

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

██████████, a Retired NFL Player and Class Member under the Amended Class Action Settlement Agreement, filed a Claim for benefits based on a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment, which the Claims Administrator ultimately denied. Because Mr. ██████████ has not presented clear and convincing evidence of error in the Claims Administrator's determination, I deny his Appeal.

On July 31, 2021, Mr. [REDACTED] saw [REDACTED], P.A., with Dr. [REDACTED], a Qualified MAF Physician, for a MAF neurological evaluation. Doc. 271198. This appointment was followed by a neuropsychological evaluation on October 22, 2021, with Dr. [REDACTED], Ph.D., ABPP. Doc. 242373.

Ultimately, Dr. M. [REDACTED] determined that “No conclusions can be drawn about Mr. [REDACTED] level of cognitive impairment due to invalid performance validity measures.” *Id.*

Yet despite the invalid performance validity measures, Dr. [REDACTED] certified a Diagnosis of Level 1.5 Neurocognitive Impairment on November 18, 2021, and submitted a MAF Diagnosing Physician Certification Form on January 25, 2022. Doc. 242372. He explained his belief that Mr. [REDACTED] “poor performance on validity testing is due to his significant cognitive impairment and deviation from the BAP diagnostic criteria warranted in this case.” *Id.* Given that Certification, Mr. [REDACTED] filed a Claim on February 9, 2022, seeking an award for a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment. Doc. 242553.

On February 21, 2022, the Appeals Advisory Panel (AAP) Consultant recommended that the validity testing results precluded a Diagnosis of Level 1.5 Neurocognitive Impairment. Doc. 269383.

Mr. [REDACTED] received notice on March 31, 2022, that under the Court’s March 4, 2022 Order prohibiting the use of Retired Players’ race in evaluating neuropsychological testing, his Diagnosis would be re-evaluated using the New Method. Doc. 244438. This application of the New Method to Mr. [REDACTED] neuropsychological testing yielded a Diagnosis of Level 2 Neurocognitive Impairment across all five cognitive domains. Doc. 265300. Yet the validity issues remained.

On June 21, 2022, the Claims Administrator requested of Dr. [REDACTED] “an addendum with your medical reasoning to explain why you believe Mr. [REDACTED] has Level 1.5 Neurocognitive Impairment in light of this deviation,” and information on “if delirium is present, if there is alcohol or substance use/abuse, and to list the current medications that the Player is taking.” Doc. 266295.

Dr. [REDACTED] replied: “I have retired and am not in the clinic anymore. Sorry. You will have to go on the notes that we sent to you previously.” Doc. 267480. Considering this response, the Claims Administrator denied Mr. [REDACTED] Claim on September 1, 2022. Doc. 269381. It noted that while Baseline Assessment Program (BAP) criteria (i) and (iii) were fulfilled, criteria (ii) and (iv) were not:

The neuropsychological testing in this case was not valid, and the diagnosing physician did not provide sufficient information to determine the presence of delirium and alcohol/substance abuse. Therefore, the diagnosis is not generally consistent with the Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment.

Id.

Mr. [REDACTED] appealed. Doc. 271197. He fulfilled criterion (iv) by introducing into the record the report from his July 13, 2021 appointment with Mr. [REDACTED] and Dr. [REDACTED] which eliminated the possibility of prescription medications or substance use, and by pointing out that Dr. [REDACTED] found “no evidence of hallucinations, delusions, or disinhibition” in her interview with Mr. [REDACTED] Docs. 271198; 242373.

Prompted by Mr. [REDACTED] Appeal, on October 11, 2022, Dr. [REDACTED] further described his reasoning for ignoring validity testing:

Mr. [REDACTED] meets the BAP Criteria for Level 1.5 Neurocognitive Impairment other than the suboptimal performance in the validity testing. With my discussions with neuropsychologists, validity testing may not be as accurate when the level of cognitive impairment increases. I stand by my opinion that the validity testing may be inaccurate in this case and deviation from the strict BAP criteria be considered.

Doc. 271198.

I remanded the Claim for re-review on October 19, 2022, to consider this proffered explanation. Doc. 271480. On November 4, 2022, the AAP Consultant advised that “Dr. [REDACTED] medical reasoning is inadequate to support his qualifying diagnosis, as the evidence for exaggerated cognitive impairment is overwhelming.” Doc. 273963. In particular, the AAP Consultant explained, “Although [Dr. [REDACTED]] found that the patient scored at the level of *severe dementia* (Level 2 Impairment by the New Method) on neurocognitive testing, he has *at most mild impairments* in daily functioning (CDR scores of 1 in CA and HH, and 0 in PC).” *Id.* (emphasis added).

So, on December 1, 2022, the Claims Administrator denied Mr. [REDACTED] Claim again, stating (in part):

Specifically, the Player’s expressive and receptive language, attention, and all other cognitive functions were entirely normal on [REDACTED] interview, and the neurological exam by [REDACTED], PA, and Dr. [REDACTED] found that the Player was “alert and oriented, recent and remote memory intact, attention and concentration normal, speech fluent without aphasia, [and] fundamental knowledge appears normal.” The Player then scored 12/30 on the MMSE. Dr. [REDACTED] 10/11/2022 addendum does not address the inconsistency of these findings. Therefore, criterion (ii) is still not fulfilled.

Doc. 273951.

For the second time, Mr. [REDACTED] timely appealed. Doc. 275041.

DISCUSSION

Mr. [REDACTED] has not demonstrated, by clear and convincing evidence, that the denial of his Claim was in error. The issue is validity: Mr. [REDACTED] neuropsychological tests were invalid and therefore reveal no information one way or another about his cognitive impairment.

The Settlement requires each neuropsychological examiner to complete the *Slick* checklist “to determine whether the Retired NFL Football Player’s test data is a valid reflection of his

optimal level of neurocognitive functioning.”¹ Here, seven of the nine *Slick* criteria were indicated, leading Dr. ██████████ to reason that “[n]o conclusions can be drawn about Mr. ██████████ level of cognitive impairment due to invalid performance validity measures.” Doc. 242373.

The goal of validity measures is not merely to detect cases of malingering, but rather to distinguish genuine cognitive impairment from other factors that may impact a Player’s effort on a neuropsychological test—factors like those Dr. ██████████ flagged here: “possible major depressive disorder (current and recurrent), major depressive episode with melancholic features, and current suicide risk (low).” Doc. 242373. In addition to mood disorders, some Retired NFL Players experience chronic physical pain, sleep issues, or other illnesses that can depress their effort.²

Because of this complex set of reasons that Players may not fully engage with testing, the Settlement requires validity measures to ensure that Players’ impairments are truly caused by “*cognitive* decline” across two or more “*cognitive* domains.”³

Mr. ██████████ relies on the “generally consistent” language in FAQs 102 and 103 to argue that because he met criteria (i), (iii), and (iv), and would have met (ii) but for the failures in validity testing, his results are generally consistent with the BAP criteria. Doc. 275041. I do not agree. As I wrote in a May 27, 2020 Opinion:

Generally consistent does not mean the same [...] And yet, it would be a perverse result if every player diagnosed outside of the BAP received an award based on results which would have rendered him ineligible within it: the exercise cannot be a mechanical one, where all ties go to the runner. If that were what the Parties had intended, the Agreement would not have said “generally consistent:” it would have explicitly directed that non-BAP diagnoses may meet a *lower*, not a *different*, standard. What’s called for instead is the exercise of reasoned, individualized, clinical judgment.⁴

In other words, clinicians may use a different set of tests to reach results generally consistent with the BAP criteria, so long as they thoroughly and cogently lay out their reasoning.

Here, Dr. ██████████ wanted to deviate from BAP criterion (ii) because in his medical opinion, the validity test results were invalid due to Mr. ██████████ significant cognitive impairment. Docs. 242372; 271198. The AAP, empowered to advise the Claims Administrator on medical questions,

¹ Settlement Agreement, Exhibit A-2 (2).

² See Special Master Ruling on Date of Diagnosis, at 9 (Nov. 1, 2022), https://www.nflconcussionsettlement.com/Docs/diagnosis_date_sm.pdf (“There are a host of reasons why a person may not provide full task engagement during neuropsychological testing; for example, if they are suffering from a mood disorder or experiencing sleep disturbances.”).

³ Settlement Agreement, Exhibit A-2 (2) (emphasis added).

⁴ Special Master Ruling on Clinical Judgment on Generally Consistent Standard, at 3 (May 27, 2020), https://www.nflconcussionsettlement.com/Docs/physician_judgment_sm.pdf.

disagrees that cognitive impairment caused invalid results for this Claim. And Dr. [REDACTED] explanation itself does not explain the discrepancies between Mr. [REDACTED] cognitive test results (indicating a level of impairment equivalent to someone with profound dementia) and his observed and reported behaviors (indicating someone with mild impairment at most). Rather than bridging the invalidity gap, Dr. [REDACTED] advocates disregarding it. This the Settlement does not permit.

Because Mr. [REDACTED] neurocognitive test results were invalid and Dr. [REDACTED] reasoning did not sufficiently address the discrepancies within those results, the Claims Administrator was not wrong in deciding that criterion (ii) had not been fulfilled.

CONCLUSION

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

Date: April 17, 2023



David A. Hoffman, Special Master