Citation: Grewal v. Aviva General Insurance, 2023 ONLAT 20-013368/AABS

Licence Appeal Tribunal File Number: 20-013368/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:

Rajwinder Grewal

Applicant

and

Aviva General Insurance

Respondent

DECISION

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

APPEARANCES:

For the Applicant: Bianca Marinescu, Counsel

For the Respondent: Bhavpreet Saini, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] The applicant, Rajwinder Grewal, was involved in an automobile accident on January 13, 2019, and sought benefits pursuant to the *Statutory Accident Benefits Schedule Effective September 1, 2010* ("*Schedule*"). The applicant was denied certain benefits by the respondent, Aviva General Insurance, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal") for a resolution of the dispute.

ISSUES IN DISPUTE

[2] The issues to be decided are as follows:

a. Is the applicant entitled to an income replacement benefit $400.00 from July 27, 2019 to date and ongoing?

b. Is the applicant entitled to $3,948.91 for physiotherapy services, recommended by Inline Rehabilitation Centre Inc. in a treatment plan (OCF-18) dated April 25, 2019?

c. Is the applicant entitled to $3,191.25 for physiotherapy services, recommended by Inline Rehabilitation Centre Inc. in a treatment plan (OCF-18) dated June 12, 2019?

d. Is the applicant entitled to $2,702.11 for chiropractic services, recommended by Inline Rehabilitation Centre Inc. in a treatment plan (OCF-18) dated April 25, 2019?

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

RESULT

[3] The applicant has not demonstrated entitlement to the benefits she seeks in this application. As no benefits are owing, no interest is payable. The application is dismissed.

ANALYSIS

The applicant is not entitled to an income replacement benefit

[4] Section 5 of the *Schedule* sets out the eligibility criteria for an income replacement benefit. To be eligible for this benefit, the applicant must demonstrate that she suffered a substantial inability to perform the essential tasks of her pre-accident employment as a result of and within 104 weeks of the

accident. She must prove that she meets this test on a balance of probabilities: see *Scarlett v. Belair Insurance Co.*, 2015 ONSC 3635.

[5] Prior to the accident, the applicant worked full-time as a quality control associate in a manufacturing plant. I accept the evidence of the applicant's employer as to the physical demands of the job. The applicant worked 12-hour shifts monitoring products for packaging defects, a role that required her to stand, bend, and lift.

[6] The respondent paid the applicant an income replacement benefit from January 19, 2019 until July 27, 2019. The respondent terminated the benefit based on the opinion of its orthopaedic assessor, Dr. L. Weisleder, that the applicant no longer met the test for entitlement. The applicant seeks a reinstatement of the benefit until January 13, 2021, the 104-week post-accident mark. She submits that she is entitled to the reinstatement because of her severe physical and psychological impairments and pain.

[7] I find that the applicant does not meet the test for entitlement to an income replacement benefit during the period in dispute. The evidence shows that she suffered physical and psychological injuries as a result of the accident, but it does not establish that those injuries left her substantially unable to perform the essential tasks of her pre-accident employment.

Psychological impairments

[8] I find that the applicant experienced psychological impairments as a result of the accident, but that they did not leave her substantially unable to perform her pre-accident employment tasks. I acknowledge the evidence of Ms. S. Simmons, who holds a Master of Arts in Psychology, and Dr. A. Prudovski, a clinical psychologist, who assessed the applicant and concluded that she developed adjustment disorder with depressed mood and specific phobia as a result of the accident. Ms. Simmons and Dr. Prudovski treated the applicant for several months following the accident. The respondent agreed to fund some of this treatment and the applicant underwent two courses of psychotherapy.

[9] I do not accept the applicant's submission that her psychological symptoms, which include a low mood and an inability to focus, have left her unable to work. I prefer the evidence of the respondent's psychological assessor, Dr. R. Day, over the evidence of the applicant's experts. Dr. Day assessed the applicant and concluded that she suffered from a single, mild episode of major depressive disorder, but that her condition was not of the nature or severity that would prevent her from performing the essential tasks of her employment. Dr. Day also

found that the applicant displayed some symptoms consistent with post-traumatic stress disorder, but that she did not meet the diagnostic criteria for that disorder.

[10] I give more weight to the opinion of Dr. Day than to the opinion of Ms. Simmons and Dr. Prudovski for three reasons. First, Dr. Day's diagnostic conclusions are consistent with the clinical notes and records of the applicant's family physician. Those records document the applicant's feelings of sadness and anxiety but show that they were treatable with antidepressant medication and supportive counselling. The family doctor recommended no further referrals or interventions to treat the psychological symptoms.

[11] Second, Dr. Day is qualified to clinically diagnose psychiatric conditions. Although the report before me states that Ms. Simmons was operating "under the supervision" of Dr. Prudovski when she assessed the applicant, only Dr. Prudovski is qualified to diagnose psychiatric illnesses. It is unclear whether the applicant had a clinical encounter with Dr. Prudovski. The co-authored May 9, 2019 Psychological Assessment concludes, tentatively in my view, that the applicant's presentation was "consistent with" the diagnoses of adjustment disorder and specific phobia. Opining that a person's clinical presentation is consistent with a diagnosis is not the same as making a formal diagnosis. Accordingly, I give less weight to the report. It does not clearly establish that an assessor qualified to diagnose psychiatric conditions was responsible for its conclusions and recommendations.

[12] Third, the applicant's assessors premise their diagnostic conclusions on psychometric testing results that may be clinically invalid. Ms. Simmons and Dr. Prudovski express concern that the applicant portrayed herself during the assessment in an "especially negative or pathological manner." The authors note that the applicant reported a level of depressive symptomatology unusual even in clinical samples. They observe that the applicant's test results are unlikely to be an accurate reflection of her objective clinical status. Ms. Simmons and Dr. Prudovski state that the psychometric testing results should be interpreted as an indication of the applicant's self-description only. Ms. Simmons' and Dr. Prudovski's validity concerns are corroborated by Dr. Day, who described the applicant as having an exaggerated negative orientation towards her experience of pain. Dr. Day determined that the applicant ruminates about her pain and may amplify it because of her thinking patterns. Because Ms. Simmons and Dr. Prudovski rest their conclusions about the severity of the applicant's impairments on potentially unreliable test results, I give those conclusions very little weight.

[13] Relatedly, Ms. Simmons' and Dr. Prudovski's report draw exclusively on the applicant's self-reported symptoms and history, and on the assessors' review of the applicant's January 15, 2019 disability certificate (OCF-3), completed by Dr. Khandwalla, a chiropractor. None of the applicant's pre- or post-accident medical records were before Ms. Simmons and Dr. Prudovski for review. The lack of evidence establishing a baseline for the applicant's psychological functioning weakens their analysis of the causation of the applicant's impairments. By contrast, Dr. Day, the Section 44 Insurer's Examiner, had the benefit of extensive medical records when he conducted his assessment of the applicant's psychological functioning.

[14] For these reasons, I give less weight to the conclusions of Ms. Simmons and Dr. Prudovski and conclude that the applicant's accident-related psychological symptoms were not so severe as to hinder her ability to perform the essential tasks of her pre-accident employment.

Physical injuries

[15] The evidence before me falls short of establishing that during the period in dispute, the applicant suffered a level of accident-related physical impairment consistent with the substantial inability test. It is undisputed that the applicant sustained numerous sprain and strain injuries in the accident, and that she experienced pain in association with those injuries. However, to prove entitlement to an income replacement benefit, it is necessary for a claimant to demonstrate that their accident-related injuries resulted in an inability to perform the essential tasks of their pre-accident employment.

[16] I am prepared to accept that the accident may have exacerbated the applicant's pre-existing conditions, including degenerative changes to her spine, arthritis in her shoulders, and osteoarthritis in the right knee. However, I find no support in the record for the applicant's submission that the accident is the probable cause of the torn meniscus in her right knee. The fact that the applicant had a torn meniscus after the accident that was not present in 2017 does not establish that the accident caused the tear. It simply shows that the tear occurred some time between the two imaging reports. I accept the finding of Dr. S. Gyomorey, the consulting orthopedic surgeon, that the applicant's torn meniscus is "most likely degenerative." That finding is corroborated by Dr. L. Weisleder, who determined that the tear was degenerative based on his review of the diagnostic imaging.

[17] The applicant has not tendered as evidence any medical recommendation that she remain off work during the period in dispute. At a February 7, 2019 visit, the applicant's family physician, Dr. H. Sharma, determined that the applicant could

not return to work, provided her with a medical note, referred her to an orthopaedic surgeon, and instructed her to follow up in two weeks. I accept this clinical notation as medical evidence that the applicant could not return to work because of her accident-related injuries, but not indefinitely. The doctor making the recommendation directed that the applicant follow up in two weeks for an additional assessment, and that does not appear to have taken place. There is no further medical recommendation that she remain off work. The clinical notes and records only make passing reference to the applicant's employment status. In my view, only the February 7, 2019 constitutes a medical recommendation that the applicant remain off work, and this note is not applicable to the period in dispute.

[18] To conclude, the medical evidence before me does not show that the applicant's accident-related psychological and physical injuries prevented her from substantially engaging in the essential tasks of her pre-accident employment. Although the evidence shows some functional impairment related to the applicant's psychological and physical conditions, that impairment does not rise to the level required by the substantial inability test. Therefore, no income replacement benefit is payable.

The applicant is not entitled to medical benefits

[19] I find that the applicant has not met her onus of proving entitlement to the disputed medical benefits, which are proposed in three treatment plans. The test for entitlement to medical benefits is found in s. 15 of the *Schedule*, which requires proposed treatment to be reasonable and necessary as a result of the accident.

[20] The fact that treatment is incurred does not make it reasonable and necessary. I accept the applicant's submission that she has incurred almost all the treatment in dispute, accruing a debt of $9,231.17. She submits that this demonstrates her efforts to mitigate her injuries and her motivation to return to her pre-accident state.

[21] I place weight on the opinion of the respondent's orthopedic assessor, Dr. Weisleder, that at the time the plans were proposed, the applicant had already been appropriately assessed and treated for her accident-related injuries. The respondent submits that the applicant obtained weekly physiotherapy, chiropractic care, and massage therapy from January 14, 2019 to September 9, 2019. I am persuaded by the respondent's submission that the treatment plans contained little if any indication that the applicant's treatment goals were being met. The authors of the disputed treatment plans indicated "N/A" when asked

what the applicant's improvement was at the end of the previous treatment plan, despite the previous treatment being provided by the same practitioners who proposed the treatment in dispute. Dr. Weisleder's conclusion that the applicant had already received adequate and appropriate care aligns with the estimated period of disability (9-12 weeks) noted by Dr. Khandwalla in the applicant's January 15, 2019 disability certificate (OCF-3). Based on this estimate, by April to July 2019 when the disputed plans were proposed, most if not all the applicant's accident-related treatment goals should have been met.

[22] In reply, the applicant restates her position that the respondent unreasonably denied the proposed treatment, and that it is payable as reasonable and necessary. I do not find those submissions compelling.

[23] To summarize, I find that the applicant has fallen short of her onus of proving, on a balance of probabilities, the reasonableness and necessity of the disputed treatment. She participated in various treatment modalities for several months after the accident. Given that her accident-related physical injuries were strain and sprain injuries, it is reasonable to expect that the applicant would have returned to her pre-accident level of function after the treatment interventions she received. The applicant's ongoing pain complaints as documented in the clinical notes and records of her family doctors do not, absent recommendations for treatment, establish the necessity of ongoing physical therapy.

CONCLUSION

[24] The applicant has not met her onus in establishing entitlement to the benefits she seeks in this application. As no benefits are owing, no interest is payable. The application is dismissed.

Released: March 14, 2023

Theresa McGee
Vice-Chair