

**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 CLAIM
DETERMINATION FOR SETTLEMENT
CLASS MEMBER [REDACTED]

INTRODUCTION

[REDACTED], a Retired NFL Football Player and Class Member under the Amended Class Action Settlement Agreement, filed a Claim for benefits based on a Qualifying Diagnosis of Level 2 Neurocognitive Impairment. His Claim lacked supporting neuropsychological testing. Dr. [REDACTED], his diagnosing neurologist, determined in late 2017 that such evaluation was unnecessary because of the severity of Mr. [REDACTED]'s impairment, providing a cursory explanation.

The Claims Administrator has since denied that Claim multiple times after a thorough and careful review process. This Opinion resolves (and denies) Mr. [REDACTED]'s third Appeal, of the latest denial.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. [REDACTED] first submitted his Claim for benefits based on a Diagnosis of Level 2 Neurocognitive Impairment on February 18, 2019. Doc. 188665. A December 6, 2017 evaluation by MAF neurologist [REDACTED] forms the basis for the Claim. Doc. 187253. Mr. [REDACTED] did not complete neuropsychological testing; Dr. [REDACTED] determined that "neuropsychological testing was unnecessary due to the patient's very severe and worsening neurocognitive impairment." *Id.* at 4.¹

¹ As the NFL Parties note, Dr. [REDACTED], who is no longer a MAF-approved physician, repeatedly justified the absence of neuropsychological testing for reasons later rejected by independent reviewers. Some of those opinions are unpublished. *See, e.g.*, Special Master's Decision, SPID [REDACTED] at 3 ("Dr. [REDACTED]'s statement that the apparent severity of Claimant's impairment obviated the need for additional [neuro]psychological evaluation was 'grossly at odds' with Claimant's continued employment and the results of Claimant's [prior] testing. . . . The AAPC also concluded that Dr. [REDACTED] demonstrated a 'lack of competency' in CDR scoring."); Special Master's Decision, SPID [REDACTED] at 3 ("The AAPC noted that the Mini-Mental State Exam score of 24 reflects only mild impairment, and that [D]r. [REDACTED]'s dismissal of neuropsychological testing was 'not medically justified' and may reflect an attempt to 'circumvent' the required diagnostic criteria."). But others are available to the Class on the Program's webpage. *See, e.g.*, Special Master Ruling on Qualified MAF Physician's Certification that Testing is Medically Unnecessary,

Dr. [REDACTED]'s notes from the evaluation do not include his reasoning for not referring Mr. [REDACTED] to a neuropsychologist, but do document his observations of Mr. [REDACTED]'s impairment:

Mr. [REDACTED] is also concerned because he has had a gradual decline in his overall functioning that has continued to worsen steadily. He does not drive very much. He tends to get lost. He states that a typical day for him will involve a poor night of sleep followed by attempts to work out during the daytime and a feeling of inability to accomplish anything. His mood has been depressed. He has increasing anxiety on a daily basis. He has given up driving for the most part. He does not want to talk to anyone and he feels anxious all the time.

His main complaints include significant loss of memory and lapses in judgement. He is very concerned because he tends to become very upset easily and he acts out. He becomes frustrated when he cannot remember the names of people that he should know. He has given up many of the social interactions that he had become used to carry out. For example, he does not go out with friends anymore and prefers not to socialize.

Doc. 187433 at 2. Dr. [REDACTED] also administered a Mini Mental Status Examination (MMSE) on which Mr. [REDACTED] scored 23/30 and reviewed a third-party affidavit from Mr. [REDACTED]'s friend [REDACTED]. *Id.*; Doc. 188514. Dr. [REDACTED] ultimately assigned Mr. [REDACTED] CDR scores of 2.0 in Community Affairs, Home & Hobbies, and Personal Care. Doc. 187433.

The Claims Administrator denied Mr. [REDACTED]'s Claim on November 14, 2019, based on the absence of neuropsychological testing. Doc. 217200. The Claims Administrator wrote that Dr. [REDACTED]'s conclusion that it was unnecessary was "not supported by the cognitive/functional abilities documented in the notes" and that "the MMSE score of 23 out of 30 recorded by Dr. [REDACTED] is higher than would be typical for a dementia so severe that a neuropsychological assessment would be either unable to be performed or unnecessary." *Id.* at 1. After multiple extensions, Mr. [REDACTED] appealed that denial on December 1, 2020.

I remanded Mr. [REDACTED]'s first Appeal for review by an AAPC. The Consultant agreed with the Claims Administrator's reasoning for denial:

1. The absence of neuropsychological testing represents a major deviation from the Settlement Program protocol. There is no convincing evidence that the patient is so cognitively impaired and/or so psychiatrically disturbed that testing would not yield valid data. Patients with MMSE scores much lower than 23 are almost always capable of producing valid test results.

at 6 (May 27, 2020), https://www.nflconcussionsettlement.com/Docs/physician_certification_testing_sm.pdf ("In this case, Dr. [REDACTED]'s explanation did not discuss aspects of the record which suggested the utility of testing, and rested on a CDR score that on its own terms was not generally consistent with severe impairment. Given these flaws, the Claims Administrator decided that the Certification was not reasonably determined.").

2. Neuropsychological assessment, with the inclusion of performance and symptom validity tests, is essential in this case. The patient's youth and the absence of objective evidence of cognitive/functional decline (e.g., fired from jobs, documented driving mishaps) makes it epidemiologically unlikely that he has a dementia syndrome of moderate severity.

3. Although Ms. [REDACTED] is not a spouse or family member of the patient, if she is his domestic partner or girlfriend, she may be biased in her reporting of his impairment.

Doc. 231717. The AAPC recommended that Mr. [REDACTED] resolve this issue by completing a neuropsychological evaluation. *Id.* The Claims Administrator denied Mr. [REDACTED]'s Claim for a second time on March 18, 2021. Doc. 233858.

Mr. [REDACTED] appealed the denial again, after several extensions, on August 31, 2021, this time including a letter from Dr. [REDACTED] offering his reasoning for not referring Mr. [REDACTED] to neuropsychological testing. Docs. 238052; 238053. In this late-arriving letter, Dr. [REDACTED] explained that Mr. [REDACTED] had been "visibly distraught" and hit him with a "mean left hook" during the exam. These behaviors, combined with frontal lobe damage visible in an MRI from December 2017, led him to conclude that "Mr. [REDACTED]'s psychiatric issues, coupled with his anger and agitation would prevent any viably successful completion or valid outcomes of neuropsychological testing of any kind." Doc. 238053 at 3. He disagreed with the AAPC's conclusion that Mr. [REDACTED]'s MMSE scores reflect capacity to complete neuropsychological testing: "I... remain in steadfast disagreement in the generalized medical theory that patients with much lower MMSE scores are always capable of producing valid test results." *Id.* at 5. Mr. [REDACTED] also submitted an affidavit from Ms. [REDACTED] clarifying that their relationship was not romantic. Doc. 238053.

I remanded to the AAPC (again) so that they might consider this new evidence. Doc. 238272. The AAPC concluded on September 25, 2021, that the new submissions did not resolve the problems with Mr. [REDACTED]'s Claim:

Dr. [REDACTED] dismisses research-supported facts regarding dementia as "hypothesized epidemiological theories" and "generalized medical theory." His naivete is both surprising and disappointing. Nonetheless, his description and documentation of the patient's neuropsychiatric symptoms are not at all contested. Neither is it contested that this former player has a neuropsychiatric disorder. What is being questioned is whether he has a dementia syndrome that meets criteria for Level 2 Neurocognitive Impairment as codified in the Settlement Agreement. The player's anger and agitation are not legitimate reasons to not even attempt neuropsychological testing, a source of critically important diagnostic information. My suggestion is that we get this patient appropriate psychiatric care (including stabilization on medications, if appropriate) and then let a board-certified neuropsychologist attempt to assess him. If it is indeed impossible to get valid cognitive performance data, we will know very quickly.

Doc. 238634 at 2. The Claims Administrator denied Mr. ██████'s Claim for a third time on October 28, 2021; the instant Appeal, filed on November 11, 2022, after several extensions Mr. ██████ requested, followed. Docs. 239640; 273586.

DISCUSSION

Appealing the October 28, 2021 denial, Mr. ██████ contests the Claims Administrator's conclusion that his Claim did not fulfill the Injury Definition's criteria for Level 2 Neurocognitive Impairment. Doc. 273586. The denial focused both on criterion (ii), which requires evidence of severe cognitive decline in accordance with the standardized neuropsychological protocol, and criterion (iii), which requires documentation of functional impairment generally consistent with scores of 2.0 for the CDR categories of Community Affairs, Home & Hobbies, and Personal Care. Doc. 239640. I will examine each criterion in turn.

Mr. ██████'s Claim included no neuropsychological testing. That requirement can be waived only when "the diagnosing physician can certify that... [it] is medically unnecessary because the Retired NFL Football player's dementia is so severe."² I have written extensively about this provision of the Agreement:

Ordinarily, deference to MAF Physicians' certification should be the rule, given those clinicians' eminence and training, as well as their personal evaluation of the player-claimant. The Claims Administrator does, however, have the obligation to determine if the Certification was "reasonably determined"—a standard fashioned by the Parties which I adopt in this Appeal. "Reasonably determined" means that the clinician's choices are cognizable as an application of the Settlement's narrow ("unless") exception to the testing requirement, i.e., that the impairment was "so severe" that testing is "medically unnecessary." Another way to put this is that it was reasonable to have concluded that the testing would not generate valid results.

Under the Settlement, particularly Section 8.6(b), the Claims Administrator has the authority to verify the sufficiency of both prongs of that reasonableness inquiry: How severe was the impairment; and, Why does the impairment's severity make the testing unnecessary? That is not the same as saying that the Claims Administrator's supervisory authority is plenary. The Parties have interpreted the agreement to mean that the Claims Administrator cannot disagree with the clinician's Certification merely because it would have made a different choice. The clinician's articulated reasons for certifying must be unreasonable. But the Claims Administrator possesses ample authority to require a complete explanation, and to ensure it is internally consistent.³

² Settlement Agreement, Exhibit 1, Section 2(b).

³ Special Master Ruling on Qualified MAF Physician's Certification that Testing is Medically Unnecessary, at 3–4 (May 27, 2020), https://www.nflconcussionsettlement.com/Docs/physician_certification_testing_sm.pdf (emphasis in original); see also *Frequently Asked questions: FAQ #363* (How much deference does the Claims

Here, Dr. ██████'s contemporaneous records did not suggest that Mr. ██████'s impairment satisfies the severity requirement. His later-arriving letters somewhat clarify his reasoning but do not link his doubts about Mr. ██████'s ability to complete neuropsychological testing to the severity of his dementia. Docs. 187253; 238053.⁴ Instead, Dr. ██████ cites Mr. ██████'s "psychiatric issues... anger and agitation." Doc. 238053 at 3. I do not trivialize the severity of Mr. ██████'s psychiatric concerns or the agitation he experienced during his evaluation. But the Settlement demands that Dr. ██████ document the severity of Mr. ██████'s dementia specifically, which his report instead undermines.

Mr. ██████ scored a 23/30 on the MMSE, and the AAPC has asserted that "[p]atients with MMSE scores much lower than 23 are almost always capable of producing valid test results." Doc. 231717. I will follow their expert medical evaluation of that fact, as well as the entire file, in concluding that Mr. ██████'s dementia is not so profound as to preclude neuropsychological testing. The Claims Administrator therefore correctly decided that Dr. ██████'s conclusion was not "reasonably determined."⁵

Mr. ██████ completed an evaluation with BAP neuropsychologist ██████ on August 30, 2022. Doc. 271647. His latest Appeal argues that this testing validates Dr. ██████'s original assertion that he would be unable to achieve "valid outcomes" on neuropsychological testing. Docs. 273586; 238053 at 3. Dr. ██████ concluded that Mr. ██████ triggered five out of the nine *Slick* criteria and that his neuropsychological testing was consequently invalid. She summarized:

The player demonstrated inconsistent effort and his overall performance was lower than expected. Again, Depression, recent substance use, and less than optimal effort all are factors on this evaluation. Symptom exaggeration was likely, though frank malingering was not considered an issue. He gave up easily on testing, but seemed to be functioning daily at a much higher level than Level 2 impairment, which is moderate to severe dementia. Effort issues clouded the level of true impairment, as he is independent in ADLs, which is not consistent with Level 2 impairment.

Doc. 271647 at 8. Mr. ██████ contends that the invalidity of his neuropsychological testing confirms Dr. ██████'s claim that the testing was unnecessary in the first place. But Dr. ██████'s conclusions about validity are not linked to the severity of Mr. ██████'s cognitive impairment. Nor did they align with Dr. ██████'s assertion that Mr. ██████'s psychiatric symptoms would prevent him from completing testing. Instead, she determined that Mr. ██████'s neuropsychological testing was invalid because he "demonstrated inconsistent effort." Doc. 271647 at 8. The fact that

Administrator give to the Diagnosing Physician's determination that neuropsychological testing is medically unnecessary?), NFL Concussion Settlement, <https://www.nflconcussionsettlement.com>.

⁴ It is also true, as the NFL Parties point out, that the later-arriving letters are due no special deference. Special Master Ruling on Neuropsychological Testing: Slick Criteria and Validity Testing, at 11 (Oct. 21, 2020), https://www.nflconcussionsettlement.com/Docs/slick_validity_testing_sm.pdf.

⁵ Special Master Ruling on Qualified MAF Physician's Certification that Testing is Medically Unnecessary, *supra* note 3.

the neuropsychological testing protocol served its intended purpose—detecting inconsistent, insufficient, task engagement—does not support the conclusion that testing could not have been completed at all.⁶

For these reasons, Mr. [REDACTED] has not surmounted his burden of showing by clear and convincing evidence that the Claims Administrator’s decision about criterion ii was in error.

Separately, Mr. [REDACTED] argues that documentation of his functional impairment is generally consistent with the CDR scores required for his Diagnosis: scores of 2.0 in the categories of Community Affairs, Home & Hobbies, and Personal Care. In its denial, the Claims Administrator noted that Dr. [REDACTED]’s initial CDR worksheet would support scores of 1.0 for Community Affairs and Personal Care. Doc. 239640. The Appeal again relies on supplemental reporting from Dr. [REDACTED], which, over several submissions, has become more articulated.⁷

But Dr. [REDACTED]’s even more recent neuropsychological report for this Appeal deepens the inconsistencies raised by the Claims Administrator in its denial. While describing discrepancy between test data and Mr. [REDACTED]’s documented background history, Dr. [REDACTED] noted that he “has worked two jobs in the recent past, but is now able to maintain one job” and that he “reported independence in his ability to manage ADLs, only stating he does not drive often due to anxiety.” Doc. 271647 at 7. She concluded that Mr. [REDACTED] “seemed to be functioning daily at a much higher level than Level 2 impairment.” *Id.* at 8. I cannot conclude that the record provides clear and convincing evidence of error in the Claims Administrator’s October 2021 denial on the basis of functional impairment.

CONCLUSION

Mr. [REDACTED] has not offered clear and convincing evidence that the Claims Administrator erred on either of the grounds supporting the denial. I deny his Appeal.

Date: March 29, 2023



David A. Hoffman, Special Master

⁶ There are, as I have previously held, “a host of reasons why a person may not provide full task engagement,” including the mood disorder and substance use Dr. [REDACTED] cites in her report. Special Master Ruling on Date of Diagnosis (Nov. 1, 2022). https://www.nflconcussionsettlement.com/Docs/diagnosis_date_SM.pdf. There is no indication that Mr. [REDACTED] was behaving disingenuously in his evaluation; as Dr. [REDACTED] emphasizes, “frank malingering was not considered an issue.” Doc. 271647 at 8.

⁷ The contemporaneous report described Mr. [REDACTED] as sometimes carrying out activities outside the home and occasionally driving, dressing himself with some difficulty, grooming with prompting, and eating with a spoon. Doc. 239640. In subsequent letters on November 23, 2020, and April 19, 2021, Dr. [REDACTED], noting that Mr. [REDACTED] no longer goes to church, visits friends and family, or attends many social events, observed that he “has to be taken/accompanied to social functions outside the home,” and “needs prompting and aid dressing, washing, and grooming.” Doc. 230634 at 24. Dr. [REDACTED] characterizes discrepancies between Mr. [REDACTED]’s documented functional impairment and expectations for the CDR categories as “ever so slightly varying observations of degrees of CDR decline.” *Id.*