

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

The second, for Level 1.5 Neurocognitive Impairment obtained through the BAP, followed in 2020. It rested in part on June 19, 2019 neuropsychological testing conducted by BAP neuropsychologist Dr. [REDACTED]. Doc. 228481. In issuing a Denial Notice on January 11, 2021, the Claims Administrator related the AAP's views on the validity of that testing:

[T]he Player's failure on most performance validity measures was not consistent with the degree of dementia claimed but the extent of failure on these measures is seen in patients with more severe dementia. The AAP Consultant also noted that the Player's performance on the recognition memory measure was relatively worse than delayed retrieval, which was felt to be inconsistent with dementia-related memory failure. This, together with the capacity of the Player to live alone (with help) and continue to drive to some extent, supported failure of several Slick criteria for performance validity (specifically, Slick criteria 1-3 and 6).

Office testing by Dr. [REDACTED] on 11/4/2019 included a MoCA where the Player scored 12/30, consistent with moderate dementia with difficulties in several tasks relating to delayed recall, language, orientation and abstraction. However, unlike the comprehensive neuropsychological testing, brief office tests such as the MoCA do not include performance validity measures to determine if the subject's poor performance is due to a sub-optimal level of effort. Therefore, based on the totality of the available evidence, because of the issues with performance validity on the standardized neuropsychological testing and the failure of Slick criteria, this criterion is not fulfilled.

Doc. 231787.

Mr. [REDACTED], appealing that Denial, submitted new evidence. I remanded to permit the Claims Administrator to consider the file. In doing so, it opened an Audit of Mr. [REDACTED]'s functional activities which ultimately resulted in no findings of material omissions or misstatements. Doc. 237516.

The Claims Administrator then notified Mr. [REDACTED] that because his Claim was still in process at the time of the Race Norming settlement, he was entitled to have his neuropsychological test scores automatically scored using the New Method. As the Claims Administrator noted:

We reviewed your Settlement Program records and determined that you submitted a Monetary Award claim for Level 1.5 or Level 2 Neurocognitive Impairment that has not been processed to a final determination. The Norming Agreement states that all pending Claims will be rescored using the New Method. You do not need to do anything. We will finalize the processing of your pending claim using the New Method and send you a final determination notice with the results.

Doc. 244433.

This was not the automatic retroactive rescoring available in the Race Norming settlement to those Claims that had already been finally denied,¹ and thus explicitly did not require or assume anything about the validity of the underlying scores. (Though, to be clear, the Claims Administrator had already found that Dr. ██████'s results were invalid estimates of Mr. ██████'s cognitive function.) Released in November 2022, those rescored test results revealed no overall changes in his nominal level of impairment. Doc. 273060.

As the Claim became ripe for resolution, a more serious problem arose: the Program put Mr. ██████'s *lawyer*, ██████, into Audit. Ultimately, that Audit resulted in a Special Master decision finding that Mr. ██████'s "conduct led to multiple material misstatements in Claims submitted on behalf of Settlement Class Members. It has diverted the attention of the Claims Administrator, raised the administrative cost of this Program, and ultimately harmed his clients." We censured Mr. ██████ and ordered that certain of his pending claims, including Mr. ██████'s, be denied. In doing so, we wrote:

Under Section 10.3 (i)(a), the twelve Claims directly implicated in this Audit [including Mr. ██████'s] are now denied. We emphasize that Mr. ██████, not his clients, is at fault. But the issues described in this Audit are intractable, ranging from unreliable PET scans to undue pressure on doctors. The task of separating out the genuine from the tainted in the medical evidence behind each Qualifying Diagnosis would be difficult, time-consuming, and in our experience unlikely to lead to successful submissions based on the existing medical records. We thus deny the Claims now to expedite the process of Claimants obtaining new medical records unsullied by the issues described in this Audit.

Doc. 286624, at 8.

Over the subsequent two years, Mr. ██████ appealed that Audit outcome first to the District Court and then to the Third Circuit, both of which affirmed.²

In the meantime, back in September of 2023, Mr. ██████ switched lawyers. Doc. 288951. Six months later, he went back to Mr. ██████. Doc. 317486. In 2024, Mr. ██████ filed a third Claim for Mr. ██████. His strategy was brazen. Rather than secure a new neuropsychologist test for his client, Mr. ██████ chose to send him to MAF neurologist Dr. ██████, who certified a Qualifying Diagnosis of Level 2 Neurocognitive Impairment based on, and back-dated to, Dr. ██████'s then five-year-old 2019 BAP testing. Doc. 353905.

Mr. ██████ (of course) knew that Dr. ██████'s testing had been previously found to be invalid by the Claims Administrator. He knew that FAQ 109 prohibits the use of non-contemporaneous tests without the Claims Administrator's permission. And he knew that his behavior toward informants, connected to the 2019 BAP test cycle, had been implicated in the

¹ That is, under Section 2.5.

² See *In re National Football League Players Concussion Injury Litigation*, 2025 WL 1639402 (3d Cir. Jun 10, 2025).

Audit findings against him, and his clients had been enjoined to seek “new medical records unsullied by the issues described” in the Audit.

Considering this submission, the AAPC reviewed the entire record, including Dr. [REDACTED]’s original test results and later filed comments. It opined that re-using Dr. [REDACTED]’s non-contemporaneous tests was inappropriate, stating that:

We cannot assume that the patient will only get worse over time. Signs and symptoms of dementia may progress, but they may also remain the same or even remit. Therefore, we cannot assume that a patient whose test scores were at Level 2 impairment in 2019 would be equally impaired in 2024 . . . This is entirely separate from the issues of cooperation and test score validity, which are themselves suspect in this case.

Doc. 359972. The AAPC continued that while “Dr. [REDACTED] wrote that only Slick criterion #1 is present. I now find that the accumulated evidence requires that many Slick criteria for ‘possible malingered neurocognitive disorder’ are met. Doc. 359972. The AAPC went on in exhaustive detail to explain why Dr. [REDACTED]’s 2019 tests provided invalid estimates of Mr. [REDACTED]’s cognitive abilities. Id.

The Claims Administrator, adopting these views, issued a Denial Notice in February 2025. Doc. 378740. Mr. [REDACTED] appealed on March 18, 2025. Doc. 383444.

RESOLVING THIS APPEAL

Mr. [REDACTED] is ill. As the AAPC recently pointed out, by 2019 his examining neuropsychologist documented nine separate disorders, including a major depressive episode, alcoholic abuse, agoraphobia, and mood and generalized panic disorders:

While any one might not be cognitively and functionally disabling, the total burden of illness must be immense and certainly sufficient to preclude employment, normal social relationships, community involvement, etc.

Doc. 359972.

But the question on appeal isn’t whether Mr. [REDACTED] generally is ill. Rather, it is whether he has clearly shown that he qualifies for an Award based on one specific condition: Level 2 Neurocognitive Impairment.

The problem—succinctly stated—is that his 2024 Qualifying Diagnosis relies on tests that were five years old. The Claims Administrator already once concluded that those tests were invalid. It has now reaffirmed that view, while also determining that they were not sufficiently contemporaneous with his 2024 Diagnosis to measure to his abilities, in line with its well-

established practice and documented regulations. Mr. [REDACTED] must show by clear and convincing evidence that applying this even-handed rule was an error. He cannot.

As Mr. [REDACTED]'s counsel must be aware, given that he has been involved in multiple appeals in the last year turning on this precise issue, FAQ 109 requires that neuropsychological tests be performed “within a year before the Player’s MAF exam in the BAP by a Qualified BAP Provider.”³ That rule exists to advance the Settlement’s goal in making accurate diagnoses: “neuropsychological testing must be contemporaneous” to be reliable.⁴

The Claims Administrator has discretion to relax the contemporaneous testing requirement, but, “as I have repeatedly held, its decision not to exercise that discretion is not itself clear and convincing evidence of error.”⁵ Mr. [REDACTED] seeks to reuse old invalid testing undertaken through the BAP to support a Qualifying Diagnosis through the MAF filed five years later. This is precisely the circumstance where the Claims Administrator’s exercise of its discretion is least susceptible to second-guessing.⁶

Mr. [REDACTED] makes no arguments at all as to why FAQ #109 should not apply, rather contesting that his test scores (from 2019) were actually valid.

First, Mr. [REDACTED] claims that Dr. [REDACTED]’s test scores must have been deemed valid to have been rescored under the Norming Agreement.⁷ But it is simply not true that Mr. [REDACTED]’s

³ *Frequently Asked Questions: FAQ #109* (What must the medical records show for Level 1.5 and Level 2 Neurocognitive Impairment diagnoses made outside the BAP for living Retired NFL Football Players?), NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com>.

⁴ Id. See also Special Master Ruling in Historical Testing, at 7-8 (May 27, 2025), https://www.nflconcussionsettlement.com/ViewDoc.aspx?dp=historical_testing_sm.pdf; Special Master Ruling on Neuropsychological Testing, at 6 (Apr. 25, 2025), https://www.nflconcussionsettlement.com/ViewDoc.aspx?dp=np_testing_sm_5.pdf (“Under the Program’s rules, neuropsychological testing must have occurred within a year of the Diagnosis.”); Special Master Ruling on Validity and Historical Testing, at 1 (Feb. 20, 2025), https://www.nflconcussionsettlement.com/ViewDoc.aspx?dp=validity_historical_testing_sm.pdf (discussing “old neuropsychological testing”); Special Master Ruling on Validity and Historical Testing, at 5 (Feb. 1, 2025), https://www.nflconcussionsettlement.com/ViewDoc.aspx?dp=validity_testing_13_sm.pdf (discussing “old test scores”).

⁵ Special Master Ruling on Neuropsychological Testing, at 6 (Apr. 25, 2025), https://www.nflconcussionsettlement.com/ViewDoc.aspx?dp=np_testing_sm_5.pdf. Special Master Ruling on Validity and Historical Testing, at 6 (Feb. 20, 2025), https://www.nflconcussionsettlement.com/ViewDoc.aspx?dp=validity_historical_testing_sm.pdf; Special Master Ruling on ...20, 2025), https://www.nflconcussionsettlement.com/ViewDoc.aspx?dp=validity_historical_testing_sm.pdf; Special Master Ruling on ...

⁶ Special Master Ruling on Validity and Historical Testing, at 4 (Aug. 6, 2023), https://www.nflconcussionsettlement.com/ViewDoc.aspx?dp=validity_testing_12_sm.pdf (specifically calling out this basis as reasonable).

⁷ The brief states: “The rescoring of the neuropsychological testing completed by Mr. [REDACTED] confirms Mr. [REDACTED] overall cognition impairment was at the Level 2.0 scoring. Per the terms of the Norming Agreement section on the Automatically Rescored Settlement Claims, the New Method shall be used to re-score the following Settlement Claims and diagnoses, where such rescoring could potentially result in a Qualifying Diagnosis or a higher Qualifying Diagnosis solely due to a change, meets the Class Action Settlement Agreement’s functional impairment

testing was subject to “Automatic Retrospective Rescoring” under Section 2.5 of that Agreement. That process was reserved for certain qualifying and previously adjudicated claims where, but for the test scores, a different outcome would have been possible. Mr. [REDACTED]’s claim, by contrast, was still under review in March of 2022 when he received notice of his scoring. Doc. 244433. It was perfectly clear from the Notice that Section 2.3 of that Agreement—governing pending claims—prompted the rescoring. The Notice neither said nor implied anything about those scores’ validity. The brief’s contrary claim is in error.

Second, Mr. [REDACTED] argues that the Claims Administrator ought to have deferred to Dr. [REDACTED] views on validity. Having considered the record, as a matter of fact, I adopt the AAPC’s repeatedly expressed, considered, conclusion that Mr. [REDACTED]’s 2019 testing was invalid.

To be clear, even if the 2019 scores were valid, it would not change the result: Mr. [REDACTED]’s claim was denied because he was not given leave to re-purpose previously-submitted 2019 BAP neuropsychological test results in 2024. It was fair to conclude, as the AAPC explained in detail, a five year lag between a test and a Qualifying Diagnosis materially undermines the latter. It was permissible to apply the general rule from FAQ 109, and the Claims Administrator’s Denial on that basis was not erroneous.

The fact that the Claims Administrator had already found the 2019 BAP tests to be invalid, that this finding was factually correct, and those tests were intertwined with an adverse Audit finding, provides additionally sufficient reasons for the Denial.

CONCLUSION

Mr. [REDACTED] and his family must be immensely frustrated by his repeated attempts to submit a successful claim, including experiencing delays after three Audits, four Denials, and associated remands, reconsiderations and appeals. Those delays resulted in large part from the actions of multiple professionals who should have known better, adding to the physical and emotional pain he experiences daily. But this Appeal, premised on his counsel’s misreading of a legal notice and the applicable Program rules, is without merit. Its filing has resulted in yet more needless delay. I deny it.

Mr. [REDACTED] is free to submit a new Claim based on fresh neuropsychological testing and a contemporaneous neurological evaluation. The Program will remain open for that submission for decades to come.

Date: August 4, 2025



David A. Hoffman, Special Master

and validity requirements for a more severe Qualifying Diagnosis based on his prior evaluations. In other words, Mr. [REDACTED]’s test would never have been rescored if the test was invalid because the neuropsychological test being valid was a pre-requisite to the test being rescored. Therefore, the testing supports 2.0 cognition impairment.” Doc. 383443, at 3 (bolded text removed).