

IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION

MDL No. 2323

THIS DOCUMENT RELATES TO:
NFL PARTIES' APPEAL OF
QUALIFYING DIAGNOSIS AND
CLAIM DETERMINATION FOR
SETTLEMENT CLASS MEMBER

Mr. [REDACTED] performed at the 25th percentile base rate or higher on 2/5 embedded measures of validity. He also performed better on easy items than difficult ones on Paired associates, which has been shown to differentiate cognitive impairment from low effort. On the Test Of Memory and Malinger, performance was above chance levels and considered borderline for adequate effort. He also displayed evidence of a dementia profile on the MSVT: 1) no scores below chance levels; 2) greater than a 20 pt difference between hard and easy subtests (i.e., 35 points); 3) immediate recall and delayed recall scores higher than free recall; and 4) paired associated score greater than free recall. In addition, his performance was consistent with self report and expected performance on for people with major cognitive disorder (in medical records). Although performance in this evaluation was considered not impaired, his poor visual spatial processing and delayed recall impairments are consistent with performance on validity tests. For this reason, he was considered to be giving adequate effort in light of current functioning.

Id. at 2.

In the report's impression section, Dr. [REDACTED] noted that Mr. [REDACTED] "has significant depression and likely panic disorder that are not normalized with current medication treatment." *Id.* at 3. And, while noting that Mr. [REDACTED] displayed "impairments in delayed memory and visual spatial processing as well as borderline overall intellectual functioning," Dr. [REDACTED] concluded that overall, Mr. [REDACTED]'s impairment level was "0 Not Impaired." *Id.* at 3-4. Perhaps as a result, as the quoted paragraph demonstrates, Dr. [REDACTED] did not explicitly describe the *Slick* criteria, as the Amended Settlement Agreement requires.¹

In May 2018, Mr. [REDACTED] completed another round of neuropsychological testing with Dr. [REDACTED]. Docs. 277834; 275431. That evaluation revealed no impairment. Doc. 275431 at 7.

On February 16, 2022, Mr. [REDACTED] saw neurologist Dr. [REDACTED]. Doc. 275431. Mr. [REDACTED] and his wife both reported noticing "continued cognitive decline during past several years and overall decline in his functions at home." *Id.* at 7. Additionally, Mr. [REDACTED] was experiencing increased "behavioral symptoms" such as "short-fuse, irritability, explosiveness, social withdrawal, and panic attacks." *Id.* At the time of the appointment, Mr. [REDACTED] had been prescribed eleven medications: Xanax, Klonopin, Aricept, Neurontin, Lamictal, Mobic, Namenda, Zofran, Inderal LA, Topamax, and Desyrel. *Id.* at 4.

Dr. [REDACTED] concluded that Mr. [REDACTED]'s neurological exam was "remarkable for objective decline in his MOCA tests from 23 in 2016 to 19 today," but qualified that statement with an observation that Mr. [REDACTED] "has had some inconsistencies on past neuropsych testing scoring below average on the TOMM test indicating decreased effort." *Id.* at 7. Having reviewed the 2017

¹ See Settlement Agreement, Exhibit A-2 (2) ("Each neuropsychological examiner must complete a checklist of validity criteria as set forth in *Slick et al.* 1999, and revised in 2013 (see below) for every Retired NFL Football Player examined in order to determine whether the Retired NFL Football Player's test data is a valid reflection of his optimal level of neurocognitive functioning.").

results from Dr. [REDACTED] as well as the 2018 results from Dr. [REDACTED], Doc. 277834, Dr. [REDACTED] called for “repeat neuropsychology testing” because the “last assessment was 2018.” Doc. 275431 at 7.

Meanwhile, pursuant to the Norming Agreement approved by the District Court, on April 27, 2022, the Claims Administrator rescored Dr. [REDACTED]’s testing. Doc. 262289. That rescoring found no impairment in the complex attention and visual-perceptual processing domains, Level 1 impairment in the learning and memory and executive functioning domains, and Level 2 impairment in language. Doc. 264407. Overall, Mr. [REDACTED] now qualified “for a diagnosis of Level 1 Neurocognitive Impairment,” instead of “no impairment.” Doc. 262289.

Informed by these rescored results, Dr. [REDACTED] revised his assessment on October 29, 2022. Doc. 275432. He adopted the rescored results on executive functioning and language impairment, but rejected their application in the learning and memory domain after examining the relevant T-Scores. *Id.* at 2. He acknowledged that a “determination for a Level 1.5 impairment in Learning and Memory requires 4 subscores below a t-score of 37.” *Id.* But, after observing that Mr. [REDACTED]’s learning and memory testing produced “3 subscores below t-score of 37 and one which is 37,” Dr. [REDACTED] concluded:

Given my professional medical judgement further informed by a history of cognitive decline in the years subsequent to this cognitive testing and supported by declining MoCA scores on cognitive screening; I would assess Learning and Memory as qualifying for Level 1.5 impairment and overall impairment of neuropsychological testing of 1.5.

Id.

The AAPC rejected this analysis on November 9, 2022, noting that “the AAP consultants have adopted a stance of strict adherence to the T-score cutoffs, since they could otherwise be used to both deny and support impairment.” Doc. 273021. The AAPC concluded that “the records reviewed are not generally consistent with the qualifying diagnosis of Level 1.5 Neurocognitive Impairment.” *Id.* On November 17, 2022, Dr. [REDACTED] responded that his “overall assessment” of Level 1.5 Neurocognitive Impairment “included interpretation of re-score of 2018 data integrated with recent history and recent assessment of function.” Doc. 275431 at 11. Apparently, Dr. [REDACTED] meant to refer to the rescored data from 2017, not 2018.

On January 6, 2023, Mr. [REDACTED] submitted a Claim for a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment, dated to October 29, 2022. Doc. 275428. The MAF Diagnosing Physician Certification Form listed Dr. [REDACTED] as the diagnosing physician, assisted by Dr. [REDACTED]. Doc. 275430. Since Dr. [REDACTED]’s report was not included in the medical records, and the Claim appeared to rest on Dr. [REDACTED]’s neuropsychological testing rather than Dr. [REDACTED]’s, the Claims Administrator asked Dr. [REDACTED] for clarification. Doc. 276036. Dr. [REDACTED] wrote back on February 21, 2023, explaining that although Mr. [REDACTED] had undergone neuropsychological testing with Dr. [REDACTED] in 2018, his Claim indeed relied on Dr. [REDACTED]’s neuropsychological testing from 2017.

Doc. 277834. The MAF Diagnosing Physician Certification Form was amended accordingly. Doc. 277380.

After some additional correspondence between the Claims Administrator and Mr. [REDACTED] regarding his employment history, Docs. 278809; 279064, the Claims Administrator determined that Mr. [REDACTED] was entitled to an Award on April 28, 2023. Doc. 285312 at 1. The NFL Parties appealed on June 29, 2023, arguing that “there is clear and convincing evidence that Mr. [REDACTED]’s testing was invalid and, thus, cannot support any Qualifying Diagnosis.” Doc. 285312 at 1.

I remanded Mr. [REDACTED]’s Claim on August 8, 2023 Doc. 287145. As part of this remand, two additional medical reports entered the record: one from an appointment with neurologist Dr. [REDACTED] on September 18, 2017 finding “No neurocognitive impairment,” Doc. 287212 at 3, and one showing the results of EEG and MRI testing from 2016. Doc. 287213.

The Claims Administrator re-awarded the Claim on September 6, 2023. Doc. 288677. Once again, the NFL Parties appealed. Doc. 290399.

DISCUSSION

The issue here is the validity of the 2017 neuropsychological testing that supports Mr. [REDACTED]’s Qualifying Diagnosis. The NFL Parties argue that there is clear and convincing evidence that Dr. [REDACTED]’s neuropsychological testing was invalid because:

- (i) Mr. [REDACTED] *failed five of seven* validity measures;
- (ii) Mr. [REDACTED]’s performance validity testing on ACS measures indicated a “*high likelihood of invalid performance*,” according to the Settlement’s guidelines;
- (iii) Mr. [REDACTED]’s symptom validity testing invalidated his entire MMPI-2-RF profile and suggested a *volitional* attempt to be uncooperative; and
- (iv) other *Slick* criteria also suggest invalidity, including because Mr. [REDACTED]’s observed behavior is inconsistent with his cognitive test results showing profound impairment in Language.

Doc. 290399 at 1 (emphasis in original, paragraph breaks added).

I asked the AAP to advise me with respect to the medical issues underlying this case. Appropriately, the AAP applied the Program’s “nested system of deference”² regarding validity testing:

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

² Special Master Ruling on Validity Testing, at 4 (July 14, 2023), https://www.nflconcussionsettlement.com/Docs/validity_testing_11_sm.pdf.

judgment through complete *Slick* analyses, the AAP may thoroughly and independently assure themselves the criteria do not indicate invalid testing.³

Because Dr. █████ did not complete a *Slick* checklist in her report, Doc. 275434, her validity analysis did not result from “completely articulated” reasoning.⁴ The AAP thus conducted a thorough and independent review of Mr. █████’s validity testing, noting facts triggering *Slick* criteria 1, 3, and 7. Doc. 297729. Regarding criterion 1, “[s]uboptimal scores on performance validity embedded indicators or tests,”⁵ the AAP wrote:

I do believe Slick criteria 1 is met and this criterion actually reflects evidence of poor task engagement not dementia. While Dr. █████ explains the failure on each measure separately she doesn’t consider that clinical implications of the consistency of the aggregated PVT measurements. The player failed to meet acceptable PVT on the aggregate embedded tests and on both stand-alone tests. Moreover, this level of failure is occurring in a player for whom ‘generally consistent’ must be invoked to meet dementia criteria in the first place. Displaying the dementia profile on PVT’s generally occurs when the dementia is unequivocal, not when it is marginal or questionable.

This is not to say the player was engaged in malingering. Rather, I believe PVT performance here is indicative of poor task engagement, the basis of which can be found in the player’s medication list described by Dr. █████ (Xanax extended release supplemented by Xanax prn, Tramadol, Ambien, Amitriptyline, Neurontin and Adderall). Dr. █████ does not address which of the prn medications might have been recently used, but 5 out of 6 of these medications have sedating effects and the 6th is probably prescribed to counteract the first five. There is a strong probability medication effects are impacting performance on these tests.

Doc. 297729 (emphasis and break added).

As the AAP emphasized—and contrary to the NFL Parties’ claim that “Mr. █████’s symptom validity testing suggests a *volitional* attempt to be uncooperative”—the fact that *Slick* criterion 1 is triggered here does not indicate active malingering. Doc. 290399 at 3–4. Generally, the purpose of the Settlement Program’s “validity measures is not merely to detect cases of malingering, but rather to distinguish genuine cognitive impairment from other factors that may impact a Player’s effort on a neuropsychological test.”⁶ It would not be surprising, as the AAP has advised, if multiple prescription sedatives affected Mr. █████’s effort on test day.

³ Special Master Ruling on *Slick* Criteria and Validity Testing, at 10 (Oct. 21, 2020), https://www.nflconcussionsettlement.com/Docs/slick_validity_testing_sm.pdf.

⁴ *Id.*

⁵ Settlement Agreement, Exhibit A-2 (2)(1).

⁶ Special Master Ruling on Validity Testing, at 4 (Apr. 17, 2023), https://www.nflconcussionsettlement.com/Docs/validity_testing_10_SM.pdf.

The AAP also identified facts triggering *Slick* criteria 7, “[s]elf-reported symptoms are discrepant with known patterns of brain functioning,”⁷ and 3, “[d]iscrepancy between test data and observed behavior.”⁸ Doc. 297729. In particular, the AAP “found it implausible that the player couldn’t remember his college major, as remote memory impairment is uncommon,” and the level of impairment reflected in Mr. [REDACTED]’s testing was “inconsistent with the player’s observed behavior of understanding and participating independently in the interview and in testing.” Doc. 297729.

The NFL Parties’ burden of proof is high: “clear and convincing evidence” means it is “‘highly probable or reasonably certain’ that there was an error.”⁹ Merely raising “reasonable concerns” about validity, as the AAP imprecisely phrased it, would not be clear and convincing evidence of error in the Claims Review process. But that is not how I read the medical records on Appeal. Dr. [REDACTED] originally found that Mr. [REDACTED]’s test results did not indicate any impairment and consequently did not document her thinking on validity using the complete *Slick* checklist. Thus, although she believed that Mr. [REDACTED]’s tests were valid, she did not provide a thorough and articulated basis for her views.

The AAP was therefore charged with undertaking an independent review of that same testing.¹⁰ It has done so and advises that Mr. [REDACTED]’s 2017 neuropsychological testing does not reliably support the inference that Mr. [REDACTED] engaged in sufficient task engagement. Relying on that factual judgment, I find that the NFL Parties have surmounted their burden: there is clear and convincing evidence that the scoring was not valid, contrary to the Claims Administrator’s determination.

CONCLUSION

Because the NFL Parties have provided clear and convincing evidence that the Claims Administrator’s determination was erroneous, I grant the Appeal.

Date: January 26, 2024



David A. Hoffman, Special Master

⁷ Settlement Agreement, Exhibit A-2 (2)(7).

⁸ Settlement Agreement, Exhibit A-2 (2)(3).

⁹ Special Master Ruling on *Slick* Criteria and Validity Testing, at 10 (Oct. 21, 2020), https://www.nflconcussionsettlement.com/Docs/slick_validity_testing_sm.pdf (quoting *In re Fosamax Alendronate Sodium Prods. Liab. Litig.*, 852 F.3d 268, 285–86 (3d Cir. 2017)).

¹⁰ Special Master Ruling on *Slick* Criteria and Validity Testing, at 7 (Oct. 21, 2020), https://www.nflconcussionsettlement.com/Docs/slick_validity_testing_sm.pdf.