

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: NATIONAL FOOTBALL LEAGUE
PLAYERS' CONCUSSION INJURY
LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

Hon. Anita B. Brody

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

INTRODUCTION

[REDACTED] is the Representative Claimant for his late father, [REDACTED]. The elder Mr. [REDACTED] timely registered for the Settlement, but died without filing a Claim. Mr. [REDACTED] submitted a Claim in May, 2022, asserting a Qualifying Diagnosis of Level 2 Neurocognitive Impairment. The Claims Administrator denied that Claim and Mr. [REDACTED] now appeals. Because Mr. [REDACTED] has not demonstrated by clear and convincing evidence that the Claims Administrator's denial of the Claim was in error, his Appeal is denied.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. [REDACTED] registered for the Settlement on February 2, 2017, but submitted no further documentation prior to his death in October 2017. Doc. 18634. Mr. [REDACTED] proffered his father's medical records on December 9, 2019. Doc. 218102. The records reflect Mr. [REDACTED] evaluations by Dr. [REDACTED], an internist unaffiliated with the Settlement, between April 2013 and November 2016 and include Dr. [REDACTED] observations of Mr. [REDACTED] "significant memory loss." *Id.* at 14.

Mr. [REDACTED] counsel also corresponded with the Claims Administrator about the timeline for Claim submission given a proposed date of Qualifying Diagnosis of June 9, 2015. Doc. 266646. The Claims Administrator advised that since the Claim at issue had a pre-Effective date of Diagnosis, Mr. [REDACTED] could submit a hardship consideration request per FAQ #80.¹ *Id.* Claimant never made that request. Instead, two years later, Mr. [REDACTED] submitted a Claim form, asserting a Qualifying Diagnosis of Level 2 Neurocognitive Impairment dated to November 22, 2016. Doc.

¹ *Frequently Asked Questions: FAQ #101* (How is the date of a Qualifying Diagnosis determined?), NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com>.

264660. Mr. [REDACTED] counsel simultaneously submitted a request that the Claims Administrator review his Claim under Section 8.2(a) in the absence of a pre-Effective Date Diagnosing Physician Certification (DPC) form from his father's physicians – which he had been unable to obtain – based solely on his medical records. Doc. 264661.

The Claims Administrator denied his Claim on June 9, 2022, stating that it fell outside the Settlement Agreement's timing rules. Doc. 265512. Mr. [REDACTED] timely appealed on July 11, 2022. Doc. 266647.

DISCUSSION

No physician has ever rendered a Qualifying Diagnosis of Mr. [REDACTED], notwithstanding some evidence that he experienced memory loss prior to his death. And no physician has agreed to sign a DPC Form memorializing such a Qualifying Diagnosis. Counsel has apparently repeatedly asked Mr. [REDACTED] doctors to make such a finding, to no avail. In the absence of a Diagnosis and Form, Mr. [REDACTED] argues that the Claims Administrator should have exercised its authority under Section 8.2 of the Settlement to evaluate the Claim anyway.

Section 8.2 provides that Claim packages “will include, without limitation . . . a Diagnosing Physician Certification” except:

- (i) If a Claimant died prior to the Effective Date (January 7, 2017) and the physician who rendered a Qualifying Diagnosis also died or was deemed incompetent prior to the Effective Date;
- (ii) If a deceased Claimant “received a Qualifying Diagnosis” but the medical records reflecting that Diagnosis “are unavailable because of a force majeure type event.”
- (iii) If a living Claimant “received a Qualifying Diagnosis” but his physician died or was deemed incompetent.²

None of these exceptions apply here: Mr. [REDACTED] died in October 2017, and his physicians neither died nor were declared incompetent. The closest exception is that the (assertedly) diagnosing physicians were unavailable “because of a force majeure type event.”³ But even this is inapt: as counsel relates, it sent copies of the DPC form to Dr. [REDACTED] and Dr. [REDACTED] offices “asking for their consideration and completion of the forms, and followed up by phone, email, and fax.” Doc. 266645 at 2. Mr. [REDACTED] family also requested that Dr. [REDACTED] and Dr. [REDACTED] complete the form. Neither doctor responded to those outreach attempts, “preventing the completion of any Pre-Effective DPC form in support of Mr. [REDACTED] Claim.” *Id.* at 3. Though unfortunate, physicians being unresponsive is not comparable to “flood, hurricane, fire.”⁴ And there is no evidence that those physicians had, or would, render a Qualifying Diagnosis. Something more is required to trigger the exception memorialized in 8.2(a)(ii). Without a DPC, the Claim must fail.

² Settlement Agreement, Section 8.2(a).

³ Settlement Agreement, Section 8.2(a)(ii).

⁴ *Id.*

Mr. ██████ originally relied on FAQ #128, which appears to provide an additional method by which the Claims Administrator may, for good cause, excuse the absence of a DPC.⁵ FAQs cannot create rights the Settlement disclaims. And in all events, FAQ #128 merely gives the Claims Administrator the “discretion to review” Claims submitted without a DPC based on “reasons that are excusable,” consistent with the Settlement.⁶ It does not require it to do so.⁷

Even if the Claims Administrator could excuse the failure to file a DPC on the grounds of physician unresponsiveness, and acceded to that request under FAQ #128, and found justified “reasons that are excusable,” the Claim would have been untimely filed. Mr. ██████ filed this Claim in 2022 with an asserted date of Diagnosis of November 22, 2016. The Settlement requires Claim Packages to be submitted no more than two years from the date of Diagnosis or from the date that the Settlement Class Supplemental Notice was posted on the Settlement Website (February 6, 2017).⁸ That timeline extends to four years if the Claimant can show that substantial hardship precluded the submission of his Claim within the two-year deadline.⁹ Mr. ██████ submitted no such hardship consideration request, despite prompting to do so by the Claims Administrator in their correspondence. Doc. 266646. Had he done so, his submission would still have fallen outside four-year time window.¹⁰

Mr. ██████ however, asserts that the Claims Administrator should have considered his Claim submitted on November 21, 2019. Docs. 266645; 266646. On that day, Mr. ██████ counsel did send an email to the Claim Administrator “requesting an opportunity to submit [Mr. ██████] claim for review” posthumously, based on his medical records. Doc. 266646 at 3. The Claims Administrator requested additional information and learned the potential date of Diagnosis for this Claim. It then advised that since the Claim at issue had a pre-Effective date of Diagnosis, Mr. ██████ would need to submit a hardship consideration request per FAQ #80.¹¹ *Id.*

The Settlement’s limitations period is tolled by the submission of a Claim Package, not a request for review.¹² A Claim Package includes a Claim Form, HIPAA Form, DPC Form, and

⁵ *Frequently Asked Questions: FAQ #128* (Are there other instances not listed in Section 8.2 of the Settlement Agreement where the Claims Administrator may excuse the medical records or Diagnosing Physician Certification Form requirement?), NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com>.

⁶ *Id.*

⁷ As the text makes clear, I have evaluated Mr. ██████ claim as if FAQ #128 provided a potential ground for recovery. However, I am concerned that the language in the FAQ may be read in ways that are inconsistent with the Settlement’s text and direct the Claims Administrator to confer with the NFL Parties and Class Counsel as to whether an edit may be indicated.

⁸ Settlement Agreement, Section 8.3(a)(i).

⁹ *Id.*

¹⁰ Claimant’s counsel argues that the language of FAQ #80 implies additional flexibility. This interpretation is incorrect. FAQ #80’s guidance that proof of substantial hardship may allow claims to be submitted outside the two-year timeline references the more generous four-year timeline but does not expand it. *Frequently Asked Questions: FAQ #80* (Is there a deadline to submit my Claims Package?), NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com>.

¹¹ *Id.*

¹² Settlement Agreement, Section 8.3(a)(i).

medical records reflecting a Qualifying Diagnosis.¹³ Mr. [REDACTED] correspondence with the Claims Administrator included none of the components of a Claim Package. And the Claims Administrator made clear it could and would not act until the submission of a hardship request.

Mr. [REDACTED] next contends that the Settlement's limitations period should not apply to his Claim at all, because the limitations are based on the date of Qualifying Diagnosis and there is no Qualifying Diagnosis in his Claim. Doc. 266645. This is a confusing argument. This Claim, like any Claim submitted under the Settlement, included an *asserted* Qualifying Diagnosis. Doc. 264660. What it lacked was a Physician willing sign off on that Diagnosis. Thus, even if the Claims Administrator had exercised its purported discretion to make a Diagnosis under FAQ #128, its efforts to "determine the appropriate date of diagnosis" would have had to have been rooted in Mr. [REDACTED] medical records, which span from April 2013 to November 2016.¹⁴ Doc. 218102. The date of Diagnosis in the Claim Form, November 22, 2016, is the latest appointment date in Mr. [REDACTED] medical file and therefore the latest possible date on which the Claims Administrator could have pinned a date of Diagnosis. *Id.* It is still decisively outside the four-year timeline for submission permissible under the Settlement.

Mr. [REDACTED] finally argues that the Claims Administrator should be equitably estopped from denying the Claim on the grounds of untimeliness. Doc. 266645. Equitable estoppel "arises when a party intentionally or through culpable negligence induces another to believe certain facts to exist and the other party rightfully relies and acts on such belief to its detriment."¹⁵ Mr. [REDACTED] has not demonstrated the necessary predicates for the doctrine's application. The Claims Administrator did not represent to Mr. [REDACTED] that his Claim was submitted in 2019; instead, it specifically told Claimant's counsel that he would need to submit a hardship consideration request for his Claim to be considered, as it was already outside the initial two-year deadline set by the Settlement. Doc. 266645. Mr. [REDACTED] has not yet submitted such a hardship request. The Claims Administrator consequently did not induce Mr. [REDACTED] to rely, and neither he nor his counsel can reasonably have believed that his Claim would be approved.

CONCLUSION

Because Mr. [REDACTED] did not show by clear and convincing evidence that the Claims Administrator erred, I deny his appeal.

Date: October 10, 2022



David A. Hoffman, Special Master

¹³ *Frequently Asked Questions: FAQ #76* (What is a Claim Package?), NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com>.

¹⁴ *Frequently Asked Questions: FAQ #128* (Are there other instances not listed in Section 8.2 of the Settlement Agreement where the Claims Administrator may excuse the medical records or Diagnosing Physician Certification Form requirement?), NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com>.

¹⁵ *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 165 (3d Cir. 2009) (internal quotation marks and citation omitted); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig.*, 375 F. App'x 269 (3d Cir. 2010) (not precedential).