

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

IN RE: NATIONAL FOOTBALL LEAGUE	:	No. 2:12-md-02323-AB
PLAYERS' CONCUSSION INJURY	:	
LITIGATION	:	MDL No. 2323

THIS DOCUMENT RELATES TO:	:	Hon. Anita B. Brody
NFL PARTIES' APPEAL OF	:	
QUALIFYING DIAGNOSIS AND CLAIM	:	
DETERMINATION FOR SETTLEMENT	:	
CLASS MEMBER [REDACTED]	:	

INTRODUCTION

[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 2 Neurocognitive Impairment. After review by an Appeals Advisory Panel (AAP) Consultant, the Claims Administrator determined that Mr. [REDACTED] was entitled to a Monetary Award based on a Diagnosis of Level 1.5 Neurocognitive Impairment on September 9, 2021. The NFL Parties now appeal on the grounds of invalid testing.

I requested an additional, consensus, expert medical review from the AAP Consultants before deciding this Appeal. Their reassessment has convinced me that there is clear and convincing evidence that Mr. [REDACTED] neuropsychological test results are invalid and cannot support an Award based on Level 1.5 Neurocognitive Impairment. I grant the NFL Parties' Appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. [REDACTED] first filed for benefits under the Settlement Agreement on June 26, 2017, based on a pre-Effective Date Diagnosis of Level 2 Neurocognitive Impairment. Doc. 83264. On January 5, 2018, the Claims Administrator denied his Claim after an audit and subsequent Special Masters' ruling disqualified his consulting neuropsychologist from participation in the Settlement Program.¹

¹ See Special Master Ruling Disqualifying Neuropsychological Testing Performed by Dr. Serina Hoover (Nov. 30, 2017), https://www.nflconcussionsettlement.com/Docs/hoover_SM.pdf.

On September 26, 2019, Mr. ██████ submitted a second Claim for Level 2 Neurocognitive Impairment. Doc. 214673. Dr. ██████, then a MAF neurologist, certified his Diagnosis on September 25, 2019, and Dr. ██████, then a MAF neuropsychologist, provided a supportive neuropsychological evaluation. Docs. 214602; 214600; 217373. In Mr. ██████ neuropsychological evaluation on May 23, 2019, Dr. ██████ summarized the results of Mr. ██████ performance validity testing: “Three external and four embedded measures were administered during testing. He passed four embedded measures and failed the three external measures. Overall, Mr. ██████ appeared to put forth adequate effort, considering his pain and fatigue, and his results are an accurate reflection of his cognitive functioning.” Doc. 217373.

After his neurological evaluation, conducted on June 17, 2019, Dr. ██████ considered Mr. ██████ failed performance validity measures and concluded that his findings were nonetheless consistent with Level 2 Neurocognitive Impairment:

I determined that Mr. ██████ 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: (1) Mr. ██████ testing results are consistent with expected patterns of neuropsychological test performance; (2) Mr. ██████ testing results are consistent with my observation of his behavior; (3) Mr. ██████ testing results are consistent with reliable collateral reports detailing his difficulties with respect to every day function; (4) Mr. ██████ testing results are consistent with his background history; (5) Mr. ██████ testing results are consistent with his self-reported history; (6) Mr. ██████ self-reported symptoms are consistent with known patterns of brain functioning; (7) Mr. ██████ self-reported symptoms are consistent with my observation of his behavior, and (8) Mr. ██████ self-reported symptoms are consistent with the information obtained from collateral informants. No one factor or fact alone has been relied upon. My determination in each category and overall is made upon the record as a whole.

Doc. 214600.

On November 7, 2019, Dr. ██████ appointment as a Qualified MAF Physician ended. As of September 13, 2019, Dr. ██████ withdrew from participation in the Program.

The Claims Administrator placed Mr. ██████ Claim into audit on November 4, 2019, and, concluding it on June 23, 2020, determined that Mr. ██████ Claim contained no misrepresentation, omission, or concealment of material fact. Docs. 216641; 225844.

A month later, given Dr. ██████ termination, the Claims Administrator referred Mr. ██████ Claim to the AAP for review.² Doc. 225895. The AAP Consultant determined that Mr. ██████ met Settlement Program criteria for Level 2 Neurocognitive Impairment. Doc.

² See Rule 27 Governing Qualified MAF Physicians (Apr. 11, 2019), https://www.nflconcussionsettlement.com/-Docs/Rules_Qualified_MAF_Physicians.pdf.

227094. At the same time, the Consultant, noting “a strong possibility of some degree of exaggeration or elaboration,” explained:

The patient failed three performance validity tests in Dr. ██████ exam. On many tests, his scores were no higher than chance performance. Either he could not exert sufficient effort to perform well on very easy tests, or chose not to.

During Dr. ██████ interview, the patient “openly answered questions posed by the clinician” and “no gross expressive or receptive language deficits were noted.” This make the patient’s Level 2 impairment on tests in the Language domain highly suspect. In particular, the patient’s score of 7/12 on the two-alternative BDAE Complex Ideational Material test and his score of 19/60 on a test of picture naming (Boston Naming Test) are approximately 4 standard deviations below average and are incompatible with normal conversational skills. . . .

The patient earned T-scores above 100 (5 standard deviations above average) on three of the F (“faking” or invalidity) scales of the MMPI-2-RF: F-r (infrequent responses), Fp-r (infrequent psychopathology responses) and Fs (infrequent somatic symptoms). This indicates profound overreporting of very unlikely symptoms.

A Slick Criteria Checklist is included in Dr. ██████ report, but he responded “no” to items that clearly merit a “yes.” These include at least the following: suboptimal validity scores and test data discrepant from behavior.

Id. Notwithstanding these concerns, the Consultant, relying on Mr. ██████ medical history and Dr. ██████ evaluation, in which Dr. ██████ “consider[ed] the patient’s severe dementia to be responsible for his failed performance validity tests,” concluded that “the available evidence is generally consistent with the presence of a moderately severe dementia syndrome.” *Id.*

The Claims Administrator subsequently determined that Mr. ██████ was entitled to a Monetary Award based on a Diagnosis of Level 1.5 Neurocognitive Impairment on September 9, 2021. Doc. 238274. The NFL Parties timely appealed on November 1, 2021. Doc. 239739.

DISCUSSION

The NFL Parties’ Appeal challenges the validity of Mr. ██████ neuropsychological testing and the deference accorded to his clinicians’ determinations. Doc. 239739.

The Settlement is built on “layered deference to expertise.”³ Test validity provides a particular example:

³ Special Master Ruling on Pre-Diagnosis Evidence, at 6 (July 2, 2020), https://www.nflconcussionsettlement.com/-Docs/pre_diagnosis_evidence_sm.pdf.

The 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. Conversely, when clinicians fail to articulate their judgment through complete *Slick* analyses, the AAP may thoroughly and independently assure themselves the criteria do not indicate invalid testing. Next, the Claims Administrator will normally accede to the judgment of the AAP Reviewer. And review on Appeal (in this ideal procedure) ought to be simple. The appellant bears a heavy burden of offering "clear and convincing evidence" that the Claims Administrator was wrong.⁴

Here, the NFL seeks to establish through clear and convincing evidence that the Claims Administrator was wrong in adopting the judgment of the AAP Consultant initially reviewing Mr. ██████ Claim. That AAP Consultant had deferred to Dr. ██████ medical judgment as applied to Dr. ██████ validity analysis. In evaluating the NFL Parties' Appeal, I initially requested an AAP review of the Appeal with specific attention to validity issues.

The AAP Consultant's review considered Dr. ██████ evaluation of effort and concluded that the evaluation "reflects errors in interpretation of performance and validity tests which are frequently seen in Dr. ██████ evaluations." Doc. 242474. The Consultant explained:

Regarding the ACS validity tests, 5/5 scores fall at or below the 25th percentile and 2/5 fall at or below the 5th percentile (i.e., under Dr. ██████ own standards, one embedded validity test was failed). Further, the results of standalone validity measures are not merely suboptimal, his performance on both trials of the TOMM and one measure on the MSVT are near chance levels. They suggest no more than random guessing. Even at a moderate level of dementia, this level of performance is uncommon.

It may be reasonable to attribute these poor performances to pain and fatigue as Dr. ██████ does. But pain and fatigue are reasons that a neuropsychological evaluation would not provide valid assessment of a player's cognitive capabilities. In other words, the presence of pain and fatigue are supportive, not dissuasive, of a finding of invalidity. Further, the patient's significant psychotropic medication regimen likely contributes to sedation that contributes these poor PVT performances, but Dr. ██████ makes no mention of possible medication effects on test results.

Id. (cleaned up). The Consultant also examined Dr. ██████ neurological findings and concluded that his assessment of the *Slick* criteria was both "incomplete (he does not acknowledge the number and severity of low scores on PVTs (criteria 1) and superficial (stating without reference to the significantly elevated SVTs scores, that the patient's self-reported symptoms are consistent with known patterns of brain function)." *Id.* The Consultant identified several discrepancies that Dr. ██████ did not address:

⁴ 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 (citations omitted).

Dr. [REDACTED] also acknowledges that the pain, medications and mood could depress these validity scores, without acknowledging that such an impact would not be selective to the validity scores but rather would suppress scores generally across all cognitive measures. Further, elevated scores on MMPI2R symptom validity measures suggest significant symptom validity issues. . . . Additionally, the player's performance on the BDAE Complex Ideation measure suggests such severe language comprehension problems that he would not have been able to comply with the interview nor provide reliable responding to the MMPI2 (which he did). Thus test scores are at odds with observed behavior.

Id. The Consultant emphasized that “the findings here are overwhelmingly indicative of invalidity” and explained the conflict between his conclusions and the 2020 AAP review:

My AAPC colleague appears clearly torn in this case, enumerating more evidence against a qualified diagnosis than for it. He independently identified each of the validity factors I noted above. However, he appears to ultimately give deference to the opinions of Dr. [REDACTED] and Dr. [REDACTED] I do not concur. It is my opinion that Drs. [REDACTED] and [REDACTED] erred in not reporting that, minimally, Slick Criteria 1, 2, 3 and 7 are all met in this case. A qualified diagnosis in this case relies on Dr. [REDACTED] evaluation being considered valid. I believe a reasonable view of the data suggests it is not. As such, the currently available neuropsychological do not support any level of neurocognitive finding.

Id. (cleaned up). A second AAP Member's review similarly concluded that Dr. [REDACTED] and Dr. [REDACTED] justifications for the failed performance validity measures “are not medically justified.” Doc. 243894.

It is (and should be) unusual for an Appeal to successfully reverse the decision to grant a Claim, particularly where that Claim was previously reviewed by one of the Program's neutral experts. To assure myself that the AAP Member's conclusion was not singular, I asked the AAP Consultants to meet as a group to consider the conflicting reports. Particularly, I asked them to work together to resolve the discrepancy between the first AAP Consultant's opinion that the evidence was consistent with the Settlement's criteria for Level 2 Neurocognitive Impairment and the consensus between the later reviewers that it was not, due to Mr. [REDACTED] failed performance validity measures. After meeting as a group and discussing the file on April 6, 2022, they concluded:

After discussion, agreement was reached that deferral to the diagnosing neurologist and neuropsychologist was not possible in this case because their clinical judgment regarding validity was not well-reasoned. The evidence is overwhelming that the patient was not exerting adequate effort to perform well on testing; therefore, the test results and conclusion could not be considered valid.

Doc. 248278. The panel of AAP Consultants then jointly adopted the AAP Consultant's report from February 7, 2022 (Doc. 242474), which concluded that a Qualifying Diagnosis of Level 2 or Level 1.5 Neurocognitive Impairment could not be supported. *Id.*

I agree with this shared judgment. The AAP Consultant who initially reviewed Mr. ██████ Claim deferred to Dr. ██████ and Dr. ██████ judgment. But, as the consensus review demonstrated, this was a mistake: their assessments were *both* clearly erroneous and inadequately articulated.

The first *Slick* criterion, which directs clinicians to administer “performance validity embedded indicators or tests” and determine if those results are “suboptimal,” renders Dr. ██████ judgment clearly erroneous.⁵ Mr. ██████ ACS scores, two of which fall below the 10th percentile of Clinical Sample Base Rates, “indicate high likelihood of invalid performance.”⁶ That is, Mr. ██████ scores do not merely fall in the range of “suboptimal” scores, within which Dr. ██████ clinical judgment would be given “safe harbor” and corresponding deference.⁷ Dr. ██████ judgment therefore “lack[s] foundation and [can] be set aside.”⁸ Dr. ██████ did not account for the implication of these failing scores, typifying a “material failure to consider relevant evidence or apprehend its import” and clearly erroneous medical judgment.⁹

At the same time, Dr. ██████ account of *Slick* criteria 2, 3 and 7 is not sufficiently articulated to “dispel suggestions of invalidity.”¹⁰ His cursory explanation does not account for Mr. ██████ BDAE Complex Ideation measure scores, which indicated that his language problems were so severe that he would be unable to comply with the test, for example. Nor does it address other clear inconsistencies between Mr. ██████ testing results and his reported and documented behavior.

The initial AAP Reviewer erred in deferring to Dr. ██████ clinical judgment to determine that Mr. ██████ met Settlement Program criteria for Level 2 Neurocognitive Impairment. The Claim Administrator's subsequent reliance on that determination was also compromised. Because available neuropsychological findings are clearly indicative of invalidity, Mr. ██████ Qualifying Diagnosis lacks foundation, and his Claim must be denied.

⁵ Settlement Agreement, Exhibit A-2, Section 2.

⁶ Retired NFL Football Players' Baseline Assessment Program: Neuropsychologists Handbook (the Clinician's Interpretation Guide), at 8.

⁷ Special Master Ruling on Neuropsychological Testing: *Slick* Criteria and Validity Testing, at 7.

⁸ *Id.*

Mr. ██████ counsel's response to the Appeal asserts that the language of the guidance (“... if the safe harbor is not satisfied, the clinician's judgment would lack foundation and could be set aside”) allows, but does not require, a clinician's judgment to be set aside. This is true, but not determinative. The subsequent AAP Consultant's report, adopted by the panel, opined that the initial Consultant's conclusion in support of Dr. ██████ judgment hinged on that Consultant's “deference” to Dr. ██████ opinion, rather than an independent review of the evidence.

⁹ Special Master Ruling on *Slick* Criteria and CDR Scoring, at 7 (April 27, 2021), https://www.nflconcussionsettlement.com/Docs/slick_cdr_sm.pdf.

¹⁰ Special Master Ruling on Neuropsychological Testing: *Slick* Criteria and Validity Testing, at 9.

This unfortunate result is not the first time that Dr. [REDACTED] and Dr. [REDACTED] diagnoses have not weathered scrutiny.¹¹ The former left the Program after numerous failures of record keeping and analysis, including what the Claims Administrator (advised by the AAP Leadership Council) found to be a “lack of any critical evaluation of the neuropsychological testing, especially findings regarding performance validity and symptom reporting.” And the latter, who, by his own choice, is no longer an MAF clinician, has repeatedly expressed his doubts to the Claims Administrator about the utility of the Settlement’s mandated quantitative performance scores in the retired player population and his skepticism about the Program’s review process. As the consensus review process demonstrated, deference to these examiners here would violate the Settlement’s requirement that Mr. [REDACTED] diagnosis resulted from test scores that validly reflect his “optimal level of neurocognitive functioning.”¹²

CONCLUSION

On appeal, the NFL Parties have offered clear and convincing evidence that the Claims Administrator’s determination was incorrect. After consulting with the Program’s medical experts, I find that Mr. [REDACTED] test results were invalid and cannot support a finding of neurocognitive impairment. I grant the NFL Parties’ Appeal.¹³

Date: April 18, 2022



David A. Hoffman, Special Master

¹¹ See, e.g., Special Master Ruling on Validity Testing (January 15, 2021), https://www.nflconcussionsettlement.com/Docs/validity_testing_2_sm.pdf; Special Master Decision in SPID # [REDACTED] noting that Dr. [REDACTED] “report contained an inadequate quantity of information to justify the judgments made” and reversing an award.

¹² Settlement Agreement, Exhibit A-2, Section 2.

¹³ I note that under the Court’s March 4, 2022, Order regarding race norming, the Claims Administrator will notify Mr. [REDACTED] by the end of April 2022 whether he qualifies for any remedies under the Norming Agreement.