

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MARGARET E. BART,	:	
PLAINTIFF,	:	CIVIL ACTION
	:	NO. 03-4102
v.	:	
	:	
CERTAINTEED PRODUCTS, INC. and	:	
CERTAINTEED CORPORATION,	:	
DEFENDANTS.	:	

**MEMORANDUM**

NEWCOMER, S.J.

January , 2005

Presently before the Court is Defendants' Motion in Limine to Preclude the Testimony of Plaintiff's Expert Witness, Dr. Lawrence Kerson. For the reasons discussed below, the Court grants Defendants' Motion.

**I. BACKGROUND**

Plaintiff claims that she was discriminated against at the hands of Defendants, her employer. She argues that because of her gender, she suffered an adverse employment action which effectively derailed her hopes of future promotion. As a result of Defendants' alleged conduct, Plaintiff claims, she suffered a debilitating flare-up of her multiple sclerosis. These events happened roughly eight years ago. Plaintiff now seeks to present expert testimony that her workplace stress caused the flare-up. Defendants deny any improper conduct, and challenge the admissibility of Plaintiff's expert witness on multiple grounds. This is the second battle fought over Plaintiff's expert. The first resulted in the exclusion of Plaintiff's initial expert witness, on the grounds that he was (admittedly) unqualified to

testify about multiple sclerosis. This Court generously granted leave to Plaintiff to locate another expert before trial. Plaintiff now offers the testimony and report of Dr. Lawrence Kerson, an eminently well-educated physician who is undisputedly well-versed in the relevant field. Defendants challenge Dr. Kerson's testimony as unreliable and unfounded. After the initial briefing on this issue, and after careful scrutiny of Dr. Kerson's report and deposition, this Court ordered a Daubert hearing to further explore the question of admissibility. At the Daubert hearing, Plaintiff's counsel presented the Court with a second, video-taped, deposition of Dr. Kerson in which additional questions were asked of him. Rather than waste time viewing Dr. Kerson's second deposition, the Court ordered the Parties to submit additional briefs on the issues, taking into account the new deposition testimony. It is against this backdrop that the Court now rules.

## **II. LEGAL STANDARD**

The admissibility of an expert's testimony finds its keystone in the principle of reliability. The expert must have used reliable methods, employed reliable facts, and his or her conclusion must naturally and reliably flow from his or her methodology. FED. R. EVID. 702 allows admission of expert testimony if "(1) the testimony is based on 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." Courts focus on the methodology and its application, rather than on an expert's conclusion, when determining admissibility. Heller v. Shaw Industries, Inc., 167 F.3d 146, 153 (3d Cir. 1999). In the case of medical expert testimony, the Court looks to several guideposts, including whether a proposed expert has good grounds for his conclusion. See Id. at 156. In the instant case, Dr. Kerson bases his conclusions on unreliable facts and on an unreliable methodology. Given the factors discussed below, his testimony and report must be excluded.

### **III. ANALYSIS**

This Court has been careful to avoid making credibility determinations during its analysis. Rather, the Court has focused on the several guideposts suggested by the Third Circuit in determining whether Dr. Kerson's testimony should be admitted. The Court has examined whether Dr. Kerson's methodology can be tested, whether the foundation for his conclusions are solid, whether the available scientific literature supports his conclusion, and whether his differential diagnosis was sufficient such that, combined with other factors, Dr. Kerson has good grounds for his belief. See Id. At 156 (discussing good grounds). Weighed together, the Court is compelled to conclude that Dr. Kerson's testimony is inadmissible.

The underlying theory supporting Dr. Kerson's conclusion, that stress can cause an exacerbation of MS symptoms, is controversial in the medical community. The Court has received studies which support the notion that stress can exacerbate MS, alongside studies finding no correlation. Although there is not a complete lack of scientific research on this issue, there is certainly no consensus within the scientific community that stress can cause MS flare-ups. Dr. Kerson himself, in his expert report, noted that the American Academy of Neurology Practice Handbook "clearly states that the issue of trauma or stress with regard to [MS] is a controversial and unsubstantiated issue about which there is conflicting literature." Kerson Rep. at 2. It is undisputed that there is absolutely no identified and accepted biological mechanism which could cause the reaction that Plaintiff claims. Although the presence or absence of peer-reviewed literature and a generally accepted consensus is not completely dispositive on this issue, it is certainly one factor that the Court must weigh. See Heller, 167 F.3d at 155 (noting that a differential diagnosis, properly performed, can overcome an absence of peer-reviewed literature).

More troubling to this Court is that Dr. Kerson testified that MS is, by its nature, an unpredictable disease, and although he was medically certain that stress caused Plaintiff's ailment in this case, he could not discount the

possibility of other sources. Although Dr. Kerson certainly did not need to discount *all* other causes for his testimony to be admissible, the fact that MS is unpredictable illuminates the importance of thoroughly exploring the other potential sources of Plaintiff's troubles during his differential diagnosis. The "methodology" (for Rule 702 purposes) employed by Dr. Kerson is his differential diagnosis of Plaintiff. In reviewing an expert's differential diagnosis, a district court must be somewhat deferential. Like other factors, a differential diagnosis is a guidepost by which the Court will base its decision on admissibility. Id. 154. A typical differential diagnosis will identify pertinent precipitating events, rule out most (but not necessarily all) alternative causes, integrate an examination and medical history, and generally involve some sort of laboratory test. Again, as the standards in all areas of the immediate inquiry are flexible, there is no "fixed" method of differential diagnosis. See In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 758 (3d Cir. 1994) (discussing the flexibility of differential diagnosis).<sup>1</sup> In the instant case, for example, Dr. Kerson ordered no laboratory tests, X-rays, or MRIs. Most likely this is because the malady Plaintiff complained of occurred eight years earlier, rendering such

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<sup>1</sup>The Court notes that, although this ruling pre-dates the present incarnation of Fed. R. Evid. 702, it is still valuable for its discussion of a district court's analysis in expert admissibility matters.

diagnostic tools useless. Dr. Kerson did note in his expert report, however, that it would have been helpful for him to have had access to additional medical records. See Kerson Rep. at 2. The Court will not denigrate the value of Dr. Kerson's differential diagnosis merely because it lacked any formal testing, but will certainly take into account the potentially limited value of information that is eight years old, especially given the lack of any identified biological mechanism supporting Dr. Kerson's theory, and in light of Dr. Kerson's note that more information would be helpful.

As to the issue of alternative causes, Defendant argues that there were many potential non work-related causes of Plaintiff's flare-up, including sleeping problems and a urinary tract infection that occurred around the same time as Plaintiff's flare-up. Dr. Kerson ruled out some, but not all, of these alternative causes.<sup>2</sup> Dr. Kerson examined Plaintiff's medical history, as supported by her medical files, performed a one hour examination of Plaintiff, and drew his conclusion primarily based on the temporal proximity (roughly two weeks) between Plaintiff's self-diagnosed stress and her MS flare-up, and based upon his experiences in practice, treating other patients with MS.

Importantly, in his examination of Plaintiff, Dr. Kerson

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<sup>2</sup>Case law does not require an expert to rule out all alternative causes. Heller, 167 F.3d at 156 (holding that district court erred when it required plaintiff's expert to rule out all alternative causes of plaintiff's illness).

paid relatively little attention to the details surrounding Plaintiff's job stress and sleeplessness - the most important event according to Plaintiff's theory of the case. Other than accepting Plaintiff's representation that she was abruptly demoted, Dr. Kerson did not explore other details of the incident. Kerson Dep. at 18, attached to Pltf.'s Response as Ex. B. Dr. Kerson should have explored the circumstances surrounding Plaintiff's job-related stress more fully. Buttressing the Court's other concerns is the fact that Dr. Kerson examined Plaintiff nearly eight years after her MS symptoms flared-up. Although the Court has no reason to suspect that Plaintiff embellished (nor would it be appropriate to make any such credibility judgment at this stage), time certainly dims the memory. In fact, an article cited by the Parties notes that "recall bias" is one of the many problems preventing researchers from fully exploring the connection between stress and flare-ups. See Defs. Reply at 4, n. 2. Additionally, in this case, it is not disputed that Plaintiff has "cognitive" problems. Given Plaintiff's strong reliance on the chronology of events (between Plaintiff's job stress and her flare-up), and the short shrift paid to possible alternative causes, the value of a differential diagnosis alone, eight years after the fact, is substantially weakened. This conclusion is bolstered by the lack of peer-reviewed literature supporting a biological relationship between

stress and MS. Furthermore, the lack of any such literature calls into question Dr. Kerson's strong reliance on the temporal relationship between Plaintiff's self-reported job stress and her MS flare-up, particularly in light of the literature's concern with recall bias and inadequately objective measures of stress. In fact, the study that Plaintiff relies upon was specifically designed to avoid one of the exact problems that the Court is concerned with here: recall bias. See Tab 2 to Pltf.'s Surrep. at 7 ("Several methodological difficulties have hampered a clear conclusion on [the relationship between stress and MS]. For example, most studies had a retrospective design that probably introduced recall bias."). The usefulness of Plaintiff's study, therefore, is somewhat limited to the Court. While the study appears to provide evidence of the possibility of the relationship between MS and stress, it highlights a potential reliability issue in Dr. Kerson's differential diagnosis.

Had Dr. Kerson performed a differential diagnosis on Plaintiff closely following a stressful incident at work, the Court might be more indulgent. But the extensive passage of time between the allegedly precipitating cause, the allegedly resulting effect, and the examination renders the foundation of Dr. Kerson's conclusion somewhat unreliable. As the facts underlying an expert's conclusion are subject to the same reliability test as all other aspects of the expert's testimony,

and the facts in this case are the Plaintiff's memory of events that happened eight years earlier, and a medical record that Dr. Kerson admitted could be fuller, the Court must conclude that Dr. Kerson's conclusion is based on an unreliable foundation. See Heller at 155 ("We have held that the reliability analysis applies to all aspects of an expert's testimony [including the facts underlying the opinion]."). Combined with the conflicting literature, the unpredictable path of MS in general, and the other factors discussed above, the Court must conclude that Dr. Kerson not be allowed to testify on the issue of damages done to the Plaintiff.

#### IV. **CONCLUSION**

The Court is loathe to endorse a rule that excludes any evidence that stress can ever exacerbate MS; that said, such a rule need not be broached in this case. Here, given the absence of a generally accepted theory of causation by the medical community, the lack of data sufficient to form a reliable foundation for events that occurred eight years ago given the concerns highlighted by the medical literature, the questionable value of the differential diagnosis in this case, and the general unpredictability of MS as a disease the Court must exclude Plaintiff's proposed expert testimony.

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Clarence C. Newcomer, S.J.