MICKELL V. BELL: FORMER NFL PLAYER OBTAINS A WIN AGAINST THE NFL RETIREMENT BOARD AFTER BEING DENIED DISABILITY

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In *Mickell v. Bell*, the United States Court of Appeals for the Eleventh Circuit revived former NFL player Darren Mickell's claim for denial of disability benefits.[1] Reversing the District Court's ruling,[2] the Eleventh Circuit held that the NFL Retirement Board abused its discretion in denying disability benefits by failing to consider two key components.[3] First, the board failed to consider relevant evidence submitted by Mr. Mickell, including "medical records and reports from his treating physicians."[4] Second, the board failed to consider the "cumulative effect of Mickell's impairments . . . ."[5]

Darren Mickell spent nine years in the NFL before leaving the league in 2001 due to chronic pain from an accumulation of injuries.[6] As a defensive end, Mr. Mickell was repeatedly subjected to intensive physical conditions, including "high speed contact hits" that resulted in "multiple orthopedic injuries . . . ."[7] Because of these injuries, Mr. Mickell underwent multiple surgeries and procedures during his time in the NFL.[8] Additionally, "multiple 'blow[s] to the head' . . . affected [Mr. Mickell's] cognitive function" during his career.[9]

The NFL Player Retirement Plan (the "Plan") provides retirement, disability, and other related benefits to eligible NFL players.[10] The Plan's

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[1] Mickell v. Bell, No. 19-10651, 2020 WL 6074329, at *1 (11th Cir. Oct. 15, 2020).

[2] Mickell v. Bell, No. 15-62195-CIV-COHN/SELTZER, 2019 WL 656328, at *1 (S.D. Fla. Jan. 15, 2019).

[3] *Mickell*, 2020 WL 6074329, at *7.

[4] *Id.*

[5] *Id.*

[6] *Id.* at *1.

[7] *Id.* Due to the repeated high-speed contact hits, Mr. Mickell sustained multiple injuries "to his back, ribs, shoulders, arms, hands, knees, hips, legs, and feet." *Id.*

[8] *Mickell*, 2020 WL 6074329, at *1 ("[Mickell] had surgeries on both shoulders and both knees; had to have his hip drained multiple times; and was given a number of medications and frequent injections to keep him in the game.").

[9] *Id.* For example, Mr. Mickell "would have trouble answering questions and would have to sit out plays." *Id.*

[10] *Id.* The Plan defines eligible players as "'any person who is or was employed under a contract by an [NFL team] to play football in the [NFL.]'" *Mickell*, 2019 WL 656328, at *1

Disability Initial Claims Committee (the "Committee") reviews claims for disability, and players may then appeal Committee decisions to the Plan's Retirement Board (the "Board").[11] On appeal, the Board may refer a player for evaluation with Plan Neutral Physicians—physicians selected by the Plan whose reports "'will be substantial factors'" in the Board's decision.[12]

Mr. Mickell filed his application for disability benefits under the Plan in September 2013 based on several impairments he sustained during his NFL career.[13] The Committee evaluated Mr. Mickell through several Plan Neutral Physicians, received evidence submitted by Mr. Mickell of his disability,[14] and ultimately denied the initial claim.[15] Mr. Mickell appealed this decision to the Board.[16] Mr. Mickell was evaluated by additional Plan Neutral Physicians and submitted additional evidence to the Board.[17] The Board ultimately denied Mr. Mickell's application for benefits based on the opinions of the Plan's retained evaluators, who concluded that Mr. Mickell was not totally and permanently disabled.[18] The Board acknowledged the conflicting evidence but, using its absolute discretion permitted by the Plan, placed less weight on Mr. Mickell's conflicting evidence.[19] Two months after the Board's decision, Mr. Mickell filed his complaint in the District

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n.1. The Plan is governed by the Employment Retirement Income Security Act of 1947 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 141, *et seq.* *Mickell*, 2019 WL 656328, at *1.

[11] *Id.* "The Board is the Plan's '"named fiduciary" within the meaning of ERISA section 402(a)(2) and [it is] responsible for implementing and administering the Plan.'" *Id.*

[12] *Mickell*, 2020 WL 6074329, at *1. "The Plan grants the Board 'full and absolute discretion, authority and power to interpret, control, implement, and manage' the Plan . . . ." *Mickell*, 2019 WL 656328, at *1.

[13] *Mickell*, 2020 WL 6074329, at *1.

[14] *See id.* at *1–2. Evidence submitted to the Committee consisted of "his medical records, including reports from his treating physicians, who opined that Mickell was not able to work." *Id.* at *2. A licensed psychologist and clinical neuropsychologist said that Mr. Mickell's "'mood symptoms are a prominent problem that could contribute to and may even account for his difficulties,'" and expressed concern that these "'problems may also be more reflective of a significant cognitive disorder related to a potential history of multiple concussive injuries.'" *Id.* One of the physicians, Dr. Mark Todd, concluded that the mental and physical problems together are "'likely to prohibit him from consistently attending work or completing work requirements.'" *Id.*

[15] *Id.* "In his initial application, Mr. Mickell noted he was working full time as a freight handler, so the Committee denied his application based on this employment. Mr. Mickell appealed that decision, claiming he was eligible for disability benefits . . . . The Board allowed Mr. Mickell to re-present his claim so it could consider whether his impairments met the definition of disability." *Mickell*, 2020 WL 6074329, at *1 n.2.

[16] *Id.* at *2.

[17] *Id.*

[18] *Id.*

[19] *Id.*

Court.[20] The District Court upheld the Board's decision and Mr. Mickell appealed to the Eleventh Circuit, where he presented three arguments: first, the Board improperly interpreted and applied the Plan's "disability" definition; second, the Board abused its discretion in deciding what evidence to admit and consider; and third, the Board abused its discretion in failing to consider the cumulative effects of Mr. Mickell's impairments.[21]

Mr. Mickell first argued the Board did not correctly interpret or apply the Plan's definition of Disability.[22] The Plan provides that a player is eligible for total and permanent disability benefits if the board finds: "(1) that he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit," and "(2) that such condition is permanent . . . ."[23] The Plan goes on to state that "[a] Player will not be considered to be able to engage in any occupation or employment for remuneration or profit . . . merely because such person . . . receives up to $30,000 per year in earned income . . . ."[24] Mr. Mickell asserted that the term "up to $30,000 per year in earned income" limits the term "any occupation or employment for remuneration or profit . . . ."[25] Therefore, both courts had to determine whether the definition of disability is "based on whether a player is unable to work a job that earns him more than $30,000 per year."[26]

The District Court found that the Board reasonably interpreted the Plan's definition of disability.[27] The District Court noted this provision as "the $30,000 exception" where it "accommodates many Players who, after retiring from professional football, earn modest income from signing autographs, for example."[28] The Eleventh Circuit agreed, holding that the plain language[29] of the Plan Documents "does not require the Board to first find that a player-applicant could earn more than $30,000 a year."[30] Rather than reading the second provision as a limitation, the Eleventh Circuit read it to clarify that "a player will not be barred from being considered disabled

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[20] *Id.*
[21] *Mickell*, 2020 WL 6074329, at *3.
[22] *Id.* at *4.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*; *Mickell*, 2019 WL 656328, at *8–9.
[27] *Mickell*, 2019 WL 656328, at *9.
[28] *Id.* at *8 (quotations omitted).
[29] *Mickell*, 2020 WL 6074329, at *4 (turning to New York federal common law in order to interpret provisions in an employee welfare benefit plan). "'The test to determine whether an insurance contract is ambiguous focuses on the reasonable expectations of the average insured upon reading the policy and employing common speech.'" *Id.* (quoting Universal Am. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 37 N.E.3d 78, 81 (N.Y. 2015)).
[30] *Id.* at *5.

simply because he makes $30,000 in annual income."[31] The Eleventh Circuit concluded that the Board "did not err in its interpretation and application of the Disability standard defined by the Plan."[32]

Second, Mr. Mickell argued that the Board abused its discretion by automatically adopting the opinions of the Plan Neutral Physicians and ignoring evidence he submitted.[33] The District Court held that the denial of benefits was clearly not arbitrary and capricious because "the administrative record include[d] the comprehensive reports of *seven* Plan Neutral Physicians . . . that . . . *unanimously* concluded that he was capable of employment . . . ."[34] On appeal, the Eleventh Circuit reviewed the denial under an abuse of discretion standard.[35] In the court's application of this standard, they concluded that the Board did in fact abuse its discretion when it "failed to review relevant medical evidence that supported Mr. Mickell's claim."[36] The District Court had stated that the Physicians' "specific conclusions [did] not significantly conflict" with each other.[37] Further, the District Court stated that the Plan "reasonably credited the unanimous opinion of the seven Plan Neutral Physicians over the conflicting evidence that [Mr. Mickell] submitted" because the Board has "'full and absolute discretion, authority and power' to weigh evidence and determine benefits claims . . . ."[38] However, the Eleventh Circuit disagreed.[39]

In its analysis, the Eleventh Circuit stated that the Board "wholly failed to consider record evidence that contradicted the opinions of the Plan Neutral Physicians."[40] While deciding Mr. Mickell's initial claim, the court noted that the Committee was "free to give more weight to the Plan Neutral Physicians' opinions than Mr. Mickell's experts" in finding that he did not meet the definition of disability, where three Plan Neutral Physicians indicated that he was employable.[41] However, the list of materials that the Board considered on appeal did not include Mr. Mickell's evidence that was

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[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Mickell*, 2019 WL 656328, at *9 (emphasis added).
[35] *Mickell*, 2020 WL 6074329, at *5. "When reviewing an ERISA benefits denial under an abuse of discretion standard, 'the function of the court is to determine whether there was a reasonable basis for the decision, based upon the facts as known to the administrator at the time the decision was made.'" *Id.* (quoting Glazer v. Reliance Std. Life Ins. Co., 524 F.3d 1241, 1246 (11th Cir. 2008)).
[36] *Id.*
[37] *Mickell*, 2019 WL 656328, at *11.
[38] *Id.* at *12.
[39] *Mickell*, 2020 WL 6074329, at *5.
[40] *Id.*
[41] *Id.*

previously before the Committee.[42] Additionally, the Board's denial letter did not discuss any of Mr. Mickell's submitted evidence either.[43]

Mr. Mickell also argued on appeal that the board abused its discretion when it "failed to consider the cumulative effect of Mr. Mickell's conditions."[44] Contrary to the Plan's arguments and the District Court's finding that the Plan Neutral Physicians "properly limited their conclusions to areas within their expertise," the Eleventh Circuit held that the Board abused its discretion by "failing to consider the combined effects of all of his impairments."[45] The court reasoned that the Board could have required Mickell to undergo an examination by a vocational expert to assess "whether Mickell's specific impairments—when considered together—prevented his gainful employment."[46] Although the Plan argued that a claimant is not required to undergo a functional capacity evaluation, the court explained that the Board overly credited the opinions of its retained evaluators while failing to consider the conflicting opinions of Mr. Mickell's physicians.[47]

The court specifically exposed one of the Plan physician's determinations that Mr. Mickell's "psychological difficulties [did] not rise to a level that preclude[d] some kind of employment such as assisting in sports programs for youths," yet that physician failed to support this conclusion with any actual tests.[48] To the contrary, Mr. Mickell's treating physician, Dr. Lichtblau, opined that Mickell would be "'unable to maintain gainful employment'" because he did not "'have the functional capacity to work 4 hours per day on an uninterrupted basis'" at the time evaluated.[49] The Eleventh Circuit concluded that the Board "ignored an important consideration in the question of whether he was disabled" when "the Board failed to consider the combined effect of Mr. Mickell's many physical and mental impairments . . . ."[50]

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[42] *Id.* "The only evidence listed are documents submitted after the Committee's September 8, 2014, denial." *Id.*

[43] *Id.* The court cited an Eleventh Circuit case that held "a plan administrator acted arbitrarily and capriciously when it 'simply ignored relevant medical evidence in order to arrive at the conclusion it desired.'" *Mickell*, 2020 WL 6074329, at *5; *see* Oliver v. Coca Cola Co., 497 F.3d 1181, 1199 (11th Cir. 2007), vacated in part on other grounds, 506 F.3d 1316 (11th Cir. 2007).

[44] *Mickell*, 2020 WL 6074329, at *2.

[45] *Id.*

[46] *Id.* at *6 (citing Bowen v. Yuckert, 482 U.S. 137, 164 (1987) (Blackmun, J., dissenting) ("discussing vocational evaluations of Social Security claimants and explaining that a disabled person's employability is about more than the effects of individual impairments.")).

[47] *Id.*

[48] *Id.* (internal quotations omitted) (noting that Dr. Faber "performed no tests to determine whether Mr. Mickell had the physical ability to work in a position like that.").

[49] *Id.*

[50] *Mickell*, 2020 WL 6074329, at *6.

Mickell v. Bell serves as a guidepost for disability benefit plan administrators in the Eleventh Circuit. In determining that the NFL Retirement Plan Board abused its discretion, the Eleventh Circuit demonstrated that evidence offered by a claimant, in addition to the symptoms from all of his impairments considered together, should be evaluated by a plan administrator when reviewing a disability benefits claim.