

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

██████████, a Retired NFL Player and Class Member under the Amended Class Action Settlement Agreement, filed a Claim for benefits based on a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment. The Claims Administrator denied the Claim, and Mr. ██████████ appealed. Because Mr. ██████████ has not presented clear and convincing evidence of error in the Claims Administrator's determination, his Appeal is denied.

On February 25, 2021, Mr. ██████ underwent neuropsychological testing with Dr. ██████ a board-certified neuropsychologist and Qualified BAP Provider. *Id.* at 12. Dr. ██████ determined that Mr. ██████ did not meet the criteria for impairment in the categories of Complex Attention and Processing Speed, Learning and Memory, Language, and Executive Functioning. *Id.* at 19–21. For Visual-Perceptual Processing, Dr. ██████ found that Mr. ██████ satisfied the criteria for Level 1 Neurocognitive Impairment; however, she emphasized that this assessment “should be viewed with some degree of caution,” given the test’s significant motor component and Mr.

■■■■■ experience of motor issues with his left (dominant) hand. *Id.* at 20. Dr. ■■■■■ concluded that “[t]aking into consideration this orthopedic issue, [Mr. ■■■■■] does not appear to meet criteria for any impairment in any cognitive domain.” *Id.* at 22. Dr. ■■■■■ also indicated scores of 0.0 for the CDR categories of Community Affairs, Home/Hobbies, and Personal Care. *Id.* at 21.

After reviewing these test results on March 29, 2021, Dr. ■■■■■ determined that “the results of the BAP neuropsychological assessment *do not* suggest that Mr. ■■■■■ meets the BAP criteria for a neurocognitive impairment.” *Id.* at 29 (emphasis added). Nevertheless, she concluded that Mr. ■■■■■ “*does* meet the NFL concussion settlement criteria for Level 1.5 Neurocognitive [I]mpairment (early dementia).” *Id.* at 30 (emphasis added).

Given this record, the Claims Administrator issued a Notice of Request for Additional Documents on June 15, 2021. Doc. 236163. Among other items, Mr. ■■■■■ had not submitted a Diagnosing Physician Certification Form. *Id.* The Claims Administrator explained that Mr. ■■■■■ had until October 18, 2021 to provide this missing information. *Id.*

In the interim, the Claims Administrator attempted to contact Dr. ■■■■■ to obtain a Diagnosing Physician Certification Form. Doc. 239363. They emailed Dr. ■■■■■ on June 8, 2021, June 22, 2021, and July 7, 2021, requesting “a Diagnosing Physician Certification and the additional neuropsychological testing you relied on to make this diagnosis.” *Id.* On Appeal, I asked the Claims Administrator for more information about these communications and was informed that although Dr. ■■■■■ did not reply in writing, she had called them and expressed uncertainty about how to proceed.

Consequently, the Claims Administrator sought guidance from the Settlement’s expert medical reviewers, the Appeals Advisory Panel Leadership Council (“AAPLC”), and scheduled a call with Dr. ■■■■■ and a member of the AAPLC on July 9, 2021. Doc. 239508. After having her questions addressed on the call, Dr. ■■■■■ confirmed that Mr. ■■■■■ did not meet the Settlement criteria for a Qualifying Diagnosis. *Id.* As such, she did not submit a Diagnosing Physician Certification Form.

The Claims Administrator denied Mr. ■■■■■ Claim on October 26, 2021. Doc. 239555. The Notice stated (in part):

We sent you a Notice of Request for Additional Documents telling you about insufficient documents and/or missing information in your Claim Package. Specifically, we asked you to provide a Diagnosing Physician Certification (“DPC”) signed by a physician who is permitted to make a Qualifying Diagnosis under the terms of the Settlement Agreement. The deadline to respond to the Notice expired on 10/18/2021, but no DPC has been provided. Your claim is denied because it is still incomplete for the missing DPC.

In addition, you submitted a Claim Package for an MAF exam that did not result in a Qualifying Diagnosis under Section 2.1(yyy) of the Settlement Agreement, and therefore your claim is not eligible for a Monetary Award under Section 6.2(a).

Id.

Mr. [REDACTED] timely appealed. Doc. 240775; Doc. 241663.

DISCUSSION

The Claims Administrator denied Mr. [REDACTED] Claim for two reasons. Doc. 239555. It noted the absence of a Diagnosing Physician Certification Form. And, Mr. [REDACTED] physician did not ultimately issue a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment. These two reasons are actually one and the same: a Diagnosing Physician Certification Form is only permitted if a Claimant has a Qualifying Diagnosis.¹

Qualifying Diagnoses of Level 1.5 Neurocognitive Impairment made outside of the BAP must be generally consistent with four diagnostic criteria.² Here, Mr. [REDACTED] satisfied neither criterion (ii) nor (iii). Criterion (ii) requires the Retired Player to have undergone a specific neuropsychological testing regimen outlined in the Settlement, and that the Retired Player's results from that testing meet designated score thresholds. Specifically, Mr. [REDACTED] needed to demonstrate "moderate to severe cognitive decline from a previous level of performance . . . in two or more cognitive domains (complex attention, executive function, learning and memory, language, perceptual-spatial)."³

Dr. [REDACTED] determined that Mr. [REDACTED] "does not appear to meet criteria for *any* impairment in *any* cognitive domain." Doc. 235351 at 22 (emphasis added). Although Mr. [REDACTED] initially seemed to satisfy the criteria for Level 1.5 Neurocognitive Impairment in one of the five categories—Complex Attention—Dr. [REDACTED] recognized that it was "noteworthy that scores on tests with a motor component were significantly weaker than the tests . . . which did not include any type of motor component." *Id.* at 19 (emphasis removed). Dr. [REDACTED] attributing this disparity to Mr. [REDACTED] orthopedic issues with his left hand, concluded that Mr. [REDACTED] did not meet the criteria for impairment in Complex Attention. And, even if Mr. [REDACTED] had satisfied the criteria for Level 1.5 Neurocognitive Impairment in Complex Attention, it would not have altered Dr. [REDACTED] ultimate Diagnosis. Mr. [REDACTED] needed to exhibit moderate to severe cognitive decline in *two or more* cognitive domains, and he did not meet the cutoffs in any other category.

Criterion (iii) requires evidence of a decline in functioning measured using the Clinical Dementia Rating ("CDR") scale. For a Level 1.5 Diagnosis, there must be evidence of impairment that is consistent with a CDR score of 1.0 in three specific categories: Community Affairs, Home

¹ Settlement Agreement, Article II, Section 2.1(gg); Article VIII, Section 8.2(a).

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

³ Settlement Agreement, Exhibit A-1, Section (1)(a)(ii).

& Hobbies, and Personal Care.⁴ Here, Dr. █████ indicated scores of 0.0 for Mr. █████ in all three categories. Doc. 235351 at 21. Although Mr. █████ reported difficulties with distractibility and memory, Dr. █████ noted that these difficulties stemmed largely from his orthopedic issues and pain medications, and were not “actually cognitive in nature.” *Id.* She also found that Mr. █████ “is independent in all basis and instrumental activities of daily living,” despite receiving help from friends with writing checks and transportation. *Id.* at 15.

Dr. █████ in turn, did not provide a formal CDR analysis or acknowledge the relevant categories (Community Affairs, Home & Hobbies, and Personal Care) in any of her reports. However, on Appeal, Mr. █████ emphasizes that “Dr. █████ . . . spoke to me [and] told me that I was at [Level] 1.5.” Doc. 241663. Confusion about Dr. █████ findings is understandable, as Dr. █████ did initially state that Mr. █████ met the criteria for Level 1.5 Neurocognitive Impairment. Doc. 235351 at 10. But to obtain a Qualifying Diagnosis, Dr. █████ evaluation needed to be supported by an eligible neuropsychological assessment. After reviewing Mr. █████ neuropsychological test results from his evaluation with Dr. █████—which unambiguously did not meet the required score thresholds for a Level 1.5 Qualifying Diagnosis—Dr. █████ became uncertain about how to proceed. *Id.* at 19–22.

The discrepancies in Dr. █████ March 29, 2021 evaluation reflect this uncertainty. *Id.* at 29–30. There, she concluded that “the results of the BAP neuropsychological assessment *do not* suggest that Mr. █████ meets the BAP criteria for neurocognitive impairment” and, simultaneously, that Mr. █████ “*does* meet the NFL concussion settlement criteria for Level 1.5 Neurocognitive [I]mpairment.” *Id.* (emphasis added). But these two conclusions cannot coexist. For Mr. █████ to satisfy the criteria for a Level 1.5 Qualifying Diagnosis, he *must* have neuropsychological test scores that support the Diagnosis. Ultimately, after speaking with the Claims Administrator and a member of the AAPLC, Dr. █████ clarified that Mr. █████ did not meet the requirements for a Level 1.5 Qualifying Diagnosis. Doc. 239508.

Mr. █████ also raises concerns about the use of race-based demographic adjustments in the scoring of his neuropsychological examination. Doc. 240168. But use of different demographic adjustments would not have changed this outcome of his Claim, as Mr. █████ did not meet the requirements for functional impairment (criterion (iii)), which is separate from the neuropsychological testing requirement. Therefore, test scores (and score adjustments) aside, Mr. █████ does not meet the Level 1.5 criteria.⁵

⁴ Settlement Agreement, Exhibit A-1, Section (1)(a)(iii). For Community Affairs, a score of 1.0 means the individual was “[u]nable to function independently [in job, shopping, volunteer and social groups], although may still be engaged in some; appears normal to casual inspection.” For Home & Hobbies, it means “[m]ild but definite impairment of function at home; more difficult chores abandoned; more complicated hobbies and interests abandoned.” For Personal Care, it means “[n]eeds prompting” with respect to self-care (including dressing, hygiene, and keeping of personal effects).

⁵ Under the Court’s March 4, 2022 Order regarding race norming, Mr. █████ may, however, be entitled to a new, free BAP exam. The Claims Administrator will notify him of his rights under that Order by the end of April 2022.

CONCLUSION

The doctors who evaluated Mr. [REDACTED] agreed that he did not have a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment. Dr. [REDACTED] reached this conclusion in her initial assessment, while Dr. [REDACTED] reached it later on once she better understood the Settlement's diagnostic requirements. Thus, there is not clear and convincing evidence that the Claims Administrator was wrong to deny Mr. [REDACTED] Claim. His Appeal is denied. This denial does not preclude Mr. [REDACTED] from submitting a new Claim in the future.

Date: March 30, 2022



David A. Hoffman, Special Master