

IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION

MDL No. 2323

THIS DOCUMENT RELATES TO:
NFL PARTIES' APPEAL OF
QUALIFYING DIAGNOSIS AND
CLAIM DETERMINATION FOR
SETTLEMENT CLASS MEMBER

Noting that these findings were “somewhat inconsistent with what he reported during the clinical interview which may reflect limited insight or a guarded presentation,” Dr. [REDACTED] emphasized the importance of securing a third-party sworn statement and/or supporting medical

records. *Id.*, at 6. Nevertheless, he noted that “[p]er the BAP Clinician’s Interpretation Guide, Mr. ██████ overall impairment rating is at Level 2” and that in accordance with the Settlement Agreement guidelines, “these findings also need to be corroborated by a CDR administered by a BAP-approved neurologist in the settlement program.” *Id.*

Dr. ██████ then evaluated Mr. ██████ on February 7, 2023. Doc. 277578. Finding that Mr. ██████ scored 2.0 in Community Affairs and Home & Hobbies, and 1.0 in Personal Care, Dr. ██████ rated him a 2.0 on the CDR scale. Doc. 277577, at 2. Dr. ██████ also concluded that Mr. ██████ “progressive cognitive dysfunction meets the level II cognitive impairment with moderate dementia per current NFL guidelines.” Doc. 277578, at 2. In coming to that view, he considered “previous documented history, current interviews, clinical symptoms and neurological examination, CDR as well as the results of neuropsychological testing.” *Id.*

The Claims Administrator rescored Mr. ██████ neuropsychological test results under the Race Norming Agreement. Doc. 280838. That rescoring did not change the overall estimated impairment level. *Id.*, at 3.¹ Under 8.6(b) of the Settlement Agreement, the Claims Administrator also asked that Mr. ██████ explain certain discrepancies in his Claim Package, which he did. Doc. 283181. The Claims Administrator then determined he was entitled to a Monetary Award. Doc. 284014.

The NFL Parties appealed on August 7, 2023. Doc. 287140.

DISCUSSION

Appealing the Monetary Award, the NFL Parties contest only the Claims Administrator’s determination that Mr. ██████ sufficiently demonstrated functional impairment generally consistent with the Diagnosis. Doc. 287140.

As the NFL Parties rightly point out, Dr. ██████ considered a CDR worksheet completed by Ms. ██████ in making his assessment. Doc. 277578, at 2. This is not the best practice, which is to complete the CDR worksheet following a semi-structured interview with the Retired Player.² But neither is it itself disqualifying.

Crucially, though Dr. ██████ did not complete the CDR worksheet himself, he reviewed it and endorsed its conclusions. He conducted an in-person interview with Ms. ██████—a reliable informant—before providing his own take on Mr. ██████ level of functional impairment. Doc.

¹ The neuropsychological testing was completed after the implementation of the Race Norming Agreement, and Dr. ██████ applied the New Method in his assessment. Nevertheless, the Claims Administrator re-ran the scores through the Settlement Portal’s algorithm to confirm their accuracy.

² Special Master Ruling on Functional Impairment, at 6 (Dec. 15, 2020), https://www.nflconcussionsettlement.com/Docs/functional_impairment_SM.pdf.

277577, at 1. Dr. [REDACTED] also reported relying on several factors, not just the CDR worksheet, for his CDR conclusion. Doc. 277578, at 2.³ This sufficed.

Second, the NFL Parties protest that Dr. [REDACTED] failed to offer any explanation for his assigned CDR scores. Doc. 287140, at 1. The CDR Assessment Form asks diagnosing physicians to “explain the Player’s level of functioning” in the areas of Community Affairs, Home & Hobbies and Personal Care and for the overall CDR score. Doc. 277577, at 2. Providing explanations is, again, best practice, but where a physician fails to comply, and there is evidence in the claim record to suggest that the CDR scores are valid, the failure to comply cannot itself serve as clear and convincing evidence of error in a determination of the Retired Player’s functional impairment. (Though it will affect the degree of deference that such scoring merits.)

Third, the NFL Parties are correct in noting that the CDR scale requires the diagnosing physician to determine whether a Retired Player’s functional impairment was due to cognitive loss, and not something else. The Settlement Agreement asks that when—as here—other factors potentially relate to the Retired Player’s functional impairment, the diagnosing physician must “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.”⁴

This requires the diagnosing physician to at least be aware of a Retired Player’s emotional and psychiatric history before reaching conclusions about his functional loss.⁵ Dr. [REDACTED]’s report shows he knew that Mr. [REDACTED] i) had been diagnosed with bipolar disorder, schizophrenia and other amnesia and ii) was taking medications, and that he considered them in making his neurological assessment. Doc. 277578, at 1. He reviewed Dr. [REDACTED]’s neuropsychological report, which indicated that Mr. [REDACTED] is medicated for mood management and “maintains regularly scheduled psychotherapy appointments with Dr. [REDACTED] at [REDACTED].” Doc. 280690, at 3. He then noted that “[u]sing sound medical judgment and best medical practices, the player’s cognitive impairments and impairments in activities of daily livings are due to repeat traumatic brain injury while playing NFL football and not due to co-morbidities,” and shortly thereafter, recommended that Mr. [REDACTED] “continue close follow up with current psychiatrist for treatment of bipolar and schizophrenia.” Doc. 277578, at 2.

Dr. [REDACTED] failed to further detail his reasoning, but it can be reasonably inferred that he isolated Mr. [REDACTED] functional impairment caused by cognitive loss from that caused by Mr. [REDACTED] psychiatric issues. That he considered and addressed all the confounding factors in

³ It is not unprecedented to see a CDR worksheet completed by someone other than the diagnosing physician. What is key is to look at the quality of the interview conducted by the physician and his or her reasoning. Special Master Ruling on Functional Impairment and Cognitive Decline, at 8 (Sept. 7, 2021), https://www.nflconcussionsettlement.com/Docs/functional_impairment_SM_5.pdf.

⁴ *Frequently Asked Questions, FAQ #111* (The Functional Impairment Must Result from Cognitive Loss.), NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com>.

⁵ See Special Master Ruling on Functional Impairment and Cognitive Decline, at 10 (Sept. 7, 2021), https://www.nflconcussionsettlement.com/Docs/functional_impairment_SM_5.pdf; but see Special Master Ruling on Functional Impairment and Validity Testing, at 4 (Mar. 19, 2021), https://www.nflconcussionsettlement.com/Docs/functional_impairment_SM_3.pdf (insufficient analysis).

making his judgment is generally consistent with what the Settlement Agreement requires. Or at least the NFL Parties have not met their burden on appeal of showing that it was wrong by clear and convincing evidence.

Finally, the NFL Parties assert that Mr. [REDACTED] overall functionality is inconsistent with an overall CDR rating of 2. Doc. 287140, at 1. They note that in the area of Community Affairs, Mr. [REDACTED] CDR worksheet says he drives without problems, “is usually able to independently shop for his needs, and that he is sometimes able to independently carry out activities outside the home.” *Id.*, at 3. They also state that in the area of Home & Hobbies, the CDR worksheet reports Mr. [REDACTED] “continued ability to perform household tasks and care for his mother as well as his retained complex hobbies such as monitoring the stock market.” *Id.*

But the record evidence is mixed. In her affidavit, Ms. [REDACTED] indicated that while Mr. [REDACTED] drove regularly, there were many times when he would forget where he was (even in places he should have been familiar with) and would get lost. Doc. 277576, at 3. She recalled a time when he “spaced out” and “found himself walking in the middle of an intersection and almost got hit by an 18-wheeler” before concluding, “if [REDACTED] needs to be somewhere, someone has to drive him most of the time.” *Id.* She also reported Mr. [REDACTED] loss of interest in his hobbies as well as his difficulties with socializing, keeping up with household chores (including grocery shopping, taking out the trash and cooking) and maintaining his personal care. *Id.* at 3-4.

In later correspondence with the Claims Administrator, Mr. [REDACTED] reinforced Ms. [REDACTED] statements about his functional abilities while addressing inconsistencies in his Claim Package. Doc. 283136. He stated that he drove on a limited basis near his home and mainly relied on others for his driving needs. Doc. 283136, at 4. He also confirmed being less social and no longer engaging in hobbies including golfing, fishing and painting. *Id.* As it relates to his daily activities, he described difficulties with cooking, hiring someone to assist him with household chores and added:

Currently, I am no longer day trading, like many of the things I have tried in the past I have struggled to keep up and quit shortly after starting. Having to focus and make quick decisions was too demanding for me, and [it’s] hard to succeed as a day trader if you are unable to react quickly or make quick decisions...[a]s far as helping her, I try to give my mom reminders to take her medicine. I don’t always remember to do that, but I try my best. Sometimes my mom also asks me to go with her to appointments when they are very close. If she has an appointment that is any further, she has to depend on my aunt to go with her because I do not like going long distances.

Id., at 5.

Dr. [REDACTED] and Dr. [REDACTED]’s reports also noted Mr. [REDACTED] declining functional abilities. Dr. [REDACTED] noted that Mr. [REDACTED] “frequently forgot little things.” Doc. 277578, at 1 (cleaned up). Dr. [REDACTED] wrote that Mr. [REDACTED] reported leaving “the stove turned on after

he finished cooking on several occasions,” including twice the week of his neuropsychological evaluation. Doc. 280690, at 2.

I agree that there is some record evidence inconsistent with the profound functional impairment required for a Level 2 Award. But the NFL Parties have not proffered clear and convincing evidence that the overall CDR rating was in error. It was reasonable for the Claims Administrator to conclude that Mr. [REDACTED] shows no pretense of independent function outside the home. He is not working because “he doesn’t have the ability to hold down a job” and his “odd end jobs...never last because of the difficulties he has.” Doc. 277576, at 3. It was not probably wrong to conclude that Mr. [REDACTED] has very restricted interests, and has trouble managing the activities of daily living.

CONCLUSION

Because the NFL Parties have not offered clear and convincing evidence that the Claims Administrator erred, I deny their Appeal.

Date: October 21, 2023



David A. Hoffman, Special Master