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Ontario

RECONSIDERATION DECISION

Before: Kate Grieves

Date: August 19, 2019

File: 17-008689/AABS

Case Name: P.P. and Portage La Prairie Mutual Insurance Company

Written Submissions by:

For the Applicant: Karen Hulan

For the Respondent: Geoffrey L. Keating

OVERVIEW

[1] On October 29, 2018, the Licence Appeal Tribunal (the "Tribunal") issued its final decision in this matter arising under the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*"). The issues before the Tribunal were the applicant's entitlement to seven treatment plans, ongoing income replacement benefits, and interest. The Tribunal determined that the applicant was entitled to the majority of the disputed treatment plans—except the cost of a weighted vest—as well as income replacement benefits beyond 104 weeks post-accident and ongoing, plus interest.

[2] The respondent has asked the Tribunal to reconsider that decision.

[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 respondent's Request for Reconsideration is dismissed.

BACKGROUND

[5] The applicant was involved in an accident on August 11, 2015. She sought accident benefits from the respondent under the *Schedule.* The applicant sought entitlement to seven treatment plans which proposed occupational therapy, physiotherapy, and speech language therapy by various providers.

[6] The respondent denied the proposed treatment plans on the basis that they were not reasonable or necessary.

[7] The parties did not dispute that the applicant was substantially unable to carry out the essential tasks of her pre-accident employment and was therefore entitled to income replacement benefits ("*IRBs*") for the first 104 weeks post-MVA.

[8] The parties disputed whether the applicant met the test for IRBs after 104 weeks. At the 104-week mark, the test for entitlement changes. The applicant must establish that she was completely unable to engage in any employment for which she was suited by way of education, training or experience.

[9] A written hearing was held to address the applicant's entitlement to the disputed treatment plans and post-104 IRBs. In support of their cases both parties submitted volumes of evidence to the Tribunal, including contradictory medical reports and opinions.

[10] The Tribunal preferred the applicant's evidence and found that she was entitled to the disputed treatment plans – except a weighted vest—as well as post-104 IRBs.

[11] The respondent has requested reconsideration of the Tribunal's decision.

ANALYSIS

[12] The respondent is relying on the criteria described in Rule 18.2(a) and (b) of the Tribunal's *Common Rules of Practice and Procedure* (the "*Rules*") with respect to its request:

> The Tribunal shall not make an order under 18.4(b) unless satisfied that 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 result had the error not been made.
>
> ….

[13] Reconsideration is only warranted in cases where an adjudicator has made a significant legal or evidentiary mistake preventing a just outcome.

[14] The respondent submits that the Tribunal's decision granting the treatment plans and ongoing IRBs should be reconsidered on the following grounds:

> 1) The Tribunal made a significant error of law in failing to consider or apply case law submitted by the respondent with respect to the test of reasonableness and necessity.
>
> 2) The Tribunal failed to provide proper reasons in finding that the Applicant has sustained a complete inability to engage in any employment for which she was suited by way of education, training or experience.

[15] I will address each in turn.

The Tribunal did not Make any Errors of Law

[16] In its submissions, the respondent cited *General Accident Insurance Company and Violi.*[1] That decision sets out steps for determining whether a treatment plan is reasonable or necessary.

[17] The respondent pointed out that the Tribunal has adopted the test set out in *Violi*, citing one decision in support of this assertion: *17-001007/AABS v Aviva*. The respondent submits that the Tribunal made a significant error of law in failing to consider or address case law put before it which the Tribunal itself had adopted with respect to the test for reasonableness and necessity. The respondent submits that had the Tribunal not committed this error, it would not have found that the treatment plans were reasonable or necessary, because the analysis in the decision falls short of what is required by the *Violi* decision.

[18] Firstly, the Tribunal is not bound by FSCO decisions. Secondly, the Tribunal's adjudicators are not bound by decisions of other adjudicators.

[19] Although I agree that the Tribunal did not specifically address the case cited by the respondent, I do not consider this to be an error in law that requires that its decision be overturned. Other than the absence of a reference to the cited case, I have no basis upon which to find that the Tribunal did not consider the respondent's submissions. The Adjudicator indicated in the decision that she based her decision on the submissions of the parties. The Tribunal is not required to expressly address every piece of evidence, argument, or case submitted by a party.

[20] More importantly, I find that if the Tribunal failed to consider this case, the error was not have led it to come to a different decision. Omitting a reference to case law while employing the correct reasonable and necessary analysis is not an error of law because the analysis itself turns on the unique circumstances of each case. The Tribunal used and applied the correct test for reasonableness and necessity when it considered the medical benefits in dispute. A review of the decision clearly indicates that the symptoms, goals, effectiveness of treatment and cost were all relevant factors typically considered in a reasonable and necessary analysis and were in fact considered by the Tribunal.[2]

[21] For the reasons noted above, the applicant has failed to persuade me that the Tribunal made any errors in law such that its decision should be overturned. I therefore reject the respondent's submissions and find that the Tribunal made no error.

[1] FSCO Appeal P99-00047, September 27, 2000.
[2] See paras 15, 16, 22, 23, 25, 26, 31, 32, 33, 37, 38 of the decision.

The Tribunal Provided Adequate Reasons

[22] The respondent submits at paragraphs 13 to 22 of its reconsideration submissions that the Tribunal failed to provide proper reasons for finding that the applicant sustained a complete inability to engage in any employment for which she was suited by way of education, training or experience. If the Tribunal failed to provide adequate reasons, this would be a violation of the rules of natural justice and procedural fairness, pursuant to criteria 18.2 (a).

[23] The respondent relies upon a FSCO appeal decision, *Lastowski and State Farm*[3], which cites *Kanareitsev*[4]. In *Kanareitsev*, the Divisional Court considered the Supreme Court of Canada decision *Baker v. Canada (Ministry of Citizenship and Immigration).*[5] The *Baker* case confirms the duty of an administrative decision maker to provide reasons for their decision. The requirement to provide reasons has a very low bar in terms of procedural fairness.

[24] In *Kanareitsev*, the Divisional Court held that the essential question in determining whether the written reasons are sufficient is whether they provide a basis for meaningful judicial review. The Divisional Court summarized the factors to be considered in determining whether adequate reasons were provided:

a. The adjudicator must set out the findings of fact and the principal evidence upon which those findings are based;

b. The reasons must address the major points in issue;

c. It is insufficient for the decision maker to summarize the parties' positions and then "baldly state its conclusions"; and,

d. The reasoning process must be set out and reflect consideration of the main relevant factors.

[25] I find that the Tribunal carefully weighed the evidence, made findings of fact, and provided sound reasons for concluding that the applicant was entitled to post-104 IRBs.

[26] At paragraphs 48 to 68 are the Tribunal's analysis and reasons for finding entitlement to the disputed benefits. At paragraphs 51 to 64 the Tribunal summarized the evidence it found significant. The Tribunal noted the five alternate jobs identified on the respondent's vocational assessment report, but also the applicant's limited education, lack of transferable skills, and ongoing limitations.

[3] FSCO AP16-00066, November 7, 2017.
[4] 2008 CanLII 26262 (ONSC DC).
[5] [1999] 2 SCR 817.

The Tribunal also noted the lack of available jobs within the applicant's proximity. Throughout this section, the Tribunal also considered the conflicting medical evidence of the parties' experts.

[27] After the foregoing summary and analysis, at paragraphs 65 and 66 the Tribunal concluded that the applicant's symptoms rendered her completely unable to engage in any employment for which she is reasonably suited by education, training or experience. The Tribunal held that:

> The applicant continues to have psychological difficulties as well as dizziness. Even the IE assessors acknowledge ongoing difficulties, though their conclusions about her ability to work differ from the applicant's doctors. In light of the applicant's cognitive impairments that include ongoing forgetfulness; dizziness; and mood difficulties, I find that the applicant is entitled to post-104 IRB. I find that the applicant has proved, in light of the impairments she continues to have, that she suffers a complete inability to engage in any employment for which she is suited by way of education, training and experience.
>
> My finding is also supported by the available jobs in the applicant's area. Given her mood difficulties and dizziness, I find the applicant would not be able to work as counter or kitchen help on a regular basis. Further, the applicant has tried to return to work without success.

[28] The respondent took issue with the language used in paragraph 66, and whether the applicant's ability to work "on a regular basis" is part of the test for entitlement to post-104 IRBs. I find that the Tribunal's comments were appropriate, given that an important step in the analysis is whether the applicant could realistically complete the jobs identified.

[29] I find that the Tribunal carefully weighed the totality of the evidence before it and provided sound reasons for finding that the applicant was entitled to post-104 IRBs. The adjudicator noted that the only job identified by the respondent's vocational assessor with prospects of employment in the applicant's area was that of food counter or kitchen helper. The Tribunal concluded that, given the applicant's mood difficulties and dizziness, that she would not be able to complete the jobs that were available in the applicant's area.

[30] I find the Tribunal's reasons balanced, reasonable, sufficient, and responsive to the parties' submissions. I do not accept that the Tribunal erred in providing insufficient reasons for its findings.

CONCLUSION

[31] For the reasons set out above, the respondent's Request for Reconsideration is dismissed.

Released: August 19, 2019

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Kate Grieves
Adjudicator