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' APPEAL OF QUALIFYING DIAGNOSIS AND CLAIM DETERMINATION FOR SETTLEMENT CLASS MEMBER [redacted]	:	**Hon. Anita B. Brody**

INTRODUCTION

On September 11, 2019, [redacted], a Retired NFL Player and Class Member under the Amended Class Action Settlement, filed a claim for benefits under the Agreement. Mr. [redacted] underwent a neurological assessment and received a Qualifying Diagnosis of Level 2. Neurocognitive Impairment from an MAF physician. After a rigorous review process, the Claims Administrator approved the Qualifying Diagnosis of Level 2 Neurocognitive Impairment.

The NFL Parties, appealing, argue that there is clear and convincing evidence that Mr. [redacted] does not experience the necessary level of impairment consistent with a Level 2 Diagnosis.

The Appeal is denied.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. [redacted] initially received a Qualifying Diagnosis of Level 2 Neurocognitive Impairment on October 18, 2017. Doc 135410. Dr. [redacted], a Qualified MAF Physician, certified the diagnosis, with Dr. [redacted] providing neuropsychological evaluations. Doc. 135410. On April 26, 2018, the claim was placed into audit. Mr. [redacted] withdrew his claim on August 31, 2018. Doc. 184137.

In February 2018, Mr. [redacted] underwent another neuropsychological evaluation, conducted by Dr. [redacted], but the results "were invalid due to multiple suboptimal performances on performance validity testing." Doc. 213427. Dr. [redacted] emphasized that the invalidity of the testing did not indicate that Mr. [redacted] did not experience impairment. *Id.*

In July 2019, Dr. [redacted] performed another evaluation, conducted "across two days to accommodate physical status," and provided a Level 2 Diagnosis. Doc. 213354; Doc 214954. In

tandem with Dr. [redacted] evaluations, Mr. [redacted] revisited Dr. [redacted] for medical consultations once in June 2019, and twice in August 2019. Doc. 215083.

During the last of these visits, Dr. [redacted] verified the validity of the July neuropsychological evaluation, and submitted further fact finding that verified the CDR finding of 2.0. *Id.* On September 11, 2019, Mr. [redacted] resubmitted his claim with this updated Diagnosis.

On November 1, 2019, the claim was placed into audit. Doc. 216564. The audit included two rounds of detailed questions regarding Mr. [redacted] employment, volunteer, and recreational activities, as well as a review of tax and employment documentation. The audit concluded on January 21, 2020, with no adverse finding. Doc. 219729. Mr. [redacted] claim was subsequently approved on February 14, 2020. Doc 220812.

On March 16, 2020, the NFL Parties appealed. Doc. 221723. As the NFL Parties submitted new evidence of Mr. [redacted] functional abilities, I afforded him the opportunity to respond. I also invited all parties to brief the overall probative value of the evidence in light of my recent decision on the weighing of post-diagnosis proof of function.

DISCUSSION

The NFL Parties' appeal focuses on Mr. [redacted] functional impairment.[1] It best summarized by the following sentence from the appellant's brief: "he is *engaging* in activities inconsistent with Level 2 impairment—including continuing to drive, volunteer, and engage in public speaking—and any functional impairment Mr. [redacted] is experiencing may result from factors other than cognitive loss." (Emphasis added).

The tense of the italicized phrase notwithstanding, a close reading of the record on Appeal reveals that almost all of what the NFL Parties offer as additional (or "new") evidence actually predates the July 2019 evaluation that led to the September 11, 2019, Claim.[2] Of the roughly two

[1] The NFL Parties do not contest that Mr. [redacted] has satisfied the first, second or fourth criteria for a Diagnosis under the Settlement Agreement, and I find that Mr. [redacted] has met his burden under those criteria.

[2] The evidence, in order of submission, is as follows:

- Doc. 221716 contains a series of fifteen social media posts from August 2018 through December 2019, of which only two post-date the diagnosis:
  - Post from personal Twitter account, [redacted] (now inactive), promoting the [redacted] community event; dated May 8, 2019.
  - Post from personal Twitter account, [redacted], including a picture of Mr. [redacted] with his youth football team and an opposing team; dated August 19, 2018.
  - Post from personal Twitter account, [redacted], including a picture of Mr. [redacted] posing alongside his youth football team, upon their recognition by (seemingly) public officials; dated January 12, 2018.
  - Post from [redacted] Instagram account, including picture of Mr. [redacted] donating SUV to the [redacted] dated December 31, 2019.
  - Instagram post from [redacted], including picture of youth football players posing alongside Mr. [redacted] dated October 17, 2019.
  - Two Facebook posts from the [redacted], including pictures of [redacted] posing with youth players on and off field; both dated January 28, 2019.
  - Facebook post from [redacted] including picture of Mr. [redacted] posing with [redacted] players; dated December 5, 2018.
  - Facebook post from the [redacted], including picture of Mr. [redacted] posing with [redacted] players at [redacted]; dated December 2, 2018.

dozen individual pieces of evidence offered, only two Instagram posts (one showing Mr. [redacted] donating a car, the other standing next to a youth football team) and state filings stating Mr. [redacted] role in a business, seem to post-date the diagnosis. The strongest evidence of Mr. [redacted] active involvement with his community—such as, for instance, participating in a discussion circle on bail and juvenile justice reform—date to around a year before his neuropsychological exam by Dr. [redacted].[3]

Much of this information was considered by the Claims Administrator in its Audit. Mr. [redacted] and his family offered various corroborations, admissions and arguments in support of his Claim, and it was ultimately approved.[4] Obviously, the absence of an adverse finding does not resolve whether Mr. [redacted] diagnosis was appropriate. Nonetheless, it means that the Claims

---

- Facebook post from the [redacted], including picture of Mr. [redacted] posing with players ahead of national championship game; dated November 25, 2018.
- Facebook post from the [redacted], including picture of Mr. [redacted] coaching players on field; November 11, 2018.
- Two Facebook posts from the [redacted], including picture of Mr. [redacted] posing with players and trophy; dated October 27, 2018.
- Instagram post from [redacted] showing YouTube video screenshot of Mr. [redacted] offering [redacted] highlights; dated September 14, 2018.
- Post from [redacted] Twitter account, [redacted], commending Mr. [redacted] for his work with the Parks and Recreation program and congratulating him on his induction into the [redacted] Hall of Fame. The post also includes a picture of Mr. [redacted] conversing with a public official; dated August 8, 2018.

➢ Doc. 221717 is a filing from the [redacted], showing Mr. [redacted] listed as CEO and CFO of [redacted] formed in January 2014 and re-registered as recently as2020; no date on document.

➢ Doc. 221718 is a filing from the [redacted], showcasing recent [redacted] activity; no date on document.

➢ Doc. 221719 is a YouTube video (as introduced, a screenshot of a YouTube video), depicting an interview with Mr. [redacted] after Division 1 Varsity Championship, submitted by [redacted].; dated December 5, 2018.

➢ Doc. 221720 is a YouTube video (as introduced, a screenshot of a YouTube video), depicting an interview with Mr. [redacted] after coaching a youth basketball team, submitted by [redacted] dated February 27, 2018.

➢ Doc. 221721 is an Instagram post from [redacted], depicting [redacted] taking notes during a discussion circle on juvenile justice reform and bail reform; dated September 12, 2018.

➢ Doc. 221722 is a screenshot from [redacted], highlighting [redacted] biography, listing his accomplishments, and offering information for public speaking bookings; no date on document.

[3] The date on a social media post at most proves the moment it was uploaded. Absent a firmer evidentiary foundation, it can be sometimes difficult to establish with precision when the activity depicted actually happened.

[4] During the November 2019 audit of Mr. [redacted] claim, Mr. [redacted] wife, who wrote on his behalf, admitted that he had engaged in public speaking at local schools about both his life story and the dangers of substance abuse, but used a planned PowerPoint presentation, and had most recently grown less comfortable with public speaking. She admitted that he drove in the past, but asserted that he no longer does at the instruction of his medical providers, especially after he repeatedly left the [redacted] autistic daughter in the car. She stated that, while the [redacted] run a youth football league, Mr. [redacted] as a former NFL star, merely serves as a figurehead, while his wife and the organization's Board of Directors ensure that it operates. She further admitted that Mr. [redacted] participates in a limited number of additional activities, namely assisting with coaching and attending Bible study sessions. Last, she admitted that while short video interviews with Mr. [redacted] regarding his coaching may appear to undermine a finding of moderate neurocognitive impairment, a "snap shot of one moment showing [Mr. [redacted] is having a good hour is nothing compared to [the] reality." Doc. 219172.

Administrator, well-versed in evaluating subtle and difficult factual problems, did not conclude that Mr. [redacted] had dissembled in describing the symptoms that led to his claim.

As the NFL Parties are well aware, overturning the Claims Administrator does not merely require the appellant to offer a plausibly different interpretation of the evidence: there must be a "high degree of probability that the determination of the Claims Administrator being appealed was wrong." Especially where the Claims Administrator has engaged in an extensive fact-gathering process that focused on these very issues, and considered if Mr. [redacted] had "misrepresent[ed], omit[ted], and/or conceal[ed] material facts that affect the claim," that standard should be enforced with vigor.

The NFL Parties make two primary arguments as to why they have met their burden.

First, they claim that the evidence discussed above "pertains to regular and recurring activities of Mr. [redacted] that are inconsistent with the stark functional impairment associated with a Qualifying Diagnosis of Level 2 Neurocognitive Impairment." The NFL Parties argue Mr. [redacted] community involvement in 2018 and 2019 is simply not consistent with a score of 2.0 in Community Affairs, i.e., "no pretense of independent function outside of the home." Because Mr. [redacted] did not dispute that he regularly drove well into 2019, and that he "regularly coached youth sports and attended community events, including public speaking engagements and regular bible study," the NFL Parties assert that the decision to accept the Diagnosis was clearly erroneous.

I agree that isolated pieces of evidence—particular videos from 2018—seem inconsistent with the level of function normally present given a Level 2.0 score in community affairs. Had the Claims Administrator denied Mr. [redacted] Claim on the basis of that evidence, that choice might very well have been entitled to deference. Alternatively, had the NFL Parties submitted more evidence from the summer of 2019, it would be easier to conclude that it undermined the factual predicates of Mr. [redacted] functional status at the time his Claim was submitted.

But this Appeal, like a recently concluded matter,[5] involves noisy signals of a claimant's function, derived from social media or by other means, which appear somewhat inconsistent with the Diagnosis. In the prior appeal, the NFL Parties asserted that *post*-diagnosis evidence supported the Claims Administrator's decision to deny a claim; here, they argue that *pre*-diagnosis evidence has the opposite effect. These arguments are not in conflict, but they do illustrate the potential unbounded scope of the use of external evidence in the appeals process.

External sources of information can be important checks on malfeasance in the audit process, and thus help to ensure that the Settlement pays only deserving Claimants. This is a very important goal. However, on Appeal, external evidence both raises problems of administrability (with layers of collateral briefing about what it "really" shows) and probative value. The "external evidence" procedure, recently adopted by the Claims Administrator, will hopefully ease the former concern. But the latter probative issue remains.

Evidence that tends to establish a pattern of behavior inconsistent with the factual predicates of a diagnosis is always probative of claims' legitimacy, and thus welcome on appeal. But the use of pre-diagnosis evidence of function—even a pattern of function—to challenge a diagnosis is fraught. Most saliently, an impaired player's degenerative course may not be linear. In this case, the NFL Parties offer to prove that Mr. [redacted] coached sports teams before and during

[5] *See* Special Master Ruling on Post-Diagnosis Evidence, June 8, 2020, available at https://www nflconcussionsettlement.com/Docs/post_diagnosis_evidence_sm.pdf.

2018, and spoke extemporaneously in an interview. But even accepting the evidence on its face, it does not indicate that his function had not degenerated even further by the summer of 2019.

This Appeal illustrates why external evidence—and, in particular, proof out of temporal joint with the diagnosis—must be evaluated with care. All three criteria focus on the claimant's degree of impairment and function as of the time of the Diagnosis, not his past behavior or his future course.[6] Thus, my focus must be on the "strength of the clinician's contemporaneously created record and the Claims Administrator's process for reviewing that record."[7]

Overall, and considering the nature and timing of the evidence submitted, and their burden, the NFL Parties have not offered a pattern of behavior *contemporaneous with the examination that led to the diagnosis* which establishes a high degree of probability that the Claims Administrator's decision was in error.

Second, the NFL Parties assert that the Diagnosis should not be credited because, in effect, Dr. [redacted] did not fully describe Mr. [redacted] function. As they write in their supplemental briefing:

> On a more fundamental level, the Special Master Decision rests on the critical assumption that the record before the examining Qualified MAF Physician is fulsome, with claimants and their collaborating witnesses forthcoming about the Retired Player's activities. Dr. [redacted] reports lack any mention of Mr. [redacted] coaching activities, let alone his regular bible study or public speaking. There is no record that Dr. [redacted] considered these activities as part of the CDR analysis.

This argument too has some merit. However, it overstates the evidentiary gaps in the record. Dr. [redacted] who—it bears repeating—personally examined Mr. [redacted] over two days, reported in an earlier examination that he was told that Mr. [redacted] attended sporting events and was "current[ly] volunteering in which he teaches kids not to play football the way he played." Doc. 213427 (though that line was left off the second examination, Doc. 213428.)

Dr. [redacted] report admittedly does not fulsomely describe Mr. [redacted] community activity, and this appeals process might have been avoided with a cleaner record. But, as Dr. [redacted] was obviously aware of the contours of Mr. [redacted] community activities, the Claims Administrator reasonably concluded that Mr. [redacted] did not obtain a diagnosis by omitting relevant facts. Dr. [redacted] relied on Dr. [redacted] report. (Doc. 215083). The record is sufficiently developed, especially given the NFL Parties' burden on appeal.

Moreover, Dr. [redacted] assessment of functional impairment did not solely rest on Community Affairs. While it is true that his evaluation did not always engage with seemingly core activities in Mr. [redacted] life—namely his involvement with coaching youth sports—it did discuss, albeit less than optimally, with the two other CDR subscales, Home and Hobbies and Personal

---

[6] *See, e.g.,* CDR Scoring Table (Doc. 221714) ("Score only as decline from *previous* usual level due to cognitive loss . . .") (Emphasis added).

[7] Special Master Ruling on Post-Diagnosis Evidence, June 8, 2020, available at https://www.nflconcussionsettlement.com/Docs/post_diagnosis_evidence_sm.pdf; *see also* Settlement Portal, *Frequently Asked Questions*, FAQ #104 (explaining that the Claims Administrator may consider medical records only if they are contemporaneous, or "very close to the date," of the event described); *see also* Settlement Portal, *Frequently Asked Questions*, FAQ #108 (explaining that a Level 2 Diagnosis must include contemporaneous neuropsychological evaluation because of the sensitivity of the evidence in making that diagnosis).

Care. Dr. [redacted] and Dr. [redacted] detailed Mr. [redacted] struggle to dress himself, perform chores, prepare meals and organize his daily activities.

The Settlement Agreement's appeals process is not intended to be an inquisitorial one, designed to nitpick the BAP and MAF physicians' clinical judgment. Rather, it is built around layered deference to expertise. The NFL Parties do not contest the results of Mr. [redacted] neuropsychological testing, and admit in reply that he suffers "some level of actual cognitive impairment." Given that reality, second-guessing MAF Physicians' considered views about the level of functional impairment would require strong countervailing proof demonstrating that they, and the Claims Administrator, all clearly erred.[8] That evidence is absent here.[9]

CONCLUSION

As the NFL Parties have not satisfied their high burden to show that the Claims Administrator's decision was clearly erroneous, I deny the Appeal.

Date: July 2, 2020

David Hoffman, Special Master

[8] While a CDR score of 2.0 in Community Affairs requires that an individual has "no pretense of independent function outside of the home," it also allows for an individual to "appear[] to be well enough to be taken to functions outside of a family home." Further, assessments of Community Affairs and Home and Hobbies take into account that an individual may be accustomed to certain activities, especially if they are relevant to and expected in daily life. Individuals living with dementia may also experience episodes of lucidity, especially in discussing familiar topics and themes, that are not indicative of their overall diminished neurocognitive impairment.

[9] The NFL Parties also suggest that since Dr. [redacted] reported Mr. [redacted] history of depression and related syndromes, he was required to "adequately consider" if his functional impairment actually arose from cognitive decline as opposed to alternatives. But this argument fails for the same reason that the ones in the main text do: it does not identify the particular basis for finding clear error in the Claims Administrator's decision. Dr. [redacted] also specifically concluded that Mr. [redacted] depression resulted from his cognitive decline, and that his functional losses resulted from that decline. *See, e.g.*, Doc. 213481 at 12 ("The patient has a clear Organic Dementia caused by repeated injury suffered during his football career in the NFL. There are no other causes for this condition other than as caused by multiple cerebral concussions. The major depression and anxiety experienced by the patient is neurological in nature with a psychiatric manifestation"); see also Doc. 215083 at 3 (concluding that though Mr. [redacted] [functional losses] "may be aggravated by physical and emotional status they exceed what would be considered secondary to such factors and occurred independent[ly]")