

IN RE: NATIONAL FOOTBALL LEAGUE
PLAYERS' CONCUSSION INJURY
LITIGATION

MDL No. 2323

THIS DOCUMENT RELATES TO:
APPEAL OF SETTLEMENT CLASS
MEMBER [REDACTED] [REDACTED] REGARDING
DENIAL OF MONETARY AWARD

Dr. [REDACTED] saw Mr. [REDACTED] for an initial evaluation on May 25, 2021. Doc. 269175. Rating Mr. [REDACTED] as a 2.0 on the CDR scale, Dr. [REDACTED] concluded that Mr. [REDACTED] “clearly has a cognitive disorder, but his data needs to be updated since he is worse since the last one was done.” Doc. 269175, at 4. Dr. [REDACTED] asked Mr. [REDACTED] to complete another neuropsychological examination and deferred making a Qualifying Diagnosis until he could review an updated neuropsychological evaluation. Docs. 269175; 237571.

Dr. [REDACTED] conducted that neuropsychological assessment on August 30, 2021. Doc. 242354. After a clinical interview with Mr. [REDACTED] and his girlfriend, [REDACTED], and a review of Mr. [REDACTED]'s medical records, Dr. [REDACTED] recommended that Mr. [REDACTED] follow up with a mental health treatment team. *Id.* He concluded that Mr. [REDACTED] suffered from "a major depressive disorder, recurrent severe without psychotic features." *Id.* at 7. On Mr. [REDACTED]'s performance validity, Dr. [REDACTED] noted:

Evaluation of embedded and free-standing performance validity indices and the criteria suggested by Slick, Sherman, and Iverson (1999; i.e., the "Slick Criteria"), suggests Mr. [REDACTED] put forth suboptimal effort including 4 of 6 free-standing and 4 of 7 embedded measures. As such the following results are likely an underrepresentation of his true cognitive abilities.

Doc. 242354, at 5.

Dr. [REDACTED] also determined that Mr. [REDACTED] had no impairment in any of the five cognitive domains. *Id.* at 6. Accordingly, he concluded that Mr. [REDACTED]'s testing was inconsistent with the Injury Definitions. *Id.*

Dr. [REDACTED], learning of these results, expressed an inability to reconcile them with his own findings in his correspondence with the Claims Administrator on October 21, 2021. Doc. 269175. Reiterating that Mr. [REDACTED] had Level 2 Neurocognitive Impairment, Dr. [REDACTED] emphasized that his own neurological testing pointed to "severe memory impairment ... that likely is due to concussions in the past, and that has destroyed any semblance of a normal life." *Id.* at 2.

Presumably due to (but not evidencing) this disagreement, Dr. [REDACTED] wrote on the MAF Diagnosing Physician Certification Form that a neuropsychologist had not assisted him in rendering Mr. [REDACTED]'s Diagnosis. Doc. 242351. He explained that Mr. [REDACTED] "went to one and I read the report but it didn't help." *Id.* at 2. Later in the Form, Dr. [REDACTED] declined to specify whether the neuropsychological testing or his medical evaluation of Mr. [REDACTED] differed from the BAP diagnostic criteria in any of the specified ways noted on the Form. *Id.* at 4. Instead, he offered an explanation based on his medical judgment and the medical supporting evidence on why Mr. [REDACTED]'s Level 2 Neurocognitive Diagnosis is "generally consistent" with the BAP diagnostic criteria, noting:

Patient was cognitively impaired, severe. He has poor judgment in most instances. He cannot function independently outside home and can be taken out of home but not go by himself. He only has preserved simple chores. He requires assistance for much personal care and is incontinent. He does not have hobbies or community affairs. He may be disoriented to time or geographic relationships.

Doc. 242351, at 4.

Mr. ■ filed a Claim for Level 2 Neurocognitive Impairment, relying on Dr. ■'s Diagnosis. Doc. 242358.

Under the Court's Race Norming Order,¹ Mr. ■'s neuropsychological test results were rescored before they were evaluated by the Claims Administrator.² That rescoring yielded an estimated impairment level consistent with Level 1.5 Impairment in the Complex Attention and Executive Function domains. Doc. 272448.

The Claims Administrator then referred Mr. ■'s file to the Appeals Advisory Panel (AAP). The AAP member reviewing the file sought input from an AAP Consultant because Dr. ■ indicated on the MAF Diagnosing Physician Certification Form that a new neuropsychological test was not needed due to the severity of Mr. ■'s cognitive decline. Doc. 272445. The Consultant, noting that "[t]he option to forgo testing is reserved for those whose cognitive and functional impairments are so profound that no meaningful information would be provided (e.g., those patients in nursing homes)," denied that testing was unnecessary. Doc. 243097, at 2. The Consultant further concluded that Dr. ■'s evaluation was "generally consistent with the requirements of the Settlement Program" and showed that Mr. ■ did not meet the standards for a Qualifying Diagnosis. *Id.* at 2.

Accordingly, Mr. ■'s Claim was denied on October 28, 2022. Doc. 272445. He submitted an appeal of the denial of his Monetary Award Claim on December 12, 2022, after an extension to the original November 28, 2022 deadline. Doc. 274464.

I asked for additional review from the AAP.

DISCUSSION

The Claims Administrator concluded that evidence in Mr. ■'s Claim did not satisfy the second and third criteria for Level 2 Neurocognitive Impairment. Doc. 272445. On appeal, Mr. ■ must show by clear and convincing evidence that these findings were in error.

This is not a close case. To be sure, I asked a neutral expert to evaluate Mr. ■'s arguments on appeal. The AAPC's summary is frank and to the point:

I am unsure why there is any debate in this case. The neuropsychological examiner in this case clearly documents his professional opinion that the player's neuropsychological examination is not valid and therefore provides no evidence to support the player's claim. This is evident in both the performance validity and impressions sections of the neuropsychologist's report. The neurologist in this case

¹ ECF No. 11648.

² Mr. ■'s medical file describes him as White. Doc. 242354, at 6. But all neuropsychological testing under review at the time the Race Norming order issued were subject to the New Method of adjusting raw scores. Here, because Mr. ■'s performance on the tests was invalid, there is no significance to any increase or decrease in the adjusted scores.

shouldn't 'over-rule' his or her own consulting neuropsychologist expertise in neuropsychology.

Further it is not clear on what basis the neurologist argues that his 'own testing' documents severe memory impairment when own mental status exam documents intact orientation, problem solving and registration of 3/3 items. It is perhaps based on 0/3 recall on this MSE, hardly a level of rigorous evaluation comparable to the extensive neuropsychological evaluation. Further, the explanation that the player's language and memory problems led to his poor PVT tests ignores that generally his language and memory scores on testing were within the average to below average range not severely impaired and the neurologist himself documents intact naming, repetition, comprehension and reading. Does the neurologist not believe his own examination?

The attorney's protestation that the player only showed suboptimal effort is counterproductive to the claimant because the relevant standard is not malingering but rather adequate effort.

Doc. 279323 (breaks added).

That is, no valid testing supports the Claim. That requirement can be waived only for diagnoses of Level 2 Neurocognitive Impairment made outside the BAP when "the diagnosing physician can certify that... [it] is medically unnecessary because the Retired NFL Football player's dementia is so severe."³ As I have previously written:

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

³ Settlement Agreement, Exhibit 1, Section 2(b).

Administrator possesses ample authority to require a complete explanation, and to ensure it is internally consistent.⁴

Dr. [REDACTED]' contemporaneous explanations do not come close to meeting this standard. Dr. [REDACTED] expressed concern about Mr. [REDACTED]'s cognitive decline and specifically for his severe memory impairment. Doc. 269175. He also noted that Dr. [REDACTED]'s testing did not assist him in making the Qualifying Diagnosis. Doc. 242351, at 2. But he provided no explanation of why the invalid testing demonstrated that Mr. [REDACTED]'s impairment was so severe to make it unnecessary. Invalid testing—whether indicating insufficient effort or malingering—does not demonstrate cognitive loss. Because Dr. [REDACTED] offered neither an explanation for Mr. [REDACTED]'s invalid neuropsychological testing nor an adequate rationale for setting his neuropsychological testing aside entirely, the Claims Administrator correctly determined that Mr. [REDACTED]'s Claim must fail on the basis of the absence of valid test scores supporting it.

Dr. [REDACTED]' justifications for his conclusions on Mr. [REDACTED]'s functional impairment are also inconsistent with the contemporaneous record. Dr. [REDACTED] reported CDR scores of 2.0 in Community Affairs and Home & Hobbies and 3.0 in Personal Care. Doc. 236005. But the Claims Administrator identified specific contemporaneous information in the record that conflicts with those findings. Doc. 272445. Dr. [REDACTED] noted that at the time of his initial evaluation, Mr. [REDACTED] did not drive. Meanwhile, Mr. [REDACTED]'s girlfriend, [REDACTED], reported in her statement she did “most” of the driving because the activity made Mr. [REDACTED] anxious. Docs. 269175; 236006. Ms. [REDACTED] similarly indicated that Mr. [REDACTED] continued to work as a golf ranger, drove a golf cart (though, as Dr. [REDACTED] notes, with GPS assistance) and that he attempted to play nine holes of golf on a weekly basis. Doc. 236006. Dr. [REDACTED] defended his conclusions in later correspondence with the Claims Administrator but did not cure these inconsistencies. Doc. 269175. The Claims Administrator correctly concluded that this information not generally consistent with a CDR score of 2.0 in Community Affairs, which is appropriate only when “there is no pretense of independent function outside the home.” Doc. 236005. On appeal, Mr. [REDACTED] has not offered clear and convincing evidence that the Claims Administrator's conclusion was in error.⁵ Doc. 274464.

⁴ 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 Administrator give to the Diagnosing Physician's determination that neuropsychological testing is medically unnecessary?), NFL Concussion Settlement, <https://www.nflconcussionsettlement.com>.

⁵ Mr. [REDACTED]'s Appeal claims that Claims Administrator incorrectly stated in its denial that Dr. [REDACTED] did not provide individual CDR scores in the categories of Community Affairs, Home & Hobbies, and Personal Care when in fact he had submitted his completed CDR worksheet. Doc. 274464. Dr. [REDACTED] did submit the worksheet. Doc. 236005. But the presence of the CDR worksheet in the record does not demonstrate the incorrectness of the Claims Administrator's conclusion, which is that Dr. [REDACTED]' asserted CDR scores were inconsistent with Mr. [REDACTED]'s reported functioning.

CONCLUSION

Because Mr. ■ did not show by clear and convincing evidence that the Claims Administrator erred in denying his Claim, I deny his Appeal.

Date: April 22, 2023



David A. Hoffman, Special Master