



Citation: F.O. v. Aviva Insurance Canada, ONLAT 2021, 19-003735/AABS

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File Number: 19-003735/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:

Fawaz Ohab

Appellant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR: Thérèse Reilly

APPEARANCES:

For the Applicant: Rajwant Singh Bamal, Counsel

For the Respondent: Surina Sud, Counsel

Court Reporters: Ingrid Begaj (March 17)
Tala Rida (March 25)

HEARD: By Videoconference on March 17 and 25, 2021

OVERVIEW

- [1] The applicant was injured in a motor vehicle accident on October 22, 2017 and applied for accident benefits to Aviva Insurance Company of Canada (“the respondent”) under the *Statutory Accident Benefit Schedule – Effective September 1, 2010* (the “Schedule”).¹ The applicant applied for a non-earner benefit (NE) from November 21, 2017 to October 22, 2019 which was denied by the respondent on the basis that the applicant did not meet the test for a non-earner benefit. The applicant submits that due to his injuries and impairment he is entitled to a chronic pain, psychological and attendant care assessment.
- [2] The respondent partially approved the treatment plans for psychological services and psychological assessment. The balance of the treatment plans were denied on the basis that they are not reasonable and necessary. The respondent submits the injuries sustained are minor soft tissue injuries which have resolved.
- [3] The evidence at this hearing was submitted by way of oral evidence from the applicant who testified about his impairment and limitations and the cross examination of Ms. Lydia Trotman, the Claims Adjuster by videoconference on March 17, 2021. Closing submissions were completed by video conference on March 25, 2021.

ISSUES

- [4] The following are the issues ² to be decided:
 - i. Is the applicant entitled to a non-earner benefit in the amount of \$185.00 per week for the period of November 21, 2017 to October 22, 2019 submitted November 19, 2017 and denied March 8, 2018?
 - ii. Is the applicant entitled to payment of \$200.00 for the completion of an OCF-3 Disability Certificate dated January 17, 2019 recommended by Downsview Healthcare Inc. submitted on February 8, 2019 and denied March 20, 2019?
 - iii. Is the applicant entitled to payment for the cost of an examination for \$2,000.00 less the approved amount of \$1,496.10, leaving a balance of

¹ Ontario Regulation 34/10.

²The respondent stated at the hearing that it approved the \$200 cost for a psychological pre-screening assessment report recommended by Downsview Healthcare Inc. incurred in February 2018 and submitted April 1, 2018. As such this item is not in dispute. The respondent in its EOB dated February 21, 2020 stated this cost was included in the treatment plan for a psychological assessment which was partially approved, Respondent Document Brief, Tab 5P.

\$503.90 for a psychological assessment recommended by Downsvieview Healthcare Inc. in a treatment plan submitted on March 6, 2018 and denied March 15, 2018?

- iv. Is the applicant entitled to a medical benefit in the amount of \$3,325.98 less the approved amount of \$1,690.20, leaving a balance of \$1,645.78, for psychological treatment recommended by Downsvieview Healthcare Inc. in a treatment plan submitted on July 15, 2018 and denied July 26, 2018?
- v. Is the applicant entitled to payment for the cost of an examination in the amount of \$1,521.26 for an attendant care assessment recommended by Downsvieview Healthcare Inc. in a treatment plan submitted on February 26, 2018 and denied March 5, 2018?
- vi. Is the applicant entitled to payment for the cost of an examination in the amount of \$2,000.00 for a chronic pain assessment recommended by Downsvieview Healthcare Inc. in a treatment plan submitted on June 4, 2019 and denied July 2, 2019?
- vii. Is the applicant entitled to an award under Regulation 664 because the respondent unreasonably withheld or delayed the payment of benefits?
- viii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[5] For the reasons set out below, I find that the applicant is not entitled to a non-earner benefit. The treatment plans are not reasonable and necessary other than the balance of the treatment plan for the psychological assessment. The balance of the treatment plan for a psychological assessment is reasonable and necessary. The claim for payment of the OCF-3 is dismissed. The claim for an award pursuant to section 10 of Regulation 664 is dismissed. The claim for interest is dismissed other than for interest payable on the balance of the psychological assessment.

Non-Earner Benefit

[6] The test for entitlement to a non-earner benefit is set out in section 12(1) of the *Schedule*. Section 12 (1) states the insurer shall pay a non-earner benefit to an insured person who sustains an impairment as a result of an accident if the insured person satisfies that the applicant suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident and does not qualify for an income replacement benefit. Section 12 (2) states the weekly

benefit amount is \$185.00. Section 3 (7) (a) of the *Schedule* states that a person suffers a complete inability to carry on a normal life as a result of an accident 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.

- [7] The parties referred to the case of *Heath v. Economical Mutual Insurance Company*,³ which outlines several principles to assess entitlement to a non-earner benefit. In summary, these include:
- i. A comparison of the applicant's daily life activities before and post-accident.
 - ii. A consideration of all the applicant's pre-accident activities but greater weight can be placed on activities seen as more important to the applicant pre accident.
 - iii. The applicant's activities and life circumstances before the accident must be assessed over a reasonable period prior to the accident. The duration of which will depend on the facts of the case.
 - iv. The accident related injuries must continuously prevent an insured from engaging in substantially all of their pre-accident activities. The disability has to be uninterrupted.
 - v. The evidence must demonstrate that the insured has significant restrictions in performing an activity as a result of the injuries sustained in the accident.
 - vi. "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" that activity.
 - vii. 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. The focus should not be on whether the applicant can physically perform those activities.

³ *Heath v. Economical Mutual Insurance Company*, 2009 ONCA 391, Respondent Document Brief.

[8] Based on the totality of the evidence and for the reasons set out below, I find that the applicant has not established that he is entitled to a non-earner benefit from November 21, 2017 to October 22, 2019. The claim is dismissed.

THE INJURIES AND EVIDENCE TO SUPPORT THE NON-EARNER BENEFIT

Disability Certificates - OCF3s

- [9] The applicant submitted three disability certificates (OCF3s) to support the claim for the non-earner benefit which includes the OCF 3s ⁴ of Dr. Pivtoran, chiropractor, who completed the Disability Certificates (OCF 3s) dated November 6, 2017, April 9, 2018 and January 17, 2019.
- [10] The OCF-3s of November 2017 and April 2018 list of injuries as a result of the subject accident is as follows:
- a. concussion,
 - b. sprain and strain of the cervical, thoracic and lumbar spine and shoulder
 - c. post-traumatic headache
 - d. post-concussion syndrome
 - e. dizziness, anxiety, stress
 - f. driver anxiety
 - g. symptoms involving emotional disturbances.
- [11] The OCF-3 states the applicant has a high level of pain and headaches. The anticipated duration of the applicant's recovery is more than 12 weeks. As this document is completed by a chiropractor, the reference in the OCF-3s to psychological impairments such as emotional disturbances are outside of scope of practice of a chiropractor.
- [12] The OCF-3s state the applicant suffers a complete inability to carry on a normal life, he cannot engage in the caregiving activities in which he engaged at the time of the accident and the housekeeping and home maintenance services that he normally performed before the subject accident. However,

⁴Exhibit 2, Tab 5a, Respondent Document Brief, and Applicant Document Brief, Exhibits 25 and 26.

the OCF-1⁵ filed by the applicant states the applicant was not the main caregiver.

- [13] The OCF-3 of January 17, 2019 expands the injuries to including concussion, chronic cervical joint dysfunction with myofascial symptoms, chronic lumbar joint dysfunction, chronic post-traumatic headache, bilateral shoulder lesion, costovertebral joint dysfunction, post concussion syndrome, symptoms and signs involving emotional states and chronic pain in multiple sites.
- [14] The OCF-3s do not assist in providing evidence with respect to the non-earner benefit of both pre and post-accident activities and functionality as they do not provide a comparison of the applicant's pre and post-accident activities. Although the OCF-3s state the applicant is unable to perform housekeeping and home maintenance there is no outline, as is required in *Heath*, of the pre-accident activities performed by the applicant and how they are impacted by the injuries from the accident. Moreover, as set out below in the reports of the IE Assessors, the applicant has returned to his personal care activities and some of his housekeeping and home maintenance activities. As such, the OCF 3s are limited in their evidentiary value and do not confirm entitlement to a non-earner benefit.

Family Doctor Records

- [15] The clinical CNRs and records of the family doctor, Dr. Woo, (the CNRs)⁶ also do not support the listed injuries in the OCF-3s nor the claim for a non-earner benefit. The CNRs state the applicant attended Dr. Woo's office the day after the accident and his injuries included sprains and strains of the cervical, thoracic and lumbar spine, the shoulder and headaches. There was no head injury, but a headache was noted with some tenderness in the cervical region. The CNRs state the hips and knees are normal. There is also no referral with respect to a possible concussion. X-rays of the neck and back showed no fractures. The results were normal.
- [16] The CNRs of January 2018 refer to the ongoing chemotherapy treatment and pain in the right groin. The February 13, 2018 and March 2018 CNRs reflect some pain and tenderness in the shoulder, lower back and neck and the applicant should continue physiotherapy.
- [17] I find the CNRs reflect soft tissue injuries and do not provide a sufficient description of the applicant's pre accident and post-accident activities of daily

⁵ Application for accident benefits, Exhibit 1. Tab 2A, Applicant Document Brief.

⁶ Clinical notes and records of the family doctor, Exhibit 6, Document Brief of the Respondent

living to support a claim for non-earner benefits. I also find that the medical evidence from the family doctor does not support the extensive list of injuries claimed in the OCF-3s.

Applicant's testimony

- [18] The applicant testified that his overall health before the accident was good. He was very active doing sports and he was finishing chemotherapy but since the accident he cannot move, he is taking medications prescribed on March 11, 2021 for pain and sleeping. He testified he continues to have ongoing pain and sleeping difficulties, which makes him angry. He is not able to do his chores or have family time. He also cannot be around people as much. As to his activities of daily living, he testified he needs assistance taking medication, taking a shower, he has to walk with a cane, he has trouble climbing stairs and he does not drive, which is left to his spouse as he cannot stand or sit for any long periods of time. He clarified this means he can stand for five minutes. After that time his feet and back start hurting. His pain is constant all the time. As to housekeeping before the accident, he could cook, vacuum, sweep, grocery shop, pick up the garbage, mow the lawn, and shovel snow. Now he cannot do any of these tasks. He testified he needs help with everything.
- [19] As to a psychological impairment, he testified that as a result of the accident he has anxiety, trouble sleeping and a decline in being able to concentrate. His overall functioning is impaired. He stated he had a normal life before the accident and without the accident it would still be normal. He intended to return to work but with the cancer diagnosis he never returned to work as an electrician or continued with his education.
- [20] As discussed below, the medical reports of the IE Assessors and the video surveillance contradict the testimony of the applicant that he needs help with everything. The evidence shows that the applicant despite his testimony at the hearing, did not mow the lawn or shovel snow before the accident. As to the claim of a psychological impairment from the accident including having anxiety, trouble sleeping and a decline in being able to concentrate, the Initial Adjudication Summary from the Canada Pension Plan file states these are due to chemotherapy treatment.

PRE-EXISTING MEDICAL CONDITIONS

- [21] The respondent disputes the claims by the applicant of the extensive list of injuries sustained in the accident. It maintains the applicant's pain complaints are due to chemotherapy treatment and other pre-existing medical conditions that

are not due to the accident. He was diagnosed with a hernia in 2017 pre accident. The most important pre-existing medical condition and condition unrelated to the accident is the applicant's diagnosis of cancer in December 2015. The applicant began chemotherapy treatment for the cancer in January 2016 which continued for three years. He testified he elected to and received an intense three year chemotherapy treatment program for his cancer. The medical evidence indicates the chemotherapy had a number of side effects which include but are not limited to nausea, weakness, pain, headaches and pancreatitis.⁷ He received lumbar punctures. The chemotherapy and hernia limited his ability to exercise. He was to avoid exposure to toxic chemicals if doing any household maintenance. Due to the cancer treatment he was to avoid driving.⁸ He would also experience difficulty with short term memory. He had a compromised immune system and sleep difficulties which required sleep aides at times.

[22] The applicant was approved for a Canada Pension Plan disability pension benefit in April 2016 and was, at the date of the hearing, receiving these benefits. The applicant was questioned about his application for disability benefits at the hearing. The evidence establishes that approval for the disability benefit requires proof of a severe and prolonged disability. The respondent claims that the approval of this benefit confirms the applicant had a severe and prolonged disability before the accident and the bulk of his complaints are not due to the accident but to this condition.

[23] The medical records submitted to support his claim for a disability pension reveal in addition to his diagnosis of cancer and chemotherapy treatment in 2016 that he had the following other conditions pre accident: fatigue, night sweats, arthralgias in the hip and knee, weight loss of 15 pounds, extreme anxiety, neck pain when he swallowed, pain in the right ear, neck and throat, and hip pain over previous bone marrow biopsy site.⁹

Applicant's Medical Evidence to Support A Non Earner Benefit

[24] The applicant's medical evidence to support the non-earner benefit consists of a psychological report and pre-screening report (dated February 5, 2018) by Dr. Shaul, psychologist who concluded in May 2018¹⁰ that the applicant as a result

⁷ Canada Pension Plan File, Tab 6A, Applicant Document Brief.

⁸ Canada Pension Plan File, Tab 6A, Applicant Document Brief. Initial Adjudication Summary, Pages 25 to 28.

⁹ Canada Pension Plan File, Tab 6A, Applicant Document Brief. Initial Adjudication Summary, Pages 25 to 28.

¹⁰ Psychological Report, Dr. Shaul, Tab 5D, Applicant Document Brief, Exhibit 3, and Prescreen Report, Tab 5B, Applicant's Document Brief.

of his psychological injuries is unable to engage in his pre-accident activities. The interview was completed by a psychotherapist supervised by Dr. Shaul. The OCF-18 for a psychological assessment included a psychological pre-screening report by Dr. Shaul who concluded that a psychological assessment was necessary to address the applicant's reported feelings of pain, irritability, frustration, depression, sleep difficulties, social decline and vehicle anxiety.

- [25] Dr. Shaul in his report recommended 14 psychological counselling sessions. He diagnosed the applicant with an Adjustment Disorder with Mixed Anxiety and Depressed Mood and Specific Phobia and vehicle phobia. He reported that the applicant is suffering from severe and significant depression, anxiety, irritability, frustration, sadness, trouble with sleeping, a low energy level, cognitive difficulties and fear and anxiety towards travelling in a vehicle. The psychological and emotional difficulties the doctor claims are a direct consequence of his physical condition. He opines the applicant is unable to perform his basic housekeeping and home maintenance tasks, self-care tasks and caregiver tasks. His psychological impairment is outside of the Minor Injury Guideline and prevents him from achieving maximal medical recovery. Dr. Shaul mentioned the applicant reported the cancer diagnosis to him and that he received chemotherapy. No further comments were made about the impact of the chemotherapy and treatment on his conditions.
- [26] I question the accuracy of Dr. Shaul's findings. I agree the applicant is suffering from anxiety, frustration, difficulty sleeping, some cognitive difficulties, but the report omits to state the impact of chemotherapy on these conditions and the fact that they existed prior to the accident. Dr. Shaul found the applicant is suffering from severe level symptoms of depression. The medical evidence of the IE Assessors does not support this finding. The CNRs also made no reference to severe depression. Lastly Dr. Shaul claims the applicant had anxiety driving or travelling in a vehicle. The video surveillance does not demonstrate this. The psychological report also states the applicant is unable to carry on a normal life since his injuries prevent him from lifting, carrying, bending, sitting and standing for prolonged periods of time. However, as described below, by October 2019 the applicant is observed bending, standing, lifting, entering and exiting a vehicle and driving comfortably.
- [27] A treatment plan for psychological therapy was submitted on July 15, 2018 for \$3,335.98. The respondent partially approved 10 sessions of the recommended treatment plan for \$1,690.20 leaving the balance in dispute.

[28] The second medical report in support of the claim for the non-earner benefit is the chronic pain assessment completed by Dr. Karmy, chronic pain physician. In his report dated July 15, 2019, ¹¹ he diagnosed the applicant with the following all caused by the accident:

- a. post-traumatic fibromyalgia
- b. traumatic brain injury
- c. chronic post-traumatic migraine-like headaches
- d. chronic mechanical neck pain, upper and lower back pain
- e. sacroiliac joint dysfunction
- f. chronic mechanical bilateral knee and ankle pain
- g. osteoarthritis
- h. chronic pain syndrome
- i. sleep disorder, and,
- j. an Adjustment Disorder with Mixed Anxiety and Depressive Mood and Specific Phobia (Driving Anxiety) as diagnosed by Dr. Shaul.

[29] Dr. Karmy states the applicant's impairments have impacted all of his activities including household, caregiving, social and recreational activities. Dr. Karmy stated the applicant returned to some light housekeeping activities. Dr. Karmy mentioned the applicant used to enjoy fishing, playing cricket and soccer but can no longer do these activities. He is independent in self care activities but cannot do these as quickly as before. Dr. Karmy recommended a course of physical modalities, physiotherapy, an active exercise program, acupuncture and massage.

[30] I find there are numerous difficulties with Dr. Karmy's report and conclusions. First, several injuries listed such as a traumatic brain injury do not appear in other reports or the CNRs. Second, there is no reference to any neurological testing or explanation of the basis for the diagnosis of a traumatic brain injury.

[31] Third, Dr. Karmy refers to pain that is constant and permanent, yet this is not reflected in the video surveillance or reports of the IE Assessors described

¹¹ Chronic Pain Assessment, Dr. Karmy, July 15, 2019, Tab 5H, Applicant Document Brief.

below. Dr. Karmy also acknowledges the impact of chemotherapy but does not acknowledge many of these conditions predate the accident. For example, the medical records to support the disability benefit claim with the Canada Pension Plan indicate that chemotherapy may cause difficulties with sleep, pain, difficulty with memory, anxiety, etc.

- [32] Four, Dr. Karmy's report also contains inaccuracies. For example, he states at page 4 of his report that Dr. Belfon ¹² found the applicant to have chronic pain. That is incorrect as there was no such finding or opinion mentioned by Dr. Belfon in his report. Dr. Karmy also makes statements about the OT Assessment report and states Mr. Sharma who stated "It is noted [the applicant] suffered a concussion, cervical lumbar pain and thoracic pain...he can stoop and bend only for short periods of time". I find the OT report ¹³ did not refer to the applicant having suffered a concussion and the opposite was noted that the applicant could walk, stoop, grab and squat. Further, Dr. Karmy's report is based on the self reporting of the applicant who states the headaches and neck pain, started immediately after the accident, and are constant. The medical evidence listed in the Canada Pension Plan file indicate these existed before the accident. Dr. Karmy states the knee and ankle pain are constant. However, the CNRs from the family doctor indicate on examination immediately after the accident the knee and ankle were not injured.
- [33] I question Dr. Karmy's conclusion that in his opinion the applicant sustained permanent serious impairments of the important bodily functions as a result of the accident. Dr. Karmy concludes the impairments are permanent and will never resolve. As to a claim of vehicle anxiety, the video surveillance and report ¹⁴ (described below) indicate an absence of vehicle anxiety as the applicant is shown driving his vehicle over several days.
- [34] In summary, the conclusions in both the psychological and chronic pain assessments are contradicted by the findings and conclusions reached by the IE assessors. Dr. Belfon in his February 2018 ¹⁵ report concluded the applicant did not meet the non-earner benefit test. He found the injuries sustained are minor and consist mostly of sprains and strains of the cervical, thoracic and lumbar spine and shoulder, headaches and some myofascial shin pain.

¹² IE Physician Assessment report, Dr. Belfon, February 23, 2018, Tab 4B, Applicant Document Brief, Exhibit 7.

¹³ IE Assessor, Mr. Sharma, occupational therapist, OT Assessment report dated February 27, 2018, Exhibit 12.

¹⁴ Video surveillance and report, October 2019, Exhibit 15, Respondent Document Brief, Tab 9.

¹⁵ IE Assessor Physician's Report by Dr. Belfon dated February 23, 2018, Exhibit 7.

- [35] Dr. Belfon in his report states the applicant had reported that he was driving occasionally, he had returned to doing some light housekeeping, he was independent with his personal care and he had some back and neck pain. He was observed by Dr. Belfon being able to stand and sit comfortably with no distress. On examination, the applicant had normal range of motion in his cervical spine and shoulders. The applicant reported his spouse did all the cooking before and after the accident. Dr. Belfon found the applicant suffered soft tissue injuries. Dr. Belfon concluded there was no impairment rendering the applicant incapable of performing all of his pre-accident activities.
- [36] In the occupational therapy in-home assessment dated February 27, 2018 by Harish Sharma,¹⁶ occupational therapist, he found the applicant had returned to doing most of his activities of daily living. This included personal care, caregiver activities, housekeeping and home maintenance. The applicant reported pain, however, the applicant was observed being able to move, walk, and sit comfortably. The applicant did not meet the test for a non-earner benefit as he can perform some housekeeping activities, he is independent with his personal care, he is independent driving and accessing the local community. Physically he was observed being able to walk, sit, stand, comfortably. He can stoop, bend and lift light articles. He did not shovel snow or garden or cut the grass before the accident. The applicant helps his spouse with housekeeping including some cleaning and vacuuming. His range of movement was within normal range. He also did not demonstrate any cognitive difficulties. In the assessor's opinion, the applicant is able to perform his activities of daily living and does not meet the test for a non-earner benefit. The occupational therapist provided a detailed chart of the activities the applicant can and cannot do after the accident which I find establishes that the applicant does not meet the test for a non-earner benefit.
- [37] The preponderance of the medical evidence presented by both parties indicates that the applicant does not have a complete inability to carry on the activities of daily living. The applicant does not meet the test for a non-earner benefit. He has stated to several medical doctors that he is independent with his personal care activities. He does perform some housekeeping and home maintenance activities. He has returned to driving and drives his children to school and drives in the local community.

¹⁶ IE Assessor, H. Sharma, occupational therapist, In Home Assessment Report dated February 27, 2018, Tab 4B, Applicant Document Brief, Exhibit 12.

[38] The test for a non-earner benefit requires that the accident related injuries must completely and continuously prevent an insured from engaging in substantially all of their pre-accident activities. The disability has to be uninterrupted. I find the evidence does not establish this. I find the accident related injuries do not continuously prevent the applicant from engaging in substantially all of his pre-accident activities. The evidence does not demonstrate that the applicant has significant restrictions in performing any activity as a result of the injuries sustained in the accident. The applicant by 2018 and up to October 2019 had resumed many of his pre-accident activities.

Video Surveillance Evidence

[39] Video surveillance taken of the applicant over 4 days between October 1, 2019 and October 4, 2019 was introduced into evidence. The video does not support the testimony of the applicant at the hearing that he needs help with everything. It also contradicts many of the statements made to Dr. Karmy. A copy of the video was provided to the applicant and counsel as was the investigation report.

[40] The respondent submitted video surveillance of the applicant taken for 4 days between October 1 and 4, 2019.¹⁷ I watched the entire footage and I found the report to be an accurate depiction of what occurs in the video. The applicant is observed entering and exiting a vehicle on several occasions with no difficulty bending, stooping, standing or reaching overhead or getting into the front and back seats of the car. He is observed driving a vehicle several times during the 4 days. He is observed walking freely with no signs of pain or discomfort and when walking is not using a cane. He is observed getting into and out of the vehicle unassisted. He is seen picking up his son and carrying him and his knapsack for a distance down the street. His walk has a normal gait. He can bend, lift and twist. He went shopping and entered several stores and food establishments with no difficulty or assistance. He is pushing a shopping cart. The video evidence has to be compared with the statement in the OCF-18s which states that in 2018 and 2019 the applicant cannot bend, stand, lift or twist. The applicant testified he needs help with everything. This is opposite to what he is observed doing in the video for 4 days.

[41] Based on the totality of evidence I find the applicant does not meet the test for a non earner benefit.

¹⁷ Video surveillance and report, October 2019, Exhibit 15, Respondent Document Brief, Tab 9.

PAYMENT OF THE OCF-3 DISABILITY CERTIFICATE

[42] I find the applicant is not entitled to payment of \$200.00 for the completion of an OCF-3 Disability Certificate dated January 17, 2019 based on section 37(1) of the *Schedule*. The respondent submits there is no requirement to pay for the OCF-3 as it was not requested by it as per section 37 (1) of the *Schedule*. I concur. The claim for payment of the OCF-3 is dismissed.

ARE THE TREATMENT PLANS REASONABLE AND NECESSARY?

Psychological treatment

[43] Dr. Siegel, psychologist completed a psychological assessment of the applicant in November 2019.¹⁸ He was asked to assess the OCF-18 for a psychological assessment denied March 2018 and the OCF-18 for the psychological services denied July 26, 2018. Dr. Siegel concluded that the applicant exhibited pain behaviour throughout the 3.5 hour examination. He noted some validity measures raised some questions about symptom magnification. Dr. Siegel concluded that the applicant had an adjustment disorder with depression, but he could not diagnose the applicant due to unreliable validity testing. There were also no neuropsychological reports to assist Dr. Siegel in assessing the statements that the applicant suffered a concussion. Dr. Siegel suggested it is better to describe the condition as concussion symptoms and not a concussion syndrome. He suggested 10 counselling sessions. The applicant testified he attended some counselling sessions at the Downsview Clinic. An invoice for \$448.84 was submitted to the respondent. When asked by Dr. Siegel if the counselling he received was helpful, the applicant replied, "he did not know".

[44] I find that the balance in dispute in the treatment plan for a psychological treatment is not reasonable and necessary on the basis that although an amount was approved for psychological counselling, the applicant has not attended for the approved treatment other than for treatment he incurred for \$448.84. When he was asked by Siegel if the treatment was helpful the applicant stated he did not know. If a treatment plan is recommended but is not used or is not shown to be helpful, it is not reasonable and necessary. Dr. Siegel opined that both the psychological assessment plan and psychological treatment were partially reasonable and necessary, albeit up to the maximum of 10 hours each. I find the applicant did not attend the treatment suggested and when questioned on whether the incurred treatment at Downsview helped he answered he did not

¹⁸ IE Psychology Assessment, Dr. Siegel, dated November 28, 2019, Tab 4D, Applicant Document Brief.

know. Therefore, the balance of the suggested psychological treatment is not reasonable or necessary.

Psychological Assessment

[45] As to the psychological assessment, I find the balance of the assessment in the treatment plan that was not partially approved is reasonable and necessary. The OCF-18 for a psychological assessment included a psychological pre-screening report by Dr. Shaul who concluded that a psychological assessment was necessary to address the applicant's reported feelings of pain, irritability, frustration, depression, sleep difficulties, social decline and vehicle anxiety. Dr. Shaul failed to address the impact of the cancer treatment on the applicant's psychological state however, the respondent approved the cost of the pre-screening report which stated an assessment was needed. Dr. Siegel partially approved the assessment stating that an assessment based on an hourly rate of 10 counselling hours would be reasonable. I find the approval based on an hourly rate is not applicable to estimate the cost of the assessment. The psychological assessment is reasonable and necessary on the basis that both Dr. Shaul and Dr. Siegel recognized the need for an assessment to assess the applicant's psychological condition after the accident.

Attendant Care Assessment and Chronic Pain Assessment

[46] Dr. Zabieliauskas, physiatrist, assessed the applicant in November 2019. In his report dated November 2019, ¹⁹ concluded the applicant had sustained uncomplicated soft tissue injuries. Dr. Zabieliauskas noted there were no signs of discomfort in the examination. This is consistent with the finding of the occupational therapist in 2018. The applicant reported ongoing pain and stated that at this time his cancer treatment had stopped. The applicant stated that he did drive his children to school. He stated the chemotherapy treatment had made him weak and fatigued. He had worked until July 2015. He stated he never returned to work after his cancer diagnosis.

[47] Dr. Zabieliauskas indicated his examination revealed the applicant had full and normal range of movement in upper and lower extremities. He showed some pain and complained of ongoing pain, but his injuries consisted of mild thoracic and lumber strain. His injuries were mostly resolved and he had made a full recovery. In Dr. Zabieliauskas opinion, there was no physical basis of chronic pain and thus the proposed chronic pain assessment was not reasonable nor necessary. Based on Dr. Zabieliauskas assessment attendant care was not needed and as such

¹⁹ IE Physiatry Assessment Report, Dr. Zabieliauskas, Physiatrist, Tab 4 C, Applicant Document Brief.

the proposed attendant care assessment was not reasonable and necessary. I agree.

[48] I find the applicant is not entitled to the attendant care assessment or chronic pain assessment based on the report of Dr. Zabieliauskas, the report of Mr. Sharma, occupational therapist as outlined above and my comments above on Dr. Karmy's report. Dr. Zabieliauskas opined that the applicant had made a full recovery in November 2019 and there was no basis for either assessment.

[49] The evidence from the applicant's testimony is that he has trouble doing everything when the medical evidence indicates otherwise. I find there is no physical basis for chronic pain. Moreover, the cancer diagnosis is largely responsible for many limitations and complaints of impairment. This is also supported by the medical records noted in the Canada Pension File.

An Award Under Regulation 664

[50] The applicant claims he is entitled to an award for unreasonably withheld or delayed payments.

[51] Section 10 of Regulation 664 permits the Tribunal to award a lump sum of up to 50% of the amount to which the insured person (i.e. the applicant) was entitled at the time of the award together with interest on all amounts then owing (including unpaid interest) if it finds that that an insurer (i.e. the respondent) has "unreasonably" withheld or delayed payments.

[52] I find there is no basis on which to make an award. There is no entitlement to the non-earner benefit and all other claims other than the balance of the psychological assessment. No evidence was presented to justify an award claim in its adjudication of the psychological assessment. I find the insurer took appropriate steps to evaluate the claim for the psychological assessment and it is entitled to rely on the report and findings of its expert. Although I found the 10 hours was not appropriate to deny the assessment, this is not a sufficient basis for an award claim. The applicant's award request is dismissed.

INTEREST

[53] Interest is payable only on the balance of the psychological assessment. The claim for interest is dismissed for all other claims.

CONCLUSION AND ORDER

[54] For the reasons outlined above, I find that the applicant is not entitled to a non-earner benefit. The treatment plans are not reasonable and necessary other than the balance of the treatment plan for the psychological assessment. The balance of the treatment plan for a psychological assessment is reasonable and necessary. The claim for payment of the OCF-3 is dismissed. The claim for an award pursuant to section 10 of Regulation 664 is dismissed. The claim for interest is dismissed other than for interest payable on the balance of the psychological assessment.

Released: July 16, 2021



Thérèse Reilly
Adjudicator