

IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION

MDL No. 2323

Hon. Anita B. Brody

He submitted his second Claim, asserting the same diagnosis on April 7, 2021, based on evaluations by BAP neuropsychologist Dr. [REDACTED] and BAP neurologist Dr. [REDACTED]. Doc. 234595. The Appeals Advisory Panel reviewed conflicting diagnoses, and found that Mr. [REDACTED] met the diagnostic criteria for Level 1.5 Neurocognitive Impairment on March 8, 2021. Doc. 234600, at 1. On September 20, 2021, the Claims Administrator determined he was entitled to a Monetary Award for Level 1.5 Neurocognitive Impairment. Doc. 238491.

In December 2022, Mr. [REDACTED] filed a Supplemental Claim for Level 2 Neurocognitive Impairment, based on a new neuropsychological evaluation by Dr. [REDACTED] and an assessment from MAF neurologist Dr. [REDACTED]. Docs. 273702; 274549.

Dr. [REDACTED] evaluated Mr. [REDACTED] on February 4, 2022. Doc. 269449. Her neuropsychological testing determined that Mr. [REDACTED] had no impairment in the Visual-Perceptual Processing and Executive Functioning domains but was at Level 2 for Language, Learning and Memory, and Complex Attention and Processing Speed domains. *Id.*, at 11-13.

Dr. [REDACTED] examined Mr. [REDACTED] five times starting in January 2021, ultimately making a Diagnosis on April 18, 2022. Docs. 273642, at 5. Her functional assessment initially determined Mr. [REDACTED] to be at 1.0 in Community Affairs, 2.0 in Home & Hobbies and 1.0 in Personal Care, and she rated him a 2.0 on the CDR scale. *Id.* Updated reports from Dr. [REDACTED] dated August 16, 2022, and November 21, 2022, restated the CDR scores for those categories as 2.0 and added that Mr. [REDACTED]'s "cognition and mood state align with the neuropsychological findings." *Id.*, at 3; 281279, at 1.

An AAP Leadership Council neurologist reviewed the Claim Package and raised concerns about Dr. [REDACTED]'s failure to document the factual basis for her assigned CDR scores and address the impact of non-cognitive factors on the scores for the three relevant CDR domains. Doc. 279560. The Claims Administrator passed these concerns to Dr. [REDACTED] on March 23, 2023:

An assignment of Level 2 Neurocognitive Impairment must be based on neuropsychological criteria (which the player fulfills) and cognitive losses as the source of functional declines (as required by CDR scoring rules) generally consistent with CDR 2 scores in Community Affairs, Home & Hobbies, and Personal Care. Level 2 NCI is indicated as the equivalent of moderate dementia by the Settlement Program Injury Definitions.

Dr. [REDACTED]'s medical decision-making to support assignment of CDR 2 scores is not evident in her documentation. In contrast her note explicitly states CDR scores of "1 in community affairs, 2 in home and hobbies, and personal care= 1.0." Additionally, a 3rd party affidavit dated 3/3/2022 indicates that functional losses in the CDR domain of personal care are "mainly due to the deep depression, anxiety, and severe headaches he experiences daily. This impacts his motivation..." which is not generally consistent with assigning CDR scores of 1 or 2 in Personal Care.

Id. (paragraph breaks added).

In response to this request for clarification, Dr. [REDACTED] submitted an updated CDR worksheet for Mr. [REDACTED] and a note from his telehealth visit dated November 21, 2022, but offered no details on how she came to her medical judgment. Docs. 281077; 281279.

An AAP Member then reviewed the Claim Package and concluded:

General consistency with the “moderate dementia” indicated by a qualifying diagnosis of Level 2.0 Neurocognitive impairment is not supported by Dr. [REDACTED]’s reports, examination, and analysis. Specifically, worsened losses in daily function attributable to cognitive decline, not other factors, are not described and the 3rd party affiant explicitly concludes that non cognitive factors predominate.

Concerns for omission or misrepresentation of material facts: The initial versions of Dr. [REDACTED]’s 4/18/22 note indicate the Personal Care score of 1.0; this is changed in other versions of the note without identification of the date of revision or factual basis of the change. Undated/unacknowledged addenda fall outside usual standards of medical documentation.

Doc. 284781, at 2 (cleaned up).

On August 25, 2023, the Claims Administrator denied the Supplemental Claim, adopting the AAP Member’s views:

Criterion (i): Dr. [REDACTED]’s note of 4/18/2022 reports complaints of cognitive decline for “several years.” The Player’s girlfriend reported that the problems had been present and worsening for 11 years. This criterion is fulfilled.

Criterion (ii): In compliance with the Court’s 3/4/2022 Order granting the Motion to Approve Modifications to the NFL Concussion Settlement Agreement Pursuant to Section 6.6, the New Method was applied to this claim to rescore the 2/4/2022 neuropsychological testing results in accordance with the revised Exhibit A-2 to the Class Action Settlement Agreement. After application of the New Method, the test results indicated Level 2 impairment in Complex Attention, Learning and Memory, and Language, and no impairment in the other two domains, for overall Level 2 cognitive impairment. This criterion is supported.

Criterion (iii): The Player’s companion explicitly states her opinion that functional losses in the CDR domain of personal care are “mainly due to the deep depression, anxiety, and severe headaches he experiences daily.” Dr. [REDACTED]’s documentation does not address the CDR scoring rule requirement that scores be assigned on the basis of “cognitive loss, not impairment due to other factors.” A 3rd party statement dated 3/3/2022 describes that the Player continues to drive and shop occasionally. Dr. [REDACTED]’s 4/18/2022 note states “Continues to play golf with close friends but can’t keep track of how many swings he had” and “He will have to ask for help from wife when trying to accomplish basic hygiene tasks such as brushing his teeth.” Whether the need for assistance with selfcare is due to cognitive or other factors is not described. The original version of the 4/18/2022 note (Doc ID 269448) clearly states CDR scores as “1 in community affairs, 2 in home and

hobbies and personal care = 1.0.” On 4/18/2022 Dr. [REDACTED] also noted “Mental status to conversation: Normal.”

The Claims Administrator asked Dr. [REDACTED] to submit an addendum to clarify her medical reasoning regarding the CDR scoring due to cognitive losses and not impairment due to other factors. In response, Dr. [REDACTED] submitted an undated CDR scoring grid with scores of 1 in Community Affairs and 2 in Home & Hobbies and Personal Care circled, as well as her note from the 11/21/2022 telehealth visit that stated “CDR rating 4/18/22: Scored 2.0 in community affairs, home and hobbies and personal care = 2.0,” with no explanation for how or why the scores were changed. Therefore, this criterion is not supported.

Criterion (iv): There is no evidence reported to indicate the effects delirium, medications or substance abuse are exclusively associated with the Player’s complaints. This criterion is fulfilled.

In conclusion, general consistency with the “moderate dementia” indicated by a Qualifying Diagnosis of Level 2 Neurocognitive Impairment is not supported by Dr. [REDACTED]’s reports, examination, and analysis. Specifically, worsened losses in daily function attributable to cognitive decline, not other factors, are not described, and the 3rd party affiant explicitly concludes that non-cognitive factors predominate.

Doc. 288288, at 2.

Mr. [REDACTED] appealed on November 2, 2023. Doc. 292001.

RESOLVING THIS APPEAL

The Claims Administrator concluded that evidence in Mr. [REDACTED]’s Claim did not satisfy the third criterion for Level 2 Neurocognitive Impairment. Doc. 288288, at 2. On appeal, Mr. [REDACTED] must show by clear and convincing evidence that this conclusion was in error.

Level 2 Neurocognitive Impairment is defined by a profound loss of function. In Community Affairs, a score of 2 implies “[n]o pretense of independent function outside home”; in Home & Hobbies, “poorly maintained” and “very restricted interests, while the patient can perform only “simple chores”; while in Personal Care the patient “[r]equires assistance in dressing, hygiene, [and] keeping of personal effects.”

To start, the contemporaneous evidence in Dr. [REDACTED]’s reports is inconsistent with the required functional loss. It’s true that she noted in her August 16 and November 21, 2022 reports that the Retired Player has “issues with personal hygiene and taking care of himself” which results in him having to ask for help from his wife when trying to accomplish basic personal care tasks, suffers “cognitive difficulty on a daily basis, such as forgetting names of close acquaintances” and his daughter’s birthday and that he “had an episode where he was confused and didn’t know where

he was.” Docs. 273642, at 1-5; 281279, at 1. But, as the NFL Parties point out, Mr. [REDACTED] has sole custody of two teenage children, “has sole responsibility and care for [them] 100% of the time,” continues to play golf with friends, “regularly engages in yoga and meditation,” tries to read for an hour each day, and plays “brain games” on his phone and computer for an hour each day. Docs. 269449, at 5, 14; 273642, at 1. These activities of daily life do not support Level 2 scores in Community Affairs or Home & Hobbies, and justify the Claim’s denial.

Second, Dr. [REDACTED] did not adequately attempt to isolate the role of cognitive loss in the functional losses that she observed. As FAQ #111 states:

In situations where the diagnosing physician determines that a Player suffers from functional impairment that is due to both cognitive loss and emotional/psychiatric factors such as depression, anxiety, or sleep disorders (other than sleep apnea), the diagnosing physician should, to the extent feasible, then attempt to isolate the functional impairment due to cognitive loss alone and assign a CDR rating based solely on that cognitive loss.¹

I have previously noted that the Claims Administration process does not require “magic words [from diagnosing physicians] to achieve relief.”² However, this guidance does not undermine the need for physicians to provide reasoned explanations at least attempting to explain the relationship between cognitive and non-cognitive factors. Thus, in one previous claim,

Multiple contemporaneous and external pieces of evidence corroborated that depression, pain, and obsessive compulsion disease contributed to [Claimant’s] lack of function. The CDR scoring system required [the neurologist] to explain the distinctive role of cognition in that debilitating process to the best of his ability. He was not required to show that cognitive loss was the sole cause of functional impairment. But he had to offer some kind of isolating framework to the “extent feasible.” The only place he came close is the bare statement that “[the Claimant’s] evaluation demonstrates underlying neurocognitive deficits with psychological and somatic symptoms.” This is insufficient to clear even FAQ #113’s low bar.³

Mr. [REDACTED]’s Claim presents a similar fact pattern. Several individuals submitted sworn statements to corroborate Mr. [REDACTED]’s self-report on his functional impairment. The most recent statement—which must have been foundational in Dr. [REDACTED]’s report—was that of Mr. [REDACTED]’s girlfriend, [REDACTED], dated March 3, 2022. Doc. 269449, at 14. Ms. [REDACTED] reported supporting Mr. [REDACTED] by driving him places, shopping for him, helping him pay for his utilities, and taking care of his children because he often forgets to handle these tasks himself. *Id.* She

¹ *Frequently Asked Questions: FAQ #111* (How are diagnosing physicians to apply the Clinical Dementia Rating (CDR) scale to Level 1.5 and Level 2 Neurocognitive Impairment Qualifying Diagnoses?), NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com>.

² Special Master Ruling on Functional Impairment, at 11 (Sept. 7, 2021), https://www.nflconcussionsettlement.com/Docs/functional_impairment_SM_5.pdf

³ Special Master Ruling on Validity Testing, External Evidence and Functional Impairment, at 10 (Mar. 27, 2023), https://www.nflconcussionsettlement.com/Docs/validity_evidence_impairment_sm.pdf

shared, “he has become more and more of a recluse. He is not able to maintain employment. He avoids simple things like going to the grocery store because of such heightened anxiety.” *Id.* But she also added:

■■■■■ struggles with taking care of himself. I believe this is mainly due to the deep depression, anxiety, and severe headaches he experiences daily. This impacts his motivation to shower and get dressed for the day. He asks me simple things like has he brushed his teeth yet, or if a basket of laundry is clean or dirty. Having to hire help for these basic needs is draining him financially quickly. He needs help. He forgets to go to doctors and doesn’t have the desire to go to therapy, even though he could really benefit from this. He stresses out about the financial portion for this as well. He needs to get physical therapy help for some of his injuries he’s sustained but avoids that for the same reason.

Id.

Dr. ■■■■■’s reports do not discuss how she reconciled Ms. ■■■■■’s judgments about the role of Mr. ■■■■■’s mental health in his functional loss with her own CDR assessment.

It is significant that Mr. ■■■■■’s history of depression and anxiety was well-documented in his other medical records. His history of “head concussions—severe migraines, memory loss, anger issues and depression,” date back to 2012. Doc. 269449, at 3. He saw a neurosurgeon in 2016—Dr. ■■■■■—who referred him to psychology, and recommended continued anger management classes and therapy, as well as pituitary labs and an fMRI study. Doc. 79215, at 3. During his 2020 assessment with Dr. ■■■■■, Mr. ■■■■■ shared that he had “been in psychotherapy at various times over three to four years for treatment of anxiety, depression, and problems with anger management and aggressive and violent altercations (some of which reportedly had legal consequences).” Doc. 234599, at 5.

After reviewing the records, the Claims Administrator asked Dr. ■■■■■ to address this very gap in the records, but she only “submitted an undated CDR scoring grid with scores of 1 in Community Affairs and 2 in Home & Hobbies and Personal Care circled, as well as a note from the 11/21/2022 telehealth visit that stated “CDR rating 4/18/22: Scored 2.0 in community affairs, home and hobbies and personal care = 2.0,” with no explanation for how or why the scores were changed.” Doc. 288288, at 2.

Mr. ■■■■■’s Appeal maintains that Dr. ■■■■■’s conclusions warrant deference because she wrote that Mr. ■■■■■’s “cognition and mood state align with the neuropsychological findings. Medications, mood, orthopedic issues, pain, and sleep disorders do not appear to play a significant role in his cognitive state.” Docs. 273642 at 3; 281279, at 1. And because Dr. ■■■■■ included a subjective account of Mr. ■■■■■’s cognition and functional impairment, Mr. ■■■■■ argues that she must have adhered to the guidance on the CDR worksheet.

I disagree.

Dr. [REDACTED] did not adequately address the relevant confounding factors respecting Mr. [REDACTED]'s impairment. She states, in a conclusory way, that “[m]edications, mood, orthopedic issues, pain, and sleep disorders do not appear to play a significant role in his cognitive state,” and in her evaluations of the Retired Player, focused solely on treatment options for his Traumatic Brain Injury and migraines. Doc. 273642, at 3. But she never discussed—despite multiple direct inquiries—Mr. [REDACTED]'s depression and anxiety as possible contributors of his functional impairment.

In Ms. [REDACTED]'s 2022 affidavit, she not only attributed Mr. [REDACTED]'s functional impairment to his depression, anxiety and severe headaches but also reported, “[h]e forgets to go to the doctor and doesn’t have the desire to go to therapy, even though he could really benefit from this...” Doc. 269449, at 14. Despite this insight, Dr. [REDACTED]'s evaluations supporting the Supplemental Claim did not discuss the mental health factors for Mr. [REDACTED]'s condition or whether he was still undergoing treatment for them. She recommended repeat neuropsychological testing given Mr. [REDACTED]'s worsening decline and offered medications and Botox for his headaches, which he tried. Doc. 273642.

“[A] diagnosing physician’s “articulated consideration” of confounding factors is typically sufficient to establish that a Player’s impairment is generally consistent with the Settlement’s requirements.”⁴ I apply this guidance in evaluating Dr. [REDACTED]'s reports. The fact that the reports—even after the AAP’s request for more detail—remained silent on how Dr. [REDACTED] reconciled Mr. [REDACTED]'s depression and anxiety with the CDR findings means she failed to even attempt to show that the CDR scores were assigned due to cognitive loss, not other factors. This failure led to the Supplemental Claim’s denial, and Mr. [REDACTED] has not remedied it through his Appeal.

CONCLUSION

Both because the evidence of his functional loss is partially inconsistent with the required showing under the injury definitions, and because his physician did not attempt to show that it resulted from cognitive loss, as opposed to mental health and other factors, Mr. [REDACTED] has not offered clear and convincing evidence of error in the Denial. I deny his Appeal.

Date: March 29, 2024



David A. Hoffman, Special Master

⁴Special Master Ruling on Validity Testing and Mental Illness, at 5 (Oct. 16, 2023), nflconcussionsettlement.com/Docs/validity_testing_mental_illness_SM.pdf