

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

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thorough investigation by the Claims Administrator, the Special Masters concluded that “claims relying on the [REDACTED]’ diagnoses may involve a misrepresentation, omission, or concealment of a material fact.” The Special Masters rescinded any prior determinations based on those doctors’ clinical review, provided for exacting and individualized assessments of pending claims, and permitted claimants to start afresh with new diagnoses. *Id.*

Mr. [REDACTED] (in November 2019) withdrew the Claim that had explicitly rested on Dr. [REDACTED] diagnosis. Doc. 217286. On that same day, he submitted a new Claim—this one—for Level 2 Neurocognitive Impairment. This Claim directly resulted from an examination in February 2019 performed by then MAF-physician Dr. [REDACTED], and was supported by a contemporaneous neuropsychological analysis performed by Dr. [REDACTED]. Doc. 216763; Doc. 216761; Doc. 217289.

Dr. [REDACTED] wrote that he had administered “[t]hree external and 4 embedded measures [of validity]. . . Mr. [REDACTED] did not pass 8 of the 9 effort measures. His Logical Memory Recognition score was within normal limits. Overall, Mr. [REDACTED] appeared to put forth his best possible effort.” Doc. 217289. About this finding, Dr. [REDACTED] wrote:

Despite Dr. [REDACTED] 02/20/2019 neuropsychological report that includes failed performance validity measures, my clinical judgment and expert medical opinion is that Mr. [REDACTED] findings are generally consistent with Level 2 Neurocognitive Impairment.

As is required by the Settlement and MAF Physician Guide, I utilize the Slick, et al. factors when reviewing files for validity. In cases such as Mr. [REDACTED] where failed validity scores exist, I closely examine all 9 Slick factors and make a determination on those factors as a whole. In doing so, I take into account the entire record, including all existing medical records, affidavits, supporting documents, and the neuropsychologist’s recommendations. I also rely heavily on my interview of the patient and experience as a clinician. Where there are failed validity scores, the number of failed tests and the severity of the failure are closely considered.

In the case, I determined that Mr. [REDACTED] level of cognitive dysfunction is consistent with his overall testing results. Evaluating the Slick factors, it is my professional opinion that while there are failed validity scores, it is not unusual in dementia patients to have failed validity scores.³ The literature recognizes that factors, such as mood disorders and anxiety, can artificially decrease validity scores, which is likely what occurred with respect to Mr. [REDACTED]. Regardless, the numerous external Slick factors and the pattern of low scores in more than one category of

³ “Please see: Walter J., Morris J, Swier-Vosnos A, Pliskin N., Effects of severity of dementia on a symptom validity measure. Clin Neuropsychol. 2014;28(7):1197-208: Results suggest that the TOMM may be an appropriate test of effort in older adults diagnosed with MCI, but is not recommended for assessing potential malingering in those with at least moderate to severe dementia.”

testing, strongly support the conclusion that Mr. [REDACTED] testing is consistent with his actual cognitive decline.

Doc. 216761.

On October 8, 2019 the Claims Administrator noticed the termination of Dr. [REDACTED] from further participation in the MAF Program, based on numerous failures of record keeping and analysis, including what the Claims Administrator (advised by the Appeals Advisory Panel Leadership Council) found to be a “lack of any critical evaluation of the neuropsychological testing, especially findings regarding performance validity and symptom reporting.” Class Counsel and the NFL were advised of that reasoning and termination. As of September 19, 2019 Dr. [REDACTED] withdrew from participating in the Program. The Claims Administrator subsequently observed questionable validity findings in several of Dr. [REDACTED] reports, prompting it to seek AAP Consultant review of all Dr. [REDACTED] examinations. Given these various infirmities, an AAP Member evaluated Mr. [REDACTED] Claim on January 3, 2020. That doctor carefully considered the entirety of Mr. [REDACTED] medical file, paying particular attention to the [REDACTED] validity analysis. Following that review, in March 2020 the Claims Administrator issued a Denial that incorporated the AAP Reviewer’s analysis:

There is documentation of concern for cognitive decline, including progressive cognitive decline since 2005, forgetting things that happen, no longer working due to cognitive problems, losing things, forgetting names, problems with comprehension, word-finding difficulty, impaired judgement, and an MMSE score of 16/30. There is also documentation of functional abilities and impairments, including no longer working, still being able to drive, able to do occasional vacuuming, and being able to walk the dog. A CDR worksheet indicates the Player is no longer working, still able to drive, sometimes able to shop independently, able to perform limited household chores, and needs prompting for washing/grooming. The third party affidavit corroborates the presence of memory problems, no longer going to the gym to workout, no longer attending Church, having conflicts with family members and strangers, his wife doing all the cooking and cleaning, his wife helping him dress, and no longer traveling alone.

The diagnosing physician, Dr. [REDACTED], reviewed the 2/20/2019 neuropsychological evaluation performed by Dr. [REDACTED] and noted the failure of eight of nine performance validity measures, but justified accepting the results in terms of the Slick Criteria. However, this evaluation included overwhelming evidence of poor effort, including multiple failed measures of both performance and symptom validity, as well as multiple inconsistencies in terms of the Slick Criteria. Additionally, Dr. [REDACTED] noted that depression and anxiety may have impacted the performance on the neuropsychological testing. Overall, there is not a valid neuropsychological assessment of the patient’s cognitive abilities. Therefore, the diagnosis made by Dr. [REDACTED] is not generally consistent with the Settlement

criteria for the Qualifying Diagnoses of either Level 1.5 or Level 2 Neurocognitive Impairment.

Doc. 221642.

After Mr. ██████ Denial Notice issued, the Special Masters issued a finding regarding the conduct of his law firm. The Special Masters concluded that this firm engaged in practices which “impugned the integrity and fair administration of the Settlement Agreement as a whole.” As a result, any still-pending Claim was to be “referred to a single member of the Appeals Advisory Panel for considered review.” And, as happened in this case, all Claims on appeal were subject to additional audit. That audit concluded without a finding of additional material misrepresentations or omissions connected to the Claim. Doc. 229452.

DISCUSSION

Though its procedural history reveals inexcusable behavior by multiple professionals, the issue on Appeal is straightforward. An AAP Reviewer determined that Mr. ██████ tests provided invalid measures of his cognitive impairment. That conclusion, adopted by the Claims Administrator, resulted from an exacting factual analysis which considered Mr. ██████ failure on eight of nine quantitative measures of validity, as well as a comprehensive review of the *Slick* factors in detail. The Settlement, a contract between the parties which provides the sole basis for Mr. ██████ right to relief, provides for this very process.⁴

Appealing, Mr. ██████ lawyers do not rebut the AAP’s factual conclusions about test validity.⁵ Rather they argue that the AAP lacked the power to disagree with Mr. ██████ physicians. The brief lists and relies on the findings of a series of physicians who examined Mr. ██████ including Dr. ██████, whose diagnoses this Program has specifically rejected because of his material misrepresentations. And, citing two Third Circuit rulings considering ALJ

⁴ Exhibit 2 provides: “Notwithstanding a practitioner’s determination of sufficient effort in accordance with the foregoing factors, a Retired NFL Football Player’s failure on two or more effort tests may result in the Retired NFL Football Player’s test results being subjected to independent review, or result in a need for supplemental testing of the Retired NFL Football Player.” Here, Dr. ██████ own report thus justifies independent review. Moreover, the Claims Administrator’s broad-ranging power and obligation to police validity, while giving deference to the considered and articulated judgments in the normal course to clinicians, is laid out in the Special Master Ruling on *Slick* Criteria and Validity Testing, at 10 (Oct. 21, 2020). In this case, even if this authority was insufficient, not only do prior rulings of the Special Masters require searching review of Claims touching on the ██████, but so does Dr. ██████ termination. Under Rule 27 of the Rules Governing Qualified MAF Physicians, after termination, the “Claims Administrator has discretion to have the AAP and/or the AAPC review a diagnosis by a terminated Qualified MAF Physician on any Monetary Award claim that has not been paid to determine whether the Settlement Class Member qualifies for a Monetary Award and then issue such notices as are appropriate.” Review and analysis by the AAP also follows from MAF Rule 20(d), and the Settlement Agreement itself, at § 8.6.

⁵ The brief mentions medical scans which, it says, “showed severe and increasing brain damage.” Even if they do show that, it is no response at all to the actual problem in Mr. ██████ file: he did not offer evidence generally consistent with a Diagnosis of Level 2 impairment as his neuropsychological test results indicated malingering rather than a valid measure of his cognitive ability. Mr. ██████ brief calls failure to discuss these brain scans “arbitrary,” and seems to thus misunderstand what precisely the AAP found problematic about the file.

determinations in Social Security cases,⁶ Mr. ██████ counsel argues that “this tribunal” (presumably, the Special Masters) must give “great weight” to the views of Mr. ██████ treating physicians.

The brief continues that when MAF physicians “agree on a qualifying diagnosis, that medical consensus constitutes clear and convincing evidence,” meaning that Claims Administrator must grant an award. Moreover, Mr. ██████ law firm “seriously question[s]” if this Appellate process satisfied due process because it “provides fewer safeguards of procedural due process than a Social Security disability hearing because the anonymous AAP member who questioned the eligibility of Mr. ██████ cannot be cross-examined.” Mr. ██████ the brief concludes, has a “reasonable expectation” that “his claim would not be subjected to a weighing of one anonymous paper reviewer’s opinion over numerous medical examiners.”

In other words, the Appeal contends that failing to give “great weight” to Mr. ██████ physicians violates the Settlement, and if it doesn’t, the Constitution. The briefing does not discuss the actual factual findings of the Reviewer, nor any of the rules created by the Settlement’s Exhibit 2. In fact, nothing in the brief engages with the language in the Settlement or its associated rules and procedures. The Appeal equates this Settlement Program with the Social Security system, and the Special Master with an ALJ.

As I have explained above, however, the Settlement Agreement permits the Claims Administrator to refer Claims to the AAP, which is explicitly empowered to advise on whether treating physicians have rendered Diagnoses that satisfy the requirements of the Settlement. Moreover, contrary to the argument made by Mr. ██████ counsel, nothing in the Settlement requires the Claims Administrator to adopt medical records created by Dr. ██████ whose assessments the Special Masters previously determined to be potentially corrupted. To be clear, *no* Diagnosis made by the ██████ can be probative of impairment absent the independent AAP Review called for in the Audit Decision.

Since the Settlement Agreement invites—indeed requires—the very exacting review of invalid scoring that Mr. ██████ argues is illegal, I can only construe his brief as offering a direct attack on that Agreement, rather than a particular disagreement about the application of that review to the facts of his Appeal. But my role is to “take all steps necessary to faithfully oversee the implementation and administration of the Settlement Agreement.”⁷ And, on Appeal, I am charged to resolve factual disagreements between the parties.

I conclude, relying on the independent judgment of the AAP and my own review of the file, that Mr. ██████ test scores were not valid: he failed the quantitative measures; Dr. ██████ *Slick* analysis was both cursory and incorrect; and the AAPLC appropriately determined that a more rigorous analysis would have qualitatively and additionally determined Mr. ██████ testing to be unreliable. I therefore agree with the Claims Administrator that it is more likely that Mr. ██████ malingering caused his neurocognitive test results than an underlying cognitive

⁶ *Gilliland v. Heckler*, 786 F.2d 178 (3d Cir. 1986) and *Morales v. Apfel*, 225 F.3d 310 (3d Cir. 2000).

⁷ Settlement Agreement, Section 10.1(a)(ii).

impairment. For that reason, he did not offer evidence generally consistent with a Level 2 Diagnosis, or indeed any Diagnosis at all.

CONCLUSION

Mr. [REDACTED] burden on Appeal was to show “that there is a high degree of probability that the determination of the Claims Administrator being appealed was wrong.”⁸ He has not met that burden. The Appeal is denied.

Date: January 15, 2021



David A. Hoffman, Special Master

⁸ Rule 26 of the Rules Governing Appeals of Claim Determinations.