Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

2021 CanLII 19430 (ON LAT)

Citation: Rickards v. Aviva General Insurance, 2021 ONLAT 19-006887/AABS – R

RECONSIDERATION DECISION

Before: Derek Grant

Date of Order: February 12, 2021

Tribunal File Number: 19-006887/AABS

Case Name: Rickards v. Aviva General Insurance

Written Submissions by:

For the Applicant: Ilona Agivaeva, Counsel

For the Respondent: Geoffrey Keating, Counsel

OVERVIEW

[1] B.R., the applicant, seeks a reconsideration of my decision released on August 27, 2020 (the “decision”). My decision dismissed the applicant’s claim for medical benefits for psychological treatment, chiropractic treatment, massage therapy and interest, on the basis that the treatment plans were not reasonable and necessary.

[2] B.R. makes the request for reconsideration pursuant to Rule 18 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)* (the “LAT Rules”).

THE LAW

[3] Pursuant to Rule 18.2 of the LAT Rules, there are limited grounds upon which the Tribunal can grant a request for reconsideration and the relief outlined in Rule 18.4(b):

a. The Tribunal acted outside its jurisdiction or violated the rules of procedural fairness;

b. The Tribunal made an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made;

c. The Tribunal heard false evidence from a party or witness, which was discovered only after the hearing and likely affected the result; or

d. There is evidence that was not before the Tribunal when rendering its decision, that could not have been obtained previously by the party now seeking to introduce it and would likely have affected the result.

[4] To be successful in her request for reconsideration, B.R. must satisfy one of the criteria set out in Rule 18.2.

[5] B.R. relies on the grounds found in Rules 18.2(a), (b), and (d), submitting that the Tribunal violated rules of procedural fairness, made several errors of fact and law in rendering its decision, and that there is now evidence before the Tribunal that could not have been obtained previously and would likely have affected the result.

[6] The respondent, Aviva General Insurance (“Aviva”), provided responding submissions. In addition, Aviva made objections related to the timing and content

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of B.R.'s request for reconsideration, claiming that it does not comply with the requirements set out in Rule 18.1 of the LAT Rules. Essentially, Aviva submits that B.R. filed her submissions late and is seeking to introduce new evidence that should have been put before the Tribunal at first instance.

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RESULT

[7] For the reasons set out below, I waive the requirement to request reconsideration within 21 days of the decision. However, I dismiss B.R.'s request for reconsideration.

ANALYSIS

Late reconsideration request

[8] Rule 18.1 requires that a reconsideration request be made within 21 days of the date of the decision.

[9] The Tribunal issued its decision on August 27, 2020. B.R. submitted her request for reconsideration on October 5, 2020, which is over 21 days after the release of the decision. Aviva submits that B.R. has not provided an acceptable reason for the delay. Aviva also submits that B.R.'s request for reconsideration was deficient because it did not indicate whether B.R. was seeking judicial review and failed to identify the remedy or relief sought, as required by Rule 18.1. For these reasons, Aviva submits that the request for reconsideration should be dismissed.

[10] Rule 3.1 states that the Rules may be waived in order to, among other things, "ensure efficient, proportional, and timely resolution of the merits of the proceedings before the Tribunal."[1]

[11] Considering the length of the delay, the absence of any argument from Aviva that it has been prejudiced by the delay, and the goal of resolving this matter on its merits, I rely on Rule 3.1 and waive the 21-day requirement in this case. In addition, I do not find that B.R.'s failure to indicate whether she is seeking judicial review or the relief sought prevented me from considering the issues raised in her request for reconsideration.

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[1] *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)*, Rule 3.1(b).

New Evidence

Dr. Kleiman's letter

[12] Aviva alleges that B.R. seeks to adduce new evidence that was not included in her written submissions or reply submissions at first instance. Specifically, Aviva argues that B.R. is attempting to introduce new evidence in the form of a letter dated October 3, 2020 from Dr. Valery Kleiman, describing his involvement in the psychological assessment and resulting report (the "Report"). On this basis, Aviva submits that the request for reconsideration should be dismissed.

[13] Rule 18.2(d) is clear that evidence that could have been obtained previously cannot be introduced for the first time on reconsideration. As the Executive Chair explained in *16-000066 v Waterloo Regional Municipalities Insurance*, the reconsideration process cannot be used to re-litigate matters that should have been addressed in the first instance.[2]

[14] B.R. submits that she could not have anticipated that the Tribunal would raise an issue with the degree of involvement from Dr. Kleiman, the supervising psychologist, during the psychological assessment and preparation of the Report. Further, she submits that the letter she has included in her reconsideration request confirms Dr. Kleiman's involvement in the assessment and should therefore be accepted as evidence that could not have been obtained previously. B.R.'s position is that the letter, along with the Report allegedly produced under the supervision of Dr. Kleiman, should be afforded substantial weight in the Tribunal's determination of whether the psychological treatment is reasonable and necessary. B.R. argues that if Dr. Kleiman's letter, which proves his role in the psychological assessment and preparation of the Report, had been before the Tribunal, it would likely have led to a different outcome.

[15] In response, Aviva argues that B.R. could have anticipated that the Tribunal might raise the issue of whether Dr. Kleiman was sufficiently involved in the assessment, as the issue was raised in Aviva's initial responding submissions. Aviva submits that B.R. had the opportunity to address the issue in her reply submissions but chose not to. Aviva further submits that the College of Psychologists of Ontario Guidelines ("CPO Guidelines") are not binding on the Tribunal, essentially because they are not law.

[16] The CPO Guidelines states that supervisors accept ultimate responsibility for the psychological services provided by the supervised member. B.R. argues that if

[2] *16-000066 v Waterloo Regional Municipalities Insurance*, 2017 CanLII 19186 (ON LAT) at para. 13.

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the Tribunal accepted the evidence set out in the CPO Guidelines, it would not have questioned the authorship of the Report. In addition, B.R. argues that the CPO Guidelines are binding on psychologists, in that a supervisory relationship is allowed as long as the supervising psychologist approves the work of the supervised member. B.R. submits that my decision interferes with the regulation of the profession of psychologists by the College of Psychologists of Ontario and, as such, is beyond the scope of the Tribunal's authority.

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[17] In the letter, Dr. Kleiman sets out his role during the September 10, 2018 assessment as follows:

a. Supervision of the clinical interview and entire process of assessment;

b. Review of Ms. Djuric's notes taken during clinical interview with B.R.;

c. Review of all work by Ms. Djuric and acceptance of responsibility for same; and

d. Involvement in the preparation and drafting of the report, including asking Ms. Djuric specific questions and reviewing relevant records/medical history.

The letter states that Ms. Djuric assisted only in asking questions and administering the psychological tests, that the opinions expressed in the Report are those of Dr. Kleiman, and that the diagnoses contained therein are based on his own knowledge.

[18] I am not satisfied that the letter could not have been obtained at first instance. I agree with Aviva that B.R. has not met the criteria in Rule 18.2(d) and therefore her request for reconsideration cannot succeed on this ground. Even if I accept that it could not have been obtained previously, I find its existence does not change the outcome of my decision, as will be discussed below. Thus, when B.R. argues that the Tribunal made a significant error in its consideration of Dr. Kleiman's report, the applicability of the CPO Guidelines, and specifically refers to Dr. Kleiman's letter, she relies on evidence that was not previously before the Tribunal. Rule 18.2 does not permit the Tribunal to grant a reconsideration on the basis of new evidence that could have been obtained previously and is unlikely to have affected the original decision.

Procedural fairness

[19] B.R. submits that the Tribunal's failure to request additional information was a violation of procedural fairness on the basis that the Tribunal made a

determination on her entitlement to psychological treatment without seeking all relevant information. B.R.'s grounds her position in Rule 9.1. and the decision of *18-004462 v. Wawanesa Mutual Insurance Company* ("*18-004462*").[3]

[20] Rule 9.1 allows a Tribunal to order a party to provide further particulars or disclosure that the Tribunal deems necessary for a full and satisfactory understanding of the issues.

[21] Aviva submits that the Tribunal is under no obligation to compel disclosure, and the onus remains on B.R. to establish entitlement to a benefit. Regarding the case law, Aviva submits that *18-004462* is distinguishable in that it dealt with whether new evidence could be included in reply submissions. Aviva's position is that the case focused on a right of reply to a Tribunal decision, which is an irrelevant issue in this case, as B.R. was given and chose to exercise her right to reply in this proceeding.

[22] I disagree with B.R.'s claim that there was a violation of procedural fairness. First, the evidence provided in Dr. Kleiman's letter was not essential to the issue of whether psychological treatment was reasonable and necessary. Even if I gave more weight to the report, I found the evidence given by the s. 44 assessor Dr. Mor to be more persuasive. Second, Dr. Kleiman's letter is a separate piece of evidence that does not form the basis of the dispute between the parties. The letter does not provide any medical evidence of objective results regarding B.R.'s psychological symptomatology. Therefore, it would not have led to a different outcome, should I have requested it at the first instance. Lastly, there was sufficient evidence for me to arrive at a reasonable conclusion that the psychological treatment was not reasonable and necessary.

[23] In situations where the Tribunal may not have in its possession the documents(s) giving rise to the dispute between the parties, it would be necessary and incumbent on the Tribunal to request the relevant document(s). I do not find that Dr. Kleiman's letter constitutes such a document.

[24] For these reasons, I do not find that there was a violation of procedural fairness.

Errors of fact and law

Psychological Treatment

[25] B.R. submits that it was an error of fact for the Tribunal to find that it was not clear who authored the report. She submits that the Tribunal further erred in fact,

[3] 18-004462 v. Wawanesa Mutual Insurance Company, 2019 CanLII 22210 (ON LAT)

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in concluding that due to the uncertainty of who authored the report, that no weight was given to the report in determining B.R.'s entitlement to psychological treatment. B.R. relies on the October 3, 2020 letter from Dr. Kleiman confirming that he supervised the clinical interview and the assessment process. Aviva submits that "the conclusion of weighing evidence is not a conclusion of fact." Aviva further submits that the purpose of reconsideration is not for the purpose of reweighing evidence.

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[26] B.R. also submits that the Tribunal made an error of fact in finding that the psychological treatment was not reasonable and necessary because her family physician did not recommend such treatment.

[27] I do not find that there was an error of fact based on the conclusion made regarding the report. As mentioned above, even if I assigned more weight to the report, I found the opinion set out in Dr. Mor's report to be persuasive; specifically, B.R.'s statements whether she thought psychological treatment was necessary.

[28] I need not get into the elements of Aviva's argument, as I find the decision reasonably determined that B.R. was not entitled to benefits for any of the treatment plans at issue. The main argument B.R. makes in her request for reconsideration is that the Tribunal made errors of law and fact regarding her claim for benefits for psychological treatment. As I have already addressed the arguments regarding Dr. Kleiman, I will not restate my findings here.

[29] What B.R.'s initial and reconsideration submissions failed to consider was B.R.'s self-reporting regarding psychological treatment, and whether she herself felt it was reasonable and necessary.

[30] I considered this at paragraph 19(iv) of the decision:

> Aviva's assessor, Dr. Mor, assessed B.R. which generated a report dated December 6, 2018. B.R. reported that "she does not require treatment as she is coping and is determined to recover". B.R. also indicated she would rather continue taking medication, Cymbalta, rather than receive psychological treatment. B.R. additionally stated that she would prefer to use funds for physical treatment.

[31] At paragraph 20, I considered the clinical notes and records of the family physician and found that they did not support B.R.'s claim for psychological treatment:

> I am also not persuaded that the clinical notes and records ("CNRs") of B.R.'s family doctor submitted as evidence prove that the OCF-18 is

reasonable and necessary on a balance of probabilities. Although Family Physician, Dr. Maxwell Chin notes psychological complaints and prescribes medication, there is no recommendation for psychological treatment.

[32] Where an insured person states that they do not want treatment, or would prefer a different form of treatment, it is not an error to rely on that statement when determining whether the treatment is reasonable and necessary. If the insured person does not think that the claimed treatment is reasonable and necessary, then the insurer should not be forced to fund that treatment. For these reasons, I find that I have not made any errors of law or fact in my decision that the psychological treatment plan was not reasonable or necessary.

Physical Treatment

[33] With respect to claimed chiropractic and massage therapy treatments, B.R. submits that the Tribunal made an error of law or fact because it allegedly failed to conduct an investigation of whether the treatment plans were reasonable and necessary before the services contemplated by the plan were administered.

[34] B.R. submits that the Tribunal erroneously made adverse inferences from her statements to Psychologist Dr. Mor, the insurer's assessor, regarding the physical treatment she had received up to the time of the assessment. B.R. submits that the Tribunal should not draw an adverse inference from her "failure to provide information about her physical condition in the course of an assessment where she is being asked very specific questions by an assessor whose aim is to answer questions about her psychological condition".

[35] It is well-known that assessors, regardless of their specialty and whether they are conducting an assessment on behalf of an insured person or an insurer, will ask an insured person about their overall physical and psychological condition. Further, it is a well-established practice that parties can rely on any evidence from a report to further validate their position, or alternatively, to refute the position of the other party. In any event, the weight of any evidence put before an adjudicator is subject to the adjudicator's discretion. It follows then, that it is not an error to rely on B.R.'s statements to assessors, even if she was not asked a specific question.

[36] I found B.R.'s first-person account of how the physical treatment she had received to date had benefitted her to be reliable and convincing. I found no reason to question the validity or honesty of B.R.'s statements, and accordingly, relied on them (in addition to other evidence) to determine whether the physical

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treatment plans at issue were reasonable and necessary. Further, regardless of who her statements about physical treatment were made to, the essence of her statements was that she found physiotherapy treatment to be temporarily beneficial. Who the statement was made to does not, in my view, impact B.R.'s own report on the effectiveness of the physical treatment. Therefore, I do not find that the conclusion I drew from Dr. Mor's assessment amounts to an error of law or fact.

[37] For these reasons, I find that I properly considered the evidence and came to a reasonable conclusion, that B.R.'s report of the benefits of physiotherapy did not support her claim for entitlement to the disputed treatment plans for chiropractic treatment and massage therapy.

DECISION

[38] Having considered the submissions of the parties, I find that B.R. has failed to establish that the Tribunal made an error of fact or law such that it would likely have reached a different decision. I also find that B.R. has not shown that any violation of the rules of procedural fairness occurred in my determination of the disputed claims in this proceeding. Lastly, I find that B.R. has not presented new evidence that could not have been put before the Tribunal at first instance and is likely to have affected the decision.

[39] For these reasons, I dismiss B.R.'s request for reconsideration.

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Derek Grant
Adjudicator
Tribunals Ontario – Licence Appeal Tribunal

Released: February 12, 2021

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