

A Paradigm Shift in Personal Injury Litigation: CMS Recognizes Traumatic Brain Injury as a Chronic Condition

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For years, personal injury attorneys litigating cases involving traumatic brain injury (TBI)—particularly “mild” TBI—have faced an uphill battle. Defendants and insurers frequently argue that mild TBI is transient and self-limiting. Plaintiffs’ counsel often must overcome skepticism about symptoms that are invisible, difficult to measure, and inconsistent across patients. Meanwhile, injured individuals struggle to receive adequate compensation for ongoing cognitive, emotional, and functional impairments.

But a recent federal policy change may shift this narrative.

As of January 1, 2025, the Centers for Medicare & Medicaid Services (CMS) now recognizes traumatic brain injury as a chronic condition for purposes of its Chronic Care Management program. (89 Fed. Reg. 29668, 29694 (Apr. 23, 2024).) In doing so, CMS places TBI in the same regulatory category as diabetes, multiple sclerosis, and heart failure. While the agency’s guidance does not distinguish between mild, moderate, or severe TBI, this broad classification implicitly recognizes the long-term impact of all forms of TBI—including those previously dismissed as “mild.”

This policy carries practical and rhetorical weight. In litigation, the term “chronic

condition” invokes a different evidentiary lens. It recognizes that symptoms may wax and wane, that treatment can be supportive rather than curative, and that recovery may be incomplete. It undermines the common defense argument that plaintiffs should have fully recovered within months of injury. It also suggests that TBI should be understood not merely as a discrete event, but as a lasting condition with serious implications for quality of life, earning capacity, and long-term care needs.

As a mediator handling personal injury and medical malpractice disputes, I’ve seen firsthand how the lack of consensus around “mild” TBI derails negotiations. Counsel often struggle to bridge the divide between visible injuries and the lived experience of cognitive fog, mood disruption, or impaired executive functioning. The new CMS designation may offer a path forward—grounding negotiations in a shared recognition that even so-called “mild” TBIs can have serious, long-lasting consequences.

This recognition carries implications on both sides of the aisle. By characterizing TBI as a chronic condition, the policy may prompt renewed focus on issues of causation and apportionment. Claimants with pre-existing neurological, psychiatric, or cognitive conditions—whether documented (e.g., prior concussions, ADHD, PTSD, early-stage

dementia) or undiagnosed—may present a more complex evidentiary record.

This invites renewed focus on **comparative fault** and **percentage of responsibility** under doctrines like California’s *Li v. Yellow Cab* framework or similar comparative causation models. Plaintiffs may find themselves needing to rebut the assertion that the injury merely “triggered” or “accelerated” a pre-existing trajectory—raising the stakes for expert analysis, diagnostic clarity, and baseline medical history.

Key Takeaways for Litigators and Claims Professionals:

- The CMS rule supports a broader, medically informed view of TBI that aligns with recent neurological research.
- Plaintiffs’ counsel may now cite federal recognition of chronicity as persuasive authority in both settlement negotiations and litigation.
- Defense counsel may challenge the extent to which an accident is the sole or primary cause of lasting impairment, particularly where pre-existing vulnerabilities are present.
- Both sides will need to engage in more nuanced evaluations of apportionment, damages, and the role of prior conditions—diagnosed or latent.

Ultimately, this policy shift may reduce the adversarial nature of TBI litigation by reframing the condition as one that deserves thoughtful, long-term attention—while also sharpening the focus on causation in cases involving

complex medical histories. In this evolving landscape, **the right mediator can make a meaningful difference**. TBI claims often require a neutral who not only understands the legal doctrines surrounding apportionment, but who is also conversant with the medical nuances of brain injury—its diagnosis, variability, and long-term impact. Effective mediators in this space must be able to translate complex medical testimony into risk-informed negotiation, manage emotionally charged dynamics, and maintain trust across asymmetrical narratives. When selecting a mediator for a TBI case, look for someone with experience in catastrophic injury or medical-legal matters, demonstrated patience and persistence, and a reputation for balancing empathy with candor. In cases where diagnosis and damages are contested, this kind of steady, informed guidance can help parties bridge difficult gaps—and move toward durable resolution.