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Date: 2017-03-22

Tribunal File Number: 16-000941/AABS

Case Name: 16-000941 v Aviva Canada

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:

F. F.

Applicant

and

Aviva Canada

Respondent

DECISION

Adjudicator:

Lan An

Written Submissions By:

For the Applicant:

Dev Misir, Counsel

For the Respondent:

Maria Cosentino, Counsel

Hearing in Writing on:

November 15, 2016

REASONS FOR DECISION AND ORDER

OVERVIEW

1. The applicant, F. F., was injured in a motor vehicle accident on June 3, 2014. He applied for and received benefits under the *Statutory Accident Benefits Schedule – Effective after September 1, 2010* (the “Schedule”).
2. Following the motor vehicle accident, the applicant applied for an income replacement benefit, an attendant care benefit, and the cost of examination for an attendant care assessment.
3. The respondent, Aviva Canada, denied the applicant’s claim for an income replacement benefit as of May 27, 2015. Aviva takes the position that the applicant does not suffer a substantial inability to perform the essential tasks of his employment.
4. The respondent also takes the position that the attendant care benefit is neither reasonable nor necessary, and it has not been incurred.
5. The respondent further takes the position that the cost of examination for an attendant care assessment is neither reasonable nor necessary.

ISSUES TO BE DECIDED

6. The respondent raises the following preliminary issue:
 - a. Has the applicant failed to comply with sections 33(1) of the *Schedule* by not providing information reasonably required to assist the respondent in determining the amount of income replacement benefit payable?
7. The following are the main issues in dispute:
 - a. Is the applicant entitled to an income replacement benefit for the period from June 10, 2014 to June 3, 2016?
 - b. If the answer to question (a) above is yes, what is the amount of the income replacement benefit?
 - c. Is the applicant entitled to attendant care benefits in the amount of \$1,003 per month for the period from June 4, 2014 to June 3, 2016?

- d. Is the applicant entitled to the cost of examination for an attendant care assessment in the amount of \$1,299.50,¹ on a Treatment and Assessment Plan (OCF-18) dated October 6, 2014, recommended by Vocan Medical Assessments Inc.?
- e. Is the applicant entitled to interest as per section 55(2) and section 51(3) of the *Schedule*?
- f. Is the applicant entitled to a costs award?

RESULT

8. The applicant is entitled to an income replacement benefit in the amount of \$132.90 weekly for the period from June 10, 2014 to June 3, 2016, along with interest on the amounts owing.
9. I do not find that the applicant is entitled to an attendant care benefit as he has not proven on a balance of probabilities that P.S, whom he claims as his attendant care provider, has suffered an economic loss.
10. I also do not find that the cost of examination for an attendant care assessment is reasonable and necessary.
11. The applicant is not entitled to costs.

ANALYSIS

Preliminary Issue – Section 33(1) of the *Schedule*

12. Section 33(1) of the *Schedule* states the following:

An applicant shall, within 10 business days after receiving a request from the insurer, provide the insurer with the following:

1. Any information reasonably required to assist the insurer in determining the applicant's entitlement to a benefit.

¹ I note that the applicant's written submissions refer to the cost of the attendant care assessment as \$1,597.50. However, the respondent is correct that the amount is \$1,299.50, which is reflected on the OCF-18 dated October 6, 2014.

2. A statutory declaration as to the circumstances that gave rise to the application for a benefit.
 3. The number, street and municipality where the applicant ordinarily resides.
 4. Proof of the applicant's identity.
13. The respondent alleges that the applicant breached s. 33(1) of the *Schedule* because he did not provide requested financial documents. Because of this breach, the respondent seeks an order that it is not liable to pay the income replacement benefit during the period of non-compliance. Pursuant to s. 34 of the *Schedule*, I find that there was a breach but the applicant has provided a reasonable explanation.
 14. The respondent's accountant, BDO Canada LLP, requested financial documents from the applicant on October 21, 2014, October 29, 2014, November 10, 2014, December 1, 2014, December 6, 2014, February 27, 2015 and May 19, 2015.
 15. The respondent advised the applicant that he was in non-compliance with section 33(1) of the *Schedule* on February 27, 2015.
 16. The respondent acknowledged receiving the following documents from the applicant on September 7, 2016:
 - Income tax summaries from 2009 to 2012
 - 2013 T1 General
 - 2013 Statement of Business or Professional Activities
 - 2014 Statement of Business or Professional Activities
 17. The respondent also acknowledged receiving further financial documents from the applicant on the day of the case conference, and the 2015 T1 General and 2015 Statement of Business or Professional Activities on October 6, 2016.
 18. It is clear that the applicant has breached section 33(1). However, section 34 states that the breach does not disentitle the person to a benefit if the person has provided a reasonable explanation.
 19. In his Reply, the applicant provided an explanation for the non-compliance. He stated that he required additional time to obtain information about his business and is elderly. I note that the applicant was 72 years old at the time of the accident. I find that he has provided a reasonable explanation for his non-compliance.

Income Replacement Benefit

20. The applicant bears the burden of proving on a balance of probabilities that he is entitled to an income replacement benefit for the period from June 10, 2014 to June 3, 2016.
21. There is no dispute that the applicant is entitled to an income replacement benefit from June 10, 2014 to May 26, 2015. In a letter dated December 30, 2014, the respondent acknowledged that the applicant is entitled to, and that he continues to be entitled to an income replacement benefit (as per Dr. Silver's report of November 20, 2014).
22. The only issue in dispute is whether the applicant is entitled to an income replacement benefit from May 27, 2015 to June 3, 2016.
23. The test for entitlement to an income replacement benefit is set out in s. 5(1) of the *Schedule*. In the applicant's case, s. 5(1) provides that he is entitled to income replacement benefit if, as a result of the accident, he suffers a substantial inability to perform the essential tasks of his pre-accident employment.
24. To determine the applicant's entitlement to the income replacement benefit, I must answer two questions. First, what are the essential tasks of the applicant's employment? Second, is the applicant substantially unable to perform the essential tasks of her employment?
 - (a) *What are the essential tasks of the applicant's employment?*
25. At the time of the motor vehicle accident, the applicant was operating, on a part time basis, an import export textile business.
26. I note that no jobsite assessments were in evidence before me in this case.
27. The best evidence available of the essential tasks of the applicant's employment is short excerpts found in Ms. Westbrook's "Functional Capacity Evaluation," Dr. Silverman's "Psychological Report," Dr. Silver's "Family Medicine Report," and Ms. Yee and Mr. Troi's "Workwell Functional Capacity Evaluation." Although there are references in these reports to a "Hypothetical Jobsite Assessment," this assessment is not in evidence before me.
28. Having reviewed these reports, I find that the following are the essential tasks of the applicant's employment:
 - Traveling to Europe and Africa to source suppliers
 - Purchasing high quality traditional African fabrics
 - Arranging for shipments to Canada and elsewhere

- Picking up shipments from Customs
- Unpacking and sorting the shipments
- Selling the imported fabrics to businesses and private customers
- Speaking to potential customers over the phone
- Cutting the fabrics
- Delivering fabrics to local clients

(b) *Is the applicant substantially unable to perform the essential tasks of self-employment as an import export textile business operator?*

29. Prior to addressing this question, I must determine the applicant's physical conditions.
30. In the Disability Certificate (OCF-3) dated July 23, 2014, Dr. I. Pun, the applicant's family physician, diagnosed the applicant with whiplash associated disorder (WAD 2) and lower back pain.
31. In the Disability Certificate (OCF-3) dated October 16, 2014, Mr. S. Gholeizadeh, the applicant's physiotherapist, diagnosed the applicant with the following:
- whiplash associated disorder (WAD 2)
 - neck pain with musculoskeletal signs
 - sprain and strain of shoulder joint
 - sprain and strain of hip
 - contusion of knee
 - sprain and strain of lumbar spine
 - other sleep disorders
 - tension-type headache
 - depressive episode
32. In his report of December 9, 2014, Dr. Silver diagnosed the applicant with the following impairments:
- Right rotator cuff tendonosis with ultrasound evidence of partial tears at the supraspinatus, infraspinatus and subscapularis tendons
 - Mechanical low back pain with right gluteal referral
 - Right knee osteoarthritis
 - Bilateral carpal tunnel syndrome
33. In his report of May 14, 2015, Dr. V. Naumetz, an orthopaedic surgeon, opined that the applicant sustained a sprain/strain of the cervical spine (WAD II), a sprain/strain of the lumbar spine, a sprain and strain of the right shoulder, and a

sprain/strain or contusion of the knee. I note, however, that he opined that the applicant “has essentially recovered from these minor injuries”.

34. I find that the applicant sustained WAD 2, a sprain/strain of the lumbar spine, a sprain/strain of the right shoulder, and a sprain/strain or contusion of the knee.
35. Although Dr. Naumetz opined that the applicant has essentially recovered from his injuries, I disagree for a number of reasons. One, Dr. Naumetz conducted a paper review based on the medical documentation, and never met the applicant in person to conduct a physical examination. Second, in his clinical notes for August 31, 2016, written after Dr. Naumetz’s report, Dr. Pun noted that the applicant still complained of shoulder and knee pain.
36. I note that in Dr. Silver’s report of December 9, 2014, he concluded the following:

“...due to the nature of his right shoulder injury [the applicant] is currently unable to perform tasks that involve significant amounts of arm movement...therefore he is unable to complete the tasks that involve repetitive and heavier lifting or reaching at this time.”
37. I have carefully considered Dr. Pun’s clinical notes for August 31, 2016 (as it is the most recent medical evidence available of the applicant’s physical condition) along with Dr. Silver’s above quoted conclusion. Considered together, I come to the conclusion that the applicant is substantially unable to perform certain essential tasks due to his multiple sites of pain (right shoulder pain, right knee pain and right side of the neck). These tasks include picking up shipments from Customs Canada, unpacking and sorting the shipments, cutting the fabric and delivering orders to local clients. I find these tasks are essential to the work processes required by the applicant’s business, and that they require the repetitive heavy lifting and reaching that Dr. Silver specifically stated he could not do.
38. For these reasons I find, on a balance of probabilities, that the applicant has proven that he suffers a substantial inability to perform the essential tasks of his pre-employment during the first 104 weeks after the subject motor vehicle accident.
39. I understand that the parties are in disagreement with respect to the amount of the income replacement benefit. I note that the respondent states that its accountant was unable to calculate the applicant’s income replacement benefit. I also note that the applicant bases his calculation of the income replacement benefit on his 2013 gross business income, the year prior to his motor vehicle

accident. As the best evidence I have available is the applicant's calculation (as the respondent provided no submissions to the contrary), I accept the applicant's submissions because it is reasonable to base the income replacement calculation on the year prior's gross business income. Accordingly, I find that the respondent must pay the applicant income replacement benefit in the amount of \$132.90 weekly for the period from June 10, 2014 to June 3, 2016, taking into consideration the ramp down in section 12(5) of the *Schedule*.

Attendant Care Benefit

40. I note that the applicant has not made any submission on whether the attendant care benefit is reasonable and necessary. He simply argues that he has incurred attendant care expenses.
41. An applicant is entitled to reasonable and necessary expenses incurred as a result of the accident for services provided by an aide or attendant (s. 19(1)(a) of the *Schedule*). A requirement for entitlement is that the expense is incurred.
42. Section 3(7)(e)(iii) of the *Schedule* sets out the definition of "incurred" that is relevant in this appeal:
- 3(7)(e) ... an expense in respect of goods or services referred to in this Regulation is not incurred by an insured person unless,
- ...
- (iii) the person who provided the goods or services,
- (A) did so in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged, but for the accident, or
- (B) sustained an economic loss as a result of providing the goods or services to the insured person
43. On my reading of the legislation, s.7(e)(iii) provides for two classes of attendant care providers:
1. The Professional providers who are typically, though not necessarily, at arms-length from the applicant; and,
 2. The applicant's family or friends who sustain an economic loss as a result of providing the service

44. In this case, P.S. provided attendant care services to the applicant. Although the applicant does not state in his submissions his relationship with P.S., I am assuming, as he discusses economic loss, that she is not a professional provider. As such, the applicant must prove on a balance of probabilities that P.S. sustained an economic loss in providing the service.
45. The applicant submits that P.S.'s economic loss was forgoing her active search for employment while providing attendant care for him.
46. Although case law has determined that "economic loss" should not be read restrictively, the Tribunal cannot speculate about a person's economic loss. The applicant submits that P.S.'s economic loss was her inability to search for and apply for employment while she was his attendant care provider. However, he has not provided any evidence to demonstrate P.S.'s economic loss. He simply makes a bald statement that it is the time she lost in not being able to job hunt.
47. As there is no evidence of economic loss, I find that the applicant has not incurred expenses for any attendant care services.

Cost of Examination

48. The applicant submits that he is entitled to the cost of examination for an attendant care assessment in the amount of \$1,299.50 on a Treatment and Assessment Plan (OCF-18) dated October 6, 2014, recommended by Vocan Medical Assessment Inc. He also submits that the examination is reasonable and necessary as it assisted in the determination of his entitlement to benefits and the medical evidence supports it.
49. The respondent submits that the applicant is not entitled to the cost of examination for an attendant care assessment as Dr. Silver's report of December 9, 2014 indicated that the assessment was not reasonable and necessary. It points out that Dr. Silver recommended an active physical therapy program that had not been provided to the applicant.
50. Section 25(1)1 of the *Schedule* states the following:
 - (1) The insurer shall pay the following expenses incurred by or on behalf of an insured person.
 1. Reasonable fees charged for preparing a disability certificate if required under section 21, 36 or 37, including any assessment or examination necessary for that purpose.

51. The onus is on the applicant to prove entitlement to the specific benefits that they are claiming.
52. In this case, the applicant simply submits that he is entitled to the attendant care assessment as it assisted in the determination of his entitlement to attendant care benefits. He also submits that the medical evidence supports that the assessment is reasonable and necessary. However, he has not stated the specific medical evidence he is relying upon.
53. I do not find his submissions to be persuasive. He has not addressed whether the assessment is reasonable and necessary. He simply states that the assessment would assist in determining his entitlement to attendant care benefits. Logically, all assessments would assist in determining whether an applicant is entitled to the benefit he/she is seeking. In his Reply, the applicant also states that the medical evidence supports that the assessment is reasonable and necessary. However, he does not point to the specific medical evidence. I find that he has not met his onus of proving that the cost of assessment for attendant care benefits is reasonable and necessary.

Costs

54. The *Licence Appeal Tribunal Rules of Practice and Procedure* (the “Rules”) includes a provision in Rule 19.1 for parties to request costs in a proceeding if they believe that the other party has acted unreasonably, frivolously, vexatiously, or in bad faith. Rule 19.4 further sets out the requirements for that request, which must include the reasons for the request and the particulars of the alleged conduct.
55. The applicant has asked for costs in this proceeding. However, the applicant has not alleged the respondent’s conduct to be unreasonable, frivolous, vexatious, or in bad faith. Furthermore, the applicant has not set out the reasons for the request or the particulars of the other party’s conduct. The applicant has failed to meet the threshold and requirements for costs set out in Rule 19. There is no evidence of unreasonable, frivolous, vexatious, or in bad faith behaviour by the respondent, and so I do not award costs.

CONCLUSION

56. In light of the foregoing, I find that the applicant is entitled to income replacement benefit in the amount of \$132.90 weekly for the period from June 10, 2014 to

June 3, 2016. He is also entitled to interest on the amount of income replacement benefit owing.

Released: March 22, 2017

Lan An
Adjudicator