

IN RE: NATIONAL FOOTBALL LEAGUE
PLAYERS' CONCUSSION INJURY
LITIGATION

MDL No. 2323

THIS DOCUMENT RELATES TO:
NFL PARTIES' APPEAL OF CLAIM
DETERMINATION FOR SETTLEMENT
CLASS MEMBER [REDACTED]

later, Dr. [REDACTED] received Dr. [REDACTED]'s two-year-old testing results. Considering Dr. [REDACTED]'s notes and a third-party affidavit submitted by Mr. [REDACTED]'s friend, [REDACTED], Dr. [REDACTED] changed her mind, writing, "I have also revised my CDR scoring to 1/Mild as I realized that I did not score correctly." Doc. 242220, at 7. Dr. [REDACTED] concluded that "[o]verall, my impression is Level 1.5 Neurocognitive Impairment." *Id.*

Drs. [REDACTED] and [REDACTED] both noted that Mr. [REDACTED] had concurrent mental health diagnoses of depression and anxiety. Docs. 242220; 242221. Explaining Mr. [REDACTED]'s MMPI-2-RF scores, Dr. [REDACTED] noted that "he is concerned with various somatic complaints and paranoia that others pose a threat to him," with the caveat that his profile "should be interpreted with caution, however, as elevations in validity scores indicate that Mr. [REDACTED] may have responded to questions in a manner that is not typical of most people." Doc. 242220, at 3. Dr. [REDACTED] similarly recorded Mr. [REDACTED]'s psychiatric diagnoses but explained: "There is history of depression but this is stable, and will not contribute to progressive cognitive decline." Doc. 242221, at 7. Dr. [REDACTED] later elaborated:

In my initial impression, I stated that he has significant generalized anxiety disorder with panic attacks and recurrent major depression which are currently not well-controlled and are likely contributing to memory issues. However, upon review of neurocognitive testing and other records, I saw that his depression and anxiety have been stable over the years and thus it is NOT contributing/causing progressive cognitive decline. As per 3rd party sworn statement that [REDACTED] can no longer hide the obvious anxiety and depression", I cannot necessarily comment on that statement on that. I am not discounting that he has depression and anxiety, but I do not believe that this is causing his progressive cognitive decline.

Doc. 267895, at 8.

Mr. [REDACTED] filed this Claim, based on medical records I've described, on March 11, 2022. Doc. 243714. Mr. [REDACTED]'s Claim was reviewed first by the same AAPC who had previously reviewed Mr. [REDACTED]'s second claim. Doc. 266895. That AAPC determined that Mr. [REDACTED]'s reassessment through the BAP adequately supported a Qualifying Diagnosis of (up to) Level 2 Neurocognitive Impairment, writing,

Although he failed the TOMM, the patient passed 4/5 ACS PVTs as well as MSVT. His effort on cognitive testing was deemed adequate; I agree with this decision... The 'New Method' of test interpretation finds Level 2 impairment in three domains and Level 1.5 in one domain: overall consistent with Level 2 Neurocognitive Impairment. Dr. [REDACTED]'s CDR ratings varied within her documentation, but it appears she ends up rating CDR=1 in each other three relevant domains. Level 2 Neurocognitive Impairment seems the appropriate qualifying diagnosis under the new methodology.

Id.

On October 12, 2022, the Claims Administrator approved Mr. [REDACTED]'s third Claim, based on a Diagnosis of Level 1.5 Neurocognitive Impairment. Doc. 271128. The NFL Parties timely appealed on January 9, 2023 after two deadline extensions. Doc. 275529.

DISCUSSION

The NFL Parties assert that Mr. [REDACTED]'s Claim should have been denied because his testing was invalid. Doc. 275529. On appeal, they must show by clear and convincing evidence that Mr. [REDACTED]'s test data is not “a valid reflection of his optimal level of neurocognitive functioning” based on his performance on the nine *Slick* validity criteria set forth in the Settlement.¹ They assert that he failed two: criteria #1, “Suboptimal scores on performance validity embedded indicators or tests,” and #7, “Self-reported symptoms are discrepant with known patterns of brain functioning.”²

I referred this Appeal to the AAP, and it was reviewed first by a Consultant on May 13, 2023, and then by an AAP Member on June 12, 2023. Docs. 283145; 285288.

Dr. [REDACTED] wrote in his report that Mr. [REDACTED] “passed Word Choice and four subtests of the MSVT. Additionally, four of five embedded measure scores were within normal limits for the recognition memory percentages. Based on these scores, Mr. [REDACTED] appeared to put forth adequate effort and his results appear to be an accurate reflection of his cognitive functioning.” The AAPC disagreed. As Dr. [REDACTED] indicated on his scoring sheets, but did not remark on, Mr. [REDACTED] failed the TOMM. And, as the AAPC continued, other quantitative markers were below the cutoffs: “two of his ACS scores are below the 5th percentile, and a third ACS score is at or below the 15th percentile.” Doc. 283145. The AAPC also agreed that Mr. [REDACTED] met *Slick* criterion #7, as both the NFL Parties and Dr. [REDACTED]'s own notes indicate a pattern of overstatement of self-reported impairments on the MMPI-2-RF. *Id.*

This analysis was echoed by an AAP Member in its subsequent review, who continued:

Additionally, the player's responses on the MMPI-2-RF are indicative of invalid symptoms reporting. Since the RBS scale is missing, Dr. [REDACTED]'s reporting of MMPI subscales is incomplete. Even with the missing data, the player's score on the revised Meyer's Index (MI-r) is elevated, with a score of 5. According to its creators, the revised Meyers index “is a method of combining multiple MMPI-2 validity scales into a single weighted index to assess exaggerated self-report on the MMPI-2.” Scores ≥ 5 indicate increased probability of unreliable MMPI-2-RF performance and symptom exaggeration. This suggests that the day-to-day abilities reported to Dr. [REDACTED] and the 3rd party affiant may not reliably represent the player's true abilities.

¹ Settlement Agreement, Exhibit A-2, Section 2.

² *Id.*

The player's appeal argues that the NFL parties failed to provide clear and convincing evidence of invalid performance. The player's appeal cites page 101 of the 'ACS Clinical and Interpretive Manual' as stating 'It is also recommended that the clinician use either the 10% or 15% base cutoff,' concluding that 'if the recommended rate of 10% is used Mr. [REDACTED] passed most of the ACS validity testing.' While the statement is true, the data are clear that two ACS scores fall below the 5th percentile, fulfilling the Clinician's Interpretation Guide criteria for 'high likelihood of invalid performance.'

The point of contention appears to center on which reference should be used. Since the 'Clinician's Interpretation Guide' cited by the NFL is the specific negotiated guidance document for the Settlement Agreement, it appears that document is appropriate standard. That guide continues, 'These scores will then be evaluated against performance on the other stand-alone measures (e.g. Test of Memory Malingered, Medical Symptom Validity Test, Victoria Symptom Validity Test).' Since, as the NFL parties identified, the TOMM was also failed at a level far below more severely impaired reference populations, the ACS performance is consistent with one other independent PVT.

Doc. 285288.

An AAP Consultant and Member have both concluded that Mr. [REDACTED] has triggered two of the *Slick* criteria, and I accept their expert analysis. But the Consultant also correctly identified the issue on which this opinion hinges: "Whether the presence of the two test-based *Slick* criteria is sufficient to determine the evaluation invalid." Doc. 283145 at 2.

As I have repeatedly concluded, the Settlement's review process demands "layered deference to expertise."³ That nested system of deference is particularly well-established in the Settlement's approach to validity:

The AAP should defer to a clinician's *Slick*-criteria-based validity analysis when it results from reasoning completely articulated in contemporaneous reports, unless the analysis is clearly erroneous. Conversely, when clinicians fail to articulate their judgment through complete *Slick* analyses, the AAP may thoroughly and independently assure themselves the criteria do not indicate invalid testing. Next, the Claims Administrator will normally accede to the judgment of the AAP Reviewer. And review on Appeal (in this ideal procedure) ought to be simple. The appellant bears a heavy burden of offering clear and convincing evidence that the Claims Administrator was wrong.⁴

³ Special Master Ruling on Pre-Diagnosis Evidence, at 6 (July 2, 2020), https://www.nflconcussionsettlement.com/Docs/pre_diagnosis_evidence_sm.pdf.

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 (cleaned up).

The question is how to apply that deferential standard to this Claim. Dr. ██████'s validity analyses have repeatedly caused problems for claimants, either due to what the AAP/AAPC identified as errors or inadequately justified conclusions.⁵ As I have previously written, "Simply put: Dr. ██████ has a fixed belief about how to conduct validity testing which does not track the

⁵ See, e.g., Special Master Decision in SPID # ██████ (Feb. 4, 2020) (AAPC review concluded that Dr. ██████'s opinion that validity measure failures were due to a Player's dementia was inconsistent with his documented functioning and that "the failed validity measures should be taken as indicators of poor effort."); Special Master Decision in SPID # ██████ (Mar. 18, 2020) (AAP review indicated that Dr. ██████'s "neuropsychological testing was determined to not support the Qualifying Diagnosis" because he did not properly address performance validity measure failures or over-endorsing of symptoms on the MMPI-2-RF); Special Master Decision in SPID # ██████ (Apr. 20, 2020) ("AAPC review of the testing by Dr. ██████ determined it was not a valid reflection of the Player's cognitive function, noting not only the outright failure on the TOMM, but very concerning performance on multiple embedded measures of performance validity (at or below the 15th percentile on four of the embedded measures, and at or below the 5th percentile on two of the embedded performance validity tests)."); Special Master Decision in SPID # ██████ (July 15, 2020) (AAPC review of failed validity measures on Dr. ██████'s evaluation noted that "the nature of some the validity measures is that they require little effort, so that patients with significantly more severe dementia than that claimed for the Player will be able to pass them" and that, although the Player's MMPI-2-RF profile was "profoundly abnormal," Dr. ██████ provided "no further comment regarding the significance of the Player's over-reporting of symptoms on the validity of his self-reported history."); Special Master Decision in SPID # ██████ (Sept. 8, 2020) ("The AAPC reviewer was of the opinion that the neuropsychological testing by Dr. ██████ was not a valid measure of the Player's cognitive deficits, finding that Dr. ██████'s report under-represented the Player's poor performance on validity measures."); Special Master Decision in SPID # ██████ (Nov. 4, 2020) ("Dr. ██████'s report contains no comments on whether he believed the Player's performance on the testing reflected an accurate view of his cognitive abilities... The AAPC disagreed with the unsupported assertion by Dr. ██████ that the Player 'appeared to be trying his best'. . . Overall, the AAPC found the neuropsychological testing is likely a significant overestimate of the Player's cognitive difficulties."); Special Master Ruling on Validity Testing (Jan. 15, 2021), https://www.nflconcussionsettlement.com/Docs/validity_testing_2_sm.pdf, at 3, 5 ("Dr. ██████'s *Slick* analysis was both cursory and incorrect."); Special Master Decision in SPID # ██████ (Apr. 19, 2021) ("Although the Player failed the TOMM (which was not addressed by either Drs. ██████ or ██████) and two of five subtests of the MSVT, he had passing scores on other measures of performance validity, and Dr. ██████ felt the results were an accurate reflection of the Player's cognitive functioning... The AAPC also expressed concerns regarding validity of the testing that, as a whole, indicate that the testing was not a valid representation of the Player's cognitive abilities."); Special Master Ruling on Validity Testing (Apr. 18, 2022), https://www.nflconcussionsettlement.com/Docs/validity_testing_6_sm.pdf, at 4 ("The AAP Consultant's review considered Dr. ██████'s evaluation of effort and concluded that the evaluation 'reflects errors in interpretation of performance and validity tests which are frequently seen in Dr. ██████'s evaluations.'"); Special Master Decision in SPID # ██████ (noting that Dr. ██████'s "report contained an inadequate quantity of information to justify the judgments made" and reversing an award); Special Master Ruling on Validity Testing (Jan. 12, 2023), https://www.nflconcussionsettlement.com/Docs/validity_testing_8_sm.pdf, at 3 ("[Dr. ██████'s email] reflects either an ignorance or an unwillingness to use the ACS validity system as it was developed. He is ignoring the fact that data were collected on clinical populations including both Alzheimers and TBI populations in the validation of this system. Data right in the manual explains how frequently or rather infrequently these groups show scores below the cutoffs. He counters with what his opinion is and that is the problem. He is interpreting the results based on his opinion and not data and not according to prevailing professional practice. As you know it is not our goal to find fault with the report but rather to assure it meets professional standards. As you know this is not the first time this neuropsychologist has failed to do so. No nuance to his argument, just rationalizing."); Special Master Ruling on AAP Review and Validity Testing (Jan. 12, 2023), https://www.nflconcussionsettlement.com/Docs/aap_review_validity_testing_sm.pdf, at 3 ("Over the course of two reviews, first by an AAP Consultant on January 28, 2021 and subsequently by an AAP Member on August 8, 2021, the Program's experts appropriately considered Dr. ██████'s analysis and concluded that it was simply incorrect. The initial AAPC report documents several inaccuracies in Dr. ██████'s *Slick* checklist.").

Settlement's requirements."⁶ And he has generally refused to engage with the Claims Administrator when it sought clarification on his judgments, instead charging that the expert panel is biased against claimants.⁷ Here, Dr. █████ did not address the *Slick* criteria beyond those related to Mr. █████'s test results (criteria #1 and #7). He did not discuss Mr. █████'s failed TOMM score. His *Slick* criteria checklist was just that, with no additional explanation or context. And the NFL Parties are correct that Mr. █████'s neuropsychological examination triggered two *Slick* factors, while Dr. █████'s short report identified none. Thus, no deference is due Dr. █████'s judgment, and the AAP was to "thoroughly and independently" evaluate the file.

In undertaking that review, the program's panel members disagree, and that disagreement itself indicates that the NFL Parties have not satisfied their burden of showing by clear and convincing evidence that Mr. █████ is not entitled to an award.⁸ The AAPC concluded:

However, based on the available medical record, I cannot specify other Slick criteria that have been met. The NFL has not made arguments regarding Slick criteria save for those directly based on psychometric scores (PVTs and SVTs). Unfortunately, neither did Dr. █████ specifically address Slick criteria beyond those related to psychometric performance. At issue here then, is whether the presence of the two test-based Slick criteria is sufficient to determine the evaluation invalid. In my opinion, in this case, it is not.

Doc. 283145, at 2. The AAP Member's review is less conclusive. Doc. 285288. It identified "additional discrepancies" between Mr. █████'s neuropsychological results and Dr. █████'s report that may indicate unreliability, namely that "the player's results in the language domain indicated Level 2 impairment with low scores in verbal fluency (FAS, category) and picture naming (Boston naming)" but that "[Dr. █████'s] comments on language abilities reflect a significant variation between observed behavior and the neuropsychological results." *Id.*, at 2. Ultimately, the Member concluded that Mr. █████'s "validity testing and observed discrepancies appear to meet the Settlement Program's definitions of a 'high likelihood of invalid performance.'" *Id.*

In evaluating these competing expert views against the clear and convincing legal standard – is it "highly probably or reasonably certain" that the tests were invalid⁹ – it is notable that Mr. █████'s observed behavior, his medical history collected by Dr. █████'s BAP examination, and

⁶ Special Master Ruling on Validity Testing (Jan. 12, 2023), https://www.nflconcussionsettlement.com/Docs/validity_testing_8_sm.pdf.

⁷ Dr. █████ withdrew from participation in the Program on September 13, 2019, and his reports all predate the Special Master's emphasis on the importance generating, and deferring to, articulated judgments by examining neuropsychologist and neurologists.

⁸ See Special Master Opinion on Slick Criteria and CDR Scoring, at 6-7 (Apr. 27, 2021), https://www.nflconcussionsettlement.com/Docs/slick_cdr_sm.pdf (discussing import of differing views on the expert panel).

⁹ In re Fosamax Alendronate Sodium Prods. Liab. Litig., 852 F.3d 268, 285-86 (3d Cir. 2018) ("Black's Law Dictionary defines clear and convincing evidence as 'evidence indicating that the thing to be proved is highly probable or reasonably certain.'").

collateral reports support both his test data and his self-reported symptoms.¹⁰ Docs. 242221; 242224; 243722. Dr. [REDACTED]'s conclusions have been scrutinized, and found wanting, by the AAP and the AAPC. But the AAPC's neuropsychological expert, after a searching and independent review, did not believe that Mr. [REDACTED]'s testing was invalid. The question is close, but I conclude that the NFL Parties have not met their heavy burden of offering clear and convincing evidence that the Claims Administrator erred.

The NFL Parties have also suggested that Mr. [REDACTED]'s impaired scores may be attributable to emotional or psychiatric factors (documented depression and anxiety) or to non-neurocognitive factors (tremors and sleep deprivation). Doc. 275529. These arguments were scrutinized by the AAP Member, who correctly deferred to Dr. [REDACTED]'s documented efforts to isolate these factors from Neurocognitive Impairment:

Guidance from a prior Special Master decision indicates that the 'Settlement does not require the exclusion of psychiatric etiologies for functional loss. Rather, the FAQ asks the physician to isolate the functional impairment due to cognitive loss to the extent feasible.' Dr. [REDACTED] addressed this topic in an addendum dated 8/4/22. She reported that she had reviewed medical and neuropsychological records and 'revised my CDR scoring to 1/Mild as I realized that I did not score correctly initially.' She concluded that 'upon review of neurocognitive testing and other records, I saw that his depression and anxiety have been stable over the years and thus it is NOT contributing/causing progressive cognitive decline.' She drew a similar conclusion about the role of chronic sleep deprivation, stating that it would be insufficient to account for the functional losses.

Doc. 285288, at 2 (cleaned up).

CONCLUSION

Because the NFL Parties have not offered clear and convincing evidence that the Claims Administrator erred, I deny their Appeal.

Date: July 14, 2023



David A. Hoffman, Special Master

¹⁰ "[T]he AAP Member and Consultants should be particularly hesitant to overturn judgments reached through the Settlement's own carefully monitored medical programs and by its own doctors, at least when they carefully explain themselves." Special Master Opinion on Stroke Definition, at 9 (Apr. 25, 2002), https://www.nflconcussionsettlement.com/Docs/stroke_sm_2.pdf.