LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Ontario

Tribunal File Number: 17-006124/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act,* RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

Amandeep Brar

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR: **Christopher A. Ferguson**

APPEARANCES

Mariya Verkhovets,	Counsel for the Applicant
Ramandeep Pandher,	Counsel for the Respondent

Heard in Writing: **May 14, 2018**

OVERVIEW

[1] AB was involved in an automobile accident on September 18, 2015, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] ("the *Schedule*").

[2] AB applied to the Licence Appeal Tribunal ("the Tribunal") when the disputed benefits were denied by Aviva.

PRELIMINARY ISSUE

[3] The Order for this hearing included an issue of whether AB is barred from appealing Aviva's decision on his claim for non-earner benefits (NEBs) because she failed to attend an insurer's examination (IE) requested by the respondent under s.44 of the *Schedule.*

[4] I note that Aviva's submissions did not address this issue at all, and therefore conclude that the issue is effectively withdrawn.

SUBSTANTIVE ISSUES

[5] The substantive issues before me are:

1. Are AB's injuries considered predominantly minor injuries as defined in s. 3.1 of the *Schedule*, and therefore subject to treatment within the Minor Injury Guideline?

2. If AB's injuries are not predominantly minor:

    a) Is AB entitled to payment in the amount of $3,939.4 for physiotherapy services as set out in a treatment and assessment plan dated October 13, 2015 from Complete Rehab Centre, denied by the respondent on October 19, 2015?

    b) Is AB entitled to payment in the amount of $2,248.90 for occupational therapy services as set out in a treatment and assessment plan dated October 19, 2015 from Complete Rehab Centre, denied by the respondent on October 23, 2015?

    c) Is AB entitled to payment in the amount of $2,108.11 for chiropractic services as set out in a treatment and assessment plan dated February 9, 2016 from Complete Rehab Centre, denied by the respondent on February 17, 2016?

    d) Is AB entitled to payment in the amount of $1,816.74 for physiotherapy services as set out in a treatment and assessment

[1] O.Reg. 34/10

plan dated May 25, 2016 from Complete Rehab Centre, denied by the respondent on May 25, 2016?

e) Is AB entitled to payment in the amount of $1,816.74 for physiotherapy services as set out in a treatment and assessment plan dated July 14, 2017 from Complete Rehab Centre, denied by the respondent on July 28, 2017?

f) Is AB entitled to payment in the amount of $2,200.00 for a neurology assessment dated April 12 ,2016 as set out in a treatment and assessment plan dated January 20, 2016 from Complete Rehab, denied by the respondent on January 27, 2016,

g) Is the applicant entitled to payment in the amount of $2,460.00 for a psychology assessment as set out in a treatment and assessment plan dated April 29, 2016 from Complete Rehab, denied by the respondent on May 5, 2016,

h) Is the applicant entitled to payment in the amount of $2,460.00 for a physiatry assessment as set out in a treatment and assessment plan dated May 6, 2016 from Complete Rehab, denied by the respondent on May 13, 2016,

i) Is the applicant entitled to payment in the amount of $2,460.00 for a chronic pain assessment as set out in a treatment and assessment plan dated April 26, 2016 from Complete Rehab, denied by the respondent on April 28, 2016?

j) Is the applicant entitled to payment in the amount of $2,460.00 for an orthopaedic assessment as set out in a treatment and assessment plan dated September 8, 2016 from Complete Rehab, denied by the respondent on September 15, 2016?

k) Is AB entitled to payment in the amount of $1,786.09 per month for attendant care benefits from September 18, 2015 to September 18, 2017, denied by the respondent on November 26, 2015?

3. Is AB entitled to NEBs in the amount of $185.00 per week from July 8, 2016 to date and ongoing, denied by the respondent on July 8, 2016?

4. Is the applicant entitled to interest for the overdue payment of benefits?

5. Is the respondent liable to pay an award pursuant to s.10 of Reg.664, RRO 1990 because it unreasonably withheld or delayed payments to the applicant?

FINDINGS

[6] ABs injuries are predominantly minor, and governed by the MIG.

[7] AB has failed to meet the onus on her to prove her entitlement to NEBs. Her appeal on this issue is dismissed.

[8] AB withdrew her Award claim in her submissions.

REASONS

Are AB's injuries predominantly minor?

[9] Section 3(1) of the *Schedule* defines a minor injury as "one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury and includes any clinically associated sequelae to such an injury." It also defines these injuries.

[10] Section 18(1) limits the entitlement for medical and rehabilitation benefits for minor injuries to $3,500.

[11] Section 14.2 restricts the payment of attendant care benefits (ACBs) to persons whose injuries are not minor.

[12] The onus is on the applicant, AB, to show that her injuries fall outside of the MIG[2]

[13] The respondent argues that all of the applicant's injuries fit the definition of "minor injury" prescribed by s. 3(1) of the *Schedule*, and therefore, fall within the Minor Injury Guideline ("the MIG"). The applicant's position is exactly the opposite.

[14] If the respondent's position is correct, then the applicant is subject to the $3,500.00 limit on medical and rehabilitation benefits prescribed by the s. 18(1) of the *Schedule*, and in turn, a determination of whether claimed benefits are reasonable and necessary will be unnecessary as the $3,500.00 maximum benefit for minor injuries has been exhausted.

[15] If the applicant is right, and her injuries are not minor, I must determine her entitlement to the claimed treatment and assessment plans.

[16] AB's position on whether the injuries that she sustained as a result of the accident were predominantly minor is frankly poorly articulated and unclear. I find that she has not made out a case for removal from the MIG for the following reasons:

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[2] *Scarlett v. Belair,* 2015 ONSC 3635 para.24

i. AB submits MRIs taken on December 27 and December 29, 2015 reveal a range of cervical and lumbar spinal problems. All of these are degenerative in nature – as AB acknowledges. Nowhere in her submission does AB make it clear whether her claim is that these injuries were caused by the accident or that that she should be removed from the MIG because she has a pre-existing condition that prevents her from achieving maximal medical recovery within the MIG.

ii. AB's submissions indicate that she suffers from ongoing pain, but fails to set out an argument that this amounts to a chronic pain condition that could remove her from the MIG.

iii. She also refers to psychological injuries, which is another ground for removal from the MIG, but again without articulating a clear case for psychological impairment in relation to the MIG.

[17] AB relies on the following medical experts to support her claims (and also her claim for NEBs and ACBs below):

i. Dr. Lance B. Majl, neurologist, who found that AB "sustained serious injuries from a neurological perspective alone" and "that these injuries prevent [AB] from providing caregiving housekeeping and home maintenance tasks." (neurological assessment report dated April 7, 2016).

ii. Dr. Manoj Bhargava, orthopedic surgeon, who concluded that AB "is disabled with respect to her household duties and would only be able to do very light tasks." He found AB incapable of bending, stooping, moderate lifting, prolonged walking, standing or sitting, and above-shoulder reaching and lifting. These restrictions prevent her from engaging in "the vast majority" of her pre-accident activities of daily living (ADLs).

[18] After reviewing the above-noted reports, I find that AB has failed to meet the onus on her to prove that she should be removed from the MIG because the medical reports she relies on are unpersuasive:

i. Dr. Bhargava's report is internally contradictory. The doctor notes normal findings with respect to mobility, range of cervical and lumbar spinal motion, spinal lordosis, muscle strength, and negative Spurling's signs[3] and Wadell's signs.[4] Yet somehow the physician concluded, without explaining the discrepancy between his normal findings and his assertions about AB's physical restrictions, that AB was at risk for chronic pain. I find this makes his report non-credible, a finding amplified by his failure to directly address the MIG issue.

[3] i.e. signs of pain and/or numbness radiating from the neck – a negative result is normal/good.
[4] i.e. signs that point to non-organic origins of pain, which can be associated with chronic pain syndrome

ii. I assign little probative value to Dr. Majl's report, because it doesn't address the MIG issue – why the applicant cannot be treated adequately within the MIG cap. It also fails to clearly link the chronic headaches in the report to the accident. Finally, the diagnosis of cervicogenic headaches resulting from injury to the C-1 – C-3 facet joints is unsupported by any diagnostic imaging.

iii. AB fails to submit medical evidence to explain how the results of diagnostic imaging prove a pre-existing condition that could remove her from the MIG.

[19] I find that AB has failed to meet the onus on her to prove that she should be removed from the MIG on psychological grounds:

i. In a psychological assessment completed by Dr. Clewes, AB did not endorse any symptoms of psychological problems or meet the diagnostic criteria for a DSM diagnosis. (IE report dated July 5, 2016).

ii. AB's complaints to her family physician and others regarding psychological issues, which led to a referral by Dr. Majl, are contradicted by her statements to Dr. Clewes.

[20] As the result of my finding on the MIG issue, it is unnecessary for me to determine whether specific medical benefits or ACB claims are reasonable and necessary.

NEBs:

[21] Section 12 of the *Schedule* requires an insurer to pay a non-earner benefit ("NEB") to an insured person who does not qualify for an income replacement benefit and who suffers a complete inability to carry on a normal life as the result of an impairment sustained in an accident. The compensable impairment must arise within 104 weeks after the accident.

[22] Section (3)(7)(a) explains that "a person suffers a complete inability to carry on a normal life […] if, as a result of the accident, the person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident."

[23] In determining this dispute, I have considered and applied criteria for meeting the test for NEB entitlement have been articulated by the courts in a case called *Heath v. Economical Mutual Insurance*[5] (*"Heath*"), specifically:

i. "… a claimant who merely goes through the motions cannot be said to be engaging in an activity" and that "the question is not whether he can do

[5] *Heath v. Economical*, 2009, 95 OR (3d) 785, cited by Aviva

the activity, but whether [the impairment] practically prevents engaging in activity".

ii. It is not enough to show changes from pre- to post-accident activities; the claimant must be continuously prevented from engaging in substantially all of her pre-accident activities.

iii. The manner in which an activity is performed and the quality of performance post-accident must be considered. If the degree to which a claimant can perform the activity is sufficiently restricted, it cannot be said that he or she is engaging in the activity.

iv. Proving disability is not sufficient to satisfy the requirements of s.12(2) of the Schedule. The applicant must establish on a balance of probabilities that his disability prevents him from engaging in substantially all of the activities in which he engaged before the accident.

v. Where pain is the primary factor preventing an applicant from engaging in former activities, the applicant must show that the degree of pain experienced by the applicant either during or subsequent to the activity renders the applicant practically unable to engage in the activity.

[24] To rebut AB's claim for NEBs, the respondent argues that she has simply failed to provide any of the evidence needed to meet the criteria set out in *Heath*:

i. AB has failed to provide a list of the activities she enjoyed pre-accident in order to determine the changes to her pre- versus post-accident levels of activity.

ii. AB has made no written submissions about her degree of pain and its role in preventing her from participating in her pre-accident activities.

[25] In addition, Aviva submits that AB's claim is contradicted by her own statements to different medical assessors, for example:

i. AB reported to Dr. Khan that she had returned to her housekeeping chores for the most part, including cooking, cleaning and laundry. She said that she was independent in her self-care tasks such as bathing, dressing and feeding herself. (IE report dated July 5, 2016)

ii. During an OT assessment with Harish Sharma AB reported that she was independent in bathing, hair care, dressing, grooming, hygiene, food preparation, hand washing dishes, going grocery shopping inside the store, laundry, dusting, sweeping, mopping (with some pain), vacuuming (with some pain), wiping counters, cleaning the tub, cleaning toilets, making the bed, garbage removal, and also reported that she continues to provide the required care to her child. She also

did not report any difficulties with social activities to Mr. Sharma (IE report dated July 5, 2016). This was reinforced by the in-home assessment by Harish Sharma on December 23, 2015, which demonstrated that AB was fully mobile, independent with personal self-care/grooming, and independent with cooking and feeding herself.

iii. In a psychological assessment completed by Dr. Clewes, AB did not endorse any symptoms of psychological problems or meet the diagnostic criteria for a DSM diagnosis (IE report dated July 5, 2016).

[26] Taken together, I find that AB's own statements to IE assessors establish that she has resumed a significant portion of her pre-accident activities and thereby contradict any assertion that she was continuously prevented from engaging in substantially all of her pre-accident activities.

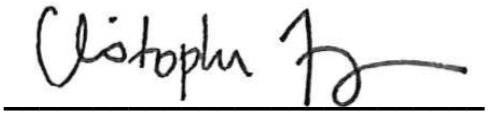
[27] The applicant makes no explanation for the discrepancies in self-reporting in the different examinations. Her limited arguments about methodological flaws in one of the respondent's IE reports focus on other issues altogether. She does not attack the veracity of the IE reports on her own statements. Accordingly, I am confident in giving the IE reports substantial weight in determining how the applicant's self-reporting speaks to her claims of complete inability to carry out pre-accident activities.

[28] AB's own statements defeat her claim to NEBs. AB's claim for NEBs is dismissed.

CONCLUSIONS

[29] AB's appeal is dismissed.

Released: June 20, 2018



Christopher A. Ferguson
Adjudicator