LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

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

Citation: Delagrammatikas vs. Aviva General Insurance, 2021 ONLAT 19-013365/AABS

Released Date: 01/22/2021
File Number: 19-013365/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:

Chris Delagrammatikas

Applicant

and

Aviva General Insurance

Respondent

DECISION AND ORDER

ADJUDICATOR: **Theresa McGee, Vice-Chair**

APPEARANCES:

For the Applicant: Jacob Aitcheson, Counsel

For the Respondent: Geoffrey Keating, Counsel

HEARD: **By way of written submissions**

REASONS FOR DECISION AND ORDER

OVERVIEW

[1] The applicant, C.D., was involved in an automobile accident on February 27, 2015, when the vehicle he was driving collided with a vehicle making an improper left turn out of a private driveway. The applicant sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the "*Schedule*").

[2] The respondent, Aviva General Insurance, denied the applicant certain benefits and he applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal") for a resolution of the dispute.

PROCEDURAL ISSUES

[3] The applicant seeks the exclusion of two of the respondent's Insurer's Examination (IE) reports because their authors, Dr. Steven Taylor and Dr. Michael Hanna, failed to complete and sign an Acknowledgment of Expert's Duty form as required under Rule 10.2(b) of the Tribunal's Common Rules of Practice and Procedure ("the Rules").

[4] For clarity, Rule 10.2(b) requires a party intending to rely on the evidence of an expert witness to provide that witness's signed statement acknowledging his or her duty to provide fair, objective and non-partisan opinion evidence related to matters within his or her area of expertise, and to assist the Tribunal as may be necessary in determining an issue.

[5] The respondent submits that the applicant is non-compliant with Rule 10.2, specifically sub-rule 10.2(a), which requires a party to provide the name and contact information of an expert witness, and sub-rule 10.2(e), which requires a party to provide a summary of the expert witness's findings and conclusions. The respondent submits that if its expert evidence is to be found inadmissible under Rule 10.2, so should the applicant's expert evidence. The respondent further submits that failure to provide an Acknowledgement of Expert's Duty does not prohibit a party from relying on an expert's report if its exclusion would result in substantial prejudice: see *17-006369 v RBC General Insurance Company*.[2]

[6] The applicant disputes the respondent's assertion that its expert witnesses, Dr. Sequiera and Dr. Benn, failed to provide their contact information and summaries

[1] O. Reg. 34/10.
[2] 2018 CanLII 110918 (ON LAT).

of their opinions. The applicant directs me to the reports of these witnesses containing the required information.

[7] I find that the reports of Dr. Sequiera and Dr. Benn comply with the requirements of Rule 10.2(a) and (e) and are admissible. The respondent has failed to comply with Rule 10.2(b) in respect of Dr. Taylor and Dr. Hanna. However, I am prepared to admit the reports of these witnesses despite the respondent's non-compliance with the rule.

[8] The reports of Dr. Taylor and Dr. Hanna contain evidence that is relevant to the issues in dispute. Dr. Taylor's opinions form the basis of the respondent's denials of all three treatment plans in dispute. The respondent submits that exclusion of these reports would result in substantial prejudice and that they should be admitted despite its failure to comply with Rule 10.2.

[9] The applicant submits that Rule 10.2 is intended to ensure fair and unbiased adjudication of consumers' claims, and that failure to adhere to procedural safeguards erodes public confidence in the dispute resolution process.

[10] On balance, I find that the prejudice to the respondent that the exclusion of its expert evidence would cause exceeds the concern for technical compliance with the Rules. The Rules are to be liberally interpreted and applied and may be varied to facilitate a fair process. I have no reason to doubt that Dr. Taylor and Dr. Hanna are qualified to provide opinion evidence in this matter. In circumstances where the potential exists for significant prejudice to one of the parties, procedural fairness militates in favour of admitting the evidence.

ISSUES IN DISPUTE

[11] I am to decide the following issues:

i. Is the applicant entitled to a medical benefit in the amount of $1,102.50 for dietician services, recommended by Sarah Perlmutter in a treatment plan (OCF-18) submitted April 5, 2018 and denied on July 9, 2018?

ii. Is the applicant entitled to a rehabilitation benefit in the amount of $3,673.63 for rehabilitation support worker services, recommended by John Shamoon and Chris Peters in a treatment plan (OCF-18) submitted April 9, 2018 and denied on July 9, 2018?

iii. Is the applicant entitled to a medical benefit in the amount of $1,430.65 for physiotherapy, recommended by John Russolo in a treatment plan (OCF-18) submitted April 19, 2018 and denied on July 9, 2018?

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

RESULT

[12] The applicant has established, on a balance of probabilities, that the treatment plans for dietician services and physiotherapy are reasonable and necessary as a result of the accident. However, he has not established that the proposed rehabilitation support worker services are reasonable and necessary.

[13] The respondent is liable to pay for the two treatment plans found payable, for a total of $2,533.15, plus interest calculated in accordance with the *Schedule*.

ANALYSIS

[14] It is not disputed that the applicant's accident-related injuries fall outside the Minor Injury Guideline[3] ("MIG"). The parties also agree that the applicant's injuries are non-catastrophic. As such, the applicant is subject to a limit of $50,000.00 for medical and rehabilitation benefits under the *Schedule*. The applicant must establish that the benefits he seeks are reasonable and necessary as a result of the accident pursuant to s. 15(1) of the *Schedule*.

[15] Following the February 27, 2015 accident, the applicant was assessed in hospital and diagnosed with whiplash and a lumbar sprain injury. He was discharged for follow-up with his family physician, Dr. Manjula Balasundaram.

[16] At Dr. Balasundaram's recommendation, the applicant began physiotherapy in March of 2015 at Russalo Physiotherapy to treat his complaints of neck, shoulder and back pain and occipital headaches. The applicant responded well to physiotherapy. His physiotherapist, Mr. Joseph Russalo, prescribed a home exercise program and discharged him in October of 2015. Without treatment, however, the applicant deteriorated. He returned to physiotherapy in July of 2016 with complaints of constant low back pain that radiated down his legs – symptoms, in Mr. Russalo's opinion, that indicated Type II lumbar disc derangement.

[17] On October 14, 2016, the applicant underwent an MRI of the lumbar spine. The MRI showed disc herniation, displacement, narrowing, bulging and disc contact with root nerves.

[18] In December of 2016, the applicant was examined by Dr. Michael Hanna at the respondent's request. Dr. Hanna, a general practitioner, diagnosed myofascial

[3] Superintendent's Guideline No. 01/14.

sprain/strain of the lumbar spine and multilevel disc herniation. He opined that additional physiotherapy was reasonable and necessary.

[19] In May of 2017, the applicant underwent an In-Home Assessment with Mr. Matthew Woodall, Occupational Therapist. Mr. Woodall documented the applicant's reports of difficulty functioning at home and at work. The applicant, a self-employed hearing instrument practitioner, continued working after the accident at reduced hours. Mr. Woodall's report notes that the applicant was able to get through the workday, but at the cost of his ability to function and be productive in the home. Before the accident, the applicant was independent in home maintenance duties, and shared responsibility for housekeeping tasks with his wife. At the time of the assessment, he reported having no functional energy left at the end of the workday to meaningfully engage in tasks in the home.

[20] In June of 2017, the applicant was assessed by Dr. Keith Sequiera, a specialist in physical medicine and rehabilitation. Dr. Sequiera documented the applicant's reduced ability to function in the area of home maintenance and the resulting impact on his relationship with his wife. Dr. Sequiera opined that the applicant's pre-existing impairments, including obesity, made him more susceptible to the effects of the accident. He opined that the applicant "is permanently relegated to light, sedentary, and rarely moderate intensity activity levels" and will need to consistently utilize proper body mechanic principles, periodic pacing and task simplification strategies. Weight loss, Dr. Sequiera opined, is essential to the applicant's rehabilitation, and a referral to a nutritionist would be necessary if his weight loss stagnated. While Dr. Sequiera did not expect the treatment he recommended to result in a curative effect, in his opinion it would result in modest, mollifying effects on his pain and quality of life and should be considered on that basis.

Dietician services

[21] The applicant submits that the Treatment and Assessment Plan (OCF-18) for dietician services (specifically, a nutritional assessment) is reasonable and necessary because the weight he gained after the accident is a barrier to his recovery from his accident-related injuries.

[22] The respondent denied the treatment plan based on Dr. Taylor's opinion that the applicant had reached maximum medical improvement from his accident-related injuries, which should have healed within six months of the accident.

[23] The parties disagree as to the amount of weight the applicant gained after the accident. The applicant submits that after the accident he gained 70 pounds due

to inactivity and stress, and that in March 2018 when the treatment plan was submitted, he weighed 330 pounds. The respondent submits that the medical evidence suggests the applicant struggled with his weight before the accident, and that there is no evidence apart from his self-reports that he weighed 250 pounds at the time of the accident. The respondent submits that, in June 2015, approximately four months post-accident, the applicant was noted as weighing 302 pounds. The respondent also points to the applicant's blood pressure ratings, which correlate to weight and were higher before the accident than afterwards.

[24] The evidence is inconclusive as to precisely what the applicant weighed at the time of the accident, how much he gained afterwards, and how much he lost with the help of Weight Watchers and exercise at the gym. I need not pinpoint every place in the medical records where the applicant's weight is documented. It is sufficient to note that the applicant weighed 302 pounds four months after the accident and 330 pounds when the treatment plan for dietician services was submitted.

[25] It is clear from the record that the applicant struggled with obesity before the accident. I find, based on the medical evidence, that he experienced additional weight gain because of accident-related inactivity and stress, and that his weight is a barrier to his recovery.

[26] The evidence establishes that the applicant gained at least 30 pounds between June 2015 and March 2018 when the treatment plan for dietician services was submitted. I find that, for the applicant, a person with pre-existing obesity, a gain of 30 pounds is a significant barrier to recovery. I base this finding on the opinion of Dr. Sequiera, whose detailed assessment of the applicant's physical functioning highlights the essential role of weight loss and proper nutrition in the applicant's rehabilitation. Dr. Sequiera's opinion is in line with the Psychological-Legal Assessment Report of Dr. Kelly Benn, Psychologist, dated July 5, 2020, which establishes that the applicant continues to struggle with the problematic eating habits that the treatment plan seeks to address, habits worsened by his inability to meaningfully engage in activities in the home.

[27] I reject Dr. Taylor's opinion that the applicant has reached maximum medical improvement from his accident-related injuries. Dr. Taylor's report raises doubt as to the thoroughness of his assessment. The report includes a list of documents identified as having been reviewed. That list includes the lumbar spine MRI report of October 2016 and the IE report of Dr. Hanna, both of which demonstrate that the applicant sustained damage to the discs of his lumbar

spine. The findings and diagnoses in these records do not appear to have been considered by Dr. Taylor, who diagnosed the applicant with whiplash and a lumbar sprain. Whatever the cause of the discrepancy, Dr. Taylor's opinion as to the applicant achieving maximum medical improvement rests on his conclusion that the applicant sustained only soft tissue injuries as a result of the accident, a premise that is unsupported by the evidence as a whole. For that reason, I discount the weight of Dr. Taylor's opinion.

[28] To conclude on this issue, I find that the applicant has discharged his onus of establishing that dietician services (a nutritional assessment) are reasonable and necessary as a result of the accident. Although I accept the respondent's submission that there is no evidence but for the applicant's self-reports that he gained 70 pounds as a result of the accident, the analysis of whether the disputed benefit is reasonable and necessary does not turn on the exact amount of weight gain cited in the treatment plan. I find on a balance of probabilities that the treatment plan will assist the applicant in achieving his rehabilitation objectives and will improve his overall functionality.

Rehabilitation support worker services

[29] The applicant submits that the Treatment and Assessment Plan (OCF-18) for rehabilitation support worker services is reasonable and necessary based on the opinion of Dr. Kelly Benn, Psychologist, who assessed him in May of 2020.

[30] The respondent submits that the proposed services, described in the treatment plan as "facilitating interpersonal relationships" are not occupational therapy services and therefore Dr. Benn's opinion on the need for occupational therapy is inapplicable. The respondent argues that the applicant has failed to establish how occupational therapy services could be carried out by a rehabilitation support worker. It submits that the plan itself fails to address how the applicant's reintegration goals will be addressed through the proposed treatment.

[31] The applicant submits that the services proposed can be carried out by a rehabilitation support worker under the supervision of an occupational therapist, and that the treatment goals identified in the plan align with the recommendations made by Dr. Benn in her Psychological-Legal Assessment Report.

[32] The applicant has failed to establish how the services described in the plan, namely "facilitation, interpersonal relationships," align with Dr. Benn's recommendations. He submits that a rehabilitation support worker would assist him with exercise follow-through and with "home projects", exactly the type of

restoration of basic activities and programming for broader activity domains Dr. Benn recommended.

[33] I accept the applicant's submission that the services of a rehabilitation support worker can achieve occupational therapy goals if carried out under an occupational therapist's supervision. However, neither the treatment plan nor the medical evidence establishes how a rehabilitation support worker is qualified to address interpersonal relationship challenges, even with the supervision of an occupational therapist.

[34] Dr. Benn recommended the ongoing involvement of an occupational therapist for functional progression and restoration of basic activities and programming for higher order activities and rehabilitation efforts. While Dr. Benn noted in her report the strain placed on the applicant's spousal relationship as a result of his diminished physical and psychological functioning, she did not directly recommend intervention to address interpersonal challenges.

[35] The applicant has not explained how interpersonal relationship facilitation is linked to the exercise follow-through and help with home projects that are the proposed focus of rehabilitation support in the treatment plan. Moreover, while a rehabilitation support worker could assist with 'breaking down projects into chunks', as the treatment plan notes, this again is not clearly related to interpersonal relationship facilitation. The services described in the plan are not clearly linked to relevant treatment objectives supported by the expert evidence.

[36] For these reasons, I am unable to find that the proposed rehabilitation support services are reasonable and necessary as a result of the accident.

Physiotherapy services

[37] The applicant submits that the Treatment and Assessment Plan (OCF-18) for physiotherapy services is reasonable and necessary. He relies on the opinions of Dr. Hanna, IE General Practitioner, who assessed him in December 2016, and Dr. Keith Sequiera, Physiatrist, who assessed him in June 2017. Dr. Hanna opined in his report that at that time, ongoing physiotherapy was reasonable and necessary. Dr. Sequiera opined that the applicant would need to engage in pacing and task simplification and recommended ongoing physiotherapy, occupational therapy, weight loss, medication and targeted injections to treat his persistent complaints.

[38] The respondent relies on the opinion of Dr. Taylor, who determined that the applicant had reached maximum medical improvement from his accident-related injuries.

[39] Again, I give very little weight to the opinion of Dr. Taylor, for the reasons set out above. The position the respondent has taken in support of its denial rests almost entirely on Dr. Taylor's assessment.

[40] The respondent refers me to case law that suggests that if an insurer has evidence that the course of a person's condition will not be changed by ongoing treatment, the person must present compelling evidence that the treatments are effective in providing the suggested relief, more than the mere assertion that treatment makes them feel better: see *Alves v. Commercial Union Assurance Company*.[4]

[41] The respondent has not presented reliable evidence that the applicant's condition will not be changed by ongoing physiotherapy treatment. Dr. Taylor's opinion is based on a flawed appreciation of the medical evidence that was apparently available to him for review. The applicant, on the other hand, has presented evidence from Mr. Russalo and Dr. Sequiera that he has experienced symptomatic relief from physiotherapy, and that it can be expected to modestly improve his quality of life and ability to manage his pain. Given Dr. Sequiera's opinion that while likely not curative in effect, physiotherapy would help the applicant manage his pain and lead to quality of life improvements, I am satisfied that the proposed physiotherapy services are reasonable and necessary.

ORDER

[42] The applicant is entitled to medical benefits for dietician and physiotherapy services in the amount of $2,533.15. He is also entitled to interest on this amount, calculated in accordance with s. 51 of the *Schedule*.

[43] The claim for rehabilitation support worker services is dismissed.

Released: January 22, 2021

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Theresa McGee
Vice-Chair

[4] FSCO A96-000247.