

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

MDL No. 2323

THIS DOCUMENT RELATES TO:  
NFL PARTIES' APPEAL OF  
CLAIM DETERMINATION FOR  
SETTLEMENT CLASS MEMBER

Evaluation of a combination of embedded and free-standing performance validity indices, and the criteria suggested by Slick, Sherman, and Iverson (1999; i.e. the “Slick Criteria”), suggests Mr. [REDACTED] put forth adequate effort overall. Specifically, four out of five total ACS performance validity measures fell in an acceptable range, at or about the 25<sup>th</sup> %-ile. Only one embedded measure fell at or below the 15<sup>th</sup> %-ile. Meanwhile, his performance on two other robust free-standing measures of assessment validity were acceptable overall. Additionally, his responses during self-report questionnaire symptom validity indices were acceptable for interpretation. Taken together, his overall performance on validity measures is considered to reflect adequate effort for purposes of interpreting the following results.

*Id.* at 3-4.

In addition to Dr. [REDACTED]’s report, Dr. [REDACTED] interviewed Mr. [REDACTED]’s partner, [REDACTED], as a reliable informant. Doc. 266848. As Dr. [REDACTED] summarized:

Per his partner, his memory has noticeably declined in the last 12 months. She attests that his memory has declined since she met him (before 2015, while he was still coaching youth football) and testifies to his increasing hermitism. She says he used to cook and enjoyed cooking, but has since stopped. He has stopped doing household upkeep entirely (except taking out the trash). She attests that he is a “messy eater” but does not have trouble with fine motor skills like buttoning a shirt. However, he may need prompting and help matching clothes, and prompting to take showers and clean. He has no hobbies and rarely socializes at all outside the house. He could not recall a grocery or shopping list, or remember events or details within the past week or month. He is unable to make change or handle small amounts of money without errors.

Doc. 272427, at 2. Dr. [REDACTED] assigned Mr. [REDACTED] CDR scores of 2.0 in Memory, Orientation, Judgement & Problem Solving, Community Affairs, and Home & Hobbies, and 1.0 in Personal Care, for an overall CDR rating of 2.0. Doc. 266849.

Mr. [REDACTED]’s Claim was placed into audit on November 2, 2022; the audit concluded on January 6, 2023 and found no indication of misrepresentation, omission, or concealment. Docs. 272571; 275392. Soon afterwards, the Claims Administrator conducted its own rescoring of his 2019 neuropsychological test results under the New Method, which indicated more significant impairment than had Dr. [REDACTED]’s addendum. Doc. 275508. Mr. [REDACTED]’s rescored testing reflected Level 2 impairment in both Learning & Memory and Language, supporting Level 2 Neurocognitive Impairment overall. The Claims Administrator also asked that Mr. [REDACTED] provide the third-party affidavit by a friend, [REDACTED], that had been referenced in Dr. [REDACTED]’s report. Doc. 277828. Mr. [REDACTED] promptly did so. Doc. 278325.

At the conclusion of this back-and-forth, the Claims Administrator determined that Mr. ██████ was entitled to a Monetary Award for Level 2 Neurocognitive Impairment on March 27, 2023. Doc. 279637. The NFL Parties appealed on May 26, 2023. Doc. 283536.

## DISCUSSION

On appeal, the NFL Parties bear the heavy burden of establishing by clear and convincing evidence that the Claims Administrator erred, here—they argue—by adopting Mr. ██████’s neuropsychological testing as valid. Doc. 283537. The NFL Parties assert that Dr. ██████ did not adequately account for Mr. ██████’s performance on several specific validity tests (the ACS Word Choice test, the TOMM, and the VSVT) in his *Slick* analysis. *Id.*

The NFL Parties claim that Dr. ██████’s “validity analysis is manifestly insufficient and not entitled to any deference.” I agree that his *Slick* analysis falls short of a “written, thorough explanation” for each *Slick* item.<sup>1</sup> In the absence of such a well-articulated analysis, I asked an AAP Consultant to determine whether Dr. ██████’s conclusions about Mr. ██████’s testing were erroneous.

The AAPC first noted the deficiencies in Dr. ██████’s *Slick* analysis, opining that “while he mentions the *Slick* criteria, there is not a clear evaluation and full documentation of each the criteria in the report.” Doc. 290460.

The AAPC then analyzed Mr. ██████’s testing. It did not agree with the NFL Parties’ analysis of Mr. ██████’s low performance on BDAE Comprehension test as indicative of poor task engagement, writing, “The player does qualify for Level 2 impairments in language. To argue as the NFL does that BDAE serves as a PVT when aphasia is not present is rendered moot by the evidence that language impairment, a.k.a. aphasia, appears to be present.” *Id.* (cleaned up).

On other testing metrics, the AAPC described “incongruities,” but concluded that Dr. ██████ had accounted for the scores the NFL Parties question on appeal:

For example, the neuropsychologist’s data table lists both the TOMM and VSVT performances at ‘Optimal.’ They are clearly not. However, in his textual statement regarding validity he lists these performances as only ‘acceptable.’ This suggests consideration of the suboptimal performances of each test. Further, he acknowledges the low performance on one ACS test. Additionally, he also notes the normal limits scores on symptom validity measures.

*Id.*

The AAPC ultimately determined that although Dr. ██████’s reasoning was not clearly articulated, the total picture found in his report restored confidence in his conclusions. As the

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<sup>1</sup> *Cf.* Special Master Decision on Neuropsychological Testing: Slick Criteria and Validity Testing, at 10 (Oct. 21, 2020), [https://www.nflconcussionsettlement.com/Docs/slick\\_validity\\_testing\\_sm.pdf](https://www.nflconcussionsettlement.com/Docs/slick_validity_testing_sm.pdf).

AAPC put it, “I believe the examining neuropsychologist gave due consideration to validity in this case. While I might not have reached the same clinical conclusion in this case, I cannot point to clear procedural or factual errors made by him.” *Id.*

For the NFL Parties to prevail on Appeal after the Claims Administrator has accepted a Diagnosis as sufficiently supported by the medical records, they must show more than just occasional inadequacies in a neuropsychologist’s report. Their burden in such cases is to show that it is “highly probable or reasonably certain” that clinician’s conclusions were erroneous (and thus wrongly accepted by the Claims Administrator).<sup>2</sup> Here, the NFL Parties have not met that high bar: the AAPC advises that Dr. [REDACTED]’s validity analysis was not clearly “incorrect.”<sup>3</sup> I adopt that factual judgment.

### CONCLUSION

Because the NFL Parties have not offered clear and convincing evidence that the Claims Administrator erred, I deny their Appeal.

Date: December 8, 2023



David A. Hoffman, Special Master

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<sup>2</sup> *In re Fosamax Alendronate Sodium Prods. Liab. Litig.*, 852 F.3d 268, 285-86 (3d Cir. 2017).

<sup>3</sup> Special Master Decision on Validity Testing, at 5 (Jan. 15, 2021), [https://www.nflconcussionsettlement.com/Docs/validity\\_testing\\_2\\_sm.pdf](https://www.nflconcussionsettlement.com/Docs/validity_testing_2_sm.pdf).