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

File Number: 18-005677/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:

Peter DiGrado

Applicant

and

Aviva General Insurance

Respondent

DECISION

ADJUDICATOR: **Lindsay Lake**

APPEARANCES:

For the Appellant: Erika Tower, Counsel

For the Respondent: Geoffrey Keating, Counsel

HEARD IN WRITING: **February 11, 2019**

OVERVIEW

[1] The applicant, Peter DiGrado ("P.D."), a self-employed photographer, was injured in a rear-end automobile accident on December 4, 2014 (the "accident") and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*") from the respondent, Aviva General Insurance ("Aviva").

[2] Aviva denied P.G.'s claim for a treatment plan for physiotherapy and massage therapy and, as a result, P.D. submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

[3] A case conference was held on October 15, 2018, and the matter proceeded to a written hearing on February 11, 2019.

ISSUES IN DISPUTE

[4] The following issues are to be decided:

(i) Is P.D. entitled to receive a medical benefit in the amount of $3,125.02 for physiotherapy services and massage therapy recommended by James DeSanto of Velocity Sports Medicine ("Velocity") in a treatment plan submitted on January 12, 2018, and denied by Aviva on April 2, 2018?

(ii) Is P.D. entitled to interest on any overdue payment of benefits?

PRELIMINARY ISSUE

[5] As part of his submissions, P.D. requested that the totality of the records from Velocity be accepted into evidence for this hearing. In an October 15, 2018 Order, the Tribunal determined that the evidence of the hearing would be limited to documents previously exchange between the parties on or by November 14, 2018. P.D. concedes his non-compliance with the Order, as Velocity's records were served on Aviva on December 14, 2018. Aviva made no submissions regarding P.D.'s request.

[6] I am allowing Velocity's records into evidence for this hearing in their totality. I agree with P.D. that the records are relevant and Aviva has not been prejudiced by the inclusion of this evidence, as Aviva was in possession of Velocity's records one month prior to its written submissions being due on January 14, 2019.

RESULT

[7] I find that P.D. has not proven on a balance of probabilities that the proposed treatment plan for physiotherapy services and massage therapy is reasonable and necessary. Accordingly, no interest is owed and the application is dismissed.

ANALYSIS

The Treatment Plan

[8] Sections 14 and 15 of the *Schedule* provide that the insurer shall pay medical benefits to, or on behalf of, an applicant so long as the applicant sustains an impairment as a result of an accident and the medical benefit is a reasonable and necessary expense incurred by the applicant as a result of the accident.

[9] P.D. bears the onus of proving his entitlement to the claimed physiotherapy services and massage therapy by proving they are reasonable and necessary on a balance of probabilities.[1]

[10] The January 12, 2018 treatment plan in dispute was completed by Mr. James DeSanto, physiotherapist, and sought funding for 35 sessions of physical rehabilitation with Mr. DeSanto and 5 sessions of massage therapy. Information under the injury and sequelae information included: whiplash associated disorder (WAD 2) with complaint of neck pain with musculoskeletal signs; and sprain and strain of lumbar spine. Mr. DeSanto answered “yes” to whether or not P.D.’s impairments affect his ability to carry out the tasks of his employment and his activities of normal life. The goals of the treatment plan were to reduce P.D.’s pain, to increase his strength and range of motion, and to return P.D. to his activities of normal living and pre-accident work activities.

[11] P.D. submitted that the treatment plan is reasonable and necessary to treat P.D.’s impairments. P.D. argued that the goals of the treatment plan are reasonable, and specific methods were set out to evaluate P.D.’s progress. P.D. relied upon his continued attendance at Velocity since December 12, 2014 for treatment despite Aviva’s denials, as he claims that the treatment he received assisted in reducing his pain, increasing his range of motion and strength, and allowed him to regain functioning and return to his activities of normal living and pre-accident work activities. P.D. submits that when he does not receive treatment, his pain increases, his range of motion and strength decreases and his functional abilities are reduced and restricted. P.D. argues that the treatment

[1] *Scarlett v. Belair Ins. Co.*, *supra* note 10, paras. 20-24.

sought is reasonable and necessary for him to "maintain a post-accident baseline level of functioning."[2]

[12] Aviva denied the treatment plan in dispute on April 2, 2018 following an insurer's examination (IE) by Ms. Dawn Rodie, physiotherapist, as she found that the treatment plan was not reasonable and necessary. Aviva also submitted that the stated goals of the treatment plan cannot be achieved through the requested treatment and, as such, the treatment plan is not reasonable and necessary.

[13] I find that P.D. has failed to prove on a balance of probabilities that the treatment plan is reasonable and necessary for the following reasons:

(i) P.D. did not submit as evidence any referral or recommendation for physiotherapy from Dr. Danuta Malinowski, P.D.'s former family physician, or from his new family doctor aside from one referral from Dr. Malinowski dated December 11, 2014,[3] which was over three years prior to the date of the treatment plan in dispute;

(ii) Physiotherapy was not recommended by the medical experts who assessed P.D. For example, P.D. was examined by Dr. Eric Duncan, neurosurgeon, on three occasions and on all three occasions (August 30, 2016, May 29, 2018 and July 3, 2018),[4] Dr. Duncan recommended an active exercise program as opposed to physiotherapy or massage therapy. Dr. Duncan's recommendation is consistent with the recommendation made by Ms. Rodie in her IE Physiotherapy Assessment Report dated March 22, 2018,[5] as she recommended that P.D. continue with his established home exercise program;[6]

(iii) As the evidence supports that P.D. has reached maximum medical improvement, the type of treatment proposed in the treatment plan would not achieve the stated goals of increasing P.D.'s strength and range of motion. Ms. Rodie opined in her March 22, 2018 report that P.D. had reached maximum medical improvement and described his condition as "static." As a result, Ms. Rodie found that the proposed treatment would not likely result in further sustained benefit to P.D.[7] To support her opinion, Ms. Rodie reported that P.D. had reduced cervical spine range of

[2] Applicant's Submissions, para. 38.
[3] Applicant's Submissions, tab 3.
[4] Applicant's Submissions, tabs 11, 14 and 16.
[5] Written Submissions of the Respondent, tab H.
[6] *Ibid*. at page 6.
[7] *Ibid*. at pages 5-6.

motion, recued lumbar spine range of motion, reduced left-side grip strength, reduced bilateral shoulder range of motion, tenderness to palpation in the cervical paraspinals, lumbar paraspinals and difficulty transitioning positions, which was substantially the same observations that she made of P.D. in a previous April 2017 IE[8] despite P.D. receiving ongoing treatment between the two assessment dates at Velocity;[9]

(iv) Ms. Rodie's opinion that P.D. has reached maximum medical improvement is supported by the findings of P.D.'s assessor, Dr. Sree Harsha Malempati, orthopaedic surgeon. In his November 30, 2017 Orthopaedic Assessment Report,[10] Dr. Harsha Malempati found that P.D.'s neck and back impairments were "permanent," stated that he does not expect P.D. to improve considerably over time and opined that P.D.'s condition may worsen in the future.[11] Despite these findings, Dr. Harsha Malempati does not conclude that P.D. has reached maximum medical improvement (or recovery), but rather recommends that P.D. "continue indefinitely" with a multidisciplinary rehabilitation program, including physiotherapy and massage therapy, in order to prevent deconditioning and deterioration of his injuries.[12] In my opinion, Dr. Harsha Malempati's findings and recommendation of an indefinite rehabilitation program support Ms. Rodie's findings that P.D. has reached maximum medical improvement. Further, it appears from P.D.'s submissions in support of the proposed treatment plan to "maintain a post-accident baseline level of functioning" that P.D. also accepts that he has reached maximum medical improvement;

(v) The stated goals of returning P.D. to his activities of normal living and pre-accident work activities in the treatment plan are also not achievable. P.D. consistently reports that he has already returned to pre-accident activities with regards to his self-care, his employment (with certain limitations regarding driving, carrying equipment and sitting), cooking, cleaning and laundry. The proposed treatment plan would not achieve the goal of returning P.D. to activities that he has not returned to, or has not fully returned to, based upon Dr. Harsha Malempati opinion that P.D.'s permanent lower back and neck impairments would prevent him from functioning at a pre-injury level.[13] Therefore, the goal of achieving a return

[8] Written Submissions of the Respondent, tab I.
[9] *Supra* note 5 at page 5.
[10] Applicant's Submissions, tab 13.
[11] *Ibid*. at page 9.
[12] *Ibid*. at pages 9-10.
[13] *Supra* note 10 at page 9.

to more of his pre-accident activities is not attainable given that P.D. has reached maximum medical improvement and his own assessor does not expect him to return to a pre-accident level of functioning; and

(vi) There is no evidence that the proposed treatment plan would achieve the goal of pain reduction. Despite ongoing treatment with Velocity, P.D. has failed to report a reduction in pain in his neck and lower back. For example, P.D. reported to Dr. Sangita Sharma, physician, in a physician IE assessment on November 19, 2015,[14] that his pain level in his neck was 8.5/10 at worst to 4/10 at best, and that the pain level in his low back was a 6/10 to 9/10.[15] No substantial pain level reduction is reported by P.D. to Ms. Rodie in March 2018 when he reported a pain level of 7/10 to 9/10 in his neck and 7.5/10 to 9.5/10 in his low back.[16] As P.D. attended treatment at Velocity between Dr. Sharma's 2015 assessment and Ms. Rodie's 2018, there is no evidence to support that the treatment he received reduced his neck and low back pain.

Interest

[14] As I have found that P.D. is not entitled to the treatment plan in dispute, there is no benefit owing and, therefore, no interest is payable.

Costs

[15] In his submissions, P.D. requests costs against Aviva.

[16] The issue of costs was not listed as an issue in dispute between the parties in the Tribunal's Order dated October 15, 2018 Order. Rule 19.2 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission's Common Rules of Practice and Procedure, Version I* (October 2, 2017) (the "*Rules*"), however, allows for written requests for costs to be made to the Tribunal at a hearing. Therefore, P.D.'s requests for costs is properly before me.

[17] I am not granting P.D.'s requests for costs in this matter as he failed to prove on a balance of probabilities that Aviva acted unreasonably, frivolously, vexatiously or in bad faith in the proceeding, as he provided no reasons for his request, which is a requirement pursuant to Rule 19.4. Further, P.D. submitted no

[14] Written Submissions of the Respondent, tab J.
[15] *Ibid*. at page 5.
[16] *Supra* note 5 at page 5.

evidence and made no submissions beyond his request for costs and, as a result, his request for costs is denied.

CONCLUSION

[18] For the reasons outlined above, I find:

(i) P.D. is not entitled to the treatment plan for physiotherapy and massage therapy submitted to Aviva on January 12, 2018, as he has failed to prove on a balance of probabilities that the proposed treatment plan is reasonable and necessary;

(ii) as there is not overdue benefit, no interest is payable; and

(iii) the application is dismissed.

Released: June 21, 2019

Lindsay Lake
Adjudicator