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

Citation: T.M. v. Aviva Insurance Company, 2020 ONLAT 19-004839/AABS

Released Date: 09/24/2020
File Number: 19-004839/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:

Teresa Marca

Applicant

And

Aviva Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: **Avril A. Farlam**

APPEARANCES:

For the Applicant:	Olga Poznyakova Counsel
For the Respondent:	Ramandeep Pandher Counsel

HEARD by Way of Written Submissions

REASONS FOR DECISION AND ORDER

OVERVIEW

[1] Teresa Marca (the “applicant”) was involved in a motor vehicle accident on April 14, 2017 (the “accident”). The applicant was 79 years of age at the time of the accident. The applicant sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule"). [1] The applicant was denied certain benefits by Aviva Insurance Company (the “respondent”) and submitted an application to the Licence Application Tribunal - Automobile Accident Benefits Service (the “Tribunal”).

[2] The respondent denied the applicant’s claim for non-earner benefits (“NEB”) and a medical benefit for physiotherapy services on the basis that it is not reasonable and necessary. The applicant’s position is the opposite.

ISSUES

[3] The issues to be decided in this hearing are:

i. Is the applicant entitled to receive an NEB in the amount of $185.00 per week for the period of May 14, 2017 to April 14, 2019?

ii. Is the applicant entitled to receive a medical benefit in the amount of $2,232.50 for physiotherapy services recommended by Eglinton West Physio and Rehab Ltd. in a treatment plan dated February 8, 2018, submitted February 28, 2018 and denied by the respondent on March 13, 2018 (“the disputed treatment plan”)?

iii. Is the applicant entitled to interest on any overdue payment of benefits?

iv. Is the respondent liable to pay an award under Ontario Regulation 664 (“award”) because it unreasonably withheld or delayed payments to the applicant?

RESULT

[4] I find that the applicant has not proven her entitlement to an NEB. The applicant is entitled to part of the disputed treatment plan in the amount of $2,103.65 with interest. There is no award made.

LAW

[5] Sections 14, 15 and 16 of the Schedule provide that an insurer is only liable to pay for medical and rehabilitation expenses that are reasonable and necessary

[1] O. Reg. 34/10.

as a result of an accident. The applicant bears the onus of proving on a balance of probabilities that any proposed treatment plan he or she seeks is reasonable and necessary.[2]

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

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

[8] The onus is on the applicant to prove that he or she suffers from a complete inability to carry on a normal life. This standard has often been cited as being one of the most difficult thresholds to meet under the Schedule.

[9] The Ontario Court of Appeal[3] set out the approach to determining whether an insured has satisfied the s. 3(7) test:

- There must be a comparison of the applicant's activities and life circumstances before the accident to those post-accident.
- The applicant's activities and life circumstances before the accident must be assessed over a reasonable period of time prior to the accident. The duration will depend on the facts of the case.
- All of the applicant's pre-accident activities must be considered but greater weight may be placed on activities that were more important to the applicant's pre-accident life.
- The applicant must prove that his/her accident related injuries continuously prevent him/her from engaging in substantially of his/her pre-accident activities. This means that the disability or incapacity must be uninterrupted.
- "Engaging in" should be interpreted from a qualitative perspective. Even if an applicant can still perform an activity, if the applicant experiences significant restrictions when performing that activity, it may not count as "engaging" in the activity.

[2] *Scarlett v. Belair,* 2015 ONSC 3635 (Div. Crt).
[3] *Heath v. McLeod,* 2009 ONCA 391; *Galdamez v. Allstate Insurance Company of Canada,* 2012 ONCA 508.

- If pain is the primary reason that an applicant cannot engage in former activities, the question is whether the degree of pain practically prevents the applicant from performing those activities.

ANALYSIS

Issue I – Is The Applicant Entitled to an NEB?

[10] The applicant submits that she meets the test for an NEB as she suffers from a complete inability to carry on a normal life as a result of the accident. The applicant submits that, pre-accident, she did traditional folk dancing every day; taught folk dancing to seniors in her building once a month as a volunteer; visited her daughters; performed home maintenance chores including cooking, cleaning, laundry, groceries; and was working as a seamstress at home doing clothing alterations for some 15-20 hours per week.

[11] Post-accident, the applicant submits that she has partially resumed some activities and some not at all. Specifically, the applicant submits that she avoids stepping out of the house too much, is unable to dance, has not returned to teaching folk dancing, is partially dependent on her grandchildren and daughter for activities of daily living such as grocery shopping and laundry, cooking is limited to preparing a cup of coffee, does not do any mopping and has not returned to seamstress work. The applicant also submits that even though she has returned partially to her personal care, she experiences pain especially with her right arm and shoulder when performing these activities. The applicant also submits that she has difficulty performing activities of daily living that involve bending, twisting, lifting, grocery shopping and reaching overhead and has decreased functional endurance walking, managing stairs. Further, the applicant submits that she has psychological impairments which completely prevent her from carrying on a normal life.

[12] The applicant relies on various medical records and reports including the following: the OCF-3 disability certificate completed by Dr. Larga, the applicant's chiropractor, at Eglinton West Physiotherapy on May 8, 2017; the OCF-12, Activities of Normal Life signed by the applicant on September 27, 2018; the disputed treatment plan; the July 19, 2017 Re-evaluation report from Eglinton West Physiotherapy; and the report of the respondent's assessor Dr. Khan, family physician, dated December 28, 2017. The applicant also relies on diagnostic imaging as objective evidence she is suffering from an impairment to her shoulder, and submits that the decreased ranges of motion of her cervical and lumbar spines as well as the right shoulder have resulted in her being completely prevented from carrying on pre-accident activities.

[13] Applying the above principles and based on the totality of the evidence, I find that the applicant is not entitled to an NEB non-earner benefit for the period in dispute for the following reasons.

[14] The applicant's self-reporting of her post-accident capabilities in the OCF-12 does not establish a complete inability to carry on a normal life as a result of the accident. Although she indicates that she can only stand for 30 minutes, sit for one hour and needs help to participate in social activities, with laundry, groceries and "other" shopping, the applicant indicates that she can "partially" do all of her pre-accident activities except washing floors, sewing, dancing and dance instructing which she describes as a very important part of her life pre-accident. The applicant's statement that she is partially able to undertake her pre-accident activities, even if some help is required for some of them, does not establish a complete inability to carry on a normal life. Washing floors, sewing, dancing and dance instructing are, according to the applicant's OCF-12 are the only activities that she can no longer do at all post-accident.

[15] With respect to washing floors, the applicant told Dr. Khan that she can do light cleaning, while she told Dr. Mandel that she can do light chores but not heavy chores. I find that, even if the applicant's evidence was clear enough to establish that she cannot wash floors, which it is not, the loss of the ability to wash floors does not establish a complete inability to carry on a normal life because this would, at its highest, constitute only a partial inability to carry on a normal life.

[16] With respect to sewing, in part 1 of the May 8, 2017 disability certificate of applicant's chiropractor Dr. Larga, the applicant certified that she did not work at least 26 of the 52 weeks preceding the accident which contradicts her submission that she was a seamstress pre-accident. Based on the certification signed by the applicant that "I certify that the information provided is true and correct", I find that the applicant was not a seamstress in the year preceding the accident and that any loss of ability to sew and be a seamstress, even if established, does not establish a complete inability to carry on a normal life as a result of the accident.

[17] Although Dr. Larga indicates in the disability certificate that the applicant suffers a complete inability to carry on a normal life, the only explanation given is "ability to complete ADLs limited due to injuries sustained" and "yes" is answered to "Does the applicant suffer a substantial inability to perform the housekeeping and home maintenance services that he/she normally performed before the accident?" Further, Dr. Larga indicates that the anticipated duration of the disability is "9-12 weeks". Given the lack of detail and explanation in this disability certificate and given that Dr. Larga anticipates the disability to be temporary, this disability certificate is given little weight and I find it does not establish that the applicant suffers a complete inability to carry on a normal life.

[18] With respect to folkloric dance and dance instructing, the applicant brought forward no evidence corroborating her own statement that she did dance and dance instructing immediately preceding the accident. The applicant's accounts of this are not entirely consistent. In submissions, the applicant indicated that pre-accident she did traditional folk dancing every day and taught folk dancing to seniors in her building once a month as a volunteer. The respondent's assessor

Dr. Khan in December 2017 reported that the applicant likes to dance and is unable to do it after the accident due to hip and rib pain, and that her hobbies before the accident included volunteering teaching folk dancing to the seniors in her building once a month. Dr. Mandel, the respondent's psychologist, reported in December 2017 that the applicant reported she is not able to dance and other activities because of her right leg pain and limitations in range of motion in her right arm and pain from her shoulder down her side into her knee on the right side. The applicant told Dr. Mandel that pre-accident she participated in a dance troop once per week and now goes weekly to her dance class to watch.

[19] The applicant has not put forward evidence to corroborate her accounts of dance activities. Given the lack of corroborating evidence, I find that the applicant did not do dance and dance instructing immediately preceding the accident.

[20] The diagnostic imaging shows either degenerative conditions or minor injuries. No fractures were sustained as a result of the accident.

[21] The disputed treatment plan contains no significant information about the applicant's pre-accident activities and therefore is not relevant to the NEB analysis. The July 19, 2017 Re-evaluation report from Eglinton West Physiotherapy contains information that is not relevant to the applicant's life, such as, for example, that post-accident she is unable to cut grass and shovel snow. The applicant lives in an apartment. I give it little weight.

[22] Without listing them all, I find that the rest of the records put forward by the applicant including the records of her family physician, Dr. Chen, and her rheumatologist, Dr. Sterrett, do not establish that the applicant is completely unable to carry on a normal life as a result of the accident. Dr. Sterrett diagnosed costochondritis and prescribed medication, over-the-counter topical analgesics and ice and heat but did not indicate that the condition was not manageable or that the applicant would be unable to carry on a normal life.

[23] The applicant relies on Dr. Khan. However, Dr. Khan's reports do not support the applicant's position. In the December 20, 2017 report, Dr. Khan diagnoses WADII, thoracic and lumbar spine sprain/strain, right shoulder sprain/strain, right upper arm myofascial strain, right thigh myofascial strain and headaches which he describes as minor injuries. Dr. Khan's opinion in the December 28, 2017 report is that there are no compelling objective findings that would render the applicant as being completely unable to carry on a normal life as a direct result of the accident and I accept this evidence.

[24] I also accept the December 2017 opinion of Mr. Hirano, the respondent's occupational therapist, that the applicant is able to perform most typical daily activities and although she may experience pain and discomfort, tasks and activities could be performed using proper body mechanics, pacing and task modification as required. The applicant has made some complaints of pain to

Dr. Chen. However, these complaints of pain are intermittent and there is no significant evidence that pain is significantly restricting or preventing the applicant from engaging in her pre-accident activities including living in her own apartment, climbing the stairs to her apartment, attending church, spending time with her daughter, laundry, grocery shopping, some cleaning and cooking, bathing, dressing and feeding herself, sitting and standing and other leisure activities such as using the computer, listening to music and watching videos. In reply submissions, the applicant "does not deny" that she will go out with her friends indicating that she is able to leave her apartment and socialize.

[25] The applicant has put forward no significant evidence that she is prevented from carrying on a normal life as a result of any psychological injuries from the accident. Dr. Mandel's opinion establishes the opposite - that from a psychological perspective the claimant does not suffer a complete inability to carry on a normal life as a direct result of the accident. Dr. Mandel's report is the only psychological assessment in evidence before me and I accept it.

[26] Having reviewed all of the evidence and based on the totality of the evidence, I find that the applicant has not discharged her burden to establish that she suffers from a complete inability to carry on a normal life as a result of the accident and as a result is not to NEB for the period claimed.

Issue II – Is The Disputed Treatment Plan Reasonable and Necessary?

[27] The applicant submits that the disputed treatment plan for physiotherapy is reasonable and necessary to deal with her pain, help regain strength and improve her range of motion, because physiotherapy has been recommended by Dr. Chen and because she has seen improvement with the past physiotherapy.

[28] The respondent submits that the treatment plan in dispute is not reasonable and necessary because the applicant, by having already received rehabilitation treatment, has achieved the plan's proposed goals of pain improvement, increase in strength and full range of motion. The respondent also submits that the proposed services are improper because they are not broken down into the type of treatment each of the five treatment providers will provide, the proposed re-assessment has already taken place because the plan was submitted contrary to s. 38(2) of the *Schedule,* and the treatment incurred on February 8, 2018 and February 14, 2018 is not payable as it was incurred before the plan was submitted to the respondent contrary to s. 38(2).

[29] I find that the disputed treatment plan is reasonable and necessary, in part. The applicant is entitled to payment of $2,232.50 being the amount of the disputed treatment plan less the cost of the proposed assessment and the treatments incurred on February 8, 2018 and February 14, 2018 which total $128.85.

[30] Dr. Chen recommended physiotherapy in November 2017, some three months before the treatment plan was proposed, to deal with her pain and injuries.

Mr. Hirano in December 2017 acknowledged in his report that the applicant was experiencing pain. Pain reduction can be a legitimate goal of a treatment plan in and of itself. Here, given the applicant's age and injuries from the accident, I find that the goal of pain reduction is reasonable and is necessary given the weight of this medical evidence regarding her pain.

[31] I find that the applicant has experienced enough improvement as a result of this treatment that it is reasonable and necessary to allow her treatment to be continued. The applicant reported 30% improvement to Dr. Chen after receiving 12 weeks of treatment.

[32] I find that the overall cost of achieving these goals is also reasonable except for the items described above. The costs of the plans appear to be in line with the Schedule.

[33] However, I accept the respondent's argument that, under s. 38(2) it is not required to pay for the assessment and the February 8 and 14, 2018 treatments as these were incurred before the plan was submitted to the respondent on February 28, 2018. Section 38(2) of the *Schedule* provides that an insurer is not liable to pay an expense for a medical or rehabilitation benefit or an assessment that was incurred before the insured person submits a treatment plan, subject to some exceptions which do not apply here. The applicant did not respond to this argument in reply submissions. It is clear from the progress and reassessment notes for February 8, 2018 filed by the applicant that the reassessment and the February 8 and 14, 2018 treatments took place prior to submission of the disputed treatment plan to the respondent. The cost of the reassessment is $99.75 and the February 8 treatment is $29.10 and there is no cost shown on the account summary from Eglinton West Physiotherapy for February 14 treatment. I find therefore a total of $128.85 is deducted from the total cost of the proposed treatment plan of $2,232.50 leaving a balance payable of $2,103.65.

[34] I do not accept the respondent's argument that the disputed treatment plan's proposed services are improper because they are not broken down into the type of treatment each of the five treatment providers will provide and are described only as "multidisciplinary rehabilitation". The plan provides for 15 treatments at $99.75 each under this heading. In part 11 of the disputed treatment plan, the health care providers are named. The only providers with the hourly rate of $99.75 are the two named physiotherapists. Therefore, it is more likely than not that the physiotherapists will be providing the 15 treatment sessions. While more specificity would be useful, in this particular case, I find that the information provided is sufficient.

Interest

[35] Interest is payable in accordance with s. 51 of the Schedule.

Special Award

[36] Section 10 of Ontario Regulation 664 provides that a special award may be granted if the respondent unreasonably withheld or delayed payments. There was no payment unreasonably withheld or delayed. The respondent was entitled to deny the NEB and disputed treatment plan for the reasons it expressed which is not an unreasonable position given the evidence. For these reasons, there is no award.

ORDER

[37] For the reasons outlined above, I find that the applicant has not proven her entitlement to NEB. The applicant is entitled to part of the disputed treatment plan in the amount of $2,103.65 with interest. There is no award made.

Released: September 24, 2020

Avril A. Farlam
Vice Chair