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

Date: 2018-06-20
Tribunal File Number: 17-006124/AABS
Case Name: 17-006124 v Aviva Insurance Canada

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:

Applicant

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR: **Christopher A. Ferguson**

APPEARANCES

For the Applicant: Mariya Verkhovets, Counsel

For the Respondent: Ramandeep Pandher, Counsel

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

OVERVIEW

[1] [The applicant] 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] [The applicant] 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 [the applicant] 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I note that Aviva's submissions did not address this issue at all, and therefore conclude that the issue is effectively withdrawn.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 [the applicant]'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 [the applicant]'s injuries are not predominantly minor:

    a) Is [the applicant] 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 [the applicant] 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 [the applicant] 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 [the applicant] entitled to payment in the amount of $1,816.74 for physiotherapy services as set out in a treatment and

[1] O.Reg. 34/10

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

e) Is [the applicant] 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 [the applicant] 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 [the applicant] 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 [the applicant] 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] [The applicant]'s injuries are predominantly minor, and governed by the MIG.

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

[8] [The applicant] withdrew her Award claim in her submissions.

REASONS

Are [the applicant]'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, [the applicant], 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] [The applicant]'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

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

find that she has not made out a case for removal from the MIG for the following reasons:

i. [The applicant] 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 [the applicant] acknowledges. Nowhere in her submission does [the applicant] 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. [The applicant]'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] [The applicant] 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 [the applicant] "sustained serious injuries from a neurological perspective alone" and "that these injuries prevent [[The applicant]] from providing caregiving housekeeping and home maintenance tasks." (neurological assessment report dated April 7, 2016).

ii. Dr. Manoj Bhargava, orthopedic surgeon, who concluded that [the applicant] "is disabled with respect to her household duties and would only be able to do very light tasks." He found [the applicant] 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 [the applicant] 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

[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

explaining the discrepancy between his normal findings and his assertions about [the applicant]'s physical restrictions, that [The applicant] 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.

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. [The applicant] 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 [The applicant] 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, [the applicant] did not endorse any symptoms of psychological problems or meet the diagnostic criteria for a DSM diagnosis. (IE report dated July 5, 2016).

ii. [The applicant]'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 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 [The applicant]'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. [The applicant] 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. [The applicant] 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 [the applicant]'s claim is contradicted by her own statements to different medical assessors, for example:

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

i. [The applicant] 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 [the applicant] 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 [the applicant] 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, [the applicant] 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 [the applicant]'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] [The applicant]'s own statements defeat her claim to NEBs. [The applicant]'s claim for NEBs is dismissed.

CONCLUSIONS

[29] [The applicant]'s appeal is dismissed.

Released: June 20, 2018

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Christopher A. Ferguson
Adjudicator