

IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION

MDL No. 2323

HON. ANITA B. BRODY

deficits are not considered to be secondary to substance use, as evidenced by no reported consumption of alcohol or illicit drugs from relevant history.” Doc. 264948, at 6 (cleaned up). Dr. [REDACTED] then recommended neurological, neuropsychological, and psychiatric follow up with appropriate therapy. *Id.*

Dr. [REDACTED] supervised Mr. [REDACTED]’s neuropsychological evaluation on August 14, 2020. Doc. 264949. He found that Mr. [REDACTED] was at Level 2 for the Learning and Memory, Visual-Perceptual Processing and Language domains, 1.5 for Complex Attention and 0 for the Executive Function domain. *Id.*, at 4. On Mr. [REDACTED]’s performance validity, Dr. [REDACTED] noted that “Mr. [REDACTED] performed in the suboptimal range on 6/7 measures of cognitive performance validity. Consequently, Mr. [REDACTED]’s performance was suboptimal according to the Slick criteria checklist. Thus, results indicate a high likelihood of invalid performance at the time of the evaluation.” *Id.*, at 3. He continued that “invalid results on the present evaluation do not mean he is without cognitive impairment. The invalid test results just mean the scores from this report cannot be used to gauge his current level of cognitive functioning.” *Id.*, at 5 (cleaned up).

After receiving the Claim, the Claims Administrator sought input from the AAPLC. Doc. 267689. The Claims Administrator also rescored Mr. [REDACTED]’s neuropsychological test results under the New Method. Doc. 267767. That rescoring did not change the overall estimated impairment level. *Id.*

In a report dated August 6, 2022, an Appeals Advisory Panel Consultant provided input on the validity of the neuropsychological testing:

The former player scored in the “suboptimal” range on 6 of 7 PVTs, but none were below chance or so low as to suggest intentional underperformance. These scores are much more consistent with the patient’s severe dementia. No other Slick criteria are present. Using the New Methodology, the player scores at Level 2 overall cognitive impairment. Dr. [REDACTED] rates the patient as severely impaired (CDR=2) on the three relevant CDR domains. I see nothing in the patient’s or his spouse’s reports of his functioning to question this. The patient appears to meet criteria for the qualifying diagnosis of Level 2 Neurocognitive Impairment.

Doc. 268011.

However, a separate neurologist consult raised concerns about the impact of non-cognitive factors on the scores for the three relevant CDR domains. The Claims Administrator in turn, passed these on to Dr. [REDACTED] on August 22, 2022, copying the neurologist’s views:

Dr. [REDACTED] gave the Player a CDR score of 2.0 for the three Settlement relevant domains. The Player did not handle his own finances, had difficulty with even simple household chores, had given up most hobbies and social activities. He had given up driving only in February of 2020 and was employed as a classroom assistant until the time of diagnosis, which is somewhat inconsistent with a CDR of

2. According to both his wife and the Player part of his social isolation is related to anxiety and suspiciousness as well as cognitive difficulties. A statement from a friend in 2017 notes the impact of his memory and cognitive difficulties on his work function but also notes a significant role of depression and anxiety in his limited activities and performance. Comments about the possible role of the Player's depression and chronic pain in his daily life and whether these factors contributed to the CDR would be helpful.

Doc. 268799.

In response, Dr. █████ submitted an addendum to his report dated September 6, 2022. Doc. 269535.

In the case of Mr. █████ with a CDR score of 2, I see no conflict or inconsistency in correlating the clinical functional decline with his neurological impairment. My opinion is that more likely than not (which is greater than 50%), this patient's loss of function is related to the neurocognitive and physical deficit caused by repeated concussive and sub-concussive blows to the head encountered while playing professional football. His depression and anxiety are indeed mostly situational, given the awareness of loss of function. A contrary opinion would be unfair to the ex-NFL player given the significant disruption that is evident from the clinical assessment and data provided by family and friends. I, therefore, stand by my opinion expressed on October 12, 2020.

*Id.*¹

On August 24, 2022, an AAP Consultant expressed that “[t]he question remains whether aggressive and successful treatment of this player's psychiatric disorder would render him more cognitively and functionally capable, in which case he might not meet criteria.” Doc. 292395. In response, the Claims Administrator asked Dr. █████ to address whether reversing Mr. █████'s depression would likely bring his test scores to a threshold that would no longer support a Qualifying Diagnosis. Doc. 270691. Dr. █████, addending his finding, wrote on September 30, 2022:

His depression was severe and involved psychosis. He was not taking medications at the time of the evaluation. The severe depression likely played a role in how he approached testing, including performance validity testing and overall cognitive testing...[b]ecause of the functional and medical signs of decline which often co-exist with cognitive decline, it is my opinion psychiatric treatment would not bring his test scores above a threshold that would no longer support a Qualifying Diagnosis.

Doc. 270692, at 1-2.

¹ Dr. █████'s original opinion was dated August 12, 2020, not October 12, 2020.

Next, under Section 8.6(b) of the Settlement Agreement, the Claims Administrator asked that Mr. [REDACTED] explain certain discrepancies in his Claim Package, which he did. Doc. 271990. Shortly thereafter, the Claims Administrator audited the Claim pursuant to Section 10.3 of the Settlement Agreement. Doc. 273410.

The investigation revealed additional details related to Mr. [REDACTED]'s work history and income—which I will discuss below—that were inconsistent with some of the statements he had made to his examining physicians. The Claims Administrator ultimately decided that the information did not offer sufficient basis to conclude that Mr. [REDACTED] (who, all agree, suffers from a significant mental illness) had engaged in a misrepresentation, omission, or concealment of a material fact. Doc 283221.

On July 12, 2023, the Claims Administrator determined that Mr. [REDACTED] was entitled to a Monetary Award. But considering the evidence emerging during Audit, it found that he was not eligible for the Level 2 Award he had claimed, but rather one for Level 1.5 Impairment. Doc. 285793, at 1. In so concluding, the Claims Administrator adopted the views of its terminal AAP reviewer. Doc. 285796.

Dr. [REDACTED] gave the Player a CDR score of 2.0 for the three Settlement relevant domains. The Player did not handle his own finances, had difficulty with even simple household chores, had given up most hobbies and social activities. He had given up driving only in February of 2020 and was employed as a classroom assistant until the time of diagnosis, which is somewhat inconsistent with a CDR of 2.0. According to both the Player and his wife, part of his social isolation is related to anxiety and suspiciousness as well as cognitive difficulties. A statement from a friend in 2017 notes the impact of his memory and cognitive difficulties on his work function but also notes a significant role of depression and anxiety in his limited activities and performance.

In response to a request for additional explanation regarding the impact of non-cognitive factors on the CDR score, Dr. [REDACTED] stated that this issue is particularly relevant in the view of the added information regarding the Player's employment/retirement status at the time of diagnosis.

Although there still is not a clear description of the Player's actual duties or performance during this period, his participation in work activities for the number of hours per week listed for two years beyond the date of diagnosis (still driving to some extent as well) is not consistent with a CDR of 2.0 for at least the domain of Community Affairs. This new information, along with the concerns regarding the impact of the Player's depression and chronic pain on the Player's daily functioning, are generally consistent with a CDR of 1.0 (Mild), but not 2.0 (Moderate), in the areas of Community Affairs, Home & Hobbies, and Personal Care.

Doc. 285796, at 1-2.

Mr. [REDACTED] appealed on August 10, 2023. Doc. 287524.

DISCUSSION

Mr. [REDACTED], contesting the Claim Administrator's determination of a Level 1.5 Qualifying Diagnosis of Neurocognitive Impairment, argues that his MAF evaluation is, rather, generally consistent with a Qualifying Diagnosis of Level 2 Neurocognitive Impairment. *Id.* He insists that contrary to the AAP physician's finding, he meets criterion (iii) for asserting a Level 2 Neurocognitive Impairment claim because his reported functional impairment is generally consistent with scores of 2.0 (Moderate) for the CDR categories of Community Affairs, Home/Hobbies, and Personal Care. Doc. 287296, at 1.

Mr. [REDACTED]'s case rests on Dr. [REDACTED]'s analysis. Dr. [REDACTED]'s neurological report described Mr. [REDACTED] as "highly disorganized at home, requiring repeated direction to complete simple tasks." Doc. 264948, at 6. On Mr. [REDACTED]'s self-care, the report said the Retired Player needed assistance "sometimes for dressing" and is not cooking because "he forgets what he is doing causing the food to burn." *Id.*, at 7. Dr. [REDACTED] also noted Mr. [REDACTED]'s denial of current engagement in hobbies and his limited socialization with friends and family. *Id.*

Crucially, Dr. [REDACTED] relied on the asserted fact that Mr. [REDACTED] had officially retired in August 2020, having last worked in March 2020 because he was getting "repeated reprimands as he could not perform many of the tasks required." *Id.* (cleaned up). These assertions were corroborated by Mr. [REDACTED]'s wife, who reported that Mr. [REDACTED] has "slowly lost his ability to accomplish activities of daily living" over time. *Id.*, at 2.

But the later-developed record is partially inconsistent with these statements about Mr. [REDACTED]'s retained function at the time of his evaluation.

In response to repeated queries from the Claims Administrator, Mr. [REDACTED] admitted that while he entered the Miami-Dade County's Deferred Retirement Option Program in August 2020, he only officially stopped working in August 2022. Docs. 264948, at 7; 272783, at 1-2. He clarified that between August 2020 and August 2022, his job responsibilities "included being an assistant in the classroom," where he "worked approximately 20-25 hours a week." Doc. 272972, at 1-2. In later correspondence, he provided more insight into this work, noting, "I helped with classroom management. My responsibilities included making sure kids were behaving and helping the teacher pass out assignments." Doc. 274525, at 2.

Mr. [REDACTED] also disclosed that he had only stopped working as a 5000 Role Model Site Director in August 2022. Doc. 272783, at 2. In his role as Site Director, he participated in a mentoring program that "met once a month for approximately 45 minutes." Doc. 272972, at 2. The Claims Administrator asked him to explain how his work involvements between August 2020 and August 2022 were consistent with the reports from his physicians which stated that he

officially retired in 2020. He responded to that with, “I filed paperwork to retire in August of 2020. I continued working as an assistant since filing but my hours were cut back and my responsibilities lightened up. I officially retired in August of 2022.” Doc. 274525, at 2.

Mr. [REDACTED] thus had significant job responsibilities at the time of the Qualifying Diagnosis—and for two years after it was rendered. These responsibilities were simply inconsistent with Dr. [REDACTED]’s CDR score of 2.0 in the area of Community Affairs. That score required Mr. [REDACTED] to have “no pretense of independent function outside the home,” though he may be “taken to functions” by others. That may have been what Dr. [REDACTED] was told and what he concluded. But his thoughtful report rested on statements by Mr. [REDACTED] and his wife which were refuted by the record as it later developed.² On appeal, Mr. [REDACTED] does not contest the facts about his work from 2020 through 2022, arguing only that it tapered with time. But that is not clear and convincing evidence that the Claims Administrator’s conclusion was in error.

CONCLUSION

Because Mr. [REDACTED] has not offered clear and convincing evidence that the Claims Administrator erred, I deny his Appeal.

Date: November 12, 2023



David A. Hoffman, Special Master

² As the NFL Parties state, the evidence developed during Audit is flatly inconsistent with Mrs. [REDACTED]’s statements that Mr. [REDACTED] “last worked in March 2020” and “does not leave the house anymore.” Doc. 264948, at 2, 7. His continued employment post “official” retirement is only nominally consistent with Dr. [REDACTED] being told by Mr. [REDACTED] that “his symptoms have caused him to retire as of 08/03/2020.” Doc. 264949, at 2. Dr. [REDACTED] found, and the NFL Parties do not contest, that Mr. [REDACTED] suffers from depression which was “severe and involved psychosis,” which may help to explain why the Claims Administrator did not issue an adverse finding in Audit. However, I would have benefited had Mr. [REDACTED]’s counsel helped to reconcile the differences between what his examining neurologist and neuropsychologist were told and what the record later revealed. Mr. [REDACTED]’s counsel calls the concerns “cherry picked.” But as I read the record, Mr. [REDACTED]’s inability to hold down a job in 2020 was a fact on which his Diagnosis of Level 2 Neurocognitive Impairment rested.