

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]

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dated May 9, 2019. Doc. 217989. Relying on that Statement and addending his early report on June 6, 2019, Dr. [REDACTED] revised his views about Mr. [REDACTED] functional impairment. He ultimately recommended certifying a Diagnosis for Level 2 Neurocognitive Impairment. Doc. 217985. Dr. [REDACTED] concurred, and in November 2019 the two BAP Providers certified a Level 2 Qualifying Diagnosis. Doc. 217988. In December 2019, Mr. [REDACTED] filed this Claim. Doc. 217827.

The Claim was put into audit in February 2020, and emerged without adverse finding in October of that year. Doc. 229982.

In December 2020, an AAP Consultant reviewed the Claim. Doc. 231072. That Consultant's review resulted in a Notice of Denial dated February 11, 2021. Doc. 232745. In that Notice, the Claims Administrator found that criteria (i), (iii) and (iv) were met, but not (ii):

Criterion (ii): There were issues with performance validity, including suboptimal performance on three out of five embedded measures of performance validity. Additionally, the Player was described as being extremely lethargic throughout the neuropsychological evaluation, with Dr. [REDACTED] reporting that there were limitations due to difficulties with alertness during parts of the testing, a slow approach to testing, and that the Player did not try harder in response to challenges. There were also issues in terms of the Slick criteria, including discrepancies between test data and observed behavior for memory and language functions characterized by poor scores on testing but adequate performance during the clinical interviews. Therefore, criterion (ii) is not fulfilled.

Id.

Mr. [REDACTED] appealed, attaching a supporting letter with additional analysis from Dr. [REDACTED] Doc. 233676. After reviewing Mr. [REDACTED] Appeal, I remanded the Claim on March 17, 2021, for the Claims Administrator to consider that new evidence. Doc. 233796. A second AAPC review followed on April 30, 2021, and the reviewing physician recommended (again) denying the Claim. Doc. 235147; 239292.

On August 15, 2021, another AAP Consultant reviewed the Claim and came to a different answer than original AAP Consultant and the AAP Member. The Consultant wrote:

Regarding 100002150, You asked if I agreed with the previous reviewer [of April 30, 2021]. I do. However, I also reviewed document 233676 [Dr. [REDACTED] letter, prepared during the Appeal], and acknowledge that the Special Master in this case may see this as a situation where the AAPC merely disagrees with the clinician's opinion rather than showing where the clinician has erred. For example, how to value the standalone PVTs vs the embedded PVTs is a matter of clinical opinion, not established practice. The SM has stated that in cases where the AAPC merely disagrees with the examining clinician, deference with attach the later. I can see that happening this case. In summary I personally agree with the arguments made by the

prior reviewer but cannot find error in the clinician's articulation of his basis of opinion enumerated in 233676.

Doc. 239292. The AAP, with this AAP Consultant's review in hand, subsequently wrote: "It was very helpful to see how these decisions can be very difficult and complicated when there is disagreement regarding the medical judgement without the disagreement rising to the level of an error." *Id.* The Claims Administrator then approved the Claim on August 27, 2021. Doc. 237937.

The NFL Parties appealed. Doc. 239336. After the Appeal had been briefed, the Claims Administrator uploaded to the Claims Portal pieces of external evidence which had come to light during the appeals process. Doc. 242249. The Claims Administrator noted the following:

1. On 1/15/22, Mr. [REDACTED] was appointed to the board of a nonprofit organization, the [REDACTED]. He is currently listed as a board member on the organization's website.
2. Mr. [REDACTED] is listed as "co-author" and "contributing author" of a new book that was published on [REDACTED] entitled [REDACTED]. The book lists three authors, including Mr. [REDACTED]. He has promoted the book in several of the interviews discussed in #3, below, since its release.
3. Between 3/22/21 and 1/20/22, Mr. [REDACTED] participated as a guest in six podcasts, one radio show, and one TV news segment. In these programs, which range in length from two minutes to two hours, he discussed his football playing days and his past cancer diagnosis, and promoted his new book.

Doc. 242249 (internal citations omitted). Both parties were given the opportunity to respond to that evidence. After they filed responses, I asked the AAP Consultant who had written the key August 15, 2021, recommendation to reexamine the Claim. Doc. 243738.

DISCUSSION

The NFL Parties' Appeal turns on validity.² At this point, the Settlement Program's approach to this issue is well-trodden ground. In an Opinion from October 2020, I explained that "[t]he 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."³ In a later Opinion expanding on the meaning of "clearly erroneous," I wrote:

It should be obvious that a *Slick* analysis is not "clearly erroneous" simply because a member of the AAP (or the Claims Administrator) merely disagrees with the

² The NFL Parties' supplemental appellate brief, relying on the External Evidence Memo, contests Mr. [REDACTED] functional impairment, primarily arguing that the Memo is in serious tension with Dr. [REDACTED] findings. Doc. 243271. I do not reach this issue, nor whether it was an impermissible cross-appeal under Rule 25, given my resolution of the Appeal.

³ 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.

conclusions that the Retired Player's neuropsychologist made. Something more is needed—such as a basic error in computation, a material failure to consider relevant evidence or apprehend its import, or a serious departure from the standard of care. This is not an exclusive list. But I do intend to emphasize the importance of *deference* once the Claims Administrator has determined that the clinicians' explanation is reasonably articulated. The *Slick* criteria embody a professional judgment. Clinicians may reasonably disagree about that judgment's application to particular facts. But such disagreements are not themselves evidence of clear error.⁴

I had the above paragraph in mind when I recently asked the AAP Consultant to reconsider the entire record. That Consultant had been the only reviewing clinician to conclude that Mr. ██████ neuropsychological test results offered a "a valid reflection of his optimal level of neurocognitive functioning."⁵ My questions follow in italics, and the AAPC's responses are in normal font.

Using your medical judgment, do the ACS scores indicate a "high likelihood of invalid performance"?

The ACS scores combined with the stand alone performance measures show an intermediate likelihood of invalid performance. Additionally the marked variability in the player's performance in the session, ascribed by Dr. ██████ to fatigue, serve as a basis for invalidity. In retrospect this fatigue has a high probability of relating to the player's medical condition at the time of testing and Dr. ██████ erred in not even mentioning this possibility.

For the remaining Slick criteria, do you believe that Dr. ██████ conclusions resulted from "reasoning completely articulated in contemporaneous reports."

Over the course of three documents noted above Dr. ██████ has articulated his reasoning regarding the Slick criteria, though it is doubtful he has had access to the external evidence made available since 1/1/2022.

If you do believe that Dr. ██████ conclusions for the remaining Slick criteria were completed articulated in contemporary reports, do you think that they were nevertheless clearly erroneous?

I now believe there is ample evidence that Dr. ██████ is clearly erroneous reasoning in the case of the Slick criteria as suggested by AAP reviewers on two prior occasions. In particular in light of aggregate evidence Dr. ██████ erred in is assessment of Slick criteria 3 and 5 wherein the player's language and memory performances appear clearly inconsistent with his interview performance within the

⁴ Special Master Ruling on *Slick* Criteria and CDR Scoring, at 7 (Apr. 27, 2021), https://www.nflconcussionsettlement.com/Docs/slick_cdr_sm.pdf.

⁵ Settlement Agreement, Exhibit A-2.

evaluation, in the reports of mental status by the neurologist (where recall was reportedly intact) and with publicly available evidence. In addition, he erred in his appraisal of criteria 2 in failing to recognize the player's medical status, and not primary CNS function, was a better explanation for the lethargy and variable effort noted. **I acknowledge that this represents a reversal of my prior opinion.** This reversal is based on the accumulation of evidence in this case, and an effort to understand how the player's functional status might been declining then subsequently improved with time. Consideration of his full medical picture is I believe helpful in this regard.

If you do not believe that Dr. ██████ conclusions for the remaining Slick criteria were completely articulated in contemporaneous reports, would you please offer your judgment as to whether they suggest that the testing was invalid, after thoroughly and independently examining the relevant evidence?

I do believe as this case has unfolded, accumulating evidence has required modification the limited understanding of a player's function that can be attained from a four-hour examination session. Initially, Dr. ██████ had a more constrained sense of the player's functional limitations until two subsequent affidavits became available. This added information seemed to support Dr. ██████ concern that the player (and his wife) may have been initially understating the extent of the player's limitations. Yet subsequent external information has come to light to suggest that these initial impressions of functioning were not inaccurate. Certainly it appears that in the past couple of years the player has been actively engaged with professional pursuits, functioning at high level in the community in a way that suggests his neuropsychological test performance in 2017 was not a valid reflection of his full cognitive capabilities. The appeal response by the settlement class member does not appear to rebut this external information in any way.

Doc. 243738 (emphasis in original). The AAPC, reconsidering, thus concluded that although Dr. ██████ did completely articulate his *Slick* analysis, it was clearly erroneous. The AAPC's judgment was based, as is appropriate, on a review of the entire medical file, which altogether bears on whether the examining clinician's review represents a "material failure to consider relevant evidence or apprehend its import, or a serious departure from the standard of care."⁶

This reconsidered view withdraws the AAPC's first (August 15, 2021) analysis. But that initial review was twice wrong.

First, in the August 15th analysis, the AAPC deferred not to the clinician's original report but rather to the later-arriving letter, generated by Dr. ██████ in March 2021 at the request of counsel. But "a letter offered in support of an Appeal is no substitute for a medical judgment created contemporaneously with an exam, in a setting where expressing such a judgment, and not

⁶ Special Master Ruling on *Slick* Criteria and CDR Scoring, *supra* note 4, at 7.

post hoc advocacy, is the order of the day.”⁷ Neither the Settlement nor any of its associated guidance require deference to expert opinions prepared for Appeal.

Second, the August 15th analysis concluded that deference was due even though the Consultant’s own professional judgment was to the contrary. In doing so, the Consultant mischaracterized the appropriate inquiry, writing “that the Special Master in this case may see this as a situation where the AAPC merely disagrees with the clinician’s opinion rather than showing where the clinician has erred.” But where the examining clinician has fully articulated his or her judgment about validity, the AAPC should simply ask if that clinical judgment was clearly erroneous. That is, did it contain (for example) a “basic error in computation, a material failure to consider relevant evidence or apprehend its import, or [did it offer] a serious departure from the standard of care.” Here, and elsewhere, the Settlement Program charges its advisory clinicians and physicians to exercise *their* professional judgment in answering that question, not to forecast the views of the Special Masters. The expert’s fundamental role is to take “all steps necessary to provide sound advice with respect to medical aspects of the Class Action Settlement.”⁸

As I understand the AAPC’s revised view, Dr. █████ judgment may have been led astray by reports of functional impairment which did not come from the Claimant himself, and which are not supported in the fully developed record. The extensive evidence of Mr. █████ post-Diagnosis functioning was relevant to assessing Dr. █████ validity analysis.⁹ And it is a good example of why “evidence that tends to establish a pattern of behavior inconsistent with the factual predicates of a diagnosis is always probative of claims’ legitimacy, and thus welcome on appeal.”¹⁰ But importantly (and appropriately), the external evidence was not dispositive: the AAPC believed there were validity issues even in the record Dr. █████ himself evaluated.

⁷ Special Master Ruling on Neuropsychological Testing: *Slick* Criteria and Validity Testing, at 11 (Oct. 21, 2020), https://www.nflconcussionsettlement.com/Docs/slick_validity_testing_sm.pdf.

⁸ Settlement Agreement, Section 9.8(a)(iii).

⁹ Settlement Agreement, Exhibit A-2, Section 2(3) (“Discrepancy between test data and observed behavior. Performance on two or more neuropsychological tests within a domain are discrepant with observed level of cognitive function in a way that suggests exaggeration or fabrication of dysfunction....”).

¹⁰ Special Master Ruling on Pre-Diagnosis Evidence, at 4 (July 2, 2020), https://www.nflconcussionsettlement.com/Docs/pre_diagnosis_evidence_sm.pdf.

CONCLUSION

The Program's medical experts, applying the appropriate standard, have concluded Mr. [REDACTED] did not offer sufficient evidence that his test scores represented valid estimates of his optimal level of neurocognitive functioning. The experts' determination follows from a careful review of the record. I accept that professional, expert, factual judgment, and therefore find that there is clear and convincing evidence that the Claims Administrator's determination was erroneous.

I grant the NFL Parties' Appeal.

Date: March 21, 2022



David A. Hoffman, Special Master