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Ontario

RECONSIDERATION DECISION

Before: Robert Watt

Date: July 13, 2020

File Number: 19-003244/AABS

Case Name: Colleen Comegna vs. Aviva Insurance Canada

Written Submissions by:

For the Applicant: Masgras Professional Corporation/Andrew Franzke

For the Respondent: Aviva Insurance Canada/Ramandeep Pandher

OVERVIEW

[1] This Request for Reconsideration was filed by the applicant in this matter. It arises out of a preliminary issue decision in which the Tribunal found that the applicant is barred from seeking a determination that the injuries sustained in this motor vehicle accident were not subject to the Minor Injury Guideline.

[2] The applicant submits that the Tribunal has made an error of law or fact such that the Tribunal would likely have reached a different result, had the error not been made.

[3] The applicant is seeking an order quashing the decision and ordering a rehearing on all parts of the matter regarding the preliminary and substantive issues.

RESULT

[4] The applicant's Request for Reconsideration is dismissed.

ANALYSIS

[5] The grounds for a Request for Reconsideration to be allowed are contained in Rule 18 of the Tribunal's Common Rules of Practice and Procedure. A request for reconsideration will not be granted unless one or more of the following criteria are met:

> a) The Tribunal acted outside its jurisdiction or violated the rules of natural justice or procedural fairness;
> b) The Tribunal made an error of law or fact such that the Tribunal would likely have reached a different result, had the error not been made;
> c) The Tribunal heard false or misleading evidence from a party or witness, which was discovered only after the hearing and would have affected the result; or
> d) There is evidence that was not before the Tribunal when rendering a decision, could not have been obtained previously by the party now seeking to introduce it, and would likely have affected the result.

[6] The ground that the applicant argues applies to this case is as follows:

[7] the Tribunal has made an error of law or fact such that the Tribunal would likely have reached a different result, had the error not been made.

Factual Error made by the Tribunal in not accepting the applicant's new evidence

[8] There was no evidence put before me, as to why the evidence of Dr. Waisman was not made available for the previous hearing, before Arbitrator Matheson That is a pre-condition to permitting any new evidence to be considered as new evidence. On this ground alone, I found that the new evidence was not permitted.

[9] The new evidence also came to basically the same conclusion as the previous evidence before Arbitrator Matheson. I am not required to go over every medical problem that the applicant has but have to look at the overall medical condition of the applicant. All reports came to the same conclusion that the applicant has chronic pain/anxiety/depression. I also accepted the IE report of Dr. A. Kopyto who came to the same conclusion as arbitrator Matheson, after having reviewed the new evidence, that the applicant's injuries were minor in nature.

[10] The report of Dr. Waisman, which was taken into account by me, does not change the result of the finding of Arbitrator Matheson, if it had been presented at the time of the original hearing as it came overall to the same conclusion as the other reports. I also accepted the IE report of Dr. Kopyto.

[11] It is trite law that the Tribunal in its reasons is not required to refer specifically to every argument made or piece of jurisprudence that it considered in its decision. It is not the role of the tribunal on a reconsideration to re-weigh evidence that has already been considered by the tribunal. The role of the Tribunal on a reconsideration is to determine if the Tribunal made an error in fact as alleged by the applicant.

[12] I find that the tribunal made no error of fact in its decision.

Error of law made by the Tribunal

a. Tribunal finding that the new report mirrors the same complaints of the applicant, at the time of the FSCO hearing, constitutes a misrepresentation of the new evidence thereby affecting the legal test to determine the applicability of res judicata.

[13] The Tribunal's findings on the evidence is not an error of law but could be an error of fact and does not affect the doctrine of res judicata. I have already in the preceding paragraphs dealt with the issue of the possible error of facts and will not duplicate it again.

[14] The Tribunal's decision on res judicata and what is required for that doctrine to apply, is clearly set out in paragraphs [18] and [19] in the decision.

b. Adjudicator's decision violates the applicant's right to procedural fairness.

[15] The applicant argues that the Tribunal failed to consider the arguments and case law contained at paragraphs 8-12 of the applicant's submissions, namely that the doctrine of res judicata has no applicability because the MIG is not a static determination.

[16] At the time of the hearing before Arbitrator Matheson, the issue at the hearing was the issue of MIG at that time. The finding was not appealed and therefore the decision was a final decision. Whether the applicant's condition deteriorates in the future and a new application is made for further medical benefits was not the issue before Arbitrator Matheson nor before the Tribunal on the preliminary issue.

[17] Again, as said earlier, it is trite law that the Tribunal in its reasons is not required to refer specifically to every argument made or piece of jurisprudence that it considered in its decision.

[18] The Tribunal, pursuant to the order of adjudicator Wallace issued on September 5, 2019, was required only to review those documents resubmitted to be used for the hearing, including the expert reports submitted. Documents filed for the case conference were not part of the evidence for the hearing.

c. The Tribunal's failure to expound upon the reason "that there… are no reasons before me as to why fresh evidence was not available to Arbitrator Matheson…" constitutes a violation of the applicant's right to procedural fairness.

[19] It is not up to the Tribunal to guess as why the fresh evidence wasn't put before Arbitrator Matheson. It's the responsibility of the applicant to put forth the evidence as to why the new evidence wasn't made available for Arbitrator Matheson.

[20] I find that there was no error of law made by the Tribunal and that there was as a result no procedural unfairness to the applicant.

CONCLUSION

[21] For the reasons noted above, I dismiss the applicant's Request for Reconsideration.

Released: July 13, 2020

Robert Watt
Adjudicator