

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

IN RE: NATIONAL FOOTBALL LEAGUE
PLAYERS' CONCUSSION INJURY LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

Hon. Anita B. Brody

THIS DOCUMENT RELATES TO:
APPEAL OF ██████████ REGARDING DENIAL
OF MONETARY AWARD

INTRODUCTION

██████████, a Retired NFL Player and Class Member under the Amended Class Action Settlement, received a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment through the BAP as of November 25, 2019. The Claims Administrator, denying Mr. ██████████ Claim in July, 2022, concluded both that his testing was invalid and that he did not demonstrate the requisite functional impairment for an award. Mr. ██████████ filed a timely Appeal.

I deny the Appeal as Mr. ██████████ has not offered clear and convincing evidence of error in the Claims Administrator's decision.

PROCEDURAL BACKGROUND

Mr. ██████████ saw two BAP providers: neurologist Dr. ██████████ on October 5, 2017, and then-BAP neuropsychologist Dr. ██████████ on September 27, 2017. Docs. 228427; 228429. Dr. ██████████, administering the validity testing, admitted that Mr. ██████████ failed both the ACS-WMS-IV Visual Reproduction Recognition score (with a raw score of 0) and the ACS-Word Choice test (with a raw score of 31). Doc. 228429. Mr. ██████████ also failed the Test of Memory Malingering (TOMM) and the Medical Symptom Validity Test. *Id.* Nevertheless, Dr. ██████████ stated that none of the *Slick* criteria were activated, including the criterion requiring consideration of suboptimal validity scores. Dr. ██████████ explained:

Observation of the client and discussion with him indicated he was trying as hard as he could, thus producing his best effort and a valid test. While normal rarely fail such effort tests, individuals with significant attentional

and executive problems often fail more than two of these tests. Slick criteria are listed in the addendum and added to the conclusion that the testing was valid.

Doc. 228429 at 3.

On September 29, 2020, the Claims Administrator requested additional documents and notified Mr. [REDACTED] that his Claim would be referred to the AAPC because he had failed two or more performance validity measures. Doc. 228590. In correspondence over two years, the Claims Administrator probed the responses that it received. Ultimately, on July 8, 2022, the Claims Administrator denied the Claim on both validity and functional impairment grounds. Doc. 266603.

DISCUSSION

Mr. [REDACTED] raises three arguments on appeal.

The first is procedural. He argues that “only when there are conflicting diagnoses should an AAP be consulted in the context of a BAP diagnosis.” Doc. 267304 at 2. The review process outlined above was, according to his briefing, “a violation of his rights as an NFL Claimant, his contractual rights, and his fundamental right to due process.” *Id.* Mr. [REDACTED] counsel raised an identical argument in a Motion for Relief under Article XXVII of the Settlement Agreement, which uses Mr. [REDACTED] case as an exemplar.¹ Judge Brody, denying that motion on December 27, 2022, concluded:

A BAP diagnosis is not an automatic rubber stamp for a Class Member to receive a monetary award. Rather, the BAP program is distinct from the claims review process, and BAP diagnosis is simply only one component of a successful Claim Package, which must be reviewed by the Claims Administrator . . . [T]he Claims Administrator may request AAP review of the medical records underlying a Claim Package in making a determination of whether a Class Member is entitled to receive a Monetary Award, regardless of whether there are conflicting diagnoses.

Doc. 275216 at 6.² I follow the District Court and conclude that Mr. [REDACTED] has not established that the Claims Administrator erred by asking for AAP input on his Claim.³

Second, Mr. [REDACTED], arguing that his testing was in fact valid, states that the AAPC “completely ignored the analysis of Dr. [REDACTED] as explained in detail in his email.” Doc. 267304 at 4. But a summary of the correspondence between the AAPC, AAP, and Dr. [REDACTED] belies this claim.

¹ ECF No. 11813, at 8-9.

² ECF No. 11931, Explanation and Order Denying 11813 Motion for Relief (December 27, 2022).

³ See also Special Master Ruling on Stroke Definition, at 8 (Apr. 25, 2022), https://www.nflconcussionsettlement.com/Docs/stroke_sm_2.pdf (concluding that AAP review did not violate the Settlement Agreement).

On November 11, 2020, the AAPC, initially reviewing the file, wrote:

This neuropsychological assessment is almost certainly invalid. Dr. [REDACTED] does not appear to understand how the ACS validity system works and misstates the results of the ACS validity scoring. The player has at least 4 tests below the 15th percentile. This is very rare even in impaired individuals. Further there are inconsistencies in between Test scores and observe behavior. The player is able to provide his own history in spite of scoring very poorly on the BDAE comprehension test. Further the player does better on delayed recall than on recognition in some instances which is inconsistent with what we know about brain function. As such Slick criteria 1, 2 and 3 are met.

Doc. 231523. On December 15, 2020, the Claims Administrator notified Mr. [REDACTED] that the AAPC had found that his testing was invalid and that his Claim would next be reviewed by the AAP. Doc. 231228. Mr. [REDACTED] submitted additional documents substantiating his claim. On January 14, the AAP reviewed the record and concurred with the AAPC that Mr. [REDACTED] failure of more than two performance validity tests rendered his tests “non-credible.” Doc. 231917 at 2. The AAP member also noted that “the normal MMSE score obtained by the neurologist, at most indicative of mild cognitive impairment, is markedly discrepant from the neuropsychological test outcomes, further supporting concerns for Slick criteria #2.” *Id.*

Dr. [REDACTED] reviewed that report and filed a supplemental email. He protested that the reviewers had not considered a population with a “complex relationship of cognitive and emotional problems caused by the brain injury.” Doc. 234697 at 1. In response, the AAPC wrote:

[Dr. [REDACTED] email] reflects either an ignorance or an unwillingness to use the ACS validity system as it was developed. He is ignoring the fact that data were collected on clinical populations including both Alzheimers and TBI populations in the validation of this system. Data right in the manual explains how frequently or rather infrequently these groups show scores below the cutoffs. He counters with what his opinion is and that is the problem. He is interpreting the results based on his opinion and not data and not according to prevailing professional practice. As you know it is not our goal to find fault with the report but rather to assure it meets professional standards. As you know this is not the first time this neuropsychologist has failed to do so. No nuance to his argument, just rationalizing.

Doc. 234767.

Dr. [REDACTED] was offered an opportunity to respond further. After initially declining (Doc. 235114), in May of 2021, he wrote:

The client did pass three of the tests as reported. In actuality, he also passed MSVT Paired Associates and Free Recall according to Greene. These were listed as fails incorrectly. So overall five measures were passed. Although against the general ACS population he failed Word Choice, he passes if he is compared to the TBI group. His other failures on the MSVT are consistent with his diagnosis of Major Depression and would be passing for those groups. His worse performances were on TOMM (which he became emotionally overwhelmed by the many items (this was also late in the day) and he missed many of the initial items so remembering them would be impossible) and on Visual Reproduction where half his answers were close but wrong. When looked at closely, his performance was poor but not nearly as severe as suggested by your review. More importantly, there was absolutely no evidence of volitional malingering on the part of the client. His emotional issues caused him to overreact at times and his ability to continue and maintain sustained attention was clearly impaired. The NFL battery unfortunately does not contain a measure of sustained attention like the CPT to demonstrate this numerically.

I answered as I did as his performance was consistent with him attempting to do his best throughout the day. While I acknowledge that some of his scores were poor, they were not an indication of malingering or feigning.

Actually, the player was a poor historian and likely inaccurate in many of his statements. Information from his ex-girlfriend was more accurate and useful. The normal MMSE score is not markedly discrepant from the clients' scores. The client had to be prompted continually to get any useful information other than complaints about his physical status and depression. The MMSE often underestimates degree of impairment and is consistent with his stronger scores. In addition, his memory scores while below the cutoff do not suggest someone who cannot report his current activities or his history. Your reviewers seem to continually overemphasize the degree of impairment—many individuals with these scores can provide histories (although there may indeed be inaccuracies.) The reviewer seems to be stretching to find discrepancies whose importance is questionable and not supported by the information available.

...

Your reviewer overemphasizes the ecological validity of neuropsychological tests. In reality there is only a minor correlation between specific scores and behaviors like driving, giving a history, living skills, and similar behaviors. To look at a BDAE score or a memory score and say the client cannot do a specific skill is over interpretation and not supported by the literature. As I noted in our conversation, your reviewers are clearly looking to find discrepancies rather than an even-handed analysis of the test data which makes me feel this is not a fair process from a neutral evaluator but rather one who wishes to discredit clients and testers. I see no solid

evidence for seeing that the remaining Slick criteria were not met.

Doc. 235688 (cleaned up).

The AAPC again considered Dr. [REDACTED] correspondence:

Dr. [REDACTED] first states that the player passed the MSVT PA and FR trials and therefore actually passed five validity tests. However, these two trials are well known to be sensitive memory measures and are not to be used for determining effort. He then reiterates his argument that the patient's emotional disorder was responsible for his failing scores on PVTs. He appears to ignore the fact that these tests were validated as measures of effort using patients with a variety of neurologic and psychiatric disorders, not just healthy persons. He concludes that his clinical impression that the patient was trying his best should trump his unambiguous failure of four PVTs. I do not believe that this meets the Special Master's requirement that his neuropsychological assessment include a thorough and accurate explanation of performance validity.

Dr. [REDACTED] response goes on to address other questions related to Slick criteria by blaming the AAP and AAPC reviewers: "Your reviewers seem to continually overemphasize the degree of impairment...", "The reviewer seems to be stretching to find discrepancies...", "Your reviewer overemphasizes the ecological validity of neuropsychological tests", and "Your reviewers are clearly looking to find discrepancies..." Despite repeated communications with Dr. [REDACTED] that the Settlement Agreement requires that specific objective, sometimes quantitative criteria be met for a qualifying diagnosis, and that the reviewers are simply attempting to ensure that criteria are applied fairly and consistently, he continues to see the process as biased against the players. This belief is unfortunate and is not likely to be remediable.

Doc. 235752 (cleaned up).

Dr. [REDACTED], also given the opportunity to assess the AAP's concerns about functional impairment, stood by his earlier reports that the reliable informant had sufficiently corroborated his CDR findings. Doc. 235352.

The AAP finally summed up these documents in June of 2021, writing:

It remains unclear whether the Player's reported functional decline was due to cognitive loss alone, and not impairment due to other factors, such as physical handicap or depression, as required by the CDR guidelines. It should be noted that the Player was clearly experiencing Major Depression, a fact that Dr. [REDACTED] failed to consider in his formulation of the case even though Dr. [REDACTED] noted that "depression and physical pains may limit his abilities and affect his

performance.”...Taken as a whole, due to invalid test performance and multiple discrepancies between behavior and test performance, the evidence provided in this case does not support any particular level of Neurocognitive Impairment. In situations such as this, where major inconsistencies between cognitive assessments and actual behaviors exist that may relate to possibly reversible factors like depression, good clinical practice dictates a course of treatment for such reversible factors followed by neuropsychological reassessment. Since a confident diagnosis of Neurocognitive Impairment is not possible in this case, I would recommend therefore, that a re-evaluation of the player be done after he has been adequately treated for depression.

Doc. 235938 at 2. A second AAPC then reviewed the file, writing “PVTs in this case clearly did not support validity. Dr. [REDACTED] does not follow professional standards in regards to the interpretation of PVTs. Concur with AAPC’s opinion.” Doc. 236482.

As this lengthy back-and-forth indicates, the Program’s experts worked carefully through Dr. [REDACTED] analysis, which sought to explain away failure on two or more performance validity tests. The Settlement Agreement specifically indicates that such failures “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.”⁴ It was in service of that requirement that the AAP, AAPC, and the Claims Administrator assessed whether or not Mr. [REDACTED] testing represented the optimal level of his neurocognitive functioning. They concluded that it did not.

Simply put: Dr. [REDACTED] has a fixed belief about how to conduct validity testing which does not track the Settlement’s requirements.⁵ As of September 13, 2019, Dr. [REDACTED] withdrew from participating in the Program. Mr. [REDACTED] briefing simply repeats Dr. [REDACTED] idiosyncratic views and intemperate attacks. Doc. 236482. The submission elides the merits and the quantitative evidence that Mr. [REDACTED] failed the embedded performance measures. It does not provide clear evidence of error.

Finally, Mr. [REDACTED] disputes the Claims Administrator’s determination that the record did not include sufficient information about his functional impairment. Doc. 267304. The AAP Member noted that Dr. [REDACTED] did not perform a structured interview with Mr. [REDACTED] and instead relied on his self-reports and a third-party affidavit. Doc. 231917. Dr. [REDACTED] process clearly could have been more articulated and he could have better separated out the role of depression and physical pain from cognitive impairment in causing functional loss. However, were Mr. [REDACTED] functional impairment the sole ground of Denial, and had Mr. [REDACTED] counsel offered *any*

⁴ Settlement Agreement, Exhibit 2, Section 2.

⁵ Special Master Ruling on Validity Testing (April 18, 2022), https://www.nflconcussionsettlement.com/Docs/validity_testing_6_sm.pdf; Special Master Ruling on Validity Testing (January 15, 2021), https://www.nflconcussionsettlement.com/Docs/validity_testing_2_sm.pdf; Special Master Decision in SPID # 100003433, noting that Dr. [REDACTED] “report contained an inadequate quantity of information to justify the judgments made” and reversing an award).

argument that the underlying contemporaneous reports sufficiently demonstrated a CDR score of 1.0 and distinguished emotional from cognitive concerns as the CDR scoresheet requires, the question might have been close.⁶

Instead, Mr. [REDACTED] counsel's brief restated Dr. [REDACTED] conclusions and asserted that the denial resulted from bias as the "AAP is being compensated by the Defendant and class counsel to seek denials of valid and payable claims." Doc. 267304 at 5. This is not a careful argument that demonstrates the Claim Administrator's factual error. It is, rather, a baseless falsehood. The AAP takes direction from the Claims Administrator, the Special Masters and ultimately the Court: neither the NFL Parties nor Class Counsel knows the identity of AAP examiners for individual claim files, nor could a party secure an expert's removal because it disagreed with a review. The Special Masters regularly meet with the AAP members to ensure that they are aware of the Settlement's requirements and purposes, which are centered around the efficient awards of valid claims.

Counsel also misperceives the results of AAP review. As Judge Brody wrote, a "BAP Diagnosis is not an automatic rubber stamp." But most BAP claims *are* approved, as they result from a process carefully designed by the parties to that very end. In 2022 alone, the Claims Administrator approved 59 Level 1.5 and 2 Diagnoses arising from BAP exams while denying only 8, including this one. Over the Settlement's history, of 308 claims based on Level 1.5 and 2 Diagnoses made through the BAP, 277 were ultimately paid, 1 was denied after an audit and 30 (like this one) for other reasons.

I conclude that Mr. [REDACTED] has not come close to meeting his burden of showing error in the Claims Administrator's determination that there was insufficient evidence supporting a CDR score of 1.0.

CONCLUSION

Because Mr. [REDACTED] did not show by clear and convincing evidence that the Claims Administrator erred, I deny his appeal.

Date: January 12, 2023



David A. Hoffman, Special Master

⁶ See Special Master Ruling on Functional Impairment/Cognitive Decline (September 7, 2021), https://www.nflconcussionsettlement.com/Docs/functional_impairment_sm_5.pdf (discussing FAQ 113).