

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	:	No. 2:12-md-02323-AB
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	:	MDL No. 2323
	:	
	:	Hon. Anita B. Brody
THIS DOCUMENT RELATES TO:	:	
NFL PARTIES' APPEAL OF CLAIM	:	
DETERMINATION FOR SETTLEMENT	:	
CLASS MEMBER [REDACTED]	:	
	:	
	:	

the Settlement. *Id.* Mr. [REDACTED] then went to a different neuropsychologist, Dr. [REDACTED], on October 4, 2019. Doc. 274209. Dr. [REDACTED] also concluded that Mr. [REDACTED] did not meet the criteria for impairment. *Id.* After examining Mr. [REDACTED] on June 12, 2020, Dr. [REDACTED], relying only on Dr. [REDACTED]'s testing, concluded that Mr. [REDACTED] did not meet criteria for a Diagnosis under the BAP. Doc. 272560.

Both sets of neuropsychological testing were rescored by the Claims Administrator using the New Method in 2022. Dr. [REDACTED]'s rescored test results continued to indicate that Mr. [REDACTED] did not meet the Settlement's criteria for impairment: he only met the threshold in the Language domain. Doc. 263742. But Dr. [REDACTED]'s revised scores reflected Level 1.5 impairment in three cognitive domains: Complex Attention, Language, and Perceptual-Spatial. Doc. 272833.

Dr. [REDACTED] re-evaluated Mr. [REDACTED] through the MAF on October 21, 2022. Doc. 272561. At that visit, he noted that Mr. [REDACTED]'s MOCA score had declined by four points in two years. *Id.* Dr. [REDACTED] also reviewed an affidavit from Mr. [REDACTED]'s co-worker, [REDACTED], documenting Mr. [REDACTED]'s deteriorating functioning at work. Doc. 272564. He ultimately assigned Mr. [REDACTED] CDR scores of 1 in Community Affairs and Personal Care and 2 in Home & Hobbies, for an overall CDR rating of 1. *Id.* Dr. [REDACTED] concluded that Mr. [REDACTED]'s CDR was "consistent with rescored neurocognitive testing (Level 1.5 Neurocognitive impairment)." *Id.* at 5. Dr. [REDACTED] then signed a Diagnosing Physician Certification Form on November 1, 2022, reflecting that Diagnosis and noting that Dr. [REDACTED] had assisted him in rendering it. Doc. 272581.

Mr. [REDACTED], filing this Claim on November 2, 2022, relied on Dr. [REDACTED]'s October 21, 2022 neurological and Dr. [REDACTED]'s February 9, 2018 neuropsychological evaluations. Doc. 272622. It was reviewed twice by the AAPC before the Claims Administrator's determination.

During the AAPC's first review, it set aside Dr. [REDACTED]'s testing as he was no longer part of the Settlement. Doc. 274474. Focusing on Dr. [REDACTED]'s 2019 testing, the AAPC concluded that "Dr. [REDACTED]'s neuropsychological exam produced results that are not at all consistent with Level 1.5 Neurocognitive Impairment" and recommended new neuropsychological testing. *Id.*

The AAPC, revising those conclusions on December 20, 2022, noted that Dr. [REDACTED] had relied on Dr. [REDACTED]'s 2018 exam rather than Dr. [REDACTED]'s 2019 testing. Doc. 274910. It first assessed the validity of Mr. [REDACTED]'s testing.² It determined that Mr. [REDACTED]'s scores were valid: "Dr. [REDACTED] reported that the TOMM, MSVT, and all five ACS PVTs were passed. Actually, one ACS test (Visual Reproductions Recognition) was performed below the 55 base-rate score. Overall, however, the neuropsychological protocol can be considered valid. Dr. [REDACTED] had no concern about any of the other *Slick* criteria." *Id.* (cleaned up). The AAPC concluded, "If Dr. [REDACTED] relied on Dr. [REDACTED]'s test results rather than the subsequent results of Dr. [REDACTED], he would be correct in assigning Level 1.5 neurocognitive impairment." *Id.*

² I have discussed the AAPC's concerns with Dr. [REDACTED]'s validity determinations at length. *See* Special Master Ruling on Validity Testing (July 14, 2023), https://www.nflconcussionsettlement.com/Docs/validity_testing_11_sm.pdf. Here too, as I describe below, Dr. [REDACTED] reached certain conclusions about the results of his own exams that the AAPC thinks are plainly incorrect.

The Claims Administrator approved Mr. ██████'s Claim on January 24, 2023. Doc. 276193. The NFL Parties appealed. Doc. 279709.

DISCUSSION

The NFL Parties bring a two-pronged challenge to Mr. ██████'s Claim. First, they assert that the Claim should fail because Mr. ██████'s 2018 testing, conducted by Dr. ██████, was invalid. *Id.* Second, they contend that even if Mr. ██████'s 2018 test scores were valid when assigned, they are *invalidated* by his subsequent 2019 neuropsychological testing by Dr. ██████, which did not indicate impairment. *Id.* For the NFL Parties' appeal to succeed, one or both of these contentions must establish, by clear and convincing evidence, that the Claims Administrator erred in granting Mr. ██████ an Award. (And, of course, Mr. ██████ ultimately bore the burden before the Claims Administrator of showing that his Diagnosis was generally consistent with the BAP.)

I referred this Appeal to the AAP, and it was reviewed by a new Consultant. Doc. 286704. That Consultant disagreed with NFL Parties' internal validity challenge, writing:

Regarding validity, I believe this is a valid assessment. It is correct that the examiner misrepresented the ACS results. Here three tests fall that the 15th percentile or lower and 2 ACS scores fall at or below the 10th percentile. So overall the embedded validity tests are failed. However, the standalone validity tests are within normal limits. So, in my opinion, *Slick* Criteria 1 is unmet. Regarding Symptom Validity Test scores there is an uneven pattern of moderate elevation (e.g., F-r, Fp-r, Fs, are elevated but FBS-r is not) that can occur in the context of 'valid' expressions of concern regarding brain functioning. In my opinion *Slick* Criteria 7 is also unmet. So, on the narrow question of whether Dr. ██████'s determination of having completed a valid assessment can be set aside, I don't believe there is adequate evidence to do so.

Id. at 1.

The NFL Parties' brief opines to the contrary. But the AAP exists to provide medical guidance in moments like these, and I adopt their judgment as a matter of fact. Dr. ██████'s findings, in 2018, offered valid estimates of Mr. ██████'s cognitive functioning. When rescored, those findings support a Level 1.5 Claim.

The Consultant's opinion on Mr. ██████'s duplicate testing is less definitive. The Consultant notes that compared to Mr. ██████'s neurological assessment, which occurred in 2022, both the 2018 and the 2019 neuropsychological evaluations now seem outdated. *Id.* But the Settlement Program contemplates the use of neuropsychological testing completed more than a year before a player's neurological evaluation under certain circumstances. As FAQ #109 reads:

If a Player's past neuropsychological testing was done more than a year before his MAF exam. . . the Qualified MAF Physician may use it as a baseline assessment to compare against contemporaneous neuropsychological testing but cannot use it to measure impairment unless the Claims Administrator approves the Qualified MAF Physician to use it in that manner.³

The Claims Administrator allowed the inclusion of Dr. ██████'s rescored 2018 evaluation in Mr. ██████'s Claim, even though it was more than one year from the neurology exam, and despite there being a (marginally) more recent exam available. This was an exercise of its discretion under FAQ #109.

That choice was not erroneous. Among the factors the Claims Administrator might have considered were: (i) Mr. ██████'s 2018 exam was performed while demographic corrections were permitted under the Settlement Agreement; (ii) this was first (and only) use of Dr. ██████'s testing battery, and as such Mr. ██████ was not pressing to reuse the same battery for two different Claims. On the other side of the ledger, the Claims Administrator might have concluded that 2018 was not sufficiently proximate in time to Mr. ██████'s 2022 diagnosis and that reuse of Dr. ██████'s exam was not appropriate given that there was an intervening exam. I will not disturb the Claims Administrator's exercise of this nuanced and particularized judgment.

Having determined that the Claims Administrator permissibly allowed the consideration of Dr. ██████'s evaluation, I turn to that evaluation's purported conflict with Dr. ██████' 2019 testing.⁴ The NFL Parties argue that the "pattern of improvement" between the two sets of testing is "inconsistent with the presence of true organic cognitive impairment." Doc. 279709 at 3-4. The AAPC, disagreeing, found that there is "no broad pattern of improvement or decline" in Mr. ██████'s testing from 2018 to 2019. Doc. 286704. Rather,

Some scores in the ██████ assessment are marginally lower than the ██████ evaluation. The key difference between the two evaluations is the improvement in three very low processing speed scores for ██████ relative to ██████. This appears to be 'regression' to the mean issue. These and a modest improvement in a single visual perceptual domain score account for the difference in award status. These score instabilities are really a problem of measurement error not either validity or practice effects.

Id. I will again defer to the AAPC's expert views regarding the technicalities of score interpretation and conclude that Dr. ██████' 2019 evaluation does not invalidate earlier, qualifying testing by Dr. ██████.

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 This is not a case where the NFL Parties are arguing that post-diagnosis evidence informs the contemporaneous validity finding, as Dr. ██████' assessment was pre-diagnosis. *Cf.* Special Master Ruling on Validity Testing, External Evidence, and Functional Impairment (Mar. 27, 2023), https://www.nflconcussionsettlement.com/Docs/validity_evidence_impairment_sm.pdf.

Finally, the AAPC raises a different concern, not quite tracking the validity process as the Settlement defines it, but rather whether Mr. [REDACTED]'s 2019 rescored neuropsychological testing indicates that his qualifying 2018 scores were a false positive. The AAPC may very well be right. The Settlement requires the Claims Administrator to review Claims for sufficiency and reject those that do not “satisfy the Amended Settlement Agreement’s exacting injury definitions,” even if there are indications of cognitive impairment.⁵ But the Claims Administrator has conducted that very review of Mr. [REDACTED]’s Claim and concluded that his 2018 testing was valid, a conclusion that the AAPC supports. Perhaps the 2018 testing was a false *positive*. Or perhaps the 2019 testing offers a false *negative*. That the settlement’s overall structure biases toward avoiding the former result is no reason to overturn a specific award that otherwise satisfies the Settlement’s injury criteria. Simply put, the mere possibility that Mr. [REDACTED]’s tests were a false positive is not clear and convincing evidence of error in the Claims Administrator’s decision, itself supported by multiple independent expert reviews.

CONCLUSION

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

Date: August 6, 2023



David A. Hoffman, Special Master

⁵ *Id.* at 24. Here, the precise review is whether the methods were “generally consistent” with those definitions.