

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 [REDACTED]

CLAIM HISTORY

No clear indicators of performance invalidity are present, nor was there a clear discrepancy between his test performance and his observed behavior. Behaviorally, Mr. [REDACTED] was noted to work diligently across the evaluation. Classification of

performance validity is optimal, and the current evaluation is considered to be a valid representation of Mr. [REDACTED] abilities.

Id.

The Claims Administrator verified that Mr. [REDACTED] neuropsychological testing applied the New Method correctly on December 27, 2022. Doc. 275002.

In an affidavit dated August 26, 2022, Mr. [REDACTED] friend, [REDACTED], noted the following concerns, in part, about Mr. [REDACTED] cognitive decline:

[REDACTED] used to be capable of maintaining all the household chores, but his wife must now do everything around the house for him. Whether it be the laundry, dishes, garbage, or cleaning in general, she will have to do it. [REDACTED] used to be capable of doing his lawn, but he has since had to hire someone else to do it for him. He has never been known as a handy man, but he would always try. However, if something needs to be fixed around the house nowadays, he will have to call someone else to do it because he can't. I remember [REDACTED] used to be a bit of a neat freak, but he isn't near as structured as he used to be. His vehicle is somewhat of a mess now. He used to keep stuff like that clean, but now I find myself having to move stuff out of the way just to make room for me to sit down.

[REDACTED] keeps himself presentable, but you can tell he doesn't care what other people think about him regarding his appearance. He used to dress up more often, however, [REDACTED] now tends to wear gym clothes most days. As mentioned before, he keeps himself presentable, but if he attends a formal event, he isn't going to wear a suit like he used to.

[REDACTED] also used to keep a clean haircut and was always well shaven, but he doesn't maintain that near as much as he used to, and he tends to let it grow out more often. **There have been a few instances where I had to give [REDACTED] reminders to clean his appearance up a little bit.**

When [REDACTED] eats, I have noticed his wife cuts his food for him, but he has never expressed to me as to why she does it for him.

[REDACTED] is just different than he once was, and I have personally seen the decline from the man he used to be versus who he is now.

Doc. 274646 (emphasis added).

On September 22, 2022, neurologist Dr. [REDACTED] examined Mr. [REDACTED] reviewed his medical records, and diagnosed him with Level 2.0 Neurocognitive Impairment. Doc. 273307. In completing Mr. [REDACTED] functional assessment, Dr. [REDACTED] noted:

The patient demonstrated a level 2.0 of impairment in areas of Community Affairs, Home & Hobbies, and Personal Care.

Community Affairs: CDR Score of 2 (Moderate).

Home & Hobbies: CDR Score of 2 (Moderate).

Personal Care: CDR Score of (Mild).

Overall impairment consists with Level 2 neurocognitive impairment per current NFL guidelines.

Id. (emphasis added).

In a later section of the same report, however, Dr. [REDACTED] stated that the “patient demonstrated a level 2.0 of impairment in areas of Community Affairs, Home & Hobbies, and Personal Care.” *Id.* But in the separate CDR assessment form, Dr. [REDACTED] recorded an impairment level of “Mild(1)” for Personal Care. Doc. 273310. His ratings for Home and Hobbies and Community Affairs, respectively, were consistently reported at “Moderate(2),” for an overall CDR rating of “Moderate(2).” *Id.*

Further complicating the picture, the CDR worksheet submitted as part of the Claim Package showed scores of 0 circled for each aspect of Personal Care. Doc. 273303. Below the circled scores, the respondent noted, “While [REDACTED] is able to perform day to day duties with little or no help there are times when I must repeat myself or remind him several times so he does not forget something.” *Id.*

On December 14, 2022, Mr. [REDACTED] filed a Claim for an Award based on a Qualifying Diagnosis of Level 2.0 Neurocognitive Impairment dated September 22, 2022. Doc. 274644. The Claims Administrator asked Dr. [REDACTED] to clarify his Personal Care score given the circled zeroes on the CDR worksheet, and his Community Affairs score given Mr. [REDACTED] retained ability to drive, shop, and carry out activities outside the house. Doc. 276033. Dr. [REDACTED] responded:

After further clarified with Mrs. [REDACTED] on CDR and reviewed CDR worksheets completed her on 10/10/2022, **Mr. [REDACTED] is advised not to drive a car but he insists to drive.** He can only drive a short distance locally with GPS. He got lost several times recently. Mr. [REDACTED] is most time dependent on others for his shopping needs. He no longer engages in any social events or community affairs.

[...] There was a misunderstanding on filling out circle estimate of the personal care of CDR by Mrs. [REDACTED]. She provided a detail descriptions in words on the same page that **clearly qualify him for level I impairment.** He requires some assistance with getting dressed and for all washing and grooming. He continues to feed himself when provided with a prepared meal. The Third-Party Sworn Statement per Mr. [REDACTED] and CDR worksheets completed by Mr. [REDACTED] on 08/26/2022 is also consistent with CDR score of level II impairment.

Doc. 284085 (emphasis added).

The CDR worksheet completed by Mrs. [REDACTED] is part of the record, Doc. 273303, while the CDR worksheet completed by Mr. [REDACTED] is not.

Next, the Claims Administrator placed Mr. [REDACTED] Claim into audit on July 7, 2023. Doc. 285599. The purpose of the audit was to “satisfy June 2023 mandatory audit requirements, and to verify his roles with multiple businesses.” Doc. 297075. After conducting a detailed review of Mr. [REDACTED] employment, volunteer, and educational pursuits, the Claims Administrator found:

- Mr. [REDACTED] worked as the Regional Safety Manager at a firm called [REDACTED] full time from 2017-2019. *Id.* at 2. In that role, Mr. [REDACTED] responsibilities included ““overseeing and managing all safety measures on construction sites, and developing safety plans and protocols.”” *Id.*
- From 2020-2021, Mr. [REDACTED] worked full time ““as an Environmental Investigator for the [REDACTED] for a few months.”” *Id.* His responsibilities there involved ““sitting in an office, reading reports, and inputting data into the system.”” *Id.*
- From 2021 to August 2022, Mr. [REDACTED] worked for a firm called [REDACTED] full time as a Regional Safety Director. *Id.* at 3. He was let go either because of downsizing (what [REDACTED] told him), “issues he was having carrying out tasks and arguments and disagreements with co-workers” (what Mr. [REDACTED] believes), or some combination of the two. *Id.*
- From 2009 to the present, Mr. [REDACTED] has been involved with the [REDACTED]. *Id.* He is currently the chapter’s Vice President, a role that involves attending meetings “once every quarter and the meetings typically last one hour.” *Id.*
- From 2020-2021, Mr. [REDACTED] “served on the advisory committee for [REDACTED],” in which capacity he gave “input on safety measures for the construction of a building” in quarterly virtual meetings. *Id.* at 4. This project was cancelled in early 2021. *Id.*
- In 2020, Mr. [REDACTED] entered and won a business pitch competition at an [REDACTED]. *Id.* His “wife booked his flights, hotel and travel to the event but he flew and attended the event alone.” *Id.* The business pitch entailed a [REDACTED]. *Id.* To deliver the pitch, Mr. [REDACTED] submitted a document and answered questions in front of a small group. *Id.*
- From June 2020 to March 2021, Mr. [REDACTED] was a co-founder of [REDACTED], a [REDACTED]. *Id.* at 5. Mr. [REDACTED] involvement mainly consisted of completing a virtual boot camp,

which entailed [REDACTED]

[REDACTED] *Id.* The boot camp took place over 20 hours per week for three months, after which Mr. [REDACTED] did “little meaningful work.” *Id.*

- From 2021 to the present, Mr. [REDACTED] has allowed his cousin to use his name and likeness in building two companies. *Id.* at 6. Although Mr. [REDACTED] is listed as a Vice President of both businesses, Mr. [REDACTED] cousin confirmed to the Claims Administrator that this was merely “for marketing purposes” and that although Mr. [REDACTED] “will occasionally join calls with possible investors,” he is not an actual employee of the businesses and does not play an active role in them. *Id.* Mr. [REDACTED] could make income if he brought in investors to the companies, but he has not been able to do this. *Id.* To date, Mr. [REDACTED] has joined three virtual calls with potential investors, during which he listened in and recapped with his cousin after each meeting. *Id.*
- Mr. [REDACTED] completed two online courses in 2023—one with the [REDACTED] and one with [REDACTED]. *Id.* at 6-7. Each was a self-paced online course that gave a certificate upon completion. *Id.* at 7. Mr. [REDACTED] took these courses to learn more about [REDACTED] and to boost his resume with the hopes of finding an “entry level position.” *Id.*

Ultimately, the Claims Administrator, concluding its audit on December 14, 2023, found no “reasonable basis to conclude that there has been a misrepresentation, omission, or concealment of a material fact” in connection with the Claim. Doc. 297147. On February 12, 2024, the Claims Administrator determined that Mr. [REDACTED] was entitled to a Monetary Award for a Qualifying Diagnosis of Level 2.0 Neurocognitive Impairment. Doc. 301976. The NFL Parties timely filed this Appeal on April 9, 2024. Doc. 320646.

RESOLVING THIS APPEAL

The NFL Parties concede that Mr. [REDACTED] advanced valid and qualifying neuropsychological tests and otherwise satisfied the Injury Definitions. But they state that Mr. [REDACTED] “functional abilities at the time of diagnosis were clearly consistent with a CDR rating of, at most, 0.5 for Community Affairs, 1 for Personal Care, and 1 for Home and Hobbies.” Doc. 320644. Since the Settlement’s definition of Level 2.0 Neurocognitive Impairment requires a CDR score of 2.0 “in the areas of Community Affairs, Home & Hobbies, and Personal Care,”¹ they argue that he should get nothing at all.²

The Claims Administrator determined that he had cleared that bar. The NFL Parties therefore bear a heavy burden of showing that not only the Claims Administrator erred, but Mr. [REDACTED] examining physician did as well. Unfortunately, Mr. [REDACTED] examining neurologist, Dr. [REDACTED] failed to produce a report that models clarity or completeness. I asked the AAP for advice

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

² See Doc. 320644 at 3 (arguing that Mr. [REDACTED] “claim determination should be reversed” and pointing out that “[d]enial here will not preclude Mr. [REDACTED] from receiving a Qualifying Diagnosis in the future”).

in making sense of the records, and, although I disagree with the reviewer in part, I have incorporated their feedback here. Doc. 349904.

FAQ 111 makes clear that CDR scoring isn't a mathematical exercise or one that requires a patient's symptoms to be equivalent across domains. Rather, it asks neurologists to make a holistic judgment:

After assigning a CDR score to each of Community Affairs, Home & Hobbies and Personal Care, the diagnosing physician must decide whether the Player has functional impairment generally consistent with the criteria set forth in the CDR as Mild (Level 1.5) or Moderate (Level 2) impairment across those three areas. While the diagnosing physician must evaluate and score each of the three areas independently, he or she must determine whether the Player's functional impairment level is Mild or Moderate, or some other level, on a qualitative basis, assessing the qualitative results of the three areas as a whole. The diagnosis is not simply an average of the three scores. There is no required minimum score on any of the three areas, but the final diagnosis must be generally consistent with the scores assigned to the Player in each of the three areas.

Thus, a Player who is scored 0 (None) on all three areas cannot be found to have a Level 1.5 or Level 2 Qualifying Diagnosis, for that diagnosis would not be generally consistent with the scores assigned to that Player. But if the Player is given a mix of scores on the three areas, the diagnosing physician must make a sound medical judgment, assessing the qualitative results of the three areas as a whole, to reach a diagnosis, and the final diagnosis rendered must be generally consistent with the scores assigned.³

In applying this FAQ, which summarizes and encodes the Program's long-established practice, I must determine if there is clear and convincing evidence that Mr. [REDACTED] has not demonstrated the requisite functional impairment consistent with moderate dementia. The burden on this Appeal is the NFL Parties', not Mr. [REDACTED]

To start, all parties involved—Dr. [REDACTED],⁴ Mr. [REDACTED],⁵ and the NFL Parties⁶—agree that Mr. [REDACTED] CDR rating for Personal Care is (at most) 1.0, not 2.0. The factual record is consistent with this unanimous position.

³ *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://nflconcussionsettlement.com>.

⁴ See Docs. 273307 (“Personal Care: CDR Score of (Mild).”); 284085 (stating that the evidence Mrs. [REDACTED] provided “clearly qualif[ied] him for level I impairment” in Personal Care); 273310 (reporting a score of “Mild(1)” for Personal Care).

⁵ See Doc. 325392 (“Dr. [REDACTED] concluded that Mr. [REDACTED] has a CDR score of 1 in Personal Care.”).

⁶ See Doc. 320644 (“Combined, Mr. [REDACTED] functional abilities at the time of diagnosis were clearly consistent with a CDR rating of, at most [...] 1 for Personal Care.”).

To warrant a Personal Care score of 1.0, a patient must need “prompting” for activities such as “dressing, hygiene, keeping of personal effects.” Doc. 320645. Mr. [REDACTED] affidavit identifies exactly this type of motivation for dressing and hygiene: “There have been a few instances where I had to give [REDACTED] reminders to clean his appearance up a little bit.” Doc. 274646. Significantly, these reminders are new, representing a “decline from previous usual level.” Doc. 320645. Mr. [REDACTED] used to “dress up more often” rather than wear “gym clothes most days,” and he “used to keep a clean haircut and was always well shaven” but now needs encouragement to “clean his appearance up a little bit.” Doc. 274646.

With respect to keeping of personal effects, Mr. [REDACTED] needs prompting here, too. Mr. [REDACTED] has to “move stuff out of the way just to make room for [himself] to sit down” in Mr. [REDACTED] car, even though Mr. [REDACTED] “used to be a bit of a neat freak.” *Id.* Whether or not Mr. [REDACTED] is literally prompting Mr. [REDACTED] to clean up his car each time he moves stuff out of the way is irrelevant because the question is whether Mr. [REDACTED] *needs* the reminder, not whether he actually gets one.

The AAP emphasizes that the “CDR respondent identified no deficits in personal care, including no need for prompting for washing and grooming.” Doc. 349904. We know from Dr. [REDACTED] addendum that Mrs. [REDACTED] filled out the CDR worksheet, “rather than through a semi-structured interview conducted by the clinician as is required by CDR scoring rules.” *Id.* This is not ideal, and indeed led to a mistake in the process—Mrs. [REDACTED] herself not a clinician well versed in the nuances of the CDR worksheet, misunderstood “filling out circle estimate of the personal care of CDR,” according to Dr. [REDACTED] addendum. Doc. 284085.

But even so, as that same addendum points out, *id.*, Mrs. [REDACTED] written description on the Personal Care part of the worksheet is consistent with a score of 1.0: “While [REDACTED] is able to perform day to day duties with little or no help there are times when I must repeat myself or remind him several times so he does not forget something.” Doc. 273303. This description is consistent with Mr. [REDACTED] account: Mr. [REDACTED] is not “[f]ully capable of self-care” (CDR level 0 or 0.5), but he also does not require “assistance in dressing, hygiene, [or] keeping of personal effects” (CDR level of 2). Doc. 320645. He can do these tasks himself, but “[n]eeds prompting”—consistent with level 1. *Id.*

Therefore, despite deficiencies in Dr. [REDACTED] process and analysis, the contemporaneous descriptions submitted by people who know Mr. [REDACTED] well are consistent with a CDR score of 1.0 for Personal Care. I have no reason not to credit these descriptions, and the Claims Administrator’s audit made no adverse and contrary findings. Doc. 297147.

Next, Dr. [REDACTED] scored Mr. [REDACTED] with a 2.0 in Home and Hobbies; the NFL Parties think the evidence is more consistent with a 1.0. Docs. 284085; 320644. A score of 2.0 is appropriate in Home and Hobbies in a situation of “[o]nly simple chores preserved; very restricted interests, poorly maintained.” Doc. 320645. Meanwhile, a score of 1.0 is appropriate where there is “[m]ild but definite impairment of function at home; more difficult chores abandoned; more complicated

hobbies and interests abandoned.” *Id.* As with Personal Care, the evidence for Home and Hobbies supports a CDR score of 1.0.

Mr. ██████ notes that Mr. ██████ “used to be capable of maintaining all the household chores, but his wife must now do everything around the house for him.” Doc. 274646. For example, Mr. ██████ is no longer able to do “laundry, dishes, garbage, or cleaning in general.” *Id.* Nor is he able to mow his lawn or even attempt to fix things around the house, although he used to engage in these activities. *Id.* Furthermore, Mrs. ██████ has to prepare and cut up food for Mr. ██████ (although Mr. ██████ was not sure exactly why this was the case). *Id.* This set of facts, in isolation, would be consistent with a level 2.0 for Home and Hobbies, as not even simple chores appear to be preserved.⁷

Cutting against the picture painted by Mr. ██████ however, Mrs. ██████ wrote “Cleaning tasks” in response to the question “What can he/she still do well?” in the Home and Hobbies portion of the CDR worksheet. Doc. 273303. Without the benefit of an articulated explanation from Dr. ██████ it remains unclear exactly to what extent Mr. ██████ is engaged in chores at home. The evidence suggests that the answer is more than zero, that he may even do certain tasks well, but that he relies on his wife for several chores that he used to take on himself.

There is also some evidence of Mr. ██████ hobbies and interests: he completed two online business courses in 2023. Doc. 297075. However, as those courses certified completion rather than mastery, it is difficult to evaluate precisely to what extent Mr. ██████ maintains his interests, even if those interests in theory are “more complicated.” Doc. 320645. An interest in a topic like private equity investing sounds difficult to maintain with a cognitive impairment, but if maintenance actually looks like watching a series of self-paced videos, perhaps the interest is simple or poorly maintained after all.

The AAP places a lot of weight on the prestige of “institutions such as ██████” and broader “principles of higher education.” Doc. 349904. But whatever ██████ general reputation for rigorous coursework, the fact remains that in the context of this particular ██████ class (and the ██████ one), “Mr. ██████ did not need to demonstrate a grasp of the concepts presented.” Doc. 325392. On this record, there is no way to evaluate Mr. ██████ actual appreciation of, or engagement in, the content of these courses. Taking them does not provide clear and convincing evidence that he had maintained *all* of his previous level of engagement in his interests.

And yet overall, the facts are most consistent with a score of 1.0 in Home and Hobbies, not a 2.0. It’s true that Mr. ██████ affidavit (alone) indicates significant loss of function. But given Mr. ██████ participation in the online business courses and Mrs. ██████ statement that Mr.

⁷ The AAP did not find Mr. ██████ affidavit persuasive on this point because he “notes that the player’s wife manages household responsibilities but does not identify that the limitations are from cognitive deficits rather than physical issues.” Doc. 349904. But it would be unreasonable and contrary to Settlement practice to expect Mr. ██████ friend to perform a differential diagnosis between chronic pain and cognitive issues. All Mr. ██████ can do is report his honest observations.

██████ does do at least some cleaning tasks well, the holistic record is more consistent with a determination of “[m]ild but definite impairment of function at home; more difficult chores abandoned; more complicated hobbies and interests abandoned” than “[o]nly simple chores preserved; very restricted interests, poorly maintained.” Doc. 320645.

Third, Community Affairs. A score of 2.0 in Community Affairs means that a player could appear “well enough to be taken to functions outside a family home,” but would have “[n]o pretense of independent function outside home.” *Id.* The AAP found that the “available data are inconsistent with the anchor text for a CDR score of 2 in Community Affairs.” Doc. 349904. I agree that although Mr. ██████ activities outside the home are limited, the record shows that at the time of his Diagnosis he maintained more than *no pretense* of independent function outside his home.

For example, at the time of his Diagnosis, he still attended quarterly meetings with the ██████. Doc. 297075 at 3. Until a month before his Diagnosis, Mr. ██████ was employed full time. *Id.* He drove occasionally, although he was not supposed to and often got lost. Doc. 284085. (That activity apparently continues today.) He is dependent on others for his shopping needs most—but not all—of the time. *Id.* Once in a while, he completes a virtual course or joins a virtual meeting—settings that, though not outside the home in a literal sense, nonetheless reveal some independent effort on his part to engage with the outside world. Doc. 297075.

He also aspires to attain an entry level position in the workforce. *Id.* at 7. While Mr. ██████ is correct that “aspiring to do something and actually being able to do it are two very different things,” Doc. 325392, his efforts at boosting his resume through virtual coursework—in combination with the other examples discussed—amount to at least a “pretense of independent function outside home.” Doc. 320645.

Overall, the AAP advises that these activities are inconsistent with the “anchor text,” and I am constrained to agree. There simply is too much evidence of too many kinds of independent function to plausibly support a 2.0 in Community Affairs.

On the other extreme—where the NFL Parties claim the evidence lies—a 0.5 CDR score in Community Affairs means that Mr. ██████ would only exhibit “[s]light impairment” in independent activities such as “job, shopping, volunteer and social groups.” Doc. 320645. I disagree with the NFL Parties as the record reveals more than “slight” impairment.

First of all, Mr. ██████ is unemployed. Doc. 297075 at 3. He believes he was laid off from his most recent full-time role because his cognitive impairment negatively impacted his performance, although the official line was that his employer was downsizing. *Id.* Whichever is true, Mr. ██████ has not found another full-time role in the two years since. *Id.* He no longer attends church, goes bowling with friends, participates in football camps, or leaves the house for family gatherings. Doc. 274646. Most of the time, he neither drives nor shops, and even when he does, he gets lost or forgets things. *Id.*; Doc. 284085.

Moreover, Mr. ██████ volunteer activities have tapered off to a trickle since 2021, and at the time of his Diagnosis consisted only of four hours a year spent with the ██████. Doc. 297075. Although he formerly kept in close contact with friends and extended family, he does not do this anymore. Doc. 274646. As I discussed above, the coursework Mr. ██████ engaged with was entirely online and completion-based—at no point was Mr. ██████ ever required to demonstrate his mastery of the subject matter. Doc. 297075 at 7. Finally, he has trouble holding a conversation with his wife and often finds himself wandering into rooms without recalling any intended purpose. Doc. 274645.

The record thus supports a CDR score of 1.0 for Community Affairs. Mr. ██████ is “[u]nable to function independently at these activities although may still be engaged in some; appears normal to casual inspection.” Doc. 320645. Try though he might (and does), Mr. ██████ is simply not able to independently hold down a job, shop for himself or his family, or participate in volunteer and social activities. On the occasional video call or quarterly meeting perhaps, he “appears normal to casual inspection.” *Id.* But dig a little deeper and Mr. ██████ is more than slightly or questionably impaired with respect to Community Affairs. He’s mildly impaired.

Given these three components, the overall issue is whether Dr. ██████ holistic judgment (had he articulated one clearly) is supported by the evidence. It is not: the NFL Parties have shown by clear and convincing evidence that in all three domains, Mr. ██████ contemporaneous records do not reflect the profound lack of retained function that a Level 2.0 aggregate indicates. However, the NFL Parties are wrong that his retained function is inconsistent with any award at all. In fact, the evidence is consistent with a Level 1.5 Award, since Mr. ██████ functional impairment is mild, and his neuropsychological scores (amply) justify an Award at that level.

Disagreeing in part with the above conclusion, the AAP opines that “Dr. ██████ did not report sufficient information to determine the role of cognitive decline, not other causes (especially depression, chronic multifocal pain, and sleep disturbance) as the cause of losses in Home & Hobbies and Community Affairs domains to support general consistency with CDR scores of 1 in those domains.” Doc. 349904. Therefore, the AAP concludes that the available information “does not support a qualifying diagnosis of either Level 2.0 or Level 1.5 Neurocognitive Impairment.” *Id.*

As an initial matter, the NFL Parties did not raise this particular argument in their briefing. As they are the party with the burden to prove that the Claims Administrator erred, it is arguably waived. Mr. ██████ was given no opportunity to respond to the criticism of Dr. ██████ report, as it was first raised by the AAP in response to my request for review. Even were I inclined to find the AAP’s view persuasive, I would not adopt it without notice and an opportunity to respond.

I am in all events not persuaded. The Settlement is clear that claimants “do not need to exclude the possibility that the Qualifying Diagnosis was caused or contributed to by [...] various risk factors linked to the Qualifying Diagnosis.”⁸ For this reason, diagnosing physicians are not

⁸ Settlement Agreement, Exhibit A-5 (15).

required to call upon “magic words to achieve relief.”⁹ They do need to make some “attempt to isolate the functional impairment due to cognitive loss alone and assign a CDR rating based solely on that cognitive loss.”¹⁰ But this is a “low bar.”¹¹ The ask is no greater than “reasoned explanations at least attempting to explain the relationship between cognitive and non-cognitive factors.”¹²

Dr. ██████ noted that Mr. ██████ struggled with depression symptoms and lack of sleep, but concluded nonetheless that Mr. ██████ “only identified risk factor” for “progressive cognitive dysfunction” was “multiple episodes of head trauma from his career as a professional football player.” Doc. 284085. In particular, Mr. ██████ “had five times of head concussions during the professional career,” including two instances in which he lost consciousness. *Id.* Mr. ██████ denied a “family history of Alzheimer’s disease, Parkinson’s disease,” smoking, alcohol abuse, or “illicit substance abuse/dependence.” *Id.* He was not taking any medications. *Id.* Therefore, in Dr. ██████ “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.” *Id.*

This reasoning is conclusory. Ideally, Dr. ██████ would have provided a more articulated explanation. Dr. ██████ is no longer a physician with the Program because of gaps in reports just like these. But here, he at least attempted to explain the relationship between the cognitive and non-cognitive factors contributing to Mr. ██████ condition by connecting his cognitive symptoms to specific instances of traumatic brain injury in the NFL and ruling out a number of other risk factors for such symptoms. Given the procedural posture and resulting evidentiary burden—where the Claims Administrator implicitly found that the functional impairment analysis sufficiently isolated Mr. ██████ cognitive decline from other factors, and the NFL Parties did not object—I conclude that it would be inappropriate to overturn the Award on this basis.

CONCLUSION

The NFL Parties have identified clear and convincing evidence of error in the Claims Administrator’s decision to grant an Award for Level 2.0 Neurocognitive Impairment. However, the record supports a lesser Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment. I grant the Appeal in part and deny the Appeal in part, and direct the Claims Administrator to make an Award consistent with the lower impairment level.

⁹ Special Master Ruling on Functional Impairment and Cognitive Decline, at 11 (Sept. 7, 2021), https://www.nflconcussionsettlement.com/Docs/functional_impairment_sm_5.pdf.

¹⁰ *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://nflconcussionsettlement.com>.

¹¹ Special Master Ruling on Validity Testing, External Evidence and Functional Impairment, at 11 (Mar. 27, 2023), https://www.nflconcussionsettlement.com/Docs/validity_evidence_impairment_sm.pdf.

¹² Special Master Ruling on Functional Impairment and Alternative Causation, at 5 (Mar. 29, 2024), https://www.nflconcussionsettlement.com/Docs/functional_impairment_alt_cause_SM.pdf.

Date: August 25, 2024

A handwritten signature in blue ink, appearing to read "David A. Hoffman", with a long horizontal flourish extending to the right.

David A. Hoffman, Special Master