

**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 REPRESENTATIVE
CLAIMANT [REDACTED]
REGARDING DENIAL OF MONETARY
AWARD

SPID No. [REDACTED]

INTRODUCTION

On February 5, 2019, Representative Claimant [REDACTED] filed a claim for benefits under the Amended Settlement Agreement on behalf of her late son, [REDACTED], a Retired NFL Football Player. Mr. [REDACTED] passed away on December 28, 2014, and later received a post-mortem diagnosis of Chronic Traumatic Encephalopathy. The Claims Administrator denied the claim for two reasons: (1) failure to meet the diagnosis deadline for Death with CTE claims, and (2) failure to establish that a doctor reviewed Mr. [REDACTED] brain tissue.

Ms. [REDACTED] timely appealed. Special Master Pritchett affirmed the denial, and Ms. [REDACTED] subsequently appealed to the District Court. Following review of Ms. [REDACTED] objection, the Court has remanded this claim to the Special Master to clarify whether the affirmance applies to one or both of the reasons for denial provided by the Claims Administrator.¹

There is neither clear and convincing evidence that a diagnosis was made before the appropriate deadline, nor clear and convincing evidence that the diagnosing neuropathologist personally examined Mr. [REDACTED] brain tissue. I therefore re-affirm the Claims Administrator's denial of Mr. [REDACTED] claim on both grounds.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. [REDACTED] passed away at age 48 on [REDACTED] after he was struck from behind by a motor vehicle while biking on a highway. Doc. 208985. On December 30, 2014, Dr. [REDACTED], a medical examiner, conducted a post-mortem autopsy and concluded that Mr. [REDACTED] cause of death was multiple blunt force injuries suffered from the accident. *Id.*

¹ Settlement Implementation Order, Doc. 225716 (June 16, 2020).

On February 5, 2019, Ms. [REDACTED] filed a claim for relief under the Settlement on behalf of her late son. Doc. 198400. Dr. [REDACTED], a board-certified neuropathologist, provided a letter stating his opinion that Mr. [REDACTED] “more likely than not” suffered from CTE at the time he passed away. Doc. 208987. The letter is undated. *Id.*

On June 17, 2019, the Claims Administrator denied the claim, writing:

Although Dr. [REDACTED] is a board-certified neuropathologist and signed a Pre-Effective Date Diagnosing Physician Certification Form indicating a CTE diagnosis, we must have proof that he personally performed the post-mortem exam on the Retired Player and that it was done on or before 4/22/15. There was no post-mortem examination report submitted to indicate that Dr. [REDACTED] examined the Retired Player’s brain tissue to confirm a CTE diagnosis. The two-page letter provided by Dr. [REDACTED] does not satisfy the requirements for a CTE diagnosis under this Settlement Program. For these reasons, this claim is denied.

Doc. 209296. Ms. [REDACTED] timely appealed. Doc. 210851.

On September 16, 2019, Special Master Pritchett denied the Appeal, stating that “Appellant did not show clear and convincing evidence of error in the Claims Administrator’s decision.” Doc. 214628.

Ms. [REDACTED] appealed the Special Master’s decision to the Federal District Court, asserting that the Special Master erred in affirming the Claims Administrator’s denial. Doc. 215705. Judge Brody remanded the claim for clarification, noting that the Special Master’s decision “did not specify whether . . . [it] applied to both of the Claims Administrator’s reasons or only one of [the] reasons” for denial of Ms. [REDACTED] claim. Doc. 225716.

DISCUSSION

This claim is one of twenty claims for Death with CTE filed by the law firm [REDACTED]. Eighteen of the twenty claims—including Ms. [REDACTED]—are based solely on a virtually identical, undated, form letter from Dr. [REDACTED]. The CTE “diagnoses,” as explicitly stated in these letters, amount to nothing more than Dr. [REDACTED]’s assertion that “it is more likely than not” that these players, based on having played football in the NFL for some duration of time, had CTE at their time of passing. From this troubling backdrop, I now assess Ms. [REDACTED]’s claim.

There are two criteria that must be satisfied under the Settlement Agreement to support a Qualifying Diagnosis of Death with CTE:²

- (1) a post-mortem diagnosis made by a board-certified neuropathologist based on examination of the deceased Player’s brain tissue,³ and

² See Settlement Agreement, Exhibit A-1(5).

³ As the Court wrote in the Final Order and Judgment approving the Settlement, “no one can conclusively say that someone had CTE until a scientist looks at sections of that person’s brain under a microscope to see if abnormally

(2) compliance with the deadline for obtaining the post-mortem diagnosis.⁴

The Claims Administrator determined that Ms. [REDACTED] claim failed to satisfy either of the two requirements. By order of Judge Brody, I now review this matter to provide additional clarification following Special Master Pritchett's affirmance. Specifically, I will address "whether clear and convincing evidence of error exists as to each independent basis given by the Claims Administrator" for denial of Ms. [REDACTED] claim. Doc. 225716.

Mr. [REDACTED] was involved in a tragic bicycle accident on [REDACTED]. Doc. 208985. Dr. [REDACTED] a medical examiner, conducted a post-mortem examination two days after the accident and determined Mr. [REDACTED] cause of death to be "multiple blunt force injuries." *Id.* The report contains no mention of CTE.

The present claim, based upon a diagnosis of Death with CTE, is supported only by an undated letter from Dr. [REDACTED] Doc. 208987. The letter states, in part:

I have conducted a study of the life and football playing history of [REDACTED]. In my Neuropathology practice I conduct an ongoing study of all available and existing knowledge related to the existence and diagnosis of CTE and I combine that knowledge with my training and extensive experience related to the discovery, study and diagnosis of CTE.

[REDACTED] died on [REDACTED] at age 48. [REDACTED] played high school and college football and one season in the NFL. Based upon the studies referenced above, it is my opinion that [REDACTED] had CTE on the date of his death.

Id.

As counsel for Ms. [REDACTED] admits, "[i]t is undisputed that there is no evidence that Dr. [REDACTED] reviewed the Player's brain tissue." Doc. 215705. In fact, like eighteen of the other twenty claims filed by Ms. [REDACTED] counsel, there are no medical records or documentation for this *particular* Retired NFL Football Player that support Dr. [REDACTED] conclusion. Given these undisputed facts, I find no evidence of error in the Claims Administrator's determination that Dr. [REDACTED] did not examine the late Mr. [REDACTED] brain tissue to support the diagnosis of CTE, and that failure was alone sufficient to deny the claim.

phosphorylated tau protein ('abnormal tau protein') is present, and if so whether it is present in a reportedly unique pattern." *See In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 391 (E.D. Pa. 2015). To conclusively diagnose CTE, the diagnosing neuropathologist must therefore examine the Player's brain tissue.

⁴ *See* Settlement Agreement, Section 6.3(f) ("A Qualifying Diagnosis of Death with CTE shall be made . . . through a post-mortem diagnosis made . . . prior to the Final Approval Date, provided that a Retired NFL Football Player who died between July 7, 2014 and the Final Approval Date shall have until 270 days from his date of death to obtain such a post-mortem diagnosis.") The Final Approval Date was April 22, 2015. *See* Settlement Portal, *Frequently Asked Questions*, FAQ # 98 (f).

Furthermore, even if Dr. [REDACTED] letter could be construed as a legitimate Qualifying Diagnosis, there is no evidence that it was made before the appropriate deadline. For a Death with CTE claim, the date of the Qualifying Diagnosis is the date of the Player's death, even though the diagnostic medical assessment necessarily occurs post-mortem.⁵ However, the Settlement provides that for Players who passed away between July 7, 2014 and the Final Approval Date of April 22, 2015, like Mr. [REDACTED] a post-mortem diagnosis of CTE must have been made within 270 days of the date of death—in this case, by September 24, 2015.⁶

The letter from Dr. [REDACTED] is conspicuously undated, and it was filed on June 12, 2019. Doc. 208987. No other proof has been offered to suggest Dr. [REDACTED] diagnosis was timely; in fact, Ms. [REDACTED] counsel never addresses the explicit provision in the Settlement requiring the diagnosis to be made within 270 days of the Mr. [REDACTED] passing. Thus, there is no clear and convincing evidence of error in the Claims Administrator's decision that the diagnosis deadline of September 24, 2015 was not met.

CONCLUSION

Because Dr. [REDACTED] did not examine Mr. [REDACTED] brain tissue as is necessary to diagnose Death with CTE, *and* because there is no proof that the diagnosis was timely, I find that Ms. [REDACTED] Representative Claim meets neither of the two Settlement requirements for a diagnosis of Death with CTE. The Claims Administrator denied Ms. [REDACTED] claim for each independent reason. Neither finding was clearly erroneous.

I thus affirm the denial on each basis.

Date: July 15, 2020



David Hoffman, Special Master

⁵ See Settlement Portal, *Frequently Asked Questions*, FAQ # 99 (a).

⁶ In the original Notice of Denial, the Claims Administrator wrote, “we must have proof that . . . the post-mortem exam . . . was done on or before 4/22/15.” Doc. 209296. This assertion was mistaken based on the date of Mr. [REDACTED] death; while the date of the Qualifying Diagnosis (i.e., the date of death) must have been on or before April 22, 2015, the post-mortem exam must have occurred within 270 days of the Mr. [REDACTED] death. See Settlement Agreement, Section 6.3(f), *supra* note 4.