576 *Diane Rothchild v. USA*, 7:23-CV-858 *Richard Sparks v. USA*, 7:23-CV-682	)	

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INTRODUCTION

Defendant's Opposition [D.E. 881, "Opp."] repeats a single refrain: that Plaintiffs' motion is nothing more than a "disagreement" with the "assumptions" upon which Defendant's three economic experts base their opinions and therefore presents a question of weight rather than admissibility. That characterization is incorrect.

Plaintiffs' Motion [D.E. 865, "Mem."] argues that Defendant's economic expert opinions regarding future medical offset amounts are inadmissible because their assumptions are based on *no analysis at all* of the foundational conditions their lifetime offset projections depend on, including payer applicability, eligibility duration, coverage, coordination of benefits over time, and the future trajectory of program-specific reimbursement rates. Nor did the witnesses on whom they relied perform that plaintiff-specific analysis. Consequently, the specific future-offset amounts generated by these experts, which Defendant asks this Court to subtract from Plaintiffs' overall awards, have no foundation and are nothing more than guesswork. Plaintiffs do not seek to render Section 804(e)(2) of the Camp Lejeune Justice Act meaningless; they seek to exclude opinions too speculative to satisfy Rule 702. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-90 (1993); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). As this Court recently made clear, "Defendant . . . must show that any proposed future offset is sufficiently certain and calculable." [D.E. 885] at 9. Defendant's economic experts' methodologies cannot reliably do this.

Defendant seeks to overcome the deficiencies in the opinions of economic experts Brod, Yount, and Tosic, who lack any specialized knowledge, education, training, or experience with the government programs upon which they opine, by claiming that another expert, Dr. Miller, "analyzed" the predicate facts. That assertion is squarely contradicted by Dr. Miller's sworn testimony, in which he repeatedly disclaimed having projected future rates, selected payers, assessed eligibility, or coordinated benefits, and stated he was "just offering the [current] rate and

nothing more than that." Miller Dep. Tr. at 94:17.

Unable to fill these methodological gaps through Dr. Miller, Defendant instead argues that the Court can resolve them through "simple addition." The experts' reports demonstrate otherwise. For several plaintiffs, Defendant offers multiple alternative future offset amounts based on different assumed government payers, and combinations thereof, yet no expert identifies which payer assumptions apply to any plaintiff or provides a methodology for selecting among those competing opinions. As discussed in Section II and illustrated by Exhibit A, Defendant instead asks the Court to make those determinations itself, unsupported by expert testimony. Miller testified that his work did not provide the information necessary to determine how government or private payers would apply together, acknowledging that the economists instead "made their own set of assumptions" and he did "not know what they are." Miller Dep. Tr. at 179:19-180:3.

Defendants' experts' application of the Consumer Price Index ("CPI") does not make their opinions reliable. The experts never analyzed the foundational assumptions upon which those projections depend. Applying an inflation factor to unsupported assumptions does not transform those assumptions into a reliable expert opinion. That the CPI contains a "medical-care component" does not demonstrate that it reliably predicts future Medicare, VHA, or TRICARE reimbursement rates over the coming decades.

Ultimately, the question presented in this motion is not how future offsets should be applied if they are established; it is whether Defendant has offered admissible expert testimony sufficient to establish those future offsets as sufficiently certain and calculable in the first place. Because Defendant's economic experts did not conduct any analysis of the assumptions underlying their opinions, they are not admissible.

ARGUMENT

I. DEFENDANT'S ECONOMIC EXPERTS' OPINIONS ARE NOT BASED ON SUFFICIENTLY CERTAIN INFORMATION.

A. *Daubert* Requires that Expert Opinions Be Based on Sufficiently Certain and Reliable Predicates. Defendant's Economic Expert Opinions Are Not.

Defendant's refrain that Plaintiffs' challenge goes to "weight, not admissibility" mischaracterizes Plaintiffs' Motion. Defendant argues that Plaintiffs merely "disagree" with assumptions about the viability of Medicare, TRICARE, and VHA. *See, e.g.*, Opp. at 1, 7-8, 9, 11, 13-14, 17. Not so. Plaintiffs argue that the assumptions underlying Defendant's offset opinions lack foundation because they were *never analyzed, validated, or subjected to any reliable methodology*, so they are fundamentally uncertain and unreliable. In Defendant's words, "without any reasonable foundation regarding the likelihood of certain events occurring or the impact of such events" (D.E. 859 at 2), Defendant's experts assume that no events will occur to change the amount, availability, or eligibility of government benefits to each Plaintiff. Because these opinions "are speculative and unhelpful to the Court, and because [they] provide[] no reliable methodology in reaching [their] opinions, they should be excluded in their entirety." *Id.*[1]

This is the province of *Daubert*. There is a critical distinction between (i) disputing the correctness of an assumption an expert has analyzed and tested (a weight issue) and (ii) challenging an expert's *failure to analyze or test* the assumption at all (an admissibility issue). "[C]ourts widely agree that trial judges may evaluate the data offered to support an expert's bottom-line opinions to determine if that data provides adequate support to mark the expert's testimony as reliable," *E.E.O.C. v. Freeman*, 778 F.3d 463, 472 (4th Cir. 2015) (Agee, J., concurring), and courts may

[1] While this argument is unavailing as to Plaintiffs' expert Mr. Rybolt, who is simply rebutting the opinions of Yount, Brod and Tosic, the Defendant's experts Yount, Brod and Tosic affirmatively opine on an issue upon which Defendant possesses the burden of proof.

exclude an opinion if "there is simply too great an analytical gap between the data and the opinion offered." *Id.* (quoting *Joiner*, 522 U.S. at 146). The Fourth Circuit has reversed where a district court failed to perform that analysis, *see Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281–84 (4th Cir. 2021), and has affirmed exclusion where, looking "to the entire process that produced an opinion," the court harbored reasonable concerns about how the expert reached his conclusions, *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig. (No. II)*, 892 F.3d 624, 631 (4th Cir. 2018). Plaintiffs challenge Defendant's experts on this same basis.

The cases Defendant cites are inapposite. In *Wilder Enterprises*, *Rhyne*, and *Smith*, *see* Opp. at 7, the challenged experts had actually *performed analysis* and opposing parties disagreed with the conclusions. Here, the experts *admit* they performed no independent analysis of the foundational assumptions. For example, Tosic admitted her "opinion is limited to the present value of the coverage," she made *no* determination "what care any of the plaintiffs will need in the future," "whether a service will be covered by the VA as opposed to by Medicare," or "whether those programs will continue to provide the same services," and performed *no* "research or analysis regarding solvency of funds" for the offset programs. Tosic Dep. Tr. at 34:9-12, 34:23-35:22, 202:18-206:22, 243:5-244:14, (JA Ex. 787, D.E. 841-18). She simply assumed that plaintiffs' needs and the offset programs will stay exactly the same. *Id.* at 245:22-246:11. Yount and Brod assumed the same without analysis. *See, e.g.*, Yount Dep. Tr. at 51:8-24, 143:25-144:5, 166:16-24, 168:23-169:6, 169:18-171:3, 178:10-179:7, 215:8-216:6, 225:16-18, 232:23-234:13, 235:1-23, 261:24-263:21, 268:23-270:3, 283:6-284:12 (JA Ex. 790, D.E. 841-21); Brod Dep. Tr. at 184:8-185:5 (JA Ex. 770, D.E. 841-1) (Brod's opinions limited to "quantifying" figures provided by others without independent evaluation). Each expert also admitted they lack the expertise to do such analyses themselves. Brod Dep. Tr. at 184:8-185:5; Yount Dep. Tr. at 24:19-21, 25:1-11;

28:12-22, 53:1-3; Tosic Dep. Tr. at 63:9-65:18, 67:12-18.

Defendant seeks to use the opinions of Brod, Tosic, and Yount to reduce Plaintiffs' damages by specific dollar amounts purportedly attributable to particular benefits Defendant asserts they will receive. Because Brod, Yount, and Tosic admittedly lack the expertise to opine on these programs, Defendant seeks to rely on Dr. Miller. But Dr. Miller merely evaluated whether services were *currently* reimbursable under those programs. He did not analyze whether those services will remain covered in the *future*, whether a plaintiff will remain eligible for benefits, how long any such eligibility or coverage will last, or how multiple payers will interact over time.

Faced with this clear analytical gap, Defendant argues Plaintiffs cite "no authority" requiring its experts to determine these predicate facts before projecting lifetime future offsets. But Rule 702 and *Daubert* require that experts base their opinions on sufficient facts or data, and where unresolved predicate facts are necessary inputs to the calculation, an expert cannot satisfy Rule 702 by leaving them unresolved and substituting assumptions in their place. Courts must ensure "that an expert's testimony . . . rests on a reliable foundation." [D.E. 886] at 4 (quoting *Daubert*, 509 U.S. at 597). Courts exclude opinions that assume rather than determine critical facts. *E.g.*, *Joiner*, 522 U.S. at 146-47; *Sardis*, 10 F.4th at 283-84; *Nease v. Ford Motor Co.*, 848 F.3d 219, 230-32 (4th Cir. 2017); *Tyger Constr. Co. v. Pensacola Constr. Co*., 29 F.3d 137, 142 (4th Cir. 1994) ("An expert's opinion should be excluded when it is based on assumptions which are speculative and are not supported by the record"). After all, the "accuracy of [a] model bears a strong positive relationship to the correct inputs being used." *Coleman v. Union Carbide Corp.*, 2013 WL 5461855, at *23 (S.D.W. Va. Sept. 30, 2013).

Here, Defendant's economic experts admit they did not analyze the critical inputs *at all*—including who will pay for services, what services will be covered, whether plaintiffs will remain

eligible for benefits, how long those benefits may last, and how multiple programs will coordinate with one another. Projections that rest entirely on unresolved assumptions that no qualified expert analyzed or endorsed are not permissible expert opinions under *Daubert* and Rule 702.

B. Dr. Miller Did Not Analyze the Challenged Assumptions.

Defendant argues that Dr. Miller *did* "analyze[] the assumptions that Plaintiffs claim are unsupported," Opp. at 10, including coordination of benefits, future coverage, and rate changes, such that the economic experts permissibly relied on him. That assertion cannot be squared with Dr. Miller's sworn testimony. Dr. Miller testified that his assignment was limited to identifying *current* reimbursement rates for discrete services under individual programs, and that he did not calculate any aggregate future offset, did not project rates into the future, did not determine which payer would apply to any given service, did not evaluate how long any plaintiff would remain eligible, and did not analyze how multiple payers would interact over time. *See* Mem. at 6-10 (describing Miller's testimony and assignment). He testified that he was "just offering the rate and nothing more than that," Miller Dep. Tr. at 94:17, and that "what I prepared is what is possible and what actually happens is dependent upon the plaintiff and the provider." *Id.* at 96:11–21. He further testified that he had "no opinion" whether the economic experts' totals were accurate and could not even determine how they had used his tables. *Id.* at 173:2–9, 182, 201:10–202:10.

Defendant's reliance on the program-continuation references in Dr. Miller's reports—his general statements that Medicare, the VHA, and TRICARE are "expected to continue . . . for the foreseeable future," *see* Miller Rep. (Hill) at 7 (JA Ex. 655, D.E. 837-19)—does not fill the gap. He suggests the programs will exist in some form, but says nothing about the case-specific, plaintiff-specific predicate facts the offset calculations require: whether a particular service in a particular life care plan will be covered by a particular program, for a particular plaintiff, for a particular duration, and at what projected rate. This is precisely the analytical gap that Rule 702

prohibits. *See Joiner*, 522 U.S. at 146. Indeed, Dr. Miller's own reports underscore the contingency he left unresolved. For example, he opined that the amount actually paid "will be determined based on where Mr. Hill seeks medical care," Miller Rep. (Hill) at 8—a determination no expert made.

Miller also acknowledged that his report did not provide the information the economists would have needed to determine what Medicare, as opposed to TRICARE, would pay for future services. When asked whether an economist relying only on his charts, testimony, and report would have had the information necessary to make that determination, Miller agreed they would not, explaining that the economists instead "made their own set of assumptions" and that he did not "know what they are." Miller Dep. Tr. at 179:19-180:3. While Defendant argues that Miller validated the assumptions used by Brod, Yount, and Tosic, Miller did not calculate future offsets and declined to opine on whether the offset opinions of Brod, Yount, and Tosic are accurate. Miller's work does not render Brod's, Yount's, and Tosic's opinions reliable.

C. Rule 702 Does Not Require a "Guarantee;" It Requires Reasonable Analysis.

Defendant insists "no expert can guarantee the future" and experts are "entitled to make reasonable assumptions based on existing data." Opp. at 10. Plaintiffs do not contend otherwise. Rule 702 does not require absolute certainty, it requires foundational *analysis*. Defendant's experts need not predict the future infallibly, but they presented no reliable, fact-based methodology *at all* for the substantive assumptions forming the basis of their opinions in projecting the applicability of specific programs and payment amounts in the future. The Fourth Circuit's gatekeeping standard distinguishes between a reasoned projection grounded in a valid methodology versus a bare assumption connected to the conclusion only by the expert's say-so. *Sardis*, 10 F.4th at 289-90. The former is admissible; the latter, which is what Defendant's experts did here, is not.

D. CPI Is Not a Reliable Standalone Methodology for Projecting Government Reimbursement Rates.

Defendant argues that its experts' methods are reliable because they use CPI to project future rates. Opp. at 13-14. Plaintiffs do not contend that CPI can *never* be used in economic projections. But CPI used *in isolation* to project government program reimbursement rates, without program-specific analysis of how each program actually sets rates or how rates are likely to change over time, is not a reliable methodology. Defendant's cases support Plaintiffs. In *Hutchens v. Abbott Laboratories, Inc.*, 2016 WL 10566144, at *3 (N.D. Ohio Dec. 22, 2016), the expert did not rely on CPI alone, but used it to calculate the "historical growth rates" of specific medical items—something no expert here did, but Dr. Miller testified should have been done. *See* Miller Dep. Tr. at 121:21-122:7. Moreover, *Hutchens* did not involve government programs, which require specialized knowledge that Brod, Yount, and Tosic lack. Defendant also cites *Wilder Enters., Inc. v. Allied Artists Pictures Corp.*, 632 F.2d 1135, 1143-44 (4th Cir. 1980), but there the expert's future estimates of property values were *excluded* because the expert "admitted he was not an expert in local real estate values," just as Defendant's economic experts admitted they are not experts on the offset programs. That is yet another reason their opinions fail to "fit" here; a methodology may be generally reliable yet unreliable when applied to a specific question. *See Daubert*, 509 U.S. at 591 (requiring both reliability and "fit").

The fact that Defendant's experts relied on "narrow, medical components of the CPI," *see* Opp. at 14, does not render their methodology reliable. Medicare, TRICARE, and VHA do not set reimbursement rates based on consumer inflation. Mem. at 24-25. Defendant argues that CPI "considers historical Medicare rates," Opp. at 15, but that CPI considers Medicare as one input among many does not mean CPI predicts how Medicare sets its own prospective payment rates.

Defendant's contention that the CPI rates "underestimate" historical Medicare increases,

Opp. at 14-15, confirms the problem. The rates are not aligned, and could under- or overestimate offsets. A handful of recent years of Medicare rates is not a reliable means to project decades of future reimbursement across three structurally distinct programs, and the comparison itself is an unexamined assumption that the recent past will persist. Tellingly, Dr. Miller did not endorse the experts' use of CPI alone. If asked to project rates, he would "look at how the rates have changed from year to year within the program, . . . there is also data . . .on how much rates have increased by Medicare from year to year. . . and I would use that information." Miller Dep. Tr. at 121:21-122:7. Dr. Miller described a *program-specific, multi-source* analysis, and acknowledged that he performed no such analysis here (and neither did the economic experts). *Id.* Without testing or "some basis to assess the level of reliability," expert opinion improperly "devolve[s] into nothing more than proclaiming an opinion is true 'because I say so.'" *Small v. WellDyne, Inc.*, 927 F.3d 169, 177 (4th Cir. 2019). *Daubert* requires reliable inputs, not merely correct arithmetic.[2]

II. THE COURT CANNOT CHOOSE BETWEEN THE EXPERTS' MULTIPLE, CONTRADICTORY CONCLUSIONS BY "SIMPLE ADDITION."

Defendant argues that Rule 702 does not prohibit presenting multiple hypothetical scenarios. Opp. at 17-18. But Defendant's experts present multiple, mutually exclusive future offset conclusions without any expert analysis identifying which applies to any particular plaintiff. There is a critical difference between presenting alternative scenarios *with* a framework for evaluating which applies versus presenting mutually exclusive outcomes *without* any analytical basis for the Court to determine which scenario to apply at trial. As illustrated in **Exhibit A**, Defendant's experts invite the Court to choose between offset amounts varying by *hundreds of*

[2] Defendant's argument that Plaintiffs' rebuttal expert reports did not comment on CPI has no merit. *See* Opp. at 17. The admissibility of expert testimony is a legal question for the Court, not a factual issue that must be identified by another expert. *See Daubert*, 509 U.S. at 592-93. Plaintiffs' rebuttal experts focused on substantive disagreements within their areas of expertise.

thousands of dollars based on competing payer assumptions, yet no qualified expert explains which payer assumptions apply or how the Court should determine the appropriate offset.

Defendant cites *Intel Corp. v. Future Link Systems, LLC*, 268 F. Supp. 3d 605, 621 (D. Del. 2017). But there, alternative scenarios depended on whether certain claims were struck, and were presented with explanations of underlying variables that would determine which outcome applied. *See id.*[3] Here, the experts present mutually exclusive payer assumptions—Medicare only, VHA only, TRICARE only, combinations thereof—with no analysis of which payer *actually* applies to any plaintiff. The experts *admit* they made no such determination. *See, e.g.*, Tosic Dep. Tr. at 205:9-206:5; Brod Dep. Tr. at 184:8-185:5. Or, in Yount's case, failed to explain why assumptions were combined and the outcomes likely. *See* Yount Dep. Tr. at 285:25-286:3; 287:23-288:1.

Exhibit A demonstrates the consequences of Defendant's missing methodology. Defendant's experts offer materially different future offset opinions for the same plaintiff. These not only present a huge range, but no expert identifies which opinion applies. The Court is therefore being asked merely not to evaluate competing expert opinions, but to supply the missing expert analysis itself. That is impermissible. *Cf. Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250-51 (4th Cir. 1999) (excluding expert where more information was needed to determine outcome).

The missing step is not "simple addition." Opp. at 18. The Court must determine which government program will pay for each plaintiff's future treatment and which corresponding offset opinion applies. Yet the economic experts admit they lack the specialized knowledge to make those determinations, and Dr. Miller expressly declined to provide that analysis. Rule 702 does not permit an expert to leave that analytical gap for the Court to fill.

[3] Defendant also cites *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 203 (4th Cir. 2000) to claim "experts may testify on hypothetical questions." Opp. at 17. That case concerned a lay witness improperly testifying as an expert, and says nothing about offering alternative conclusions.

Dated: July 1, 2026.

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