

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION

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No. 2:12-MD-02323-AB

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MDL No. 2323

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HON. ANITA B. BRODY

THIS DOCUMENT RELATES TO:
APPEAL OF SETTLEMENT CLASS
MEMBER [REDACTED]
REGARDING DENIAL OF
MONETARY AWARD

[REDACTED], a Retired NFL Football 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. The Claims Administrator determined that Mr. [REDACTED]'s Claim should be denied because it relied on invalid neuropsychological testing.

As Mr. [REDACTED] has not shown by clear and convincing evidence that the Claims Administrator's determination was in error, I deny his Appeal.

CLAIM HISTORY

This is Mr. [REDACTED]'s second Claim. He submitted his first, for Level 2 Neurocognitive Impairment, on October 31, 2017, based on examinations by MAF neurologist Dr. [REDACTED] and neuropsychologist Dr. [REDACTED]. Doc. 138938. Both examinations were conducted on July 6, 2017. Docs. 138935; 138936. That initial Claim underwent extensive review, including an audit and four rounds of AAP and AAPC review.

The first AAPC reviewer concluded, on August 19, 2019, that Mr. [REDACTED] did not meet the Settlement's criteria for any Qualifying Diagnosis; all subsequent AAP reviews reiterated that conclusion. The AAPC's view resulted from both apparent discrepancies in Mr. [REDACTED]'s functional impairment and, relevant to his present Appeal, indications of invalidity in Dr. [REDACTED]'s neuropsychological testing:

Dr. [REDACTED]'s neuropsychological report does not contain scores on any of the performance validity tests. Actual numeric scores are required to evaluate the patient's motivation to perform well.

We are told that the player failed the TOMM, a major performance validity test. However, an environmental interruption may have invalidated this procedure.

Dr. [REDACTED] writes that the player produced a valid profile on MMPI-2-RF, but T scores are not reported. Actual numeric scores are required to evaluate the patient's emotional, behavioral, and cognitive symptomatology, as well as any tendency to under- or over-report symptoms.

Doc. 230400 at 2 (cleaned up). The Claims Administrator denied Mr. [REDACTED]'s first Claim on that basis. Doc. 216798 at 1.

Mr. [REDACTED] appealed; I received two different AAP reviews that advised on validity. Docs. 227431, 228315. The reviewers examined a file augmented by records of Mr. [REDACTED]'s prior medical evaluations submitted during appeals process – “nearly 2000 pages of records.” Doc. 227431 at 1. They both concurred with the first AAPC's opinion that Dr. [REDACTED]'s neuropsychological testing did not satisfy the *Slick* validity criteria. One of them summarized:

This case is seriously flawed by numerous problems with validity involving: 1) performance validity, 2) symptom validity, and 3) Slick Criteria. These validity issues were not resolved during the appeal process. Documentation provided for the appeal does not provide scores for any of the validity measures. This is a glaring omission since when this case was previously reviewed by two different AAP Consultants, both cited missing validity information as a major limitation. Due to these validity problems, the neuropsychological testing cannot be considered a reliable or accurate measure of the retired player's cognitive ability; and the test data cannot be used to establish a qualifying diagnosis at either Level 2.0 or 1.5 Neurocognitive Impairment.

Doc. 228315 at 1.

I denied Mr. [REDACTED]'s appeal given these AAP and AAPC analyses. Doc. 228712.

However, the reviewers' analysis was incomplete, as (in fact) Mr. [REDACTED] had already submitted the additional missing validity test scores. Doc. 374743. I consequently vacated my decision and remanded the Claim for re-review on October 14, 2020. Doc. 374743. The AAPC reviewer looked at four additional neuropsychological evaluations and at the performance validity test scores Dr. [REDACTED] had submitted. Doc. 230400. The reviewer's conclusion was the same: multiple *Slick* criteria were implicated by Dr. [REDACTED]'s examination. *Id.* The AAPC wrote:

Dr. [REDACTED] has submitted scores on performance validity tests. The patient failed 2 out of 7 tests administered (TOMM and ACS Visual Paired Associates Recognition).

Dr. [REDACTED] also submitted sores for the MMPI-2-RF. The former player actually produced elevated (i.e., abnormal) scores on 3 of the 8 validity scales. F-r, Fs, and FBS-r were all above the 98th percentile, raising doubts about the credibility of his symptom reports.

...

Based on all the information reviewed, a properly completed Slick Checklist would contain affirmative responses on the following criteria for possible malingered neurocognitive disorder:

- a. Suboptimal scores on symptom validity tests
- b. Discrepancy between test data and observed behavior
- c. Discrepancy between test data and reliable collateral reports
- d. Discrepancy between test data and documented background
- e. Self-reported symptoms are discrepant with known patterns of brain functioning

Id. at 2-3 (cleaned up).

On the basis of that review, the Claims Administrator denied Mr. [REDACTED]'s Claim on January 29, 2021. Doc. 232431. He did not appeal.

Mr. [REDACTED] submitted his present Claim on November 16, 2023. Doc. 293897. His asserted Diagnosis of Level 1.5 Neurocognitive Impairment relies on a new neurological evaluation by former MAF neurologist Dr. [REDACTED], but the *same* neuropsychological testing conducted by Dr. [REDACTED] on July 6, 2017. Doc. 293894. It was supplemented by new records of other neuropsychological exams, including one by Dr. [REDACTED] on July 19, 2021, through the BAP. Doc. 296526. But both Mr. [REDACTED] and his Diagnosing Physician, Dr. [REDACTED], are clear that his Diagnosis relies on Dr. [REDACTED]'s 2017 neuropsychological testing. Docs. 293897; 293894.

His new Claim was sent to the AAPC for review. Doc. 298121. The AAPC concluded that the passage of time had not cured the deficits in Dr. [REDACTED]'s evaluation:

The primary question asked of me in this case is whether we can rely on Dr. [REDACTED]'s 2017 neuropsychological test results in supporting Dr. [REDACTED]'s 2023 diagnosis of Level 1.5 Neurocognitive Impairment. My response is a resounding "no," for the following reasons:

1. The patient has displayed a repeated pattern, on virtually every neuropsychological exam, of inadequate effort and/or deliberate underperformance.
2. Dr. [REDACTED]'s 2017 exam is no exception. The patient failed two PVTs and three symptom validity scales (on the MMPI-2-RF). Neither his cognitive performance nor his reported symptoms can be taken at face value.

3. With seven neuropsychological exams, how does one select the one to consider trying to render a diagnosis? The most recent exam would be my choice, as it is closest in time to Dr. ██████'s neurological exam. That would be Dr. ██████ 2021 exam, which found unambiguously invalid neurocognitive test results.

Id. at 4. The Claims Administrator denied Mr. ██████'s Claim on June 12, 2024. Doc. 343526. He appealed on July 12, 2024. Doc. 347853.

RESOLVING THIS APPEAL

On appeal, Mr. ██████ must demonstrate by clear and convincing evidence that the Claims Administrator erred in denying his Claim. He asserts that he is entitled to rely on Dr. ██████'s 2017 testing, which, he argues, does not describe invalid results. Doc. 347853. In doing so, he seeks to relitigate the denial of his first Claim on the grounds that it was invalid.

The Claims Administrator did not err in sustaining its original determination.¹ Neuropsychological test scores must be contemporaneous with the Qualifying Diagnosis unless the Claims Administrator in its discretion permits relaxation of that rule.² Dr. ██████'s 2017 testing predated Dr. ██████'s 2023 diagnosis by 5 years: it was not contemporaneous, and it had already been used in a prior Claim submission. Mr. ██████'s ability to reuse these non-contemporaneous test scores purportedly relies on Section 2.7 of the Norming Agreement.³ But that Agreement specifically 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."⁴

The Claims Administrator determined that Dr. ██████'s testing was invalid after an exhaustive process in 2020, and made a final judgment to that effect in 2021, when it denied Mr.

¹ The NFL Parties argue that Rules Governing Appeals of Claim Determinations, Rule 31 applies. I am not sure this is true, since the Rule by its terms applies to the Special Master's decisions, and I vacated my decision finding invalidity after learning that it had rested on a misunderstanding about the availability of the performance validity scores. I do agree that generally speaking, prior determinations by the Claims Administrator are final and binding. The issue here is whether the Norming Agreement requires Mr. ██████'s validity finding to be revisited. I conclude it does not.

² See 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> ("Because evidence of moderate to severe (for Level 1.5 diagnoses) or severe (for Level 2 diagnoses) cognitive decline as determined by and in accordance with the standardized neuropsychological testing protocol in Exhibit 2 to the Settlement Agreement is a key component of these Qualifying Diagnoses, the neuropsychological testing must be contemporaneous. If a Player's past neuropsychological testing was done more than a year before his MAF exam, or was done by anyone other than a Qualified BAP Provider in the BAP, 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 Mr. ██████'s brief makes this clear. See Doc. 347853, at 2 ("Utilization of Mr. ██████'s July 6, 2017 MAF Neuropsychological exam as part of his claim submission is appropriate under Section 2.7 of the Norming Agreement and should be the only exam considered as part of this claim submission.").

⁴ Norming Agreement, Section 2.7(c).

██████'s first Claim. Mr. ██████ could have but did not appeal that determination.⁵ That invalidity finding is settled. By its terms, the Norming Agreement neither requires rescoring of Mr. ██████'s old test scores—which were determined to be invalid for reasons unrelated to demographic norming—nor instructs the Claims Administrator to redo its earlier analysis. Mr. ██████ therefore cannot escape the requirement that his Claim must be accompanied by contemporaneous, valid, and sufficient test scores. He did not meet that burden by using the 2017 testing, which is both non-contemporaneous and invalid.⁶ Therefore the Claims Administrator did not err when it denied his second Claim.

CONCLUSION

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

Date: February 1, 2025



David A. Hoffman, Special Master

⁵ The opportunity to appeal the 2021 denial offered Mr. ██████ the chance to be heard; instead, the denial, and its underlying factual determinations, rested unchallenged.

⁶ The AAPC appears to have independently assured itself of the correctness of its earlier decision. Doc. 298121. Though not strictly necessary, I re-adopt its factual conclusion that the 2017 test results were not valid.