

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

██████ best friend to be consistent with a score of 1.0 in Community Affairs, Home & Hobbies and Personal Care. *Id.* at 1.

The Claims Administrator agreed that Mr. ██████ was entitled to a Level 1.5 Award. Doc. 167148.

The NFL Parties, appealing the Claims Administrator’s determination, asserted that Mr. ██████ neuropsychological test scores and his functional impairment were not generally consistent with the Impairment Criteria. Doc. 171643. The NFL Parties did not explicitly contest Mr. ██████ neuropsychological test results on validity grounds.

On July 11, 2018, the Claims Administrator began an audit under Section 10.3 of the Settlement Agreement. Doc. 178622. During the audit, the Claims Administrator requested that an AAP Member and an AAP Consultant review pertinent information related to the validity of Mr. ██████ claimed diagnosis. Docs. 207268;¹ 216484. On April 25, 2019, the Claims Administrator completed the audit, finding no reasonable basis to conclude that there had been a misrepresentation, omission, or concealment of a material fact. Doc. 205669.

Resuming the review of the Appeal, Special Master Pritchett sought the input of an independent AAP Reviewer who opined that “review of the neuropsychological testing by the AAPC would be helpful to evaluate the validity of the conclusions in the neuropsychological assessment.” Doc. 209224. Subsequently, an AAP Consultant reviewed Mr. ██████ neuropsychological results. Doc. 214892. The independent AAP Reviewer then evaluated the new/additional information provided in the AAP Consultant reports. Doc. 214966.

The AAP Reviewers ultimately concluded that there was insufficient record evidence that the neuropsychological test results provided a reliable and accurate measure of Mr. ██████ cognitive ability. Docs. 214892; 214966. In relevant part,² they flagged concerns with performance and symptom validity, inconsistencies regarding the *Slick* criteria, and Dr. ██████ failing to adequately address effects from anxiety, depression, and alcohol use disorder. Docs. 214892; 214966.

¹ Reviewing Dr. ██████ neurological report, the AAP Member found that it did not “contain sufficient information to establish any Settlement Agreement diagnosis independently” as Dr. ██████ did not document consideration for the personality elements identified in the MMPI or address other medical issues as potential contributors to Mr. ██████ functional impairment. Doc. 207268 at 1. The Settlement asks that when other factors potentially relate to the Retired Player’s functional impairment, the diagnosing physician must, to the extent feasible, attempt to isolate the functional impairment due to cognitive loss alone and assign a CDR rating based solely on that cognitive loss. *Frequently Asked Questions, FAQ #111* (The Functional Impairment Must Result from Cognitive Loss.), NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com>.

² Dr. ██████ used education-only adjusted norms and found Mr. ██████ to be impaired in the Language and Complex Attention domains. Doc. 152742 at 4-7. However, when Mr. ██████ test scores were compared to the demographically adjusted test scores then recommended by the BAP Manual, he was only impaired in the Language domain. Doc. 207268 at 1. The norming analysis that the AAP Reviewers conducted following the then applicable rules would now be prohibited under the Race Norming Agreement, and did not bear on the validity determination.

On October 30, 2019, Special Master Pritchett granted the NFL Parties' Appeal and reversed the grant of the Monetary Award. Doc. 216487. He concluded that the evidence was on the whole, not generally consistent with a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment because there were validity issues apparent from the neuropsychological report and no indication that the reported CDR scores reflected a decline from the previous usual level due to cognitive loss and not due to impairment from other factors. Doc. 216487 at 3. Mr. █████ did not appeal that judgment.

Instead, on December 19, 2023, Mr. █████ filed a new Claim, asserting Level 1.5 Neurocognitive Impairment. Doc. 297474. MAF neurologist Dr. █████ made the Qualifying Diagnosis based on a 2023 examination, while relying on Dr. █████ 2017 testing. Doc. 297390.

No more recent testing accompanied the submission. Instead, Dr. █████ submitted an addendum dated November 20, 2023, that contained scores for all performance validity tests she had administered to Mr. █████ in 2017. Doc. 297389.³ She also rescored her historic testing using the New Method and found Mr. █████ exhibited Level 2 impairment in the Complex Attention and Executive Functioning domains, but Level 0 for the Learning and Memory, Language and Visual-Perceptual domains. *Id.* at 3. Accordingly, she concluded that Mr. █████ cognitive impairment rating overall was a Level 2. *Id.*

Dr. █████ evaluated Mr. █████ on December 11, 2023. Doc. 297385. Finding that Mr. █████ scored a 1.0 in Community Affairs and in Personal Care and 2.0 in Home & Hobbies, Dr. █████ rated him a 1.0 on the CDR scale. *Id.* at 6. She then diagnosed him with Level 1.5 Neurocognitive Impairment. *Id.* Her consultation report highlighted the history of Mr. █████ present illness, the results of his neuropsychological testing, excerpts from the third party affidavit provided by Mr. █████ best friend, Mr. █████ prior medical, surgical and sleep history, a physical examination, CDR as well as the results of diagnostic tests. *Id.*

On review, an AAP Consultant identified concerns with the neurological and neuropsychological tests under consideration. From Dr. █████ report, the Consultant flagged a discrepancy, writing, "the exam revealed no increase in tone, postural or gait disorder, tremor, or bradykinesia. She writes explicitly her report that 'there is no evidence of Parkinson's disease. Why then is the patient taking carbidopa/levodopa?'" Doc. 303977 at 2. And from Dr. █████ addendum, the AAP Consultant pointed to *Slick* criteria concerns that the clinician had not flagged. Doc. 303977 at 1. The Consultant wrote, "Dr. █████ judged *Slick* criteria #1, 2, 3, 7, and 8 to be absent; she had insufficient information to rate criteria #4, 5, 6, and 9." *Id.* But,

Dr. █████ description of globally elevated MMPI scores should be sufficient to trigger *Slick* criterion #7. The patient obtained a T-score of 15 (<0.1 percentile) on the BDAE Complex Ideational Material. Scores as low as his (08/12) are almost

³ The addendum to the neuropsychological testing was completed after the implementation of the Race Norming Agreement, and Dr. █████ presumably applied the New Method in her assessment. Nevertheless, the Claims Administrator ran the scores through the Settlement Portal's algorithm to confirm their accuracy. Doc. 297865.

never seen in conversant, nonaphasic patients who are trying their best. This should trigger Slick criterion #2.

Id.

The AAP Consultant opined on a fundamental question in this case, which was whether the Claims Administrator could rely on Dr. [REDACTED] 2017 neuropsychological test results (re-interpreted using the New Method) in supporting Dr. [REDACTED] 2023 diagnosis of Level 1.5 Neurocognitive Impairment. *Id.* The Consultant cautioned against it, concluding, “[a] new neuropsychological exam is strongly recommended, and should be possible given the patient’s December 2023 MoCA score of 24/30.” *Id.* at 2.

Ultimately, on September 12, 2024, the Claims Administrator denied the Claim, writing:

Regarding criterion (i): Dr. [REDACTED] reported the Player reported gradually progressive memory loss since around 2015, often misplaced objects, forgot names, and struggled with short-term memory. The Player had a MoCA score of 24/30, which would be consistent with concern for cognitive impairment but is higher than would typically indicate concern for dementia. Therefore criterion (i) is fulfilled despite the relatively high MoCA score.

Regarding criterion (ii): Dr. [REDACTED] 11/2/2017 testing was relied on in support of a prior claim for Level 1.5 Neurocognitive Impairment that was denied in a Post-Appeal Denial Notice dated 10/31/2019, which cited the Special Master’s 10/30/2019 decision that determined the testing was invalid:

Criterion (ii) is not adequately supported by the record. Claimant’s Mini-Mental State Examination score of 29/30 would not typically be compatible with moderate to severe cognitive decline. (Doc. 209224.) Further, AAP reviewers correctly found there to be insufficient evidence to conclude that the test scores administered by Dr. [REDACTED] are a reliable and accurate measure of the Player’s cognitive ability. (Doc. 207268; Doc. 214966.) Dr. [REDACTED] acted improperly in failing to administer any of the four required validity measures. (*Id.*) Both AAP reviewers pointed out that Dr. [REDACTED] reported that the MMPI-2-RF validity scales indicated a high likelihood of symptom overreporting, but she did not provide any additional details or scores for the validity scales within the MMPI. (*Id.*; Doc.207268.)

Because the test results were found to be invalid in a final decision, the Player is not eligible to have the testing rescored because of the exclusion enumerated in Section 2.7(c)(i) of the Norming Agreement. Therefore, Dr. [REDACTED] 2017 testing cannot be used to support the claim, and this criterion is not fulfilled.

Regarding criterion (iii): Dr. [REDACTED] reported the Player often misplaced objects, did not manage the household finances, his pizza business failed, he rarely drove and had problems driving, did not perform household chores, was not able to do

household repairs, was not able to shop, was able to order groceries from Instacart, had issues with choosing inappropriate clothing, was able to dress himself, needed reminders for bathing, had bladder/bowel incontinence, went on occasional social outings, and his hobbies mainly included watching YouTube videos.

The third-party affidavit by [REDACTED] dated 12/4/2023 (Doc ID 297388) corroborated that the Player was less social, was divorced, his mother and aunt handled all the household chores, the Player would wear the same outfit for days even when dirty, let dirty dishes pile up in the sink, forgot to take garbage out, no longer mowed the lawn, had problems cooking, no longer volunteered at camps, continued to drive but with problems and was able to use GPS for navigation, no longer did grocery shopping, no longer went to Church, had a decline in appearance, needed assistance to pick out appropriate clothing, and needed prompting for bathing and brushing his teeth. Dr. [REDACTED] reported ratings of 1 for Community Affairs and Personal Care, and a rating of 2 for Home/Hobbies, and these ratings seem generally consistent with the available information as corroborated by the third-party affidavit. Therefore, this criterion is fulfilled.

Regarding criterion (iv): Dr. [REDACTED] reported the Player used alcohol 3 times per week, had past but not current marijuana use, and listed the current medications as mirtazapine, bupropion, celecoxib, and carbidopa/levodopa, which would not be expected to cause the level of cognitive impairment described as a side effect. Dr. [REDACTED] also specified that depression and anxiety, while present, were not felt to be contributing significantly to the cognitive issues and that there was no evidence of acute delirium or substance abuse. Therefore criterion (iv) is fulfilled.

Overall, because Dr. [REDACTED] neuropsychological testing cannot be used to support the claim, the diagnosis is not generally consistent with the Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment.

Doc. 357397.

Mr. [REDACTED] appealed on October 14, 2024. Doc. 362705.

RESOLVING THIS APPEAL

The gist of Mr. [REDACTED] Appeal is that he should be able to reuse his 2017 tests because validity issues were not explicitly raised by the NFL Parties but rather were generated by Special Master Pritchett's request for input from the AAPC during the appeal. Doc. 362705. Therefore, he says, he was never able to effectively contest those findings and should be able to now argue they were wrong. *Id.* If I accept that threshold argument, he further claims that his 2017 scores were (in fact) valid and should be used (though they are five years removed from his 2023 neurological exam) to support his Qualifying Diagnosis. *Id.*

As I've recently pointed in a similar appeal, the Settlement does not contemplate this kind of relitigation of previously decided validity analyses, either through FAQ 109 or through Section 2.7 of the Race Norming Agreement.⁴ The former permits the Claims Administrator to decide in limited circumstances to permit the use of non-contemporaneous exams: the AAPC here made clear why that was a bad idea, and I see nothing in the record which could disturb that judgment. And the latter explicitly states that "Retired Players will not be eligible to have their testing rescored under [Section 2.7] if...their test results were found to be invalid in any final decision."⁵

Mr. [REDACTED] submitted neuropsychological test results that were found to be invalid in a final decision—the Special Master decision dated October 30, 2019. That determination isn't subject to a redo. Indeed, the Rules Governing Appeals of Claim Determinations explicitly state that the "Special Master's decision on an Appeal is final and binding on the Settlement Class Member(s), the Parties to the Appeal and the Claims Administrator..."⁶ There simply is no warrant in the Settlement Agreement, the FAQs, or the Norming Agreement for repeated re-analysis of settled validity determinations, particularly as the alternative—collecting a fresh and contemporaneous test—is what the Settlement explicitly contemplates and is good medical practice.

Indeed, even if Mr. [REDACTED] were correct that his 2017 testing could be reevaluated, and that it was valid, it is not contemporaneous with his 2023 Diagnosis and was appropriately rejected by the Claims Administrator for that reason alone. As an AAP Consultant pointed out in a February 17, 2024 report, "[s]ix years is a very long time in the natural history of a neurocognitive syndrome. In a typical degenerative dementia, cognitive and functional impairment would progress substantially. If deficits remain stable or even remit (with or without treatment), the diagnosis would be in question." Doc. 303977 at 2. At the same time, pushing together two reports so distant in time creates new interpretative issues which neither Dr. [REDACTED] nor Dr. [REDACTED] address. *Id.*

Those interpretative issues here have resulted in an attenuated review process, exactly what the validity exclusions in the Norming Agreement were designed to avoid. The Claims Administrator has a great deal of discretion under FAQ 109 as to whether to make an exception to the general contemporaneous test rule. I see no error in its decision here to require a fresh set of testing to sufficiently support a 2023 Qualifying Diagnosis. Given Mr. [REDACTED] recent MoCA score, he should be able to reliably provide a new round of testing, and if it qualifies, submit a Claim that has no ambiguities or complexities which would delay its review.

⁴See Special Master Ruling on Validity and Historical Testing, at 4 (Feb. 1, 2025), https://www.nflconcussionsettlement.com/ViewDoc.aspx?dp=validity_testing_13_sm.pdf.

⁵ Norming Agreement, Section 2.7(c).

⁶ Rules Governing Appeals of Claim Determinations, Rule 31.

CONCLUSION

Because Mr. [REDACTED] has not offered clear and convincing evidence that the Claims Administrator erred, I deny his Appeal.

Date: February 20, 2025



David A. Hoffman, Special Master