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Ontario

RECONSIDERATION DECISION

Before: Rupinder Hans, Adjudicator

Date: October 16, 2019

File: 17-008580/AABS

Case Name: N.D. v Unifund Assurance Company

Written Submissions By:

For the Applicant: Michelle F. Jorge & Lawson Hennick, Counsel

For the Respondent: Geoffrey L. Keating, Counsel

OVERVIEW

[1] The applicant, N.D., was injured in an automobile accident on September 30, 2012, and when she was denied certain benefits by the respondent, she filed an application for dispute resolution with the Licence Appeal Tribunal (the "Tribunal").

[2] This request for reconsideration arises from a decision on February 19, 2019 where the Tribunal found that the applicant was entitled to $3,349.08 for chiropractic services and $2,486.00 for a physiatry assessment, and the interest thereof. The Tribunal found that the applicant was not entitled to other chiropractic services in the amount of $2,585.50, and a psychiatric assessment in the amount of $2,486.00. The applicant is seeking reconsideration of those two treatment plans.

[3] The applicant argues that the Tribunal made an error of fact and law in determining that the applicant was not entitled to the chiropractic services and a psychiatric assessment without the respondent adequately demonstrating the lack of relevance or necessity.

[4] The respondent objects to the request for reconsideration stating that the Tribunal's decision was correct. It takes the position that the applicant failed in her onus to prove that the Tribunal made an error in fact or law.

[5] Pursuant to s. 17(2) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act,* 2009, S.O. 2009, c. 33, Sched. 5, I have been delegated responsibility to decide this matter in accordance with the applicable rules of the Tribunal. For the reasons set forth below, I am not satisfied that the Tribunal made an error of law or fact such that the Tribunal likely would have reached a different result if it had not made the error(s).

[6] The purpose of a request for reconsideration is not to reargue positions which failed at the hearing. In my opinion, that is what the applicant has attempted to do. I find that the applicant has failed to establish any grounds upon which the Tribunal's decision should be overturned. The applicant's request for reconsideration is denied.

DISCUSSION AND REASONS

[7] There are limited grounds upon which a person can request a reconsideration. In this case, the applicant relies upon section 18.2(b) of the Tribunal's *Common Rules of Practice and Procedure*, which provides as follows:

> i. 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.

[8] In *16-002782 v. Aviva Ca. Ins*., 2018 CanLII 39370 (ON LAT), the Tribunal explained that Rule 18 affords the Tribunal the ability to remedy serious breaches of procedural fairness or errors that materially affect decisions. The reconsideration process serves a curative role. A party seeking reconsideration

has a high onus to meet. Minor or inconsequential procedural or substantive mistakes will not meet this onus. When the onus is met, the Tribunal has broad remedial powers to order a matter re-heard, or to cancel, confirm, or vary an order or decision.

[9] Thus, under Rule 18.2(b) in order to interfere with the Tribunal's original decision, the Tribunal must not only have made an error of law or fact, but that error must be significant enough that the Tribunal likely would have come to a different conclusion. Based upon the evidence present, I am not convinced this is the case.

I. Determination of No Entitlement to Chiropractic Services

[10] The applicant asserts that the Tribunal correctly found that the applicant was entitled to chiropractic services in the amount of $3,349.08 which treatment plan was submitted on November 24, 2015, but incorrectly denied the later treatment plan for chiropractic services submitted on February 17, 2017. The applicant argues that as the Tribunal had found the earlier plan reasonable and necessary based upon the medical evidence submitted, specifically, that the applicant has physical impairments and experiences pain which inhibits and impacts her daily activities, consequently, the later plan should also have been found reasonable and necessary.

[11] I note that the Tribunal's finding of non-entitlement is based upon the applicant refusing to attend an insurer's examination ("IE") as properly requested by the respondent. It had been almost two years since the last chiropractic assessment and the respondent sought an examination. The Tribunal found that the respondent's request for an IE was reasonable based upon the evidence presented, and the applicant was held in non-compliance with section 44 of the *Statutory Accident Benefits Schedule – Effective after September 1, 2010* (the "*Schedule*"), for failing to attend, and per section 55(1)2 of the *Schedule* was precluded from proceeding to a hearing with respect to the issue.

[12] The applicant further submits that the respondent had an abundance of medical evidence regarding the applicant's medical condition and that an IE was not reasonably necessary as required by section 44. I am not persuaded by the applicant's submissions in the regard. I find no error of law or fact in the Tribunal's findings in this regard and its application of the relevant law. It was open to the Tribunal, based upon the evidence presented, to conclude that the applicant was required to attend the IE.

[13] Further, I find no error in the Tribunal's finding that the mandatory language of section 55(1)2 was triggered by the applicant's refusal to attend the IE, and thus, there was no entitlement to the benefit. Again, this was open to the Tribunal to determine.

[14] Under the circumstances, as the Tribunal determined that section 55(1)2 applied, the respondent was not required to demonstrate the lack of relevance or necessity

as the applicant asserts. Instead, as correctly noted by the respondent, section 55(1)2 acts as a preliminary bar with respect to the entitlement, and therefore the Tribunal is not required to consider whether the treatment plan is reasonable or necessary. I am not persuaded by the applicant's submissions to the contrary. There was no error in this regard.

[15] I find that the applicant has not met her onus.

II. Determination of No Entitlement to a Psychiatric Assessment

[16] Similar to her submissions with regards to the chiropractic services, the applicant submits that the Tribunal erred in determining that the applicant was not entitled to the psychiatric assessment without the respondent "adequately demonstrating the lack of relevance or necessity."

[17] The applicant acknowledges that per section 38(2) of the *Schedule*, an insurer is not liable to pay for an expense incurred before the treatment plan is submitted. The psychiatric assessment was completed on December 8, 2016, and the treatment plan for the assessment was submitted fifteen days later, on December 23, 2016. The respondent denied the benefit on the basis that the treatment plan was submitted in contravention of section 38(2). The Tribunal agreed with the respondent's position and further found that there are exceptions listed in section 38(2), but that the applicant had not submitted or provided any evidence that an exception applied in her case.

[18] In the reconsideration, for the first time, the applicant is arguing that an exception applies. The applicant states that section 38(2)(c)(ii) permits payment incurred when the expense is reasonable and necessary as a result of the impairment sustained by the insured. The expense permitted is limited to $250 or less per item, however, the applicant submits that "the severity of the circumstances calls for a rare exception." It appears the applicant is seeking payment of the full amount of the treatment plan under the exception, and not the $250 permitted. The applicant submits that the circumstances are that the applicant is showing a lack of competence to care for herself, has threatened to do harm to herself and others, and that her psychological status in under surveillance as she is unfit to provide clear instructions.

[19] In its submissions, the respondent submits that the exception proposed by the applicant has no legal justification, and is not permitted under the provisions of the *Schedule*. The applicant counters that the Tribunal has the discretion to grant a ruling on an exception basis, and although there is no decision permitting this proposed exception, there is also no decision disallowing it.

[20] I do not agree with the applicant's submissions. The Tribunal applied the law in its current state, and was well within its purview in finding that the treatment plan was submitted in contravention of section 38(2). I find no error when the Tribunal did not make, as the applicant states, "a rare exception." I note that the purpose of a

reconsideration is not to relitigate or assert new arguments, and is instead to fix errors of law or fact that would have led to a different conclusion.

[21] There was also no error in law or fact by the Tribunal not requiring the respondent to demonstrate the lack of relevance or necessity. I note that before the test for a benefit is considered there are certain prerequisites that are required in applying for and determining benefits. When those prerequisites are not met it may automatically disentitle the benefit before an analysis of the test is required. I find no error in this regard.

[22] Given the above, I find that the Tribunal did not commit an error of fact or law under Rule 18.2(b) that would have changed the outcome of the decision.

CONCLUSION

[23] For the reasons noted above, I dismiss the applicant's request for reconsideration.

_____

Rupinder Hans
Adjudicator
Licence Appeal Tribunal

Released: October 16, 2019