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Licence Appeal Tribunal

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Ontario

RECONSIDERATION DECISION

Before: Linda P. Lamoureux, Executive Chair

Date: November 10, 2017

File: 16-000941/AABS

Case Name: F.F. v. Aviva Canada

Written Submissions By:

For the Respondent: M. Jennifer Cosentino, Counsel

For the Applicant: Dev Misir, Counsel

Overview

1. This request for reconsideration considers the extent to which the applicant, F.F., is entitled to an income replacement benefit ("IRB") under the *Statutory Accident Benefits Schedule – Effective after September 1, 2010*, O. Reg. 34/10 (the "*Schedule*"). F.F.'s insurer, Aviva Canada ("Aviva"), accepts the Tribunal's decision that he suffers from a substantial inability to perform the essential tasks of his pre-accident employment and, thus, that he is eligible to receive the IRB. Aviva raises a different challenge to the Tribunal's decision that F.F. should receive the IRB for the claim period at issue: according to Aviva, the Tribunal erred in finding that F.F. had a reasonable explanation for breaching s. 33(1) of the *Schedule* by not providing Aviva with information it reasonably required to calculate the IRB. Aviva argues that, once this error is corrected, the consequence outlined in s. 33(6) applies, namely that it is not liable to pay the IRB for any period during F.F.'s failure to provide the information it requested.

2. I agree. For the reasons below, I therefore grant Aviva's request in part and vary the Tribunal's decision of March 22, 2017 to provide that F.F. is entitled to an IRB from only June 10, 2014 to May 26, 2015.

The Facts

The accident

3. F.F. was injured in a motor vehicle accident on June 3, 2014. At the time, he was a 72-year-old former airline mechanic who, although retired, continued to operate a long-standing business importing African textiles to Canada. After the accident, health practitioners completed multiple Disability Certificates (OCF-3) on F.F.'s behalf, indicating that his injuries included whiplash-associated disorder (WAD2), lower back pain, and sprain and strain of his shoulder joint. These injuries impaired F.F.'s ability to, among other things, operate his business.

The application for benefits

4. As a result, F.F. applied to Aviva under the *Schedule* for various benefits, including an IRB. That process began when F.F. sent Aviva an Application for Accident Benefits (OCF-1) dated July 23, 2014, along with an OCF-3 completed by his family physician, Dr. I. Pun.

5. In response, Aviva noted a discrepancy. In an Explanation of Benefits dated August 8, 2014, Aviva highlighted that, whereas the OCF-1 indicated that F.F. was self-employed and that the accident prevented him from working, the OCF-3 indicated that he did not suffer from a substantial inability to perform the essential tasks of his pre-accident employment. Aviva therefore asked him to complete an Election of Benefits form (OCF-10) to help it determine F.F.'s entitlement to a

specific benefit. F.F. eventually submitted an OCF-10 months later, on February 13, 2015, electing to receive an IRB.

The requests for information

6. In the interim, Aviva did two things.

7. First, it invoked its limited right under s. 44 of the *Schedule* and asked F.F. to attend three insurer examinations to determine whether he was eligible to receive an IRB. By Explanation of Benefits dated December 30, 2014, Aviva provided F.F.'s counsel with the three reports arising from these examinations. Aviva explained that, based on these reports, it would "continue [F.F.'s] entitlement to [sic] income replacement benefit at [that] time" but would reassess his condition by June 2015.

8. Second, and during this same period, Aviva engaged BDO Canada LLP ("BDO"), a professional accounting firm, to help calculate the IRB. To that end, BDO wrote to F.F.'s counsel on both October 29 and December 1, 2014 to request certain financial information from F.F., including his 2013 personal tax returns. In both letters, BDO explained that it had been retained by Aviva to calculate F.F.'s IRB, asked for information that it identified specifically, and requested a response within 15 days. BDO received no response. This prompted Aviva to write to F.F.'s counsel on December 6, 2014. In its letter, Aviva asked for the same financial documentation "[r]equested by BDO since October 29, 2014" and, citing s. 33(1) of the *Schedule*, asked for a response within 10 days. It received no response. For that reason, Aviva wrote again to F.F.'s counsel on February 27, 2015 to reiterate its request and explain that, given the lack of response, it would not pay for an IRB for any time before February 27, 2015.

9. Over the next couple of months, Aviva reassessed F.F.'s condition. To that end, it again asked F.F. to attend additional insurer examinations, which he attended. The result was that, by Explanation of Benefits dated May 19, 2015, Aviva informed F.F. of its position that he did not suffer a substantial inability to perform the essential tasks of his pre-accident employment and, thus, that "[his] Income Replacement Benefits will not be paid beyond the date of May 26, 2015." Aviva's letter also mentioned the outstanding financial information: "Please be advised that once we have the income information the official stoppage of the IRB will be effective May 26, 2015, and no benefits will be paid beyond that date." In this sense, this latest correspondence suggested that Aviva would pay F.F. for an IRB up to May 26, 2015, provided he forwarded his financial information, but that it would not pay the IRB for any period thereafter.

F.F. commences this application

10. Almost one year later, on June 24, 2016, F.F. commenced this application to dispute, among other things, his entitlement to an IRB.

F.F. provides Aviva with his financial information

11. As this matter progressed towards a hearing, F.F. finally began to provide his financial information to Aviva. On either August 27 or September 7, 2016, he gave Aviva copies of his 2013 and 2014 personal income tax returns. (The parties disagree over the exact date, which is of no consequence given that both fall after the end of the claim period.) This was F.F.'s first response to BDO and Aviva's outstanding requests for financial documentation. F.F. also later provided Aviva with additional records concerning his income.

The parties' positions

12. On November 15, 2016, this application was then heard by way of a written hearing based solely on the parties' written submissions and supporting documentation. The parties agreed that at issue was whether F.F. was entitled to a weekly IRB in the amount of $132.90 from June 10, 2014 to June 3, 2016. Notably, this amount – *i.e.*, $132.90 – is based on the income that F.F. reported in his 2013 personal tax return.

13. In his written submissions filed before the hearing, F.F. maintained that he was eligible for the IRB, and that "several documents" that BDO requested were not relevant to his claim. In his view, all necessary and relevant information had been provided to Aviva.

14. For its part, Aviva disputed F.F.'s eligibility for the IRB. It also pointed to its multiple requests under s. 33(1) of the *Schedule* and F.F.'s failure to provide Aviva with all requested financial information. Given these facts, it argued, s. 33(6) applied: it was not liable to pay the IRB for any period during F.F.'s failure to provide all of the requested information. Aviva also argued that, although it provided all of F.F's available financial information to BDO, BDO was still unable to calculate the IRB and had requested further information from F.F., which F.F. had failed to provide. Thus, Aviva argued, it was "not in a position to quantify" the IRB.

15. In reply, F.F. made a number of arguments addressing Aviva's reliance on s. 33(6). The most significant of these underscored s. 33(8)(b). That section provides that, where an applicant fails to comply with s. 33(1) but subsequently does comply and provides a "reasonable explanation" for the delay in complying, an insurer shall pay all amounts that were withheld as a result of the previous non-compliance. F.F. proffered an explanation for his delay in answering BDO and Aviva's requests for his financial information: "he required additional time to obtain information as he was involved in a serious motor vehicle collision, suffered serious injuries, is elderly, and was unexpectedly required to provide extensive documentation about his business."

The Tribunal's decision

16. In its decision, the Tribunal held that F.F. is substantially unable to perform the essential tasks of his pre-accident employment and, thus, that he is entitled to receive an IRB. That finding is not disputed. Rather, the parties' dispute at this stage is over the IRB's duration and quantum.

17. Concerning the former, the Tribunal made two key determinations. First, it held that there was no dispute that F.F. was entitled to the IRB from June 10, 2014 to May 26, 2015. It explained, at paras. 20-22, as follows:

> 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.
>
> 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…
>
> The only issue in dispute is whether the applicant is entitled to an income replacement benefit from May 27, 2015 to June 3, 2016.

18. Second, the Tribunal held that, while F.F. failed to comply with s. 33(1) of the *Schedule*, he had a reasonable explanation for doing so. The relevant portion of the Tribunal's decision, at paras. 18-19, is as follows:

> 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.
>
> 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.

19. Based on these findings, the Tribunal went on to adopt F.F.'s calculation of his IRB based on his 2013 personal income tax return, holding that F.F. should receive a weekly IRB of $132.90 from June 10, 2014 to June 3, 2016.

Discussion and Reasons

Why the Tribunal erred in considering F.F.'s "reasonable explanation"

20. Aviva makes this request for reconsideration on two main grounds. First, it argues that the Tribunal made a significant error in fact concerning F.F.'s breach of s. 33(1) of the *Schedule*. More specifically, it argues that the Tribunal erred in accepting that F.F. had a reasonable explanation for his failure to comply with BDO and Aviva's multiple requests for his financial information.

21. I agree.

22. Much of the parties' disagreement focuses on the breadth of BDO and Aviva's request for information, their argument being over the extent to which the documentation requested was relevant and, thus, "reasonably required" within the meaning of s. 33(1). I need not consider all of the information that BDO and Aviva requested. At the very least, F.F.'s 2013 personal income tax return was information that Aviva reasonably required in order to determine the quantum of F.F.'s IRB. Indeed, that same return, which was the first item that BDO requested in its letter of October 29, 2014, formed the basis for F.F.'s own calculation of the IRB's quantum. Unfortunately, after BDO's initial request for this information, F.F. did not provide Aviva with *anything* for almost two years – *i.e.*, until either August 27 or September 7, 2016 – when he finally gave Aviva a copy of his 2013 personal tax return. For these reasons, I have no difficulty finding that, insofar as his 2013 personal tax return is concerned, F.F. clearly breached s. 33(1).

23. As for F.F.'s explanation for his delay in complying with BDO and Aviva's requests for information, the Tribunal accepted F.F.'s assertion that "he required additional time to obtain information about his business and is elderly." However, there is no evidentiary basis for that finding. Based on the record before the Tribunal, which I have reviewed in its entirety, BDO and Aviva's requests for information went unanswered until, at the earliest, either August 27 or September 7, 2016. At no point did F.F. or his counsel write to explain the difficultly in gathering this information, whether due to F.F.'s age or any other reason he cited before or now. There might have been any number of reasonable explanations for F.F.'s delay. None were ever offered. There was only silence.

24. Any explanation that F.F. offers now for failing to comply with BDO and Aviva's multiple requests for information is simply a bald, after-the-fact assertion. The suggestion, which the Tribunal accepted, that he "required additional time to obtain information about his business and is elderly" appears for the first time in the record in F.F.'s reply submissions filed before the hearing. The other explanations he now offers for his delay, for example his age, injuries, and pre-existing conditions, are undocumented assertions. None of these is supported by any evidence accounting for F.F.'s delay in responding to BDO or Aviva. In fact, the record belies

F.F.'s position. F.F. received a copy of his 2013 personal tax return from the accounting services firm that prepared it by letter dated May 10, 2016, months before he eventually provided it to Aviva. Thus, based on the record before me, I refuse to accept any explanation that F.F. now offers for his delay.

25. The Tribunal's conclusions must be based on evidence, not speculation or conjecture. Given the lack of evidence explaining F.F.'s delay in responding to BDO and Aviva's requests for financial information, the Tribunal's decision involved a significant error of fact that, if corrected, would have affected its decision. The consequence provided in s. 33(6) applies.

26. The only remaining question is when this consequence should begin to apply. In its request for reconsideration, Aviva takes no issue with the Tribunal's determination, mentioned above, that there was "no dispute that the applicant is entitled to an income replacement benefit from June 10, 2014 to May 26, 2015." For that reason, I find that F.F. is not entitled to an IRB after May 27, 2015. Again, given that F.F. finally provided Aviva with a copy of his 2013 personal income tax return on either August 27 or September 7, 2016, he is not entitled to an IRB for the remainder of the claim period, which ended on June 3, 2016.

Why the remainder of the Tribunal's decision should stand

27. Aviva makes a number of additional arguments that, in effect, seek to challenge the IRB's quantum. I see no merit in any of these.

28. For example, Aviva alleges that the Tribunal made a significant error of fact and law when it "determined that the IRB calculation provided by the Applicant's representative was more persuasive than the conclusions reached by BDO, the independent financial accountants retained by the Respondent." In this respect, Aviva asserts that the Tribunal did not afford sufficient weight to BDO's conclusions concerning the IRB.

29. The obvious response to this submission is that neither BDO nor Aviva offered *any* competing calculation of F.F.'s IRB. As mentioned above, Aviva's position before the hearing was that it provided all of F.F's available financial information to BDO, BDO was still unable to calculate the IRB and had thus requested further information from F.F., but that F.F. had failed to respond. As a result, Aviva was "not in a position to quantify" the IRB. The only calculation of the IRB that the Tribunal was offered was provided by F.F., whose evidence the Tribunal was entitled to accept for the reason it offered, namely that "it is reasonable to base the income replacement calculation on the year prior's gross business income:" see para. 39. Indeed, s. 4(2)3 and 4(3) of the *Schedule* contemplate this same approach.

30. Additionally, Aviva asserts that F.F. had "ample opportunity, over 2 years, to retain an independent accountant to assess the financial documentation he provided to

the Respondent and BDO and disprove BDO's conclusion that it was unable to quantify the IRB given the lack of financial documentation." In this vein, Aviva appears to suggest that F.F. should have been required to retain an independent accountant to calculate his IRB or, likewise, that it was only evidence from such a consultant that should have informed the Tribunal's decision.

31. As F.F. correctly points out, there is no requirement prescribed by the *Schedule* that an applicant take on the burden of securing an independent accountant to calculate an IRB entitlement. This would be an onerous burden, one that I would not read into the *Schedule*. The suggestion also overlooks the flexibility of the rules of evidence applicable to administrative proceedings, particularly in light of s. 15 of the *Statutory Powers Procedure Act*, R.S.O. c. S.22. At any rate, both before the Tribunal and on this request, Aviva offered no detail, example, or illustration of what information is missing from F.F.'s calculation of the IRB, or how any of the requested but outstanding financial documentation might change F.F.'s calculation – which, again, derives solely from his 2013 personal income tax return. I agree with Aviva that calculating a self-employed individual's income is no easy task. However, its general assertion here that "more information is required" is, without any further explanation, insufficient.

Decision

32. Based on the above, I therefore grant Aviva's request for reconsideration in part and vary the Tribunal's decision of March 22, 2017 to provide that F.F. is entitled to an IRB from only June 10, 2014 to May 26, 2015.

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Linda P. Lamoureux
Executive Chair
Safety, Licensing Appeals and Standards Tribunals Ontario

Released: November 10, 2017