

**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:
APPEALS OF SETTLEMENT CLASS
MEMBER [REDACTED]
REGARDING DENIAL OF MONETARY
AWARD

INTRODUCTION

[REDACTED], a Retired NFL Player and Class Member under the Amended Class Action Settlement Agreement, filed a Claim for benefits based on a Qualifying Diagnosis of Level 2 Neurocognitive Impairment. The Claims Administrator rejected the Claim. Since Mr. [REDACTED] has not presented clear and convincing evidence that the Claims Administrator was wrong, the Appeal is denied.¹

PROCEDURAL HISTORY

In February 2018, [REDACTED] submitted a Claim for Level 2 Neurocognitive Impairment. Doc. 155625. Dr. [REDACTED] provided Mr. [REDACTED] with a neuropsychological assessment on December 14, 2017, and then-MAF neurologist Dr. [REDACTED] certified the Diagnosis on December 29, 2017. *Id.*; Doc. 155558; Doc. 150367. On March 29, 2018, the Claims Administrator determined that Mr. [REDACTED] was entitled to a Monetary Award consistent with his Diagnosis. Doc. 164565.

The NFL Parties timely appealed, arguing that Mr. [REDACTED] regular driving, as well as his work as the CEO of an athletic training company, [REDACTED], were not consistent with the Settlement's CDR requirements. Doc. 169394. The NFL Parties also submitted over a dozen pieces of evidence drawn from social media and the internet showcasing Mr. [REDACTED] engagement in a wide array of Community Affairs-related activity. Docs. 169396–169411. The Special Master

¹ See *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.'").

denied the Appeal, holding that the NFL Parties did not offer clear and convincing evidence of the Claim Administrator's error. Doc. 181334.

On June 28 and July 11, 2018, the NFL Parties, writing to the Special Masters, asserted that the appeals process violated the Settlement Agreement when evaluating certain Claims—including Mr. [REDACTED]—without consulting the Appeals Advisory Council and its Consultants. The NFL Parties also requested a stay of payment and re-review of each of these Claims. On September 28, 2018, Special Master Pritchett held that “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.” Doc. 189695.

The NFL Parties appealed the Special Master's ruling with respect to seventeen Claims—again including Mr. [REDACTED] Doc. 189659. On November 14, 2018, the District Court stayed payment,² but on April 12, 2019, denied the NFL Parties' Appeal of Special Master Pritchett's decision. However, Judge Brody remanded Mr. [REDACTED] Claim, and thirteen others, determining that these diagnoses “would benefit from application of the revised Rules Governing Qualified MAF Physicians.”³

The AAP then reviewed Mr. [REDACTED] Claim. On May 22, 2019, a Consultant explained that Mr. [REDACTED] records did not support his Claim for Neurocognitive Impairment:

1. The patient's functioning was at a much higher level than is typical in moderate, or even mild but definite, dementia.
 - a. In 2012, the player travelled, apparently alone, by airplane and rental car from West Palm Beach to Tampa for his evaluation by Dr. [REDACTED]
 - b. In 2013, the player flew unaccompanied to Chicago, arranged overnight accommodations, took a taxi to Dr. [REDACTED] office, found a restaurant for breakfast, and arrived on time, appropriately attired, and well-groomed for his assessment.
 - c. In 2015, the player started his own company, of which he remains the CEO. This is at least 5 years after the onset of his alleged cognitive decline.
 - d. In 2017, the player was continuing to drive, without getting lost (per Drs. [REDACTED]).
 - e. In 2017, approximately 7 years into his alleged dementia, the patient travelled unaccompanied from his home in [REDACTED] to Houston for his examinations by Drs. [REDACTED].
2. There is ample evidence that the player was exerting less than full effort to performing well on cognitive testing, or was intentionally performing less well than he could.

² Court Decision Regarding Stay on Payment for 17 Claims Stay on Payment (Nov. 16, 2018), https://www.nflconcussionsettlement.com/Docs/stay_17_claims_aapaapc.pdf.

³ Court Decision Regarding AAP/AAPC Consultation by Special Master (Apr. 12, 2019), https://www.nflconcussionsettlement.com/Docs/order_AAP_AAPC_consultation.pdf.

- a. He failed the TOMM, MSVT, CVLT-II Recognition Trial, WMS-IV Logical Memory Recognition Trial and WMS-IV Visual Reproduction Recognition Trial on Dr. [REDACTED] exam. Many of these performances were at chance level.
 - b. Dr. [REDACTED] does not provide scores on performance validity tests, but does note that the player performed suboptimally on the MSVT.
 - c. Every examiner noted that the patient's expressive and receptive language was normal during their interviews. His having severe (Level 2) language impairment on testing is not believable.
3. The player appears to have a severe major depressive disorder and a history of prescribed opioid abuse. In addition, he appears to be amplifying his symptoms.
 - a. Requiring 20 minutes to complete the first 32 items of the MMPI-2-RF on Dr. [REDACTED] exam is noncredible for someone who could read items on other symptom scales without difficulty.
 - b. Dr. [REDACTED] noted "embellishment" in 2013.
 - c. Dr. [REDACTED] does not report T-scores for the MMPI-2-RF. This is problematic, as the validity scales as well as the clinical scales need to be evaluated. However, he does report "the possibility of over-reporting of somatic symptoms."

In summary, the reports of [this] retired player[s] . . . neurological and neuropsychological examinations cannot support a diagnosis of a major neurocognitive disorder (either moderate or mild dementia syndrome). Based on the materials reviewed, the player does not currently meet the NFL Concussion Settlement Program's criteria for Level 2 or 1.5 Neurocognitive Impairment.

Doc. 207267 (cleaned up).

The Claims Administrator subsequently denied the Claim on June 21, 2019. Doc. 209697. On July 27, 2019, Mr. [REDACTED] appealed. Doc. 211846. On August 13, 2019, the Special Master remanded for re-review in light of additional evidence. Doc. 212695.

On this second review of the Claim, the Consultant re-considered Mr. [REDACTED] third-party affidavit and Dr. [REDACTED] response to the prior AAP report. Doc. 217338. Ultimately, the Consultant reaffirmed the prior analysis, adding:

For reasons I have already articulated, both in my original report and in this addendum, [these] arguments are entirely unconvincing. Persons with moderately severe dementia (Level 2 Neurocognitive Impairment) are often found in assisted living facilities or are otherwise closely supervised. They are not running companies, traveling around the country to public appearances (even if someone makes the arrangements for them), driving without incident, etc.

Id.

As a result of this second review, on January 23, 2020, the Claims Administrator again denied the Claim, explaining:

The Player was able to travel alone for the evaluations (including fly between states and cities, take a taxi, and find and go to a restaurant for breakfast), continues to drive, and serves as CEO for a company (who would be ultimately responsible for the success or failure of the company), which requires that he speak at events and interact with the public on behalf of the company. Consequently, it is clear there is at least the pretense of independent functioning, even if the day-to-day responsibilities and management of the company and travel arrangements are done by others to assist him. These activities would indicate a higher level of functioning than would be generally consistent with the Settlement criteria for Level 2 Neurocognitive Impairment.

Additionally, the new evidence does not resolve the issues with the neuropsychological assessment, including: (1) indications of less than full effort, such as failure of the MSVT on Dr. [REDACTED] exam; (2) inconsistencies between the impaired performance on Language tests compared to the examiner's reports of the Player's expressive and receptive language abilities exhibited during the testing; and (3) indication of possible suboptimal performance and over-reporting on the MMPI-2-RF. Consequently, the diagnosis made by Dr. [REDACTED] is not generally consistent with the Settlement criteria for the Qualifying Diagnoses of either Level 2 or Level 1.5 Neurocognitive Impairment.

Doc. 219968.

It is the 2020 Denial that generates this Appeal, which Mr. [REDACTED] filed on June 30, 2020. Doc. 226458. His briefing explained that "since the last time he was tested, Mr. [REDACTED] can no longer drive alone" and that "Mr. [REDACTED] . . . does virtually none of the work required to operate [his company] and fulfill its goals . . . The only role Mr. [REDACTED] plays in the organization . . . is physically showing up to events on an occasional basis, which must be scheduled . . ." Doc. 226108, at 5–6.

The Claims Administrator, as a part of its normal processes of fraud detection, examined Mr. [REDACTED] social media presence. On July 16, 2020, it uploaded ten videos depicting Mr. [REDACTED] training youth football players and driving. Docs. 226599–226608. In light of the discrepancy between Mr. [REDACTED] activity in these videos and descriptions of his activity included in the briefing, I extended his counsel the opportunity to file a revised, corrected Appeal Statement. *See* Doc. 231164. At my request, the Claims Administrator also asked Mr. [REDACTED] counsel to address the steps taken to verify all factual statements made on his behalf. *Id.*

On October 28, 2020, Mr. [REDACTED] counsel offered additional briefing further explaining his impairment, in addition to another supportive third-party affidavit from a Mr. [REDACTED] Doc. 229945; Doc. 229946, Ex. F. Contrary to the previous briefing, but without explaining the

discrepancy, counsel now explained that “since the last time he was tested, Mr. [REDACTED] *does* drive alone, or with his son or dogs.” Doc. 229945. The brief continued that Mr. [REDACTED] athletic training company will not permit him to drive athletes, and that a personal assistant “drives him virtually everywhere presently.” *Id.*, at 11. Mr. [REDACTED] also clarified that, while he is the figurehead for the company, his cognitive impairment heavily restricts him from performing any of the training himself.

The Claims Administrator observed further inconsistencies between the revised appellate briefing and Mr. [REDACTED] continued social media postings. It sent Mr. [REDACTED] counsel the following questions on November 10, 2020:

1. As we previously communicated to you, Mr. [REDACTED] Facebook page contains numerous and frequent videos showing Mr. [REDACTED] driving [REDACTED]. For example, see videos posted on 10/10/2020, 10/16/2020, 10/21/2020 and 10/25/2020. In many of these videos, Mr. [REDACTED] does not appear to exhibit frustration or disorientation, instead appearing relaxed and often in good spirits. Please explain how Mr. [REDACTED] statements that when Mr. [REDACTED] has attempted to drive, he becomes lost, frustrated and disoriented, is consistent with the videos.
2. Mr. [REDACTED] Facebook page contains numerous recent videos that appear to show him driving alone or driving/riding with a woman who he refers to as “Mamaaa” or “Momma [REDACTED]”. Please explain how these videos and this activity is consistent with Mr. [REDACTED] statement that [REDACTED] “drives him virtually everywhere presently.”
3. In several of the recent videos on Mr. [REDACTED] Facebook page, including those from 10/28/2020, Mr. [REDACTED] is a passenger with another person driving. In those videos, Mr. [REDACTED] provides the driver with driving directions and instruction, and corrects her on mistakes. Please explain how these videos are consistent with Mr. [REDACTED] statements that Mr. [REDACTED] is unable to navigate his car safely or effectively and that he becomes lost, frustrated and disoriented.
4. Mr. [REDACTED] Facebook page contains several videos that show him driving with multiple children in the car (for example, see the videos posted on 10/10/2020). Several of these children are wearing [REDACTED] shirts and they appear to be a part of the [REDACTED]. Please explain how these videos are consistent with Mr. [REDACTED] statement that Mr. [REDACTED] is unable to travel with the children in his camp due to his difficulties driving and your statement that Mr. [REDACTED] is not permitted to drive the athletes.
5. The videos on Mr. [REDACTED] Facebook page that show him driving, giving directions, and traveling with children from [REDACTED] are easily accessible and viewable. What steps did you take to verify the contents of Mr. [REDACTED] affidavit and the statements made by you in your revised Appeal Statement?

Doc. 230611.

In its December 2, 2020 response, Mr. ██████ counsel reexplained the history of the Claim, and also provided further information about his third-party affiants: ██████, the general manager of the athletic training company, as well as ██████, “an extremely well regarded community business leader,” and a mentor to Mr. ██████ who had invested in ██████. Doc. 230730. Mr. ██████ representatives added that he had been driving with an expired license, and his decision to operate a vehicle against medical advice was in large part due to his commitment to young people involved in his athletic training program.

In response, the Claims Administrator memorialized its conclusions:

[T]he firm did not directly address all of our questions, but rather offered additional explanation about Mr. ██████ decline in functional ability, and discussed Mr. ██████ background and role in the community. The letter also explained that Mr. ██████ does continue to drive against the advice of others, that he has not held a driver’s license since March 2020, and that this behavior further supports his Qualifying Diagnosis. The firm did not offer to retract or correct Mr. ██████ affidavit or their revised Appeal Statement.

The publicly available videos posted by Mr. ██████ to his Facebook page show that he frequently drives unaccompanied, has driven several ██████ youth athletes and other children, and that when riding as a passenger, has provided the driver with directions and instructions. On 12/10/2020, we uploaded 15 videos to Mr. ██████ portal that exemplify these activities. We acknowledge that these videos are examples of Mr. ██████ driving activities and due to the voluminous nature of similar videos posted by Mr. ██████ we are unable to upload all the available evidence to the portal.

Doc. 231164. The Claims Administrator also included a brief analysis of each of these fifteen videos that show Mr. ██████ driving, noting that in four of them, he drove ██████ youth athletes, and in five others, he drove other passengers. *Id.* Three of the videos also documented Mr. ██████ as a passenger providing the driver with cogent directions. *Id.* These videos also included evidence of Mr. ██████ driving while talking on the phone and through a snowstorm. *Id.*

DISCUSSION

The Claims Administrator offered two independent grounds to deny Mr. ██████ Claim: concerns about his retained function, and doubts about the validity of his testing. I conclude that Mr. ██████ has not offered clear and convincing evidence of error on either basis. In light of Mr. ██████ counsel’s representations and allegations, I address only the former at length here.⁴

⁴ Mr. ██████ has not offered clear and convincing evidence that the AAP Consultant was wrong to recommend denial of the Claim based on concerns about the validity of his scoring. As the AAP noted, Dr. ██████ did not provide scores for performance validity tests, and Mr. ██████ performed suboptimally on the MSVT and MMPI-2-RF, as well. Moreover, Mr. ██████ record does not include any evidence of diminished expressive and receptive language

To receive a Qualifying Diagnosis of Level 2 Neurocognitive Impairment, the Settlement Agreement requires evidence of functional impairment generally consistent with a CDR 2 rating in Community Affairs, meaning that a Class Member has “[n]o pretense of independent function outside [the] home.” Nothing in the Agreement categorically states that a Level 2 Diagnosis is incompatible with continuing to drive.⁵ But the fact and extent of this retained functional ability is one of several factors that together help clinicians, including the AAP Members and Consultants, evaluate a Claim. The question is whether Mr. [REDACTED] has offered clear and convincing evidence that the Claims Administrator was wrong to deny the Claim based in part on evidence of the nature of his driving.

The record contains numerous, conflicting references to Mr. [REDACTED] ability to drive himself and others. His original December 2017 neuropsychological assessment, for example, notes that he “denied any difficulty with driving other than the risk of developing a headache while driving on sunny days.” Doc. 155558. And his Appeal of the June 2019 Denial of his Claim states that his “ability to drive is the only activity alleged by the AAP that can truly be considered independent functioning outside the home.” Doc 211846. But his original Appeal of the January 2020 Denial of his Claim asserted that “since the last time he was tested, Mr. [REDACTED] can no longer drive alone,” suggesting that Mr. [REDACTED] worsening conditions may have changed his driving habits. Doc. 226108.⁶

After the Claims Administrator discovered videos of Mr. [REDACTED] driving alone and asked his counsel to provide further clarity, his counsel attempted to further contextualize the extent and scope of his driving:

When viewed within the full context of the CDR criteria and medical evidence supporting his claim, Mr. [REDACTED] ability to drive is the only activity alleged by the AAP that can truly be considered independent functioning outside the home. Notably, since the last time he was tested, Mr. [REDACTED] does drive alone, or with his son or dogs. However, [REDACTED] will not permit him to drive the athletes. His family

during his examination, which is inconsistent with his purported Language impairment. On these factual grounds, the Claim was properly denied for lack of valid scoring.

⁵ The Parties have jointly advised the Special Masters and the Claims Administrator that no bright-line rule should be adopted with respect to Retired Players’ driving. But they have further noted that “that persons with Level 2 diagnoses require close supervision, are often in assisted living and would rarely work (even in supported fashion), drive, or attend medical appointments alone, as set forth in the Neurocognitive Impairment Reference Table drafted by the Claims Administrator in coordination with the AAP Leadership Council for circulation to MAF Physicians.” NFL Concussion Settlement Program Open Issues (As of 2/27/2020) (cleaned up).

⁶ I have previously opined that post-diagnosis evidence that depicts limited episodes of Community Affairs activity is of limited probative value, especially when it fails to show a pattern and arrives late in the life of a Claim. *See* Special Master Ruling on Post-Diagnosis Evidence (June 28, 2020), https://www.nflconcussionsettlement.com/Docs/post_diagnosis_evidence_sm.pdf. Here, however, the later-arriving evidence that the Claims Administrator submitted is both consistent with the notes of his clinician *and* shows a distinct, recurrent pattern of daily activity that the AAP confirms is grossly inconsistent with a Diagnosis of Level 2 Neurocognitive Impairment.

and friends have tried to stop him from driving and a friend has taken over the role of driving when possible.

Doc. 229945, at 9 (cleaned up). The brief also states that Mr. ██████ had hired a new personal assistant “who drives him virtually everywhere presently.” *Id.*, at 11. And Mr. ██████ submitted an additional third-party affidavit from a mentor and business associate, ██████, who explained that “Mr. ██████ appears unable to navigate his car safely or effectively enough to take the kids in his camp to other training camps, so they go by bus. He becomes lost and frustrated if he tries to drive.” Doc. 229947, at 8.

In response, the Claims Administrator again noted a number of discrepancies—reinforced by Mr. ██████ continued practice of posting videos of himself driving to social media. Mr. ██████ counsel, responding in a December 2020 letter, explained that his associates had “begun to drive [him] from place to place,” that he “does continue to drive against advice of friends,” and that “[t]his is unquestionably reckless improper behavior consistent with his Clinical Dementia Rating of 2.” Doc. 230730, at 5–6. According to counsel’s latest letter, making the poor choice to continue to drive indicates deficits in Mr. ██████ function under the “Judgment & Problem Solving” CDR category (which is not one of those scored under the Settlement Agreement). Counsel also argues that “[n]othing in the NFL FAQs requires that a class member cannot drive in his neighborhood.” *Id.*, at 7.

Yet, the fifteen videos that the Claims Administrator uploaded—recorded between September 13, 2020 and October 28, 2020—demonstrate that Mr. ██████ drove himself, his family members, and various nonfamilial passengers—including ██████ youth athletes he alleged he was prohibited from driving. The videos depict Mr. ██████ providing cogent driving directions as a passenger in a vehicle, as well as talking on the phone while driving. They include shots of Mr. ██████ driving on the highway, contrasting with his counsel’s assertions that he merely drives around his neighborhood and that he cannot solve problems. Doc. 231105. They also undermine Mr. ██████ account of Mr. ██████ functioning. These videos are a mere sample of a much larger set the Claims Administrator observed, and Mr. ██████ has not shown that they are unrepresentative.

It was the AAP Consultant’s independent view that Mr. ██████ retained ability to transport himself, his loved ones, and those he mentors on a daily basis is inconsistent with a Score of 2 in Community Affairs for the purposes of the Settlement’s Clinical Dementia Rating. Mr. ██████ ultimately disagrees with the weight that the AAP Consultant gave to this factor. But that disagreement about weighting, argued at length, is not clear and convincing evidence the AAP’s judgment (which the Claims Administrator adopted) was wrong. I adopt the Claims Administrator’s factual conclusions about the scope of Mr. ██████ daily functioning and its consequences for his CDR scoring.

Mr. ██████ role in his business also undercut a score of 2 in Community Affairs and Home and Hobbies. As the Appeals Advisory Consultant explained in reviewing Mr. ██████ Claim for a second time, “[p]ersons with moderately severe dementia (Level 2 Neurocognitive Impairment)

are often found in assisted living facilities or are otherwise closely supervised. They are not running companies, traveling around the country to public appearances (even if someone makes the arrangements for them), driving without incident, etc.” Doc. 217338. As the AAP Consultant wrote: “[t]he player was the CEO of the company . . . He has to speak at events and interact with the public, and is ultimately responsible for the success of the enterprise.” Doc. 217338. Mr. [REDACTED] did not present clear and convincing evidence to support the assertion that he is only the figurehead of his company, and it is impossible to reconcile this assertion with videos showing him providing guidance on and off the field to young athletes. Thus, on this ground as well, Mr. [REDACTED] has not presented clear and convincing evidence of error in the Claims Administrator’s Denial.

CONCLUSION

Mr. [REDACTED] counsel, arguing that the Claims Administrator’s handling of the Claim “reeks of subjective improper influence,” charges that the “NFL Parties and the Claims Administrator adopt unexplained innocent photographs and videos posted on social media to support arguments that Mr. [REDACTED] must be more functional than the neuropsychologist or the examining MAF physician found in 2017 . . .” Doc. 229945, at 6–7 (cleaned up). I conclude by addressing that argument.

The Claims Administrator plainly has the responsibility “to detect and prevent fraudulent submissions to, and payments of fraudulent claims from, the Monetary Award Fund.”⁷ It advanced that interest here without recourse to intrusive methods of surveillance, but rather merely by observing videos that Mr. [REDACTED] himself posted this Fall. Mr. [REDACTED] through his counsel, was repeatedly offered opportunities to correct the record and to provide clear and convincing evidence that the Claims Administrator’s determination regarding his daily cognitive functioning was incorrect. This he failed to do. The fact of the matter is that, while his Claim was still being assessed and processed, Mr. [REDACTED] time and time again uploaded to social media evidence of activity that both contradicted factual statements made in his legal briefing and those made in supporting evidentiary submissions, as well as the requirements for his submitted Diagnosis.

As I have explained, the “Settlement Agreement’s appeals process is not intended to be an inquisitorial one,” but rather a system that ultimately relies on the good faith and judgment of professionals—doctors, claims administrators, *and lawyers*.⁸ Mr. [REDACTED] counsel, by making statements in briefs that the public record refuted, and by failing to respond adequately to the Claims Administrator’s inquiries in response to those discrepancies, made adjudication of this claim unnecessarily complex. Counsel must take reasonable steps to verify the accuracy of Claims made in their filings, especially when relying on Claimants whose memory may be fading.⁹ Mr.

⁷ Settlement Agreement, Section 10.3(b).

⁸ Special Master Ruling on Pre-Diagnosis Evidence, at 6 (July 2, 2020), https://www.nflconcussionsettlement.com/-Docs/pre_diagnosis_evidence_sm.pdf.

⁹ Cf. Notice Regarding Special Investigations (July 1, 2020), https://www.nflconcussionsettlement.com/Docs/notice_special_investigations.pdf (“The Special Masters are committed to the principle that all former Players and/or Representative Claimants who are entitled to compensation under the agreed-upon terms of the settlement, and only those entitled to compensation, receive an Award. This can

██████ counsel's actions in this case caused the Claims Administrator to spend time—and thus resources—which would have been better devoted to the fair and equitable administration of the Settlement for the benefit of the Class as a whole.

The Settlement Agreement requires Mr. ██████ to show by clear and convincing evidence that the determination of the Claims Administrator was incorrect. Mr. ██████ failed to do so either with respect to his CDR evaluation or the validity of Neurocognitive test scores. The Appeal is denied.

Date: March 10, 2021



David A. Hoffman, Special Master

only be effectuated if all submitted materials are truthful, honest, free from undue influence, and compiled with careful attention to the requirements of the claims process.”).