

**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 ██████████
MONETARY AWARD

INTRODUCTION

On March 29, 2019, ██████████, a Retired NFL Player and Class Member under the Amended Class Action Settlement Agreement, filed a claim for benefits. He received a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment through the Baseline Assessment Program, as certified by an Appeals Advisory Panel Reviewer. The AAP Reviewer was responsible for evaluating the claim and determining the appropriate level of impairment because Mr. ██████ received conflicting diagnoses from the assigned BAP neuropsychologist and neurologist.

The Claims Administrator determined that Mr. ██████ was eligible for a Monetary Award, and the NFL Parties filed this Appeal. The case was subsequently reviewed by both an independent AAP Reviewer and an AAP Consultant, pursuant to my request for additional medical input and analysis. Following that guidance, I find that the medical documentation in this case does not support a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment.

This is a rare case where there is clear and convincing evidence that the Claims Administrator's decision was wrong.¹ The NFL Parties' Appeal is granted.

¹ See Settlement Agreement, Section 9.8. The Special Masters must decide an appeal of a Monetary Award based on a showing by the appellant of clear and convincing evidence that the determination of the Claims Administrator was incorrect. See Order Appointing Special Masters, at 5. "Clear and convincing evidence" is a recognized intermediate standard of proof—more demanding than preponderance of the evidence, but less demanding than proof beyond a reasonable doubt. *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.'").

FACTUAL AND PROCEDURAL BACKGROUND

Mr. █████ first received a Pre-Effective Date Diagnosis of Level 1.5 Neurocognitive Impairment on December 16, 2016, made outside of the BAP by Dr. █████. Doc. 123274. He filed a claim for benefits under the Settlement on December 28, 2017, and the Claims Administrator subsequently issued a Notice of Preliminary Review highlighting several areas in which the claim failed to meet the Settlement requirements. Specifically, the Claims Administrator was concerned that the Qualifying Diagnosis was not made by a board-certified physician, and that the provided medical documentation failed to illustrate moderate to severe cognitive decline consistent with the diagnostic criteria. Doc. 188630. Shortly thereafter, Mr. █████ withdrew this first claim. Doc 192830.

This Appeal concerns Mr. █████ second claim, which he filed on March 29, 2019. The Claim results from his participation in the BAP. Doc. 204242. On April 19, 2018, Mr. █████ underwent a neuropsychological evaluation performed by Dr. █████, a board-certified neuropsychologist and Qualified BAP Provider. Doc. 204520. Dr. █████ concluded that the results of Mr. █████ evaluation were “consistent with No Diagnosis of Neurocognitive Impairment” due to suboptimal validity measures across all indexes and concerns about over-reporting. *Id.*

Mr. █████ was then evaluated on May 3, 2018 by Dr. █████, a board-certified neurologist and Qualified BAP Provider. Doc. 204518. Dr. █████ initially concluded that Mr. █████ suffered from early dementia and Level 1.5 Neurocognitive Impairment, which he later amended to reflect a diagnosis of moderate dementia and Level 2 Neurocognitive Impairment. *Id.* Despite reaching a significantly different conclusion than that reported by Dr. █████ Dr. █████ adhered to his diagnosis and reiterated that his assessment of Mr. █████ impairment under the CDR framework was consistent with Level 2 Neurocognitive Impairment. Doc. 204522.

Because Dr. █████ and Dr. █████ provided conflicting diagnoses, the results of the BAP assessments were sent to the AAP for review and determination of the appropriate diagnosis.² An AAP Reviewer determined that the evidence was most consistent with a diagnosis of Level 1.5 Neurocognitive Impairment under the Settlement. Doc. 204519.

The claim was put in audit on June 14, 2019. Doc. 209195. On February 4, 2020, the audit process ended without no adverse findings. Doc. 220330. The Claims Administrator subsequently evaluated the claim and determined that Mr. █████ was eligible for a Monetary Award based upon the Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment. Doc 220368.

The NFL Parties timely appealed, asserting that the Qualifying Diagnosis of Level 1.5 was clearly erroneous because Mr. █████ lacked valid neuropsychological testing results. Doc. 221428.

² Settlement Agreement, Section 5.13 (“If there is a lack of agreement, as required by Section 5.2 and Exhibit 1, between the two Qualified BAP Providers regarding whether a Retired NFL Football Player has Level 1 Neurocognitive Impairment, Level 1.5 Neurocognitive Impairment, Level 2 Neurocognitive Impairment, or none, the BAP Administrator may in its discretion . . . refer the results of the BAP baseline assessment examination and all relevant medical records to a member of the Appeals Advisory Panel for review and decision . . . [which] will be final and binding, except a claim for a Monetary Award or Derivative Claimant Award relying on such diagnosis may still be appealed, as set forth in Section 9.5.”).

Pursuant to my request for additional medical input, the claim was independently reviewed by both an AAP Consultant and an AAP Reviewer. Doc. 224816; Doc 225069.

DISCUSSION

Living Retired NFL Football Players diagnosed through the BAP, like Mr. ██████ must meet the requirements set forth in the injury definitions provided in Exhibit A-1 of the Settlement. There are four diagnostic criteria that must be satisfied for a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment,³ and the NFL Parties' appeal can only be granted if there is clear and convincing evidence that the medical support for Mr. ██████ diagnosis does not meet the criteria. At issue here is criterion (ii) ("evidence of severe cognitive decline . . . as determined by and in accordance with [] standardized neuropsychological testing").

This Appeal turns on test validity. Validity measures are explicitly required by the Settlement as part of the neuropsychological test battery.⁴ Dr. ██████ administered neuropsychological testing as required by criterion (ii) with use of appropriate validity metrics and concluded that the evaluation was consistent with "No Diagnosis of Neurocognitive Impairment" due to failure across *all* validity measures. Doc. 204520. Dr. ██████ did not disagree that these scores were invalid under the BAP protocol, but provided an explanation to excuse the invalidity and support his diagnosis of Level 2 Neurocognitive Impairment: "[Mr. ██████ validity testing was likely impacted by his cognitive impairments / dementia." Doc. 204522.

The AAP Reviewer who evaluated the BAP assessments in light of the conflicting diagnoses also agreed that the neuropsychological test results did not meet the Settlement requirements, finding that the "cognitive test performance for Dr. ██████ was invalid according to the BAP protocol." Doc. 203827. The AAP Reviewer nonetheless certified a Qualifying Diagnosis, writing that "the cognitive testing in this case across multiple examiners is consistent with at least Level 1.5 Neurocognitive Impairment and [there is a] reasonable argument that the player's significant major cognitive impairments may have influenced his motivation during the neuropsychological evaluation." *Id.*

The NFL Parties now press the argument that because Mr. ██████ does not have valid neuropsychological test results, he cannot support a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment. Doc. 221428. Though Mr. ██████ counsel has written a passionate brief, he does not actually dispute that Mr. ██████ failed the relevant validity measures. The brief merely repeats Dr. ██████ proffered explanation.

Given differing views among three eminent members of the program—an AAP Reviewer, Dr. ██████ and Dr. ██████—I requested additional input from both the AAP and an AAP Consultant.⁵ The AAP Consultant who reviewed the file offered a stark assessment:

³ *Id.*, Exhibit A-1 (1)(a)(i)–(iv); *see also* Settlement Portal, *Frequently Asked Questions*, FAQ # 107 (restating that medical documentation of the four criteria listed in Exhibit 1 is required to support a Level 1.5 or Level 2 Neurocognitive Impairment for diagnoses made within the BAP).

⁴ *Id.*, Exhibit A-2, Section 1–2.

⁵ As Judge Brody, approving a previous decision by the Special Master not to consult an AAP Consultant, wrote: "The Settlement Agreement thus unambiguously states that deciding whether to consult a member of the AAP and/or an AAPC is within the complete discretion of the Special Masters . . . I may only disturb the Special Master's

This is one of the clearest cases I have seen in this Settlement Program of a former player grossly exaggerating cognitive impairment. This gentleman scored in the malingering range (“suboptimal” is a euphemism) on 11 out of 11 well-validated measures of performance validity. On at least five of these, the patient scored below chance levels. This can only happen when the examinee is purposely choosing the wrong answer. (Never being presented the to-be-remembered material and pure guessing would yield chance performance). Since profound dementia is not in the differential diagnosis (i.e., the patient is able to drive without difficulty, he traveled to his neuropsychological exam and presented alone), Dr. [REDACTED] interpretation of Dr. [REDACTED] findings is entirely without merit.

Doc. 224816. The AAP Consultant further expanded upon Dr. [REDACTED] assessment that the specific pattern of invalidity rendered Mr. [REDACTED] results particularly concerning. Detailing the significance of the different validity indexes, the AAP Consultant wrote:

On the MMPI-2-RF, the player produced highly elevated (abnormal) scores on five symptom validity scales. He reported physical, cognitive, emotional, and behavioral symptoms that are extremely unusual and unlikely, as well as an extraordinary number of symptoms. His overall level of symptomatology, and his memory complaints in particular, are non-credible (both 7 [standard deviations] above average, >99.99th percentile). Importantly, the two validity scales that assess consistency of reporting are not elevated. This indicates that the player was not responding randomly or without regard to item content, as might be seen in advanced dementia. Thus, the MMPI-2-RF profile is highly suggestive of deliberate symptom exaggeration or fabrication. *Id.*

This report offers an informed and convincing refutation of Dr. [REDACTED] discussion of the validity testing. As Dr. [REDACTED] who as a neuropsychologist is particularly well-positioned to explain the significance of validity testing, specifically clarified in his report, the “patient’s protocol was invalid likely due to over-reporting in multiple domains (over-reporting was noted across all associated validity indexes),” and further that the pattern of over-reporting “was not due to variable or inconsistent responding alone.” Doc. 204520. Thus, the concern at hand is not merely that Mr. [REDACTED] failed the validity measures, but that he failed across all indexes and to a degree that Dr. [REDACTED] characterized as “quite uncommon even for individuals with severe psychiatric and medical diagnoses.” *Id.*

The most recent AAP Reviewer offered a global assessment of the case: “there is not a valid neuropsychological assessment to support a Qualifying Diagnosis of Level 1.5

decision on AAP consultation if it was an abuse of discretion.” Order Pursuant to Settlement Implementation Determination at 2 (Apr. 12, 2019), https://www.nflconcussionsettlement.com/Docs/order_AAP_AAPC_consultation.pdf. See also Settlement Agreement, Section 9.8(iv). Mr. [REDACTED] counsel protests that “[n]owhere in the Settlement Agreement does it provide that some claims should be reviewed by the AAPC rather than by the AAP.” Doc 223187. However, input from an AAP Consultant does not *replace* the input of an AAP Reviewer, but rather supplements it, and requesting review by an AAP Consultant was within my discretion.

Neurocognitive Impairment and so I would recommend denial with re-evaluation including a valid neuropsychological evaluation.” Doc. 225069. I adopt this position.

CONCLUSION

Mr. [REDACTED] argument reiterates that his diagnosis came through the BAP and that the original AAP Reviewer and the Claims Administrator approved it. Because the NFL Parties offered “no evidence” of error, he protests, their request for additional review amounts to “another bite at the apple.” Especially given the attenuated nature of the review process, his frustration is palpable.

But to ensure equity across Class Members, Claimants must follow a standardized process. That process includes an explicit requirement that test results supply valid measures of cognitive performance. The AAP and AAP Consultants who are empowered to advise on these precise grounds concluded that Mr. [REDACTED] test results were invalid.

For lack of valid test results, Mr. [REDACTED] claim does not meet the Settlement’s requirements. Therefore, there is a “high degree of probability that the determination of the Claims Administrator being appealed was wrong.”

The NFL Parties’ Appeal is granted.

Date: June 24, 2020



David Hoffman, Special Master