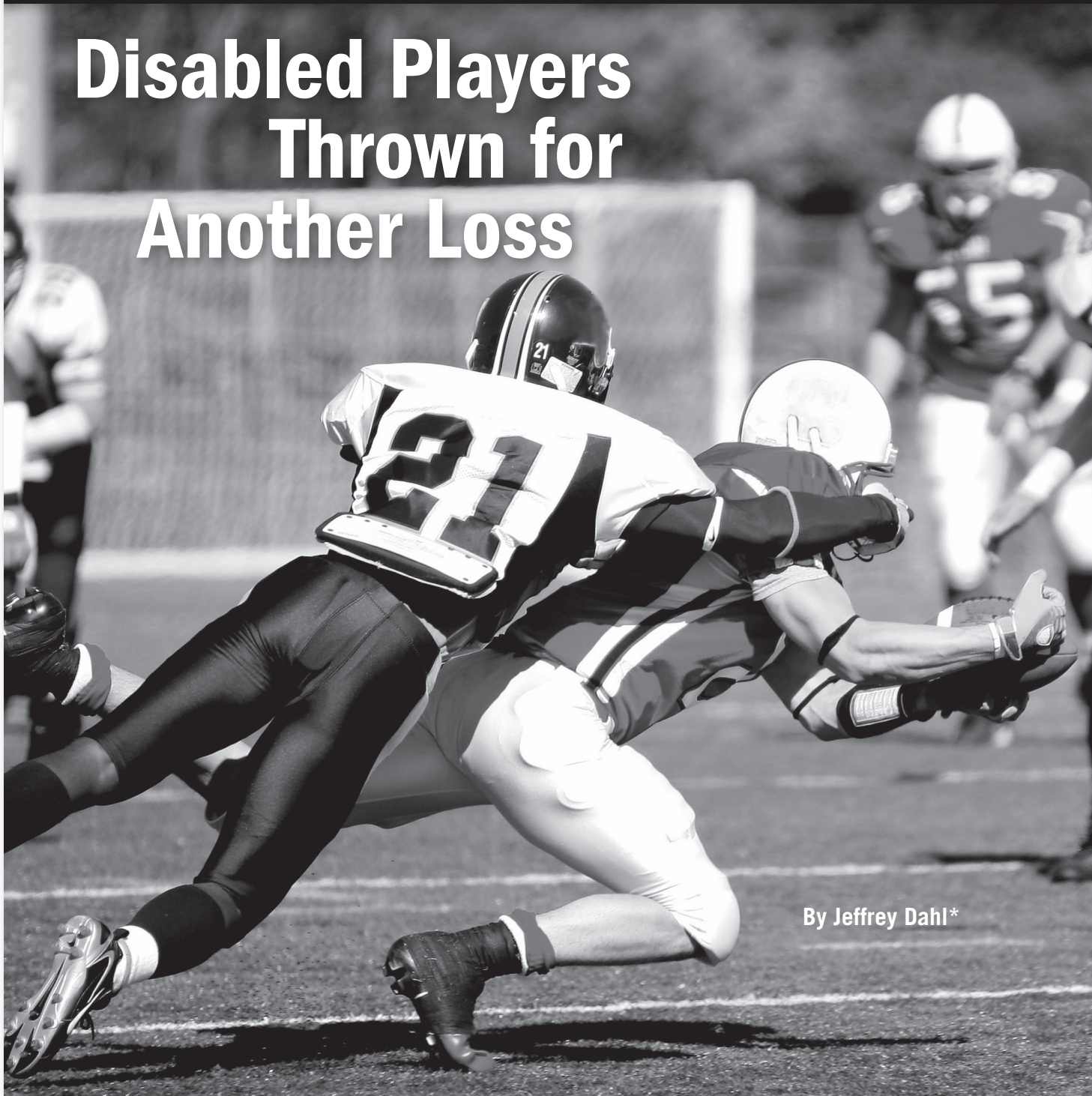


THE NFL AND ERISA

Disabled Players Thrown for Another Loss



By Jeffrey Dahl*



INTRODUCTION

Retired professional football players face a daunting challenge when trying to obtain football-related disability benefits from the NFL, even when the greater weight of the evidence supports their claim. This is due to the Employee Retirement Income Security Act of 1974 (known by the acronym ERISA) and the federal court decisions of the last 35 years that have interpreted it, combined with disability plan terms that give advantage to those denying the claim and the willingness of decision-makers to exploit the leverage ERISA has offered them. Although other employees in the private sector face the same hazards and hurdles of ERISA, claims of former NFL players help highlight the significant shortcomings of the law.

THE NFL, CONCUSSIONS, AND ERISA

The long-term health effects of concussions suffered by NFL players has recently garnered significant attention. Considering that concussions are common in many contact sports, and have occurred in the NFL since its formation in 1920, serious study and public discussion of their potential to cause serious long-term injury have been long overdue. In the old days, they were just called “dingers” or “having your bell rung” and usually nothing more was said about it. The consumer demand for an entertainment product that included bone-crunching hits and tackles and the need to have the best players on the field caused those that owned and managed the NFL, the most profitable sports business in the world, to avoid serious study and discussions of the long-term effects of head trauma. The warrior mentality of the players enabled the long silence, as most learned at an early age to equate complaining with weakness. Being the best often required having a high pain threshold and keeping quiet about temporary blurred vision and fuzzy-headedness.

There is a different but intertwined harm to players who submit a claim for disability benefits to the NFL, a subtle but significant harm that does not grab any headlines. The NFL disability plan (contained in two documents, the NFL Retirement Plan and a supplemental disability plan) is an ERISA plan that provides the NFL Retirement Board discretion to make disability benefit decisions. This means: 1) that the scales of justice are

tilted in favor of the NFL, i.e. a court is required to defer to a disability decision made by the NFL Retirement Board and can only reverse the NFL Board’s decision’s if it is found to be an abuse of that discretion, and 2) there is no legal remedy beyond getting the benefits that are due, meaning there is little or no downside in delaying and denying valid football-related disability benefit claims.

GENE ATKINS

Things used to be different for Gene Atkins. By the time he was eight years old, he believed he would become a professional football player. Gene grew up on Orange Avenue, in the South City area of Tallahassee, Florida. His father sold furniture at a retail store in Tallahassee and his mother stayed at home and looked after their nine children. Gene, the second youngest, attended Rickards High School in Tallahassee, a tough school where many of the kids ran in gangs. At Rickards Gene played football, baseball, and ran track. Although dyslexic, Gene persevered. He would not only graduate from high school but college as well.

Atkins received a number of scholarship offers and elected to play football at Florida A&M in Tallahassee, where he became a college All-American. In 1987, after his junior year, he was drafted in the 7th round by the New Orleans Saints. He was the 179th draft pick overall.

Six foot one inch and 200 pounds, Gene played regularly for the Saints as a defensive back and kick-returner in 1987

In December of 2004 Atkins applied for football-related disability benefits under the Bert Bell/Pete Rozelle NFL Player Retirement Plan.

and 1988. Although just 21 and one of the elite few who make it to the NFL, he returned to Florida A&M during his first off-season to complete his college degree.

In 1989 he became a starter and started in almost every game in the defensive backfield for the remainder of his career. He played six years with the Saints and three years with the Miami Dolphins, ending his career in 1995. He was known as hard-hitter, especially in New Orleans, which at the time had one of the best defenses in the league. Gene dislocated his right shoulder four times while playing for New Orleans, and repeatedly had his “bell rung” from high speed collisions involving his helmet. Atkins often resorted to hitting and tackling opposing players with his head because he was unable to wrap them up with his arms due to the repeated injuries to his right shoulder. Since Atkins was in the defensive backfield, each game in which he played over his ten-year career was a series of high-speed collisions, many of which involved the use of his head to hit opposing players.

Unfortunately, Atkins doesn't remember much of his professional football career. His claims against the NFL have given him reason to retrieve old game tapes out of his garage and watch some of them. Many times, he says, it's like watching a stranger play football.

After football, Atkins tried the construction business and then coaching, but his neck pain, headaches, and cognitive problems grew more severe. Frustrated and wanting to help provide for his family, he got a job at a Target store near their apartment in Round Rock, Texas, hanging signs in the morning before the store opened. His wife Patricia remembers him repeatedly calling home, asking her about simple work tasks that he was told to perform. Due to his continuous neck and shoulder pain, headaches, cognitive impairment, and fingertips that felt like they were covered in plastic, Gene had to quit his job a few months after being hired.

Atkins has overcome some incredible hurdles. Even so, his prior success could not adequately prepare him for the struggle which he continues to face in trying to obtain football-related disability benefits from the NFL.

Atkins Applies for Benefits

In December of 2004 Atkins applied for football-related disability benefits under the Bert Bell/Pete Rozelle NFL Player Retirement Plan, which, along with a supplemental disability plan, provides monthly income benefits in case of total and permanent disability. Within his application, which he completed with the help of his ex-wife Sandra Atkins, he described three conditions which caused him to be disabled, all of which he attributed to his ten years playing NFL football:

“1) Unable to lift right shoulder or move arm to functional positions cannot reach up or more than 90 degrees to either side. Had several dislocated shoulder

injuries and eventually had a pin inserted to keep shoulder in place. The pin was removed in 1996 because of chronic pain in the area. I have trouble driving because it's difficult to turn the steering wheel;

2) Chronic constant pain at the base of head and neck. Pain sometimes radiates through arms and my hands, feels like plastic. Everything I touch feels numb and I drop objects I try and pick up. Unbearable pain most days. I had several stingers while playing but did not feel any affects until I turned 38 years old;

3) Mood swings-because of my inability to function without constant pain, my mood has been effected. Depression over the physical condition of my body and not being able to work.”

Atkins submitted a letter with his application in efforts to further explain his condition. The last paragraph reads as follows:

“I suffer from depression, and probably have for several years, but was in denial. I have not sought any medical attention, because of my lack of insurance coverage. I have not been able to work, therefore I am not covered by any insurance. I am now seeking disability income to recover and hopefully get better to where I can function and take care of my children. I am in great need of immediate medical attention and would welcome the opportunity be seen by your physician in order to receive the help I need.”

The NFL retirement plan and supplemental disability plan are both ERISA plans. These plans are funded by a trust, which is funded by contributions from the NFL teams. The greater the number of players who are approved for disability benefits, the greater the contributions required (assuming there is no offsetting decrease in contribution requirements).

If a player is found to totally and permanently disabled by the NFL while under contract with an NFL team, the disability is classified as either football-related (a category called Active Football) or unrelated to football (Active Nonfootball).¹ If a disability is found to have arisen after the player's NFL career is over but before the later of age 45 or 12 years after the end of the player's last credited season, the player can receive either Football Degenerative benefits (for a disability arising out of NFL football activities) or Inactive benefits (for disabilities found to be unrelated to football). The focus here is on the latter two categories of benefits, both of which are available for disabilities arising after a player's NFL career is over.

Players are paid a relatively small monthly amount if they are approved for Inactive benefits. Monthly benefits are en-

hanced dramatically (and the supplemental disability plan is triggered) if the player is approved for Football Degenerative benefits. Because the disability benefits are paid for life, in contrast to most other disability plans where monthly payments stop at or near age 65, if a relatively young player is found to be disabled from playing football, the long-term payout can be significant. Of course it is a flyspeck when contrasted with the combined annual revenue of the NFL and its franchises, which was reported to be approximately 8.5 billion dollars in 2009.²

Atkins, who commanded a salary of close to a million dollars a year in the latter stages of his career, receives \$2,650.50 per month from the NFL for disability benefits. His benefits are classified as Inactive benefits, which means the NFL Retirement Board has found his disability to be unrelated to playing NFL football. Pursuant to a divorce decree, half of his benefit goes to his ex-wife Sandra. Most disability plans pay approximately 60% of one's pre-disability salary, usually until the age of 65 if one remains disabled. Atkins receives approximately 3% of his pre-disability earnings.

Dancing the Seven Physician Tango...Plus One

Dr. Isern-Psychiatrist

After receipt of his claim for football-related disability benefits, the NFL sent Atkins to a psychiatrist in Beaumont, Raul Isern, Jr., M.D. Atkins saw Dr. Isern on January 4, 2005. Dr. Isern never turned in a report to the NFL subsequent to his examination of Atkins.

Dr. Souryal-Orthopedic Specialist

The NFL then had Atkins examined by an orthopedic specialist in Dallas. The orthopedic specialist, Tarek Souryal, thought Atkins could perform many tasks that did not involve heavy lifting, but noted that "headaches and arm/hand numbness may signify non-orthopedic problem. Should have a neurologic eval." On the NFL form that he was asked to complete, Dr. Souryal wrote that he felt Atkins could work but that he had impairments to his neck and shoulder, and that these impairments were caused by playing NFL football.

Dr. Kesler-Psychiatrist

The next physician the NFL selected to examine Atkins was Keith Kesler, M.D., a psychiatrist in Austin. After conducting two examinations of Atkins, Dr. Kesler concluded that Atkins was totally disabled as a result of the following impairments: poor cognitive functioning, chronic pain with depressed mood, chronic headaches, and possible neurologic deficits. Dr. Kesler found that Atkins' chronic pain with depressed mood, chronic headaches, and possible neurologic deficits were all related to playing football. Like the orthopedic specialist Souryal, Kesler recommended that Atkins be examined by a neurologist and also recommended that Atkins see a pain specialist.

The First of Three Deadlocks: Atkins' Claim is Denied

After the NFL obtained the reports of Dr. Kesler and Dr. Souryal, the Disability Initial Claims Committee ("Committee"), which is the initial decision-maker for disability benefit claims brought under the NFL retirement plan, deadlocked in its decision whether Atkins was disabled (The Committee has two



members: one appointed by the player's association and one appointed by management). Atkins was advised that because the Committee had deadlocked, his application for disability benefits was denied by virtue of the plan's provision that renders a claim automatically denied when the Committee deadlocks.

Atkins' Appeal

ERISA has a structured claims procedure, formulated by the U.S. Department of Labor and placed within the U.S. Code of Federal Regulations, which both decision-makers and claimants are supposed to follow. One of ERISA's well-established rules is that all group benefit plans must give a claimant the right to appeal a denied claim. This appeal is sometimes referred to as a "full and fair review" of the claim, the phrase "full and fair review" coming directly from the ERISA statute that requires it. Simply put, the claimant can write a letter saying that he wants a review of the denial, and he has the opportunity to submit more documentation in support of his claim. At this reviewing stage, when the original documentation as well as new documentation is required to be reviewed, the parties are not viewed adversaries. In fact, ERISA law requires that the person or persons conducting the review of the denied claim act as the claimant's fiduciary. Being a fiduciary means acting fairly, honestly, and impartially when reviewing the claim.

Dr. Williamson-Orthopedic Specialist

Exercising his right to a full and fair review of his claim, Atkins appealed the Committee's decision. In response, the NFL sent Atkins to another orthopedic specialist and a neurologist. In July, 2005, Atkins was examined by J. Bryan Williamson, M.D., an orthopedic specialist in Houston. Dr. Williamson examined Atkins for approximately 30 minutes and found impairments to his neck, right shoulder, and thumb, all of which were caused by football, but Williamson indicated that he felt Atkins would be able to engage in a light duty or sedentary occupation.

Williamson summarized Atkins' condition:

"His right shoulder which gives him pain and discomfort and limited range of motion is directly related to playing football and injuries sustained while playing football. His neck pain which results from multiple level degenerative disease is related to his position to playing safety and repetitive trauma to his head and neck. It is important to note that persons of his age can have degenerative change similar to this on a degenerative basis only. It is felt that playing football in the NFL contributed to the significant degenerative change in his neck and pain in his neck."

About Atkins' severe headaches he said:

"Overall it is expected his neck and secondary cervical

The guiding principle of ERISA, according to the U.S. Supreme Court, is a “careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans.”

occipital headaches will continue to give him problems and difficulties in the future. It is unclear that there is any relationship of Mr. Atkins’ ability to concentrate or ability to work with others is related to his neck or shoulder problems.”

Dr. Martin-Neurologist

Then Atkins was also examined by Raymond Martin, a neurologist selected by the NFL. Dr. Martin determined that Atkins was disabled. He reported that the impairments which caused Atkins to be disabled were bilateral numbness in hands, frozen right shoulder, neck pain and limited range of motion in the neck, chronic headaches, and memory problems. On the NFL form, Martin indicated that the numbness in Atkins’ hands, his frozen right shoulder, and his neck pain all resulted from playing football. Martin was unable to say whether Atkins’ memory problems were related to football.

THE NFL PLAYER’S FIDUCIARY: THE NFL RETIREMENT BOARD

The NFL Retirement Board is the fiduciary that is required to conduct the full and fair review of a player’s denied claim. It has six members, three of whom are selected by the NFL Players’ Association (“NFLPA”) and three of whom are selected by the NFL Management Council.

The Second Deadlock: Atkins’ Claim Referred to a Medical Advisory Physician for a Binding Decision

After receipt of the additional medical examination reports, the Board announced that it had deadlocked on its review of the claim just as the Initial Committee had deadlocked. In a letter, Atkins was advised that pursuant to a retirement plan provision his claim would be referred to a Medical Advisory Physician (“MAP”) for a determination of disability that would be binding upon the Board.

TIME OUT: MORE ABOUT ERISA

Because it provides the explanation as to why Atkins’ claim was not decided at this point, it is appropriate to discuss ERISA in greater detail. According to the U.S. Congress, ERISA was enacted to:

“protect participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation of fiduciaries of employee benefit plans, and by providing appropriate remedies, sanctions, and ready access to the

Federal courts.”³

The guiding principle of ERISA, according to the U.S. Supreme Court, is a “careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans.”⁴

ERISA applies to most employee benefits in the private sector, most commonly pension benefits, disability benefits, health insurance benefits, and life insurance benefits. Although its primary focus is the regulation and protection of pension benefits, including the creation of a pension guaranty fund, ERISA governs other benefits, including disability benefits, and regulates how claims are to be handled. One of its stated purposes is to protect a claimant’s right to seek redress at the courthouse, but it also trumps, in legal nomenclature “preempts,” all state law, so that a claimant must exclusively rely upon ERISA law when seeking a legal remedy. The established case law on ERISA benefit claims has created a difficult incline for current and future claimants.⁵

No Live Testimony, No Cross-Examination, No Jury Trial

Because their disability claims are governed by ERISA, NFL players have no right to a jury trial. In deciding whether the NFL Board abused its discretion in denying a player’s claim, the trial is limited to a federal judge’s review of the claim file. Once the dispute is in court (which generally means once a complaint has been filed at the federal courthouse) players have no right to subpoena documents concerning the background or qualifications of the physicians who the NFL has asked them to see. The players have no right to testify or elicit live testimony from their spouses, former teammates, or treating physicians. They have no right to cross-examine physicians or adverse witnesses at trial.

A Player Must Prove that the NFL Board Abused its Discretion

Many of the rights denied a claim pursuant to ERISA are often considered fundamental. For example, a right to a jury trial to resolve a civil dispute over 20 dollars is supposed to be guaranteed by the Seventh Amendment.⁶ However, there is even a greater loss than the loss of a jury and the right to live testimony. Because the NFL retirement plan and supplemental disability plan grant the NFL Board the right to be king, i.e. full discretion to decide player benefit claims, established ERISA case law requires that a reviewing court defer to the NFL Board’s decision. The Board’s decision will not be tampered with unless the court finds that it abused its discretion. What this means is that the player must come to court with more than a “preponderance of the evidence” in his favor, which is the burden of proof required for the vast majority of civil claims. To win in court, the player must prove that the NFL Board acted arbitrarily and capriciously in denying his claim. The distance between these two burdens of proof is considerable. ERISA deference, the requirement that a

claimant prove at trial that the final decision-maker acted arbitrarily and capriciously, is a high hurdle, and is often the lynchpin of federal court decisions that are adverse to an ERISA claimant.

Onerous Plan Terms: A Clear and Convincing Evidence Standard

Although some details of ERISA plans are regulated (ERISA is primarily devoted to the regulation of pension plans), most details of a non-pension plan can be freely written (such as the definition of disability). Plan terms that seem innocuous or too esoteric to matter can have a real impact on benefit claims. An NFL player who has already been found disabled but who is receiving Inactive benefits, i.e. he has been found disabled by the NFL Board but his disability is found to be unrelated to football, has a much more difficult time upgrading to football-related benefits than a new claimant asking for the same thing. This is because the NFL plans require that a disabled claimant prove by clear and convincing evidence, rather than a preponderance of the evidence, that his disability should be reclassified as a football-related disability.

A typical civil trial is a contest between disputants on a level playing field. In a typical ERISA trial, the claimant starts within a hole on his side of the field because he must prove that the claims decision was an abuse of discretion. Disabled NFL players, deemed by the Board to be disabled for reasons other than pro football, start in a hole within the broader hole. The broader hole is the abuse of discretion standard where all players find themselves, the blacker hole within is the plan requirement that a player, already disabled, prove to the NFL Board by clear and convincing evidence that he should be upgraded to football-related benefits.

The Only Damages Will Be the Benefits that Should Have Been Paid

Finally, ERISA jurisprudence has stripped the players of the leverage that extra-contractual claims can provide. No matter how unreasonably the NFL Board may have responded to his claim or how much delay occurred as a result of its structural malformation (3 players association members and 3 management members) and internal dispute resolution deformity (no time clock on an arbitration when the Board is deadlocked), if a player is wildly successful at the courthouse the most he will receive are the monthly benefits that should have been paid in the first place. Unlike claims that can be brought under state tort law or under state insurance codes, no claims for consequential damages, mental anguish damages, or punitive damages can be brought against the NFL for either purposeful delay or for rendering an outlandish decision. Unreasonable delay and unreasonable decision-making are guaranteed a free ride (other than the possible payment of attorney's fees).

BACK TO ATKINS' CLAIM

At this point in the process, 10 months after Atkins submitted his claim, no decision had been reached. From an orthopedic perspective Atkins was found not disabled. But the physician specialists in neurology (Martin) and psychiatry (Kessler), physicians hand-picked by those that operate and manage



the NFL retirement plan and supplemental disability plan, determined Atkins to be totally and permanently disabled as a result of playing professional football.

In the absence of ERISA jurisprudence, there is little doubt that Atkins' claim for football degenerative disability benefits would have been quickly approved at this point. The NFL Board would be reckless indeed if they were to let Atkins have a jury trial where they would be forced to admit that they denied his claim even though from a psychiatric and neurologic perspective Atkins was found to be totally and permanently disabled as a result of playing pro football. There was no competing evidence from specialists in either discipline indicating otherwise. Furthermore, these were not findings by treating physicians who may have held a treatment bias in favor of their patient but instead were findings by medical specialists selected by the NFL! A large jury verdict in favor of Atkins would not be surprising. The NFL Board's insistence upon more examinations would probably be viewed by a jury as bad faith, that is, shopping for an opinion that the NFL Board wanted, i.e. an opinion of no disability or disability unrelated to football, and also motivated by delay.

However, because ERISA offers the claimant no possibility of a monetary remedy for unreasonable delay, Atkins was sent to more physicians.

Atkins' Claim Continues....For Another Four Years!

The MAP: Thomas Boll, Ph.D.-Neuropsychologist

Atkins was sent to see Thomas Boll, Ph.D. on December 29, 2005, whose opinion would break the second deadlock and bind the Board. Although the NFL retirement plan promises the players that only a physician may bind the Board when it deadlocks over a player's medical condition, the NFL Board assigned its decision on Atkins to Dr. Boll, who is not a physician but has a Ph.D. in neuropsychology. He is the Plus One in the Seven Physician Tango choreographed by the NFL. Dr. Boll opined that Atkins was disabled due to the impairments of illiteracy and borderline mental ability, major depression, and pain. He said Atkins' illiteracy and borderline mental ability were not related to football, that it could not be determined whether his depression was related to football, but indicated that his unresolved pain was caused by his pro football career.

Atkins Approved for Inactive Benefits

By letter dated February 23, 2006, approximately 14 months after Atkins applied for benefits, the Board notified Atkins that his claim for disability benefits had been approved. However, the NFL Board determined that his disability was unrelated to football, that is, he was approved for Inactive benefits. The Board found the effective date of disability, i.e. the date dis-

Dr. Cantu indicated that Atkins was not able to work due to demented mental status caused by head trauma from professional football activities and that this condition was permanent.

ability payments would commence, as being June 1, 2005. The NFL advised Atkins that he would receive \$1,822.50 per month (Inactive benefits have since increased slightly-as of April, 2010, Atkins is receiving \$2,650.50), to be divided equally with his ex-wife, pursuant to a divorce decree. As a result, Atkins began receiving \$911.25 per month from the NFL for his disability.⁷

Atkins was relieved to finally receive something from the NFL but didn't understand why he was only entitled to Inactive benefits, since Dr. Boll found some of his impairments were caused by playing pro football. He appealed the decision.

Atkins was sent to more doctors.

Dr. Gilbert-Neurologist

Although the neurologist Dr. Martin had already found Gene disabled from playing football, the NFL sent Atkins to Atlanta in June 2006 to see another neurologist, Dr. Robert Gilbert. According to Atkins, Dr. Gilbert conducted a physical exam on Atkins that lasted approximately five minutes and indicated that although Atkins was limited by pain from impairments caused by football, he felt Atkins could engage in some type of sedentary work.

The NFL Board denied Atkins' appeal, indicating that he was only entitled to Inactive benefits.

Dr. Robert Cantu-Neurosurgeon

When Atkins learned of the suicide death of his NFL contemporary Andre Waters, who also played safety, he sought more help for his depression and cognitive problems.⁸ He was led to Chris Nowinski, a Harvard graduate who suffers from post-concussion syndrome as a result of a brief pro wrestling career, and who subsequently wrote the book *Head Games: Football's Concussion Crisis*. Nowinski has been instrumental in creating the current public awareness surrounding concussions and their potential for long-term damage. Atkins talked with Nowinski, who referred him to a neurosurgeon named Robert Cantu, M.D. in February of 2007.⁹ Dr. Cantu practices in Concord, Massachusetts, and specializes in post-concussion injury to athletes such as Atkins. After conducting a number of tests on Atkins, Cantu diagnosed Atkins with post-concussion syndrome and early traumatic encephalopathy.¹⁰ Dr. Cantu indicated that Atkins was not able to work due to demented mental status caused by head trauma from professional football activities and that this condition was permanent. By letter dated October 5, 2007, the Committee denied the request for reconsideration and reclassification, but advised Atkins that he could appeal the determination.

The Social Security Administration Awards Atkins Benefits, Finding Atkins Severely Impaired by his Frozen Right Shoulder and Post-Concussion Syndrome

Additional support for Atkins' appeal was provided, in-

cluding interviews with Atkins and his wife Patricia along with a notice that Atkins had received from the Social Security Administration awarding him disability benefits from January 1, 1998 forward.

The Administrative Law Judge for the Social Security Administration, who decided that Atkins was disabled and should receive Social Security disability benefits, found that Atkins was "severely impaired" by post concussion syndrome and frozen right shoulder, and that Atkins was "unable to understand, remember, and carry out simple routine instructions on a sustained basis." He based his findings on the opinions of Dr. Cantu and the findings of Dr. Ronald DeVere, who had seen Atkins in May of 2007 at the government's request. A neurologist, Dr. DeVere found that Atkins had a significantly slowed mental functioning.

The NFL advised by correspondence that Atkins' claim would be presented to the NFL Board for decision at its next quarterly meeting on April 30, 2008. Atkins was advised after the Board meeting on April 30, 2008 that the Board had tabled its decision of his appeal and wanted Atkins to see yet another physician selected by the NFL. In June 2008, the NFL sent Atkins to Seattle to see neurologist James Gordon.

Dr. Gordon-The Third Neurologist Selected by the NFL

Just as he had seven times before, Atkins readily complied. He flew to Seattle and saw Dr. Gordon on June 25th, 2008. Dr. Gordon evaluated Atkins for the following health conditions: concussions, headaches, and memory loss. Dr. Gordon was the third neurologist and the eighth physician who evaluated Atkins at the request of the administrators of the NFL retirement plan.¹¹

On September 11, 2008, James Gordon delivered his report to the NFL. Dr. Gordon determined that Gene was totally disabled due to cognitive dysfunction and depression, indicating that both of these impairments arose in part as a result of Gene's NFL career. He also determined that Gene was impaired due chronic tension headaches and post-concussive headaches, which he also attributed to Gene's NFL career. Gordon summarized his findings as follows:

"It is impossible to distinguish the precise extent to which head injury causes, rather than exacerbates, Mr. Atkins's headaches, cognitive and behavior problems, given preexisting neuropsychological limitations and psychiatric predispositions. What is clear, however, is that he suffers disabling chronic headache, depression, and cognitive limitations, and that recurrent head trauma resulting from his role as an NFL defensive back contributed significantly to his current condition, even if that contribution cannot be reliably quantified. In his current condition, he cannot be gainfully employed."

A Third Deadlock

Atkins received a letter from the NFL on November 20, 2008, approximately four years after he had filed his disability claim and over three years after a neurologist (Martin) and psychiatrist (Kesler) selected by the NFL found Gene to be disabled as a result of playing professional football. The NFL told Atkins it was deadlocked for a third time (two deadlocks by the NFL Board, the final decision-maker; one deadlock by the Initial Claims Committee), indicating as follows:

“At its November 11, 2008 meeting, the Retirement Board of the Bert Bell/Pete Rozelle NFL Player Retirement Plan (“Plan”) considered your appeal from its earlier decision to award you inactive total and permanent (“T&P”) benefits effective June 1, 2005. The Retirement Board was deadlocked on the classification issue raised by your appeal. Pursuant to provisions of Plan section 8.3(a), the Retirement Board referred that issue to final and binding arbitration.

Please note that you are not a party to the arbitration. The arbitration is between the members of the Retirement Board appointed by the NFL Players Association and the members of the Retirement Board appointed by the NFL Management Council.....”

The Arbitration Decision

The arbitration to settle the dispute between NFL Board members over Atkins’ claim has taken over 18 months. Both parties have been represented by counsel.¹² Although so deeply entrenched that they engaged in a year and a half of litigation against one another, all of the Board members were supposed to remain Atkins’ fiduciary during this period, as this litigation was part of the ERISA-required full and fair review of his claim.

The Arbitrator, Mr. Richard Kasher, described the heart of the dispute between Board members as whether Atkins was entitled to “football-related total and permanent disability degenerative benefits because, as he claims, he suffers from post-concussion syndrome.” The basis of that claim was the diagnosis of post-concussion syndrome made by Dr. Cantu.

Mr. Kasher decided in favor of the management Board members. His decision rested on the “clear and convincing” evidence standard written into the NFL plan, the hole within the hole, at the bottom of which stands Mr. Atkins. Mr. Kasher summarizes the competing evidence and his decision as follows:

“Dr. Cantu’s opinion is qualified by his finding that Mr. Atkins’ CTE¹³ is based upon a “more probable than not” diagnosis. Such an opinion, as well-founded as it is by Dr. Cantu, a highly qualified and respected medical practitioner, does not, in this Arbitrator’s opinion, meet the “clear and convincing” standard of proof required to sustain Mr. Atkins’ claim.

.....

.....

Therefore, the resolution of the issues in this case require the analysis of the two plausible medical opinions/diagnoses of Gene Atkins’ cognitive dysfunction.¹⁴ In this Arbitrator’s opinion, neither the opinions of Dr. Cantu, Gordon and DeVere on the one hand and Dr. Boll on



the other rise to the level of clear and convincing evidence. And, as noted above, this Arbitrator is bound by that standard of proof.

Therefore, Mr. Atkins’ claim falls into the realm of “probability”, as both Doctors Cantu and Boll have implicitly acknowledged.”

The NFLPA Board members have submitted a request for reconsideration that is pending. December 2009 marked the fifth anniversary of the filing of Atkins’ claim for football-related disability benefits. Because there is a request for reconsideration pending, there has been no final Board decision (however, the Board is bound to follow the arbitrator’s decision). Atkins’ federal court claim, challenging the Board’s decision (whenever that occurs), hasn’t even begun.

OTHER PLAYERS WHO HAVE EXPERIENCED ERISA

The NFL’s handling of Gene Atkins’ claim is far from unique. In December 2005 the *Wall Street Journal* reported that only 90 out of more than 7,561 former pro players covered by the NFL disability plan receive football-related disability benefits.¹⁵ Drawn out claims and litigation over former players’ claims are easy to find. Although the preponderance of the evidence, i.e. the greater weight of the evidence, shows players to have valid football-related disability claims, under ERISA law that is often not enough, and therefore deserving players often lose. Here are a few examples.

Victor Washington

Physicians selected by the NFL said that Victor Washington, a former NFL defensive back, running back, and wide receiver, was disabled from football-related injuries, including depression from chronic pain.¹⁶ Washington filed his claim in 1983, seeking football-related benefits, and, like the Atkins case, the NFL Board deadlocked and after four years it was sent to an arbitrator. In 1987 the arbitrator found Washington to be disabled but that his disability was not related to football. In 1996 Washington requested reclassification based upon a neutral psychiatrist’s favorable findings, and the case settled in 1998, although litigation continued until 2007 over whether the NFL improperly withheld information prior to the settlement.

Donald Brumm

Donald Brumm played pro football between 1963 and 1972.¹⁷ He applied for disability benefits in November of 1984, requesting football-related benefits. Despite an NFL selected psychiatrist who found Brumm to be disabled from playing football, in January 1987, two years after Brumm filed his claim, the NFL Board decided Brumm should be paid Inactive benefits. Brumm

Found in a local train station in 1996, he was seen by a psychiatrist to whom he reported that he had been living out of his car and hotels the last three and one-half years.

challenged the decision at the courthouse and ultimately won when a federal appeals court decided in 1993 that the NFL acted arbitrarily and capriciously in denying Brumm football-related benefits. Even though it took Brumm nine years to obtain the football-related benefits that he deserved (over six years elapsed between the time that the psychiatrist selected by the NFL diagnosed Brumm with a football-related disability and the appeals court found in favor of Brumm) and the NFL was found to have acted arbitrarily in denying Brumm benefits, Brumm was entitled to nothing more than the benefits that he should have been paid in the first place.

Michael Webster

Iron Mike Webster is perhaps the most well-known football player to have battled the NFL on a disability claim, although his 7 year battle had to be finished by his estate because of his early death.¹⁸ Webster is remembered as a Pittsburgh Steeler, where he earned 4 Super Bowl rings. He played a total of sixteen years (between 1974 and 1991) and sustaining multiple concussions during his pro career. Webster's life deteriorated after football. Found in a local train station in 1996, he was seen by a psychiatrist to whom he reported that he had been living out of his car and hotels the last three and one-half years. In November of 1998, Webster was diagnosed with dementia caused by his football-related head trauma.

Webster applied for active football benefits, in the alternative degenerative football benefits, in the spring of 1999. After repeated delays, in 2003 the NFL granted him degenerative benefits but denied active football disability benefits (active football benefits provides more monthly benefits than degenerative football benefits), finding the onset of his disability to have occurred after his pro football career had ended. Litigation ensued and was not completed until 2006, when a federal appeals court (U.S. Fourth Court of Appeals) concluded that Webster should have received active football disability benefits. The court, noting the great burden that Webster had to overcome in prevailing on the case, wrote as follows:

"While recognizing that the decisions of a neutral plan administrator are entitled to great deference, we are nevertheless constrained to find on these facts that the Board lacked substantial evidence to justify its denial here. In particular, the Board ignored the unanimous medical evidence including that of its own expert, disregarded the conclusion of its own appointed investigator, and relied for its determination on factors disallowed by the plan....."

Despite the arbitrary denial by the NFL Board, the court could award nothing more than the benefits that should have been paid in the first place.

Otis Armstrong

The procedural delays of Armstrong's claim mirrors the delays experienced by Gene Atkins.¹⁹ Armstrong was a running back for the Denver Broncos, playing from 1973 until 1980. He was injured while playing in 1980 and did not play another down. He applied for active football disability benefits from the NFL in 1981. Like Atkins' claim, Armstrong's claim wound its way into a Board deadlock, the three player's association members siding with Armstrong and the three management members deciding that Armstrong was not disabled. Additional physician opinions were obtained and in 1986, five years after Armstrong's case was submitted, it was sent into arbitration to break the deadlock. Armstrong sought to rescind the arbitration by a federal court decision but it was denied. However, the arbitrator was ordered to rule within 30 days of submission of the briefs. In reciting the facts of the case in order to display what he called a "six-year senseless contest," Judge Kane, a federal judge from Denver, provided unrestrained criticism of the NFL Board:

"This brief and nonexhaustive chronology of plaintiff's experience since his 1980 injury is replete with delays, confusion, stalemates, and inconstancy in the part of the board and the persons under its control. Otis Armstrong has been the unfortunate forgotten victim of the struggle between NFL management and players."

Although Judge Kane is critical of the NFL's claims process, deservedly so since players like Armstrong and Atkins get lost in what can become an epic struggle between the players and management, to the NFLPA's credit, they did not fold to management's desire to withhold football disability benefits from Armstrong. At the time of Judge Kane's order, the physicians were lined up 5 to 2 in support of an award of football disability benefits.

Daniel Johnson

Johnson played NFL football from 1982 until he suffered a career-ending back injury.²⁰ He then fought the NFL regarding the onset date of his disability and lost in the 8th Circuit Court of Appeals. Although the physician count is noted to be two to one in favor of Johnson's claim, due to ERISA deference, Johnson lost. In ruling against Johnson, the Court, in a passive, hands-off manner which is typical of ERISA court decisions, concludes:

"Again, the Board has the authority to construe the terms of the Plan,

we are required to give deference to its interpretation, and we reverse only if it has abused its discretion.... Given the Plan's language, we cannot say that the Board's interpretation was unreasonable or constituted an abuse of discretion..."

Lawrence Smith

The NFL prevailed in the 9th Circuit Court of Appeals on Lawrence Smith's claim regarding the category of disability benefits that were paid to him (he was approved for degenerative football but not active football) and the date of onset of disability.²¹ As the Court notes, however, it took the NFL almost four years to decide his claim once he applied for benefits. Although the Court indicates that Smith was partly responsible for the delay because of his failure to submit information, four years is inexcusable, can cause financial devastation, and is the kind of legal delay that another depressed individual was talking about in his "to be or not to be" soliloquy, when reciting the reasons to "quietus make with a bare bodkin."²²

Anthony Green

Anthony Green played for four years in the NFL, 1990 until 1993.²³ His career was cut short as a result of injuries to his hands, knees, and shoulders. Green applied for disability benefits with the NFL in 1997. Although he applied for active football disability benefits, for which he was eligible even though he didn't have enough seasons to be vested so that he could apply for football degenerative or inactive benefits, the NFL Board sidestepped the merits of the claim. Instead, it denied Green's claim on the basis that he was not vested. The Court sent it back to the Board in 1999 because of the Board's avoidance of the claim's merits.

Brent Boyd

Brent Boyd was a Minnesota Viking from 1980 until 1987.²⁴ He filed a disability claim with the NFL for orthopedic ailments in 1997 and was denied. He filed another claim, this time for organic brain damage as a result of head trauma, in 2000. Like Atkins, Boyd was awarded inactive disability benefits. The NFL deferred his claim for football degenerative benefits. Boyd was sent to a neurologist selected by the NFL who found Boyd's disability to be football-related. Another physician viewed Boyd's brain scan and concurred with the neurologist. Boyd was then sent to a psychologist picked by the NFL who also found Boyd's disability to be football-related.

Still discontent, the NFL sent Boyd to yet another physician. This physician, a neurologist, opined that Boyd's disability was not football-related, i.e. that his head trauma from playing in the NFL did not cause organic brain injury. The Board followed the minority opinion, determining that Boyd was only entitled to Inactive disability benefits.

Boyd challenged the decision in court but lost in trial and in his appeal, primarily due to the throne of ERISA deference upon which the NFL Board sits. In denying Boyd's appeal, the Ninth Circuit wrote as follows:

"An ERISA administrator's exercise of its discretion to adjudicate claims is not a mere exercise in expert poll-taking. We hold that a mere tally of experts is insufficient to demonstrate that an ERISA fiduciary has abused its discretion, for even a single persuasive medical opinion may constitute substantial evidence upon which a plan administrator may rely in adjudicating a claim."

Boyd testified before Congress in 2007, claiming that the process was corrupt. Well-versed in ERISA as a result of his long battle with the NFL, he asked Congress for a change to



ERISA so that full discretion could not be what he described as a grant of "absolute power" to the Board.

CONCLUSIONS FROM THESE CLAIMS

Incredible Delay is Common

When placing Atkins's claim in a mixing bowl with these published claims, some conclusions can be made. One is that incredible delay is often the norm. Incredible is a fair description because in the world of non-ERISA disability claims, an insurer or administrator is required to decide the claim promptly or incur delay damages and penalties. Texas insurance law basically requires claims to be decided within 60 days or an 18% penalty will attach to all damages for wrongfully rejecting a claim. Not so here. State law protections are of no use to players like Brent Boyd, Otis Armstrong, or Gene Atkins. The underlying reason for the delay, a delay that may very well result in financial devastation to the player and his family, is that the law allows it. ERISA provides no monetary sanction against prolonged delay in making a decision on a disability claim.

A Player Does not Prevail Just Because the Evidence Weighs in his Favor

Also, it is clear that there are those sitting on the NFL Board who are willing to exploit the deference that they are given by the courts. Even if the greater weight of the evidence is in favor of football-related disability, decision-makers know that they can side with a minority medical opinion and get away with it often enough. It is naive to suggest that this kind of decision-making, taking advantage of the leverage given by ERISA deference rather than focusing on where the greater weight of the evidence lies, is limited to the NFL. Since it is legal and follows a basic profit motive (less claim payments, greater profit), this thinking is commonplace with ERISA insurers and claims administrators. It has spawned a cottage industry of "expert report" services, which are limited to providing expert consulting reports (the medical consultant doesn't see the patient; he or she merely renders an opinion of disability after reviewing the claim file) that can be tucked into an ERISA claim file, designed to insure that if the claim is taken to the courthouse, the court will find the decision reasonable, i.e. not arbitrary and capricious, even when the expert report is contrary to the greater weight of the medical evidence.

Plan Language Can Derail a Valid Claim

Although the average person may believe that a disabled employee should receive disability benefits if the greater weight of the evidence supports that decision, the plan language controls. The discretionary clause and the "clear and convincing"

Although esoteric, ERISA is often devastating in its application, allowing a denial of benefits to be affirmed even though the greater weight of the evidence supports the claim.

evidence standard put players at a significant disadvantage if they want to contest the Board's decision at the courthouse. The "clear and convincing" evidence standard, directed at players who are already disabled, requiring them to climb a higher hurdle than non-disabled players who also apply for football-related benefits, is an example of a provision that can deftly derail a valid football-related disability claim.



Gene Atkins

ATKINS: A TALLY OF THE EVIDENCE

Since Atkins filed his disability claim, he has seen nine physicians and one neuropsychologist. Eight of these specialists were selected by the NFL. The chronology of specialists and their findings are as follows:

1. Dr. Isern-Psychiatrist-never turned in an opinion.
2. Dr. Souryal-Orthopedist-impaired, but not disabled; recommended a neurologist because of headaches and hand-arm numbness;
3. Dr. Kesler-Psychiatrist-disabled-football related;
4. Dr. Williamson-Orthopedist-impaired, not disabled;
5. Dr. Martin-Neurologist-disabled-football-related;
6. Dr. Boll-Neuropsychologist-disabled-some impairments football-related, some not;
7. Dr. Gilbert-Neurologist-not disabled;
8. Dr. Cantu-Neurosurgeon-disabled-football-related;
9. Dr. Gordon-Neurologist-disabled-football-related; and
10. Dr. DeVere-Neurologist-disabled-football-related.

The two not selected by the NFL were Dr. Cantu and Dr. DeVere. Although the greater weight of the evidence clearly supports a finding of football-related disability, ERISA deference, in tandem with the clear and convincing evidence requirement inserted into the plan, have thus far caused Atkins to receive much less than he deserves.

CONCLUSION

It is a good thing that the long-term health effects of concussions is finally getting the study and exposure that it has long deserved. Prevention of potential brain injury is absolutely critical. However, for those already disabled, whether by concussions or otherwise, many face another challenge, an uphill road that often remains hidden from the landscape because of its dry detail. Although esoteric, ERISA is often devastating in its application, allowing a denial of benefits to be affirmed even though the greater weight of the evidence supports the claim. More public awareness of the difficulties which disabled players and other disabled employees throughout the private sector commonly face in trying to obtain disability benefits is needed. Perhaps the players mentioned here, gladiators like Gene Atkins who were paid to physically punish the opposing players game after game, year after year, with no weapons or instruments to generate force other than their own bodies, can help create that public awareness that may ultimately lead to a re-leveling of the scales in regards to ERISA benefit claims.

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1. The plan term "Total and Permanent" disability is to contrast it with the Line of Duty benefits. Line of Duty benefits are shorter-term disability benefits (although they can last up to 90 months) available to active players. Total and Permanent disability benefits are the long-term disability benefits, available for disabilities arising either during a player's NFL career or afterwards (but before the later of age 45 or 12 years after the end of a player's last credited season). The focus here is on long-term disability benefits: total and permanent disability.
2. *New York Times*, April 5, 2010.
3. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001(b) 2000.
4. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004).
5. Insurance carriers tell the story of ERISA advantage as well as anyone. The author received a brief this week requesting that the federal court in Austin find that the disability policy at issue in the case is an ERISA policy. Seeking the shelter ERISA provides, counsel for MassMutual writes in the opening paragraph:

"The Court should, at the outset, resolve the threshold issue of ERISA's applicability. If applicable, ERISA will dramatically impact the remaining proceedings. First, ERISA will preempt all of Smith's state law claims, leaving her with

only a claim for benefits under ERISA. Second, Smith will not be entitled to a jury trial. Third, the Court will review MassMutual's factual determinations that Smith was not disabled under an abuse of discretion standard. Fourth, the Court may consider only the evidence available to MassMutual, and the parties cannot supplement the record with oral testimony. (cites omitted)."

6. In fact, one of the many causes of the American Revolution was King George III's decree forbidding jury trials in the American colonies.

http://en.wikipedia.org/wiki/Seventh_Amendment_to_the_United_States_Constitution.

7. Atkins payment was reduced by 25% due to an early withdrawal of money from the retirement plan.

8. Waters was a safety like Atkins and played in the NFL at the same time as Atkins. An autopsy was done on Waters' brain after his death, from which it was determined that Waters had the brain of an 85 year old man. The deterioration of his brain was attributed to trauma as a result of the hard hits he delivered while in the NFL.

9. Nowinski and Cantu are co-founders of the Sports Legacy Institute, a non-profit organization founded in 2007, meant to research, inform, and help prevent brain trauma in sports.

10. "Encephalopathy" is generalized brain dysfunction marked by varying degrees of impairment of speech, cognition, orientation, and arousal. Taber's Cyclopedic Medical Dictionary, 20th Edition, page 698.

11. Dr. Gordon was the fourth neurologist that Atkins had seen after filing his claim, as neurologist Dr. DeVere examined Atkins at the request of the Social Security Administration.

12. Although they are fighting over Atkins' claim, with 3 management Board members taking a position adverse to Atkins' claim for football-related benefits, by ERISA law, all NFL Board members were required to remain a fiduciary to Atkins during this "full and fair" review process. The writer appreciates and gives a special thanks here to the NFLPA's counsel, Joseph "Chip" Yablonski, who kept Atkins' and his counsel advised of the Board's adversarial deliberations in keeping with the fiduciary requirements of the entire NFL Board. Although the management board members didn't communicate with Atkins or his counsel during the arbitration process, the brief which they filed after the arbitration hearing was concluded indicated that they relied heavily upon the "clear and convincing" evidence standard, and continued to urge



Dr. Boll's opinion that Atkins' disabling cognitive problems were not caused by football but were caused by functional illiteracy and bipolar disorder or depressive disorder.

13. CTE is chronic traumatic encephalopathy.

14. The opinion contrary to Dr. Cantu and Dr. Gordon was from Dr. Boll, the neuropsychologist, who believes that Atkins' cognitive dysfunction is not from post-concussion syndrome but is caused by a combination of functional illiteracy, psychiatric symptoms consistent with depressive disorder or bipolar disorder, and pain.

15. "A Hobbled Star Battles the NFL" Ellen E. Schultz, *Wall Street Journal*, December 3 – 4, 2005.

16. Facts taken from the case *Washington v. Bert Bell/Pete Rozelle NFL Retirement Plan* (9th Cir. 2007).

17. Facts taken from *Brumm v. Bert Bell NFL Retirement Plan*, 995 F.2d 1433 (8th Cir. 1993).

18. Facts taken from *Jani v. Bell*, 209 Fed. Appx. 305 (4th Cir. 2006).

19. Facts taken from *Armstrong v. Bert Bell NFL Player Retirement*, 646 F.Supp. 1094 (D. Colo. 1986).

20. Facts and quote taken from the Court's opinion in *Johnson v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 468 F.3d 1082 (8th Cir. 2006).

21. Facts taken from *Smith v. Bell*, 125 F.3d 859 (9th Cir. 1997).

22. "...for who would bear the whips and scorns of time, the oppressor's wrong, the proud man's contumely, the pangs of despised love, the law's delay, the insolence of office and the spurns the patient merit of the unworthy takes, when he himself might his quietus make with a bare bodkin..." Shakespeare's *Hamlet*, Act 3, Scene 1. Obviously, depressed and financially strapped players like Atkins are poorly equipped to handle a 4 or 5 year delay.

23. Facts taken from *Green v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, 1999 WL 417925 (N.D. Tex.).

24. Facts taken from *Boyd v. Bert Bell/Pete Rozelle NFL Players Retirement Plan*, 410 F.3d 1173 (9th Cir. 2005).