

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 had developed. Doc. 164202.² Dr. [REDACTED] was one of these seven Template Doctors. The Claims Administrator recommended that the Special Masters disqualify the Template Doctors and bar any Claim that relied on their assessments. *Id.* On September 17, 2018, the Special Masters ruled that a member of the AAP, with assistance from an AAP Consultant, should make an individualized assessment of any active Claims relying on evaluations that Dr. [REDACTED] and the other Template Doctors provided. Doc. 185424.

On October 19, 2020, the Claims Administrator concluded its ongoing audit of Mr. [REDACTED] Claim, finding no reasonable basis to conclude that Mr. [REDACTED] misrepresented, omitted, or concealed any material fact. Doc. 229454. Then, on February 5, 2021, an AAP Consultant, reviewing the Claim pursuant to the Special Masters' September 2018 directive, concluded that Mr. [REDACTED] neuropsychological evaluation results did not adequately support a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment. Doc. 232660. The AAP Consultant wrote:

- The player failed stand-alone and embedded effort validity measures within the BAP battery. Failed embedded validity measures include: ACS Word Choice (< 20, < 1%). He obtained a score of 42 on Trial 2 of the TOMM. The TOMM Manual states, "Any score lower than 45 on Trial 2 should concern that the individual is not putting forth maximum effort and is likely malingering[.]" The player's poor performance on numerous validity measures indicates sub-optimal effort and likely deliberate underperformance. Dr. [REDACTED] actually states, "inadequate effort very likely occurred," but he ignores the importance of test results indicating invalid performance.
- The player also failed one symptom validity scale within the MMPI-2-RF, the RBS scale (T = 92, 99%) due to over-reporting of an unusual combination of responses associated with *non-credible memory complaints*. Thus, his subjective complaints and self-report of functional limitations should be viewed with caution.
- There are inconsistencies involving Slick validity criteria and the player continues to function at a level inconsistent with Level 1.5 Neurocognitive Impairment:
 - It appears that the retired player was able to travel independently from [REDACTED] and stay over night in between the neuropsychological and neurological evaluations.
 - The player did not require anyone to accompany him to the medical appointments, and was able to provide[] a detailed and accurate history.
 - There are inconsistencies involving employment. At the time of the evaluation with Dr. [REDACTED] the player reported noticing problems "when he is hosting on air[.]" The 2017 Form 1099-MISC indicates that he was paid by [REDACTED] (a local television station). The

² For more information on the Claims Administrator's audit of the Template Doctors and specifically Dr. [REDACTED] *see* Special Master Ruling on Validity Testing and Functional Impairment, at 2-3 (Feb. 16, 2021), https://www.nflconcussionsettlement.com/Docs/validity_testing_3_sm.pdf.

player reports, “I worked as an independent contractor providing sports analysis for [REDACTED]. I worked one to four days a week, depending on whether or not it was football season.” The form also shows that he received income from [REDACTED]. This organization “trains NFL prospects on drills they would be performing at the NFL combine. I worked as a trainer 3 days a week for one hour each day.” Other paid employment during 2017 includes income reportedly paid by [REDACTED] for “modeling and acting work in 2017[.]” 1099-MISC Form for 2018 reports payment to the player for several “appearances” for the Arizona Cardinals Football Organization. The player completed the Employment History Form and indicated that he was “self-employed as a TV analyst” from 1998 until November 2017.

In conclusion, Dr. [REDACTED] neuropsychological evaluation does not adequately support a diagnosis of Level 1.5 Neurocognitive Impairment. In addition, there is insufficient evidence of functional decline due to cognitive impairment.

Id. (cleaned up).

On April 22, 2021, the Claims Administrator, denying the Claim, concluded:

Criterion (i): Dr. [REDACTED] reports concern for memory loss, including forgetting recent conversations, going into rooms and forgetting why, frequent repetition, asking the same questions repeatedly, word finding problems, forgetting names, forgetting what he is going to say, difficulty with multitasking and calculations, and needing to write things down. This criterion is fulfilled.

Criterion (ii): The neuropsychological evaluation by Dr. [REDACTED] reports questionable performance on multiple stand alone and embedded effort validity measures. Specifically, Dr. [REDACTED] reported that the Player “had suboptimal performance on 5 of 13 validity measures” and that “on one of the memory validity subtests (Word Choice), the patient performed at a level indicating a significant lapse in performance.” Dr. [REDACTED] stated that inadequate effort very likely occurred and that the Player’s inconsistency in performance may have impacted findings. Neither Dr. [REDACTED] nor Dr. [REDACTED] provided a complete Slick Criteria analysis, but Dr. [REDACTED] reports in his supplemental explanation that variability in performance validity testing did not necessarily indicate intentional underperforming. However, this ignores the purpose of performance validity testing and Dr. [REDACTED] statements that underperformance very likely occurred and may have impacted findings. Further, Dr. [REDACTED] statement is somewhat misleading because it suggests that a failure to indicate intentional underperformance also indicates a valid evaluation. Additionally, there were inconsistencies in terms of the Slick criteria, including the Player’s ability to travel independently between [REDACTED] for

evaluations, not needing to be accompanied to the evaluations, being able to provide detailed history information during the evaluations, and inconsistencies involving employment. Consequently, there is failure of multiple Slick criteria, including: Slick criterion 1 suboptimal scores on performance validity tests (suboptimal performance on 5 of 13 validity measures), Slick criterion 3 discrepancy between tests data (impaired performance on BDAE Complex Ideational Material and low average performance on Category Fluency in the Language Domain, as well as impaired performance on 3 of 6 Learning/Memory Domain tests and borderline performance on the remainder of the Learning/Memory tests) and observed behavior (ability to provide detailed history information during the evaluations), and Slick criterion 5 discrepancy between test data (impaired performance on 3 of 4 measures of Executive Function) and documented background history (being able to travel to the evaluations independently, not needing to be accompanied to the evaluations, and employment history). Because of these performance validity issues, criterion (ii) is not fulfilled.

Criterion (iii): Dr. [REDACTED] documents the Player is no longer working, is able to use GPS for navigation, is able to pay bills online, can shop with a list, is able to maintain personal hygiene, is able to feed himself, can cook a simple meal but is unable to follow a complex recipe, may forget to turn off the stove, and has lost interest in hobbies such as golf. The Player's response to audit questions indicate that he traveled out of state for his evaluations and did not need to be accompanied to the evaluations, continues to drive, and worked and volunteered during 2017. The third-party affidavit only corroborates needing reminders to eat meals and not remembering that he wore the same shorts and tee from the day before. Dr. [REDACTED] did not document scores for the relevant CDR categories and acknowledged in the additional explanation statement that a CDR assessment was not performed. The functional abilities documented, including continuing to be able to work, drive, shop, cook, maintain personal hygiene, and feed himself are not generally consistent with scores of 1.0 for the CDR categories of Community Affairs and Personal Care (the lack of interest in hobbies such as golf and inability to cook complicated meals may be generally consistent with a score of 1.0 for the category of Home/Hobbies). Consequently, while there is report of some functional impairment and decline, the information is not generally consistent with the Settlement criteria for Level 1.5 Neurocognitive Impairment and criterion (iii) is not fulfilled.

Criterion (iv): There is no mention of delirium or acute substance abuse, the Player reports he did not take any medications or substances on the day of the evaluations, and the current medications listed by Dr. [REDACTED] (Zyrtec and Advil) are not likely to produce the cognitive deficits described in the evaluation. Therefore criterion (iv) is fulfilled.

Based on the failure of criteria (ii) and (iii), the diagnosis made by Dr. [REDACTED] does not meet the Settlement criteria for the Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment.

Doc. 234959 (cleaned up). On July 6, 2021, Mr. [REDACTED] filed an Appeal. Doc. 236665.

DISCUSSION

The Claims Administrator denied Mr. [REDACTED] Claim because he failed performance validity assessments during his neuropsychological testing (criterion ii), and because he did not submit sufficient evidence of mild decline in functional impairment (criterion iii). For his Appeal to be successful, Mr. [REDACTED] must present clear and convincing evidence that the Claims Administrator's findings were incorrect.

Dr. [REDACTED] explained, and the AAP corroborated, that Mr. [REDACTED] performance on five of thirteen validity measures was suboptimal. In fact, Mr. [REDACTED] performance was deficient in four of the seven discrete performance validity tests listed in the BAP test battery, Mr. [REDACTED] performance was suboptimal in four of them.³ Dr. [REDACTED] in explaining that other factors—"pain, emotional distress, environmental distracters and/or testing fatigue"—could have contributed to these scores, nonetheless concluded that "findings of this nature indicate that some inconsistency in performance may have impacted findings." Doc. 141055, at 12.

Yet, after Dr. [REDACTED] explained that the *Slick* analysis generally "assures that symptoms observed in the testing environment are evident with other evaluators and also occur in the patient's actual day-to-day environment," he failed to perform one. *Id.* Dr. [REDACTED] instead wrote: "Overall, the current neuropsychological data set and patient self report indicated that the patient is experiencing significant, relatively diffuse neuropsychological dysfunction. Comparison of the full diagnostic profile . . . will provide further clarity regarding the severity of the condition and its impact on functional cognitive capacity." *Id.* The Claims Administrator rightly determined that this analysis was deficient.

When a neuropsychologist fails to provide "written, thorough explanations" of a Claim's validity issues and "fail[s] to articulate [a] judgment through complete *Slick* analyses, the AAP may thoroughly and independently assure themselves the criteria do not indicate invalid testing."⁴ Here, because of the process that the Special Masters had previously mandated for Claims supported by Dr. [REDACTED] evaluations, an AAP Consultant had an additional opportunity to further review the Claim. In incorporating this Consultant's assessment and adopting the associated *Slick* analysis, the Claims Administrator concluded:

³ Mr. [REDACTED] performance was also suboptimal on the TOMM Trial 2 test.

⁴ Special Master Ruling on Neuropsychological Testing: *Slick* Criteria and Validity Testing, at 10 (Oct. 21, 2020), https://www.nflconcussionsettlement.com/Docs/slick_validity_testing_sm.pdf.

Additionally, there were inconsistencies in terms of the Slick criteria, including the Player's ability to travel independently between [REDACTED] for evaluations, not needing to be accompanied to the evaluations, being able to provide detailed history information during the evaluations, and inconsistencies involving employment. Consequently, there is failure of multiple Slick criteria, including: Slick criterion 1 suboptimal scores on performance validity tests (suboptimal performance on 5 of 13 validity measures), Slick criterion 3 discrepancy between tests data (impaired performance on BDAE Complex Ideational Material and low average performance on Category Fluency in the Language Domain, as well as impaired performance on 3 of 6 Learning/Memory Domain tests and borderline performance on the remainder of the Learning/Memory tests) and observed behavior (ability to provide detailed history information during the evaluations), and Slick criterion 5 discrepancy between test data (impaired performance on 3 of 4 measures of Executive Function) and documented background history (being able to travel to the evaluations independently, not needing to be accompanied to the evaluations, and employment history).

Doc. 234959.

Given these factual conclusions about the invalidity of Mr. [REDACTED] test scores, to which I defer and now adopt, criterion (ii) of the Settlement Agreement is not fulfilled.

Dr. [REDACTED] did not perform a CDR analysis to substantiate criterion (iii). *See* Doc. 230864, at 1.⁵ Mr. [REDACTED] Claim does include evidence of his daily functional challenges: he lost interest in hobbies such as golf, forgot to get his morning coffee, forgot to attend events he otherwise shows interest in, could no longer maintain his vehicles himself, had difficulty with calculations required to pay bills, needed a list when shopping, and struggled to cook complicated recipes. However, there is also evidence that, at the time of his evaluation, Mr. [REDACTED] independently worked, drove, shopped, cooked, and dressed himself. Doc. 172272, at 2–3; Doc. 224496, at 6; Doc. 232660, at 2 (AAP Consultant Report noting audit findings). Given Dr. [REDACTED] failure to perform a CDR and the proffered mixed evidence of functional impairment, the Claims Administrator concluded that Mr. [REDACTED] had not offered evidence sufficient to establish criterion (iii).

Mr. [REDACTED] brief emphasizes a phrase in the text of the Settlement, which states that “functional impairment shall be corroborated by documentary evidence (e.g., medical records, employment records), the sufficiency of which will be determined by the physician making the Qualifying Diagnosis.” Doc. 236663, at 5–6, citing Settlement Agreement, Exhibit A–1(1)(a)(iii). This emphasis perhaps suggests that the fact of a Claimant's functional impairment—rather than the sufficiency of documentary evidence corroborating it—is solely to be determined by the

⁵ Dr. [REDACTED] specifically states that “CDR was not done.” Doc. 230864. But Mr. [REDACTED] counsel nevertheless argues that “Dr. [REDACTED] found that Appellant had suffered a moderate to severe decline in neurocognitive performance and that his current impairment falls within the National Alzheimer's Coordinating Center's Clinical Dementia Rating (CDR) category of Mild Dementia [1.0].” Doc. 236663.

diagnosing physician. Mr. ██████ counsel is not the first to have read this phrase to deprive the Claims Administrator of the authority to determine the sufficiency of Claims.⁶

“[B]asic contract principles do indeed apply to settlement agreements.”⁷ The last antecedent doctrine dictates that “qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding and not to others more remote.”⁸ “[R]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.”⁹ A straightforward application of this contract interpretation principle indicates that its drafters intended to give deference to the diagnosing physician’s views about whether the documentary evidence was sufficiently corroborative of his or her findings, but not to the ultimate merits judgment.

Admittedly, this rule can be “overcome by other indicia of meaning.”¹⁰ For example, in one Class Action Settlement, use of the last antecedent doctrine “would [have been], among other things, at odds with the literal words as well as the timeframes that the Settlement Agreement provide[d].”¹¹ But for this Settlement, the decision about the sufficiency of evidence of functional impairment is explicitly vested in the Claims Administrator, in the first instance, and on appeal, with the Special Master.¹² These explicit textual references belie the assertion that the diagnosing physician’s conclusions about a Claimant’s functional impairment are dispositive.¹³

In this case, after extensive review, the AAP found (and the Claims Administrator concluded) that Mr. ██████ retained function was inconsistent with a CDR of 1.0. Mr. ██████ has not offered clear and convincing evidence that this factual judgment was incorrect. I adopt it in finding that he has not fulfilled criterion (iii).

⁶ *But see* Special Master Ruling on Evidence to Support a Qualifying Diagnosis, at 7 (Sept. 5., 2020), https://www.nflconcussionsettlement.com/Docs/evidence_of_qualifying_diagnosis_sm.pdf (“That the diagnosing physician can exercise judgment in determining the sufficiency of the documentary record’s *corroboration* of functional impairment is not the same as saying that he or she ultimately has plenary authority to determine the player’s functional impairment. The Settlement Agreement does not confer such unreviewable authority to diagnosing physicians.”) (emphasis in original).

⁷ *Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.)*, 233 F.3d 188, 193 (3d Cir. 2000).

⁸ *Stepnowski v. C.I.R.*, 456 F.3d 320, 324 (3d Cir. 2006) (cleaned up).

⁹ *United States v. Ashurov*, 726 F.3d 395, 399 (3d Cir. 2013) (cleaned up).

¹⁰ *J.C. Penney Life Ins. Co. v. Pilosi*, 393 F.3d 356, 365 (3d Cir. 2004) (cleaned up).

¹¹ *In re: Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 525 F. App’x 140, 143 (3d Cir. 2013).

¹² *See* Settlement Agreement, Section 8.4 (“[T]he Claims Administrator will determine the sufficiency and completeness of [Claim Packages]”; Section 9.1 (“Based upon its review of the Claim Package . . . the Claims Administrator will determine whether a Settlement Class Member qualifies for a Monetary Award and the amount of any such Award.”)).

¹³ In multiple decisions, the Special Masters have elaborated on the Settlement’s system of layered deference, which generally affords latitude to diagnosing physicians’ views when they have articulated their judgment in contemporaneous reports. That system generally “police[s] the process, not its outcomes.” Special Master Ruling on Neuropsychological Testing: *Slick* Criteria and Validity Testing, *supra* note 4, at 12. Dr. ██████ failure to perform a CDR analysis, the inconsistent nature of the findings in his report, and the late-arriving nature of Mr. ██████ other evidence vitiates that ordinary practice.

CONCLUSION

On appeal, Mr. [REDACTED] has not offered clear and convincing evidence that the Claims Administrator's determination was incorrect. Mr. [REDACTED] suboptimal performance on validity tests, in addition to his level of daily cognitive functioning, indicate that he offered insufficient evidence in support of a Diagnosis of Level 1.5 Neurocognitive Impairment. Therefore, his Appeal is denied.

Date: October 31, 2021



David A. Hoffman, Special Master