

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE
PLAYERS' CONCUSSION INJURY
LITIGATION

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

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MDL No. 2323

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:
Hon. Anita B. Brody

THIS DOCUMENT RELATES TO:
APPEAL OF REPRESENTATIVE
CLAIMANT [REDACTED]
REGARDING CALCULATION OF
MONETARY AWARD

INTRODUCTION

[REDACTED] is the Representative Claimant for her husband, [REDACTED]. She filed a Claim for benefits on behalf of her husband, who is a Retired NFL Football Player and Class Member under the Amended Class Action Settlement Agreement, based on a Qualifying Diagnosis of Level 2 Neurocognitive Impairment. The Claims Administrator granted the Claim but applied the stroke offset, reducing Mr. [REDACTED] Monetary Award by 75%, as he suffered a medically diagnosed stroke several years before his date of Diagnosis. Mrs. [REDACTED] now appeals that offset.

Mrs. [REDACTED] has not met her burden of showing that her husband's strokes did not cause his Qualifying Diagnosis. She therefore has not demonstrated by clear and convincing evidence that the Claims Administrator erred in applying the offset. I deny her Appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. [REDACTED] experienced a medically diagnosed stroke in February 2014. Doc. 265635. After registering for the Settlement, Mr. [REDACTED] completed baseline assessment examinations with BAP neuropsychologist [REDACTED] and BAP neurologist [REDACTED] on August 24, 2017, and September 22, 2017, respectively. Docs. 266008; 266007. Drs. [REDACTED] and [REDACTED] determined that Mr. [REDACTED] met the Settlement criteria for Level 1 Neurocognitive Impairment and Mr. [REDACTED] was notified of his entitlement to BAP Supplemental Benefits on June 8, 2018. Doc. 266140.

Mrs. [REDACTED] was appointed her husband's Representative Claimant on March 22, 2021, based on his legal incompetence. Doc. 233914. The following year, in May 2022, Mr. [REDACTED] 2017 neuropsychological testing was automatically rescored using the New Method established under

the Norming Agreement. Doc. 264626. The Claim Administrator determined that Mr. [REDACTED] rescored neuropsychological testing now met the threshold for Level 2 Neurocognitive Impairment. *Id.* Mrs. [REDACTED] submitted a Claim asserting that Qualifying Diagnosis on June 14, 2022.¹ Doc. 265635.

Mr. [REDACTED] 2014 stroke was noted on the Claim Form. Doc. 265635. Mrs. [REDACTED] also indicated that she believed her husband's stroke was not causally related to his Qualifying Diagnosis. *Id.* She concurrently submitted Mr. [REDACTED] medical records from 2012 to the present along with an affidavit from his primary care provider, Dr. [REDACTED]. Docs. 265637; 265638. In his affidavit, Dr. [REDACTED] attested that he had been Mr. [REDACTED] provider since 2012 and that "while Mr. [REDACTED] exhibited profound physical effects of his stroke, I did not note any cognitive changes in Mr. [REDACTED] as a result of his stroke in [his] records." Doc. 265638 at 1. Dr. [REDACTED] explained further:

It is my opinion that, since Mr. [REDACTED] cognitive symptoms developed years after his stroke and were not correlated at all with the physical symptoms that immediately accompanied his stroke, his cognitive impairment was not due to his stroke or infarct, but were due to his head trauma suffered playing NFL football.

Id.

On August 2, 2022, the Claims Administrator notified Mrs. [REDACTED] that the Claim Package would be reviewed by the AAP for sufficiency. Doc. 267694. The AAP Member who reviewed the Claim concluded that the available records "support the opinion that the Stroke did contribute to the cognitive impairments and decline." Doc. 269493. Shortly thereafter, on September 6, 2022, the Claims Administrator determined that Mr. [REDACTED] was entitled to a Monetary Award based on a Diagnosis of Level 2 Neurocognitive Impairment. Doc. 269487. It applied the 75% stroke offset to the Award. *Id.* Mrs. [REDACTED] timely appealed the offset on October 4, 2022. Doc. 270670.

DISCUSSION

The Settlement provides that if a Player suffered a medically diagnosed stroke occurring prior to a Qualifying Diagnosis, a 75% offset will be applied to his Monetary Award unless "the Settlement Class member demonstrates, by clear and convincing evidence, that the Qualifying Diagnosis was not causally related to the Stroke."² I have previously interpreted this burden as follows:

Thus, in this case, the Claims Administrator's task was to evaluate whether the available evidence produced a firm belief or conviction—in other words, that it is highly probable or reasonably certain—that [the Claimant's stroke] did not cause his Qualifying Diagnosis. To succeed on appeal, [the Claimant] must show that

¹ Mr. [REDACTED] had also completed new BAP neurological and neuropsychological evaluations in 2020, before the rescoring, but those evaluations are not the source of nor referenced in the Claim at issue here. Doc. 238548.

² Settlement Agreement, Section 6.7(d).

there is a high degree of probability that the Claims Administrator was wrong in determining he had not met that burden, and therefore in applying the 75% stroke offset.³

Mrs. [REDACTED] essentially argues that Dr. [REDACTED] affidavit and the accompanying medical records make it highly probable or reasonably certain that Mr. [REDACTED] impairment was not caused by his stroke. She then argues that the Claims Administrator and reviewing AAP Member erred in “rel[ying] on purported conclusions of the BAP providers that Mr. [REDACTED] cognitive impairment was caused by his stroke” rather than on Dr. [REDACTED] records and testimony. Doc. 270670 at 1. In essence, she contends that the AAP and Claims Administrator should have deferred to Dr. [REDACTED] judgment rather than that of the examining BAP neurologist and neuropsychologist.

I have repeatedly emphasized the “fundamental presumption that the Claims Administrator – and by extension the AAP – should defer to the articulated medical judgments of examining clinicians and physicians.”⁴ But that deference applies to precisely the examining physicians that Mrs. [REDACTED] appeal seeks to undermine: BAP providers such as Drs. [REDACTED] and [REDACTED], who have expertise specific to the Settlement and the opportunity to apply that expertise in first-hand examinations. By contrast, Dr. [REDACTED] is a general practitioner who has neither expertise in the Settlement nor expertise in neurology or neuropsychology.⁵ The AAP quite correctly gave precedence to Dr. [REDACTED] and Dr. [REDACTED] judgment that “the Player’s cognitive difficulties were causally related to the Stroke with a diagnosis of vascular major neurocognitive disorder.” Doc. 269493.

Mrs. [REDACTED] denies that Dr. [REDACTED] and Dr. [REDACTED] examinations reveal a causal relationship between Mr. [REDACTED] stroke and neurocognitive impairments. But to meet her initial burden, she must establish that their records provide clear and convincing evidence—that is, making it highly probable or reasonably certain—of the *absence*, not *presence*, of that causal relationship. Instead, both providers repeatedly reference Mr. [REDACTED] stroke in their examinations and link it to his neurocognitive impairment. Dr. [REDACTED] wrote that Mr. [REDACTED] “has had problems thinking of words since his stroke,” that he “was unable to provide many details from his past medical history, seemingly due to the effects of his stroke several years ago,” and that his stroke had “resulted in... some level of cognitive impairment most likely including word finding, attention, and procession speed.” Doc. 266008 at 1 and 4. Dr. [REDACTED] report also notes that although Mrs. [REDACTED] account of her husband’s history was inconsistent, she did state “at one point in the interview... that he was independent in most activities of daily living until his stroke.” *Id.* at 1. In his 2017 report, Dr. [REDACTED] states that he had reviewed and agreed with Dr. [REDACTED] findings. Doc. 266007. And, in a later evaluation of Mr. [REDACTED] on December

³ Special Master Ruling on Stroke Definition, Apr. 25, 2022, https://www.nflconcussionsettlement.com/Docs/stroke_sm_2.pdf at 7.

⁴ *Id.* at 8 (emphasis omitted).

⁵ The Settlement makes the distinction between Settlement-authorized providers and third-party physicians clear by giving the AAP decision-making power over the sufficiency of pre-Effective Date Diagnoses, which are categorically rendered by physicians outside of the Settlement, while limiting it to an advisory role when reviewing Diagnoses rendered by BAP and MAF providers. Diagnosis and Review Requirements, NFL Concussion Settlement, https://www.nflconcussionsettlement.com/Docs/Diagnosis_Review_Table.pdf.

9, 2019, he specifically notes that Mr. [REDACTED] earlier neuropsychological testing suggested “major vascular neurocognitive disorder” and that “vascular” could be a “significant contributor” to his “severely advanced dementia.” Doc. 229406 at 11.

Mr. [REDACTED] BAP examinations therefore present no clear and convincing evidence against a causal connection and much in favor of it, which the Claims Administrator and AAP correctly and reasonably used to render their decision.

Finally, Mrs. [REDACTED] contends that Dr. [REDACTED] and Dr. [REDACTED] determinations about the impact of Mr. [REDACTED] stroke on his impairment were inadequately informed by his medical history, as she did not submit all of his medical records until after they completed their examinations. If so, Mrs. [REDACTED] contributed to that failure by refusing to allow Drs. [REDACTED] and [REDACTED] to request and review her husband’s records. Docs. 266008; 266007. In all events, her later submission was duly considered by the AAP and found wanting. The AAP noted its review of the records following Mr. [REDACTED] stroke and wrote that “[w]hile in rehab, the Player was noted to have a slowed response time and an expressive aphasia, consistent with imaging of a dominant hemisphere middle cerebral artery Stroke.” Doc. 269493.

Mr. [REDACTED] BAP examinations are the foundation of his record and do not provide clear and convincing evidence that his Qualifying Diagnosis was not causally related to his stroke. Mrs. [REDACTED] has not presented clear and convincing evidence on appeal that the Claims Administrator erred in not superseding that foundation based on Dr. [REDACTED] affidavit. I therefore deny her Appeal.

CONCLUSION

Because Mrs. [REDACTED] did not show by clear and convincing evidence that the Claims Administrator erred in applying a stroke offset to her husband’s Monetary Award, I deny her Appeal.

Date: January 20, 2023



David A. Hoffman, Special Master