UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
	Hon. Anita B. Brody
Kevin Turner and Shawn Wooden, *on behalf of themselves and others similarly situated,* Plaintiffs,	Civ. Action No. 14-00029-AB
v.	
National Football League and NFL Properties, LLC, successor-in-interest to NFL Properties, Inc., Defendants.	
THIS DOCUMENT RELATES TO: ALL ACTIONS	

SPECIAL MASTER RULING: APPLICATION OF THE DEFINITION OF ELIGIBLE SEASON TO GAME DAY ROSTER DESIGNATIONS

I. INTRODUCTION

This matter requires the Special Master to interpret a provision of the Amended Class Action Settlement Agreement (hereinafter, "the Settlement Agreement") that dictates offsets of Monetary Awards to Claimants based on the number of "Eligible Seasons" the Retired Player played in the National Football League (hereinafter, the "NFL").

The parties dispute the Settlement Agreement's definition of an "Eligible Season" and disagree about whether Players who were moved from their Club's "Active List" to its Inactive List on game-day accrue games toward an Eligible Season. For the reasons stated below, the Special Master holds that such games do accrue toward an Eligible Season. This ruling is a "Matter of Law" as defined by the Settlement Agreement.

II. BACKGROUND

A Retired NFL Player who receives a Qualifying Diagnosis according to the terms of the Settlement Agreement is eligible to receive a Monetary Award in the amount set by the Monetary Award Grid in Exhibit 3 of the Settlement Agreement.[1] Under § 6.7(b)(i) of the Settlement Agreement, Monetary Awards are subject to downward adjustments for Retired Players who accrued fewer than five "Eligible Seasons" in the NFL. The fewer Eligible Seasons a Player accrued, the steeper the reduction of the Monetary Award: The Award for a Player with 4.5 Eligible Seasons is offset by ten percent, the Award for a Player with 4 Eligible Seasons is offset by twenty percent, and so forth.

Section 2.1(kk) of the Settlement Agreement defines "Eligible Seasons," granting a Player a full Eligible Season if he was:

(i) On a Club's Active List "on the date of three (3) or more regular season or postseason games," or

(ii) On a Club's Active List "on the date of one (1) or more regular or postseason games, and then spent at least two (2) regular or postseason games on [the Club's] injured reserve list or Inactive List due to a concussion or head injury."[2]

The parties dispute what it means to be on the "Active List." Per the Constitution and By-Laws of the National Football League, Clubs have to cut down their roster to a 53-Player "Active List" prior to the first regular-season game; however, ninety minutes before kickoff of each game, they are required to establish a 45-Player "Active List" and place the remaining rostered Players on the "Inactive List."[3] It is undisputed that the Players who are placed on the Inactive List on game day often practice in full for the week leading up to the game.

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[1] Receipt of a Monetary Award is subject to other requirements set forth in the Settlement Agreement that are not pertinent to this opinion.

[2] Section 2.1(kk) also allows Players to accrue "half of an Eligible Season" by spending at least eight games on a Club's "practice, development, or taxi squad" roster; or being on the active roster of a team in the World League of American Football, NFL Europe League, or NFL Europa League "on the date of three (3) or more regular season or postseason games" or "one (1) or more regular or postseason games" followed by "at least two (2) regular or postseason games on [the team's] injured reserve list or team inactive list due to a concussion or head injury."

[3] §§ 17.1(f) and 17.3 of the Constitution & By-Laws of the National Football League, Appended as Ex. A in Part II(B) of the Resp.'s to Special Masters (filed Oct. 18, 2017). The NFL states in its brief that both the season-long and game-day rosters have changed in size over time, explaining that prior to 1993, the maximum season-long roster was 47 Players, with 45 Players active on game day. (Resp.'s to Special Masters (filed Oct. 18, 2017), at 38 n. 1.) In 2011, the game-day rosters expanded from 45 to 46, while season-long rosters remained at 53. The NFL contends that because of the non-static nature of these rosters, the parties refrained from defining "Active List" in the Settlement Agreement by reference to a specific number of Players. (*Id.*)

The question before the Special Master is whether a Player who is assigned to the Inactive List ninety minutes before kickoff qualifies as someone who was on the Active List "on the date of" the game for purpose of accruing Eligible Seasons.

III. ARGUMENTS OF THE PARTIES

A. Argument by the NFL Parties

The NFL argues that interpreting the Settlement Agreement to count games on the Inactive List towards the accrual of an Eligible Season would violate basic principles of contract interpretation by rendering a provision of the Agreement meaningless. (Resp.'s to Special Masters (filed Oct. 18, 2017), at 41 (hereinafter, "Responses") (citing In re G-I Holdings, Inc., 755 F.3d 195, 202 (3d Cir. 2014) ("Court[s] should interpret the contract in such a way as to not render any of its provisions illusory or meaningless.")).

The NFL asserts that crediting *all* games spent on the Inactive List would render part (ii) of the Eligible Season definition – which specifically credits games on the Inactive List *due to a concussion or head injury* – superfluous. (Responses, at 40-41.)

Finally, the NFL claims that, because there is only one possible way to interpret § 2.1(kk) – to discount games on the Inactive List unless those games qualify for part (ii) of the Eligible Season definition – the provision is clear and unambiguous. (*Id.*, at 41.) Accordingly, the NFL argues, the plain meaning of the provision must be applied: Contract interpretation doctrine forbids a court from considering extrinsic evidence (such as the evidence of intent set forth by Co-Lead Class Counsel) in interpreting a clear and unambiguous provision. (*Id.* (quoting Great Am. Ins. Co. v. Norwin Sch. Dist., 544 F.3d 229, 243 (3d. Cir. 2008) ("Only where a contract's language is ambiguous may extrinsic or parol evidence be considered to determine the intent of the parties…In the absence of an ambiguity, the plain meaning of the agreement will be enforced.") (internal citations omitted)).

B. Argument by the Co-Lead Class Counsel

Co-Lead Class Counsel argue that the "letter and spirit" of the Settlement Agreement is violated by excluding rostered Players who practiced the week leading up to the game but were placed on the Inactive List 90 minutes before kickoff from Eligible Season accrual. (Responses, at 17.) Counsel notes that Eligible Seasons were chosen as a proxy for the number of concussive hits sustained by Retired Players as a result of playing in the NFL. (*Id.*, at 12 (citing In re Nat'l Football League Players' Concussion Injury Litig., 307 F.R.D. 351, 409 (E.D. Pa. 2015), *amended* No. 2:12-MD- 02323-AB, 2015 WL 12827803 (E.D. Pa. May 8, 2015), *aff'd* 821 F.3d 410 (3d Cir. 2016), *as amended* (May 2, 2016)).

Thus, Counsel argues that the NFL's interpretation of the definition of "Eligible Seasons" would lead to an "absurd result." (*Id.*, at 17.). Rostered Players who practiced for the entire week leading up to the game – sustaining hits in the process – before being placed on the Inactive List 90 minutes prior to game time would not accrue any games toward an Eligible Season, but non-

roster practice and developmental squad members *would* accrue games toward half an Eligible Season.

IV. DISCUSSION

A. Choice-of-Law Analysis

In multi-district litigation (MDL) consolidation under 28 U.S.C. § 1407, where the court has jurisdiction under 28 U.S.C. § 1332 based upon diversity of citizenship, the transferee court applies state substantive law as determined by the choice of law analysis required by the state in which the action was filed. Oil Field Cases, 673 F. Supp. 2d 358, 363 (E.D. Pa. 2009). Although this case was filed in multiple states, the prevailing choice-of-law analysis under any state would be substantially the same. Because federal district courts with diversity jurisdiction under 28 U.S.C. § 1332 must apply the choice-of-law rules of the state in which they sit, for the purposes of this decision, the Special Master will apply Pennsylvania choice-of-law analysis to determine the applicable state substantive law. Carlson v. Arnot-Ogden Mem'l Hosp., 918 F.2d 411, 413 (3d Cir. 1990) (citing Klaxon Co. v. Stentor Mfg. Co., 313 U.S. 487, 496 (1941)).

Pennsylvania courts tend to honor the intent of the parties by enforcing a contractual choice-of-law provision. T & N, PLC v. Pa. Ins. Guar. Ass'n, 44 F.3d 174, 185-86 (3d Cir. 1994) (citing Smith v. Commonwealth Nat. Bank, 557 A.2d 775, 777 (Pa. Super. 1989), *appeal denied*, 569 A.2d 1369 (Pa. 1990) ("The Pennsylvania courts have adopted section 187 of the Restatement (Second) Conflict of Laws which provides that…the law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.").

Per § 27.1 of the Settlement Agreement, the parties have agreed that the provisions of the Settlement Agreement shall be "interpreted and enforced in accordance with the laws of the State of New York." Accordingly, the Special Master will honor the intent of the parties and interpret the Settlement Agreement according to the state contract law of New York.

B. Whether There is Only One Interpretation That Gives Meaning to All Provisions

Because the NFL argues that interpretive principles of contract law allow for only one possible interpretation of § 2.1(kk) of the Settlement Agreement, the Special Master will analyze this argument first to see if it obviates the need for further review.

The Settlement Agreement is governed by contract-law principles. See Interspiro USA, Inc. v. Figgie Int'l, Inc., 815 F. Supp. 1488, 1501 (D. Del. 1993) (citing Rainbow v. Swisher, N.E.2d 258, 259 (N.Y. 1988) ("Under New York law, [a] settlement agreement must be interpreted as any other contract.") (internal quotations omitted).

Under the law of New York, the parties are bound to the "plain terms" of a contract "unless, when so construed, the contract becomes meaningless." See Peerless Weighing & Vending Mach. Corp. v. Int'l Ticket Scale Corp., 126 F.2d 239, 241 (3d Cir. 1942) (citing Stern

v. Premier Shirt Corporation, 183 N.E. 363, 364 (N.Y. 1932); Outlet Embroidery Co., Inc. v. Derwent Mills, Limited, 172 N.E. 462, 463 (N.Y. 1930); Cohen & Sons, Inc. v. M. Lurie Woolen Co., Inc., 133 N.E. 370, 371 (N.Y. 1921).

The NFL argues that crediting *all* games in which a Player was placed on the Inactive List on the date of the game would render the second provision of § 2.1(kk) (hereinafter, "part (ii)") – which specifically credits games for which a Player was on the Inactive List "due to concussion or head injury" – meaningless. (Responses, at 40-41.) The Special Master concurs that unless there is a possible interpretation of § 2.1(kk) that credits all games in which a Player was placed on the Inactive List "on the date of" the game *without* rendering superfluous the provision crediting a specified subset of games spent on the Inactive List, then the NFL's interpretation of this provision must control.

The Special Master finds that there is another interpretation of § 2.1(kk) under which part (ii) would retain meaning. Such an interpretation hinges on the presence of the phrase "on the date of" in both parts (i) and (ii) of the Eligible Season definition. Per the Constitution and By-Laws of the National Football League, teams are not required to assign Players to the Inactive List until ninety minutes before kickoff. (Responses, at 23.) These provisions can be reasonably interpreted to conclude that Players who are first placed on the Inactive List 90 minutes before kickoff *were* on the Club's Active List "on the date of" the game, thereby fulfilling the requirements of § 2.1(kk) for accrual towards an Eligible Season.

If the lynchpin of accrual of a game towards an Eligible Season is presence on the Active List "on the date of" the game, then part (ii) would serve a purpose: crediting Players who were placed on the Inactive (or Injured Reserve) Lists *prior to* "the date of the game" for reasons related to a concussion or head injury," while *not* crediting Players who were placed on those lists prior to the date of the game for other reasons not related to a head injury.

Accordingly, the Special Master finds that the plain language of the Settlement Agreement allows for an interpretation that does not render any of its provisions superfluous.

C. Whether the Plain Meaning of the Terms of § 2.1(kk) are Ambiguous

Because there are multiple potential interpretations of § 2.1(kk) that give effect to all provisions of the Settlement Agreement, the Special Master must now turn to the issue of interpreting the relevant provisions. Under New York law, a court must interpret a contract according to the intent of the parties; if such intent is "discernible from the plain meaning of the provisions of the agreement, then there is no need to look further." Peak Partners, LP v. Republic Bank, 191 F. App'x 118, 123 n.5 (3d Cir. 2006) (quoting Evans v. Famous Music Corp., 807 N.E.2d 869, 872 (N.Y. 2004).

A contract that is "complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Mosaid Techs. Inc. v. LSI Corp., 629 F. App'x 206, 211 (3d Cir. 2015) (quoting Greenfield v. Philles Records, Inc., 780 N.E.2d 166, 170 (N.Y. 2002)). Thus, when the plain meaning of the contract is clear and unambiguous, New York courts do not consider extrinsic evidence to determine the intent of the parties. Bethlehem Steel Co. v. Turner Constr. Co., 141 N.E.2d 590, 593 (N.Y. 1957) ("It has long been the rule that when

a contract is clear in and of itself, circumstances extrinsic to the document may not be considered.").

In considering whether a provision is ambiguous, courts review the entire contract. Franklin Advisers, Inc. v. iHeart Commc'ns Inc., No. 04-16-00532-CV, 2017 WL 4518297, at *2 (Tex. App. Oct. 11, 2017) (applying New York state contract law). A contract is ambiguous when "reasonable minds could differ" as to what the parties intended. Van Wagner Adver. Corp. v. S & M Enters., 492 N.E.2d 756, 759 (1986). The provisions of a contract are not considered ambiguous solely because the parties seek different interpretations. Seiden Assocs. v. ANC Holdings, Inc., 959 F.2d 425, 428 (2d Cir. 1992) (applying New York law). It is therefore incumbent upon the Special Master to determine whether the relevant terms of the Settlement Agreement have a plain meaning, and whether reasonable minds could differ as to the plain meaning of the agreement.

New York courts often refer to the dictionary definition of the terms of a provision in order to determine the plain meaning of a contract. See Graev v. Graev, 2008 NY Slip Op 7945, ¶ 1, 898 N.E.2d 909, 910 ("Words in a contract are to be given their ordinary dictionary meanings."); see, e.g., In re Nortel Networks, Inc., 737 F.3d 265, 271 (3d Cir. 2013) (applying New York contract law and holding that the Oxford English Dictionary definitions of "dispute" and "resolver" constituted the plain meaning of the words).

Here, the provision in question, § 2.1(kk) of the Settlement Agreement, reads as follows:

> "'Eligible Season' means a season in which a Retired NFL Football Player or deceased Retired NFL Football Player was: (i) on a Member Club's Active List *on the date of* three (3) or more regular season or postseason games…" (emphasis added).

There is one critical clause in the provision for the purposes of this dispute: "on the date of." Black's Law Dictionary's primary definition of "date" is "[t]he day when an event happened or will happen," such as the "date of trial." *Date*, Black's Law Dictionary (10th ed. 2014). It follows from this definition that the status of a particular person "on the date of" a specified event refers to that person's status on the day when that event "*will happen.*" Section 2.1(a) of the Settlement Agreement specifies that the "Active List" means the "list of all Players physically present, eligible and under contract to play for a [Club] *on a particular game day*" (emphasis added), and § 2.1 clarifies that all "references to 'day' or 'days' in the lower case are to calendar days." Thus, when a Player is present, eligible and under contract to play on the calendar day of a particular game, the Settlement Agreement instructs that the Player is on the Active List for that game.

The common law has long refrained from fractionalizing a day unless otherwise specified by the parties: "A thing done at any time during the day is in legal effect done on the last instant of the day." In re Puglisi, 230 F. 188, 189 (E.D. Pa. 1916); see also Garelick v. Rosen, 8 N.E.2d 279, 281 (N.Y. 1937) ("[I]n the absence of an express limitation, the law does not take notice of a fraction of a day."); 2 WILLIAM BLACKSTONE, COMMENTARIES *141 ("In the space of a day all the twenty-four hours are usually reckoned; the law generally rejecting all fractions of a day, in order to avoid disputes.").

If the parties had intended to specify that a Player must be on the Active List at the particular moment that the game starts, rather than on the calendar day of the game, they could have written the provision accordingly. See, e.g., Swenson v. Erickson, 2006 UT App. 34, P.3d 267, 271 ("The inclusion of only a date without a specific time suggests that [the action] could be taken any time that day. If the parties had intended to impose a strict 12:01 a.m. deadline…the [agreements] could have said so."); see also Carter Petroleum Prods. v. Bhd. Bank & Tr. Co., 33 Kan. App. 2d 62, 67 (2004) ("Accordingly, if the [appellant] wanted more specificity as to when and where [appellee] had to make presentment, [they] could have included such provisions [including a]…specific time of day.").

Accordingly, the Special Master finds that when a Player is not placed on the Inactive or Injured Reserve Lists until the calendar day of the game, that Player is on the Active List "on the date of" that game and accrues a game towards an Eligible Season.

Because such an interpretation of the Settlement Agreement can be effected without rendering part (ii) of § 2.1(kk) meaningless – by discounting the accretion of games for which the Player was placed on the Injured Reserve or Inactive List prior to the calendar day of the game, *unless* that Player was placed on such a list due to a head injury as specified in part (ii) – the plain meaning of the provision compels an interpretation that credits games in which the Player was on the Active List on the calendar day of the game.

D. Whether the Plain Meaning Leads to an Absurd Result

Because the plain meaning of § 2.1(kk) credits Players on the Active List on the day of the game towards an Eligible Season, the Special Master must determine whether the exception to the plain-meaning rule is triggered. Under New York law, a "contract should not be interpreted to produce a result that is absurd," "commercially unreasonable," or "[gives] one party an unfair and unreasonable advantage over the other." Dervan v. Gordian Grp. LLC, No. 16-CV-1694 (AJN), 2017 WL 819494, at *6 n.3 (S.D.N.Y. Feb. 28, 2017) (quoting Luver Plumbing & Heating, Inc. v. Mo's Plumbing & Heating, 43 N.Y.S.3d 267, 269 (N.Y. App. Div. 2016)). Courts may thus modify the plain meaning of an unambiguous contract if enforcing the contract under its plain meaning would lead to such an unfair, unreasonable, or absurd result. Wallace v. 600 Partners Co., 658 N.E.2d 715, 717 (1995).

Applying the plain meaning of § 2.1(kk) would result in some line-drawing that could conceivably be perceived as unfair. For example, a rostered Player who spent three weeks practicing with the team – only to be placed on the Inactive List on the date of each game – and then injured his leg on the first day of Week 4 would accrue a full Eligible Season. By contrast, a Player who spent eight games on the same team's practice, developmental, or taxi squad would have played in the same number of games (zero) and practiced for five more weeks, only to accrue half of an Eligible Season. However, as the NFL notes, "There was—and always will be—line-drawing that occurs in this type of Settlement." (Responses, at 43.) This Court has already held that "[w]hile the Settlement may have been more generous if [those] Retired Players received Eligible Season credit, the lack of credit does not render the Settlement unfair." *Id.* (citing In re Nat'l Football League Players' Concussion Injury Litig., 307 F.R.D. 351 at 410). Indeed, as Co-Lead Class Counsel detail, a reading that the eight Players only placed on the Inactive List 90 minutes prior to game time, but who participated fully in practice all week,

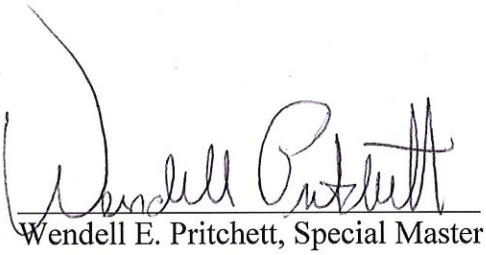
would receive less credit than those on the practice squad who were not on the active list at any time on a game day would lead to an absurd result (Responses, at 17.)

Additionally, the Special Master finds nothing in this interpretation of § 2.1(kk) that leads to an unfair or commercially-unreasonable result: While the total cost of payouts under the Monetary Award Fund may increase incrementally, this does not suffice to meet the standard of commercial unreasonableness. Veliz v. Cintas Corp., No. C 03-1180 SBA, 2004 WL 2452851 *modified on reconsideration*, No. 03-01180(SBA), 2005 WL 1048699 (N.D. Cal. May 4, 2005), at *28 (N.D. Cal. Apr. 5, 2004) ("The presence of a commercially unreasonable term [refers to] a term that no one in his right mind would have agreed to.").

V. CONCLUSION

The Special Master holds that the plain meaning of the terms of the Agreement is evident: retired NFL Players who were on the Active List on the calendar day of their Club's particular regular season or postseason game shall receive credit toward that game for the purposes of calculating an Eligible Season, even when the Player was placed on the Inactive or Injured Reserve Lists prior to the start of the game.

Date: December 4, 2017



Wendell E. Pritchett, Special Master

FINDINGS AND REMEDIES OF THE SPECIAL MASTERS PURSUANT TO SECTION 10.3(i) REGARDING SEVEN MONETARY AWARD CLAIMS

I. INTRODUCTION.

Pursuant to Section 10.3 of the Settlement Agreement and Rule 7(b) of the Rules Governing Audit of Claims (the "Audit Rules"), the Claims Administrator audited seven Monetary Award Claims that relied on neuropsychological testing Dr. August Dolan-Henderson performed. This Audit included reviews of records, interviews with relevant individuals, and consultation with an Appeals Advisory Panel Consultant. The Claims Administrator concluded that Dr. Dolan-Henderson misrepresented information submitted to the Program in connection with the seven Monetary Award Claims.

On March 14, 2018, the Claims Administrator referred these seven Monetary Award Claims to the Special Masters for review and findings in accordance with Section 10.3(i) of the Settlement Agreement. The Claims Administrator also notified Settlement Class Members of the referral. Three Settlement Class Members withdrew their claims following the Claims Administrator's referral to the Special Masters under Section 10.3 of the Settlement Agreement. The Special Masters reviewed the Record of the Audit Proceeding and issues these findings and remedies for the remaining claims.

II. FACTUAL BACKGROUND.

The Claims Administrator began auditing Dr. Dolan-Henderson after finding that two versions of a neuropsychological report that he prepared for a player for the same evaluation contained conflicting information. These two reports listed the same assessment date, report date, signature date, and player background and history, but the testing battery described was different. For two tests listed in both test batteries, the player's scores differed in the two reports. In addition, in one report, Dr. Dolan-Henderson referred to the player by the wrong name.

The Claims Administrator contacted the player's lawyer and Dr. Dolan-Henderson to ask why two versions of the same report were included with the claim and received two different explanations. The player's lawyer submitted a written statement from Dr. Dolan-Henderson saying the reports differed because the second version was reformatted to conform with the Settlement Agreement. The Claims Administrator later interviewed Dr. Dolan-Henderson over the phone. He stated that the two reports were not for the same person. He said he realized his mistake of using another person's test scores in the original report, which prompted him to issue the revised report and that he notified the player's lawyer of the error and instructed that only the second report should be used.

After receiving conflicting explanations for the two versions of the same report, the Claims Administrator requested input from two Appeals Advisory Panel Consultants regarding whether either explanation adequately addressed the concerns identified in the Audit. They found neither explanation to be credible and instead indicated that they would not accept either report or any report prepared by Dr. Dolan-Henderson as valid because of the concern that test results in a report may not belong to the player named in the report and be otherwise unreliable.

The Claims Administrator then reviewed all seven claims supported by neuropsychological testing from Dr. Dolan-Henderson. During this analysis, the Claims Administrator identified a second player whose file contained two versions of the same report from Dr. Dolan-Henderson with conflicting information. These differing reports display some of the same issues previously identified: both have the same report date but provide different test batteries. For one test listed in both test batteries, the player's scores in the two reports are different.

The Claims Administrator identified that the claim file of a third player contained two different neuropsychological reports: the first prepared by Dr. Dolan-Henderson with testing done on July 21, 2015, and the second prepared by another neuropsychologist with testing on May 6, 2016. The player performed markedly better on the May 6, 2016 testing than he did on the 2015 testing administered by Dr. Dolan-Henderson. The Claims Administrator requested input from an Appeals Advisory Panel Consultant about whether there could be a reasonable explanation for the improvement reflected in the May 6, 2016 testing. The Appeal Advisory Panel Consultant noted that even accounting for "practice effects," that is, the expected improvement in scores after repeated exposure to neuropsychological testing, the extreme improvement demonstrated by the May 6, 2016 testing would discredit a finding of impairment for the player. The Appeals Advisory Panel Consultant also expressed concern that, given the conflicting reports submitted for the two other players, the testing from Dr. Dolan-Henderson may not contain results belonging to the player and felt it would be unacceptable to rely upon Dr. Dolan-Henderson's report.

Based on Dr. Dolan-Henderson's inconsistent explanations to the firm and to the Claims Administrator regarding the differing versions of reports for a player and the statements from the Appeals Advisory Panel Consultants after their review of Dr. Dolan-Henderson's testing that they could not accept any report prepared by Dr. Dolan-Henderson as reliable, the Claims Administrator concluded that there was a reasonable basis to support a finding that Dr. Dolan-Henderson misrepresented or concealed the results of his testing for the players he evaluated. The Claims Administrator issued Notices of Referral to Special Masters of Adverse Audit Report to the affected players on April 12, 2018.

No player affected by the Adverse Audit Report for Dr. Dolan-Henderson submitted an Opening Memorandum to address or challenge the Claims Administrator's findings. Neither Co-Lead Class Counsel nor Counsel for the NFL Parties submitted a Reply Memorandum addressing the Adverse Audit Report.

III. CONCLUSION AND REMEDIES.

Under Section 10.3(i) of the Settlement Agreement, the Special Masters' review and findings may include the following relief, without limitation: (a) denial of the claim in the event of fraud; (b) additional audits of claims from the same law firm or physician (if applicable), including those already paid; (c) referral of the attorney or physician (if applicable) to the appropriate disciplinary boards; (d) referral to federal authorities; (e) disqualification of the attorney, physician and/or Settlement Class Member from further participation in the Class

Action Settlement; and/or (f) if a law firm is found by the Claims Administrator to have submitted more than one fraudulent submission on behalf of Settlement Class Members, claim submissions by that law firm will no longer be accepted, and attorneys' fees paid to the firm by the Settlement Class Member will be forfeited and paid to the Settlement Trust for transfer by the Trustee into the Monetary Award Fund.

Upon review, the Special Masters find that claims relying on Dr. Dolan-Henderson's testing include a misrepresentation, omission, or concealment of material fact and that Dr. Dolan-Henderson's testing results do not meet the standard of care required for a Monetary Award under the Settlement Agreement. Specifically, Dr. Dolan-Henderson created two versions of a neuropsychological report purportedly for the same evaluation, but the versions contained conflicting information. He did this for two different players subject to the Claims Administrator's Adverse Audit Report. When questioned about the conflicting information for one player, Dr. Dolan-Henderson provided two different, irreconcilable explanations. Based on these facts, the Special Masters conclude that Dr. Dolan-Henderson misrepresented either the results of his neuropsychological testing or the reason(s) for his creation of two versions of testing results for the same player.

Accordingly, and pursuant to Section 10.3 of the Settlement Agreement, the Special Masters order these remedies:

1. **Disqualification of Dr. Dolan-Henderson:** Dr. Dolan-Henderson is disqualified from participation in the Program. Any Monetary Award Claim that relies on neuropsychological testing performed by Dr. Dolan-Henderson is disallowed and no claims may be submitted in reliance on his testing or opinions.

2. **Disposition of Monetary Award Claims Relying on Dr. Dolan-Henderson's Evaluations:** The Claims Administrator will deny without prejudice any Monetary Award Claim that relies on evaluation, testing or opinions performed or rendered by Dr. Dolan-Henderson. Those Settlement Class Members whose Monetary Award Claims rely on neuropsychological testing by Dr. Dolan-Henderson may seek a new evaluation through the Baseline Assessment Program, if they are eligible to participate in the BAP, or from a Qualified MAF Physician. If the original Qualifying Diagnosis reached by Dr. Dolan-Henderson or a physician relying on his testing is confirmed by the Qualified MAF Physician or the BAP Provider, the diagnosis date may be dated retroactively to match the date of the original Qualifying Diagnosis asserted in the Monetary Award Claim that relied on Dr. Dolan-Henderson's evaluation.

Wendell E. Pritchett, Special Master

Date: 8/29/18

Jo-Ann M. Verrier, Special Master

Date: 8/29/18

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	No. 2:12-md-02323-AB MDL No. 2323
Kevin Turner and Shawn Wooden, *on behalf of themselves and others similarly situated,* Plaintiffs, v. National Football League and NFL Properties, LLC, successor-in-interest to NFL Properties, Inc., Defendants.	**Hon. Anita B. Brody** Civ. Action No. 14-00029-AB
THIS DOCUMENT RELATES TO: ALL ACTIONS	

FINDINGS AND REMEDIES OF THE SPECIAL MASTER
PURSUANT TO SECTION 10.3(i) REGARDING 153 MONETARY AWARD CLAIMS

I. INTRODUCTION.

Under Section 10.3(i) of the Settlement Agreement, if upon completion of an audit the Claims Administrator determines that there has been a misrepresentation, omission, or concealment of a material fact made in connection with a claim for a Monetary Award, the Claims Administrator refers that claim to the Special Master for review and findings.

In the case at hand, the Claims Administrator investigated 153 Monetary Award Claims supported by neuropsychological testing performed by Dr. Serina Hoover. This investigation included reviews of relevant records, interviews with relevant individuals, and consultation with an Appeals Advisory Panel Consultant. The Claims Administrator concluded that Dr. Hoover misrepresented information submitted to the Program in connection with the 153 Monetary Award Claims. Accordingly, on November 9, 2017, the Claims Administrator referred these 153

Monetary Award Claims to the Special Master for review and findings pursuant to Section 10.3(i) of the Settlement Agreement.[1]

II. REVIEW OF FACTS.

As noted, these claims were referred to an Appeals Advisory Panel Consultant. The Consultant reported the following inadequacies in the neuropsychological evaluations performed by Dr. Hoover:

- Dr. Hoover excessively relied on patient complaints in the diagnosis of major neurocognitive disorder secondary to repetitive head injuries with behavioral disturbance;
- Dr. Hoover's assessments often violated standardized procedures (for example, administering Part B of the Trail Making Test without Part A);
- Certain testing interpretations were incorrect (e.g., better performance on the color-word trial of the Stroop test than expected based on individual color and word trials was erroneously used as an indicator of executive dysfunction);
- Dr. Hoover disregarded indicators of suboptimal effort, such as results showing that errors on the Tests of Memory Malingering exceeded the cutoff for suboptimal effort and scores in the invalid performance range on other validity tests. Dr. Hoover classified these as "valid" or "questionable" or otherwise provided unconvincing explanations; and
- Dr. Hoover labeled the MMPI-2 a "mood" inventory and incorrectly interpreted the testing.

The AAP Consultant concluded that the evaluations performed by Dr. Hoover fail to meet the standard of care required for approval of a Monetary Award.

Dr. Hoover reviewed the Appeals Advisory Panel Consultant's opinion and replied with her explanations and references to medical literature to support her conclusions. The Appeals Advisory Panel Consultant reviewed these responses and maintained the opinion that Dr. Hoover did not perform evaluations that meet the standard of care or that are free from bias.

The Claims Administrator noted other concerns with the evaluations. Multiple Players traveled from other states to California to be tested by Dr. Hoover, including twelve Players who reside in Florida and eleven who reside in Georgia.

Furthermore, the Claims Administrator noted concerns about the timing of Dr. Hoover's evaluations. Dr. Hoover allegedly evaluated and tested at least three Players on the same date on 25 different days, and on two days, one of which was New Year's Eve, she evaluated and tested eight Players in one day. These dates, where at least three or more Players were tested on one day, are listed below:

[1] The Claims Administrator also notified Settlement Class Members of the referral.

SCM Testing Date		Number of Claims from SCMs
1.	December 31, 2016	8
2.	December 21, 2016	8
3.	November 30, 2016	5
4.	December 10, 2016	5
5.	December 14, 2016	5
6.	August 21, 2016	4
7.	September 7, 2016	4
8.	September 14, 2016	4
9.	November 16, 2016	4
10.	December 3, 20176	4
11.	December 28, 2016	4
12.	December 29, 2016	4
13.	January 4, 2017	4
14.	June 8, 2016	3
15.	August 3, 2016	3
16.	August 10, 2016	3
17.	September 28, 2016	3
18.	October 5, 2016	3
19.	October 12, 2016	3
20.	November 9, 2016	3
21.	December 4, 2016	3
22.	December 6, 2016	3
23.	December 9, 2016	3
24.	December 19, 2016	3
25.	December 27, 2016	3
26.	**TOTAL**	**99**

On December 21, 2016 and December 31, 2016, Dr. Hoover allegedly examined eight Players and signed the corresponding reports on the day following the examinations (December 22, 2016 and January 1, 2017, respectively). Established procedures require that all portions of the examination protocol must be completed by the time Dr. Hoover signs the report. In these cases, the evaluation reports indicate that Dr. Hoover performed all testing and evaluation, and wrote the reports herself.

These reports show that the combined testing, interpretation, and report preparation time for the December 31, 2016 examinations is 134.5 hours across a 48 hour period.

In an interview with the Claims Administrator, Dr. Hoover indicated that she had three psychometrists assist with testing administration and interpretation. Even assuming Dr.

Hoover's use of three assistants, and equally dividing the work among the four individuals, each would have had to work approximately 17 hours straight on both December 31, 2016 and January 1, 2017. However, Dr. Hoover indicated that the work was not shared equally with the psychometrists but rather that Dr. Hoover herself had conducted initial interviews and some testing, and she herself prepared all reports.

Similarly, the combined testing, interpretation, and report preparation time stated in the reports for the eight December 21, 2016 examinations add up to 139.75 hours.

III. CONCLUSION AND REMEDIES.

Under Section 10.3(i) of the Settlement Agreement, the Special Master's review and findings may include the following relief, without limitation: (a) denial of the claim in the event of fraud; (b) additional audits of claims from the same law firm or physician (if applicable), including those already paid; (c) referral of the attorney or physician (if applicable) to the appropriate disciplinary boards; (d) referral to federal authorities; (e) disqualification of the attorney, physician and/or Settlement Class Member from further participation in the Class Action Settlement; and/or (f) if a law firm is found by the Claims Administrator to have submitted more than one fraudulent submission on behalf of Settlement Class Members, claim submissions by that law firm will no longer be accepted, and attorneys' fees paid to the firm by the Settlement Class Member will be forfeited and paid to the Settlement Trust for transfer by the Trustee into the Monetary Award Fund.

Upon review, the Special Masters find that claims relying on Dr. Hoover's testing include a misrepresentation, omission, or concealment of a material fact and that Dr. Hoover's testing results do not meet the standard of care required for a Monetary Award under the Settlement Agreement. Accordingly, and pursuant to Section 10.3 of the Settlement Agreement, the Special Masters order these remedies:

1. **Disqualification of Dr. Hoover:** Dr. Hoover is disqualified from participation in the Program. Any Monetary Award Claim that relies on neuropsychological testing performed by Dr. Hoover is disallowed and no claims may be submitted in reliance on her testing or opinions.

2. **Disposition of Monetary Award Claims Relying on Dr. Hoover's Evaluation:** The Claims Administrator will deny without prejudice any Monetary Award Claim that relies on evaluation, testing or opinions performed or rendered by Dr. Hoover. Those Settlement Class Members whose Monetary Award Claims rely on neuropsychological testing by Dr. Hoover may seek a new evaluation through the Baseline Assessment Program, if they are eligible to participate in the BAP, or from a Qualified MAF Physician. If the original Qualifying Diagnosis reached by Dr. Hoover or a physician relying on her testing is confirmed by the Qualified MAF Physician or the BAP Provider, the diagnosis date may be dated retroactively to match the date of the original Qualifying Diagnosis asserted in the Monetary Award Claim that relied on Dr. Hoover's evaluation.

3. **Other Remedies:** The Special Masters will continue to review the Monetary Award Claims supported by neuropsychological testing from Dr. Hoover and may order further remedies as deemed appropriate and necessary.

Wendell Pritchett, Special Master

Signed 30 of November, 2017.

Jo-Ann Verrier, Special Master

Signed 30 of November, 2017.

FINDINGS AND REMEDIES OF THE SPECIAL MASTERS PURSUANT TO SECTION 10.3(i) REGARDING 66 MONETARY AWARD CLAIMS

I. INTRODUCTION.

Pursuant to Section 10.3 of the Settlement Agreement and Rule 7(b) of the Rules Governing Audit of Claims (the "Audit Rules"), the Claims Administrator audited 62 Monetary Award claims supported by neuropsychological testing from seven neuropsychologists (referred to hereinafter as "these neuropsychologists") who used substantially the same template report used by Dr. Serina Hoover (for more information on Dr. Hoover, see Findings and Remedies of the Special Master Pursuant to Section 10.3(i) Regarding 153 Monetary Award Claims (Document 9507)). These neuropsychologists are: Drs. Daniel Zehler, Charles Furst, Therese Moriarty, Julia Johnson, Julie Keck-Olson, Nicole Anders and Phillip Pines. The Claims Administrator's investigation included reviews of relevant records, interviews with relevant individuals, and consultation with an Appeals Advisory Panel Consultant ("AAPC").

The Claims Administrator concluded that these neuropsychologists misrepresented information submitted to the Program in connection with the 62 Monetary Award claims. On 2/28/18, the Claims Administrator referred these 62 Monetary Award claims to the Special Masters for review and findings pursuant to Section 10.3(i) of the Settlement Agreement and notified the affected Settlement Class Members. Since making the referral, the Claims Administrator identified an additional four claims that rely on evaluations from one of these neuropsychologists and these four will be subject to the same treatment as the 62 claims addressed in the Audit Report. The Special Masters reviewed the Record of the Audit Proceeding and issue these findings and remedies.

II. REVIEW OF FACTS.

The Claims Administrator began auditing claims supported by neuropsychological testing from these neuropsychologists after finding that the neuropsychological reports that they used were remarkably similar in their form and in their actual wording to the report template that Dr. Serina Hoover used. The Claims Administrator sought to determine whether the testing results from these neuropsychologists presented misrepresentations, omissions, or concealment of material fact.

The Claims Administrator asked an AAPC to review seven sample reports from these neuropsychologists. The AAPC concluded that these neuropsychologists' reports were problematic as follows:

1. Their assessments often violated standardized procedures.
2. They ignored test results indicating invalid performances.
3. They accepted player self-reports of impairment at face value, despite indications that players exaggerated or demonstrated unbelievable symptoms in light of the standardized, validated tests.

4. Even if the players' test scores were valid, the doctors did not always reach diagnostic conclusions suggested under the Settlement Agreement framework.
5. They grossly inflated the time they spent on assessments.

The Claims Administrator attempted to interview these neuropsychologists and report the following:

Drs. Furst and Moriarty stated that they got the report template from Peter Shahriari of the Law Office of Hakimi & Shahriari (f/k/a Top NFL Lawyers). Dr. Gabichvadze, the director of the Psych Testing Center where Drs. Olsen-Keck, Pines, and Anders performed neuropsychological evaluations of players, stated that the doctors at the Center also received the template from Mr. Shahriari. Dr. Johnson was too busy for an interview and asked the Claims Administrator to direct any questions to Mr. Shahriari. Dr. Zehler informed the Claims Administrator that his employer was an acquaintance of Dr. Hoover and that she instructed him on how to perform his evaluations; Dr. Zehler used Dr. Hoover's psychometrists.

Regarding evaluation timing, Drs. Zehler and Keck-Olson performed multiple test sessions on the same day, which the AAPC stated devalues the reliability of the submitted reports. Even if some of Dr. Zehler's recorded hours should instead be attributed to the psychometrists Dr. Hoover recommended, the multiple evaluations on the same day suggest that the time billed for the testing was inflated. Table 1 lists the dates and times Dr. Zehler spent testing and evaluating the players, excluding report preparation time, which Dr. Zehler says occurred on another day:

Table 1	**Multiple Players Dr. Zehler Evaluated on the Same Day**	
Testing Date	**Players Examined**	**Total Hours Spent**
5/27/17	4	52.25
5/31/17	3	39
6/7/17	3	39.25
5/2/17	2	20
6/10/17	2	27.25
8/9/17	2	27.25
8/16/17	2	25

Dr. Keck-Olson evaluated and tested two players apiece on 11/21/16 and 12/1/16 for 15 hours each. Dr. Keck-Olson's reports state that testing, scoring and interpreting testing, and report preparation all occurred on the same date. She said she did all the testing herself. For all 16 of her reports, Dr. Keck-Olson indicated that testing took seven hours, scoring and interpretation took three hours and report preparation took five hours. Performing 30 hours of work in one day is impossible and suggests inflated billing. These dates and times spent are listed in Table 2:

Table 2	Multiple Players Dr. Keck-Olson Evaluated on the Same Day	
Player Testing Date	**Players Examined**	**Total Hours Spent**
11/21/16	2	30
12/21/16	2	30

The Claims Administrator also noted potential discrepancies between players' Level 2 Neurocognitive Impairment determinations by these neuropsychologists, and the activities and/or employment reported by the players. According to an Appeals Advisory Panel ("AAP") member, a player's continued ability to function independently outside the home should be considered a "red-flag" that a diagnosis of Level 2 Neurocognitive Impairment may not be consistent with the clinical abilities. Twelve claims were analyzed in which the player received a Level 2 Neurocognitive Impairment Qualifying Diagnosis but told the neuropsychologist that he was working or studying. In seven of these instances, the players engaged in significant employment or other activities.

III. CONCLUSION AND REMEDIES.

Under Section 10.3(i) of the Settlement Agreement, the Special Masters' review and findings may include the following relief, without limitation: (a) denial of the claim in the event of fraud; (b) additional audits of claims from the same law firm or physician (if applicable), including those already paid; (c) referral of the attorney or physician (if applicable) to the appropriate disciplinary boards; (d) referral to federal authorities; (e) disqualification of the attorney, physician and/or Settlement Class Member from further participation in the Class Action Settlement; and/or (f) if a law firm is found by the Claims Administrator to have submitted more than one fraudulent submission on behalf of Settlement Class Members, claim submissions by that law firm will no longer be accepted, and attorneys' fees paid to the firm by the Settlement Class Member will be forfeited and paid to the Settlement Trust for transfer by the Trustee into the Monetary Award Fund.

Upon review, the Special Masters find that claims relying on these neuropsychologists' testing may involve a misrepresentation, omission, or concealment of a material fact. Accordingly, and pursuant to Section 10.3 of the Settlement Agreement and Audit Rule 31(i), the Special Masters order these remedies for the 66 claims based on testing by these neuropsychologists (and any future claim resting on neuropsychological testing by one of these neuropsychologists):

1. **Individualized Assessment by the AAP:** The Monetary Award claims that rely on neuropsychological testing by any one of these neuropsychologists shall be directed to a single member of the AAP, with consultation from a single AAPC, for individualized assessment.

2. **Final Determination:** After this AAP review, the Claims Administrator will issue an Award or Denial Notice on each claim, which will be subject to appeal under Section 9.5 of the Settlement Agreement.

It is noted that some of these 66 Monetary Award claims are subject to another Audit investigation or an Audit Proceeding before us. These claims will not proceed under the remedy above unless and until the other Audit issues are resolved without denial of the claim.

Several players who were seen by one of these neuropsychologists have withdrawn their claims. Under Audit Rule 13, a Retired NFL Football Player with a claim in Audit may at any time withdraw that claim. As is always the case, that player may be examined by a Qualified BAP Provider (if eligible for the BAP) or by a Qualified MAF Physician and, if found to have a Qualifying Diagnosis, substitute a new Diagnosing Physician Certification, including a medically indicated date of diagnosis (that may precede the date of the new exam), to the Claims Administrator for review in the claims process.

Wendell Pritchett, Special Master

9/11/18
Date

Jo-Ann Verrier, Special Master

9/11/18
Date

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	:	No. 2:12-md-02323-AB MDL No. 2323
	:	**Hon. Anita B. Brody**
THIS DOCUMENT RELATES TO: OBJECTION OF [redacted] REGARDING DENIAL OF MONETARY AWARD	:	

INTRODUCTION

This matter requires the Special Master to determine whether, upon conclusion of an audit and the issuance of a new Monetary Award determination, a party has an additional 30 days to appeal under the Settlement Agreement. Here, the Special Master must also decide whether there is clear and convincing evidence that the grant of a Monetary Award to the claimant was incorrect.

For the reasons stated below, the Special Master grants the appeal of the NFL Parties.

FACTUAL AND PROCEDURAL HISTORY

[redacted] ("Claimant") is a Retired NFL Player and Class Member under the Amended Class Action Settlement Agreement ("the Settlement Agreement"). He received a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment by a Board Certified Neurologist, Dr. [redacted] on June 3, 2015, prior to the Effective Date of the Settlement Agreement. (Doc. 153235, Ex. 1, at 40.)[1]

Pursuant to §6.4 of the Settlement Agreement, Claimant's Qualifying Diagnosis was reviewed by the Appeals Advisory Panel ("AAP"). (*Id.*, at 1.) The Appeals Advisory Panel approved the Qualifying Diagnosis in spite of an AAP Consultant's recommendation to deny the claim. (*Id.*, at 2; Doc. 111820, at 2.) According to Claimant's brief, he received a Notice of Monetary Award on July 20, 2017; 32 days later, Claimant's award was the subject of a random

[1] The Effective Date of the Settlement Agreement is defined in §2.1(jj) as the day following the deadline for appeals of the Court's approval of the Settlement Agreement, which was January 7, 2017. *See NFL Concussion Settlement Website*, "Basic Information", FAQ #11.

audit by the Claims Administrator, pursuant to §10.3(c) of the Settlement Agreement. (Doc. 116229.)

Claimant's award was formally approved following completion of the audit, and he received a new Notice of Monetary Award on December 4, 2017. (Doc. 145915.) On January 3, 2018, thirty days from Claimant's receipt of this Notice, the NFL Parties appealed. (Doc. 150806.) The Special Master requested that Claimant's case be reviewed by the AAP; at this point, the AAP determined that [redacted] claim should be denied. (Doc. 172127, at 1-2.) On May 31, 2018, the Special Master granted the NFL Parties' appeal and denied the claim. (Doc. 173671.)

On June 21, 2018, Claimant filed an Objection to the Special Master's ruling. (Doc 179984.) The court remanded the matter to the Special Master for further explanation of the determination. (Doc. 180031.)

STANDARD OF REVIEW

The Special Masters must decide an appeal of a Monetary Award based on a showing by the appellant of clear and convincing evidence that the determination of the Claims Administrator was incorrect. (Order Appointing Special Masters, 5.) "Clear and convincing evidence" is a recognized intermediate standard of proof—more demanding than preponderance of the evidence, but less demanding than proof beyond a reasonable doubt. In re Fosamax Alendronate Sodium Prods. Liab. Litig., 852 F.3d 268, 285-86 (3d Cir. 2017) ("Black's Law Dictionary defines clear and convincing evidence as 'evidence indicating that the thing to be proved is highly probable or reasonably certain.'").

DISCUSSION

A. Whether the NFL Parties Timely Appealed

Claimant argues that the NFL Parties waived their right to an appeal by failing to submit their Appeals Form within thirty days of the initial Notice of Monetary Award Claim Determination, as required by §9.7(a) of the Settlement Agreement. (Doc. 153235, at 2.) As this is a threshold issue that would preclude the Special Master's review of the Claim Determination, this issue must be determined before evaluating the merits of the appeal.

Section 9.7 of the Settlement Agreement requires the submission of an Appeals Form "no later than thirty (30) days after receipt of ***a*** Notice of Monetary Award Determination" (emphasis added). There is no requirement in the Settlement Agreement that the Appeals Form must be submitted within thirty days of ***the first*** Notice of Monetary Award Determination. Nor is there any restriction on appeals following a Notice of Monetary Award Determination resulting from the completion of an audit.

Claimant states that he received an initial Notice of Monetary Award Determination on July 20, 2017. (Doc. 153235, at 1.) His claim was then selected as part of the monthly 10% audit of eligible claims as dictated by §10.3 of the Settlement Agreement. Following conclusion of the

audit, Claimant received another Notice of Monetary Award Determination on December 4, 2017. By the express terms of the Settlement Agreement, nothing precludes an appeal from either party within thirty days of such a Notice.

Claimant's Notice of Monetary Award Determination from December 4 explicitly includes a "Deadline to Appeal" of January 3, 2018. (Doc. 145915, at 1.) The NFL Parties filed their Appeals Form on January 3; accordingly, the NFL Parties' appeal was timely by the terms of §9.7 of the Settlement Agreement. (Doc. 150806.)

B. Whether There is Clear and Convincing Evidence That Claimant Should Have Been Denied a Monetary Award

Based on the advice of the Appeals Advisory Panel, the Special Master concluded that there is clear and convincing evidence that Claimant's diagnosis was not generally consistent with the Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment as defined in the Settlement Agreement. For living Retired NFL Football Players diagnosed prior to the Effective Date, a diagnosis of Level 1.5 Neurocognitive Impairment must be accompanied by "evaluation and evidence generally consistent with the diagnostic criteria set forth in" the relevant section of Exhibit A-1 of the Settlement Agreement. (Settlement Agreement Ex. A-1, hereinafter "Injury Definitions.") Claimant's records do not provide evidence generally consistent with the diagnostic criteria set forth in the Settlement Agreement for Level 1.5 Neurocognitive Impairment.

A Retired NFL Player seeking a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment must exhibit (1) concern that there has been a severe decline in cognitive function, (2) evidence of a moderate to severe cognitive decline from a previous level of performance, and (3) functional impairment. (*Id.*) Claimant has fulfilled the first requirement by virtue of his own report. However, based on the advice of the AAP, the Special Master concludes that there is clear and convincing evidence that Claimant's records are not generally consistent with requirements (2) and (3).

As noted by the AAP Consultant, Claimant's cognitive assessment does not establish moderate to severe cognitive decline. Claimant's records do not include evidence supporting a 1.0 (Mild) score in the Home & Hobbies category, which requires "definite impairment of function at home; more difficult chores abandoned; [and/or] more complicated hobbies and interests abandoned."

CONCLUSION

For the foregoing reasons, Special Master grants the appeal of the NFL Parties and denies the grant of a Monetary Award.

Date: September 24, 2018

Wendell E. Pritchett, Special Master

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	:	No. 2:12-md-02323-AB MDL No. 2323
	:	**Hon. Anita B. Brody**
THIS DOCUMENT RELATES TO: NFL PARTIES' REQUEST FOR COMPULSORY AAP/AAPC REVIEW OF MONETARY AWARD CLAIMS	:	

INTRODUCTION

This matter requires the Special Master to determine whether an Appeals Advisory Panel member ("AAP") or Appeals Advisory Panel Consultant ("AAPC") must review all claims that turn on the sufficiency of the medical evidence behind the claimant's Qualifying Diagnosis. For the reasons stated below, the Special Master holds that compulsory AAP/AAPC review is not required by the Settlement Agreement.

DISCUSSION

The NFL Parties have requested a stay of payment and re-review of all appeals that have not already been reviewed by the AAP/AAPC and "turn on technical, medical grounds," including diagnoses made by Qualified MAF Physicians (Letter from NFL Parties to the Special Master dated June 28, 2018 ("NFL Letter"), at 1-2.) While acknowledging that Qualified MAF Physicians are approved by the parties, the NFL Parties state that it was "always the intent of the Parties that AAPs and AAPCs would be used on appeals involving [diagnoses made by] Qualified MAF Physicians." (NFL Letter, at 2.)

The plain language of the Settlement Agreement does not evince such an intent. Section 9.8 of the Settlement Agreement states that, with respect to appeals taken by the parties, the court "may be assisted, ***in its discretion***, by any member of the Appeals Advisory Panel and/or an Appeals Advisory Panel Consultant" (emphasis added). The Settlement Agreement thus makes clear that the Court – and by extension, the Special Master – has the sole discretion to decide whether to consult an AAP/AAPC before ruling on an appeal.

Certain categories of compulsory AAP/AAPC review are explicitly included in §6.4(a) of the Settlement Agreement. These include Qualifying Diagnoses made prior to the Effective Date by neurologists, neurosurgeons, and physicians who are ***not*** Qualified MAF Physicians. The fact that Qualifying Diagnoses made by Qualified MAF Physicians are not included in this list further clarifies that the parties did not intend for compulsory AAP/AAPC review of such diagnoses.

Requiring AAP/AAPC review of all claims turning on medical grounds would unduly limit the discretion given to the Court and the Special Master under the plain language of the Settlement Agreement. Such compulsory review would also burden Settlement Class Members with an additional requirement for approval of claims beyond the requirements set forth in the Agreement. For these reasons, the Special Master denies the NFL Parties' request to compel AAP/AAPC review of all claims that turn on the sufficiency of the medical evidence supporting the Qualifying Diagnosis.

CONCLUSION

The NFL Parties' request for a stay of payment of claims pending AAP/AAPC review is denied.

Date: September 28, 2018

Wendell E. Pritchett, Special Master

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	:	No. 2:12-md-02323-AB MDL No. 2323
THIS DOCUMENT RELATES TO: NFL PARTIES' OBJECTIONS TO DIAGNOSES MADE OUTSIDE THE BASELINE ASSESSMENT PROGRAM	:	**Hon. Anita B. Brody**

INTRODUCTION

This matter requires the Special Master to determine whether the NFL Parties may object to the Special Master's determination that Qualifying Diagnoses made outside the Baseline Assessment Program ("BAP") were supported by medical evidence "generally consistent" with the criteria set forth in the Settlement Agreement. For the reasons stated below, the Special Master holds that the rulings on these appeals were not predicated on conclusions of law, and thus the NFL Parties may not object.

STANDARD OF REVIEW

The Special Masters must decide an appeal of a Monetary Award based on a showing by the appellant of clear and convincing evidence that the determination of the Claims Administrator was incorrect. ("Order Appointing Special Masters," filed July 13, 2017, at 5.) "Clear and convincing evidence" is a recognized intermediate standard of proof—more demanding than preponderance of the evidence, but less demanding than proof beyond a reasonable doubt. *In re Fosamax Alendronate Sodium Prods. Liab. Litig.*, 852 F.3d 268, 285-86 (3d Cir. 2017) ("Black's Law Dictionary defines clear and convincing evidence as 'evidence indicating that the thing to be proved is highly probable or reasonably certain.'").

The NFL Parties object to denial of its appeals of six Monetary Awards based on the sufficiency of the medical evidence supporting the claimants' Qualifying Diagnoses, all of which were made outside of the BAP. Diagnoses made outside of the BAP must be based on evidence "generally consistent" with the diagnostic criteria set forth for Qualifying Diagnoses made within the BAP (Settlement Agreement at Ex. A, "Injury Definitions".) The NFL Parties argue that these six claims were not supported by evidence generally consistent with the diagnostic criteria, and thus the Monetary Awards should have been denied.

DISCUSSION

The parties to the settlement agreed and the Court directed that the "factual determinations of the Master(s) on…appeal will be final and binding." ("Order Appointing Special Masters," at 5.) Pursuant to Fed. R. Civ. P. 53(f)(4), the Court must review *de novo* any objection to the Special Master's conclusions of law. (*Id.*) The parties also agreed that the "Special Masters will identify in each decision any issue the Special Master determines to be a conclusion of law to which a party to the appeal may object and have it reviewed by the court." ("Rules Governing Appeals of Claim Determinations," Rule 31.) The NFL Parties did not object to this Rule.

In all six of the appeals at issue, the Special Master did not identify a conclusion of law. Each of the Special Master's determinations clarified that the Special Master's decision is a factual determination and is final and binding. The Special Master found that each of these appeals involved conclusions of fact, because the appeals required the Special Master to apply the undisputed factual circumstances of each case to a legal standard – "generally consistent" – that was clearly established by the parties to the Settlement Agreement.[1] According to FAQ 95 on the Settlement Website, a Qualifying Diagnosis is supported by evidence that is "generally consistent" with the relevant diagnostic criteria if the evidence "ha[s] more elements or characteristics in common" with the diagnostic criteria than "elements or characteristics that differ" from the criteria.[2]

Based on this definition, when an appeal of a Monetary Award turns on the sufficiency of the medical support for the Claimant's Qualifying Diagnosis, the appellant must prove clearly and convincingly that there are more differences than commonalities between the medical evidence supporting the Qualifying Diagnosis and the Settlement Agreement's diagnostic criteria. The Special Master denied the six appeals at issue because the NFL Parties failed to meet this standard of proof in light of the factual circumstances on the record in each case.

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[1] *See* Randall H. Warner, *All Mixed Up about Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 113-14 (2005) ("Cases often equate law interpretation with the application of fact to law, and therefore conclude that law application is a question of law. This is sometimes true, but not always…[L]aw application may just involve taking an established, undisputed legal standard and deciding whether the undisputed facts of this case fall within the standard. This…exercise does not involve law interpretation."). Warner notes that clarifying the meaning of a legal standard involves a question of law, while applying the standard to the facts of a case is for the trier of fact. *See id.* at 133 (quoting *Harris v. Parker College of Chiropractic*, 286 F.3d 790, 794 (5th Cir. 2002) ("Challenges to a district court's finding of hostile work environment and constructive discharge are typically treated as factual questions.").

[2] *See Settlement Website FAQs*, "FAQ 95: What does 'generally consistent' mean?" (available at https://www.nflconcussionsettlement.com/FAQ.aspx). FAQ 95 also states that "[t]he common elements or characteristics [between the medical evidence and the diagnostic criteria] must predominate over the uncommon ones." The primary dictionary definition of "predominate" is "to hold advantage in numbers or quantity." *Predominate,* Merriam-WEBSTER.COM (2018), available at https://www.merriam-webster.com/dictionary/predominate. FAQ 95 thus makes explicit that the "generally consistent" standard requires that the commonalities between the diagnostic criteria and the evidence supporting the Qualifying Diagnosis outnumber the differences.

Under Fed. R. Civ. P. 53(f)(4), the Special Master must defer to the Court's interpretation of the "generally consistent" standard. However, based on the definition of "generally consistent" set forth in FAQ 95, the Special Master concludes that the six appeals at issue fail to establish by clear and convincing evidence that there are more differences than commonalities between the medical support for the Qualifying Diagnoses and the relevant diagnostic criteria.

Therefore, based on the Special Master's conclusion that the definition of "generally consistent" in FAQ 95 is the correct standard, the Special Master holds that the rulings on the six appeals by the NFL Parties did not involve conclusions of law, but evaluations of fact against a legal standard that was clearly defined by the parties. The NFL Parties have thus exhausted the review process afforded by the Settlement Agreement with respect to these claims.

CONCLUSION

For the reasons stated above, the NFL Parties may not object to the determinations of the Special Master.

Date: October 18, 2018

Wendell E. Pritchett, Special Master

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	:	No. 2:12-md-02323-AB MDL No. 2323
THIS DOCUMENT RELATES TO: APPEAL OF NFL PARTIES REGARDING GRANT OF MONETARY AWARD TO [redacted]	:	**Hon. Anita B. Brody**

INTRODUCTION

This matter requires the Special Master to determine whether the appellant has established by clear and convincing evidence that the medical support for Claimant's Qualifying Diagnosis is not "generally consistent" with the diagnostic criteria for Level 2.0 Neurocognitive Impairment in the Settlement Agreement.

For the reasons stated below, the Special Master grants the appeal of the NFL Parties.

FACTUAL AND PROCEDURAL BACKGROUND

[redacted] ("Claimant") is a Retired NFL Player and Class Member under the Amended Class Action Settlement Agreement ("the Settlement Agreement"). He received a Qualifying Diagnosis of Level 2.0 Neurocognitive Impairment after the Effective Date by an MAF-approved neurologist, [redacted] after receiving neuropsychological testing from [redacted] (Doc. 171109, at 1.) On March 22, 2018, Claimant received a Notice of Monetary Award Determination from the Settlement Claims Administrator. (Doc. 163129.)

The NFL Parties timely appealed the Claims Administrator's determination. (Doc. 168735.) The Special Master requested review of the medical evidence by the Appeals Advisory Panel ("AAP").

STANDARD OF REVIEW

The Special Masters must decide an appeal of a Monetary Award based on a showing by the appellant of clear and convincing evidence that the determination of the Claims Administrator was incorrect. (Order Appointing Special Masters, 5.) "Clear and convincing

evidence" is a recognized intermediate standard of proof—more demanding than preponderance of the evidence, but less demanding than proof beyond a reasonable doubt. In re Fosamax Alendronate Sodium Prods. Liab. Litig., 852 F.3d 268, 285-86 (3d Cir. 2017) ("Black's Law Dictionary defines clear and convincing evidence as 'evidence indicating that the thing to be proved is highly probable or reasonably certain.'").

DISCUSSION

The NFL Parties have established by clear and convincing evidence that the grant of a Monetary Award to Claimant was incorrect. For living Retired NFL Football Players who received a Qualifying Diagnosis outside of the Baseline Assessment Program ("BAP"), the diagnosis must be accompanied by "evaluation and evidence generally consistent with the diagnostic criteria set forth in" the relevant section of Exhibit A-1 of the Settlement Agreement. (Settlement Agreement Ex. A-1, hereinafter "Injury Definitions.") The parties to the Settlement Agreement have defined "generally consistent" to mean that the evidence has more elements or characteristics in common" with the diagnostic criteria than "elements or characteristics that differ" from the criteria. (*See* Settlement Portal, *Frequently Asked Questions,* at FAQ #95.)

Claimant was diagnosed outside of the BAP. Thus, the NFL Parties' appeal can only be granted if there is clear and convincing evidence that the medical support for Claimant's diagnosis of Level 2.0 Neurocognitive Impairment does not have more commonalities with than differences from the diagnostic criteria for such a Qualifying Diagnosis.

There are four diagnostic criteria for a Qualifying Diagnosis of Level 2.0 Neurocognitive Impairment:

(i) Concern of the Retired NFL Football Player, a knowledgeable informant, or the Qualified BAP Provider that there has been a severe decline in cognitive function.

(ii) Evidence of a severe cognitive decline from a previous level of performance, as determined by and in accordance with…standardized neuropsychological testing protocol annexed…to the Settlement Agreement, in two or more cognitive domains (complex attention, executive function, learning and memory, language, perceptual- spatial), provided one of the cognitive domains is (a) executive function, (b) learning and memory, or (c) complex attention.

(iii) [F]unctional impairment generally consistent with the criteria set forth in the National Alzheimer's Coordinating Center's Clinical Dementia Rating (CDR) scale Category 2.0 (Moderate) in the areas of Community Affairs, Home & Hobbies, and Personal Care.

(iv) The cognitive deficits do not occur exclusively in the context of a delirium, acute substance abuse, or as a result of medication side effects.

(Injury Definitions.)

The AAP found that Claimant's medical support for criteria (ii), (iii), and (iv) did not have more commonalities than differences with those criteria. For criterion (ii), the AAP found that there was evidence of a severe cognitive decline in only one domain (learning and memory). (Doc. 178295.) In coming to this conclusion, the AAP noted that the Claimant continues to drive and [redacted] (*Id.*)

An AAP Consultant found no documentation supporting criterion (iii) – requiring functional impairment according to CDR Category 2.0 – and stated that the Claimant "is functioning at a level much higher than would be expected" for someone with moderate dementia as indicated by Level 2.0 Neurocognitive Impairment. (Doc. 177807.) The AAP also cited a sworn affidavit from the Claimant's friend, who wrote that Claimant has not declined in his personal care. (Doc. 178295.)

The Special Master agrees with the AAP's finding that the medical support for Claimant's Qualifying Diagnosis does not share more commonalities with than differences from the diagnostic criteria for Level 2.0 Neurocognitive Impairment. The Special Master thus holds that the NFL Parties have met their burden of proving that, by clear and convincing evidence, the support for Claimant's Qualifying Diagnosis is not generally consistent with the diagnostic criteria.

CONCLUSION

For the reasons stated above, the Special Master grants the appeal of the NFL Parties.

Date: October 24, 2018

Wendell E. Pritchett, Special Master

FINDINGS AND REMEDIES OF THE SPECIAL MASTERS PURSUANT TO SECTION 10.3(i) REGARDING 84 MONETARY AWARD CLAIMS

I. INTRODUCTION.

Pursuant to Section 10.3 of the Settlement Agreement and Rule 7(b) of the Rules Governing Audit of Claims (the "Audit Rules"), the Claims Administrator audited 84 Monetary Award claims supported by Qualifying Diagnoses made by Dr. Robert Martinez and his son, Dr. Robert C. Martinez (the "Martinez Doctors"). The Claims Administrator's investigation included reviews of relevant records, interviews, and consultation with a member of the Appeals Advisory Panel ("AAP"). The Claims Administrator concluded that these neurologists misrepresented information submitted to the Program in connection with the 84 Monetary Award claims.

Accordingly, on 5/1/18, the Claims Administrator referred these 84 Monetary Award claims to the Special Masters for review and findings pursuant to Section 10.3(i) of the Settlement Agreement and notified the affected Settlement Class Members. Seven Settlement Class Members withdrew their claims following the Claims Administrator's referral to the Special Masters under Section 10.3 of the Settlement Agreement, leaving 77 claims remaining. The Special Masters reviewed the Record of the Audit Proceeding and issue these findings and remedies to apply to the remaining claims.

II. REVIEW OF FACTS.

The Claims Administrator began auditing claims based on a Qualifying Diagnosis by the Martinez Doctors after receiving anonymous tips stating the Martinez Doctors had: (1) performed evaluations at the offices of a law firm in Florida, which is a non-clinical setting; (2) rendered Qualifying Diagnoses to every player they had seen; and (3) used questionable techniques in making their diagnoses. The Claims Administrator investigated these statements and did not find evidence that the Martinez Doctors had evaluated players at a law office or had issued a Qualifying Diagnosis to every player they evaluated.

The Claims Administrator did find evidence to support the third allegation regarding questionable techniques and determined that the Martinez Doctors made misrepresentations that were material to the Qualifying Diagnoses asserted in 84 Monetary Award claims submitted to the Program.

These are the Qualifying Diagnoses the Martinez Doctors rendered:

Table 1	Martinez Claims Qualifying Diagnoses				
Doctor		Level 1.5	Level 2	Alzheimer's	Total
1.	Robert Martinez	27	30	2	**59**
2.	Robert C. Martinez	12	12	1	**25**
3.	**Total**	**39**	**42**	**3**	**84**

To evaluate whether the Qualifying Diagnoses made by the Martinez Doctors relied on any misrepresentations, omissions, or concealment of facts and to assess whether their diagnoses were made in a manner generally consistent with the Settlement Criteria, the Claims Administrator asked a member of the Appeals Advisory Panel ("AAP") to review a sample of these 24 claims with Qualifying Diagnoses by the Martinez Doctors:

Table 2	Martinez Claims in AAP Sample			
	Doctor	Level 1.5	Level 2	Total
1.	Robert Martinez	6	8	**14**
2.	Robert C. Martinez	4	6	**10**
3.	**Total**	**10**	**14**	**24**

The AAP member who reviewed all 24 claims found that "CDR ratings are not consistent with and do not reflect either the history information in his own note, history information in the neuropsychology note and/or the information contained in the third-party affidavit checklist." The AAP member found such problems with 9/14 (64%) of the Level 2 diagnoses in the sample and 7/10 (70%) of the Level 1.5 diagnoses in the sample.

The Claims Administrator found discrepancies between players' Level 2 Neurocognitive Impairment Qualifying Diagnoses by the Martinez Doctors and the functional activities and/or employment reported to the Martinez Doctors by the players. According to the AAP, a score of 2.0 on the CDR for community affairs indicates "no pretense of independent function outside the house." A player's continued ability to function independently outside the home is indicative that functional impairment is not corroborated by documentary evidence. In 18 of the 42 claims where the Martinez Doctors diagnosed the player with Level 2 Neurocognitive Impairment, the Martinez Doctors did not include evaluation of the players' own statements to the doctor that he was working.

The Claims Administrator found that the Martinez Doctors provided the exact same score across all three relevant areas of the CDR for 79 of the 84 claims resting on their diagnoses (the remaining five claims did not have specific CDR scores). For example, when diagnosing Level 2 Neurocognitive Impairment, the Martinez Doctors always assigned CDR scores of 2 in Community Affairs, Home and Hobbies, and Personal Care. These "across-the-board" scores appear highly unlikely; it does not appear credible that every player with a claim on which the Martinez Doctors provided CDR scores had the identical scores in all three areas.

The Claims Administrator identified a player with a Qualifying Diagnosis from a Martinez Doctor who was previously evaluated by a neurologist who did not render a Qualifying Diagnosis to the player. On 3/31/14, a board-certified neurologist examined the player, assigned the player CDR scores of zero in all three areas, and did not render a Qualifying Diagnosis. Dr. Robert Martinez evaluated the player on 4/20/16 and assigned the player CDR scores of 2 in all three areas and diagnosed the player with Level 2 Neurocognitive Impairment. Members of the AAP and AAPC stated the diagnosis in this specific case is not supported by the information in Dr. Martinez's notes or third-party affidavits.

III. CONCLUSION AND REMEDIES.

Under Section 10.3(i) of the Settlement Agreement, the Special Masters' review and findings may include the following relief, without limitation: (a) denial of the claim in the event of fraud; (b) additional audits of claims from the same law firm or physician (if applicable), including those already paid; (c) referral of the attorney or physician (if applicable) to the appropriate disciplinary boards; (d) referral to federal authorities; (e) disqualification of the attorney, physician and/or Settlement Class Member from further participation in the Class Action Settlement; and/or (f) if a law firm is found by the Claims Administrator to have submitted more than one fraudulent submission on behalf of Settlement Class Members, claim submissions by that law firm will no longer be accepted, and attorneys' fees paid to the firm by the Settlement Class Member will be forfeited and paid to the Settlement Trust for transfer by the Trustee into the Monetary Award Fund.

Upon review of the Record of the Audit Proceeding, the Special Masters find that claims relying on the Martinez Doctors' diagnoses may involve a misrepresentation, omission, or concealment of a material fact and adopt the findings of the Claims Administrator. Accordingly, and pursuant to Section 10.3 of the Settlement Agreement and Audit Rule 31(i), the Special Masters order these remedies for the remaining 77 of the 84 claims based on a diagnosis by the Martinez Doctors (and any future claim resting on diagnosis by either of the doctors):

1. **Rescission of Prior Determinations[1]:** Any Award or Denial Notice issued for a Monetary Award claim based on a Qualifying Diagnosis by one of the Martinez Doctors is hereby rescinded.

2. **Individualized Assessment by the AAP:** The Monetary Award claims based on a Qualifying Diagnosis by one of the Martinez Doctors shall be directed to a single member of the AAP, with consultation from a single AAPC member, for individualized assessment of whether each individual claim qualifies for an Award under the medical criteria in the Settlement Agreement.

3. **Final Determination:** After this AAP review, the Claims Administrator will issue an Award or Denial Notice on each claim, which will be subject to appeal under Section 9.5 of the Settlement Agreement.

Some of these 77 Monetary Award claims are subject to another Audit investigation or an Audit Proceeding before us. These claims will not proceed under the remedy above unless and until the other Audit issues are resolved without denial of the claim.

As we noted earlier, seven of the 84 players with a Qualifying Diagnosis by one of the Martinez Doctors have withdrawn their claims. Under Audit Rule 13, a Retired NFL Football Player with a claim in Audit may at any time withdraw that claim. As is always the case, that player may be examined by a Qualified BAP Provider (if eligible for the BAP) or by a Qualified

[1] The Claims Administrator has issued three Denial Notices and one Payable Notice to players for Monetary Award claims based on a Qualifying Diagnosis by one of the Martinez Doctors. These four Notices will be rescinded.

MAF Physician and, if found to have a Qualifying Diagnosis, substitute a new Diagnosing Physician Certification, including a medically indicated date of diagnosis (that may precede the date of the new exam), to the Claims Administrator for review in the claims process.

Wendell E. Pritchett, Special Master

Date: 10/25/18

Jo-Ann M. Verrier, Special Master

Date: Oct. 25, 2018

FINDINGS AND REMEDIES OF THE SPECIAL MASTERS PURSUANT TO SECTION 10.3(i) REGARDING 48 MONETARY AWARD CLAIMS

I. INTRODUCTION.

Pursuant to Section 10.3 of the Settlement Agreement and Rule 7(b) of the Rules Governing Audit of Claims (the "Audit Rules"), the Claims Administrator audited 48 Monetary Award Claims supported by diagnoses from Dr. Ena Andrews. This Audit included the review of relevant records, interviews, and consultation with an Appeals Advisory Panel Member. The Claims Administrator concluded that Dr. Andrews misrepresented, omitted, or concealed material facts in connection with the 48 Monetary Award Claim Packages.

Accordingly, on February 23, 2018, the Claims Administrator referred these 48 Monetary Award Claims to the Special Masters for review and findings pursuant to Section 10.3(i) of the Settlement Agreement. The Claims Administrator also notified Settlement Class Members of the referral. One Settlement Class Member withdrew his claim following the Claims Administrator's referral to the Special Masters under Section 10.3 of the Settlement Agreement. The Special Masters reviewed the Record of the Audit Proceeding and issue these findings and remedies for the remaining claims.

II. REVIEW OF FACTS.

Dr. Andrews signed Diagnosing Physician Certification Forms for 48 Monetary Award Claim Packages that have been submitted to the Settlement Program. All 48 claims are from players who are, or were, represented by the law firm of Smith & Stallworth. Of these, 36 are Qualifying Diagnoses of Alzheimer's and the remaining 12 are Level 1.5 Neurocognitive Impairment diagnoses.

The Claims Administrator began auditing Dr. Andrews after several Appeals Advisory Panel ("AAP") Members raised concerns about the claims supported by her diagnoses. Specifically, the AAP Members: (1) questioned her experience in diagnosing diseases of aging, such as Alzheimer's, when she specializes as a pediatric neurologist; (2) noted incomplete histories taken; (3) found functional symptoms that did not match the diagnoses; and (4) said that she failed to exclude other contributing causes.

A. Claims Administrator's Review and Findings.

After reviewing all 48 Monetary Award Claim Packages, the Claims Administrator found that:

1. For 29 claims, the neuropsychologist testing was performed on the same day as the neurological exam and diagnosis.

2. For nine claims, the neuropsychologist report was dated after the diagnosis was rendered.

3. For ten claims, neuropsychological testing occurred approximately six months to one year before Dr. Andrews' exam.

4. In at least 12 instances, Dr. Andrews examined two players on the same day, and on one day she evaluated and diagnosed three: on 3/14/16, Dr. Andrews met and diagnosed three players at her office. These players also underwent neuropsychological testing at The Neuropsychiatric Institute on the same day.

The Claims Administrator found these facts concerning: could Dr. Andrews have received and fully evaluated the neuropsychological testing results when testing occurred on the same day as or subsequent to her evaluation and diagnosis dates? The Claims Administrator was also concerned that Dr. Andrews made statements in her affidavits in support of the claims that did not reflect that neuropsychological testing occurred approximately six months to one year before Dr. Andrews' exam. Specifically, Dr. Andrews noted in each affidavit that she had "requested neuropsychological testing which was conducted contemporaneously with my assessment..." and that "test scores [she] relied upon resulted as a consequence of [her] request...."

The Claims Administrator identified several instances of repetitive information in Dr. Andrews' reports. Specifically, the Claims Administrator identified six different groups of players where each player had identical vital signs as each of the other players in that group. The largest group consisted of ten players who reportedly had the same blood pressure, pulse rate, and respiration rate at the time of their evaluations with Dr. Andrews. During an interview with Dr. Andrews, the Claims Administrator questioned whether these repetitive vitals could have resulted from the use of a template and inadvertent transfer of information from one player to another. Dr. Andrews denied that such inadvertent transfer could have occurred and stated that every report was specific to each player.

The Claims Administrator also identified repetitive language across all of Dr. Andrews' reports. In one instance, the Claims Administrator noted that the reports for two players are nearly identical to each other, despite a 35-year age difference between the two players. The report for one player contains 76 sentences while the report for the second player contains 72 sentences. Fifty-four sentences (over 70% of each report) are identical between the reports while several additional sentences contain very similar language. The Impression sections of the reports, where Dr. Andrews lists her diagnoses for the players, are completely identical except for one word where Dr. Andrews diagnoses one player with "Headaches".

B. <u>AAP Member Review and Findings</u>.

The Claims Administrator asked an AAP Member to review all claims supported by evaluations from Dr. Andrews. The reviewing AAP Member did not find qualifying diagnoses in any of the claims submitted on the basis of Dr. Andrews' evaluations. The AAP Member pointed to several factors of concern as to Dr. Andrews' diagnoses:

1. In the AAP Member's opinion, the percentage of claims noting a finding of Alzheimer's Disease, with a mean age of 46.25, is exceptional and does not comport

with the research (the AAP Member referred to research by McKee and colleagues identifying Alzheimer's type pathology (neuritic plaques) in only 27% of 51 autopsy-confirmed Chronic Traumatic Encephalopathy cases with ages of death from 23-80 (Journal of Neuropathology & Experimental Neurology, 2009; 68:709–735)).

2. The AAP Member noted a lack of variability in the "Impression" section of notes made by Dr. Andrews across player files, and that these notes omitted potential non-Alzheimer's contributors to cognitive impairment even when these are documented elsewhere.

3. In three cases, Dr. Andrews noted mutually exclusive diagnoses of "Neurocognitive Disorder, level 1.5" and "Mild Neurocognitive Disorder due to Probable Alzheimer's Disease" since the Injury Definition for Level 1.5 disorder represents "early dementia" and "Mild Neurocognitive Disorder" which exclude dementia-level functional losses.

4. The AAP Member found that Dr. Andrews' notes do not address other conditions that might contribute to diagnoses and do not identify critical information about deficits.

C. Review of Medical Records from Other Providers.

The Claims Administrator issued Notices of Audit of Claim to every player for which Dr. Andrews provided a Qualifying Diagnosis. In the Notice, the Claims Administrator followed standard procedure as outlined in the Settlement Agreement and requested the players to provide the name and contact information for every health care provider they saw within the past five years and sign a HIPAA Authorization Form to allow the Claims Administrator to request records directly from the providers. The Claims Administrator issued these Notices in June through September 2017, at least six months after Dr. Andrews made her last Qualifying Diagnosis on December 29, 2016.

Eight players, despite receiving a diagnosis from Dr. Andrews (five of Alzheimer's Disease), responded to the Notices by stating that, within the last five years, they had either: (a) not seen any healthcare providers other than Dr. Andrews and the other providers associated with their claim in the Program; or (b) seen only non-relevant healthcare providers (e.g., a dentist or optometrist) in addition to Dr. Andrews and the other providers associated with their claim in the Program.

The Claims Administrator obtained and reviewed additional medical records from the last five years for 29 players. These showed:

1. **Medical Records After the Qualifying Diagnosis Do Not Mention Dr. Andrews' Diagnosis.** The Claims Administrator received medical records from 17 players' doctors for visits that occurred after the date when Dr. Andrews made her Qualifying Diagnosis, yet none of those records referenced her Qualifying Diagnosis, despite the fact that Dr. Andrews diagnosed 15 of these players with Alzheimer's Disease.

2. **The Only Medical Records are from Before the Qualifying Diagnosis, and Do Not Corroborate Dr. Andrews' Diagnosis.** The Claims Administrator received medical records from ten players' doctors for visits that occurred before Dr. Andrews' Qualifying Diagnosis. Six players did not seek medical attention for two or more years before the Qualifying Diagnosis and none of the ten had any records for treatment following Dr. Andrews' diagnoses.

   One player's medical records from a neuropsychologist showed that the player underwent neuropsychological testing on January 11, 2016 and January 18, 2016; his results were found normal in all tested domains. The doctor found signs of mild cognitive deficiencies and recommended that the player follow-up with his neurologist in three to five years. Two months later, on March 17, 2016, Dr. Andrews diagnosed the player with Level 1.5 Neurocognitive Impairment.

   Another player's records contain information from a psychological exam on January 21, 2015. The doctor diagnosed, among other things, Mild Neurocognitive Disorder, Unspecified. Approximately six months later, Dr. Andrews diagnosed the player with Alzheimer's Disease. After this player became *pro se*, he contacted the Claims Administrator with questions about the Audit. He told the Claims Administrator that he fired his lawyer because he had not seen any records from his visit to Dr. Andrews and stated that, despite a diagnosis of Alzheimer's Disease, he had not been told what his diagnosis was.

3. **Recent Records Mention Neurocognitive Impairment but do not Support Diagnoses.** Medical records obtained by the Claims Administrator for two players do mention neurocognitive issues. Medical records for the first player, from the NFL Player Benefits Office, report a neurological evaluation and diagnosis in March 2016 of mild cognitive impairment; Dr. Andrews diagnosed Level 1.5 Neurocognitive Impairment on March 8, 2016. One player submitted records from a family medicine practitioner noting that the player reported that "he had been told that he had early signs of Parkinson's and possibly early dementia due to concussions from playing football." These cases were sent to an AAP Member for review. The AAP Member concluded that neither of these records support Dr. Andrews' diagnoses, or any Qualifying Diagnosis, for the players.

III. CONCLUSION AND REMEDIES.

Under Section 10.3(i) of the Settlement Agreement, the Special Masters' review and findings may include the following relief, without limitation: (a) denial of the claim in the event of fraud; (b) additional audits of claims from the same law firm or physician (if applicable), including those already paid; (c) referral of the attorney or physician (if applicable) to the appropriate disciplinary boards; (d) referral to federal authorities; (e) disqualification of the attorney, physician and/or Settlement Class Member from further participation in the Class Action Settlement; and/or (f) if a law firm is found by the Claims Administrator to have

submitted more than one fraudulent submission on behalf of Settlement Class Members, claim submissions by that law firm will no longer be accepted, and attorneys' fees paid to the firm by the Settlement Class Member will be forfeited and paid to the Settlement Trust for transfer by the Trustee into the Monetary Award Fund.

Upon review, the Special Masters find that claims relying on Dr. Andrews' diagnoses may be based on misrepresentations, omissions, and/or concealment of material facts.

Accordingly, and pursuant to Section 10.3 of the Settlement Agreement, the Special Masters order these remedies:

A. **Disqualification of Dr. Andrews:** Dr. Andrews is disqualified from participation in the Program. Any Monetary Award Claim that relies on an evaluation performed by, or a diagnosis made by, Dr. Andrews is disallowed, and no claims may be submitted in reliance on her evaluations or opinions.

B. **Disposition of Monetary Award Claims Relying on Dr. Andrews' Evaluations:** The Claims Administrator will deny without prejudice any Monetary Award Claim that relies on evaluation, testing or opinions performed or rendered by Dr. Andrews. Those Settlement Class Members whose Monetary Award Claims rely on a diagnosis from Dr. Andrews may seek a new evaluation through the Baseline Assessment Program, if they are eligible to participate in the BAP, or from a Qualified MAF Physician. If the original Qualifying Diagnosis reached by Dr. Andrews is confirmed by the Qualified MAF Physician or the BAP Provider, the diagnosis date may be dated retroactively to match the date of the original Qualifying Diagnosis asserted in the Monetary Award Claim that relied on Dr. Andrews' evaluation.

Wendell E. Pritchett, Special Master

Date: 10/25/18

Jo-Ann M. Verrier, Special Master

Date: Oct 25, 2018