

IN RE: NATIONAL FOOTBALL LEAGUE
PLAYERS' CONCUSSION INJURY
LITIGATION

MDL No. 2323

THIS DOCUMENT RELATES TO:
NFL PARTIES' APPEAL OF CLAIM
DETERMINATION FOR SETTLEMENT
CLASS MEMBER [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 NFL Parties now appeal on the grounds that Mr. ██████████ Diagnosis was unsupported by contemporaneous records that reflect a sufficient degree of functional impairment. Because the NFL Parties have not demonstrated by clear and convincing evidence that that the Claims Administrator was wrong to issue the award, their Appeal is denied.

This is Mr. ██████ third filed Claim. The Claims Administrator audited his first, originally submitted on May 12, 2017, based on malfeasance by his original diagnosing physician. Docs. 68592; 189131. Mr. ██████ withdrew that claim on October 11, 2019. Doc. 215559. The Claims Administrator then denied his second Claim, filed on October 14, 2019, on the grounds of inconsistent retained function and invalid neuropsychological testing. Docs. 215560; 223186.

This particular Claim stems from examinations by MAF neurologist Dr. [REDACTED] and by examining neuropsychologist Dr. [REDACTED], conducted on October 6, 2020, and September 26, 2020, respectively. Docs. 230496; 234206. Dr. [REDACTED] examination precipitated a Diagnosing Physician Certification Form, dated October 13, 2020, before he had received a copy of Dr. [REDACTED] neuropsychological report. Doc. 230086. On the Certification form, Dr. [REDACTED] listed a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment, while stating that he had not been assisted by a neuropsychologist in making the Qualifying Diagnosis. He included a CDR worksheet, on which Mr. [REDACTED] scored 0.5 in the areas of Community Affairs, Home & Hobbies, and Personal Care. Doc. 230087.

Dr. [REDACTED] faxed his report to Dr. [REDACTED] on November 13, 2020. Doc. 236004. On January 26, 2021, Dr. [REDACTED] resubmitted the Diagnosing Physician Certification Form. Doc. 232300. The form, now reflecting a Qualifying Diagnosis of Level 2, stated that "level of severity increased to 2.0 with the assistance of neuropsychologist evaluation per Dr. [REDACTED] notes." *Id* (cleaned up). Mr. [REDACTED] then filed this Claim for Level 2 Neurocognitive Impairment on January 29, 2021. Doc. 232425.

On March 11, 2021, the Claims Administrator sent Mr. [REDACTED] a Notice of Preliminary Review and began correspondence with Drs. [REDACTED] and [REDACTED] to resolve missing information from the Claim Package. Doc. 233637. Among other things, the Claims Administrator noted that Dr. [REDACTED] neuropsychological testing had not been submitted and that Dr. [REDACTED] report of CDR scores of 0.5 were not consistent with a Diagnosis of Level 2 Neurocognitive Impairment. *Id*.

Both clinicians responded. On March 30, 2021, Dr. [REDACTED] submitted Mr. [REDACTED] neuropsychological evaluation from the previous September. Doc. 234206. That document noted that Mr. [REDACTED] "exhibited performances meeting Level 2 impairment criteria in the domains of complex attention and processing speed, executive functioning, language, and visual perceptual functioning." *Id*.

Dr. [REDACTED] in turn, provided an explanatory note dated June 4, 2021. In it, he stated that his belated receipt of Dr. [REDACTED] neuropsychological evaluation and their subsequent correspondence prompted him to revise his Diagnosis:

The discussion concerned Mr. [REDACTED] function in the realms of community affairs, home and hobby and personal affairs, and how they support the diagnosis of Level 2. Mr. [REDACTED] is greatly affected in these areas. Superficially, he can socialize, but he cannot function well as a football coach or in other activities. He cannot make change from money, he has difficulty driving but may be taken to shop or to attend social functions outside the home. He has sphincter control and can wash and dress unaided. He does not participate in most of his hobbies. He did come with an informant. I agree that the distinction in this patient is difficult. I later changed him to a 2.0 after getting the neuropsychological evaluation... Looking at the CDR, I gave him a 0.5 or questionable impairment in the three categories you mentioned detailed above. Rereading my assessments, I could easily have given him a "mild" in all of these categories based on the information in the notes. His CDR would then consist of three more "ones" rather than 0.5's. Therefore, I stand by my second assessment of 2.0, and would invite Dr. [REDACTED] to defend 1.5 level. There was no other cause of his elevated scores on my assessment that makes any sense to me.

Doc. 236003 (cleaned up).

An AAP Consultant, who had previously reviewed Mr. [REDACTED] second Claim, issued an addendum to his existing report on June 30, 2021. Doc. 236536. The Consultant raised concerns

about discrepancies in five of the *Slick* criteria and concluded that “the addition of this new information does not paint a picture that is generally consistent with a Level 1.5 or Level 2 Neurocognitive Impairment.” *Id.* Dr. ██████ responded at length on October 14, 2021. Doc. 239159. The AAP Consultant, reviewing Dr. ██████ “thoughtful and intelligent consideration of clinical and psychometric issues,” concluded that it sufficiently addressed the issues previously raised and provided “reasonable justification and support for his clinical decision-making,” such that Level 1.5 Neurocognitive Impairment was a reasonable diagnosis. Doc. 239262.

The Claims Administrator subsequently determined that Mr. ██████ was entitled to a Monetary Award based on a Diagnosis of Level 1.5 Neurocognitive Impairment on January 19, 2022. Doc. 241916.¹

The NFL Parties timely appealed on March 21, 2022. Doc. 243951.

DISCUSSION

The NFL Parties appeal on the sole ground that as of January 2021, Mr. ██████ retained a level of daily function inconsistent with a Diagnosis of Level 1.5 Neurocognitive Impairment. They contest the admissibility of Dr. ██████ reassessment of Mr. ██████ CDR scores and subsequent revision of his Diagnosis on the basis that it was not based on contemporaneous records. And they contend that were the record limited to Dr. ██████ initial CDR scores and accompanying examination notes, it would be insufficient to support a Diagnosis of Level 1.5 Neurocognitive Impairment.

I can only grant the Appeal if the NFL Parties show, by clear and convincing evidence, that the Claims Administrator’s decision to issue an award was wrong.² Where, as here, the Claimant’s tests are done outside the BAP, the procedures and outcomes must be generally consistent with the Injury Definitions, including that for functional impairment.³ Evidence is “generally consistent” with a given criterion if it has more in common with the required elements of that criterion than it has differences.⁴ Applying these standards, the contemporaneous record of Mr. ██████ functional impairment more than sufficiently supports Dr. ██████ Diagnosis.

Dr. ██████ November 4, 2020 submission—which the NFL Parties focus on—preceded his review of Dr. ██████ examination. The NFL Parties are correct that, standing alone, that report provides ambiguous information about Mr. ██████ level of functional impairment, including scores of 0.5 which are not standard. But the Claim on Appeal was filed not in November 2020 but in January 2021, after Dr. ██████ revised submission on January 26, 2021, which expressly incorporated Dr. ██████ notes and the Third-Party Statement by Mr. ██████ friend ██████

¹ The AAP Member’s contemporaneous report explains why a Level 2 Diagnosis was not sufficiently supported. Doc. 241917. Mr. ██████ has not appealed that determination.

² Rules Governing Appeals of Claim Determinations, at 9. https://www.nflconcussionsettlement.com/Docs/rules_governing_appeals_of_claim_determinations.pdf.

³ Settlement Agreement, Exhibit A-1 (2)(b).

⁴ See *Frequently Asked Questions: FAQ #103* (What does “generally consistent” mean?), NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com>.

Both provide compelling evidence of Mr. [REDACTED] decreased functioning in Personal Care, Home & Hobbies, and Community Affairs. Doc. 241917. Dr. [REDACTED] noted that Mr. [REDACTED] wife reminded him of appointments and that Mr. [REDACTED] believed he “would struggle to keep his appointments due to forgetfulness” without her help. Doc. 234206. Mr. [REDACTED] reportedly no longer participated in household tasks like washing dishes, vacuuming, and managing the yard, and, though he continued to drive, “he will at times forget why he is going somewhere.” *Id.* Meanwhile, Mr. [REDACTED] described Mr. [REDACTED] once “well-dressed, clean-shaven,” as now “frequently unshaven and his hair and appearance are unkempt.” He lamented that Mr. [REDACTED] no longer was hosting social gatherings, had withdrawn from his circle of friends and his family, and was avoiding members of the community despite being a former star athlete. Doc. 232428. These observations, integrated into Dr. [REDACTED] explanation for his revised Diagnosis, provide sufficient support for his conclusion that Mr. [REDACTED] functioning in Personal Care, Home & Hobbies, and Community Affairs is “greatly affected.” Doc. 236003.

It was permissible for Dr. [REDACTED] to supplement his Diagnosis with Dr. [REDACTED] notes and supporting sworn documentation from September. These documents are paradigmatic of what FAQ 106 describes as information “created on or very close to the date of the event described.”⁵ Only about three months elapsed between Dr. [REDACTED] original examination on October 6, 2020, and the amended Diagnosis that he submitted on January 29, 2021. And, in response to the Claims Administrator’s query, Dr. [REDACTED] expanded further on June 4, 2021, again referring back to Dr. [REDACTED] notes and documentation. Doc. 237576. This process of supplementation is a far cry from the sort of disfavored and Appeal-generated analysis that I have previously discounted.⁶

The only remaining question is whether, after accepting Dr. [REDACTED] revisions, and considering Dr. [REDACTED] report and related evidence, the Claims Administrator erred in determining that Mr. [REDACTED] was entitled to a Monetary Award based on a Diagnosis of Level 1.5 Neurocognitive Impairment. As the AAP Member noted in his report, Dr. [REDACTED] explanation of his revised Diagnosis sufficiently documents a rationale for CDR scores of 1 in the areas of Personal Care, Home & Hobbies, and Community Affairs. Doc. 241917. The NFL Parties have not shown by clear and convincing evidence that the Claims Administrator’s decision was in error.

⁵ By contrast, I recently found that a new medical report introduced four years after a Player’s neuropsychological examination could not replace a concurrent CDR analysis, for example. Special Master Ruling on Functional Impairment, at 7 (March 11, 2022), https://www.nflconcussionsettlement.com/Docs/functional_impairment_sm_6.pdf.

⁶ Dr. [REDACTED] offered further explanation for his revision in an April 20, 2022 addendum to his previous explanation, included as new evidence in the Appellee Memorandum. Doc. 265036. This new evidence, as the NFL Parties argue in their Supplemental Brief, “is no substitute for a medical judgment created contemporaneously with an exam, in a setting where expressing such a judgment, and not post hoc advocacy, is the order of the day.” 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. But Dr. [REDACTED] June 4, 2021 explanation, in response to the Claim Administrator’s questions about his amended diagnosis, is categorically different.

CONCLUSION

The Claims Administrator correctly considered the revisions Dr. [REDACTED] made to Mr. [REDACTED] CDR scores and Diagnosis within months of his original examination. As the Program's medical experts found, those revisions and supporting documentation adequately support a Diagnosis of Level 1.5 Neurocognitive Impairment. I deny the NFL Parties' Appeal.

Date: August 6, 2022



David A. Hoffman, Special Master