

**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 ██████████
REGARDING DENIAL OF MONETARY
AWARD

INTRODUCTION

On February 6, 2019, Representative Claimant ██████████ filed a claim for benefits under the Amended Settlement Agreement on behalf of her late husband, ██████████, a Retired NFL Football Player. Mr. ██████████ passed away on August 23, 2008, 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. ██████████ brain tissue.

Ms. ██████████ timely appealed. Special Master Pritchett affirmed the denial, and Ms. ██████████ subsequently appealed to the District Court. Following review of Ms. ██████████ 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

While there is no clear and convincing evidence that a diagnosis was made before the appropriate deadline, I do find there is clear and convincing evidence that the diagnosing neuropathologist personally examined Mr. ██████████ brain tissue. I therefore re-affirm the Claims Administrator's denial of Ms. ██████████ claim on the first basis only.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. ██████████ passed away at age 40 on August 23, 2008. Doc. 199407. On August 24, 2008, Dr. ██████████, a Tarrant County medical examiner, conducted a post-mortem autopsy and concluded that Mr. ██████████ cause of death was "sudden adult death with evidence of hypertensive heart disease." *Id.*

¹ Settlement Implementation Order, Doc. 225723 (June 17, 2020).

On February 6, 2019, Ms. [REDACTED] filed a claim for relief under the Settlement on behalf of her late husband. Doc. 199403. Dr. [REDACTED], a board-certified neuropathologist, provided a letter stating that he conducted an examination of the late Mr. [REDACTED] brain tissue based upon “three H&E stained slides” received from the [REDACTED] Medical Examiner. Doc. 199405. Dr. [REDACTED] concluded that the “histopathologic findings are diagnostic of CTE,” and that “[REDACTED] had CTE.” The letter is undated. *Id.*

On February 20, 2019, the Claims Administrator requested additional documentation, writing:

The medical records must show a post-mortem diagnosis of CTE made before April 22, 2015 (the Final Approval Date) by a board-certified neuropathologist for a Retired NFL Football Player who died before April 22, 2015. See Section 6.3 (f) of the Settlement Agreement and FAQ 109. Mr. [REDACTED] died on August 23, 2008, and the August 24, 2008 autopsy report signed by [REDACTED] does not reference CTE and neither does the death certificate. You provided an undated letter from Dr. [REDACTED] who diagnosed Mr. [REDACTED] with CTE. You must establish that Dr. [REDACTED] reviewed Mr. [REDACTED] brain tissue and made a CTE diagnosis on or before April 22, 2015.

Doc. 201410. Ms. [REDACTED] did not respond to the request for additional documentation within the specified 120-day deadline. The Claims Administrator denied the claim on June 25, 2019 based on the unresolved documentation issue. Doc. 209824.

Ms. [REDACTED] timely appealed. Doc. 210928. On September 26, 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. 214641.

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 further explanation. Doc. 225716.

DISCUSSION

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 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.

(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.⁵ Doc. 201410. 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.

Based on Dr. [REDACTED] personal examination of Mr. [REDACTED] brain tissue, I conclude that it was clearly erroneous for the Claims Administrator to deny his Claim on that basis, if, indeed, that is what it did.

However, the Settlement explicitly provides that "[a] Qualifying Diagnosis of Death with CTE shall be made only for Retired NFL Football Players who died prior to the Final Approval Date [of April 22, 2015], through a post-mortem diagnosis made by a board-certified neuropathologist prior to the Final Approval Date" Thus, there are *two* aspects to complying with the deadline for obtaining a Qualifying Diagnosis of Death with CTE: both the date of the Qualifying Diagnosis *and* the date of the neuropathologist's post-mortem examination must be prior to April 22, 2015.

Mr. [REDACTED] tragically passed away at the age of 40 on [REDACTED]. An autopsy was performed the following day, and the medical examiner determined that heart complications were the likely cause of death. Doc. 199407. The report does not mention CTE.

The present claim, based upon a diagnosis of Death with CTE, is supported by a conspicuously undated letter from Dr. [REDACTED] discussing his analysis of Mr. [REDACTED] brain tissue. Doc. 199405. The letter was filed on February 6, 2019. Although the date of the Qualifying Diagnosis (that is, the date of Mr. [REDACTED] passing) is well before the Final Approval Date of April 22, 2015, no proof has been offered to suggest that Dr. [REDACTED] examination was timely.

Counsel for Ms. [REDACTED] repeatedly asserts that "the Claims Administrator erroneously concluded that the date of diagnosis is not the date of the Player's death." Doc. 215680. This incorrect assertion misrepresents the deficiency in Ms. [REDACTED] claim. The problem with Ms. [REDACTED] claim—as stated by the Claims Administrator—is not the date of the Qualifying Diagnosis; rather, at issue it is what date the diagnosis was *actually made*.

⁴ See Settlement Agreement, Section 6.3(f) ("A Qualifying Diagnosis of Death with CTE shall be made only for Retired NFL Football Players who died prior to the Final Approval Date, through a post-mortem diagnosis made by a board-certified neuropathologist 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).

⁵ In truth, whether the Claims Administrator accepted that Dr. [REDACTED] examination was sufficient to satisfy the first of the requirements is somewhat unclear. I proceed on the understanding, confirmed by Judge Brody's order, that it did not.

Ms. [REDACTED] continues to provide no proof of when Dr. [REDACTED] examined the late Mr. [REDACTED] brain tissue to make his diagnosis. Thus, there is no clear and convincing evidence of error in the Claims Administrator's decision that the April 22, 2015 deadline for obtaining a diagnosis was not met.

CONCLUSION

The Claims Administrator denied Ms. [REDACTED] claim for two independent reasons.

First, the claim was denied based upon a lack of proof that the diagnosis was timely. I find that there is no evidence that the diagnosis of Death with CTE was obtained before the appropriate deadline.

Second, the claim was denied for failure of the diagnosing physician to personally examine the Player's brain tissue. However, the evidence suggests that Dr. [REDACTED] did examine the late Mr. [REDACTED] brain tissue as is necessary to diagnose Death with CTE.

The Claims Administrator correctly concluded that Ms. [REDACTED] failed to show that the diagnosis was obtained before the appropriate deadline. I thus affirm the denial solely on the first basis.

Date: July 15, 2020



David Hoffman, Special Master