

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION

:
: No. 2:12-md-02323-AB

:
: MDL No. 2323

:
: **Hon. Anita B. Brody**

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

INTRODUCTION

These Appeals regard claims filed by [REDACTED] and [REDACTED], two Retired NFL Players and Class Members under the Amended Class Action Settlement. Both filed a claim for benefits under the Agreement, and were represented by the same law firm. The Claims Administrator denied their claims for the identical reason: the assisting neuropsychologist, Dr. [REDACTED], was not Board certified, and therefore their Diagnoses did not satisfy the Settlement's requirements.

Counsel for Mr. [REDACTED] and Mr. [REDACTED] though filing separate appeals, has written nearly identical briefing. The basic argument is that Dr. [REDACTED] holds credentials and experiences that exceed the requirements of the Settlement Agreement, and that the diagnostic test results were therefore good enough. Counsel also argues the Claims Administrator provided deficient reasoning in support of the denial, depriving it of due process.

Because counsel has treated these two claims as identically situated, I will consolidate their disposition here.

The Appeals are denied.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. [REDACTED] initially received a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment on May 22, 2017. Doc. 206848. Dr. [REDACTED], a Qualified MAF Physician, certified the Diagnosis, with Dr. [REDACTED], providing neuropsychological evaluations. *Id.* The report, which includes individual test results that align with Level 1.0, Level 1.5, and Level 2.0 diagnoses,

ultimately concludes, “[f]or the reasons stated above, Mr. [REDACTED] demonstrates Level 1.5 neurocognitive impairment.” *Id.*

Mr. [REDACTED] submitted a claim based on the Level 1.5 Diagnosis; however, the MAF Diagnosing Physician Certification Form indicates that the claim is for a Level 2 Diagnosis. Doc. 206854. After receiving a Notice of Preliminary Review from the Claims Administrator, Mr. [REDACTED] counsel responded on February 28, 2020 to concerns raised by the Claims Administrator regarding a number of testing requirements that were not clearly addressed, and submitted Dr. [REDACTED] curriculum vitae. Doc. 221173; Doc. 221181. In response, Mr. [REDACTED] counsel offered a consolidated response for the nine class members he represented whose claims were simultaneously placed under review.

On March 9, 2020, the Claims Administrator denied the claim. It found that the neuropsychological testing, as well as the certification of Dr. [REDACTED] failed to meet explicit Settlement Agreement requirements.

Section 6.3(b)(i) of the Settlement Agreement states that any licensed neuropsychologist who assists a Qualified MAF Physician in making a Qualifying Diagnosis must be certified by the American Board of Professional Psychology (ABPP) or the American Board of Clinical Neuropsychology (ABCN), a member board of the American Board of Professional Psychology, in the specialty of Clinical Neuropsychology. Dr. [REDACTED], the licensed neuropsychologist identified in Section III of the Diagnosing Physician Certification Form, is not ABPP/ABCN certified in the specialty of Clinical Neuropsychology.

You submitted a Claim Package for a MAF exam that resulted in a finding of Level 2 Neurocognitive Impairment; however, the results of your neuropsychological testing does not meet the requirements for this diagnosis as defined by Exhibit A-2 of the Settlement Agreement.

You responded to the Notice of Request for Additional Documents on 2/28/2020, citing a decision made by the Special Master for SPID [REDACTED]. The Special Master ruled in his 8/26/2018 decision that it does not have preclusive effect, which means that prior decision does not apply to Mr. [REDACTED] claim.

Doc. 221474.

Mr. [REDACTED] appealed on April 22, 2020. Doc. 223683.

Mr. [REDACTED] initially received a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment on June 19, 2017. Doc. 208638. Again, Dr. [REDACTED] provided neuropsychological evaluations, and Dr. [REDACTED] certified the Diagnosis. Doc. 208639; Doc. 208640.

Mr. █████ submitted a claim based on a Level 1.5 Diagnosis. Doc. 208637. The Claims Administrator filed a Notice of Preliminary Review which was quite similar to that it provided in Mr. █████ case. Mr. █████ counsel, responding, submitted the same document as that it submitted for Mr. █████ Doc. 221688. The March 9, 2020, denial was similarly substantively identical. Doc. 221476.

Like Mr. █████ Mr. █████ appealed on April 22, 2020. Doc. 223668.

DISCUSSION

The Appeals raise two arguments.

First, they defend Dr. █████ qualifications and expertise, listing examples of his publications and accomplishments. Dr. █████ resume is impressive. His accomplishments speak to a trailblazing career in the field of neuropsychology, and he holds affiliations with some of the most prestigious academic institutions in the world.

But the Settlement Agreement requires that neuropsychologists who assist neurologists in making a Qualifying Diagnosis must be certified by either the American Board of Professional Psychology (ABPP) or the American Board of Clinical Neuropsychology (ABCN).¹ Dr. █████ was certified by neither of these Boards. He consequently could not assist in making a Qualifying Diagnosis under this Settlement Agreement.

Counsel argues that Dr. █████ qualifications have passed muster for an assessment conducted prior to the Effective Date, and that his extensive experience and myriad of accomplishments satisfy the Settlement's purpose, if not its text.

To start, it is neither here nor there that in a prior decision, Dr. █████ assisted in making a Pre-Effective Date Diagnosis.² The rules regarding Pre-Effective Date Diagnoses are different from those that apply to these Post-Effective Date Claims.³

Moreover, Dr. █████ undeniable eminence is no answer to the Claims Administrator's insistence that Diagnoses conform to the Settlement's unambiguous requirements. At the time of the May 2017 Qualifying Diagnosis for Mr. █████ and the June 2017 Qualifying Diagnosis for Mr. █████ Dr. █████ was certified by neither of the Settlement's approved neuropsychological professional organizations. The Claims Administrator's decision to deny the Claim was correct.

¹ Settlement Agreement, Section 6.3(b)(i).

² Players' counsel references the Claim of █████, which it identifies under Settlement Program ID #█████. The actual Settlement Program ID is #█████.

³ See Settlement Agreement, Section 6.3(c) (explaining that, prior to the Effective Date, "board-certified neurologists, board-certified neurosurgeons, or other board-certified neuro-specialist physicians" were eligible to make Qualifying Diagnoses, without specification as to any required certifying entity).

Second, the claimants' initial briefing, and an unsolicited letter of July 1, 2020, stated the Claims Administrator did not adequately explain why the claim failed to meet necessary requirements. It is not clear that these are permitted good faith grounds for an Appeal. Nor, as I find below, does the assertion have any merit. However, the claimants' June 25, 2020, letter offered what appeared to be a harmless alternative to remand which would fully cure any prejudice: it asked that I permit additional briefing. Having not fully reviewed the record, I did so, believing that the briefing would be about the merits. It was extremely surprising when counsel spent much of its supplemental brief arguing about the claims of other parties, which it calls (for reasons I do not fully understand) "related."

In any event, the contention that Mr. [REDACTED] and Mr. [REDACTED] lacked notice about why their claims were denied is meritless. Consider the following timeline:

For both Mr. [REDACTED] and Mr. [REDACTED] on October 24, 2019, the Claims Administrator offered a detailed list of issues that needed to be addressed for each claim to be accepted. The Claims Administrator included instructions on how to address such issues.⁴ That issue list explicitly included the concern that Dr. [REDACTED] was not qualified to render diagnoses under the Agreement.

Months later—in February 2020—players' counsel provided responses that failed to adequately engage with most of these questions. For example, in response to the Claims Administrator's concern that the complete test battery was not administered, players' counsel responded with the text of the Settlement Agreement that explains that a testing regimen that is generally consistent could be accepted. However, players' counsel never explained why or how the testing was generally consistent. Nor did it offer an adequate response to Dr. [REDACTED] lack of certification.

After the Claims Administrator's denial, counsel submitted a brief that discussed Dr. [REDACTED] qualifications. The supplemental brief continued that discussion. Obviously, counsel (and Claimants) were fully aware of the nature of the deficiency in their Qualifying Diagnosis.

There is no requirement that the Claims Administrator dilate in its explanation for a denial—it must merely "include a short statement regarding the reasons for the adverse determination."⁵ Here, the Claims Administrator fulsomely communicated with players' counsel throughout the claims process, especially by detailing specific areas that needed further information in order for the claim to be accepted. The Denial notice made those grounds even more evident.

⁴ See Settlement Portal, *Frequently Asked Questions* (updated July 28, 2020), FAQ #136 ("The Claims Administrator will review your Claim Package to determine whether you have sent in everything required to make your claim complete. If you have, your claim will be reviewed on its merits either by the Claims Administrator or by an AAP doctor. If you have not sent in everything to make your claim complete, you will receive a Notice of Preliminary Review or a Notice of Request for Additional Documents describing what has been excluded and what you need to do next.").

⁵ Settlement Agreement, Section 9.1(c)(i).

I find as a matter of fact that these claimants were afforded more than adequate notice of the infirmities in their submissions.

CONCLUSION

For the reasons given above, the appeals of both Mr. [REDACTED] and Mr. [REDACTED] are denied, as the Claims Administrator did not clearly err in disposing of their claims.

Date: August 12, 2020



David A. Hoffman, Special Master