

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

CHARLES SCHUMACHER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 18-4130-HLT-KGG
	)	
HARDWOODS SPECIALTY PRODUCTS,	)	
US, LP; <i>et al.</i> ,	)	
	)	
Defendants.	)	
_____	)	

**MEMORANDUM & ORDER ON  
MOTION FOR RULE 35 PHYSICAL EXAMINATION AND  
MOTION FOR PROTECTIVE ORDER**

Before the Court are Defendants’ Motion for a Rule 35 Physical Examination (Doc. 40) and Plaintiff’s competing Motion for a Protective Order (Doc. 42) regarding such an examination. After review of the parties’ motions, the Court **GRANTS** Defendant’s Motion for a Rule 35 Physical Examination (Doc. 40) and **DENIES** Plaintiff’s Motion for a Protective Order regarding the examination (Doc. 42).

**BACKGROUND**

The present lawsuit results from a motor vehicle accident between Plaintiff and the individual Defendant. (Doc. 28, at 4.) Plaintiff alleges that the individual

Defendant was acting as an agent/employee of the corporate Defendants at the time of the accident. (*Id.*) Plaintiff contends that he “sustained extensive and severe personal injuries, resulting in multiple surgeries, multiple procedures, and multiple hospitalizations and other damages” as a result of the accident. (*Id.*, at 6.) He does not contest the fact that his physical condition has been placed at issue in this case.

Defendants have filed a motion for a Rule 35 physical examination, identifying Dr. Chris Fevurly as the examiner. (Doc. 40.) Plaintiff objects to the use of Dr. Fevurly as the examiner on the basis of his alleged lack of foundation and history. (*See generally* Doc. 41.) Plaintiff also moves for a Protective Order relating to the examination, requesting that it “be observed by a third party medical professional, or that the examination be video recorded.” (Doc. 42, at 1.)

### **ANALYSIS**

Federal Rule of Civil Procedure 35 governs physical and mental examinations for individuals who have put their physical or mental condition into controversy. The Rule states, in relevant part, that the Court may enter an Order for such an examination to be conducted by a “suitably licensed or certified” medical examiner “for good cause and on notice to all parties and the person to be examined.” Fed.R.Civ.P. Rule 35(a)(1), (a)(2)(A). Any such Order “must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.” Fed.R.Civ.P. Rule 35(a)(2)(B).

Case law from this District holds that the party seeking to impose condition(s) on the examination must establish good cause why the Court should impose it. *Maldonado v. Union Pac. R. Co.*, No. 09-1187-EMF, 2011 WL 841432, at \*3 (D. Kan. March 8, 2011) (citing *Hertenstein v. Kimberly Home Health Care, Inc.*, 189 F.R.D. 620, 628 (D. Kan.1999) and *Chaparro v. IBP, Inc.*, 1994 WL 714369, at \*2 (D. Kan. Dec. 7, 1994)). In making the determination as to what, if any, conditions should be imposed on the examination, a court “should balance the competing considerations involved in the particular case and set such conditions for the examination as are just.” *Hertenstein*, 189 F.R.D. at 630 (quoting *Galiati v. State Farm Mut. Auto. Ins. Co.*, 154 F.R.D. 262, 265 (D.Colo.1994)).

The Court’s analysis will first address whether Dr. Fevurly should be prohibited from conducting the examination. Thereafter, the Court will determine whether Plaintiff has established good cause for the conditions proposed.

**A. Dr. Fevurly.**

Plaintiff argues that Dr. Fevurly should be disqualified because of a lack of foundation/expertise and the allegedly biased nature of his practice. Simply stated, Plaintiff contends that his

injuries are neurological and orthopedic in nature, and Dr. Chris Fevurly does not have the proper foundation to perform an adequate examination of Plaintiff. In

addition, Dr. Chris Fevurly has a history of Defense bias when performing these types of examinations.

(Doc. 41, at 2.) As such, Plaintiff argues that Dr. Fevurly is not a “suitably licensed or certified examiner” as contemplated by Rule 35(a)(1).

Plaintiff relies on previous testimony from Dr. Fevurly in which he admitted that he is not a specialist in neurology, neurosurgery, or pain management and that he is not qualified to interpret MRIs. (Doc. 41, at 4, 8; Doc. 41-2, at 4-6.) Plaintiff argues that his “injuries are neurologic and orthopedic in nature” and that he “has received treatment through pain management, neurology, and orthopedics,” making any examination by Dr. Fevurly improper “due to his lack of foundation.” (Doc. 41, at 2, 8.)

Defendants reply that Dr. Fevurly is a “suitably licensed or certified examiner” because he holds a medical license in Kansas, “is board certified in Internal Medicine and Occupational Medicine,” “a Diplomat of the National Board of Medical Examiners and a Diplomat of the American Board of Preventative Medicine with Certification in Occupational Medicine,” is “certified in the Evaluation of Disability and Impairment Rating and was a Diplomat of the American Board of Independent Medical Examiners for 10 years.” (Doc. 56, at 2-3.) Defendants argue that “[a]lthough Dr. Fevurly’s specialty and board certification differ from that of Plaintiff’s treating physicians, that difference does

not prevent him from rendering opinions regarding the nature, extent, and causation of Plaintiff's injuries." (*Id.*, at 4 (citing *Tompkins v. Bise*, 259 Kan. 39, 49, 910 P.2d 185, 191 (1996) (holding that in a medical malpractice case, a medical expert need not specialize in the same medical specialty as the defendant doctor).)

Defendants continue that Plaintiff's argument "lacks rational basis" and that the mere fact that "more defendants than plaintiffs request him to perform examinations" does not mean he is disqualified from providing an expert opinion. (*Id.*, at 4.) Defendants note that Plaintiff cites no authority for the "proposition that perceived or alleged bias disqualifies a medical examiner." (*Id.*)

Plaintiff next argues that Dr. Fevurly's perceived bias because the "vast majority" of his work is performed for defendants in litigation. (Doc. 41-2, at 3.) Plaintiff also has concerns because Dr. Fevurly's opinion was given "no weight" in a 2010 decision from the Western District of Missouri wherein the court found he had a "lack of knowledge concerning fibromyalgia." (Doc. 41, at 6, 8 (citing *Green v. Union Sec. Ins. Co.*, 700 F.Supp.2d 1116, 1136 (W.D. Miss. 2010).)

Defendant notes, however, that Plaintiff's counsel has failed to mention this decision was reversed and remanded on other grounds by the Eighth Circuit.

*Green v. Union Sec. Ins. Co.*, 646 F.3d 1042 (8th Cir. 2011).<sup>1</sup> Defendant also argues that if the Court is going to give weight to orders from Missouri trial court judges in unrelated litigation, the Court also “must give the same weight to the orders of all the courts of all the jurisdictions where a plaintiff was ordered to submit to a medical examination by Dr. Fevurly.” (Doc. 56, at 8.)

Defendants further argue that “Plaintiff’s criticisms of Dr. Fevurly are more appropriately explored on cross-examination of [the doctor] in a deposition and/or at trial ... .” (*Id.*) The Court agrees and finds that Plaintiff’s stated reasons for disqualifying Dr. Fevurly to go more to the issues of admissibility, weight, and credibility of his testimony at trial rather than a basis to prohibit him from examining Plaintiff. Further, Rule 35 “does not require that the examination be conducted by an independent examiner.” *Greenhorn v. Marriott Intern., Inc.*, 216 F. R.D 649, 652 (D. Kan. 2003) (citing Fed.R.Civ.P. 35(a)). “[W]hile a defendant ‘may not have an absolute right to choose its examining doctor, the defendant’s choice should be respected in the absence of a valid objection.’” *Id.* (citing *Chrissafis v. Continental Airlines, Inc.*, 1997 WL 534874, at \*5 (N.D. Ill. Aug.21, 1997) (citation omitted).)

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<sup>1</sup> In reaching that conclusion, the Eighth Circuit opined that the plaintiff “likely suffers from fibromyalgia,” but that “does not automatically” mean the plaintiff was rendered “disabled.” *Green*, 646 F.3d, at 1053. The Court also found that the insurer did not abuse its discretion in denying the plaintiff’s claim for long term disability benefits and that there was “[s]ubstantial evidence” to support the insurer’s denial.

Defendant's Motion for Rule 35 Physical Examination (Doc. 40) is, therefore, **GRANTED**. The Court's analysis will now address whether Plaintiff has established good cause for the conditions he proposed for the examination.

**B. Conditions on Examination.**

Protective Orders are controlled by Fed.R.Civ.P. 26(c), which states in relevant part that the court may issue such an order, upon motion, "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Such an order may include one or more of the following limitations or conditions on the discovery:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

...

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

...

Fed.R.Civ.P. 26(c)(1). Plaintiff seeks a Protective Order placing conditions on any examination by Dr. Fevurly that would allow "the examination to be observed by a third party medical professional, or that the examination be video recorded." (Doc. 42, at 2.)

It is well-established that a party has no right to the presence of a third party at the examination and also has no right to have the examination recorded. *See generally Hertenstein v. Kimberly Home Health Care, Inc.*, 189 F.R.D. 632 (D. Kan. 1999). As stated above, case law from this District holds that the party seeking to impose such conditions on the examination must establish good cause why the Court should impose them. *Maldonado v. Union Pac. R. Co.*, 2011 WL 841432, at \*3.

In an effort to establish good cause, Plaintiff relies on the same arguments advanced in opposition to Defendant's Motion for a Rule 35 Physical Examination, discussed *supra*. According to Plaintiff, "Dr. Fevurly's lack of foundation and defendant bias make him unqualified to perform the physical examination requested by Defendants," but a third party medical observer or a video recording device would counteract this. (Doc. 42, at 4.) Plaintiff again points to the fact that "Dr. Fevurly has been disallowed in several prior cases from performing examinations when the injuries are neurologic and orthopedic in nature, such as in the present matter." (Doc. 42, at 4.) Plaintiff argues that "[w]ithout a video recording or third party observer, it would be difficult to determine whether Dr. Fevurly performed an appropriate examination of the Plaintiff to justify his results." (*Id.*) Plaintiff also argues that the conditions are justified because of "Dr. Fevurly's bias [which] has been demonstrated by his



continual use by the defense bar when it comes to independent medical examinations and physical examinations.” (*Id.*) Plaintiff continues that “[a] third party medical provider observer or a video recording device would help ensure that Dr. Fevurly’s examination is unbiased and consistent with acceptable medical standards and practices.” (*Id.*)

The Court is not persuaded that Plaintiff’s stated reasons establish good cause for imposing the proposed conditions. Plaintiff has offered no case law in which such conditions were imposed as a result of similar concerns stated by a party. In *Greenhorn*, for instance, this District ordered that an independent mental examination be audio-taped, but only upon a showing of specific, legitimate concerns, supported by credible evidence, that the chosen doctor had acted in an abusive manner and ignored court orders imposing conditions during prior examinations. 216 F.R.D. 649.

Plaintiff has made no similar analogous showing in this case. Rather, Plaintiff merely relies on the fact that Dr. Fevurly is not a neurologist and does most of his work for defendants. If anything, the Court is concerned that the Plaintiff’s request for the presence of a third-party would “only threaten to turn the examination into a more adversarial process than it should be.” *Id.*, at 654 (citation omitted).

IT IS THEREFORE ORDERED that Defendant's Motion for Rule 35 Physical Examination (Doc. 40) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Protective Order (Doc. 42) is **DENIED**.

**IT IS SO ORDERED.**

Dated at Wichita, Kansas, on this 25<sup>th</sup> day of July, 2019.

s/ KENNETH G. GALE  
KENNETH G. GALE  
United States Magistrate Judge