

**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
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: MDL No. 2323
:

:
: **Hon. Anita B. Brody**
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THIS DOCUMENT RELATES TO:
NFL PARTIES' APPEAL OF
QUALIFYING DIAGNOSIS AND
CLAIM DETERMINATION FOR
SETTLEMENT CLASS MEMBER

██████████

INTRODUCTION

On November 1, 2017, ██████████, a Retired NFL Player and Class Member under the Amended Class Action Settlement, filed a claim for benefits under the Agreement. Mr. ██████████ underwent a neuropsychological assessment and received a Qualifying Diagnosis of Level 2 Neurocognitive Impairment from an MAF physician. The NFL Parties subsequently filed an appeal seeking reversal of Mr. ██████████ claim determination on grounds that he failed to submit “evidence generally consistent with the diagnostic criteria” specified in the Settlement.¹

The case was reviewed by the Claims Administrator and multiple times by the Appeals Advisory Panel, most recently pursuant to the Special Master’s request for additional medical input and analysis. Following that AAP Review, I find the evidence in this case supports a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment. Mr. ██████████ claim determination should be adjusted accordingly; thus, the NFL Parties’ appeal is granted in part and denied in part.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. ██████████ received a Qualifying Diagnosis of Level 2 Neurocognitive Impairment on October 10, 2017. Doc. 139406. Dr. ██████████, then a qualified MAF physician, certified the diagnosis, with Dr. ██████████ providing neuropsychological evaluations. Doc. 139406; Doc. 139407. On May 1, 2018, the Claims Administrator issued a Notice of Monetary Award Claim Determination, approving the claim. Doc. 169752.

¹ See Settlement Agreement, Exhibit 1(1)(b).

The NFL appealed the Level 2 Neurocognitive Impairment diagnostic assessment on May 31, 2018. Doc. 173815. On July 11, 2018, the claim entered audit, and emerged without an adverse finding on April 25, 2019. Doc. 178637, Doc. 205685. On September 19, 2019, an AAP Consultant, reviewing the claim, found that the available reports did not adequately support the claim for the Qualifying Diagnosis. Doc. 214331. On January 3, 2020, an AAP Reviewer concurred. Doc. 219107.

The Special Master requested an independent AAP review of Mr. ██████ case. On March 25, 2020, that review concluded that Mr. ██████ should receive a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment. Doc. 223783.

DISCUSSION

Neither party disputes the validity of Mr. ██████ cognitive assessment nor challenges the accuracy of the results; rather, at issue is the interpretation of evidence and the resulting diagnosis. There are four diagnostic criteria for a Qualifying Diagnosis of Level 2 Cognitive impairment; here, the parties disagree about both category (ii) (“evidence of a severe cognitive decline . . . in two or more cognitive domains”) and category (iii) (“functional impairment”).²

For criterion (ii), Dr. ██████ concluded that based upon an estimate of average premorbid functioning, Mr. ██████ met the criteria for Level 2 Neurocognitive Impairment in three cognitive domains: Complex Attention, Learning and Memory, and Language Functioning. Doc. 139407, at 5-6. However, Dr. ██████ misinterpreted the Baseline Assessment Program (“BAP”) guidelines for the categories of Complex Attention and Learning and Memory.³

In response to the NFL Parties’ appeal, Mr. ██████ argues that even if his test results do not precisely match the BAP injury criteria, the Diagnosis is still “generally consistent”—which “does not mean identical”—with the BAP diagnostic standards. Doc. 177888, at 1 (internal quotation omitted).⁴

The notion of “general consistency” does not provide the diagnosing physician latitude to loosely construe the Injury Definitions that have been set forth in the Settlement Agreement, at least without further explanation. Dr. ██████ did not explain his deviation from the criteria, as the Rules now require.⁵ More importantly, the most recent AAP review established that a careful

² See Settlement Agreement, Exhibit 1(2)(a)(ii)-(iii).

³ Mr. ██████ displayed 2 scores of T = 30 in Complex Attention, failing to meet the requirement of 2 or more scores below T = 30 for Level 2 Neurocognitive Impairment (which Dr. ██████ read as “at or below” T = 30). Doc. 139407 (emphasis added). Similarly, Mr. ██████ did not display the requisite level of impairment for Learning and Memory, displaying one score of T = 35 and two scores below T = 35. *Id.* Mr. ██████ did satisfy the criteria for Language Functioning with 2 scores below T = 35. *Id.* at 6. See Settlement Agreement, Ex. 2, at 7, displaying the relevant table of impairment criteria.

⁴ The parties to the 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, FAQ #101.

⁵ Dr. ██████ used the BAP test panel itself, and under the rules now governing MAF physicians, where the results “do not meet the thresholds necessary to support the qualifying diagnosis,” the physician “must explain in writing, in the method prescribed by the Claims Administrator and to the satisfaction of the Claims Administrator, any deviation

reading of Mr. ██████ neuropsychological assessment results is generally consistent with Level 1.5, not 2, Neurocognitive Impairment.⁶ Doc. 223783

For criterion (iii), a CDR 2.0 designation carries the implication that an individual cannot function independently at work or home. Mr. ██████ experiences cognitive impairment that hinders his ability to independently function, but only partially. The evidence is thus more consistent with a CDR score of 1.0.

Mr. ██████ is indeed employed as the head coach of a high school football team, where he has amassed honors and even won a state championship. The NFL Parties present evidence suggesting that Mr. ██████ success as a high school football coach is inconsistent with the cognitive decline necessary for a CDR score of 2.0; however, the evidence also makes clear that there may be a difference between the perception of Mr. ██████ as a head coach, and what goes on behind the scenes. While he completes paperwork, he often cannot recall specific plays nor the names of student-athletes, and he no longer calls plays during games. Doc. 139407; Doc. 139409. Though Mr. ██████ behavior may appear normal to outside observers of his and the football team's success, the record fairly read reveals that moderate memory loss, moderate difficulty with time relationships, and moderate difficulty in handling problems aptly characterizes his day-to-day coaching experience. Taken together, Mr. ██████ experience as an ostensibly successful high school football coach who struggles to execute many, but not all, of his job responsibilities is generally consistent with a CDR score of 1.0 in Community Affairs.

Mr. ██████ daily activities beyond coaching are also consistent with a CDR score of 1.0. Mr. ██████ continues to drive, but struggles with directions and relies on a GPS. Doc. 139409. As one AAP Reviewer found, he "sometimes has significant difficulty in his job because of problems with memory or thinking, sometimes is able to independently shop for needs, sometimes is able to independently carry out activities outside the home, and he has problems or risks driving because of poor thinking, all indicating difficulty functioning independently though still engaged in some activities . . ." Doc. 223783 (emphasis in original).

I conclude that, taken as a whole, the evidence in Mr. ██████ case has more differences from than similarities with the diagnostic criteria for Level 2 Neurocognitive Impairment, and is instead "generally consistent" with Level 1.5 Neurocognitive Impairment.

CONCLUSION

from the BAP diagnostic criteria and must obtain information from the Examining Neuropsychologist as is necessary to provide a complete explanation." See Rule 20 of Rules Governing MAF Physicians.

⁶ In two categories of neurocognitive testing, Mr. ██████ met the criteria for Level 2 Neurocognitive Impairment: in Visual-Perceptual, he displayed two scores below T = 35, and in Language Functioning, he displayed two scores below T = 35. In one category, Executive Functioning, Mr. ██████ met the criteria for Level 1.5 Neurocognitive Impairment with three scores below T = 35. In the remaining two categories, Mr. ██████ met the criteria for Level 1 Neurocognitive Impairment: in Complex Attention, he displayed two scores of T = 30 and one score of T=35, and in Learning and Memory, he displayed one score of T = 35 and two scores below T = 35. Mr. ██████ neurocognitive test results thus indicate an overall estimate of Level 1.5 Neurocognitive Impairment. See Settlement Agreement, Ex. 2, at 7, displaying the relevant table of impairment criteria.

As Mr. [REDACTED] has offered evidence generally consistent with a Qualifying Diagnosis of Level 1.5, but not Level 2, Neurocognitive Impairment, I grant in part and deny in part the NFL Parties' Appeal.

Date: June 2, 2020



David Hoffman, Special Master