

IN RE: NATIONAL FOOTBALL LEAGUE
PLAYERS' CONCUSSION INJURY
LITIGATION

MDL No. 2323

THIS DOCUMENT RELATES TO:
NFL PARTIES' APPEAL OF CLAIM
DETERMINATION FOR SETTLEMENT
CLASS MEMBER [REDACTED]

independent with eating, using a toilet, showering, shaving, bathing, dressing, undressing, and walking. He is independent regarding operating a motor vehicle, performing house cleaning activities, cooking, and shopping. He manages his own financial affairs. According to the Clinical Dementia Rating Scale, with respect to community affairs, he independently functions at his usual level in job, shopping, and volunteering in social groups (no impairment - 0). With respect to home and hobbies, life and home hobbies and intellectual interests are well-maintained (no impairment - 0). With respect to personal care, he is fully capable of self-care (no impairment - 0). With respect to memory, for the past four to five years, he has had mild nonprogressive impairment of long-term memory; however, he denies any impairment of short-term memory (no memory loss or slight inconstant forgetfulness - no impairment - 0). With respect to orientation, he is fully oriented (no impairment - 0). With respect to judgment and problem-solving, he solves everyday problems and handles business and financial affairs well. His judgment is good in relation to past performance (no impairment - 0). He has had chronic pain and stiffness of posterior cervical region and entire back since playing professional football. Since playing professional football, he has had intermittent headache localized to the bifrontal region or bioccipital region, currently occurring twice a month. He is not using medications for treatment of headache with headache resolving within several hours. As noted above, for the past four to five years, he has been aware of nonprogressive mild impairment of long-term memory; however, he denies any impairment of short-term memory. For the past six years, he occasionally becomes easily angered.

Id., at 2. Dr. [REDACTED] ultimately concluded:

At this time, the patient does not meet the criteria for a neurocognitive impairment based on the criteria for the NFL concussion settlement. In this regard, assessment of the patient according to the Clinical Dementia Rating scale revealed that he had no impairment regarding community affairs, home and hobbies, and personal care. He is independent regarding all activities of daily living.

Id., at 6–7. Dr. [REDACTED] then provided a neuropsychological evaluation on February 9, 2018. Doc. 220201. In assessing Mr. [REDACTED] functional status and Clinical Dementia Rating (CDR) scoring, Dr. [REDACTED] explained:

Mr. [REDACTED] was rated as a 0.5 for the Community Affairs subscale. He reported needing reminders to pay bills and manage his bank account. On the Home and Hobbies subscale, he was also rated as a 0.5. He functions in his usual household activities but not at the level he once did, and needs reminders to perform some tasks. With respect to the Personal Care subscale, Mr. [REDACTED] was rated as a 0, as he is able to dress, wash and groom himself, eat and toilet independently.

Id., at 6-7.

Dr. [REDACTED] also reviewed additional evidence from a third-party affidavit of Mr. [REDACTED] longtime friend, [REDACTED], before concluding:

It appears that on CDR, Mr. [REDACTED] somewhat minimized the level of his functional impairment. This could partly be due to being somewhat embarrassed to discuss his personal difficulties, as well as having limited insight into his functional decline. Therefore, it would be particularly important to take into consideration the information provided by Mr. [REDACTED] friend of over 20 years. Based on this information, his overall functional impairment appears to be in the 1.0 range (Mild Impairment).

Id. at 7-8 (emphasis omitted).

Two years after his first report, on January 5, 2020, Dr. [REDACTED] issued a supplemental one. He explained:

Dr. [REDACTED] indicated that taken as a whole, the results of the BAP baseline neuropsychological assessment suggested that the patient may meet BAP criteria for a diagnosis of level 1.5 neurocognitive impairment. Mr. [REDACTED] met criteria in the areas of language (level 1.5 impairment) and executive functions (level 1.5 impairment) and thus his overall rating base upon the neuropsychological battery would be considered level 1.5 neurocognitive impairment per BAP guidelines. The patient's functional status as assessed by the three subscales of the CDR was 0.5 for community affairs, 0.5 for home and hobbies and 0 for personal care. In addition, Mr. [REDACTED] provided a sworn third party affidavit from his long-time friend of over 20 years, which provided a supplementary source of information, indicating areas in which he was functionally impaired. Based on this information, his overall rating of functional status was judged to be a category 1.0 (consistent with level 1.5 impairment). Dr. [REDACTED] indicated that overall Mr. [REDACTED] demonstrated adequate effort on measures of performance validity.

Doc. 220203, at 1.

Dr. [REDACTED] ultimately concluded: "In view of the information provided by the report of Dr. [REDACTED] regarding neuropsychological assessment on 02/09/2018, the patient's BAP impairment rating should be revised to level 1.5 neurocognitive impairment." *Id.*, at 2.

On March 15, 2021, Mr. [REDACTED] submitted a Claim based on this Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment. Doc. 233713. On August 27, 2021, the Claims Administrator approved a Monetary Award consistent with Mr. [REDACTED] Qualifying Diagnosis. Doc. 237935. The NFL appealed on October 18, 2021. Doc. 239335.

On November 11, 2021—after the Claims Administrator issued a Claim Determination and after the NFL Parties appealed—Dr. ██████ again assessed Mr. ██████ Doc. 240735. Another CDR analysis was performed, and Dr. ██████ indicated that a score of CDR score of 1.0 in both Home & Hobbies and Community Affairs were appropriate. *Id.*, at 2. Dr. ██████ concluded that Mr. ██████ “CDR impairment level was considered to be compatible with mild impairment and reflective of a CDR score of 1.0. This finding and the patient’s previous neuropsychological evaluation by Dr. ██████ on 02/09/2018 appear to justify the patient’s BAP impairment rating as level 1.5 neurocognitive impairment.” *Id.*, at 8.

DISCUSSION

The NFL Parties appeal on the sole ground that Mr. ██████ “reported abilities are inconsistent with the functional impairment required for his diagnosis.” Doc. 239333, at 1. They accurately assert that for a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment, Mr. ██████ must “exhibit[] functional impairment generally consistent with the criteria set forth in the National Alzheimer’s Coordinating Center’s Clinical Dementia Rating (CDR) scale Category 1.0 (Moderate) in the areas of Community Affairs, Home & Hobbies, and Personal Care.”²

Dr. ██████ Mr. ██████ BAP neurologist, originally performed a CDR analysis which yielded a CDR score of 0 in each of the three relevant categories. Notably, Dr. ██████ explained that Mr. ██████ “independently functions at his usual level in job, shopping, and volunteering in social groups,” “life and home hobbies and intellectual interests are well-maintained,” and “he is fully capable of self-care.” Doc. 220202, at 2.

Dr. ██████ Mr. ██████ BAP neuropsychologist, performed another CDR analysis just three weeks later. Dr. ██████ noted that Mr. ██████ needs reminders to pay bills and to complete household chores, and he accordingly assigned Mr. ██████ a CDR score of 0.5 in Community Affairs and Home & Hobbies, and a score of 0 in Personal Care. As neither Dr. ██████ nor Dr. ██████ assigned Category 1.0 functional impairment to any of the three Settlement CDR categories, the record is devoid of any CDR analysis that yields scores that are generally consistent with the Settlement’s requirements for a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment.³

² Settlement Agreement, Exhibit A-1, (1)(a)(iii).

³ On June 15, 2021, the Claims Administrator requested additional documentation from Mr. ██████ regarding his functional impairment to assess whether his diagnosing physician and clinician appropriately considered the CDR criteria. Doc. 236164. In response to this request, the BAP Administrator highlighted the portion of Dr. ██████ February 2018 report where he concluded that Mr. ██████ “overall functional impairment appears to be in the 1.0 range”—despite the CDR scoring that suggests otherwise. Doc. 237713. The BAP Administrator further explained:

Dr. ██████ simply made an error on the Table of Test Results where he stated overall CDR of 0.5 but the narrative was correct with the overall CDR=1.0 rating which supports the Level 1.5 BAP diagnosis. He also goes into great detail about how the 3rd party affidavit led to these CDR ratings

Yet, notwithstanding the CDR analysis he administered, Dr. [REDACTED] ultimately reasoned that Mr. [REDACTED] functional impairment was generally consistent with his asserted Qualifying Diagnosis based on a third-party affidavit taken from a longtime friend, [REDACTED]. The affidavit described Mr. [REDACTED] increasing apprehension to engage in church and youth sports mentorship activities, as well as his inability to complete yard work and house repairs. It also nonetheless explained that Mr. [REDACTED] has maintained his attention to hygiene and is able to ensure that he is “very put together.” Doc. 220201, at 7.

Dr. [REDACTED] attributed the discrepancies between the CDR analysis and the affidavit to “[Mr. [REDACTED] being embarrassed to discuss his personal difficulties, as well as having limited insight into his functional decline.” *Id.* Dr. [REDACTED] ultimately concluded that, in light of this third-party affidavit, Mr. [REDACTED] exhibited a level of functional impairment generally consistent with a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment. In his second report, Dr. [REDACTED] adopted Dr. [REDACTED] analysis in reviewing Mr. [REDACTED] neuropsychological examination results and certifying the Claim. Dr. [REDACTED] did not explain the inconsistencies between his earlier report and this one.

These records do not adequately support the 2018 Qualifying Diagnosis. In the absence of documentary evidence to support a CDR analysis, a “Retired NFL Football Player’s functional impairment...must be *corroborated* by a third-party sworn affidavit from a person familiar with the Retired NFL Football Player’s condition....”⁴ Here, however, in deciding that Mr. [REDACTED] may have been too embarrassed to openly discuss his cognitive decline, or may not have fully understood its extent, Dr. [REDACTED] used this third-party affidavit to *supplant*—rather than *corroborate*—the CDR analysis.⁵

If Dr. [REDACTED] did determine that his interview may not have yielded a fully truthful or accurate account of Mr. [REDACTED] functional impairment, he should have gone to further lengths

in the same report should that be necessary to review. Please review the highlighted portion...for the correct CDR score that supports the Level 1.5 BAP impairment rating.

Id. Notwithstanding the BAP Administrator’s emphasis on Dr. [REDACTED] reliance on the third-party affidavit, this explanation is plainly insufficient. Dr. [REDACTED] analysis indicates that he, in fact, did come to appropriate conclusions when performing the CDR analysis. “[N]eeding reminders to pay bills and manage [a] bank account” comports with a CDR score of 0.5 in Community Affairs. Doc. 220201, at 6. “[F]unction[ing] in...usual household activities but not at the level that [a Retired Player] once did, and need[ing] reminders to perform some tasks” comports with a CDR score of 0.5 in Home & Hobbies. *Id.*, at 7. Being “able to dress, wash and groom...[and to] eat and toilet independently” comports with a CDR score of 0 in Personal Care. *Id.* In sum, Dr. [REDACTED] CDR analysis could not support a Level 1.5 BAP Diagnosis.

⁴ Settlement Agreement, Exhibit A-1, (1)(a)(iii) (emphasis added).

⁵ See Special Master Ruling on Evidence to Support a Qualifying Diagnosis, at 7 (Sept. 5, 2020), https://www.nflconcussionsettlement.com/Docs/evidence_of_qualifying_diagnosis_sm.pdf (“That the diagnosing physician can exercise judgment in determining the sufficiency of the documentary record’s *corroboration* of functional impairment is not the same as saying that he or she ultimately has plenary authority to determine the player’s functional impairment.”) (emphasis in original).

to provide Dr. [REDACTED] with a more comprehensive picture of Mr. [REDACTED] daily cognitive functioning, which the neurologist could then have used, perhaps after further follow-up, to justify the Claim. Nonetheless, there is clear and convincing evidence that the Claims Administrator was incorrect in relying on Dr. [REDACTED] conclusion, which incorporated Dr. [REDACTED] CDR analysis, in determining that a Monetary Award was appropriate.⁶

Nearly a month after the NFL Parties filed this Appeal and provided accompanying briefing, Dr. [REDACTED] conducted another neurological assessment of Mr. [REDACTED]. This report contained more information about the extent of Mr. [REDACTED] functional impairment, and Dr. [REDACTED] accordingly provided a new CDR analysis that yielded different scores than either his previous January 2018 report or Dr. [REDACTED] February 2018 report.⁷ In response to the NFL Parties' Appeal, Mr. [REDACTED] counsel submitted this new medical report, and subsequently argued in its briefing that "it is crystal clear that Mr. [REDACTED] meets the requirements of a diagnosis of Level 1.5 Neurocognitive Impairment." Doc. 240737, at 5.

I do not agree. To start, the latest report is not contemporaneous with those that justify the 2018 Diagnosis. On appeal, "the appropriate focus is on the strength of the clinician's contemporaneously created record and the Claims Administrator's process for reviewing that record."⁸ Documentation of functional impairment is contemporaneous "if it was created on or

⁶ On February 20, 2022, a member of the AAP supported this conclusion:

A Neuropsychologist Dr. [REDACTED] on 2/9/18 initially gave the Player a CDR of 0.5 for Community Affairs, 0.5 for Home and Hobbies and 0 for Personal Care on the basis on an interview with the Player which is not consistent with the qualifying diagnosis. He later revised this rating to an overall CDR of 1 on the basis of a statement from a friend Ms. [REDACTED] stating that he felt the initial CDR based on the Player's interview was an underestimate of his functional difficulties due to embarrassment and poor insight. Of note, his comments regarding the Player's performance on the MMPI do not support this assumption of an underestimate, with a Player showing a tendency toward over reporting of symptoms rather than under reporting. The friend's statement commented mostly of the Player's behavioral issues such as irritability but gave few specific examples of functional impairment. The Neurologist, Dr. [REDACTED] during his evaluation of the Player (apparently alone) on 3/12/18 gave the Player a CDR of 0 for the Settlement relevant domains, also not consistent with the claimed diagnosis. Dr. [REDACTED] later revised his overall CDR to 1 in a letter of 1/5/20 noting Dr. [REDACTED] revised CDR but provided no additional information or rationale. An AAPLC review of 6/2/21 did not agree that the description of the Player in the friend's statement justified the revised CDR to a qualifying level of impairment. In conclusion, the opinion of the AAPLC, based on the medical records available at that time, that the revised CDR of 1 on 1/5/20 was not consistent with Settlement guidelines was correct.

Doc. 243200.

⁷ Notably, Dr. [REDACTED] appears to rely on an interview he conducted with Mr. [REDACTED] girlfriend in performing this new CDR analysis. However, such an interview is not a substitute for the documentary evidence that the Settlement requires for a determination of Category 1.0 functional impairment. Settlement Agreement, Exhibit A-1, (1)(a)(iii). Nor is it sufficient to corroborate a finding of functional impairment, as a third-party sworn affidavit—not an interview taken during the neurological examination—is required. *Id.*

⁸ Special Master Ruling on Post-Diagnosis Evidence, at 4 (June 8, 2020), [https://www.nflconcussionsettlement.com/Docs/post diagnosis evidence sm.pdf](https://www.nflconcussionsettlement.com/Docs/post%20diagnosis%20evidence%20sm.pdf).

very close to the date of the event described.”⁹ And yet, Mr. █████ counsel urges me to replace Dr. █████ CDR analysis—which was performed contemporaneously with his neuropsychological evaluation and which was the basis of the Claims Administrator’s determination—with one that Dr. █████ performed nearly four years after the date of Diagnosis. I am particularly concerned that these records were issued after the Appeal commenced.¹⁰

The Claims Administrator must “[d]etermine whether Settlement Class Members who submit Claim Packages and Derivative Claim Packages are entitled to Monetary Awards....”¹¹ Such a determination requires an examination of all evidence that Retired Players submit—evidence that is submitted when the Claim is filed, in response to a request for additional documents, or during audit. In turn, the Special Masters decide an Appeal of a Monetary Award based on whether there is clear and convincing evidence that the Claims Administrator’s determination was incorrect.¹² As a result, my determination of any Appeal, including this one, is generally limited to evidence that the Claims Administrator relies on in making a determination.

Of course, both Claimants and the NFL Parties will sometimes submit external evidence on appeal that tends to support or undermine the Diagnosis. This evidence is typically of limited value.¹³ Here, it has essentially none. Given the degenerative nature of the Diagnosis, the fact that Mr. █████ may have mild functional impairment in late 2021, indicated in Dr. █████ November 2021 report, is not probative of whether Mr. █████ was similarly afflicted in early 2018. This is especially true where the contemporaneous 2018 evidence is to the contrary.

Ultimately the question is whether the records in the Claim file justify the Diagnosis. They do not. Of note, however, I believe that Mr. █████ is eligible for a second free BAP examination pursuant to the Court’s March 4, 2022 Order. The Claims Administrator will confirm this next step for Mr. █████ by the end of April.¹⁴

⁹ Settlement Agreement, FAQ #106.

¹⁰ See Special Master Ruling on *Slick* Analysis and Functional Impairment, n. 5 (July 1, 2021), https://www.nflconcussionsettlement.com/Docs/slick_functional_impairment_sm.pdf (explaining that “the Claims Administrator and AAP should only consider the neuropsychological evaluations on which the Claim rests in determining whether... Class Members meet the Settlement’s requirements for Criterion (ii) of a Qualifying Diagnosis,” although the AAP and Claims Administrator may consider “current neurological and neuropsychological assessment results in the context of reliable data” for the purposes of the *Slick* analysis.) Given the need for the Claims Administrator to make consistent and fair determinations, the same must be true for Criterion (iii) of a Qualifying Diagnosis.

¹¹ Settlement Agreement, Article X, Section 10.2(b)(6).

¹² See Order Appointing Special Masters, at 5.

¹³ See Special Master Ruling on Post-Diagnosis Evidence (June 8, 2020), https://www.nflconcussionsettlement.com/Docs/post_diagnosis_evidence_sm.pdf; Special Master Ruling on Pre-Diagnosis Evidence, at 4 (July 2, 2020), https://www.nflconcussionsettlement.com/Docs/pre_diagnosis_evidence_sm.pdf (“[E]xternal evidence both raises problems of administrability...and probative value.”).

¹⁴ Much of both parties’ briefing addresses whether Dr. █████ November 2021 CDR analysis adequately supports a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment. I do not decide that question today. Mr. █████ may submit a new Claim, for example, if found to have a Qualifying Diagnosis through the expanded BAP, relying

CONCLUSION

On appeal, the NFL Parties have offered clear and convincing evidence that the Claims Administrator's determination was incorrect. Mr. [REDACTED] did not submit sufficient evidence of mild functional impairment in 2018, and therefore a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment was not appropriate. I grant the Appeal.

Date: March 11, 2022



David A. Hoffman, Special Master

in part on this recent exam. Any new report should explain the (potential) incongruity of that Diagnosis with Mr. [REDACTED] continued employment as a heavy metals mechanic, and the Claims Administrator can then evaluate its sufficiency.