

IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION

MDL No. 2323

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

Dr. [REDACTED] now acting as a Qualified MAF Physician, confirmed that the rescored results did not establish a Qualifying Diagnosis on October 24, 2022. Doc. 278954. Two days later, on October 26, 2022, Dr. [REDACTED] re-tested Mr. [REDACTED] Doc. 278410. It is this second round of neuropsychological testing that is at the heart of Mr. [REDACTED] Appeal.

The Settlement requires neuropsychologists to use the Test of Premorbid Functioning (TOPF) to estimate a player's pre-morbid reading level as Below Average, Average, or Above Average.¹ That reading level allows a neuropsychologist to compare a player's scores on a battery of neuropsychological tests against the appropriate Impairment Criteria table to determine his level of impairment in each of the five neurocognitive domains.²

Mr. [REDACTED] received a TOPF score of 89. Doc. 279433. Under the Settlement, a score below 90 establishes an estimated Below Average pre-morbid reading level.³ Nevertheless, Dr. [REDACTED] classified Mr. [REDACTED] level as Average, explaining his decision as follows:

Mr. [REDACTED] reading level fell in the Below Average range based on his TOPF Word Reading Score (Raw Score = 32; Standard Score = 89; Predicted Standard Score = 103). However, his reading level is considered an underestimate of his premorbid intellectual ability because Mr. [REDACTED] graduated from [REDACTED] with a B- GPA. This is consistent with the observed-predicted discrepancy as noted above. The likelihood that someone with Below Average IQ could graduate from college is extremely low (see McGue et al., 2022 for a review). As such, Mr. [REDACTED] scores were considered against the Average table in the settlement.

Doc. 278410 (emphasis in original).

Had Dr. [REDACTED] classified Mr. [REDACTED] with a Below Average pre-morbid reading level, his neuropsychological test scores would have revealed no impairment in any neurocognitive domain. Doc. 279433. But with an Average reading level as the baseline, those same scores produced Level 2 Impairment in two neurocognitive domains: Language, and Learning and Memory. Doc. 278410. Dr. [REDACTED] therefore concluded that Mr. [REDACTED] met the criteria for Level 2 overall impairment. *Id.* Relying in part on Dr. [REDACTED] neuropsychological testing, Dr. [REDACTED] diagnosed Mr. [REDACTED]—then 39 years old—with Alzheimer's Disease on February 6, 2023. 278408. Mr. [REDACTED] submitted his Claim shortly thereafter. Doc. 278939.

The Claims Administrator requested review by the Appeals Advisory Panel Leadership Council (AAPLC) of Dr. [REDACTED] Qualifying Diagnosis. Doc. 280029. The AAPLC asked Dr. [REDACTED] to respond to the following comment:

¹ ECF No. 11648-1, Replacement for Exhibit A-2 to the Class Action Settlement Agreement, at (3) (Mar. 4, 2022).

² *Id.* at (4).

³ *Id.* at (3).

The diagnosis of Alzheimer's disease is not supported by the medical records or the reasoning articulated by Dr. [REDACTED]. Alzheimer's disease is vanishingly rare at age 39, even when autosomal dominant inheritance patterns are clearly established. [...] [T]here is evidence from multiple biomarkers contradicting Alzheimer's disease as the cause of the symptoms. Finally, the CDR appears to have been completed as a self-report form. This is outside the standard for this published instrument. [...]

Regarding the 10/26/22 neuropsychological testing, the Player's Reading Level falls in the Below Average range based on the TOPF Reading Standard Score, and the explanation provided by Dr. [REDACTED] as to why he selected Average Reading Level is not sufficient to satisfy the narrow exception to the Reading Level guidance that allows the clinician to select Average in cases where the Player has an acquired language disorder or severe learning disability. When the Below Average Reading Level is applied, the testing results in No Impairment in any domain, as shown in the attached New Method results document.

Doc. 282591.

Dr. [REDACTED] responded to the AAPLC's feedback on August 14, 2023. Doc. 287692. Revising her Diagnosis to Level 2.0 Neurocognitive Impairment, Dr. [REDACTED] suggested that it might "be determined at a later date with the appropriate biomarkers that he has Dementia of the Alzheimer's type or CTE." *Id.* Her addendum did not acknowledge the AAPLC's concerns regarding Dr. [REDACTED] decision to use the Average reading level. *Id.* Rather, Dr. [REDACTED] repeated her original conclusion that Mr. [REDACTED] neuropsychological testing satisfied Settlement criteria:

The required degree of decline in Neuropsychological testing must be found to exist in at least two of these five cognitive domains, and at least one of those two must be (1) complex attention, (2) executive function and/or (3) learning and memory. Neuropsychological testing of Mr. [REDACTED] was consistent with moderate decline (Level 2.0) in Learning and Memory and Language domains. Mr. [REDACTED] performance was above recommended threshold scores across all standalone and embedded measures of performance validity with no evidence of malingering.

Id.

Reviewing this explanation on October 14, 2023, the AAP noted that Dr. [REDACTED] assertion of impairment in two neurocognitive domains "is contradicted by the interpretations evident in Document ID #279433," referring to Mr. [REDACTED] neuropsychological test results scored from the Below Average reading level baseline. Doc. 291070. Adopting the AAP's findings, the Claims Administrator denied Mr. [REDACTED] Claim on January 18, 2024 because:

Dr. [REDACTED] explanation for using Average instead of Below Average Reading Level, because the Player "graduated from [REDACTED] with a B- GPA" and that "the likelihood that someone with a Below Average IQ could graduate from

college is extremely low,” does not satisfy the Settlement’s Exhibit A-2 rules regarding the use of the TOPF Reading score to determine the Player’s Reading level:

The Test of Premorbid Functioning (TOPF) Reading Standard Score should ordinarily be used to determine the Retired Player’s reading level. However, the TOPF Reading Standard Score should not be used if the examiner has a strong indication from the Retired Player’s history, behavioral observations, and other language test results suggesting that an acquired language disorder or severe learning disability is present, or if English was learned as a second language in adulthood. If a clinician documents a Retired Player’s reading score to be fundamentally inaccurate and not representative of his longstanding reading ability, that Retired Player could be classified as having “Average Reading Level” for purposes of using the impairment criteria set out in this document.

Notably, when using Below Average instead of Average Reading Level, the Player’s scores did not indicate impairment in any cognitive domain. [...]

In conclusion, the Qualifying Diagnosis of Alzheimer’s Disease is not supported because of the reasons described above. Furthermore, the Qualifying Diagnoses of Level 1.5 and Level 2 Neurocognitive Impairment are not supported because the neuropsychological testing did not indicate qualifying impairment in any cognitive domain.

Doc. 299570.

Mr. [REDACTED] timely appealed the Claims Administrator’s decision. Doc. 314907.

I remanded Mr. [REDACTED] Claim on March 22, 2024, for re-review in consideration of new evidence concerning Mr. [REDACTED] social media presence and involvement in certain activities, and to allow Mr. [REDACTED] a chance to respond to this evidence. Docs. 317709; 318443; 319175. This new evidence, the AAP found, “provides no new clinical information” and does not “support or refute his position.” Doc. 350071. Accordingly, once again, the AAP concluded that “[n]either a diagnosis of Alzheimer’s Disease or Level 2.0 Neurocognitive Impairment is supported by the available information.” *Id.*

On that basis, the Claims Administrator again denied Mr. [REDACTED] Claim on September 19, 2024. Doc. 358817. Mr. [REDACTED] timely appealed. Doc. 362897.

RESOLVING THIS APPEAL

Mr. [REDACTED] argues that his TOPF score of 89 was generally consistent with an Average reading level, and thus, Level 2 Neurocognitive Impairment. *Id.* Therefore—he contends—there is clear and convincing evidence that the Claims Administrator erred in denying his Claim. *Id.*

Though I appreciate the strength of his argument, I can not conclude that it meets his heavy burden on appeal.

As I wrote recently, “[n]europsychological test results that nearly or almost meet BAP scoring criteria are not, by virtue of their approximate numerical fit, generally consistent with the BAP.”⁴ This stems from long-established precedent:

Generally consistent does not mean the same [...] And yet, it would be a perverse result if every player diagnosed outside of the BAP received an award based on results which would have rendered him ineligible within it: the exercise cannot be a mechanical one, where all ties go to the runner. If that were what the Parties had intended, the Agreement would not have said “generally consistent:” it would have explicitly directed that non-BAP diagnoses may meet a *lower*, not a *different*, standard. What’s called for instead is the exercise of reasoned, individualized, clinical judgment.⁵

Even so, Mr. [REDACTED] argues that if “generally consistent does not mean the same,” then “a one-point variance is necessarily generally consistent since there can be no smaller variance.” Doc. 362897 (cleaned up). But again, the generally consistent standard is not “a mechanical one,” concerned only with “the closeness of numerical fit.”⁶ When a MAF physician or clinician deviates from the BAP score thresholds, and yet concludes that the test results are generally consistent with a Qualifying Diagnosis, he or she must provide a “reasoned, individualized, clinical judgment” explaining the deviation.⁷

As Mr. [REDACTED] rightfully points out, this explanation need not be a “compelling argument,” but “merely an *explanation*, i.e., an *accounting* of why the clinician believed that the deviation was appropriate.”⁸ The problem here is that neither Dr. [REDACTED] nor Dr. [REDACTED] met this standard.

Dr. [REDACTED] explanation is that “because Mr. [REDACTED] graduated from [REDACTED] with a B- GPA,” and the “likelihood that someone with Below Average IQ could graduate from college is extremely low,” Mr. [REDACTED] must have an Average pre-morbid reading level, regardless of what the TOPF says. Doc. 278410. Taking this reasoning to its logical conclusion, Dr. [REDACTED] appears to argue that any Retired NFL Player who has graduated from college should not be estimated to have had Below Average pre-morbid function, no matter how far their TOPF score lands from the Average reading level range.

⁴ Special Master Ruling on Generally Consistent Standard and Validity, at 5 (February 6, 2025), https://www.nflconcussionsettlement.com/ViewDoc.aspx?dp=generally_consistent_validity_sm.pdf.

⁵ Special Master Ruling on Clinical Judgment on Generally Consistent Standard, at 3 (May 27, 2020), https://www.nflconcussionsettlement.com/Docs/physician_judgment_sm.pdf.

⁶ *Id.* at 3, 4.

⁷ *Id.* at 3.

⁸ *Id.*

As the Claims Administrator explained in its Notice of Denial, a clinician might deviate from the TOPF scores and still be generally consistent with them if there's evidence that a player suffers from "an acquired language disorder or severe learning disability," or "if English was learned as a second language in adulthood." Doc. 299570. It makes sense that in such situations, an English-language reading test might not be "representative" of a player's "longstanding reading ability."⁹ *Id.* College graduation, if anything, cuts the other way from a learning disability or a language disorder. In any event, the AAP, finding the neuropsychological test scores calculated from the Below Average baseline to be the accurate ones, did not find Dr. [REDACTED] college graduation explanation satisfactory under these guidelines. *Id.*

Meanwhile, Dr. [REDACTED] failed to acknowledge or explain the deviation in reading level from Below Average to Average at all. In her report, Dr. [REDACTED] cited Dr. [REDACTED] final conclusion regarding Mr. [REDACTED] test scores and his resulting level of impairment. Docs. 278410; 278408. But she ignored Dr. [REDACTED] discussion of Mr. [REDACTED] reading level, which occurs only several paragraphs before. *Id.* As the NFL Parties point out, Dr. [REDACTED] also did not certify that Mr. [REDACTED] Diagnosis differed from the BAP criteria, or provide an explanation for that deviation, on her original Physician Certification Form. Doc. 278940.

Even when the AAPLC specifically requested that Dr. [REDACTED] address the discrepancy in Mr. [REDACTED] reading level classification, she did not. Docs. 282591; 287692. Instead, Dr. [REDACTED] repeated near-verbatim her previous conclusion, which contained no mention of reading level. Doc. 287692. Dr. [REDACTED] thus failed to provide a "reasoned, individualized, clinical judgment" explaining the deviation because—put simply—she has provided no explanation whatsoever.

Having nothing substantive to defer to, the Claims Administrator properly applied the relevant numerical cutoffs. Doing so revealed no impairment in any of the five neurocognitive domains. Doc. 279433. The Claims Administrator was therefore correct to deny Mr. [REDACTED] Claim.

⁹ The Claims Administrator is referencing language added to Exhibit A-2 as part of the Norming Agreement in 2022. ECF No. 11648-1. Before these changes, in order to calculate pre-morbid functioning (now, pre-morbid reading level), clinicians had the freedom to choose between using the TOPF score and a combination of demographic models, which included, among other things, an education component. ECF No. 11648-2, Exhibit 2: New Method (Mar. 4, 2022). In May 2020, recognizing this broad discretion, I found that the generally consistent standard granted deference to a clinician's articulated choice of which model to use, as well as to adjustments or deviations justified on the basis of education. Special Master Ruling on Test of Premorbid Functioning (TOPF), at 3-6 (May 1, 2020), https://www.nflconcussionsettlement.com/ViewDoc.aspx?dp=topf_sm.pdf. With respect to the TOPF and determining pre-morbid reading level, that decision no longer carries weight. Under the revised Exhibit A-2, clinicians must now use the TOPF score alone, subject to the limited exceptions described by the Claims Administrator. ECF No. 11648-1. The generally consistent standard's application must reflect these changes.

CONCLUSION

Mr. [REDACTED] Claim relies on an estimated pre-morbid reading level not generally consistent with his TOPF score. The Claims Administrator denied his Claim after consulting with the AAP. Finding no clear and convincing error in either that process or its outcome, I deny Mr. [REDACTED] Appeal.

Date: February 21, 2025



David A. Hoffman, Special Master