

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

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Neuropsychologist ██████ saw Mr. ██████ on November 22, 2021. Doc. 243957. After a thorough evaluation, including a history notable for increasing cognitive difficulties, Dr. ██████ noted that Mr. ██████

exhibited difficulties with word retrieval, but he did not appear to experience difficulties with fluency, articulation, or goal-directedness in speech. He appeared to approach each task in an open and interested manner, but he struggled to apply effective problem-solving across most tests ... He exhibited a relatively high level of frustration tolerance and was able to complete all tasks administered to him during the testing session.

Id. at 4.

Overall, Dr. ██████ determined that Mr. ██████'s performance on the tests was invalid, "given the pattern of test performance, discrepancy between test data and observed behavior, as well as discrepancy between test data and background history. Symptom validity scales on the MMPI-2-RF also raised concerns about the possible impact of over-reporting, specifically related to memory complaints, and under reporting." *Id.* at 4-5. He concluded:

On his current neurocognitive examination, Mr. ██████ demonstrated pervasive cognitive impairments across all domains. His functional inquiry also revealed declines from previous testing in the areas of community affairs, home and hobbies, and personal care. His psychological inquiry revealed complaints of multiple somatic issues and a diffuse pattern of cognitive difficulties. Nevertheless, Mr. ██████'s evaluation was invalid due to his performance on imbedded and standalone performance validity tests, as well as on symptom validity indicators, along with multiple aspects on the Slick criteria checklist; therefore, no determination for impairment level may be determined at present.

Doc. 243957 at 6.

Despite having asked for this evaluation, and received it, Dr. ██████ disregarded it.¹ On his Diagnosing Physician Certification Form, Dr. ██████ checked the box that he had not been assisted by a neuropsychologist in making the Diagnosis. Doc. 242414, at 3. He then checked that the testing protocol was not medically unnecessary. Below, he continued (in handwriting):

He saw neuropsych 11/22/21 was "cognitively impaired" but test was "invalid"
Nonetheless my neurologic determination is that he has Level 2 impairment

Doc. 242414 at 6.

¹ And not for the first time, as the NFL Parties point out. *See* Special Master Ruling on Absence of Neuropsychological Testing, at 3-4 (April 22, 2023), https://www.nflconcussionsettlement.com/Docs/absence_np_testing_sm_2.pdf (noting a very similar fact pattern involving this same clinician and physician).

On February 3, 2022, in response to Claims Administrator's inquiry. Dr. [REDACTED] modestly expanded on his original explanation, writing:

I diagnosed him with level 2 cognitive impairment. The neuropsychologist who evaluated him subsequently thought he was 'cognitively impaired across all domains' but nonetheless did not assign a rating due to his impression that the testing was 'invalid' due to imbedded measures of validity. I concur that he was cognitively impaired across all domains. My own neurologic assessment remains that he has level 2 cognitive impairment, as I was convinced during my assessment that his deficits were real, regardless of the neuropsychological input. That is my final determination. Please feel free to contact me with additional questions.

Doc. 242417.

Mr. [REDACTED]'s raw scores (resulting from invalid testing) were rescored in the Claims Process under the New Method, but no change in his level of impairment resulted. Doc. 266390. After a short round of outreach about aspects of Mr. [REDACTED]'s functional impairment, the Claims Administrator denied the Claim on March 17, 2023. Doc. 279309. Although the Claims Administrator found that Mr. [REDACTED]'s file satisfied the first, third, and fourth criteria for an Award, he had not submitted qualifying, valid, tests, nor provided a sufficient excuse for their absence.

Criterion (ii): There is a report of a neuropsychological evaluation performed on 11/22/2021 by Dr. [REDACTED] which indicated cognitive impairment, but the testing results were determined to be invalid. When the Claims Administrator asked him to clarify whether he considered any neuropsychological testing in making the diagnosis, Dr. [REDACTED] explained on 2/3/2022 that he made the determination of Level 2 Neurocognitive Impairment regardless of the neuropsychologist's determination that the testing was invalid.

Because Dr. [REDACTED] did not certify in the Diagnosing Physician Certification form that the testing was medically unnecessary because the Retired NFL Football Player's dementia is so severe, this denial does not apply the Special Master's two-pronged analysis to determine whether such a certification was reasonable. In compliance with the Court's 3/4/2022 Order granting the Motion to Approve Modifications to the NFL Concussion Settlement Agreement Pursuant to Section 6.6, the New Method was applied to this claim to rescore the 11/22/2021 neuropsychological testing results in accordance with the revised Exhibit A-2 to the Class Action Settlement Agreement. After application of the New Method, the testing resulted in Level 1 impairment in Learning/Memory and Level 2 impairment in Complex Attention and Executive Functioning, with no impairment level in the other domains, for an overall impairment at Level 2.

However, an Appeals Advisory Panel Consultant (AAPC) reviewed the testing and concluded that the evaluation by Dr. [REDACTED] was invalid due to failure of

multiple performance validity measures and multiple Slick Criteria concerns and that Dr. █████ erred in dismissing Dr. █████'s contemporaneous findings of inadequate effort. I concur with the AAPC's conclusion. Furthermore, Dr. █████ states in his report that the Player was orientated to day, date, month, year, president, city, state, time of day, place, and county, which would not be consistent with a severity of impairment sufficient to make a neuropsychological evaluation medically unnecessary. Therefore, criterion (ii) is not fulfilled.

Id. (paragraph breaks added).

Mr. █████ appealed. Doc. 284652.

DISCUSSION

Mr. █████'s appeal is simply stated: his impairment is so severe as to render neuropsychological testing unnecessary under the Settlement.²

This argument faces procedural and substantive hurdles. Procedurally, Dr. █████ did not check the box certifying that he believed that testing was unnecessary on account of the severity of Mr. █████'s infirmity. On Appeal, Mr. █████ argues that because Dr. █████' handwritten (very short) explanation implies that he thought testing was not necessary, the failure to check the appropriate box must have been an error, and the relevant question is whether Dr. █████' decision was substantively supported under the Settlement. I accept this position for the purposes of deciding this Appeal.

But Mr. █████ must still show that Dr. █████' decision to avoid the Settlement's testing requirement in reaching his Diagnosis was sufficiently justified. Both parties agree that a prior decision provides the relevant analytical approach. As I wrote:

Ordinarily, deference to MAF Physicians' certification should be the rule, given those clinicians' eminence and training, as well as their personal evaluation of the player-claimant. The Claims Administrator does, however, have the obligation to determine if the Certification was "reasonably determined"—a standard fashioned by the Parties which I adopt in this Appeal. "Reasonably determined" means that the clinician's choices are cognizable as an application of the Settlement's narrow ("unless") exception to the testing requirement, i.e., that the impairment was "so severe" that testing is "medically unnecessary." Another way to put this is that it was reasonable to have concluded that the testing would not generate valid results.

Under the Settlement, particularly Section 8.6(b), the Claims Administrator has the authority to verify the sufficiency of both prongs of that reasonableness inquiry: How severe was the impairment; and, Why does the impairment's severity make the testing unnecessary? That is not the same as saying that the Claims

² Settlement Agreement, Exhibit A-1 (2)(b).

Administrator's supervisory authority is plenary. The Parties have interpreted the agreement to mean that the Claims Administrator cannot disagree with the clinician's Certification merely because it would have made a different choice. The clinician's articulated reasons for certifying must be unreasonable. But the Claims Administrator possesses ample authority to require a complete explanation, and to ensure it is internally consistent.³

I asked an AAPC to consider Dr. [REDACTED] contemporaneous explanations given this standard. The AAPC advised:

There is substantial evidence that the neurologist in this case did not or should not have seen the player's impairments as being too severe to support valid neuropsychological testing. The neurologist's own report states "Due to the lack of prior evaluation, I will refer him to a neuropsychologist and order a brain MRI ". This suggests that he felt a neuropsychological evaluation had value in this case.

This initial inclination of the neurologist to obtain neuropsychological testing is consistent with the clinical facts of the case. On the neurologists' Clinical Dementia Rating scale, the player is fully oriented, learns the target items on a brief memory screen, recalls at least some of these at delay and is rated as having only mild orientation and memory impairment challenges. This is clearly a player capable of, and requiring, neuropsychological assessment if he is to meet the requirements of a level 2 determination.

Further the clinical facts of the case affirm that the player was capable of completing the evaluation. The neuropsychologist's behavioral observations note the player "exhibited a high level of frustration tolerance and was able to complete all tasks administered to him during the testing session." Moreover, the player's performance is not at the "floor" on any of the tests and in for some tests is within normal limits. The player was not too impaired for neuropsychological testing.

In my opinion there is an unsupportable and circular argument made by the examining neurologist player's counsel regarding deference to the 'too impairment' judgement. The argument amounts to the idea that the player's functional deficits, rated by the neurologist at a global CDR score of two, are prima facie evidence of impairment severity sufficient to forego neuropsychological testing. However, a CDR of two score is the minimum required in Level 2 cases. If this reasoning for deference to 'to impaired' were deemed acceptable, then no cases of Level 2 impairment would require neuropsychological testing. Such reasoning

³ Special Master Ruling on Qualified MAF Physician's Certification that Testing is Medically Unnecessary, at 3-4 (May 27, 2020), [https://www.nflconcussionsettlement.com/Docs/physician certification testing sm.pdf](https://www.nflconcussionsettlement.com/Docs/physician%20certification%20testing%20sm.pdf) (emphasis in original); see also *Frequently Asked Questions: FAQ #360* (How much deference does the Claims Administrator give to the Diagnosing Physician's determination that neuropsychological testing is medically unnecessary?), NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com>.

would seem to clearly deviate from the intention and plain language of the settlement agreement that states Level 2 impairments require... “*Evidence of a severe cognitive decline from a previous level of performance, as determined by and in accordance with the standardized neuropsychological testing protocol*” annexed in Exhibit 2 to the Settlement Agreement”. Providing documentation of CDR global score of 2 in and of itself cannot be sufficient to meet the ‘testing is medically unnecessary’ standard. Clearly the medically unnecessary standard is intended for even more severe levels of dementia where other settlement diagnoses are rendered.

Finally, it is undisputed in this case is that the neuropsychological testing is invalid. This is well documented by the examining neuropsychologist and conceded by all parties and AAP reviewers. This invalidity is sufficient for a finding of no award.

In summary, this a case where appropriate neuropsychological testing was untaken as required by the settlement agreement to determine whether a player met level 2 criteria. Arguments that such testing was unnecessary due the level of impairment of the player are circular and rendered specious by the fact the player did complete a full neuropsychological evaluation. Such testing was clinically appropriate. That testing was deemed invalid by the examining neuropsychologist. As such there is not sufficient documentation provided to support any level of award in this case.

Doc. 292020 (paragraph breaks added).

I adopt this explanation, which carefully lays out both why Mr. [REDACTED]’s condition was not so severe as to obviate the need for testing, and how Dr. [REDACTED] explanation failed to make the case for the contrary conclusion in a complete, internally consistent, and reasonable way. Given the incompleteness and circularity of Dr. [REDACTED] contemporaneous explanations, the facts emerging from Mr. [REDACTED]’s examinations regarding his abilities, and the chronology of the case, where Dr. [REDACTED] first thought testing would be useful and then disregarded it on its receipt, there is not clear and convincing evidence that the Claims Administrator erred in denying the Claim.

CONCLUSION

As Mr. [REDACTED] has not provided clear and convincing evidence of error in the Claims Administrator’s decision, his Appeal is denied.⁴

Date: November 11, 2023



David A. Hoffman, Special Master

⁴ Contrary to some statements made in Mr. [REDACTED]’s brief, I find that he remains eligible for the Expanded BAP.