

In the United States Court of Federal Claims

No. 05-448C
(Filed: May 13, 2009)

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RAYTHEON COMPANY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

* * * * *

ORDER DENYING RAYTHEON'S MOTION TO STRIKE THE TESTIMONY AND WRITTEN REPORTS OF COLIN ENGLAND ON THE POST-RETIREMENT BENEFIT ISSUE

Pending before the court is Raytheon's Motion to Strike the Testimony and Written Reports of Colin England on the Post-Retirement Benefit issue. As discussed at the oral argument held today and for the below-stated reasons, the motion is DENIED.

Rule 702 of the Federal Rules of Evidence provides the framework for trial courts to use in determining the admissibility of expert testimony. Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education,

may testify thereto 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. Evid. 702. Under Rule 702, the trial judge acts as a gatekeeper to ensure that the expert evidence is both reliable and relevant. See Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993).

At issue here is the question of whether the government's expert witness, Colin England, is qualified to give expert testimony under Rule 702. The plaintiff argues that Mr. England is not qualified to offer an expert opinion regarding the application of various actuarial terms in the context of the Cost Accounting Standards at issue in this case. The plaintiff contends that because Mr. England has admitted that he is not an expert on the Cost Accounting Standards and has had no hands-on experience in applying them, he is not qualified to testify in this case, and his report should be stricken. The government contends that Mr. England is a qualified pension actuary who has extensive experience with pensions and has been trained at seminars on the subject matter of this lawsuit and that as an actuary, Mr. England is qualified to offer an expert opinion in this case regarding the application of actuarial terms and concepts addressed in the Cost Accounting Standards at issue.¹

¹Mr. England's qualifications were described as follows in Gen. Motors Corp. v. United States, 78 Fed. Cl. 336, 340 n.15 (2007):

Mr. England is a Fellow of the Society of Actuaries, an Enrolled Actuary, and a Certified Employee Benefit Specialist. He is the manager of the Actuarial and

Whether gaps in an expert’s qualifications or knowledge are sufficient to bar an expert’s testimony on the grounds that he or she is not “qualified” under Rule 702 is a complicated issue. As a general rule, “it is still true that while the court may rule that a certain subject of inquiry requires that a member of a particular profession . . . be called, a specialist in a particular branch of a discipline or profession is usually not required.” McCormick, On Evidence, § 13 (6th ed. 2006) (emphasis added); see also Doe v. Cutter Biological, Inc., 971 F.2d 375, 385 (9th Cir. 1992) (holding that the trial court erred in disallowing the testimony of blood experts because the experts were not licensed hematologists). Ordinarily, questions regarding the extent of an expert’s specialized knowledge in a field go to the weight of the expert’s testimony, not to its admissibility. See, e.g., DaSilva v. Am. Brands, Inc., 845 F.2d 356, 361 (1st Cir. 1988); Pineda v. Ford Motor Co., 520 F.3d 237, 245-46 (3d Cir. 2008). This is not to say that a witness, regardless of how impressive his or her background, can testify about areas that fall completely outside his or her education and training. Smith v. Goodyear Tire & Rubber Co., 495 F.3d 224, 227 (5th Cir. 2007) (holding that an expert whose “only experience with tires [was] as a consumer” was properly excluded). However, the court need not demand that a party use only the most qualified expert. Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777, 782 (3d Cir. 1996) (holding that “witnesses may be competent to testify as

Benefits Consulting operations of Wachovia Retirement Services. He has 25 years of consulting experience, primarily with retirement plans. For the last 11 years, he has taught classes at the PBGC for new actuaries regarding their duties, and the applicable rules and regulations relating to terminating pension plans.

experts even though they may not, in the court's eyes, be the 'best' qualified"). If an expert is qualified to testify about a subject generally and has had training in the subject matter at issue, then the expert may offer an opinion. Pineda, 520 F.3d at 245.

Tested by these standards, the court concludes that Mr. England may testify regarding his understanding of how the actuarial terms used in the Cost Accounting Standards should be applied. Gaps in Mr. England's knowledge and experience will be relevant in determining the weight to be given to his opinion testimony. There is no doubt that there may be actuaries who have more knowledge of the Cost Accounting Standards than Mr. England and may therefore be better qualified than Mr. England to offer an opinion on the application of various actuarial terms in the Cost Accounting Standards. Nonetheless, the fact that other experts may be more qualified does not mean that Mr. England is not qualified. Mr. England has had extensive actuarial experience and has been trained in the Cost Accounting Standard at issue in this case.² He therefore may offer his opinion regarding the application of the actuarial terms and concepts embodied in the Cost Accounting Standards.

For these reasons the plaintiff's motion to strike the testimony and expert report of Mr. England with regard to the Post-Retirement Benefits issue is **DENIED**.

²Importantly, there is no separate certification required for actuaries holding themselves out as Cost Accounting Standards specialists.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Judge