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: APPEAL OF SETTLEMENT CLASS MEMBER [redacted] REGARDING DENIAL OF MONETARY AWARD	:	

INTRODUCTION

[redacted], a Retired NFL Football Player and Class Member under the Amended Class Action Settlement Agreement, filed a Claim for benefits based upon a Diagnosis of Level 2 Neurocognitive Impairment from a Qualified MAF Physician. The Claims Administrator deemed it deficient, and (after Mr. [redacted] failed to cure the noted problems) the Claim was denied. Mr. [redacted] appeals that Denial.

This case is one of six I decide today in which claimants—represented by one law firm—seek to rely on a non-conforming neuropsychological test battery administered by Dr. [redacted] The Appeals Advisory Panel (AAP) separately reviewed each file. The general conclusions of the AAP review regarding Dr. [redacted] procedures, as well as the AAP's individualized conclusions about the tests' administration to Mr. [redacted] form the backbone of this opinion. At the same time, I consider counsel's additional procedural and substantive objections.

Because he has not established by clear and convincing evidence that the Claims Administrator's decision was wrong, Mr. [redacted] Appeal is denied.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. [redacted] filing a Claim on May 15, 2019, sought an award for a Diagnosis of Level 2 Neurocognitive Impairment. Doc. 207030.

On March 30, 2017, Mr. [redacted] underwent a neuropsychological examination by Dr. [redacted] Doc. 207028. Dr. [redacted] applied a test battery which was different from the Baseline Assessment Program (BAP). Dr. [redacted] concluded that Mr. [redacted] met the criteria for a Level 2 Neurocognitive Impairment.

On June 20, 2017, Mr. [REDACTED] underwent a neurological evaluation performed by Dr. [REDACTED], a licensed neurologist and MAF Physician. *Id.* On July 28, 2017, Dr. [REDACTED] reported on that evaluation. Drawing on the neuropsychological test results obtained by Dr. [REDACTED] Dr. [REDACTED] agreed that a Level 2 Diagnosis was appropriate. *Id.*

On October 24, 2019, the Claims Administrator issued a Notice of Request for Additional Documents. After listing a number of discrete missing records and missing substantiation, the Claims Administrator explained:

> Dr. [REDACTED] mentioned medical records concerning a brain tumor surgery and related neurological assessments in his report. The documents were not provided. We have contacted Dr. [REDACTED] to explain how the additional documents may affect his overall Qualifying Diagnosis.
> …
> Dr. [REDACTED] relied on neuropsychological testing performed by Dr. [REDACTED] on 3/30/2017 however; (1) the testing is missing t-scores, (2) the testing did not meet Exhibit 2 criteria for Level 2, (3) The provider did not administer the complete test qualified by Rule 20(a) of the Rules Governing Qualified MAF Physicians, (4) Exhibit A-2 of the Settlement Agreement requires at least seven performance validity metrics to be administered during baseline, and if relevant, subsequent neuropsychological examinations.
>
> Dr. [REDACTED] used the Clinical Dementia Rating (CDR) scale to evaluate the player's level of functional impairment and stated in his Medical records dated 6/30/2017 that the player demonstrated Moderate and Severe Impairment in the areas of Community Affairs, Home & Hobbies, and Personal Care. However, Dr. [REDACTED] does not indicate whether the claimant still drives but notes that his girlfriend drives to appointments because of falling asleep behind the wheel. Additionally, he notes apneic episodes, Suicidal thoughts, knee pain, and brain tumor surgery.

Doc. 216132 (internal citations omitted).

Mr. [REDACTED] response to this report included an additional affidavit from Dr. [REDACTED] as well as an argument that a previous decision by the Claims Administrator to accept Dr. [REDACTED] testing battery made any objections to his Claim "moot." Doc. 221179.

On March 9, 2020, the Claims Administrator denied Mr. [REDACTED] Claim. Doc. 221477. The Denial stated:

> You submitted a Claim Package for a MAF exam that resulted in a finding of Level 2 Neurocognitive Impairment; however, the results of your neuropsychological testing does not meet the requirements for this diagnosis as defined by Exhibit A-2 of the Settlement Agreement.

> You responded to the Notice of Request for Additional Documents on 2/28/2020 citing a decision made by the Special Master for SPID [redacted] The Special Master ruled in his 8/26/2018 decision that it does not have preclusive effect, which means that prior decision does not apply to Mr. [redacted] claim.

Id.

This Appeal followed. Doc. 223682. After briefing was complete, Mr. [redacted] counsel submitted a letter on his behalf (along with other parties). Alleging that the Claims Administrator had not fully explained itself in denying his claim, Mr. [redacted] counsel demanded "either that (1) Claimants' cases be remanded to the Claims Administrator for reconsideration and issuance of a factual determination or (2) Claimants be provided the opportunity to respond to the NFL's position on Claimant's appeals since it has been presented as the basis for denial of the claims." Doc. 225955.

To fully satisfy and thereby moot any procedural objection, I granted both parties the right to submit additional briefing, which Mr. [redacted] counsel did. In fact, Mr. [redacted] counsel then submitted yet another letter (on August 13, 2020) explaining that the Claims Administrator had recently accepted Dr. [redacted] testing regime in a different case, and arguing that Mr. [redacted] Claim should therefore be approved. Doc. 227379.

Discussion

The basic issue in this Appeal—along with others I decide today—concerns Dr. [redacted] idiosyncratic neuropsychological test battery.[1] As he was diagnosed through the MAF, Mr. [redacted] burden was not to replicate the BAP criteria but rather to offer evaluation and evidence "generally consistent" with them. As I have recently written:

> Generally consistent does not mean the same . . . And yet, it would be a perverse result if every player diagnosed outside of the BAP received an award based on results which would have rendered him ineligible within it: the exercise cannot be a mechanical one, where all ties go to the runner. If that were what the Parties had intended, the Agreement would not have said "generally consistent:" it would have explicitly directed that non-BAP diagnoses may meet a *lower*, not a *different*,

[1] Because the extra briefing was explicitly requested to satisfy any purported flaw in the Notice of Denial, I consider the objection to be mooted. Regardless, the procedural history of this file makes the Claim difficult to countenance. The Claims Administrator communicated extensively with Mr. [redacted] counsel, most clearly in issuing a fulsome and extremely clear Notice of Request for Additional Documents, as well as a denial notice that stated that the testing was not sufficient and referred to that unfulfilled request. After reviewing the relevant procedural history, I conclude, as a matter of fact, that Mr. [redacted] was on notice of the deficiencies in his Claim. Certainly his counsel, who prosecuted this Appeal with vigor, understood exactly what was amiss.

standard. What's called for instead is the exercise of reasoned, individualized, clinical judgment.[2]

Before considering that reasoned, individualized, clinical inquiry, some brush must be cleared. Mr. [redacted] counsel argues that two decisions by the Claims Administrator regarding Dr. [redacted] battery establish his right to relief.

In the first, a Claim from 2017, the Claims Administrator approved the same testing protocol without AAP review. The NFL Parties appealed, largely on the ground that the claimant had not established that he had moderate or severe impairment in two cognitive domains. The Special Master affirmed, writing "The Qualified MAF Physician rendered the diagnosis on this Claim in compliance with the applicable provisions of the Settlement Agreement, and the record on this appeal does not show that such diagnosis was clearly and convincingly wrong."[3] However, the Special Master chose not to give the decision precedential effect.

In the second Claim, the Claims Administrator again considered Dr [redacted] battery, approving it on August 10, 2020.[4] That Claim resulted from a Pre-Effective Date Diagnosis (as Dr. [redacted] the same neurologist as here, had not signed the MAF Physician agreement by the time the relevant exam was completed). An AAP member reviewed the Claim and recommended that it be granted a Monetary Award, largely because of concerns about functional decline. The Claim has now been appealed by the NFL Parties.

Neither previous decision determines this Appeal. Procedurally, the 2017 Claim offered the Special Master's non-binding view that adopting Dr. [redacted] battery for that player was not clearly wrong. The 2020 Claim, apart from being distinguishable, has not yet been evaluated on appeal. And substantively, to know if Mr. [redacted] Diagnosis is generally consistent with the BAP requirements, the Claims Administrator (and its expert advisors) must evaluate both the test battery as a whole and its application to Mr. [redacted] Such an inquiry is necessarily factually intensive and would not ordinarily be resolved by prior decisions about different claimants.

That said, counsel is correct that decisions about complex test batteries should generally be consistent and transparent. Therefore, I sought AAP Review, asking that the program's experts evaluate Dr. [redacted] test battery's general consistency with the BAP criteria as well as its application to this particular Claim. The AAP Reviewer provided the following detailed analysis:

> 1. Dr. [redacted] administered a consistent neurocognitive test battery to all players. However, it deviates considerably from the BAP battery. The tests he used are well-known, standardized procedures that cover the domains of intellect, attention and concentration, language, visual-spatial reasoning and organization, learning and memory, executive functioning, motor

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[2] Special Master Ruling On Clinical Judgment on Generally Consistent Standard, at 3 (May 27, 2020), https://www.nflconcussionsettlement.com/Docs/physician_judgment_sm.pdf.

[3] Post-Appeal Notice of Monetary Award Claim Determination of Settlement Class Member I.D. #[redacted]

[4] Notice of Monetary Award Claim Determination of Settlement Class Member I.D. #[redacted]

functioning, and psychopathology. The major question in these six cases is whether Dr. [redacted] evaluation is "generally consistent" with the BAP assessment in both *content and interpretive methods.*

a. Content
    i. Only 13 of the 22 BAP test variables are included. This makes it difficult to determine the magnitude of impairment in each of the five specified neurocognitive domains, which the Program requires.
        1. Reasonable substitutes can be found in Dr. [redacted] battery for WAIS-IV Cancellation, WMS-IV Verbal Paired Associates, WMS-IV Visual Reproductions, and the Booklet Category Test.
        2. No reasonable substitutes can be found in his battery for WAIS-IV Letter-Number Sequencing, Category (Animal) Fluency, or BDAE Complex Ideational Material.
            a. As a result, the Language domain contains a single test (Boston Naming Test). This is insufficient for finding an impairment in this cognitive domain.
    ii. The BAP instructs participating neuropsychologists to include seven performance validity tests (PVTs). In most cases, Dr. [redacted] employed only two (PVTs).
        1. Standard administration and scoring of the Rey 15-Item Test (as done by Dr. [redacted]) is well known to lack sufficient sensitivity and specificity for the detection of malingered or exaggerated impairment. There is an extensive published literature on this. The standard Rey 15-Item Test is not an appropriate test.
        2. The TOMM consists of two learning trials and a delayed recall trial. In every case except one ([redacted] Dr. [redacted] administered only one learning trial. This short-cut is acceptable (i.e., a few published studies attest to its utility), but it is not ideal.
        3. In two cases ([redacted] and [redacted] Reliable Digit Span was added. This is an acceptable PVT.

a. Interpretative Methods
    i. Using the same test score to "qualify" in multiple domains is inappropriate. It gives undue weight to arbitrarily-selected measures and violates the spirit of a broad-based assessment.
    ii. Although participating neuropsychologists are instructed to provide T-scores based on demographically-appropriate

normative samples, Dr. [REDACTED] provides only "educationally-adjusted" T-scores.[5]

1. Although uniform sets of norms are recommended by the Program (ACS and Heaton norms), Dr. [REDACTED] relied on several different normative samples for establishing standard scores.
2. For many variables, Dr. [REDACTED] omits T-scores altogether and reports only standard scores or percentile ranks (from which T-scores can be imputed).

iii. It appears that Dr. [REDACTED] assigned an impairment level to each domain impressionistically rather than systematically (i.e., using decision rules).

1. When using T-score cut-offs specific to players' presumed premorbid functioning, as directed in Exhibit 2 of the Settlement Agreement, no player met criteria for Level 2 Neurocognitive Impairment. (See details for each player below.)

2. A Slick Criteria Checklist (for malingered neurocognitive disorder) is required, but is not included in any of Dr. [REDACTED] reports.
3. There is no indication that a formal Clinical Dementia Rating (CDR) exam was performed by either Dr. [REDACTED] or Dr. [REDACTED]
   a. No CDR Worksheets appear among the medical records.
   b. Many of the examples given in support of CDR ratings appear to be functional changes due to psychiatric symptoms (e.g., decreased interest or motivation) or physical impairment (e.g., chronic pain) rather than dementia.

Doc. 228097.

More specifically to Mr. [REDACTED] file, the Consultant identified particularized deficiencies. The Consultant noted that the MMPI-2-RF indicated overreporting, discrepancies were not addressed using a *Slick* checklist, and Dr. [REDACTED] employed only two embedded performance validity metrics. The Consultant also noted a missing CDR worksheet, and confusion of functional changes due to psychiatric symptoms rather than dementia. Doc. 228841. The Consultant concluded:

> I find that the omissions, irregularities, and misinterpretations in Dr. [REDACTED] evaluations, taken together, undermine their utility in the MAF program. His test battery and interpretive methods cannot be considered "generally consistent" with

[5] The Special Masters have previously held that not applying the Settlement Agreement's recommended demographic adjustments may result in a remand when neuropsychologists do not explain the exercise of their discretion. But that disposition is mooted here given the multiple other independent grounds for denial. *See* Special Master Ruling on Demographic Norm Adjustments (Aug. 20, 2020), https://www.nflconcussionsettlement.com/Docs/demographic_norms_sm.pdf.

> those of the Baseline Assessment Program. Therefore, these neuropsychological exams cannot be used to support diagnoses of dementia (either Level 2 or Level 1 Neurocognitive Impairment)."

Doc. 228097.

That is, the AAP determined that Dr. [REDACTED] battery as applied to Mr. [REDACTED] medical exam was not generally consistent with the BAP criteria. Though it is true that some test variables overlap (Mr. [REDACTED] counsel argued sixty percent, so that "common elements clearly predominate over uncommon elements") the AAP's analysis is more individuated and focuses on the goals of the tests and their relationship to establishing a reliable and meaningful exam. As the AAP concluded, "no reasonable substitutes" exist in Dr. [REDACTED] battery for important parts of the Settlement's evaluative exams, his methods did not provide internal indicia of validity in the way that the Settlement requires, and he paid no attention to qualitative evidence of validity through the *Slick* criteria. A final report reached the same conclusion. Doc. 228248.

Relying on the well-articulated opinions of the Settlement's expert panel, I conclude that the Claims Administrator was not clearly wrong to determine that Mr. [REDACTED] Claim did not offer evidence generally consistent with a Qualifying Diagnosis.

CONCLUSION

Mr. [REDACTED] has failed to satisfy his burden to show that the Claims Administrator's decision was clearly erroneous. His Appeal is therefore denied.

Date: October 28, 2020

David A. Hoffman, Special Master