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: NFL PARTIES' APPEAL OF QUALIFYING DIAGNOSIS AND CLAIM DETERMINATION FOR SETTLEMENT CLASS MEMBER [redacted]	:	

INTRODUCTION

Mr. [redacted], a Retired NFL Player and Class Member under the Amended Class Action Settlement, filed a Claim for benefits on October 29, 2019 based on a Diagnosis of Level 1.5 Neurocognitive Impairment. The Claims Administrator subsequently determined that Mr. [redacted] merited an award based on this Diagnosis.

The NFL Parties, in filing this Appeal, argue that Mr. [redacted] Claim should be denied because his neuropsychological test results were invalid. The NFL Parties emphasize that marijuana was in Mr. [redacted] system during his testing regimen, and that his neuropsychologist did not adequately consider the impact of his regular marijuana consumption and psychiatric conditions on his alleged cognitive impairment.

I remand the Claim for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. [redacted] first filed for benefits on March 29, 2017. Doc. 49568. That filing was deficient: he did not select a Qualifying Diagnosis, include the date of the Qualifying Diagnosis on the Claim Form, or submit a Diagnosing Physician Certification Form. The Claims Administrator denied Mr. [redacted] Claim on July 17, 2019. Doc. 211200.

Mr. [redacted] filing a second claim benefits on October 29, 2019, asserted a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment. Doc. 216458.

The Claim was based on a neuropsychological evaluation that Dr. [redacted] provided on April 4, 2019. Doc. 216461. Dr. [redacted] included the following assessment of Mr. [redacted] substance use:

> He does not currently drink alcohol. He drank alcohol in the past and denied history of past problematic alcohol use or abuse. He does not smoke cigarettes. He smokes marijuana on a daily basis, reportedly for medical reasons, and has a medical marijuana card. He reported using marijuana on the morning of the evaluation but denied that he used enough to cause him to feel high or intoxicated at the time of the interview and subsequent testing. He denied misuse/abuse of prescription medications. He denied known family medical history of dementia and neurological or psychiatric disorders.

Doc. 216461.

Additionally, in discussing the *Slick* criteria and the overall validity of Mr. [redacted] assessment, Dr. [redacted] report included:

> Mr. [redacted] performed in a range consistent with valid responding on the TOMM. His responses were consistent with invalid responding on 2 of 3 scores from the MSVT. He performed in a range consistent with valid responding on embedded measures from the WMS-IV provided through Advanced Clinical Solutions. Variability in his scores may have resulted from fluctuations in attention and effort may have varied over the course of the evaluation.
>
> Information from performance validity testing and clinical observations was taken into consideration to complete the Slick criteria checklist above, and Mr. [redacted] overall performance was determined to be consistent with valid responding. Although fluctuations were observed on performance validity testing, there was no evidence of attempt to exaggerate or malinger cognitive impairment on current testing. Note that a similar pattern was observed on performance validity testing during his neuropsychological evaluation in 2017. The following test results are considered to be an accurate representation of Mr. [redacted] neurocognitive functioning at the time of the evaluation.

Id.

Ultimately, Dr. [redacted] determined that a Diagnosis of Level 1.5 Neurocognitive Impairment was appropriate. Neurologist Dr. [redacted] and Dr. [redacted] certified the Diagnosis on May 3, 2019. *Id.*

Mr. [redacted] Claim was approved on November 15, 2019. Doc. 217219. The NFL Parties timely appealed. Doc. 218402.

In a January 6, 2020 follow-up neurological examination of Mr. [redacted] Dr. [redacted] noted:

> Today, I was presented the NFL appeal by the player's wife who accompanies him, and the patient reports taking 'medical marijuana' which he states has helped his anxiety (he still exhibited anxiety but to a lesser degree). Provided that the player had received benefit with anxiety symptoms and still exhibited deficits as stated in the Neuropsychological Assessment on the day of 4/4/19, this may reduce the possibility that anxiety had confounded the results, but I cannot be 100% certain of the degree of its effect on the Neuropsychological Assessment. I would engender the opinion from the Neuropsychologist, Dr. [redacted] who was asked to perform the assessment in question. I am in agreement that a newer neuropsychological assessment (without the influence of any potential confounder) to be absolutely certain of the designation Level of Impairment for future purposes.

Doc. 220772.[1]

DISCUSSION

The NFL Parties' Appeal is relatively straightforward: Mr. [redacted] regularly consumed marijuana, including on the morning of his neuropsychological evaluation. Research shows that acute or longer-term marijuana use may impact cognitive function (and therefore whether the neuropsychological testing results were "optimal" measures of cognitive function). Further, diagnosis of Level 1.5 Neurocognitive Impairment requires that "cognitive deficits do not occur exclusively in the context of a delirium, acute substance abuse, or as a result of medication side effects."[2]

At my request, an AAP Reviewer evaluated the claim. The Program's expert observed that "more information on the player's dosage, frequency, perceived effects of use (and abstinence) [of marijuana] on daily ability, overall duration of use, and trends in usage pattern over time is required to determine" whether his assessed cognitive impairment and decreased daily functioning were causally linked to his marijuana usage. Doc. 227908. Additionally, the Reviewer raised concerns regarding the validity of Mr. [redacted] assessment: he failed two of three MSVT performance validity tests, and also initially wore sunglasses and obscured his facial expressions with the hood of his sweatshirt. The latter activity represents "a finding highly associated with psychogenic findings on neuroophthalmological assessment, associated with secondary gain in litigation and disability claims, and an indication that migraine/headache is major source of functional disability." *Id.*

[1] In this most recent report, Dr. [redacted] explains that Mr. [redacted] "marijuana use had not been clear. For example, 'no' was checked for recreational drug use in the current intake paperwork." Doc. 220772. But, while marijuana—medical or otherwise recreational—was not detailed under Mr. [redacted] lists of medications in Dr. [redacted] May 2019 report, Mr. [redacted] did admit to smoking marijuana as part of this neurological assessment. Doc. 216461. Any factual discrepancies regarding the nature of Mr. [redacted] marijuana use, including whether such use should be characterized as medical or recreational, may be clarified on remand.

[2] Settlement Agreement, Exhibit A-1, Level 1.5 Neurocognitive Impairment (1)(a)(iv).

The Reviewer indicated the usefulness of AAP Consultant review to evaluate test validity. A Consultant, duly considering the file, ultimately deferred to Mr. [redacted] neuropsychologist's validity analysis.[3]

> As noted by the AAP member (and the neuropsychologist), the player had stray low scores on the [MSVT] and a couple marginal scores on the ACS measures. However, he technically 'passed' the ACS overall, and his TOMM performance was entirely within normal limits. In short, I cannot point to a solid basis to dispute the neuropsychologist's final determination regarding the Slick criteria. She herself flagged the pattern of weaker scores, seems to have diligently considered all Slick criteria, and ultimately judged the final results to be valid[]. Having no sound basis to rebut this conclusion, I believe I must defer to the examining clinician's conclusion.

Doc. 228015.

Finally, the AAP re-reviewed the file, and concluded that further information was necessary to determine the Claim's disposition:

> The role of marijuana/cannabis products in the player's overall profile cannot be reliably determined from the available information. As with any substance ingested for medical reasons there are intended effects, which may be psychological or physiological, and there are unintended effects, again psychological or physiological. Furthermore, the person experiencing the unintended effects may not be consciously aware of them. This is especially true if those effects are experienced chronically, and become the person's "new normal[.]"
>
> In the absence of dosing information – how much cannabis product, of what type, and how often – quantitative determination of the absolute magnitude of unintended effects is not feasible. There are behavioral observations that suggest that cannabis products may have had a meaningful effect on the player's abilities on the day of the neuropsychological assessment. Dr. [redacted] reported, "He was also initially very quiet and sat slumped in his chair," but continues, "As the interview proceeded, he became more interactive and began to answer questions on his behalf." This implies a sedative effect that improved over time.

[3] As I have previously held, "[t]he AAP should defer to a clinician's *Slick*-criteria-based validity analysis when it results from reasoning completely articulated in contemporaneous reports, unless the analysis is clearly erroneous. Conversely, when clinicians fail to articulate their judgment through complete *Slick* analyses, the AAP may thoroughly and independently assure themselves the criteria do not indicate invalid testing." Special Master Ruling on *Slick* Criteria and Validity Testing, at 10 (Oct. 21, 2020). Here, the AAP Consultant determined that Dr. [redacted] validity analysis successfully articulated sound medical judgment, and was not clearly erroneous.

> Here, the unknown frequency and size of dosing becomes critical to understand its role in the player's daily function. His MMPI-2-RF results indicate "possibility of over-reporting symptoms and, in particular, over-reporting cognitive difficulties." Dr. [redacted] continues, "He appears to be highly focused on somatic and physical complaints and may be experiencing heightened physical and cognitive symptoms in response to stress and emotional distress." If, each time the player begins to experience stress and distress, he treats them with medical cannabis, it becomes likely that the quiet, slumping, unengaged behavior explicitly described by Dr. [redacted] at the time of the examination contribute meaningfully his impaired daily abilities. The reports state that the player "does not participate in home chores" rather than concluding that cognitive declines prevent him from completing tasks. This is consistent with the amotivational state described by Lawn and colleagues in their studies, an effect that varies by the exact cannabinoids that were ingested and whether "dependence" was present.
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> A statement from the player's wife dated 2/13/20 indicates that there is knowledge of the dispensed amounts and the exact ratio of "cbd:thc products" for his "specific symptoms." It is that dosing information which does not appear in the medical record. I concur with the player's wife that many people experience meaningful therapeutic benefits of medical cannabis products. However, when being used prescriptively, knowledge of the products and dosing allows better determination of the pattern and severity of the unintended effects.

Doc. 229076 (internal citations omitted).

Over the course of this Appeal process, three medical experts—Mr. [redacted] own neurologist as well as two independent reviewers—have all had the same response when confronted with the question of whether and how Mr. [redacted] marijuana consumption impacted his Diagnosis: they asked for more information. Each suggested that, while Dr. [redacted] disclosed Mr. [redacted] self-described daily use of medical marijuana (including on the morning of his neuropsychological examination) in her report, and affirmed Mr. [redacted] view that he was not intoxicated, a lack of detail makes the record incomplete.

Without information regarding the dosing and frequency of Mr. [redacted] marijuana intake, the medical experts have indicated that it is not possible to discern the substance's impact on his test results on the day of his neuropsychological evaluation. Thus, Mr. [redacted] records lack precision about his test results' relationship to his actual cognitive impairment. This dearth of information also makes it difficult to determine if marijuana use contributed to Mr. [redacted] decreased daily functioning, as assessed through the Clinical Dementia Rating (CDR) scale. For example, as the latest Reviewer explains, it is possible to attribute Mr. [redacted] inability to complete home chores to the side-effects of marijuana, rather than cognitive decline. It is also possible that marijuana played a role in the psychiatric issues Dr. [redacted] discusses.

Without further detail on the dosage and frequency of Mr. [redacted] use of the substance, and without further detail on whether and how Dr. [redacted] considered Mr. [redacted] use of marijuana in her ultimate Diagnosis, the record is incomplete. I accordingly remand this Claim for further analysis. On remand, the Claims Administrator may solicit from Dr. [redacted] the dosing information and frequency of Mr. [redacted] marijuana use. Dr. [redacted] may also submit an analysis of why a Diagnosis of Level 1.5 Neurocognitive Impairment is appropriate despite the potential impacts marijuana may have had on (1) Mr. [redacted] April 4, 2019 examination, and (2) on his daily cognitive functioning, as articulated in the CDR. Further AAP review, informed by that dosing and usage information, may follow.

CONCLUSION

For the reasons given, I remand Mr. [redacted] Claim to permit Dr. [redacted] to further provide analysis and documentation.

Date: December 2, 2020

David A. Hoffman, Special Master