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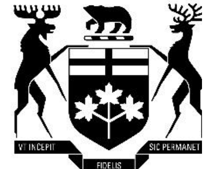

RECONSIDERATION DECISION

Before: Thérèse Reilly, Adjudicator

Date: August 19, 2019

File: 18-002735/AABS

Case Name: M.K. v. Aviva Insurance Company of Canada

Written Submissions by:

For the Applicant: Loreto Scarola, Paralegal

For the Respondent: Jennifer Cosentino**,** Counsel

OVERVIEW

[1] This Request for Reconsideration was filed by the applicant (the insured). It arises out of a decision in which the Tribunal found the applicant was not entitled to a non-earner benefit. The Tribunal also found that the applicant was not entitled to an award under section 10 of Ontario Regulation 664 and interest.

[2] The applicant submits that the Tribunal erred in law and in fact by failing to consider the evidence in its totality and related case law. The applicant requests the Tribunal set aside the decision dated December 10, 2018 and that I vary the Tribunal's decision and find the applicant is entitled to the benefit claimed on the basis that the Tribunal made significant errors of law and fact.

[3] 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.

RESULT

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

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 a significant error of law or fact such that the Tribunal would likely have reached a different decision;
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 new evidence that could not have reasonably been obtained earlier and would have affected the result.

[6] The applicant submits in its Request for Consideration that Rule 18.2(b) applies as the Tribunal erred in law and in fact by failing to consider the evidence in its totality and related case law. The applicant states the adjudicator erred by failing to:

i properly interpret Section 44 of the Statutory Accident Benefit Schedule by finding it reasonable that the applicant attend an

insurer's examination (IE) to address a benefit that has already been denied by the respondent.

ii fairly apply the principals of *Heath v. Economical Insurance Company* to both sides of this dispute. The applicant maintains she met the standard of proof.

iii properly interpret and assign the proper weight to the family doctors clinical notes by ignoring the family doctor's diagnosis of the applicant's injuries and impairments and the effects on her Activities of Daily living such as being unable to clean her home, visit with family, walk safely without a cane.

vi properly interpret and assign the proper weight to the assessment reports of Dr. Judith Pilowsky (psychologist) and Dr. Osama Benmoftah (orthopedic surgeon) even though these very reports were found to be credible in a decision by a different adjudicator at a previous LAT Hearing for this same applicant.

v acknowledge the 82 year old applicant's medically documented impaired cognitive functioning of the applicant as a result of the accident when commenting on the contents of expert's reports.

vi properly analyze and interpret the contents of the video surveillance.

vi consider the testimony of the applicant's son in its entirety.

[8] The details of each allegation were submitted in the Applicant's Reply to the Request for Reconsideration[1] and attached at Tab 4 of the Reply, are the 2017 clinical notes of the family doctor. The respondent objected to the Reply and argued the applicant was attempting to introduce new evidence that was available before the hearing through the Reply. The respondent objects to the introduction of this evidence in the Reconsideration and at this stage of the appeal.

[9] The respondent submits that the facts as set out in the applicant's Request for Reconsideration and the Reply were made, orally and in writing, at the LAT hearing and they were heard, read, weighed and considered by the adjudicator in rendering her decision. The respondent submits this request is an attempt by the applicant to reargue her case which failed at the hearing. Further, the applicant has failed to prove the Tribunal made a significant error in fact or law. The respondent states the decision disentitling the applicant to a non-earner benefit is the correct application of the law to the facts as found.

[10] In order to interfere with the original decision of the Tribunal under Rule 18.2(b)

[1] The Tribunal specified a maximum of 10 pages, the applicant's Reply is 13 pages.

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. When the Tribunal's decision is read in its entirety, it is clear the decision provides a well-reasoned analysis of the submissions and evidence of both parties and supports the decision to deny the applicant's claim for a non-earner benefit. I am not persuaded by the applicant's submissions that the Tribunal made a significant error in law or fact. This is discussed below.

The Tribunal did not err under Rule 18.2(b)

Section 44

[11] A preliminary issue was raised orally at the outset of the hearing by the respondent regarding the applicant's failure to attend a section 44 insurer examination (the IE). The applicant did not attend the IE. Following arguments from both parties, the adjudicator found it was reasonable under section 44 (1) to have scheduled the IE. The adjudicator outlined in its decision that the insurer has the right under section 44 to schedule an IE to assist it to determine if an insured person is or continues to be entitled to a benefit. The IE in the circumstances was required to reassess the respondent's earlier findings. There is no provision in the Schedule that states an insurer cannot reassess a denied benefit. The adjudicator ruled the applicant was non-compliant and stated that should the Tribunal find the applicant be entitled to a non-earner benefit, a negative inference could be drawn from the applicant's failure to attend the IE. For these reasons, I find the Tribunal did not commit an error of fact or law under Rule 18.2(b) such that the Tribunal would likely have reached a different conclusion.

[12] I am not persuaded by the applicant's submissions alleging the respondent's scheduled IE after the hearing dates was suspect and an attempt by the respondent to unfairly obtain new evidence that could not be medically scrutinized in time for the hearing. The applicant states the respondent had ample opportunity to arrange the IE at the case conference and chose not to.

[13] The respondent states that the facts as presented by the applicant are not correct in that the respondent's IE notice was sent out on August 15, 2018 after the case conference which was held on July 23, 2018 and almost 2 months after receiving a significant amount of medical documents from the applicant requiring the insurer to schedule the IE for a re-assessment of entitlement to the benefit. The adjudicator agreed with the respondent that scheduling the IE in the circumstances was reasonable and within its right to do so under section 44.

[14] I see no reason to interfere with the decision of the Tribunal regarding the non-compliance. If additional time would have been required by the applicant to assess any new evidence in time for the hearing, the applicant could have

brought a motion to adjourn the hearing to a new date, if necessary.

The Heath principles and whether the applicant met the standard of proof

[15] When the Tribunal's decision is read in its entirety, it is clear the decision provides a well-reasoned analysis of the submissions and the medical evidence presented by both parties. The applicant's evidence was reviewed and analyzed against the medical evidence of four IE assessors. The adjudicator outlined the reasons why she preferred the report of the IE assessors over that of the applicant's report from Dr. Pilowsky. Paragraph 32 of the decision supports this finding. The adjudicator also noted inconsistencies between the reports about the activities the applicant could and could not do. Paragraphs 33 to 35 of the Tribunal's decision supports this finding.

[16] The applicant maintains the clinical notes and records of the family doctor were submitted and summarized in the applicant's initial submissions for the sole purpose of providing a comparison of the applicant's pre and post accident functioning, yet she states this was not acknowledged nor commented on by the adjudicator. I disagree. The adjudicator noted that one of the Heath principles requires a comparison of the applicant's daily activities before and post accident. The disability must also be uninterrupted. The adjudicator noted that the clinical notes of the family doctor did not provide a sufficient description of the applicant's pre and post accident activities. Paragraph 21 supports this finding. The adjudicator noted a limitation in Dr. Pilowsky's report is the commentary of what the applicant could or could not do and was based on the self reports of the applicant. These activities as noted in the OCF3s also conflicted with activities the applicant was observed doing in the video surveillance evidence. The adjudicator also found the disability was also not uninterrupted, as required by Heath. Paragraphs 26, 37 and 42 support these findings.

The Clinical Notes of the Family Doctor

[17] In its Request for Reconsideration, the applicant submits that the Tribunal ignored the physician's diagnosis of injuries and impairments and the effects on her daily activities. I am not persuaded by the applicant's submissions on this point. In the paragraph above, I noted the finding made by the adjudicator following a review of the clinical notes of the family doctor that the notes failed to provide a sufficient description of the pre and post accident activities of daily living to support the claim for a non-earner benefit. Paragraphs 11, 21 to 23 and 35 and 36 of the decision support this finding. The disability certificates (OCF3s) were also analyzed in detail in paragraphs 19 and 20 of the decision to determine if they provided sufficient evidence to identify the pre and post accident activities of the applicant and her functionality. The adjudicator found they were not.

[18] The Tribunal's decision provides a well-reasoned analysis of the clinical notes of the family doctor and the diagnosis and impairments and the reasons for its decision to deny the non-earner benefit. I see no reason to interfere with the decision.

The Assessment Reports of Dr. Pilowsky and Dr. Benmoftah

[19] I find the Tribunal's decision provides a well-reasoned analysis of the section 25 reports of Dr. Pilowsky and Dr. Benmoftah[2]. The adjudicator provides a detailed comparison of the section 25 reports compared to the IE reports, discussed in paragraphs 28 to 36, and 40 of the decision. Contradictions evident between the reports and limitations of the reports were outlined by the adjudicator in paragraphs 28 to 31 of the decision. In paragraph 32, the adjudicator outlined the reasons to prefer the report of Dr. Valentin over that of Dr. Pilowsky due to the validity testing administered by Dr. Valentin. The adjudicator is open to assess the medical evidence presented and did provide detailed reasons for preferring one report over another. The Tribunal's decision provides a well-reasoned analysis of the submissions and evidence of the experts and IE assessors. Based on a review of the evidence, I find no error in the conclusions reached by the adjudicator and the weight assigned to the assessment reports of Dr. Pilowsky and Benmoftah.

[20] A further argument was raised by the applicant that a section 25 report was held to be credible in a prior decision involving this applicant which the adjudicator failed to acknowledge in assessing weight to the section 25 reports. As to the weight assigned to a report from another Tribunal decision, each decision is based on its own merit. Moreover, this alone under Rule 18.2 (b) does not satisfy one of the grounds for a reconsideration that there is a significant error of law or fact such that the Tribunal would likely have reached a different decision.

The age and impaired cognitive functioning of the applicant

[21] The applicant asserts the adjudicator did not acknowledge the applicant's age (82) and medically documented impaired cognitive functioning as a result of the accident when commenting on the contents of expert's reports. I do not find the applicant's submissions persuasive on this point. The initial submissions of the applicant included a few references to "cognitive issues", but these cognitive issues are not identified. The applicant did not submit into evidence any expert medical report that refers to or concludes the applicant suffered an "impaired cognitive functioning" as a result of the accident.

[22] Dr. Pilowsky in her report and analysis did not opine on any cognitive impaired functioning of the applicant. Although cognitive issues are not

[2] The section 25 analysis is discussed in paragraphs 24 to 30 of the decision.

psychological issues, Dr. Pilowsky noted the applicant had emotional deficiencies and depression. Dr. Tepperman, a general practitioner, who made his report following the date of the video surveillance, found no neurological impairment and the applicant was not incapable of performing her pre-accident activities such as being independent with self-care.

[23] The family doctor notes of December 22, 2015 refer to “dementia versus cognitive functioning” but no additional discussion is set out in the notes. The family doctor refers the applicant to a geriatrician to assess ongoing memory concerns. If one accepts that a cognitive issue includes a memory concern, the notes of the family doctor on September 6, 2018 refer to a cognitive assessment of the applicant and states the applicant at that time reported no “major concerns with memory”. The references in the doctors notes to a cognitive issue is not sufficient medical evidence to support the applicant’s position that the applicant suffered an impaired cognitive impairment as a result of the accident. The adjudicator presented a detailed review and analysis of the doctor’s notes that were submitted into evidence at the hearing. Paragraphs 2, 11, 21 to 23, 34, 36 and 43 of the decision supports this. For the reasons outlined, I do not find any reason to interfere with the decision of the Tribunal. The Tribunal did not commit an error of fact or law such that the Tribunal would likely have reached a different conclusion.

Video Surveillance and Testimony of the Applicant’s Son

[24] The applicant argues that the Tribunal failed to properly analyze and interpret the contents of video surveillance and the testimony of the son. I disagree with the applicant on both of the alleged errors. I am not convinced there was any error in law or in fact. The adjudicator outlines the observations from 5 days of video surveillance which was also examined in the context of a report of Dr. Tepperman, a general practitioner, who made his report following the date of the video surveillance. Dr. Tepperman found no neurological impairment and the applicant was not incapable of performing her pre-accident activities such as being independent with self-care. The admissibility of video surveillance was also raised at the outset of the hearing as a preliminary issue. The applicant objected to the video evidence being submitted into evidence. After hearing arguments, the adjudicator allowed the video surveillance evidence. The applicant had notice of the video surveillance evidence for at least two years prior to the hearing.

[25] As to the son’s testimony, some of his evidence was discounted as it was hearsay since it was based on conversations with and observations from his father. Although hearsay evidence is allowed, as outlined in the decision, the adjudicator noted his personal observations about his mother’s functioning would have been more beneficial than hearsay evidence. The Tribunal did not commit an error of fact or law to assign this evidence less weight given the lack of personal observations by the son.

The Adjudicator did not consider or comment on past case law

[26] The Applicant maintains that the Tribunal did not consider nor comment on past case law presented by the applicant in her initial submissions and reply. I am not persuaded by the applicant's submissions. The Tribunal reviews the evidence and submissions from the parties in rendering its decision. It is not required to refer to each piece of evidence or submissions in its written decision.

The Reply and Submission of New Evidence and Objection to the Reply

[27] The adjudicator in her decision at paragraphs 22 and 36 notes a gap in the clinical notes of the family doctor for the year 2017. Medical records from the family doctor that were submitted into evidence for the years prior to and after 2017. The adjudicator at paragraph 23 commented that had the applicant testified at the hearing, orally or by affidavit, this could have assisted to explain her impairment in 2017 and 2018, and the absence of the notes.

[28] The applicant submits the Tribunal did not give proper weight to the family doctors notes. The applicant submits the 2017 notes were submitted to the respondent as part of the scheduled document exchange, as documents the applicant intended to rely upon for this hearing. The applicant attached the clinical notes and records for the year 2017 of the family doctor to the applicant's Reply at Tab 4.The respondent denies they were introduced as evidence at the hearing and objects to the notes for 2017 being filed as new evidence for the reconsideration and the appeal. It states that the material at Tab 4 of the Reply was not put before the adjudicator at the hearing. The information was not admitted into evidence at the hearing and should not be considered on reconsideration. I agree.

[29] The initial submissions of the applicant did not discuss the notes for 2017 (submitted as Tab 4 to the Reply) or attach them to the submissions. Sending a document to a party in a document exchange prior to the hearing does not amount to submitting these notes into evidence at the hearing. As outlined by the respondent in its submissions, the applicant in her submissions for the hearing submitted clinical notes and records of the family doctor at Tab 14 which consisted of 28 pages. Tab 14 did not include clinical notes and records for the 2017 year found at Tab 4 of the Reply and was correctly identified as such by the Tribunal.

[30] The notes for 2017 were available prior to the hearing and as such are not new evidence for the purposes of this reconsideration or the appeal. I agree they are inadmissible for the purposes of this reconsideration as a result of Rule 9.4 of the License Appeal Tribunal Rules of Practice and Procedure and if admitted would violate natural justice and procedural fairness as the applicant had ample opportunity to serve these documents prior to the production deadline and hearing submission deadlines. There is no error in law or fact as these notes were not part of the evidence at the hearing. The applicant failed to submit these

into evidence at the hearing. They do not form part of the Tribunal's assessment in this reconsideration.

[31] Lastly, the respondent objected to the filing of the Reply by the applicant on the basis that the right of reply is a limited one. The Reply was allowed to be filed by the Tribunal, as such I am not striking the Reply from the record.

CONCLUSION

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

Thérèse Reilly, Adjudicator
Tribunals Ontario – Safety, Licensing Appeals and Standards Division

Released: August 19, 2019