

**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 SETTLEMENT CLASS
MEMBER [REDACTED] REGARDING
DENIAL OF MONETARY AWARD

INTRODUCTION

In 2017, [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. The Claims Administrator ultimately denied the Claim.

Mr. [REDACTED] appeals, seeking to show by clear and convincing evidence, that the Claims Administrator was wrong to deny his Claim.¹ I remand for further auditing.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2017, Mr. [REDACTED] filed a Claim for benefits based on a Qualifying Diagnosis of Level 2 Neurocognitive Impairment. Doc. 150064. Dr. [REDACTED], a licensed neuropsychologist, carried out his neuropsychological testing on October 16, 2017. Doc. 146395. Dr. [REDACTED]—a neurologist who was, at the time of Mr. [REDACTED] examination, a Qualified MAF Physician—certified the Diagnosis on the same date. Doc. 146396. In his report, Dr. [REDACTED] mentioned having reviewed a variety of Mr. [REDACTED] prior medical records, including the results of neuropsychological testing performed by Dr. [REDACTED] on November 29, 2016. *Id.*

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 “well-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).

On March 13, 2018, the Claims Administrator provided notice of multiple deficiencies in the available medical documentation. Doc. 161415. Among other things, it requested submission of the Clinical Dementia Rating (CDR) Worksheet that Dr. █████ used to assess Mr. █████ impairment—a required part of the neurological examination—as well as records from the neuropsychological testing performed in 2016 by Dr. █████ *Id.* Mr. █████ provided the requested documentation. Docs. 162048; 166330. On March 30, 2018, the Claims Administrator notified Mr. █████ that it had determined he was entitled to a Monetary Award. Doc. 164766.

The NFL Parties timely appealed, asserting that the record contained clear and convincing evidence that Mr. █████ functional impairment was not generally consistent with a CDR score of 2—and, thus, that Mr. █████ failed to satisfy the Settlement Agreement’s requirements for Level 2 Neurocognitive Impairment. Doc. 169561. In support of their Appeal, the NFL Parties submitted evidence from social media and several websites.

On August 2, 2018, Special Master Pritchett denied the NFL Parties’ Appeal in a nonprecedential ruling, explaining: “The Qualified MAF Physician rendered the diagnosis on this claim in compliance with the applicable provisions of the Settlement Agreement, and the record on this appeal does not show that such diagnosis was clearly and convincingly wrong.” Doc. 181333.

In addition to appealing Mr. █████ Claim determination, the NFL Parties sent a letter to the Special Master on June 28, 2018, requesting stay of payment and re-review of all appeals that had not already been reviewed by the AAP/AAPC and “turn on technical, medical grounds.” Doc. 189698. Special Master Pritchett denied both the NFL Parties’ request to compel AAP/AAPC review and the request for stay of payment on September 28, 2018. *Id.*

The NFL Parties filed an objection with the district court on October 29, 2018, seeking reversal of Special Master Pritchett’s decision declining to require review by the AAP/AAPC on claim appeals. Doc. 189660. Specifically, they asserted that the Special Master’s practice of not consulting with AAP Members and Consultants in deciding these seventeen Claim Appeals constituted an abuse of discretion. *Id.* Additionally, that same day, the NFL Parties sent a letter to the Court requesting a stay of payment on seventeen Claim awards—including Mr. █████ pending the outcome of two appeals (one being the Appeal of Special Master Pritchett’s AAP/AAPC decision), which they asserted would “effectively be mooted . . . if the [seventeen] claims are paid before the court has ruled.” Doc. 189680.

In an Order issued on April 12, 2019, the Court denied the NFL Parties’ objection and adopted the Special Master’s conclusions in the September 28, 2018 Ruling.² However, the Court determined that the claims arising from Qualifying Diagnoses by MAF Physicians—which includes Mr. █████—would benefit from application of the revised Rules Governing MAF

² Order on AAP/AAPC Consultation by Special Master (Apr. 12, 2019), https://www.nflconcussionsettlement.com/-Docs/order_AAP_AAPC_consultation.pdf.

Physicians, which had been adopted by the Court just one day prior.³ The Court remanded this subset of Claims to the Claims Administrator.

The Claims Administrator subsequently referred Mr. ██████ Claim to the AAP Leadership Council for review.⁴ The reviewing AAP physician then requested assistance from an AAP Consultant in evaluating the neuropsychological testing performed in support of Mr. ██████ Claim. Doc. 209168. The Consultant, evaluating both the 2016 testing performed by Dr. ██████ as well as the 2017 testing by Dr. ██████ concluded that “the results of these two neuropsychological evaluations . . . do *not* satisfy the NFL Concussion Settlement Program’s Criteria for Level 2.0 Neurocognitive Impairment.” *Id.*

On August 7, 2019, adopting the AAP physician’s analysis, the Claims Administrator denied Mr. ██████ Claim, writing:

The Qualifying Diagnosis of Level 2 Neurocognitive Impairment was not made in a manner that is generally consistent with the Settlement Criteria. In his report, the diagnosing physician, Dr. ██████ notes concern for cognitive decline, including memory problems for a few years that are worsening, misplacing items, forgetting people’s names, forgetting appointments, forgetting chores, needing a family member to manage his household finances, needing to make lists, keep notes, and use reminders, and also getting lost. However, Dr. ██████ also reports continued activities that would not be generally consistent with the level of functional impairment required for the diagnosis, including continuing to work and drive.

Additionally, the neuropsychological assessments by Dr. ██████ on 11/29/16 and by Dr. ██████ on 10/16/17 do not support a diagnosis of Level 2 Neurocognitive Impairment due to issues with performance/symptom validity, Slick Criteria inconsistencies, and confounding effects from psychiatric illnesses, substance abuse, and insomnia. There were issues with both performance and symptom validity, including selective reporting of T-scores with Dr. ██████ not providing either raw scores or T-scores for any of the validity measures, and Dr. ██████ did not administer either the stand alone or the embedded validity measures recommended by the Settlement Battery except for the TOMM. Furthermore, the MMPI-2-RF profiles were invalid on both the testing by Dr. ██████ and the testing by Dr. ██████ with non-credible memory complaints identified by Dr. ██████. There were also inconsistent test scores between the two examinations suggestive of suboptimal effort. Additionally, there were Slick Criteria inconsistencies such as not needing to be accompanied to the testing evaluations despite Level 2 impairment, continued employment, being able to actively engage in community activities such as running

³ See Rules Governing Qualified MAF Physicians (Apr. 11, 2019), https://www.nflconcussionsettlement.com/-Docs/Rules_Qualified_MAF_Physicians.pdf.

⁴ Rule 23 of the Rules Governing Qualified MAF Physicians provides the Claims Administrator with discretion to request the AAP Leadership Council’s “advice and assistance on any medical issues arising in the monitoring of the work of Qualified MAF Physicians.”

with his wife, completing a 5k race, and being able to work, dine, and travel in the community independently. Also, Dr. [REDACTED] reported the Player received a telephone call during the testing and then left for several hours to deal with a family emergency, but Dr. [REDACTED] did not comment on the effects of this on the testing results. Based on the reported inconsistencies regarding the Player's CDR and functional impairment and questionable neuropsychological testing methods and results, the diagnosis of Level 2 Neurocognitive Impairment was not made in a manner that is generally consistent with the Settlement criteria.

Doc. 212496. Mr. [REDACTED] timely appealed. Docs. 213813; 214154. In support of his Appeal, Mr. [REDACTED] provided—among other exhibits—a written explanation from Dr. [REDACTED] addressing the criticisms raised by the AAP Consultant. Doc. 214155. In part, Dr. [REDACTED] clarified his reasoning for not providing raw scores or T-scores for the performance validity tests, writing:

My decision to omit raw scores from the performance validity tests is both *intentional* and *consistent* with the publishers of these tests and the recommendations set forth by multiple medicolegal experts within the field of clinical neuropsychology. Including raw scores from validity tests will lead to sharing of information and have a devastating impact both on the settlement and to the field of neuropsychology. With that being said, I understand the need to have scores independently verified and, after having expressed my concerns about including these scores, have worked with [the Claims Administrator] to submit them via a secure . . . site as needed. . . . Mr. [REDACTED] clearly passed all validity tests and I am confident that any reviewer of his scores will reach the same conclusion.

Id. On September 23, 2019, the Claims Administrator notified Mr. [REDACTED] that his Claim had been placed into audit, thereby putting the appeal proceedings on hold pending completion of the audit. Doc. 214427.

What happened next is best summarized by the Claims Administrator:

Section 10.3(b) of the Settlement Agreement directs Class Counsel, Counsel for the NFL Parties, and the Claims Administrator to “establish and implement procedures to detect and prevent fraudulent submissions to, and payments of fraudulent claims from, the Monetary Award Fund.” While implementing these adopted audit procedures, we made several observations that called into question veracity of documents submitted in support of the claim. Specifically, to support his position that his functional impairment is generally consistent with the diagnostic criteria for a CDR score of 2 in Community Affairs, Mr. [REDACTED] provided in his Appeal a letter from his purported former employer, [REDACTED], who explained that Mr. [REDACTED] was involuntarily terminated from employment on March 29, 2019 because he could not work independently. Docs. 214154; 214155. This termination letter followed a sworn third-party affidavit that Mr. [REDACTED] had prepared in support of Mr. [REDACTED] diagnosis, where he described himself as Mr. [REDACTED]

“employer/supervisor,” and explained his duties were “to help recruit physicians and IT professional.” Doc. 148208.

We found reasons to question authenticity of these documents and, accordingly, placed the claim into audit and sent a Notice of Audit of Claim on September 23, 2019, which stayed Mr. [REDACTED] Appeal. In audit, we interviewed various parties and obtained documents from third party independent sources, asked and received multiple responses from Mr. [REDACTED]. Our findings indicated that certain documents in Mr. [REDACTED] file related to his employment could be fabricated, also leading us to question veracity of any other statements in the file from the source (Mr. [REDACTED] of those documents.

We therefore informed Mr. [REDACTED] counsel that there was a reasonable basis to support a finding of misrepresentation and omission concerning Mr. [REDACTED] employment. We indicated that we intended to issue a Report of Adverse Finding in Audit, recommending that Mr. [REDACTED] claim be referred to the Special Masters for further proceedings under the Audit Rules. We reminded Ms. [REDACTED] that Mr. [REDACTED] could withdraw his claim at any time. Initially counsel for Mr. [REDACTED] indicated that the claim would be withdrawn but later informed us they did not plan to withdraw it.

We then discussed our audit findings regarding Mr. [REDACTED] claim with the Special Masters, who agreed that we would move forward with a Rule 15 Audit Report, or Mr. [REDACTED] counsel could withdraw the claim. We informed the firm of this on October 7, 2020, and during our call, Ms. [REDACTED] asked if they could instead submit a revised Appeal Statement that corrected the issues. We agreed that this was an option. On November 17, 2020, we received an email from Ms. [REDACTED] stating “Mr. [REDACTED] withdraws his claim of lost wages that was supported by his former employer.” Ms. [REDACTED] also asked if we needed for them to draft a new appeal brief. We replied that we did, and gave a 15-day deadline, of December 2, 2020, to submit it. On December 3, 2020, Ms. [REDACTED] uploaded an amended Appeal Statement and exhibits. Docs. 230731; 230732. This Appeal Statement did not reference or rely on the termination letter from Mr. [REDACTED] but we believed that it relied on the third-party affidavit from Mr. [REDACTED] that Dr. [REDACTED] relied upon in rendering his Qualifying Diagnosis. The amended Appeal Statement also referred to Mr. [REDACTED] as Mr. [REDACTED] former part-time employer and used the third-party affidavit.

As a result, we felt that the issues were not fully resolved. We shared our thoughts with the Special Masters and suggested informing Mr. [REDACTED] counsel that they must exclude any information or documentation from Mr. [REDACTED] from the appeal. The Special Masters agreed with our recommendation.

On December 9, 2020, we emailed the firm and gave it the opportunity to file a second, revised, Appeal Statement that did not rely on anything from Mr. [REDACTED] Doc. 235485. On December 23, 2020, the firm uploaded their second amended Appeal Statement and exhibits. Docs. 231438; 231439. We reviewed this amended statement and the exhibits and confirmed that it does not directly rely on Mr. [REDACTED] We did not inform the NFL Parties of these events, and to our knowledge they did not know of the issues with the first two Appeal Statements.

Doc. 235794.

On January 5, 2021, the Claims Administrator notified Mr. [REDACTED] that the audit had concluded without an adverse finding. Doc. 231542. The appeal proceedings then resumed, and the NFL Parties filed a brief in opposition to Mr. [REDACTED] Appeal in February. Doc. 232589. The NFL Parties' brief—consistent with the above memorandum—contained extensive discussion of Mr. [REDACTED] affidavits and their role in the case's disposition, but no discussion of the procedural events of the previous Fall.

In March, I requested that Dr. [REDACTED] submit the raw scores and T-scores for the performance validity tests from Mr. [REDACTED] examination on October 16, 2017, and that those scores be independently reviewed and verified by an AAP Consultant. Doc. 234086. A Consultant confirmed that the scores supported the validity of the assessment, and that overall, "the neuropsychology findings would support up to a level 2.0 [Diagnosis], dependent on the final functional (CDR) assessment." Doc. 234843. The Consultant was not privy to the post-Appeal procedural history.

I next asked the Parties to provide supplemental briefing on whether the evidence regarding Mr. [REDACTED] functional impairment was generally consistent with a CDR score of 1 in Community Affairs. Doc. 234924; Doc. 234925. The NFL Parties' supplemental briefing again discussed the [REDACTED] employment; Mr. [REDACTED] brief did not. Indeed, Mr. [REDACTED] supplemental brief implied that he had only one employer, although it appears to again reference the [REDACTED] affidavit:

At the time Mr. [REDACTED] was examined, he may have appeared normal to casual inspection to some, *even his full-time employer*, but he and those close to him noticed the functional changes and reported their concerns to the examining physicians, including providing the appropriate corroborative materials in the form of *Third Party Sworn Statements*. Those statements and physician reports, along with his subsequent termination and inability to regain employment ever since, all demonstrate evidence generally consistent with being unable to function independently at work, while still engaged in some work activities. Mr. [REDACTED] need not have lost his job before he was examined to meet criteria for a CDR Score of 1.

Doc. 234924 (emphasis added).

Late in the life of this Appeal, I focused on the role of Mr. [REDACTED] affidavit in the original Diagnosis. I then learned that the NFL Parties had not been made aware of the alleged deficiencies in the earlier briefing. This explained the seemingly confused state of the record on appeal. I asked the Claims Administrator to summarize the procedural history (memorialized above) and gave the Parties an opportunity to vet that summary.

DISCUSSION

Mr. [REDACTED] like several other recent Claimants, has faced a prolonged review process, precipitated in part by the NFL Parties' linked appeals of October 2018.⁵ A problem in many of these cases is the lack of detail in some of the underlying medical records, particularly those produced by Dr. [REDACTED].⁶ That problem recurs here. This Appeal has also produced a very concerning provisional finding in an audit. This is the second time this year that this firm—[REDACTED]—made submissions that the Claims Administrator flagged as concerning.⁷

The Claims Administrator, in offering Mr. [REDACTED] and his counsel the opportunity to file not one but two revised briefing statements, had a laudable purpose. It sought to allow the Claim to advance on appeal in an expeditious manner, perhaps believing that the issue of Mr. [REDACTED] employment with Mr. [REDACTED] and how that employment terminated, might not be ultimately material to the Claim's disposition.

The Claims Administrator informed me of its proposed resolution, and I acquiesced.

On further consideration, I have concluded that I erred. True, there are multiple grounds on which the Diagnosis rests, but a crucial one is the limited nature of Mr. [REDACTED] work with Mr. [REDACTED].⁸ Or at least that is what Mr. [REDACTED] original Appeal of September 2019 argued. In its briefing, Mr. [REDACTED] asserted that the evidence was generally consistent with a CDR of 2 for a number of reasons. The *first* was the [REDACTED] evidence:

⁵See, e.g., Special Master Ruling on Functional Impairment (Mar. 10, 2021), https://www.nflconcussionsettlement.com/Docs/functional_impairment_sm_2.pdf; Special Master Ruling on Neuropsychological testing: *Slick* Criteria and Validity Testing (Oct. 21, 2020), https://www.nflconcussionsettlement.com/Docs/slick_validity_testing_sm.pdf.

⁶Dr. [REDACTED] Diagnoses have resulted in no less than thirty-six appeals to date—out of ~360 resolved by the Special Masters to date. Considering that there are hundreds of physicians producing diagnoses in the Program, it is telling that a single doctor's diagnoses played a role in around *one of ten resolved Appeals*.

⁷See also Special Master Ruling on Functional Impairment (March 10, 2021), https://www.nflconcussionsettlement.com/Docs/functional_impairment_sm_2.pdf (noting the difficulties resulting from briefing which did not reflect the public record).

⁸Dr. [REDACTED] October 16, 2017, exam notes states that he has worked in “advertising, and physician recruiting part time.” Dr. [REDACTED] report of that same day states that “[REDACTED] reestablished employment within the business development industry where he has remained for the past eight months although he continues to struggle with completing tasks on time.” The December 11, 2017, affidavit of Mr. [REDACTED] describes Mr. [REDACTED] work in his organization physician recruiting, in a “non-traditional environment.” Doc. 148208. That affidavit was submitted as a part of Mr. [REDACTED] Claims package.

[T]he Third Party Affidavit provided by Mr. [REDACTED] now former employer, [REDACTED] [Doc 148208], demonstrates that Claimant's employment at the time he was diagnosed was fully dependent on benevolent supervision and special accommodations afforded to him by Mr. [REDACTED] ([REDACTED] Affidavit at 3.) Mr. [REDACTED] reported Mr. [REDACTED] would not be able to work in a traditional office setting and noted that it is only because he gave Mr. [REDACTED] the opportunity to work in a non-traditional environment and his relationship with his fiancée that Claimant's functionality has not drastically declined even further. (Id.) Without Mr. [REDACTED] constant supervision and support, including the fact that he personally hired Mr. [REDACTED] out of concern for his well-being in the first place, it is unlikely that Claimant would have been employed at all at the time he was examined. (Id.) In fact, despite Mr. [REDACTED] commendable efforts, Claimant was involuntarily terminated from his job on 3/29/19 solely because he was never able to reach their goal of working independently throughout his tenure with the company. (See [Doc. 214155,] Ex. C, [REDACTED] Letter of Explanation.) While Claimant's Qualifying Diagnosis was rendered before he was terminated, it is crucial to recognize his employment at the time he was examined was anything but independent. (Id.)

The Qualified MAF Physician reviewed the Third Party Affidavit of Mr. [REDACTED] as part of his evaluation and surely considered this important factor in making a determination that Claimant's employment, when viewed in context, was not inconsistent with a CDR score of 2 in Community Affairs as the AAP suggests, but rather supported a finding that he is generally unable to function independently outside the home.

Doc. 214154, at 7 (emphasis and paragraph break added). I had not read this argument when I agreed to the substituted briefing proposals in the Fall. Having done so, I am concerned that the record on which the Diagnosis rests would be materially undermined if it were true, as the Claims Administrator provisionally concluded, that information produced by Mr. [REDACTED] was falsified. Indeed, before I recalled the sequence of events that led to Mr. [REDACTED] being permitted to file two revised briefs, I wrote a quite different, lengthy, draft of this opinion that heavily relied on Mr. [REDACTED] explanation for Mr. [REDACTED] termination in discussing Mr. [REDACTED] functional impairment.

Worse, if, as the Claims Administrator provisionally found, Mr. [REDACTED] submitted fabricated documentation in support of this Appeal, other representations by Mr. [REDACTED] and his counsel, may be compromised. Multiple pieces of evidence of Mr. [REDACTED] functional impairment—from the nature of his work with the [REDACTED], to the extent of his driving, to his conduct during his clinical examinations—rely on evidence he controlled, mediated through his counsel. If one third-party affiant produced a fabricated document, others may have as well. And the role of [REDACTED] [REDACTED]—which has submitted many other Claims in this Settlement Program—in producing and monitoring Mr. [REDACTED] documentation is unclear.

But this all puts the cart before the horse: the Claims Administrator made no adverse findings that Mr. [REDACTED] has been able to contest. Mr. [REDACTED] may have acceded to the Claims Administrator's proposal that he withdraw his briefs and supporting documentation not because

he and his counsel agreed with its factual predicates but because they shared the view that a resolution was preferable to additional procedural wrangling. Or they may have believed that the NFL Parties were aware of what had happened and all involved had agreed that it was a sideshow. A negotiated resolution is not an admission of responsibility, especially in the context of this Settlement, where such negotiations are apparently common, and the stakes (for the Player and his counsel) are high. I do not draw any inculpatory inferences from the correspondence of the Fall of 2020.

But nor can I resolve this Appeal on this factual record, and I will not proceed without more certainty about the veracity of the evidence that Mr. [REDACTED] submitted to his clinicians and in support of his Appeal. That assurance can only come from an Audit Report that considers the [REDACTED] evidence. The Appeal must be remanded, pursuant to Rule 24 of the Rules of Appeal, and Rule 7 of the Audit Rules. On remand, the Claims Administrator shall reopen the audit and make findings, on the record and pursuant to the Audit Rules, about whether any of Mr. [REDACTED] statements and documentary submissions misrepresented or omitted material facts. That audit shall encompass Mr. [REDACTED] law firm to inquire what role it had in misrepresentations (if any are found to have occurred). After issuing an Audit Report on these matters, the Claims Administrator shall, pursuant to the Audit Rules, give the Parties an opportunity to respond.

CONCLUSION

Following an evaluation conducted three and a half years ago, by a neurologist no longer associated with the Program, Mr. [REDACTED] was diagnosed with Level 2 Neurocognitive Impairment. His Claim was successively approved, appealed, affirmed, objected to, remanded, denied, audited, and appealed again. And now I remand the Claim again for further auditing.

I apologize to the Parties, and particularly to Mr. [REDACTED] for my role in this inordinate delay. But the Settlement Program demands that its fiduciaries work efficiently to pay valid Claims: one of my primary duties is to make sure that the documentation and evidence that we rely upon as custodians of the Monetary Award Fund is reliable. Here, the Claims Administrator provisionally found a potentially material piece of evidence to be fabricated, which led it to doubt the trustworthiness of a key source of information about Mr. [REDACTED] functional impairment. Those findings must be fully vetted before this Claim can proceed.

Date: June 3, 2021



David A. Hoffman, Special Master