LICENCE APPEAL TRIBUNAL

Safety, Licensing Appeals and Standards Tribunals Ontario

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Date: March 19, 2019
File Number: 18-003337/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:

Amy Wong

Appellant

and

Aviva Insurance Canada

Respondent

DECISION

VICE CHAIR: **Dawn J. Kershaw**

APPEARANCES:

For the Appellant:	Amy Wong**,** Applicant
	George (Gjergji) Laloshi, Paralegal
	Scott Weng, Representative
For the Respondent:	Lynn Highley, Adjuster
	Gina Nardella, Counsel
Interpreter:	Grace Chan, Cantonese
Court Reporter:	Bruce Porter.

HEARD In-Person: **December 17, 18 & 20, 2018**

OVERVIEW

[1] On December 6, 2015, the applicant and her husband got off a bus and the applicant was struck by a car as they crossed the road. She did not lose consciousness and got up at the scene. She was walking and oriented when she arrived at hospital by ambulance. She had a fractured left wrist, shoulder and upper arm injuries, and a cut to her elbow, and complained of pain in both knees.

[2] The applicant sought benefits pursuant to the Statutory Accident Benefits Schedule — Effective September 1, 2010 (the "Schedule")[1]. The applicant was denied certain benefits by the respondent and submitted an application to the Licence Application Tribunal - Automobile Accident Benefits Service ("Tribunal").

[3] When the parties were unable to resolve their dispute, the Tribunal scheduled an in person hearing. This is the decision that results from that hearing.

ISSUES

[4] The disputed claims in this hearing are:

i. Is the applicant entitled to receive a **non-earner benefit** ("NEB") in the amount of $185.00 per week for the period March 6, 2017 to date and ongoing?

ii. Is the applicant entitled to payments for the **cost of examinations** in the amount of $2,486.00 for a chronic pain assessment, recommended by Dr. Stephen Brown in a treatment plan dated January 3, 2018, and denied by the respondent on March 7, 2018?

iii. Is the applicant entitled to receive a **medical benefit** in the amount of $2,200.00 for chiropractic treatment, recommended by Wendy Mok in a treatment plan dated January 10, 2018, and denied (partially approved in the sum of $1000) by the respondent on March 7, 2018?

iv. Is the applicant entitled to **interest** on any overdue payment of benefits?

RESULT

[5] Based on the evidence before me, I find that:

i. The applicant is not entitled to an NEB in the amount of $185.00 per week for the period from March 6, 2017 to date and ongoing;

[1] O. Reg. 34/10.

ii. The applicant is not entitled to payment for the cost of examinations for a chronic pain assessment;

iii. The applicant is entitled to payment for the remainder of the outstanding amount of the treatment plan for chiropractic treatment in the sum of $1200.00;

iv. The applicant is entitled to interest on the outstanding amount of $1200.00.

PRELIMINARY ISSUES

[6] At the outset of the hearing, the parties narrowed the number of witnesses and there were no witnesses scheduled for December 19, 2018. As a result, the respondent suggested that the applicant's witness, Dr. Brown, could give his evidence by telephone, rather than have everyone re-attend in person. The applicant objected, and I heard submissions.

[7] The applicant did not identify any prejudice to the applicant of having Dr. Brown gave his evidence by telephone. In addition Rule 12.1(d) of *The Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)* provides that the Tribunal may hold a hearing in any combination of in-person, written or electronic, which includes telephone. As such, I ordered Dr. Brown's evidence to take place by telephone.

ANALYSIS

A. NEB

Law

[8] Pursuant to section 12 of the Schedule, the applicant is entitled to a non-earner benefit of $185 per week, after a 26 week waiting period, if she can prove that she has a complete inability to carry on a normal life within the 104 weeks after the accident.

[9] Section 3 defines a complete inability to carry on a normal life as an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident. The onus is on the applicant to establish that she meets the test for entitlement to the non-earner benefit on a balance of probabilities.

[10] The Court of Appeal set out how to determine whether an applicant has a complete inability to carry on a normal life as follows:[2]

i. Compare the applicant's activities of daily living before and after the accident;

ii. Consider all of the applicant's pre-accident activities during a reasonable period of time before the accident, perhaps giving greater weight to the activities the applicant identifies as being important to her pre-accident life;

iii. Consider whether the applicant is continuously prevented from engaging in substantially all pre-accident activities;

iv. Take a qualitative perspective to determining if the applicant is engaging in the activity post-accident; and

v. Assess whether the degree of the applicant's pain is such that it prevents her from engaging in the activities.

Evidence and Analysis

Injuries & Treatment

[11] The applicant had a cast for her left wrist fracture until approximately the end of January 2016. She had physiotherapy not quite once a week beginning in December 2015 for her wrist, left shoulder and back. She had no physiotherapy between December 2016 and July 2017 when she attended a different clinic a couple of times. The December 2016 note said she was feeling much better and had no pain in her wrist or lower back. The note said she had lower back soreness only when she walked too much, and she was able to walk or stand for 45 minutes. The applicant's son denied she was able to walk for more than about 15 minutes. The applicant attended physiotherapy a couple of times at a different clinic in July and August 2017 for back strain, and was discharged because her back pain decreased from 6/10 to 2-3/10. The applicant then returned to the first clinic on March 28, 2018.

Pre-Accident Activities

[12] The now-76 year old applicant gave evidence with respect to her pre-accident activities. At the time of the accident, she lived in a home with her son daughter-in-law and her husband, who is about 15 years older than she is and has dementia. She testified that, before the accident, she cleaned, vacuumed,

[2] *Heath* v. *McLeod*, 2009 ONCA 391

cooked and grocery shopped. She took great pride in keeping the house clean. She testified she spent about half her day cleaning, while her son said she spent one or two hours a day cleaning.

[13] She testified she made afternoon tea for her husband, and liked to have a meal ready for the family when they got home from work. Dr. Dwyer, an orthopaedic surgeon who assessed her on July 25, 2016, reported that the applicant cooked three meals a day.

[14] Walking outside daily for about an hour was very important to the applicant. She also spent time at the mall looking at things or talking to friends. She testified that, prior to the accident, her husband did not go to the mall with her often because he walked slowly, but she also testified that they took the bus to the mall almost daily and spent an hour there with friends. The applicant's son testified that his father always went with the applicant, and that they spent 3 or 4 hours there. In either case, it was apparent from the applicant's evidence that walking and going to the mall to meet friends were important activities to her before the accident.

Post-Accident Activities

[15] Having heard and reviewed the evidence, I find that the applicant is not continuously prevented from engaging in substantially all her pre-accident activities. I accept that the applicant has ongoing back pain that interferes with her ability to do certain activities to the level she was used to pre-accident. However, I find that she is not continuously prevented from doing substantially all her pre-accident activities. By November 2016, the applicant was going to the mall quite regularly. She continues to walk, albeit perhaps slower and for not as long.[3] I acknowledge that she began using a walker in 2018 but this is past the two-year mark from the date of the accident and, in addition, she said she uses it because her legs are weak. The applicant is able to do her self-care; she is able to prepare simple meals; she still goes to the mall; and she still does some housekeeping, though her family stops her when they see her doing it. In addition, she invites friends over.

[16] The applicant testified that, since the accident, she has not gone to the mall once and instead tells friends to come over. She has not tried any

[3] See, e.g.: *17-003731 v Aviva Insurance Canada,* 2018 CanLII 81898 at para. 27: "*The* Schedule is clear that entitlement to a non-earner benefit is established when the insured person suffers a "complete (emphasis added) inability to carry on a normal life as a result of the accident". Lacking an ability to continually engage in daily activities, post-accident, must be clearly established. Where there is clear evidence of continued participation in daily activities, post-accident, even at a reduced frequency, or with pain, this does not constitute a complete inability. The legislation was meant to be interpreted to clearly differentiate between a reduced or affected ability and a complete inability, hence the word "complete" being included in the wording. The complete inability test must be clearly satisfied in order for the non-earner benefit to be considered payable."

housekeeping because her legs are too tired. She began using a walker in 2018 because her legs were weak. The applicant's son testified he made her go to the mall a couple of times a month after the accident, but she has not gone otherwise. The applicant's son testified that the applicant is embarrassed because she is hunched over due to back pain. He testified she sometimes has a day or several days when her back is not as painful, but then she has a week or two of bad days.

[17] The applicant's son testified that the applicant cannot cook, do laundry or clean. The applicant initially tried but stopped in about March 2016. He acknowledged he did not know that his mother told the physiotherapist she was still doing these things. The applicant told the physiotherapist on May 26, 2016 that she prepares eggs in the morning, dresses and showers independently, walks with her husband and does laundry. This is consistent with the June 17, 2016 occupational therapy report in which the applicant reported she was preparing simple meals, was mostly independent in her self-care and was doing some laundry.

[18] When asked about the apparent contradiction between his and the applicant's evidence and what the applicant told the physiotherapist about her activities, the applicant's son testified that the applicant would try to present herself in the best light to the physiotherapist. He was also asked about the applicant's testimony that she would do activities around the house when he and his wife were not around, but if they caught her, they would stop her. He acknowledged they would stop her from doing things they felt might harm her.

[19] The medical evidence did not support the applicant's evidence about walking or going to the mall after the accident. The rehabilitation specialist's notes include: February 25, 2016 – to mall to walk; March 10, 2016 – increased walking for exercise; April 28, 2016 - she was walking more at the mall; May 26, 2016 - she felt better when she was at the mall and keeping busy; July 21, 2016 - she is "fine with going to the mall"; and November 11, 2016 – she goes to the mall regularly with her husband to walk around for socialization, her son drives them and they take the bus home. When the applicant was asked about this apparent contradiction between her evidence and the medical notes, she agreed it was possible that she was having trouble remembering things during her testimony.

[20] With respect to the applicant's other pre-accident activities, while the applicant did not testify about caring for her husband as one of her pre-accident activities specifically, she did testify that since the accident, her husband had to move to a seniors' home because she could not take care of him, and felt she could have done so if she had not had the accident. The applicant's son testified that the applicant appeared to give up on life even before her husband was moved, and that she has deteriorated significantly since.

[21] The applicant was assessed by an occupational therapist ("OT") in June 2016. At that stage, the applicant was doing her self-care, preparing simple meals, hanging and sorting laundry. If she walked outdoors, she reported having to rest after 10 minutes. She required help with cleaning her home, as Dr. Dwyer also reported in July 2016.

[22] Dr. Dwyer diagnosed the applicant with chronic pain syndrome; myofascial and ligamentous injury in her lumbar spine; soft tissue contusion in the left shoulder; and a fractured scaphoid of the left wrist. He stated she could only walk or stand 10 minutes a day. He concluded that her ability to return to her pre-accident activity level was poor, and she was not able to do heavy groceries, laundry or garbage. The applicant testified if she did any work, the pain would start, so she could only rest.

[23] Dr. Osinga, an orthopaedic surgeon, assessed the applicant for an insurer's examination for NEB on December 19, 2016. He assesses acute, not chronic, pain. There were no physical findings and no reproducible pain, despite the applicant's report of steady low back pain that increased with walking. The applicant told Dr. Osinga she could prepare "easy" food, take care of her personal care and grooming and use the laundry machine.

[24] The OT reassessed the applicant on January 19, 2018, but again this was past the two year mark. The historical information the OT gathered from the applicant and her son was not as reliable as the information the applicant gave the physiotherapist progressively.

[25] Dr. Brown, an anaesthesiologist and specialist in pain medicine, assessed the applicant past the two year mark after the accident, specifically on January 5, 2018. Therefore his findings were of limited value. They were further compromised by the fact that he did not have the physiotherapy records. He concluded that the applicant had chronic pain syndrome and suffered a complete inability to carry on a normal life. He further concluded that socializing and the applicant's ability to care for her husband and go for walks were impacted. He testified that the most important activity to the applicant was caring for her husband though this was not in his report. He also admitted that the applicant's ability to engage in activities was based on what the applicant told him in January 2018.

[26] The test for NEB is a difficult one to meet. It requires the applicant to have a complete inability to carry on a normal life, though it does not require her to be bedridden or totally incapable of doing anything.

[27] There was evidence about the applicant caring for her husband prior to the accident. However, there was virtually no evidence that permitted me to compare the level of care the applicant rendered her husband before and after

the accident. I acknowledge that the applicant's husband was moved to a care facility sometime after the accident, but I did not have sufficient evidence to conclude that it was because the applicant could not care for him as opposed to an unavoidable deterioration in his condition, given his dementia and his age.

[28] I prefer the physiotherapy notes to the doctors' and OT's notes because the physiotherapists saw the applicant more than anyone and discussed her activities with her when she attended. The applicant's memory was not good at the hearing. In addition, the applicant's son's evidence was not entirely reliable because the applicant apparently does activities when he is not there, and does more than she has told him she does.

[29] Despite my finding that the physiotherapists' notes are the strongest evidence, I note that all the doctors and the OT agreed that the applicant can still prepare some food and do her personal care. She also does some housekeeping, though she cannot do the heavier aspects of it. I note that just because Dr. Brown and Dr. Dwyer diagnosed the presence of chronic pain, this does not automatically lead to the conclusion that the applicant has a complete inability to do her activities, and I find in conclusion she does not.

[30] I turn now to the issue of whether the applicant is entitled to the cost of a chronic pain assessment.

B. COST OF EXAMINATION

[31] The applicant bears the onus of proving on a balance of probabilities that the cost of examination she claims for a chronic pain assessment is reasonable and necessary, pursuant to section 25(1)(3) of the *Schedule*.

[32] The cost of one assessment or examination is capped at $2,000.00, pursuant to section 25(5)(a) of the *Schedule*. The Professional Services Guideline (the "Guideline") sets out that the cap on any one assessment or examination excludes the addition of HST.[4]

[33] Dr. Brown recommended a chronic pain assessment at a cost of $2,486.00 ($2200.00 plus HST) in a treatment plan dated January 3, 2018, denied by the respondent on March 7, 2018. The stated goals were to return the applicant to her activities of normal living, identify impairments and help her achieve maximum recovery.

[34] Dr. Lam conducted an IE of the applicant in respect of this treatment plan on February 16, 2018. He concluded that the chronic pain assessment was not reasonably required because the applicant already had orthopaedic and family doctor consultation, and occupational therapy evaluation. Dr. Lam concluded

[4] Superintendent's Guideline, No. 03/14 (September 2014)

that a formal chronic pain assessment would not add any further relevant information. Instead of a chronic pain assessment, Dr. Lam recommended that the applicant continues with facility-based active treatment. On cross-examination of Dr. Brown, he agreed with this approach. In fact, in his chronic pain assessment of February 26, 2018, he concluded that the applicant would benefit from "evidence-based interventions for chronic pain including physiotherapy, structured/supervised exercise, and behavioural therapy".

[35] The applicant was diagnosed with chronic pain by Dr. Dwyer in July 2016, but this report was not before Dr. Lam. However, Dr. Dwyer recommended various investigations, none of which was a chronic pain assessment. He also recommended various forms of treatment, similar to what Dr. Lam recommended. Dr. Brown's chronic pain assessment did not add to the information already in the file because Dr. Dwyer's assessment was already done. In addition, Dr. Brown's conclusion was sufficiently similar to Dr. Lam's conclusion that it in effect added no new information. As such, I find that the chronic pain assessment was not necessary.

C. MEDICAL BENEFIT – CHIROPRACTIC TREATMENT

[36] Wendy Mok and Susana Loi, a chiropractor and physiotherapist at Brimley Physiotherapy, recommended treatment for the applicant in the sum of $2,200.00 in a treatment plan dated January 10, 2018, partially approved by the respondent on March 7, 2018, in the sum of $1000.00.

[37] The goal of the treatment plan was to reduce pain and increase strength and range of motion to return the applicant to the activities of normal living. Barriers to recovery were the extent and severity of injuries and transportation. Recommendations included ongoing education and active therapy.

[38] Dr. Lam considered the treatment plan in his March 5, 2018 IE report. He concluded that 16 sessions of active treatment were reasonable at $50.00 per session, plus an assessment fee of $200.00.

[39] The onus is on the applicant to show that the proposed treatment is reasonable and necessary. The respondent submitted there was nothing in the file that showed the applicant needed more treatment, nor did the authors of the treatment plan assess the applicant. However, the respondent partially approved the treatment plan. In light of that, it must have accepted that the treatment was necessary. In addition, the IE assessor, Dr. Lam, stated in his IE that "Continued facility-based active treatment to address [the applicant's] residual accident-related physical injuries, improve range of motion and strength, and assist with increased activity participation for conjunctive therapeutic task specific conditioning is recommended". However, he then states: "It is therefore my opinion that the proposed formal goods and services

in the January 3, 2018 Treatment and Assessment Plan (OCF-18) are **not** considered reasonable and/or necessary." Dr. Lam's opinion is consistent with approving the treatment plan. Given that and the treatment plan, I find it reasonable and necessary, and the respondent shall pay the balance outstanding.

ORDER

[40] In conclusion, I order:

i. The applicant's claims for an IRB and the cost of examinations for a chronic pain assessment are dismissed;

ii. The respondent shall pay:

(i) the balance of the treatment plan for chiropractic treatment in the sum of $1200;

(ii) interest on the overdue payment of the chiropractic treatment plan.

Released: March 19, 2019

Dawn J. Kershaw
Vice Chair