

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]

under the Settlement Agreement, and the Special Masters disqualified her from the Program on November 30, 2017.²

Mr. [REDACTED] then pursued the Baseline Assessment Program. BAP Neuropsychologist [REDACTED] assessed Mr. [REDACTED] on March 1, 2020. Doc. 233255. In that assessment, Dr. [REDACTED] considering the validity of Mr. [REDACTED] testing, wrote:

Validity Test Summary:

- 1.) Reliable Digit Span = Valid Effort
- 2.) Logical Memory Recognition = Invalid Effort
- 3.) Verbal Paired Associate Recognition = Invalid Effort
- 4.) Visual Reproduction Recognition = Invalid Effort
- 5.) Test of Memory and Malinger: Trial 1: Valid Effort; Trial 2: Valid Effort; Retention Trial = Valid Effort
- 6.) Word Choice Test = Valid Effort
- 7.) Victoria Symptom Validity Test: Easy: Valid Effort; Difficult: Questionable Effort; Total: Valid Effort

Slick Criteria: Embedded and Stand Alone Validity Measures;

- A. Embedded Measures: 1/4 = Valid Effort
- B. Stand Alone Measures: 6/7 = Valid Effort
- C. His WAIS-IV Full Scale IQ of 76 and General Ability Index of 86 are in the Borderline and Low Average Range respectively. The TOPF Actual IQ was 97 and his projected IQ was 98, a 1-point difference that presents at a base rate of 49.8% and is not significant.
- D. It should be noted that Mr. [REDACTED] weak performance on 3 of 4 embedded validity measures may be the result of a difficulty with encoding during presentation of the original verbal and visual stimuli (Auditory Memory Index = 74, a score in the Borderline Impaired range; Scale Scores of 5, 7, and 4 on immediate recall of the verbal and visual stimuli are all low; a non-memory based Perceptual Reasoning Index of 100 and a Booklet Category Test T-score of 60 show good effort.) Given that his Stand-Alone validity test scores are adequate, the lower embedded scores would seem to be more a problem with encoding than with inadequate effort.
- E. Mr. [REDACTED] presented himself throughout the testing session as being invested in completing the testing as requested. Scores on the validity scales of the MMPI-2-RF suggest the possibility of over-reporting, but they can also be interpreted as reflecting an individual with genuine, significant

² Special Master Ruling Disqualifying Neuropsychological Testing Performed by Dr. [REDACTED] (Nov. 30, 2017), [https://www.nflconcussionsettlement.com/Docs/\[REDACTED\]_SM.pdf](https://www.nflconcussionsettlement.com/Docs/[REDACTED]_SM.pdf).

physiological and psychological problems. Given the previous medical report of Dr. [REDACTED] the apparent neuropsychological test findings of Dr. [REDACTED] the Affidavit of Mr. [REDACTED] the significant drop in his current Full Scale WAIS-IV IQ, and the lowered score on his General Ability Index relative to his Predicted IQ, it is reasonable to conclude that the MMPI-2-RF was a valid profile reflecting significant physical, cognitive, and psychological problems.

Given all of the above, it is this Examiner's opinion that Mr. [REDACTED] appears to have met the validity criteria set forth by Slick et al., and that his performance on the neuropsychological tests and the significant elevations on the clinical scales seen on the MMPI-2-RF should be viewed as reflecting his current cognitive abilities and affective status.

Id., at 3. Dr. [REDACTED] provided a neurological assessment on June 26, 2020, and both doctors certified the Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment on January 30, 2021. Doc. 233256; Doc. 233258. Mr. [REDACTED] then filed for benefits consistent with Level 1.5 Neurocognitive Impairment on March 10, 2021. Doc. 233632.

On March 29, 2021, at the request of the Claims Administrator, an Appeals Advisory Panel Consultant reviewed Dr. [REDACTED] validity analysis. The Consultant explained that Dr. [REDACTED] “noted and addressed low validity scores and considered *Slick* criteria. I defer to [the] examiner's opinion in this case.” Doc. 234075.

On July 8, 2021, Mr. [REDACTED] Claim was placed into audit. Doc. 236749. On September 7, 2021, the Claims Administrator concluded that audit, determining that Mr. [REDACTED] Claim contained no misrepresentation, omission, or concealment of a material fact. Doc. 238196. On September 20, 2021, the Claims Administrator approved a Monetary Award consistent with Mr. [REDACTED] Qualifying Diagnosis. Doc. 238489.

The NFL Parties appealed on November 19, 2021. Doc. 240466.

DISCUSSION

The NFL Parties argue that Mr. [REDACTED] neuropsychological testing was not valid: his “egregious performance validity failures on ACS measures indicated a ‘high likelihood of invalid performance’,” “his extreme elevations on symptom validity scales suggested that his MMPI-2-RF was invalid,” and “his testing implicated additional *Slick* criteria based on the clear discrepancy between Mr. [REDACTED] test data and his observed behavior and reported functionality.” Doc. 240465, at 1. Their Appeal interrogates Dr. [REDACTED] validity analysis in detail.

I asked an AAP Consultant to review the file and to consider the NFL Parties' argument. That Consultant explained:

The patient's very low scores on the three embedded [performance validity tests] from the WMS-IV were explained in detail by Dr. [REDACTED] His explanation is a very reasonable one.

- 1) The patient obtained abnormally low scores on the immediate and delayed recall trials of these three tests; his scoring below the 10% base-rate score on the recognition portions is not unreasonable, even in a patient who appeared to be "invested" in the testing.
- 2) The patient obtained valid scores on four other well-validated PVTs: Test of Memory Malinger, Victoria Symptom Validity Test, ACS Word Choice Test, and Reliable Digit Span Test. On some trials of some of these tests, the patient performed errorlessly. If he were purposely attempting to feign impairment, it is unlikely that he would be selective in this way.

The NFL Parties have expressed concern that the patient, though laconic on interview, displayed no "dysarthria, word-finding difficulties, aphasia, paraphasias, or neologisms," yet scored at Level 2 impairment (severe) on tests in the Language domain. However, this is a pattern we have observed with surprising regularity among claimants in this Settlement Program. It is apparently not necessarily a sign of deliberate underperformance on testing. Similarly, the NFL Parties believe that the player's being hired as a defensive analyst for Division I college football team is inconsistent with his having mild dementia (Level 1.5 Neurocognitive Impairment). In the player's response to audit questions, he explains that this is a volunteer (unpaid) position where his contribution is limited to commenting on videotaped plays, an ability that is so-far relatively spared.

Although Dr. [REDACTED] addresses "Slick Criteria" on page 3 of his report, his analysis is really limited to criterion #1 (suboptimal scores on performance validity tests) and criterion #7 (self-reported symptoms [i.e., MMPI-2-RF] discrepant with known patterns of brain function). He does not include a checklist that addresses all nine criteria. However, this reviewer believes that the evidence requires that none of the other criteria be coded as present.

In conclusion, I see no convincing reason why we should not accept Dr. [REDACTED] findings as supporting the qualifying diagnosis of Level 1.5 Neurocognitive Impairment.

Doc. 242407.

This review disposes of the Appeal. It may be true—as the NFL Parties assert and as one of the AAP Consultants reviewing the Claim assumes—that Dr. [REDACTED] *Slick* analysis was not

fully articulated.³ And it also could be that Mr. [REDACTED] performance validity test scores indicate a high likelihood of invalid performance, and therefore, as the NFL Parties suggest, that Dr. [REDACTED] “judgment...lack[s] foundation and could be set aside.”⁴ However, two different AAP Consultants have now reviewed the validity of Mr. [REDACTED] neuropsychological test scores, and have “thoroughly and independently assure[d] themselves the criteria do not indicate invalid testing.”⁵ I defer to their expert judgment, and conclude that the NFL Parties have not offered sufficient evidence that the Claims Administrator’s determination was wrong.

CONCLUSION

On appeal, the NFL Parties have failed to offer clear and convincing evidence that the Claims Administrator’s determination was incorrect. AAP Consultants reviewed the validity of Mr. [REDACTED] testing, both before the Claims Administrator made its determination, and after the NFL Parties’ Appeal. In both instances, the Settlement’s experts concluded that Mr. [REDACTED] neuropsychological testing was indeed valid.

Therefore, the Appeal is denied.

Date: April 1, 2022



David A. Hoffman, Special Master

³ As the second AAP Consultant noted, Dr. [REDACTED] did not include a thorough *Slick* Checklist that explicitly considered all nine criteria. As I have written, “discussing each *Slick* criteria is a strongly recommended best practice.” Special Master Ruling on Neuropsychological Test: *Slick* Criteria and Validity Testing (Oct. 21, 2020), at 9, https://www.nflconcussionsettlement.com/Docs/slick_validity_testing_sm.pdf.

⁴ *Id.*, at 7.

⁵ *Id.*, at 10.