

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

In performing that testing, Dr. [REDACTED] noted that Mr. [REDACTED] “performed in the suboptimal range on several measures of cognitive performance validity,” and that Mr. [REDACTED] was experiencing bilateral hip pain, perhaps impacting his performance. Doc. 284355 at 63. He ultimately determined the test results provided invalid estimates of Mr. [REDACTED] abilities.

Dr. [REDACTED] referenced both rounds of neuropsychological testing in rendering his 2023 Diagnosis. He tied Mr. [REDACTED] date of Diagnosis, March 19, 2016, to the first set of testing. Doc. 284298. And, disputing Dr. [REDACTED]’s own conclusion that Mr. [REDACTED] 2020 testing was invalid, Dr. [REDACTED] wrote that “the noted failure of validity measures on testing from 2020, when applied genuine memory impairment profile score, reveals that the patient’s failure seems to be more likely as a result of the severity of memory impairment as opposed to malingering or effort impairment.” *Id.* at 4. Dr. [REDACTED] concluded that new neuropsychological testing was unnecessary: “At this time, I do not feel that repeat neuropsychological testing is warranted, as I feel that the patient’s degree of memory impairment at this time makes him less capable of completing these tasks.” *Id.*

In the absence of contemporaneous neuropsychological testing, and despite disputing her conclusion of invalidity, Dr. [REDACTED] noted on the Diagnosing Physician Certification form that he had relied on Dr. [REDACTED]’s neuropsychological evaluation. Doc. 284300.

The Claims Administrator sought additional information about Mr. [REDACTED] Claim. It requested his raw neuropsychological test scores from Dr. [REDACTED] and then referred his Claim to the Appeals Advisory Panel Consultant (AAPC). Docs. 286812; 287589. The AAPC agreed with Dr. [REDACTED] that Mr. [REDACTED] 2020 neuropsychological testing was invalid:

The patient “appeared to be putting forth consistent effort despite variable performances on performance validity tests (PVTs).” Dr. [REDACTED] opined that, overall, the results are highly likely to be invalid. She rated Slick criteria #1 and #3 to both be present. Although the patient performed at Level 2 impairment in three cognitive domains and at Level 1.5 in the remaining two domains according to the New Method, Dr. [REDACTED] wrote, in bold font, “there is insufficient evidence that these scores represent valid test performances” for each domain. Based on conversation with the patient’s girlfriend/domestic partner, Dr. [REDACTED] [REDACTED] rated CDR = 0.5 in Community Affairs and Home & Hobbies and CDR = 0 in Personal Care.

...

The patient’s performance on PVTs is more than “variable”; it clearly indicates either insufficient effort to perform well or an effort to perform poorly. This gentleman failed 4 out of 5 ACS validity tests; two scores were below the 10% base-rate and two were below the 2% base-rate. In addition, he performed below cutoff for validity on the TOMM. On the WMT, his scores were lower than expected but

actually still above cutoff for validity. (Note that Green's Medical Symptom Validity Test is in the recommended BAP test battery, while his Word Memory Test is not.)

The patient's MMPI-2-RF also strongly suggests symptom exaggeration. His score on RBS (over-reported memory complaints) was five standard deviations above average (T=105). He also produced marked elevations on scales reflective of highly unusual and unlikely symptoms (F-r and Fs both T = 83).

Dr. [REDACTED] is correct. The results on her neuropsychological evaluation do not support any qualifying diagnosis as described in Exhibit 2 of the Settlement Agreement.

Doc. 287589.

The Claims Administrator then followed up with Dr. [REDACTED]. Pointing out that Dr. [REDACTED] had been disqualified and his diagnoses could not form the bases for an Award, it first requested that Dr. [REDACTED] consider a date of Diagnosis that did not rely on the 2016 neuropsychological testing. It also asked for an explanation for discrepancies in Mr. [REDACTED] functional impairment ratings. Doc. 289571. The Claims Administrator's initial email to Dr. [REDACTED], on September 21, 2023, met with no response; follow-up emails were sent on a nearly monthly basis for 7 months. Docs. 291562; 296724; 299559; 303018, 319482; 324715; 334389.

Dr. [REDACTED] finally responded on June 2, 2024. He changed Mr. [REDACTED] date of Diagnosis to August 18, 2020. Doc. 336101. He also acknowledged that there were discrepancies between Mr. [REDACTED] milder functional impairment during his 2020 testing and his own functional impairment ratings. *Id.* Arguing, however, that the differences were minimal, he concluded that "although validity measures [in Dr. [REDACTED] evaluation] were suboptimal, it noted impairments in several cognitive domains..." *Id.* at 1. Dr. [REDACTED] ultimately attributed the variation to "the progressive nature of Mr. [REDACTED] condition" and Mr. [REDACTED] "reported difficulty in accurately self-assessing his deficits." *Id.* at 1-2.

Dr. [REDACTED]'s updated opinion was sent back to the AAPC for consideration. The AAPC concluded, once again, that Mr. [REDACTED] 2020 neuropsychological testing was invalid and that it was inappropriate for Dr. [REDACTED] to rely on it:

[Dr. [REDACTED]] minimizes the significance of Dr. [REDACTED]'s findings of inadequate effort and/or deliberate underperformance, and interprets her findings as indicating "impairments in several cognitive domains" and a "consistent progression of cognitive impairment."

Dr. [REDACTED] displays considerable chutzpah in over-riding Dr. [REDACTED]'s interpretation of her own test findings. She is a board-certified neuropsychologist; he is not. He is wrong and she is right. As I indicated previously, his statement about

the Genuine Memory Impairment profile is irrelevant since: 1) the patient actually met criteria for validity on this test, 2) the MSVT, not the WMT, is in the BAP battery, 3) the patient failed multiple other performance validity tests.

Doc. 344570 at 2.

The AAPC also raised an additional issue with Dr. [REDACTED]'s reliance on Dr. [REDACTED]'s testing: her neuropsychological evaluation took place over two years before his evaluation of Mr. [REDACTED]. As a result, "these exams cannot be considered contemporaneous... they should not be combined in an effort to cobble together a Qualifying Diagnosis." *Id.* (cleaned up).

Given these concerns, Claims Administrator denied Mr. [REDACTED] Claim on October 3, 2024, on the basis that he had not met diagnostic criteria for Level 2 Neurocognitive Impairment. Doc. 361091. Criterion (ii) requires "evidence of severe cognitive decline... in accordance with the standardized neuropsychological protocol."¹ The Claims Administrator adopted the AAPC's analysis of Mr. [REDACTED] neuropsychological testing, writing:

Dr. [REDACTED] reported suboptimal performance on multiple performance validity measures...

Dr. [REDACTED] reported that when the genuine memory impairment profile score was applied that the Player's failure of validity measures was more likely to be a result of the severity of the memory impairment as opposed to malingering or effort impairment. Additionally, in the Diagnosing Physician Certification Form dated 6/13/2023, Dr. [REDACTED] indicated the interpretation of the neuropsychological testing results differed from the BAP diagnostic criteria and that additional neuropsychological testing was not needed.

However, AAPC review of Dr. [REDACTED]'s 2020 results indicated that, despite the application of the genuine memory impairment profile score, Dr. [REDACTED] was correct that the results of the evaluation were not valid and did not support any Qualifying Diagnosis.

In response to a request from the Claims Administrator to address the inconsistencies, Dr. [REDACTED] submitted an addendum dated 6/2/2024 stating that despite concerns about the validity of some test results, the records indicated there was consistent progression of cognitive impairment. However, the AAPC determined that Dr. [REDACTED] minimized the significance of Dr. [REDACTED]'s findings of inadequate effort and/or deliberate underperformance when interpreting her findings as indicating impairments in several cognitive domains and showing a consistent progression of cognitive impairment.

¹ Settlement Agreement, Exhibit 1, Section 2(a)(iii).

The AAPC review also concluded that the Genuine Memory Impairment profile was irrelevant since the patient met the criteria for validity on this test anyway, the MSVT and not the WMT is in the BAP battery, and the patient failed multiple other performance validity tests. Additionally, because Dr. [REDACTED]'s evaluation was more than two years prior to Dr. [REDACTED]'s evaluation that the results should not be combined.

Dr. [REDACTED] also indicated on the Diagnosing Physician Certification Form that neuropsychological testing was not medically necessary because he did "not feel repeat neuropsychological testing is needed." The Special Master has adopted a two-pronged analysis to determine whether the determination that certain testing is medically unnecessary is reasonably determined: (1) how severe was the impairment, and (2) why does the severity of the impairment make the testing unnecessary.

In this case, the neuropsychological testing is not valid and was performed two years prior to Dr. [REDACTED]'s examination, making it outdated and indicating it would not be able to adequately estimate the current severity of the impairment for prong one. Additionally, Dr. [REDACTED] reported that he relied on a more complete set of outside records rather than the neuropsychological testing results from 2020, which would also indicate that the 2020 neuropsychological testing is outdated and would not be the best indicator of the current cognitive deficits. Consequently, the severity of the impairment is best estimated by Dr. [REDACTED]'s examination findings in his note dated 11/2/2022 (Doc ID 284355), including the reported MoCA score of 15/30, which would be consistent with dementia. Overall, it is reasonable to defer to Dr. [REDACTED]'s conclusion that the Player's impairment was severe enough to satisfy prong one.

However, not all individuals with dementia would be expected to be so severely impaired as to make a neuropsychological evaluation unnecessary, so this alone would not provide adequate justification to fulfill prong two. Consequently, additional information needs to be considered, including that the Player was able to complete a neuropsychological evaluation with Dr. [REDACTED] just two years prior and that the Player continues to function well enough to drive when needed, according to the 10/29/2022 third-party affidavit. In particular, the ability to drive when needed would seem to indicate a level of cognitive functioning that would permit a neuropsychological evaluation to be obtained, and Dr. [REDACTED] noted in his 6/2/2024 addendum that relying on third-party observations such as the third-party affidavit would provide a more accurate depiction of the Player's functional state due to the Player's difficulty in accurately self-assessing deficits due to anosognosia.

In other words, it is medically improbable that someone would be both cognitively able to drive when needed but also so severely impaired that a neuropsychological

evaluation would be unnecessary. Regarding the second prong of the Special Master's analysis, Dr. [REDACTED] stated that repeat neuropsychological testing was not needed because the Player's degree of memory impairment would make him less capable of completing these tasks. However, this is not a sufficient justification to make neuropsychological testing unnecessary because neuropsychological evaluations include assessment of multiple cognitive domains and not just memory function. Consequently, it seems unlikely that memory impairment by itself would prevent assessment of the other cognitive domains.

Doc. 361091 (breaks added). The Claims Administrator also cited discrepancies in Mr. [REDACTED] reported functional impairment in its Denial Notice. *Id.* Mr. [REDACTED] appealed on December 4, 2024. Doc. 368956.

RESOLVING THIS APPEAL

On appeal, Mr. [REDACTED] must demonstrate by clear and convincing evidence that the Claims Administrator erred in denying his Claim. That would require either showing that (i) Dr. [REDACTED] properly relied on Dr. [REDACTED]'s non-contemporaneous neuropsychological testing despite its invalidity or (ii) Dr. [REDACTED] properly deemed neuropsychological testing medically unnecessary.

The Claims Administrator determined that Dr. [REDACTED]'s old testing could not be used to support Dr. [REDACTED]'s Diagnosis. Under the Program's rules, neuropsychological testing must have occurred within a year of the Diagnosis.² Dr. [REDACTED]'s testing, conducted through the BAP over two years before Mr. [REDACTED] saw Dr. [REDACTED], did not meet that requirement. The Claims Administrator has discretion to relax the contemporaneous testing requirement, but, as I have repeatedly held, its decision not to exercise that discretion is not itself clear and convincing evidence of error.³

Mr. [REDACTED] asserts that even if the 2020 testing cannot be used, his Claim should be able to proceed without it because Dr. [REDACTED] certified that neuropsychological testing was medically unnecessary. The Settlement allows a Diagnosis of Level 2 Neurocognitive Impairment without

² See *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> ("Because evidence of moderate to severe (for Level 1.5 diagnoses) or severe (for Level 2 diagnoses) cognitive decline as determined by and in accordance with the standardized neuropsychological testing protocol in Exhibit 2 to the Settlement Agreement is a key component of these Qualifying Diagnoses, the neuropsychological testing must be contemporaneous. If a Player's past neuropsychological testing was done more than a year before his MAF exam, or was done by anyone other than a Qualified BAP Provider in the BAP, the Qualified MAF Physician may use it as a baseline assessment to compare against contemporaneous neuropsychological testing but cannot use it to measure impairment unless the Claims Administrator approves the Qualified MAF Physician to use it in that manner.").

³ See, e.g., 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 ("The Claims Administrator has a great deal of discretion under FAQ 109 as to whether to make an exception to the general contemporaneous test rule.").

neuropsychological testing if “the diagnosing physician can certify that... [such] testing... is medically unnecessary because the Retired NFL Football player’s dementia is so severe.”⁴ A Certification is entitled to deference if the physician’s articulated judgment was “reasonably determined.”⁵ But Dr. ██████’s explanation here was at best cursory. He wrote only, “At this time, I do not feel that repeat neuropsychological testing is warranted, as I feel that the patient’s degree of memory impairment at this time makes him less capable of completing these tasks.” Doc. 284298.

The Claims Administrator evaluated Dr. ██████’s judgment using the established two-pronged inquiry: “How severe was the impairment; and, Why does the impairment’s severity make the testing unnecessary?”⁶ Mr. ██████ impairment, based on Dr. ██████’s testing and on his MoCA score in particular, is certainly severe, as the Claims Administrator acknowledged in its Denial Notice. Doc. 361091. But Dr. ██████ did not connect the severity of Mr. ██████ impairment to an inability to complete neuropsychological testing. I have previously held that “a given functional score can’t necessarily determine... medical necessity for the purpose of certification.”⁷

The Settlement’s presumption is that a Diagnosis of Level 2 Neurocognitive Impairment includes both documented functional loss *and* neuropsychological testing or certification. Many Players for whom a neurologist would support a Diagnosis of Level 2 Neurocognitive Impairment have indicia of significant impairment—a low MoCA score, as in Mr. ██████ case, or high CDR scores, as has been the case in several past opinions.⁸ But to avoid the Settlement’s testing presumption, the physician’s Certification must include some individualized judgment as to why *this* Player’s impairment means that he should not be required to complete neuropsychological testing. The physician’s articulation of those “links in the chain of argument from... impairment to Certification” is part of the basis for a reasoned determination.⁹ The sort of conclusory statements Dr. ██████ makes here—that Mr. ██████ is “less capable” than others of completing neuropsychological testing, without more—do not adequately establish that connection.¹⁰

⁴ Settlement Agreement, Exhibit 1, Section 2(b).

⁵ 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.

⁶ *Id.*

⁷ Special Master Ruling on Qualified MAF Physician’s Certification that Testing is Medically Unnecessary, at 4 (May 27, 2020), https://www.nflconcussionsettlement.com/Docs/physician_certification_testing_sm.pdf.

⁸ See Special Master Ruling on Qualified MAF Physician’s Certification that Testing is Medically Unnecessary, at 5 (June 8, 2020), https://www.nflconcussionsettlement.com/ViewDoc.aspx?dp=physician_certification_testing_sm_2.pdf (“It was consequently within the authority of the Claims Administrator to require a more complete explanation from Dr. —one which described more fully the link between the asserted CDR score and the conclusion that testing was unnecessary.”).

⁹ Special Master Ruling on Qualified MAF Physician’s Certification that Testing is Medically Unnecessary, at 4 (May 27, 2020), https://www.nflconcussionsettlement.com/Docs/physician_certification_testing_sm.pdf.

¹⁰ I have previously found the similarly conclusory statement that “neuropsychological testing would be difficult to perform” an inadequate justification for Certification. Special Master Ruling on Qualified MAF Physician’s Certification that Testing is Medically Unnecessary, at 5 (June 8, 2020), https://www.nflconcussionsettlement.com/ViewDoc.aspx?dp=physician_certification_testing_sm_2.pdf.

As I have previously concluded, “if a clinician offers a coherent and reasonably complete explanation of why [the Certification] standard is satisfied, the Claims Administrator should accept the Certification even if it would have made a different choice.”¹¹ But when a clinician has *not* offered a complete explanation, the Certification is not entitled to deference. The Claims Administrator permissibly looked for the connection between the severity of Mr. [REDACTED] impairment and his ability to complete neuropsychological testing in his record independently and did not find it. It noted that Mr. [REDACTED] had been able to complete a neuropsychological evaluation with Dr. [REDACTED] just two years before. Doc. 361091. That testing was invalid for reasons that, in the AAPC’s expert judgment, were uncoupled from “genuine memory impairment,” and thus cannot be used to support the assertion that Mr. [REDACTED] impairment would prevent him from generating valid neuropsychological results. Doc. 344570. And Mr. [REDACTED] documented functional impairment does not imply completing neuropsychological testing would be unattainably difficult for him. He can, for example, drive when necessary. *Id.* Without a reasonably determined explanation from Dr. [REDACTED], the Claims Administrator correctly concluded that Mr. [REDACTED] had not met the second prong of this inquiry.

This is a truly unfortunate case given the documented severity of Mr. [REDACTED] impairment. But the Settlement provides specific requirements for Mr. [REDACTED] Diagnosis: either valid neuropsychological testing or a physician’s reasonably determined Certification that such testing was unnecessary. Given those standards, the Claims Administrator’s denial was correct. This conclusion does not preclude Mr. [REDACTED] from receiving a Qualifying Diagnosis in the future.

Mr. [REDACTED] also appealed the Claims Administrator’s conclusion that his CDR scores were undermined by discrepancies in his reported functional impairment. The lack of contemporaneous and valid neuropsychological testing adequately supports the Claim Administrator’s denial. However, both the AAPC and the Claims Administrator were concerned by inconsistencies between Mr. [REDACTED] functioning as reported to Dr. [REDACTED] in 2020 and to Dr. [REDACTED] in 2022. In addition to curing the fatal deficiency in Mr. [REDACTED] Claim, a new neuropsychological evaluation could help resolve questions about these incongruities and the degree to which they can be explained by “the progressive nature of dementia,” as Dr. [REDACTED] argued in his addendum. Doc. 336101.

CONCLUSION

Because Mr. [REDACTED] has not offered clear and convincing evidence that the Claims Administrator erred, I deny his Appeal.



Date: April 25, 2025

David A. Hoffman, Special Master

¹¹ Special Master Ruling on Qualified MAF Physician’s Certification that Testing is Medically Unnecessary, at 6 (May 27, 2020), https://www.nflconcussionsettlement.com/Docs/physician_certification_testing_sm.pdf.