

IN RE: NATIONAL FOOTBALL LEAGUE
PLAYERS' CONCUSSION INJURY LITIGATION

Hon. Anita B. Brody

¹ Dr. [REDACTED] report indicates failing scores on the Test of Memory Malinger (TOMM) and ACS-Word Choice test; however, after AAPC review, Mr. [REDACTED] failing score on the ACS-Word Choice test was incorrectly marked. He

Id. Nevertheless, Dr. [REDACTED] indicated that Mr. [REDACTED] had satisfied all of the *Slick* criteria. *Id.* Evaluating Mr. [REDACTED] effort, he wrote only that “Mr. [REDACTED] effort was passing overall.” *Id.* at 2 (cleaned up). Dr. [REDACTED] reported that Mr. [REDACTED] “has had severe decline in cognitive function” and assigned him a CDR score of 2.0 based on his reported level of functioning in Community Affairs, Home & Hobbies, and Personal Care. Doc. 228183 at 5. Mr. [REDACTED] fiancée also submitted an affidavit attesting to her observations of his functional impairment. Doc. 228185.

The Claims Administrator requested an AAP Consultant review Mr. [REDACTED] file based on the failed validity tests and notified Mr. [REDACTED] of this decision on September 23, 2020. Doc. 228336. The Claims Administrator subsequently amended its request for AAP review on October 27, 2020 to also include an assessment of “discrepancies between the player’s reported activities and the overall CDR rating assessed by the provider.” Doc. 229889.

After correspondence between the Claims Administrator, the AAP, and Dr. [REDACTED], but not Dr. [REDACTED], both an AAP Consultant and an AAP Member concluded that Mr. [REDACTED] failed validity tests undermined the evidence of his cognitive decline and the sufficiency of documentation of functional impairment. Docs. 232375; 237478. The Claims Administrator denied Mr. [REDACTED] Claim on June 14, 2022. Doc. 265643. Mr. [REDACTED] timely appealed on June 15, 2022. Doc. 265675.

DISCUSSION

Mr. [REDACTED] appeals on several grounds. First, he argues that the Claims Administrator improperly referred his Claim to the AAP, which he claims is only permissible “when there are conflicting BAP diagnoses.” Doc. 265674 at 2 (cleaned up). Mr. [REDACTED] counsel raised the same contention in a Motion for Relief under Article XXVII of the Settlement Agreement, in which Mr. [REDACTED] is a named plaintiff. Judge Brody, denying that motion on December 27, 2022, concluded:

A BAP diagnosis is not an automatic rubber stamp for a Class Member to receive a monetary award. Rather, the BAP program is distinct from the claims review process, and BAP diagnosis is simply only one component of a successful Claim Package, which must be reviewed by the Claims Administrator . . . [T]he Claims Administrator may request AAP review of the medical records underlying a Claim Package in making a determination of whether a Class Member is entitled to receive a Monetary Award, regardless of whether there are conflicting diagnoses.

Doc. 275215 at 6.² I follow the District Court and conclude that Mr. [REDACTED] has not established that the Claims Administrator erred by asking for AAP input on his Claim.³

passed that test and instead failed the ACS-WMS-IV Logical Memory Recognition test, which Dr. [REDACTED] missed. Docs. 228182; 232375.

² ECF No. 11931, Explanation and Order Denying 11813 Motion for Relief (December 27, 2022).

³ See also Special Master Ruling on Stroke Definition, at 8 (Apr. 25, 2022), https://www.nflconcussionsettlement.com/Docs/stroke_sm_2.pdf (concluding that AAP review did not violate the Settlement Agreement).

Mr. [REDACTED] next argues that his testing was valid and that the AAP Member who reviewed his claim “completely ignored the results and determination of the BAP neuropsychologist who found that Mr. [REDACTED] results were valid and he passed all *Slick* criteria.” Doc. 265674 at 4 (cleaned up). Dr. [REDACTED] did report that Mr. [REDACTED] had met the *Slick* criteria. Doc. 228182. But flaws in Dr. [REDACTED] review illustrate why AAP review of BAP diagnoses is sometimes necessary to ensure diagnostic accuracy.

In fact, rather than ignoring Dr. [REDACTED] determination, the AAP Member appropriately reviewed it after the Claims Administrator noted that Mr. [REDACTED] had failed two of the embedded and standalone performance validity tests.⁴ The AAPC specifically found that Mr. [REDACTED] failed both the TOMM and the ACS-WMS-IV Logical Memory Recognition test. His score on the latter, 15/30, “falls below the 5% base-rate score and is an unambiguous ‘fail.’” Doc. 232375 at 1.

Over the course of two reviews, first by an AAP Consultant on January 28, 2021 and subsequently by an AAP Member on August 8, 2021, the Program’s experts considered Dr. [REDACTED] analysis and concluded that it was simply incorrect. The initial AAPC report documents several inaccuracies in Dr. [REDACTED] *Slick* checklist:

A Slick Criteria Checklist for “possible malingered neurocognitive disorder” is included in Dr. [REDACTED] report. None of the nine criteria is reported as present. However, the evidence clearly requires that the following criteria are met:

#1: Suboptimal scores on performance validity tests (patient failed TOMM and ACS Logical Memory Recognition);

#2: Pattern of test performance discrepant from accepted models of CNS function (patient performed below chance on BDAE Complex Ideational Material; this is a sure sign of withholding correct answers);

#3: Discrepancy between test data and observed behavior (language scores were in the range of severe impairment, yet there was no indication of communication problem during interview; very severe psychopathology is indicated by MMPI-RF, yet patient was calm, cogent, and entirely symptom-free during interview; Dr. [REDACTED] noted that patient was well groomed, yet rated him CDR = 2 in Personal Care);

#7: Self-reported symptoms discrepant with known patterns of brain function (five of the eight MMPI-RF validity scales are clinically elevated, with three above T=90 [>99.99th percentile]; the evidence for fabricated or at least exaggerated symptoms is extremely strong);

⁴ The Settlement states that “a Retired NFL Football Player’s failure on two or more effort tests may result in the Retired NFL Football Player’s test results being subjected to independent review, or result in a need for supplemental testing of the Retired NFL Football Player.” Settlement Agreement, Exhibit 2.

#8: Self-reported symptoms discrepant with behavioral observations (patient complained of language and memory impairment, yet Dr. [REDACTED] notes that he “is alert and fully oriented with normal speech, language, and memory function”).

Doc. 232375 (cleaned up).

Mr. [REDACTED] failed validity measures undermine the neuropsychological testing that Dr. [REDACTED] used as “evidence of severe cognitive decline... in two or more cognitive domains.”⁵ The AAP Member ultimately concurred with the AAPC’s determination that Mr. [REDACTED] neurocognitive assessment failed the Settlement’s validity criteria requirements. Doc. 237478. Mr. [REDACTED] failed validity measures consequently preclude him from meeting the Settlement criteria for Level 2 Neurocognitive Impairment. He has therefore not offered clear and convincing evidence of error in the Claims Administrator’s denial of his Claim.

CONCLUSION

Because Mr. [REDACTED] did not show by clear and convincing evidence that the Claims Administrator erred, I deny his appeal.

January 12, 2023



David A. Hoffman, Special Master

⁵ Settlement Agreement, Exhibit A-1. Dr. [REDACTED] submitted responsive documentation of Mr. [REDACTED] functional impairment to his determination of CDR scores of 2.0 in Personal Care, Home & Hobbies, and Community Affairs on June 23, 2021. Doc. 236385. Dr. [REDACTED] addendum assesses Mr. [REDACTED] functional impairment based on his self-report and his fiancée’s third-party affidavit rather than a structured CDR assessment, which the subsequent AAP Member notes “removes the objective CDR components that might protect against overreporting.” Doc. 237478. However, as the AAP Member indicates, “the Settlement does not specify how strictly a diagnosing physician must adhere to CDR instructions in making these assessments.” *Id.* I do not rule on this issue as it is unnecessary to resolve the Appeal.