

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

independently perform complex activities of daily living or to engage in any occupation for remuneration or profit.” *Id.*

Mr. [REDACTED] told Dr. [REDACTED] that following “his retirement from football he has worked in various positions including driving a truck, coaching intern, high school football coach, and currently works in a computer fulfillment center.” *Id.* “Mr. [REDACTED] denie[d] depression and anxiety” and reported “that he has always been a happy person.” *Id.* Dr. [REDACTED] therefore found “no evidence of depression.” *Id.*

Mr. [REDACTED]’s third and most recent neuropsychological evaluation took place on December 17, 2021. Doc. 290879. BAP neuropsychologist Dr. [REDACTED] interviewed Mr. [REDACTED] and administered a battery of testing. *Id.* Mr. [REDACTED] told Dr. [REDACTED] that he “saw a psychiatrist around 2013 for depression” and had seen a therapist “off and on since 1997.” *Id.* Mr. [REDACTED] also reported that “since 2018,” he “worked full time in security.” *Id.*

Using “demographically corrected” T-scores, Dr. [REDACTED] found no impairment overall. *Id.* Like Dr. [REDACTED], Dr. [REDACTED] found Level 1.5 “impairment in the area of complex attention and processing speed.” *Id.* Dr. [REDACTED] also considered functional impairment and found “no impairment in Community Affairs, Home and Hobbies, or Personal Care.” *Id.* Finally, Dr. [REDACTED] provided the following validity analysis:

Performance validity was assessed using embedded and stand-alone measures. The claimant performed in the optimal range on embedded measures of cognitive performance validity and on stand-alone measures of cognitive performance validity. Performance validity was also assessed by application and review of the clinical criteria for assessing performance validity and malingering as proposed by Slick et al. (Slick DJ, Sherman EM, Iverson GL, Diagnostic criteria for malingered and neurocognitive dysfunction: proposed standards for clinical practiced and research. *Clin Neuropsychol*, 1999, 13(4): 545-6). The claimant’s performance was determined to be valid.

Id.

Finding “no level 1, 1.5 or 2.0 neurocognitive impairment,” Dr. [REDACTED] diagnosed Mr. [REDACTED] with “Major Depressive Disorder,” noting that Mr. [REDACTED] also met criteria for agoraphobia, social anxiety disorder, and obsessive-compulsive disorder. *Id.* (emphasis deleted).

On January 5, 2022, BAP neurologist Dr. [REDACTED] evaluated Mr. [REDACTED] and concluded that while Mr. [REDACTED] “does have some mild cognitive impairment,” he “does not meet criteria for any neurocognitive impairment as per the NFL [] settlement guidelines.” Doc. 290879. At the time of Mr. [REDACTED]’s appointment with Dr. [REDACTED], his December 2021 neuropsychological testing results were (for reasons that are unexplained) “unavailable for review.” *Id.* Mr. [REDACTED] told Dr. [REDACTED] that he “worked as a truck driver briefly after he retired from the NFL but currently is not working and mostly spends his time watching TV.” *Id.*

Almost two years after Mr. ██████'s neuropsychological evaluation with Dr. ██████, on September 15, 2023, MAF neurologist Dr. ██████ diagnosed Mr. ██████ with Level 1.5 Neurocognitive Impairment. Doc. 290881. Dr. ██████ reviewed Mr. ██████'s neuropsychological testing from 2018, 2019, and 2021. *Id.* Regarding the 2021 testing in particular, Dr. ██████ reviewed both Dr. ██████ "[i]nitial evaluation" and "rescoring using the new method." *Id.*¹ He also reviewed a third-party affidavit by ██████. *Id.* In that affidavit, Ms. ██████ described her relationship to Mr. ██████ as "domestic partner." Doc. 290880.

Dr. ██████ interviewed both Mr. ██████ and his "close friend," ██████, who accompanied Mr. ██████ to the appointment. Doc. 290881. Mr. ██████ described his current employment as a "security guard" for the past three years. *Id.* He said he lost his "yard jockey" job at Amazon because he "couldn't concentrate or focus" and "couldn't keep up" with the requirements of the job— "assigning and checking the trucks at the docking bay." *Id.*

Dr. ██████'s report also notes that "Lexapro made him have bad thoughts." *Id.* Opining that Mr. ██████'s "psychological symptoms are secondary to his cognitive symptoms," Dr. ██████ observed that Mr. ██████ "did not demonstrate signs or symptoms of depression or anxiety during the examination." *Id.*

Combining the 2023 Level 1.5 Neurocognitive Impairment Diagnosis from Dr. ██████ and 2021 neuropsychological testing from Dr. ██████ (normed using the new method, which revealed Level 1.5 impairment in both the complex attention and executive functioning domains), Mr. ██████ submitted a Claim for a Monetary Award on November 29, 2023. Doc. 295991.

On December 4, 2023, the Claims Administrator put Mr. ██████'s Claim into Audit under Section 10.3 of the Settlement Agreement. Doc. 296201. During the Audit, the Claims Administrator gathered and reviewed additional information about Mr. ██████'s employment history. Doc. 297523. Mr. ██████ disclosed that he was currently employed, and had been since November 2019, as a "Special Police Officer (Security Guard)" in the ██████ Sheriff's Office. *Id.* Prior to that role, he worked as a security guard for ██████ Public Works and a Transportation Operations Manager (also called a "Yard Jockey") for Amazon. *Id.*

In response to the Claims Administrator's inquiries concerning his employment and job training activities, Mr. ██████ described his current role as follows:

Currently, my title at the ██████ Sheriff's Office is, "Special Police Officer". That job however is nothing more than a security guard. My only job duties are to monitor the closed-circuit cameras in the sheriff's office building and report any suspicious activity to my superior. To get the job I had go to the training referenced above at the sheriff's academy. The classroom work was mostly listening

¹ The 2021 neuropsychological testing adjusted using the new norming system appears in the portal within a larger packet of medical evidence as of October 15, 2023, and as an independent document as of July 19, 2024. Docs. 290879; 349310.

to audio and watching videos. I am not a sworn deputy and I do not carry a weapon. So yes I did tell my MAF provider that I was a security guard.

Doc. 297525.

The Claims Administrator also interviewed [REDACTED] of the [REDACTED] Sheriff's Office about Mr. [REDACTED]'s heavy responsibilities there. Doc. 347845. As [REDACTED] explained:

The role and responsibilities of a [Special Police Officer, or SPO] is to provide physical and personal security within the [REDACTED] Circuit Court and District Court. This includes:

- 1) After Deputies transport the inmates into the courthouse's sallyport located in the basement/garage area of the building, SPOs take over inmate movement from that point. SPOs will move the inmates via elevator to the holding area and then to the courtroom where they are to appear. Once the inmate is delivered to the courtroom, the Deputies take over responsibility for them. [REDACTED] noted that the inmate holding areas within the courthouse are secured electronically. The SPOs have access to keys, but they are only needed if the electronic systems are not operating correctly.
- 2) SPOs monitor the cameras in the courthouse including the movement of Judges when they enter the garage.
- 3) SPOs patrol the building and conduct security rounds, and
- 4) SPOs are responsible for booking certain individuals who report to the courthouse.

SPOs are not sworn law enforcement officers but are sworn in by the Chief Clerk of Courts. They do not carry weapons and do not have arrest powers unless the Sheriff grants them that authority. In addition, SPOs are required to be certified by the State of [REDACTED] every three years and must undergo twelve hours of mandatory training annually which encompasses both online coursework and in-service days in the classroom with tests and scenarios they must pass. Several years ago, their job title was relabeled from Security Officer to SPO.

Currently, there are six SPOs in the courthouse and each day they are given different assignments within the building. They all interact with each other and with the Deputies in the Sheriff's Department. [REDACTED] has no information that Mr. [REDACTED] is having any difficulties performing his duties and is not aware of any disciplinary actions or issues with him.

Id. (paragraph breaks added).

Finally, the Claims Administrator interviewed [REDACTED]. Doc. 347846. Ms. [REDACTED] explained that she and Mr. [REDACTED] had “maintained a ‘dating’ relationship for about fifteen years.” *Id.* She described her observations of Mr. [REDACTED]’s functioning, in relevant part, as follows:

Mr. [REDACTED] can communicate well but forgets things which tends to upset him. He recognizes his forgetfulness and complains to Ms. [REDACTED] about his memory issues. She started to notice Mr. [REDACTED]’s memory loss several years ago, and it has been gradually getting worse. Mr. [REDACTED]’s ability to remember past events and even current ones has diminished. He has forgotten birthdays (including his son’s), the names of old friends, upcoming planned events and various things they have done together in the past. Mr. [REDACTED] can drive, but Ms. [REDACTED] worries about the distance when he comes to see her.

Mr. [REDACTED] does not have any anger issues. Ms. [REDACTED] described him as a sweet man and a ‘gentle giant.’

At times, Mr. [REDACTED] looks ‘scruffy’ and unkempt, and Ms. [REDACTED] urges him to shave or get a haircut.

Mr. [REDACTED] lives alone comfortably and can cook and grocery shop, but Ms. [REDACTED] often reminds him to eat and to make sure he has food in the house.

Id.

Ultimately, the Claims Administrator found on July 15, 2024, that there was not “a reasonable basis to conclude that there ha[d] been a misrepresentation, omission, or concealment of a material fact” in connection with Mr. [REDACTED]’s Claim. Doc. 348016.

On August 7, 2024, the AAPC weighed in. Doc. 352174. After reviewing and summarizing the medical records in the Claim file, the AAPC recommended additional neuropsychological testing, explaining its reasoning as follows:

The patient is inconsistent in reporting his history. He told Dr. [REDACTED] that he had no history of anxiety or depression, but he had apparently received mental health treatment in the past and was still taking Lexapro. He was also inconsistent in reporting his work history. He told Dr. [REDACTED] in 2019 only that he was working for Amazon, but told Dr. [REDACTED] in 2021 that he was working as a security officer since 2018. He told Dr. [REDACTED] in 2022 that he was not working, but told Dr. [REDACTED] in 2023 that he had been working in security for three years. All of this raises concern for Slick criterion #6.

Regarding Dr. [REDACTED]'s report, the patient actually performed below criteria on the Victoria Symptom Validity Test.

Dr. [REDACTED]'s CDR rating of 1 in Community Affairs appears to be based largely on the patient's loss of interest in activities rather than loss of ability.

It is unclear why Dr. [REDACTED]'s neurological evaluation should not be preferred to Dr. [REDACTED]'s (other than its outcome). Dr. [REDACTED] included an objective mental status screening (MoCA) while Dr. [REDACTED] did not. Also, Dr. [REDACTED]'s exam was much closer in time to Dr. [REDACTED]'s evaluation than was Dr. [REDACTED]'s.

Although the New Method of test interpretation suggests Level 1.5 impairment, three different board-certified neuropsychologists concluded that this patient has difficulty only with Complex Attention & Processing Speed. This could be due to the patient's depression, as mental speed is the domain most commonly affected by mood disorders and their pharmacologic treatment. These clinicians do not make the diagnosis of dementia. If Dr. [REDACTED] is bound by New Method rules, he should be given the opportunity to reconsider his diagnosis. Since he found no functional impairment in any domain (i.e., CDR=0), it is unlikely that he would diagnose a dementia syndrome. In that case, and since his exam was almost two years prior to Dr. [REDACTED]'s assignment of a qualifying diagnosis, neuropsychological re-evaluation would be in order (notwithstanding my reluctance to recommend yet a fourth neuropsychological exam).

Id.

Deferring to this medical guidance and an additional AAP report, the Claims Administrator denied Mr. [REDACTED]'s Claim on September 23, 2024. Doc. 359206. Reviewing the Settlement's criteria for a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment, the Claims Administrator found that criteria (i) and (iv) were satisfied, but criteria (ii) and (iii) were not. *Id.*

Criterion (ii), which "requires evidence of moderate to severe cognitive decline in accordance with the standard neuropsychological protocol," was unfulfilled because the "inconsistencies between the various reports" triggered validity concerns and because Dr. [REDACTED] neuropsychological testing occurred nearly two years before Dr. [REDACTED]'s Diagnosis. *Id.* New neuropsychological testing was called for. *Id.*

As for criterion (iii), requiring "documentation of functional impairment generally consistent with scores of 1.0 (Mild) for the CDR categories of Community Affairs, Home/Hobbies, and Personal Care," the Claims Administrator found that Mr. [REDACTED]'s "ability to continue to work, drive, shop, and carry out activities outside the home independently but with some problems would indicate a score of 0.5 for the CDR category of Community Affairs and would not be consistent with a CDR score of 1." *Id.* Additionally, "the third-party affidavit was provided by the Player's domestic partner, so a new third-party affidavit is needed." *Id.*

Mr. ██████ appealed the denial. Docs. 371675; 391704. The NFL Parties oppose the Appeal. Doc. 383994.

RESOLVING THIS APPEAL

This Appeal is one of several recently that illustrate the problems of mixing and matching neuropsychological exams that significantly precede the operative neurologist diagnosis.² As the AAP observed, the various medical reports relay different and contrasting facts about Mr. ██████'s history of depression and employment, and none contemporaneously concluded that he had established test scores consistent with an Award, meaning their *Slick* analyses were necessarily truncated.

The relevant neuropsychological exam is Dr. ██████, later rescored. Dr. ██████ evaluated Mr. ██████ two years before Dr. ██████. But FAQ 109 requires that neuropsychological tests must be performed “within a year before the Player’s MAF exam in the BAP by a Qualified BAP Provider.”³ That rule exists to advance the Settlement’s goal in making accurate diagnoses: “neuropsychological testing must be contemporaneous” to be reliable.⁴

The point is reinforced when old neuropsychological testing raises validity concerns with the Settlement’s independent medical experts. That was just what the AAP concluded on reviewing Dr. ██████ tests. Doc. 352174. I wrote recently that the “Claims Administrator has a great deal of discretion under FAQ 109 as to whether to make an exception to the general contemporaneous rule.”⁵ I similarly see no clear and convincing evidence of error in its exercise of its discretion here.⁶

Mr. ██████ argues that requiring additional neuropsychological testing circumvents Section 2.7(a) of the Norming Agreement.⁷ Docs. 371675; 391704. But Section 2.7(a) only applies to “Retired Players who received a valid Post-Effective Date neuropsychological evaluation from

² See Special Master Ruling on Neuropsychological Testing, at 6 (Apr. 25, 2025), https://www.nflconcussionsettlement.com/ViewDoc.aspx?dp=np_testing_sm_5.pdf (“Under the Program’s rules, neuropsychological testing must have occurred within a year of the Diagnosis.”); Special Master Ruling on Validity and Historical Testing, at 1 (Feb. 20, 2025), https://www.nflconcussionsettlement.com/ViewDoc.aspx?dp=validity_historical_testing_sm.pdf (discussing “old neuropsychological testing”); Special Master Ruling on Validity and Historical Testing, at 5 (Feb. 1, 2025), https://www.nflconcussionsettlement.com/ViewDoc.aspx?dp=validity_testing_13_sm.pdf (discussing “old test scores”).

³ *Frequently Asked Questions: FAQ #109* (What must the medical records show for Level 1.5 and Level 2 Neurocognitive Impairment diagnoses made outside the BAP for *living* Retired NFL Football Players?), NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com>.

⁴ *Id.*

⁵ Special Master Ruling on Validity and Historical Testing, at 6 (Feb. 20, 2025), https://www.nflconcussionsettlement.com/ViewDoc.aspx?dp=validity_historical_testing_sm.pdf.

⁶ As the AAP notes, one additional factor in evaluating the overall appropriateness of temporally out-of-joint tests is that it “is unclear why Dr. ██████’s neurological evaluation should not be preferred to Dr. ██████’s (other than its outcome).” Doc. 352174.

⁷ Norming Agreement, Section 2.7(a).

a *neuropsychologist approved* to support diagnoses from Qualified MAF Physicians *through the MAF program (rather than a Qualified BAP Provider through the BAP)*.”⁸ Dr. █████ administered Mr. █████’s neuropsychological testing through the BAP, not the MAF. Doc. 290879. As the Claims Administrator correctly found, Section 2.7(a) does not apply to Mr. █████’s Claim. Doc. 359206.

Mr. █████ also argues that Section 2.5(d) of the Norming Agreement requires treating his rescored neuropsychological testing as “final and binding.” Docs. 371675; 391704. But Section 2.5 provides for automatic retrospective rescoring “where such rescoring could potentially result in a Qualifying Diagnosis or a higher Qualifying Diagnosis *solely due to a change in the Retired Player’s neuropsychological T scores*—i.e., *the Retired Player otherwise meets the Class Action Settlement Agreement’s functional impairment* and validity requirements for a more severe Qualifying Diagnosis based on his prior evaluations.”⁹

Dr. █████ testing did not qualify for automatic retrospective rescoring under Section 2.5, and was not in fact automatically rescored. Indeed, at the time of the Norming Agreement, Mr. █████’s BAP results had not yet been finalized. Doc. 245673.¹⁰ Further, Dr. █████ concluded that Mr. █████ did not (as of 2021) demonstrate the requisite functional impairment for a Qualifying Diagnosis. Doc. 290879. Thus for both reasons of timing and substance (as the NFL Parties point out) the “Claims Administrator determined that Mr. █████ did not qualify for automatic retrospective rescoring.” Doc. 383994. That is, even if Dr. █████ neuropsychological testing demonstrated an entitlement to relief, his overall exam did not support any level of Award. Section 2.5, therefore, does not apply to Mr. █████.

Moreover, “[d]eterminations on who qualifies for rescoring are final and unappealable.”¹¹ Mr. █████ has not provided clear and convincing evidence of error in the Claims Administrator’s determination on criterion (ii).

⁸ *Id.* (emphasis added).

⁹ Norming Agreement, Section 2.5(a) (emphasis added).

¹⁰ In fact, the Claims Administrator provided the then-BAP Administrator with “new norm” results for Mr. █████, but not as a part of an automatic “rescoring” process, as he had not yet received a Claim determination from the Program to be re-done.

¹¹ Norming Agreement, Section 2.5(b).

The parties make further arguments about Mr. [REDACTED]'s functional impairment and his third-party affidavit.¹² I deem them unnecessary to resolve for the purposes of this Appeal.¹³

CONCLUSION

Because Mr. [REDACTED] has not provided clear and convincing evidence of error in the Claims Administrator's denial of his Claim, I deny his Appeal.

Date: May 27, 2025



David A. Hoffman, Special Master

¹² Mr. [REDACTED] asserts that under Section 8.5 of the Settlement Agreement, the Claims Administrator was required to give him the opportunity to cure his third-party affidavit by a domestic partner. Doc. 391704. But the "Claims Administrator may deny a claim where the rules and criteria were not followed and the issue [...] cannot be cured[.]" *Frequently Asked Questions: FAQ #143* (Does the Claims Administrator question the medical judgment of the physician who made the Qualifying Diagnosis?), NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com>. Here, the rule is provided on the affidavit form itself: a player's domestic partner "cannot complete this form." Doc. 290880. Where the form had "friend" type-written in to describe Ms. [REDACTED]'s relationship to Mr. [REDACTED], Ms. [REDACTED] added in handwriting, "domestic partner." *Id.* The Claims Administrator acted within its discretion in concluding that this affidavit could not be cured, and that a new one is required. Doc. 359206.

¹³ As the Claims Administrator found, there are significant inconsistencies in what Mr. [REDACTED] told his various clinicians, and it is at best unclear whether his work as a full-time security guard can be consistent with a Level 1.5 Award. But the Denial can stand on the ground that the Claims Administrator did not abuse its discretion in rejecting his non-contemporaneous testing.