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 THE NFL PARTIES REGARDING SETTLEMENT CLASS MEMBER [redacted] 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. After the Claims Administrator determined that he was eligible for an award, the NFL Parties appealed. As with six recently decided cases arising from the test battery administered by Dr. [redacted], I asked the Appeals Advisory Panel to review Mr. [redacted] file.

After a fine-grained analysis of Mr. [redacted] medical records, the AAP recommended granting the NFL Parties' Appeal because Mr. [redacted] evaluation was not generally consistent with the Settlement Agreement. On review, I agree that this is a rare case where there is clear and convincing evidence of error in the Claims Administrator's determination.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. [redacted] filing a Claim on October 24, 2018, sought an award for a Diagnosis of Level 2 Neurocognitive Impairment. Doc. 188864. His underlying tests well-preceded that date: a neuropsychological exam on February 24, 2017 by Dr. [redacted], and a June 13, 2017, neurological exam by Dr. [redacted], a Qualified MAF Physician. Doc. 188879. Dr. [redacted] applying a test battery which was different from the Baseline Assessment Program, nevertheless concluded that Mr. [redacted] met the criteria for a Level 2 Neurocognitive Impairment. Dr. [redacted] concurred.

On October 29, 2018, the Claims Administrator issued a Notice of Preliminary Review. Doc. 189313. Mr. [redacted] responded. The Claim then went into a brief audit, emerging in January 2019 without adverse finding. Doc. 196946. An AAP Reviewer, based on input from an AAP

Consultant, then recommended denial pending additional substantiation, which was duly noticed in December of that year. Docs. 215917, 219067.

After Mr. [redacted] responded to the Claims Administrator's second request for substantiation, his Claim was granted on August 10, 2020. Doc. 227218. The NFL Parties timely appealed on October 9, 2020. Doc. 229071. On October 28, 2020, in a published opinion evaluating Dr. [redacted] test battery, I denied six Claims.[1] About Mr. [redacted] pending Appeal, I wrote:

> That Claim result[s] from a Pre-Effective Date Diagnosis (as Dr. [redacted] . . . 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. . . . The 2020 Claim, apart from being distinguishable, has not yet been evaluated on appeal. And substantively, to know if [a Claimant's] 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 [the Claimant]. Such an inquiry is necessarily factually intensive and would not ordinarily be resolved by prior decisions about different claimants.

Those six claimants—sharing a counsel with Mr. [redacted]—filed an objection with the District Court. On January 15, 2021, the District Court denied the objection. Judge Brody emphasized that "[a]ll Qualifying Diagnoses made outside of the BAP—whether post-Effective Date diagnoses by Qualified MAF Physicians or pre-Effective Date diagnoses made by other medical providers—must be based on evaluation and evidence generally consistent with the BAP diagnostic criteria that are defined in Exhibit 2 of the Settlement Agreement." (Internal citations omitted). And she stated that "prior decisions about the test battery as applied to other claimants do not control this determination," but rather the appropriate inquiry was whether the test battery was "generally consistent" with the Settlement Agreement in light of "individualized findings," which in that case followed expert review by the AAP.

As with these related six cases, I asked the AAP for its input. Filing a supplemental report, the AAP Consultant who had originally analyzed the file now recommended that the Claim be denied and the Appeal granted. After meticulously examining both the battery and its use in Mr. [redacted] case, the Consultant concluded:

> In summary, the omissions, irregularities, and misinterpretations in Dr. [redacted] and [redacted] joint report undermines its usefulness in this Program. Dr. [redacted] neuropsychological assessment battery and interpretive methods cannot be considered "generally consistent" with those of the Baseline Assessment Program. Therefore, his evaluation cannot support a diagnosis of dementia (either Level 1.5 or 2 Neurocognitive Impairment) in this 35 year-old man.

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[1] Special Master Ruling on Deviation from BAP Criteria (Oct. 28, 2020), https://www.nflconcussionsettlement.com–/Docs/deviation_bap_criteria_sm.pdf.

Doc. 231356. The AAP agreed with this analysis, summarizing the problems with the second criterion:

> Regarding criterion (ii): Dr. [redacted] reports no level of impairment in Visual/Perceptual functioning, level 1.0 impairment in Attention/Concentration, and level 2.0 impairment in Language, Learning/Memory, and Executive Function.
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> The initial AAPC review indicated issues with the Neuropsychological Testing, including using more tests than specified in the BAP Protocol for each domain and not using correct normative data. The problems identified were both reasonable concerns, however, the only specific example provided indicated that use of correct normative data would have changed the T-score for the COWAT from 14 to 34, both of which were under the cut off of below a Tscore of 35 which is needed for level 2.0 impairment in the Language domain for an average pre-morbid IQ.
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> An addendum to the AAPC report indicates additional problems with the neuropsychological testing, including that the composition of the battery and Dr. [redacted] interpretive methods deviate considerably from the BAP battery. Regarding the contents of the battery, there are only 13 of the 22 test variables included, which makes it difficult to determine the magnitude of impairment in each of the five specified neurocognitive domains.
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> In particular, there are no reasonable substitutes in Dr. [redacted] battery for the WAIS-IV Letter-Number Sequencing, Category (Animal) Fluency, or the BDAE Complex Ideational Material tests, leaving only a single BAP-recommended test in the Language domain. There is also no estimation of the Player's pre-morbid intellect provided (only the current overall intelligence is reported), which is essential in evaluating pathological cognitive decline.
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> Additionally, Dr. [redacted] only employed two of the seven performance validity tests and the Rey 15-Item test is not an acceptable substitute. Also, Dr. [redacted] did not include a Slick Checklist when assessing the validity. Regarding the interpretive methods, Dr. [redacted] uses the same test scores to qualify for impairment in multiple domains which is inappropriate, does not provide T-scores, did not use a uniform set of norms, and assigned an impairment level to each domain impressionistically rather than systematically. When using T-score cut-offs for persons of presumed average premorbid intellect, the Player would only meet criteria for Level 2 Neurocognitive Impairment in a single cognitive domain which is Learning/Memory. Therefore criterion (ii) is not fulfilled.

Doc. 231833 (paragraph breaks added). The AAP did, however, conclude that criterion (iii) was satisfied, notwithstanding "multiple inconsistencies" in the case file.

DISCUSSION

As he was diagnosed by a Qualified MAF Physician, Mr. ███████ burden was not to replicate the Settlement criteria for a Level 2 Qualifying Diagnosis—including neuropsychological testing in accordance with the BAP test battery—but rather to offer evaluation and evidence "generally consistent" with them.

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

I follow the District Court's recent order in considering Mr. ███████ Claim on its own, applying an individualized, factual, inquiry to the question of whether he has offered evidence generally consistent with the Settlement's requirements.[3] The AAP and AAPC have both concluded that he has not, as Dr. ███████ battery, as applied to Mr. ███████ exam, was not generally consistent with the BAP criteria. As the AAP concluded, "no reasonable substitutes" exist in Dr. ███████ 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. Doc. 231833.

Mr. ███████ counsel defends the Claims Administrator's original decision. Counsel points out that a number of tests used by Dr. ███████ are in common with the BAP, argues that the validity analyses performed are reasonable substitutes, and states repeatedly that the tests need not be identical. The Settlement Program has, many times, accepted test batteries that differ from the BAP's in various particulars.[4] But here, however, for the reasons the AAP and AAPC provided, Dr. ███████ battery, as it was used to evaluate Mr. ███████ claim of impairment, was not generally consistent with the BAP.

I adopt the AAP and AAPC's individualized, factually-intensive, analysis. Consequently, I conclude that the Claims Administrator erroneously approved Mr. ███████ Claim, since it did

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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] As the District Court ruled, whether Mr. ███████ diagnosis was pre- or post- Effective Date is irrelevant to the application of the generally consistent standard. Contrary to Mr. ███████ brief, I did not hold to the contrary. Rather, I pointed out two facts that might distinguish the Claim, and noted that it had "not yet been evaluated on appeal."

[4] *See, e.g.*, SPID ███████ (MAF claim involving testing by Dr. ███████ SPID ███████ (Pre-ED claim found generally consistent with Level 1.5); SPID ███████ (Pre-ED claim found generally consistent with Level 1.5).

not provide evidence generally consistent with the testing criteria articulated in the Settlement Agreement.

CONCLUSION

The NFL Parties have offered clear and convincing error in the Claims Administrator's decision to award Mr. ██████ Claim. That decision is, therefore, reversed.

Date: January 23, 2021

David A. Hoffman, Special Master