

IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION

MDL No. 2323

THIS DOCUMENT RELATES TO:
APPEAL OF [REDACTED]
REGARDING DENIAL OF MONETARY
AWARD

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Level 2 Neurocognitive Impairment. Doc. 196082. The NFL Parties also asserted that Dr. [REDACTED] Diagnosis did not comply with the Agreement's requirements because it lacked neuropsychological testing or an explanation for why that testing had not been completed.

On July 17, 2018, Special Master Pritchett denied the NFL Parties' Appeal, explaining: "The Qualified MAF Physician rendered the diagnosis on this claim in compliance with the applicable provisions of the Settlement Agreement, and the record on this appeal does not show that such diagnosis was clearly and convincingly wrong." Doc. 179570. The decision was designated as nonprecedential.

In addition to appealing Mr. [REDACTED] claim determination, the NFL Parties sent a letter to the Special Master on June 28, 2018, requesting stay of payment and re-review of all Appeals that had not already been reviewed by the Appeals Advisory Panel and "turn on technical, medical grounds." Special Master Pritchett denied both the NFL Parties' request to compel AAP/AAPC review, as well as the request for stay of payment, on September 28, 2018.

The NFL Parties filed an objection with the district court on October 29, 2018, seeking reversal of Special Master Pritchett's use of the AAP/AAPC on claim appeals. Specifically, they asserted that the Special Master's practice of not consulting with AAP Members and Consultants in deciding seventeen claim appeals—including Mr. [REDACTED]—constituted an abuse of discretion. Additionally, that same day, the NFL Parties sent a letter to the Court requesting a stay of payment on these seventeen claim awards pending the outcome of two appeals (one being the Appeal of Special Master Pritchett's AAP/AAPC decision), which they asserted would "effectively be mooted...if the [seventeen] claims are paid before the court has ruled." Doc. 189691.

In an Order issued on April 12, 2019, the District Court denied the NFL Parties' objection and adopted the Special Master's conclusions in the September 28, 2018 Ruling.² But, the Court determined that the Claims arising from Qualifying Diagnoses by MAF Physicians—which includes Mr. [REDACTED]—would benefit from application of the revised Rules Governing MAF Physicians, which had been adopted by the Court just one day prior.³ The Court remanded this subset of Claims to the Claims Administrator.

The Claims Administrator subsequently referred Mr. [REDACTED] first Claim to the AAP Leadership Council for review.⁴ In July, 2019, the reviewing AAP Member recommended that it be denied, writing:

Dr. [REDACTED] diagnosed Level 2.0 Neurocognitive Impairment (NCI) on 10/16/17. His note reports a MMSE score of 26/30; this is a normal or no more

² Order on AAP/AAPC Consultation by Special Master (Apr. 12, 2019), https://www.nflconcussionsettlement.com/-Docs/order_AAP_AAPC_consultation.pdf.

³ See Rules Governing Qualified MAF Physicians (Apr. 11, 2019), https://www.nflconcussionsettlement.com/-Docs/Rules_Qualified_MAF_Physicians.pdf.

⁴ Rule 23 of the Rules Governing Qualified MAF Physicians provides the Claims Administrator with discretion to request the AAP Leadership Council's "advice and assistance on any medical issues arising in the monitoring of the work of Qualified MAF Physician."

than mildly impaired score. Dr. [REDACTED] states that neuropsychological testing was not required due to the severity of deficits. Dr. [REDACTED] reports that he player has severe problems with sleep and notes that the player has “disabling” headaches. The medical history also includes chronic pain and sleep apnea.

Additionally he reports CDR scores of 2 in Community Affairs, Home & Hobbies, and Personal Care. However, he also reports that the player lives alone and spends his time trying to remain physically and mentally fit. The 3rd party statement indicates that the player is less socially active, doesn’t keep a clean house, and doesn’t pursue his personal appearance as diligently as in the past. None of the statements point to cognitive losses as the origin of these deficits as is required by CDR scoring rules. His continuing ability to live alone and pursue the interests of physical and mental well-being are not generally consistent with moderate dementia or the specific scoring guidelines for CDR 2 in in the required domains. Dr. [REDACTED] attests to a CDR score of 1.5 in Community Affairs. This is not valid. No such score exists in the CDR scoring algorithm and demonstrates that Dr. [REDACTED] may lack the knowledge or experience to provide valid CDR scoring.

Given the generally intact performance on the MMSE and the players ability to maintain independent living, the deferral of neuropsychological testing is not medically justified. The lack of documented consideration of other physical and medical contributors to functional decline, as well as the assignment of an invalid domain score of 1.5 indicates that Dr. [REDACTED] CDR scoring was not generally consistent with the instrument’s published standards.

In its Appeal the NFL brought forward additional evidence that the player was actively involved in business affairs and community events in a period contemporaneous with Dr. [REDACTED] diagnosis. The omission of these material facts from the physician evaluation further undermines the validity of the diagnosis.

Doc. 210600. The Claims Administrator, adopting this analysis, denied the Claim on July 19, 2019. Doc. 211373.

Mr. [REDACTED] then changed representation and began the process of filing a new Claim.⁵ Dr. [REDACTED], a MAF neurologist, evaluated Mr. [REDACTED] on September 4, 2019, and later certified a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment supported by the neuropsychological testing of Dr. [REDACTED] that occurred on June 28, 2019. Doc. 220582; 220584. Notably, the MAF Diagnosing Physician Certification Form, uploaded on February 10, 2020, states that the date of Diagnosis was July 2, 2019. Doc. 220585. In all events, this Claim was ripe for review by the beginning of 2020.

On March 20, the Claims Administrator began the process of evaluating this Second Claim—the process that ultimately resulted in this Appeal. It issued a Notice of Preliminary

⁵ His current counsel has ably prosecuted this Appeal.

Review. Doc. 221854. That Notice identified multiple gaps in the records: missing pages, an absence of separate evaluations for each of the requisite domains of functional impairment, raw neuropsychological test scores and standardized scores, and validity scores (which were incomplete).

Dr. ██████ responded to that Notice by email on May 27, 2020. Doc. 225675. He noted that he had trouble performing several tests due to Mr. ██████ “high intensity pain and photophobia,” and that he was then unable to access certain records due to the pandemic. *Id.* But he proceeded to comment on the separate components of Mr. ██████ CDR as follows:

Memory – unable to assess

Orientation – normal

Judgment & problem solving – no obvious impairment

Community affairs – able to function independently

Home and hobbies – probably mild impairment d/t chronic headache (daily/constant)

Personal care – okay

Behavior, comportment, and personality – dramatic pain behaviors; otherwise, appropriate

Language – no difficulty

Id. On July 31, 2020, Dr. ██████ followed up again by email that he had sent a questionnaire to Mr. ██████ and was then awaiting his response. Doc. 227032.

The AAPC reviewed the documentation and recommended that the Claim be denied on April 12, 2020. Doc. 227373. The Consultant noted a number of problems with Dr. ██████ exam, including “the player’s level of cooperation and engagement,” test scores which were not part of the BAP neuropsychological battery making it difficult to apply the “[Settlement Program] decision rules,” performance validity tests that are “not adequate substitutes,” a lack of exploration of the role of depression in causing Mr. ██████ symptoms, and a lack of formal assessment using the CDR scale. *Id.* On August 13, 2020, reviewing additional documents, the Consultant reaffirmed his view, noting a suspicion of “suboptimal effort,” confounding effects of depression and pain, and particularly that, as “Dr. ██████ writes ‘Community Affairs – able to function independently; Home & Hobbies – probable mild impairment d/t chronic headache (daily/constant); Personal Care – okay.’ This does not support a moderate to severe functional decline due to dementia.” *Id.* at 2.

On August 18, 2020, Mr. ██████ submitted his response to the Notice of Preliminary Review. Doc. 227482. On January 6, 2021, the Consultant (who had written in April and August) revised his report, reaffirming it. Doc. 231674. The Consultant noted, in addition to the earlier expressed concerns about the lack of a formal CDR assessment, that Dr. ██████ analysis was potentially confounded by Mr. ██████ “pain disorder, chronic daily headaches, impaired memory, and DSM-5 mood disorder.” *Id.* The Consultant concluded that the neuropsychological test scores remained generally inconsistent with the Settlement Criteria.

Relying on the Consultant's analysis, an AAP Member recommended denial of the Claim. The Claims Administrator subsequently issued a Denial Notice on January 11, 2021. Doc. 231785. The Denial is comprehensive:

The Player was evaluated by the diagnosing physician, Dr. [REDACTED], on 9/4/2019 (Doc ID 220582) and there is an additional explanation from Dr. [REDACTED] dated 5/27/2020 (Doc ID 225675). The neuropsychological evaluation was performed by Dr. [REDACTED] on 6/25/2019 (Doc ID 220509) through the NFL Player Neurocognitive and Total & Permanent Disability Benefit Plan, and there is additional information about the neuropsychological evaluation, raw scores, and explanation regarding issues with the neuropsychological assessment as well (Doc IDs 227461, 227482, and 227483). Dr. [REDACTED] is not a Qualified BAP Provider nor is he approved as an Examining Neuropsychologist for MAF evaluations, but he is ABPP-CN certified.

A diagnosis of Level 1.5 Neurocognitive Impairment rendered outside of the BAP must be generally consistent with these four diagnostic criteria: (i) concern of severe decline in cognitive function; (ii) evidence of moderate to severe cognitive decline . . . in two or more cognitive domains; (iii) functional impairment; and (iv) not exclusively in the context of delirium, acute substance abuse, or medication side effects.

The AAP member reviewed the entire file and noted the following:

Criterion (i) is fulfilled with documentation by Dr. [REDACTED] of memory problems, impaired concentration, impaired memory, and a mood disorder.

Criterion (ii) is not fulfilled due to issues with validity and additional issues related to scoring, the lack of information about the normative data used, and issues with the number of tests administered. AAPC review of the neuropsychological testing indicated there is failure of multiple performance validity assessments (one trial of the TOMM and two trials of the MSVT). The AAPC also noted other issues, including that the full-scale IQ score that was assessed as being nominally higher than the estimated premorbid IQ, which is not consistent with a moderate to severe cognitive decline, and there were a great many more test scores reported in each cognitive domain mostly from tests that are not part of the BAP battery, making it extremely difficult to apply the Settlement criteria. Additionally, Dr. [REDACTED] relied on cut-offs for persons with average premorbid intellect based on the TOPF (SS=84), while the Player is below-average according to the Settlement Program definition (IQ<90). Consequently, criterion (ii) is not fulfilled.

Criterion (iii) would be fulfilled with information from the CDR worksheet dated 9/3/2019 (Doc ID 220579) and corroborated by information from the third-party affidavit (Doc ID 154639). However, it is notable that Dr. [REDACTED] reported

information regarding the CDR categories that would not be generally consistent with the Settlement criteria in the explanation sent via e-mail on 5/27/2020 (Doc ID 225675), in which he indicated the Player was able to function independently for the category of Community Affairs, with possible mild impairment for the category of Home/Hobbies, and being okay for the category of Personal Care. Consequently, the information regarding criterion (iii) is mixed, and the most recent information supplied by Dr. [REDACTED] is not consistent with scores of 1.0 for the required categories. Therefore, based on the totality of the provided information, criterion (iii) is not satisfied.

Criterion (iv) is fulfilled because there is no evidence that the cognitive deficits occur exclusively in the context of a delirium, acute substance abuse, or as a result of medication side effects.

Overall, the diagnosis is not generally consistent with the Settlement criteria for Level 1.5 Neurocognitive Impairment because the issues with the neuropsychological testing described above do not fulfill criterion (ii), and also due in part to the most recent assessment of the functional abilities by Dr. [REDACTED] not fulfilling the requirements for criterion (iii).

Mr. [REDACTED] appealed this Second Denial. Doc. 232725. The Claims Administrator asked some questions about the Player's activities reported in support of the Claim, and cleared the Appeal to move forward in February of this year. The NFL Parties filed responsive briefing. Doc. 234388. Class Counsel then filed its own statement, objecting that the NFL Parties had raised grounds for affirmance that were not in the Denial Notice. Doc. 235173. Mr. [REDACTED] and the NFL Parties responded to that statement and the issues are now ripe for review. Doc. 235637; 235648.

DISCUSSION

Mr. [REDACTED] bears the burden of showing, by clear and convincing evidence, that the Claims Administrator erred in denying his Claim. The issue of his retained function is dispositive. As the factual recitation above illustrates, the Claims Administrator determined that Mr. [REDACTED] functional impairment was not generally consistent with a CDR score of 1. Its conclusion rests largely on information relayed in Dr. [REDACTED] post-Diagnosis clarification email from May 27, 2020. That email followed from the Claims Administrator's Notice of Preliminary Review regarding deficiencies in the Claim's original documentation—that is, Dr. [REDACTED] original failure to explain how he reached the conclusions that he did regarding functional impairment in his exam of September 2019.

Mr. [REDACTED] argues this choice was likely an error by the Claims Administrator because it “ignores the contemporaneous pattern of functional decline at the time of diagnosis within the documentary evidence.” But Mr. [REDACTED] brief, in suggesting that there was “more proximate in time” evidence, points only to a note in Dr. [REDACTED] exam which states: “ADLs: Needs help with

household chores.”⁶ Doc. 220582. Moreover, though it is true that Dr. [REDACTED] email is an “undetailed summary,” his underlying report was similarly cursory: the email resulted from a Notice of Preliminary Review, pointing out that Dr. [REDACTED] report did not adequately discuss each of the potential areas of retained function. Neither Dr. Heilbronner’s nor Dr. [REDACTED] reports spent any significant time discussing Mr. [REDACTED] functional impairment.

Thus, using Dr. [REDACTED] nearly-contemporaneous note to reach a judgment as to the adequacy of the evidence of Mr. [REDACTED] functional impairment was not in error. And the email fits the facts. Mr. [REDACTED] at the time of the Diagnosis, lived alone. Doc. 220582 at 4. He reported (to a Dr. [REDACTED] two weeks before his Diagnosis) that he was engaging in relatively normal self-care (though he no longer cooked), shopped online and managed his finances (though he “struggles to keep them in order”). Doc. 220510 at 2. It is true, as the Claims Administrator wrote, that information gathered from a CDR worksheet (administered on September 3, 2019, Doc. 220579) and Third-Party Worksheet (from [REDACTED], dated August 30, 2019, Doc. 220581)⁷ may support the Claim. But that information was not discussed in Dr. [REDACTED] report, which renders it significantly less valuable. For example, the informant seems to suggest that Mr. [REDACTED] depression and pain caused his lack of function. Dr. [REDACTED] might have put those comments into context, as the Program’s Rules (FAQ 113.2) require. When he was later asked to enlarge on his views, Dr. [REDACTED] did so, but in a way unhelpful to Mr. [REDACTED] claim.⁸

The Claims Administrator, considering Dr. [REDACTED] disclaimer of Mr. [REDACTED] functional loss in conjunction with the (deficient) neurological report, concluded that Mr. [REDACTED] failed to establish his entitlement to relief under the Settlement. I do not see clear and convincing evidence of error in this determination. As FAQ 113 makes clear, the Diagnosing Physician’s report is a key document in evaluating whether the Claimant has adequately come forward with evidence of his functional impairment. That report is supposed to pull together the Claimant’s medical history, relevant documents and the physician’s articulated judgment. Dr. [REDACTED] report, especially when read together with its supplementary email, simply does not establish a CDR of 1, and thus cannot support an overall award of Level 1.5 Neurocognitive Impairment. True, the Claims Administrator might have tried again to establish the sufficiency of the relevant documentation, but Dr. [REDACTED] statements were clear and evidently based on his personal observation of Mr. [REDACTED]. When Dr. [REDACTED] wrote that Mr. [REDACTED] had no impairment (“able to function independently”) in Community Affairs and Personal Care (“okay”), the Claims Administrator was well within its discretion to credit that view.

Thus, Mr. [REDACTED] has not satisfied his high burden on Appeal.

The NFL Parties also argue that the Denial was correct to conclude that there were “issues with validity and additional issues related to scoring,” and that factors other than cognitive decline

⁶ The ADL scale is, of course, distinct from the CDR measures.

⁷ The Denial Notice refers to an earlier Third-Party Worksheet, also from Mr. [REDACTED] from 2018.

⁸ In a document filed in response to the Notice of Preliminary Review, Mr. [REDACTED] attorneys argued that Dr. [REDACTED] must have relied upon and reviewed documentation supportive of Mr. [REDACTED] Claim, including his disability award, because he wrote that Mr. [REDACTED] was “receiving total/permanent disability payments.” But a more likely explanation is that Mr. [REDACTED] informed Dr. [REDACTED] of that fact during his examination.

may have caused Mr. █████ functional loss. Class Counsel, supported by Mr. █████ reply briefing, argues these issues were not preserved. Class Counsel relies heavily on a recent opinion I wrote that discussed when issues are properly presented on Appeal:⁹

Section 9.1(c)(i) of the Settlement provides that ‘Notices of Monetary Award Claim Determination that provide an adverse determination will include a short statement regarding the reasons for the adverse determination and information regarding how the Settlement Class Member can appeal the determination.’ Rule 26 of the Rules Governing Appeals of Claim Determinations further states that on appeal, ‘the Appellant must convince the Special Master that there is a high degree of probability that the determination of the Claims Administrator being appealed was wrong.’ The Claims Administrator communicates its final determination to deny a claim through a Notice of Denial. The Notice of Denial is an ‘Appealable Notice,’ as defined in Rule 3(d); it is the basis for a Player’s Appeal.

Thus, the Settlement requires the Claims Administrator to provide ‘the reasons for the adverse determination’ in the Notice, and it is this Notice which the Claimant must address in arguing that the Administrator clearly erred. The goal isn’t empty formalism, but rather to ensure that the Claimant has sufficient notice to adequately pursue an appeal in the context of a process where reply briefs are constrained, and oral argument is absent. Of course, the final Notice does not stand alone: communications from the Claims Administrator received prior to the Appealable Notice are incorporated into the Appealable Notice.

Class Counsel makes three related arguments about this Notice of Denial. First, it did not adequately inform Mr. █████ that there were both quantitative and qualitative deficits in his performance validity. Additionally, it would be a “new reason”—and thus not a ground for affirmance—to conclude that Mr. █████ functional impairment resulted from factors other than cognitive loss. Finally, it argues that the Special Masters lack the power to affirm on any ground absent from the Denial Notice.¹⁰

Given my resolution of the larger issue of the general consistency of Mr. █████ functional impairment, it is not strictly necessary to decide these points. However, I will note that unlike that earlier opinion to which Class Counsel cites, the Claims Administrator clearly *did* note that its Denial rested on flaws in analysis with the second *and* third criteria for a Level 1.5 Diagnosis. The Appealable Notice must be a “short statement” that makes Claimants aware of the Claims Administrator’s reasons for deciding as it did: it is not clear to me that the Claims Administrator

⁹ See Special Master Ruling on Reasons in Notice of Denial (Dec. 4, 2020), https://www.nflconcussionsettlement.com/Docs/denial_reasons_sm.pdf.

¹⁰ Class Counsel relies on my decision of December 2020, but appears to implicitly disagree that reasons articulated by the Claims Administrator in pre-decision correspondence are incorporated into the Appealable Notice. For reasons I earlier articulated, I have concluded that ignoring the content of these earlier Notices would misread Section 8.5 of the Settlement Agreement. *Id.*

must list in granular detail each way in which each relevant criteria was not satisfied, so long as the Claimant is given fair notice of why he is not entitled to relief.

Regardless, I do not agree that the Denial Notice, when read together with the supporting correspondence, fails to inform Mr. [REDACTED] of either “new” justification raised by the NFL Parties. The Notice and the previous requests for additional information both explicitly make reference to problems in qualitative measures of validity: indeed, the underlying correspondence discusses these qualitative methods of determining malingering (including wearing sunglasses) at length. Given that Dr. [REDACTED] report does not even undertake a *Slick* analysis, or offer well-articulated grounds for dismissing concerns about validity, it would be surprising if this were not so. Similarly, the underlying correspondence, and the AAPC report, both raise the concern that psychiatric issues were not adequately explored by the examining physicians as a reason for Mr. [REDACTED] loss of function. Doc. 227373.

However, perhaps Class Counsel is correct that these issues could have been more clearly identified in the Denial Notice. Were they to be the only ones left standing between Mr. [REDACTED] and an Award, I likely would remand this case instead of simply affirming.¹¹ The goal of that remand would be to permit the Claims Administrator to decide, in the first instance, whether issues with the *Slick* criteria and the role of depression and pain in Mr. [REDACTED] functional impairment precluded an Award. But that course is unnecessary, and inefficient, given the larger problems with functional impairment that Mr. [REDACTED] examining neurologist identified.

CONCLUSION

Because he has not offered clear and convincing evidence that the Claims Administrator erred in concluding his functional impairment did not meet the Settlement’s Diagnostic criteria, I conclude that Mr. [REDACTED] Appeal must be denied.

Date: May 28, 2021



David A. Hoffman, Special Master

¹¹ Class Counsel may be right that affirmance on a particular ground never raised or suggested in the Denial or a Claim’s procedural history would violate the Agreement. But Rule 24 of the Rules Governing Appeals of Claim Determinations provides that “at any time the Special Master determines it necessary to do so, the Special Master may remand any Claim subject to an Appeal to the Claims Administrator for further processing.” This power is plenary, and I agree with the NFL Parties that were there to be a clear example where a Claim would be otherwise wrongfully granted due to an error by the Claims Administrator, the better procedure would be to remand. That said, the NFL Parties are not exactly as hapless as their briefing makes out in response to problems like these. They can advise the Special Masters and the Claims Administrator about general issues with Claim processing, and I am confident that they will continue to encourage robust and fulsome Notices of Denial. The Appeals process works better if all involved are on the same page.