

**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 CLAIM	:	
DETERMINATION FOR SETTLEMENT	:	
CLASS MEMBER [REDACTED]	:	
[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 1.5 Neurocognitive Impairment derived from a Baseline Assessment Program exam. The Claims Administrator determined that Mr. [REDACTED] was entitled to a Monetary Award based on that Diagnosis on June 28, 2022. The NFL Parties, appealing, argued that Mr. [REDACTED] testing was invalid.

I requested an expert medical review from the Appeals Advisory Panel before deciding this Appeal, and Mr. [REDACTED] Claim was reassessed by both an AAP Consultant and AAP Member. Both agreed that Mr. [REDACTED] testing was valid. I therefore deny the NFL Parties' Appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. [REDACTED] initially filed for benefits under the Settlement Agreement on June 21, 2018, based on a pre-Effective Date Diagnosis of Level 2 Neurocognitive Impairment. Doc. 176378. An AAP Member reviewed his Claim and determined that the documentation of Mr. [REDACTED] functional impairment and cognitive decline across the required domains was insufficient to support any level of neurocognitive impairment, as explained in the Denial Notice issued by the Claims Administrator on December 14, 2018. Doc. 193151.

On November 18, 2021, Mr. [REDACTED] submitted a second Claim, this time for Level 1.5 Neurocognitive Impairment. Doc. 240424. Qualified BAP neuropsychologist Dr. [REDACTED] and neurologist Dr. [REDACTED] certified his Diagnosis on November 8, 2021. Doc. 240425. Dr. [REDACTED] determined that Mr. [REDACTED] met the criteria for Level 1 impairment in executive function and for Level 1.5 impairment for learning & memory and complex attention. Doc. 242569. After

documenting CDR scores of 1.0 in Community Affairs and Home & Hobbies and 2.0 in Personal Care, she summarized:

Though he might appear able from casual inspection and is engaged in various activities [the patient and his wife] describe him as unable to function independently in community affairs. He has mild, but definite impairment in his ability to function independently at home and has abandoned more difficult chores, hobbies, and interests. Additionally, he requires reminders and assistance with personal care.

Id. at 7. Mr. ██████ passed the stand-alone performance validity tests and all but one embedded measures of effort. *Id.* Dr. ██████ concurred: “...my cognitive testing is compatible with a cognitive deficit. I agree with a 1.5 level of BAP disability.” Doc. 242570.

The Claims Administrator placed Mr. ██████ Claim into audit on March 2, 2022, and, concluding it on April 8, 2022, found that Mr. ██████ Claim contained no misrepresentation, omission, or concealment of material fact. Docs. 243299; 248267. The Claims Administrator subsequently determined that Mr. ██████ was entitled to a Monetary Award based on a Diagnosis of Level 1.5 Neurocognitive Impairment on June 28, 2022. Doc. 266312. After receiving an extension, the NFL Parties timely appealed on September 8, 2022. Doc. 269662.

DISCUSSION

On appeal, the NFL Parties contend that Mr. ██████ testing was not “a valid reflection of his optimal level of neurocognitive functioning” and that it therefore cannot support his Qualifying Diagnosis. Doc. 269661 at 1. The NFL Parties ground their validity concerns in three factors: discrepancies between Mr. ██████ testing and observed behaviors, his “egregious” testing on the MMPI-2-RF mental health assessment, and his concurrent medical conditions. *Id.*

I requested a review of the NFL Parties’ Appeal by the AAP and AAPC.¹ It was seen first by an AAP Consultant, who noted the Mr. ██████ passed the standalone validity tests and 4 out of the 5 embedded validity tests; his performance therefore did not trigger the Settlement’s requirement for additional review or supplemental testing.² Doc 273072. The Consultant went on to critique the standard the NFL Parties applied:

The NFL Parties’ argument, requiring ‘optimal’ cognitive performance, is in my opinion, an unreasonable, even unattainable, standard. This standard would differ from customary clinical practice, including that used to date throughout the settlement. In spite of our tendency to employ euphemisms like ‘suboptimal’

¹ Mr. ██████ response to the NFL Parties’ Appeal protests that any review of BAP-derived diagnoses violates the Settlement. I do not agree, as the Settlement explicitly vests broad discretion in the Claims Administrator to determine the sufficiency of “*any Claim Package*,” including those derived from BAP exams. Settlement Section 8.6(b) (emphasis added). Mr. ██████ counsel has pressed these arguments before the District Court and they there remain pending. In light of the fact finding in his favor I render above, I have resolved this Appeal now to avoid needless delay in Mr. ██████ Claim adjudication.

² Settlement Agreement, Exhibit 2.

performance, validity testing does not appraise whether an examinee's performance was optimal. Rather it only determines if task engagement appeared adequate.

Id (cleaned up).

This is a subtle point, but bears emphasis (which is why I write this decision instead of summarily affirming). The NFL Parties suggest that Dr. █████ analysis was cursory and therefore unworthy of deference because it demanded only that Mr. █████ testing validly reflect his "current," not his "optimal," level of cognitive functioning. But the NFL Parties' standard, says the AAPC, does not reflect clinical practice as the Settlement embodies it: validity testing exists "to determine whether the Retired NFL Football Player's test data is a valid reflection of his optimal level of neurocognitive functioning."³ The Consultant correctly interprets the performance validity tests as "the floor, not the ceiling" of a Player's cognitive performance. *Id* (cleaned up). The performance validity tests indicate if the Player was making a sufficient effort to allow his neuropsychological results to *reflect* his optimal level of cognitive performance; the Settlement does not require that the Player be functioning at the absolute peak of his capabilities for his testing to be valid. The Consultant concluded that Dr. █████ "rightly appraised the *Slick* criteria here... [T]his assessment provides a reasonable basis for evaluating cognitive function and supporting (or not) an award." *Id*.

The Consultant referred the NFL Parties' arguments about Mr. █████ symptom validity testing and concurrent medical conditions to the AAP, one of whom reviewed Mr. █████ Claim on November 15, 2022. Doc. 273389. The AAP Member explained that Mr. █████ poor performance on the MMPI-2-RF, a mental health assessment, would "affect the potential validity of self-reported symptoms." *Id*. at 1. As the NFL Parties emphasize, Dr. █████ characterized Mr. █████ performance on that test as "a cry for help" or indicative of "a desire to appear worse-off than he is." Doc. 242569 at 8. However, these concerns are countered in Mr. █████ Claim by "documentary evidence that corroborates many of the functional impairments." Doc. 273389 at 1. The AAP Member identified six prior medical evaluations, a third-party affidavit, and reports from Mr. █████ wife that support his level of functional impairment outside of his self-reported symptoms. *Id*. This evidence mitigates any doubts raised by his MMPI.

Finally, the Settlement requires that "cognitive deficits do not occur exclusively in the context of a delirium, acute substance abuse, or as a result of medication side effects."⁴ Only the last is possibly relevant here. In its review, the AAP Member, evaluating Mr. █████ prescribed medications, concluded, "I do not feel that the cognitive deficits could be considered to occur exclusively in the context of medication side effects." Doc. 273389 at 2. The NFL Parties list Mr. █████ fatigue, chronic pain, and depression as conditions that could invalidate his testing. But I, like the AAP Member, will defer to Mr. █████ examining neuropsychologist, who was aware of these concerns, addressed them in her report, and concluded that they did not invalidate his testing

³ *Id*.

⁴ Settlement Agreement, Exhibit 1.

results. *Id.* The Claims Administrator did not err in determining that Mr. [REDACTED] neuropsychological testing supported his Diagnosis.

CONCLUSION

Because the NFL Parties have not shown by clear and convincing evidence that the Claims Administrator's decision was in error, I deny their Appeal.

Date: November 23, 2022



David A. Hoffman, Special Master