



Citation: Gallimore v. Aviva Insurance Company, 2023 ONLAT 20-002561/AABS

Licence Appeal Tribunal File Number: 20-002561/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:

Savannah Gallimore

Applicant

and

Aviva Insurance Company

Respondent

DECISION

VICE-CHAIR: Ian Maedel

APPEARANCES:

For the Applicant: Savannah Chorney, Counsel

For the Respondent: Geoffrey Keating, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] Savannah Gallimore, the applicant, was involved in an automobile accident on December 10, 2014, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the “*Schedule*”). The applicant was denied benefits by the respondent, Aviva Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

ISSUES

- [2] The issues in dispute are:
- i. Is the applicant entitled to a medical benefit in the amount of \$2,344.64 for occupational therapy services, recommended in a treatment plan (“OCF-18”) dated February 25, 2019?
 - ii. Is the applicant entitled to a medical benefit in the amount of \$6,386.85 for physiotherapy, chiropractic and massage therapy treatment recommended in an OCF-18 dated April 6, 2019?
 - iii. Is the applicant entitled to a medical benefit in the amount of \$3,566.18 for psychological services recommended in an OCF-18 dated May 31, 2019?
 - iv. Is the applicant entitled to \$2,200.00 for the cost of a psychological assessment recommended in an OCF-18 dated January 18, 2019?
 - v. Is the applicant entitled to \$2,486.00 for an orthopaedic assessment recommended in an OCF-18 dated September 10, 2020?
 - vi. Is the applicant entitled to a medical benefit in the amount of \$1,986.31 for occupational therapy services recommended in an OCF-18 dated October 26, 2020?
 - vii. Is the applicant entitled to a medical benefit in the amount of \$3,800.37 for chiropractic treatment and assistive devices recommended in an OCF-18 dated September 11, 2020?
 - viii. Is the applicant entitled to \$2,200.00 for a neurocognitive assessment recommended in an OCF-18 dated April 1, 2020?
 - ix. Is the applicant entitled to \$2,070.00 for a psychological assessment recommended in an OCF-18 April 1, 2020?

- x. Is the applicant entitled to a medical benefit in the amount of \$3,216.24 for physiotherapy treatment recommended in an OCF-18 dated January 2, 2020?
- xi. Is the applicant entitled to interest on any overdue payment of benefits?
- xii. Is the applicant entitled to an award pursuant to s. 10 of Regulation 664 because the respondent unreasonably withheld or delayed payments?
- xiii. Is the applicant entitled to costs pursuant to Rule 19 of *The Common Rules of the Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission (effective October 2, 2017)* (“Common Rules”)?

[3] **Resolved issue** – the respondent agreed to fund \$3,308.56 in occupational therapy treatment, listed as issue number 5 in the previous Case Conference Report and Order.

RESULT

- [4] The applicant is entitled to a psychological assessment in the amount of \$2,000.0, and psychological services in the amount of \$3,566.18 plus interest;
- [5] The applicant is not entitled to the balance of the treatment plans and assessments in dispute;
- [6] The applicant is not entitled to an award, nor costs.

Background

- [7] The applicant was a pedestrian struck by a vehicle in a low-speed collision while she was crossing the street. She was fourteen years of age at the time and a grade 9 student. She reported lower leg pain and left ankle tenderness at the scene. The applicant was transported to hospital via ambulance. She was discharged from hospital on the same date without any prescriptions nor specialist referrals.
- [8] On December 15, 2014, four-days post-accident, she visited a walk-in clinic and upon examination she exhibited tenderness in the back, trapezius, right hip, and thigh. It was noted she had a bruise on her left calf with swelling. She was advised to take Advil for pain, rest, and not attend school until December 17, 2014.

- [9] By March 3, 2015 the applicant visited her family physician, Dr. A. Rayar, who noted that most of her accident-related symptoms had resolved, although she was suffering from pain along right ankle and knee, and some dizziness. However, the applicant indicated pain was not affecting her activities of daily living.
- [10] Since then, the applicant has treated her injuries consistently by attending physiotherapy at Active Life Wellness Centre Inc. between May 2016 and August 2017. The applicant's condition remained stable until April 2019 when she began to reattend physiotherapy.

ANALYSIS

- [11] Pursuant to s. 15 and 16 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. To do so, the applicant should identify the goals of treatment, how the goals would be met to a reasonable degree and that the overall costs of achieving them are reasonable.

Occupational Therapy treatment is not reasonable and necessary

- [12] I am not persuaded that the two OCF-18s in the amount of \$2,344.64 dated February 25, 2019 and \$1,986.31 dated October 26, 2020 for occupational therapy are reasonable and necessary pursuant to the *Schedule*.
- [13] In the OCF-18 dated February 25, 2019 completed by R. McMackin, occupational therapist, the goals were listed as pain reduction and a return to safety, independence, and functional participation in activities of daily living.
- [14] In the OCF-18 dated October 26, 2020, completed by S. Fleming, occupational therapist, the goals were listed as pain reduction, increase in strength, participation in self-care, addressing occupational performance issues, and to facilitate safe functional participation in activities of daily living.
- [15] The applicant submits that the primary goal of treatment is the management of her chronic pain, making additional treatment reasonable and necessary. To her, the treatment at issue is proportional to the goals set out in the OCF-18s at issue.
- [16] The respondent submits that pain relief should not encourage inappropriate or indefinite dependency. The respondent submits the applicant has received considerable treatment and there has been little evidence tendered to demonstrate further treatment will provide meaningful reduction in pain, particularly more than six years post-accident. I agree with the respondent.

- [17] The records of the applicant's family physician, Dr. Rayar indicate the applicant had largely recovered from her physical accident-related impairments by the end of November 2016. Dr. Rayar first recommended physiotherapy for strengthening approximately nine months-post accident on August 14, 2015, when the applicant continued to report lower back pain off and on since the accident. Mild pain in the right trapezius and lumbar region was noted with movement, however, it was noted that flexion, extension, and rotation were all normal, there was no swelling, or atrophy of muscles and the pain was not affecting her activities of daily living. There were no complaints of ankle pain reported at this time.
- [18] A year later, on August 30, 2016 Dr. Rayar examined the applicant's right ankle and noted no swelling nor tenderness with palpation through the ankle or foot. She demonstrated full active and passive range of motion of the ankle and an additional referral for physiotherapy "if still having problems". By November 7, 2016 Dr. Rayar noted no joint pain or restrictions in range of motion, a normal gait, and no soft-tissue injuries observed. His diagnosis was that she was a "well child".
- [19] It wasn't until almost three-years post-accident on November 14, 2017 that Dr. Rayar noted musculoskeletal pain secondary to the accident in her back and right ankle. It was reported she was managing the pain with physiotherapy and it was not affecting her activities of daily living.
- [20] An ultrasound on June 14, 2019 indicated her right ankle was unremarkable. An MRI of her right ankle conducted on November 11, 2019 revealed an osteochondral lesion involving the navicular bone of the foot with surrounding edema. On December 13, 2019 Dr. Rayar noted this could be post-trauma, but she noted the applicant's musculoskeletal pain was secondary to the accident, and she was managing with physiotherapy. A referral for an ankle orthotic was made in September 2019 to assist with ankle stability.
- [21] Similar to Dr. Rayar's medical records, the records from Active Life Wellness Centre Inc. are not persuasive evidence demonstrating that the applicant requires occupational therapy services. The applicant began physiotherapy treatment at Active Life Wellness Centre Inc in May 2016. She reported pain and stiffness in neck and weakness in right ankle. The prognosis at that time was listed as "good". She sought treatment for 26 sessions between May 2016 and August 2017. In June 2017 it was noted there was "steady improvement" over her upper and lower back, and no new concerns. By August 2017 it was noted there was resolution of her pain and stiffness in her back, and that the exercises were helpful. There is a 19-month gap in the Active Life Wellness records

between August 2017 and April 6, 2019. On April 6, 2019 the applicant reported upper and lower back pain aggravated by prolonged sitting and heavy lifting and right ankle pain with instability while walking. However, by July 9, 2019 the applicant noted “steady improvement overall” and “no new voiced concerns”.

- [22] I am not persuaded by the In-Home Assessment Report by occupational therapist N. Abballe, dated June 21, 2016, as this report pre-dates the treatment in dispute, and therefore has little relevance. The applicant was noted to have movement within functional limits of the shoulders and back, with lower back pain upon extension. She further noted the applicant’s ankles were within functional limits and no pain was noted. She cited reduced tolerance for prolonged ambulation and climbing stairs due to lower back and ankle pain. She recommended use of an elevator, continued massage and physiotherapy.
- [23] I find the report by Dr. F. Tavazzani, orthopaedic surgeon, dated July 28, 2020, unpersuasive. He noted that within two years of the accident, the applicant was “getting back to normal” and she continued her university education without interruption. He further noted the applicant was concerned about how her continuing neck, back, and ankle pain would impact her career opportunities. He diagnosed the applicant with chronic myofascial strain to her cervical spine, both shoulder girdles, lumbar spine, chronic sprain of right ankle, osteochondral injury to right navicular bone in her foot, and chronic pain syndrome. Dr. Tavazzani noted the applicant’s inability to perform all housekeeping, home maintenance and leisure activities and indicated her injuries were permanent and it was unlikely they would improve in the future.
- [24] Dr. Tavazzani’s report and diagnosis of chronic pain holds less weight because it cites the incorrect test for chronic pain pursuant to the *American Medical Association Guides* (“*AMA Guides*”), stating that 4 criteria are required. However, pursuant to the 6th edition of the *AMA Guides*, only 3 criteria are required. Additionally, Dr. Tavazzani failed to specify how the applicant met these criteria, instead he simply listed them and indicated she suffers from chronic pain syndrome based on these criteria. Given this failure to delineate her symptoms based on the specific criteria in the *AMA Guides*, 6th edition, I place little weight upon his diagnosis of chronic pain syndrome.
- [25] In contrast, I place weight upon the insurer’s examination (“IE”) report provided by Dr. J. Millard, physiatrist, dated November 23, 2017. Dr. Millard’s findings most accord with the clinical notes and records provided by Dr. Rayar for this period. Dr. Millard notes she previously assessed the applicant in November of 2016 and the applicant noted at that time that she had improved by 70%.

Following a physical examination, Dr. Millard diagnosed the applicant with posttraumatic headache, lumbar spine sprain – chronic, residual muscular soreness/tenderness, and right ankle sprain – resolved. She concluded the applicant demonstrated no ongoing musculoskeletal impairments. Dr. Millard recommended a home-based stretching and strengthening program on a self-directed basis.

- [26] I also place weight upon the Occupational Therapy In-Home IE Report provided by Mr. A. Sansani, occupational therapist, dated June 17, 2019. These findings also accord with Dr. Rayar's clinical notes, and the treatment records provided by Active Life Wellness for this period. He noted the applicant was independent in all activities of daily living and noted no restrictions or weakness during range of motion and strength testing. Mr. Sansani also noted the applicant demonstrated adequate range of motion and functional abilities to be independent with all activities of daily living.
- [27] Similarly, I place weight upon the Orthopaedic IE Report provided by Dr. O. Safir, orthopaedic surgeon, dated July 15, 2021. During this assessment, the applicant reported her symptoms had improved by 50%. Dr. Safir noted it had been approximately 6.5 years since the accident. These findings accord with the applicant's natural healing progression over a period of years following the accident. Following an examination, Dr. Safir diagnosed the applicant with cervical spine sprain/strain, whiplash associated disorder I/II, thoracolumbar spine sprain/strain, right ankle contusion. He indicated that she demonstrated full range of motion in her spine and ankles. Overall, Dr. Safir indicated there was no objective evidence of any musculoskeletal impairment as a result of the accident, and she had received maximum therapeutic benefit from facility-based physical rehabilitation.
- [28] When I consider the evidence tendered, I am not persuaded additional occupational therapy is reasonable and necessary. I am acutely aware that this accident occurred in December 2014. The applicant missed only a few days of school, resuming her studies the following week. She required some accommodation such as the use of the bus to travel to school and the use of the elevator while at high school. Otherwise, the applicant was able to complete a full-time University program without accommodation. Furthermore, Dr. Rayar's clinical notes are replete with references to how the applicant's activities of daily living were unaffected by pain, contrary to the goals set out in these OCF-18s. Similarly, the treatment records of Active Life Wellness Centre demonstrate steady improvement in her physical symptoms throughout spring and summer 2017. This is followed by a nineteen-month gap in these records, explained by

the applicant's attendance at Brock University in St. Catharines. I can only infer that the applicant did not require facility-based treatment during this period. The applicant returned to Active Life Wellness in April 2019, however, by July 2019 these records indicate further improvement in her back and ankle pain. By October 2020, the applicant reported she had attended physiotherapy in St. Catharines only three or four times while attending Brock University.

- [29] The IE reports demonstrate the applicant suffered soft-tissue injuries, and no objective evidence of musculoskeletal impairment as a result of the accident. While I do not deny that the applicant may still suffer some pain as sequelae from these accident-related impairments, I am not satisfied that this rises to the level of chronic pain syndrome as diagnosed by Dr. Tavazzani. At this juncture, almost nine years have past since the accident and the applicant has failed to provide objective evidence that further occupational therapy is required. I am not satisfied that further facility-based treatment is required for the applicant's remaining accident-related impairments. Otherwise, I agree with Dr. Millard, that any residual physical pain may be addressed by self-directed home exercise and stretching or through the continued use of an ankle orthotic.

Additional physiotherapy, chiropractic, massage treatment and assistive devices are not reasonable and necessary

- [30] I am not persuaded that additional physiotherapy, chiropractic, massage, and assistive devices in the amount of \$6,386.85, \$3,216.24, and \$3,800.37 are reasonable and necessary pursuant to the *Schedule*.
- [31] In the OCF-18 for \$6,386.85 dated April 6, 2019 by S. Kaur, physiotherapist, included an initial assessment, chiropractic treatment, physiotherapy, and massage therapy. The goals of treatment were identified as pain reduction, increase in strength, increased range of motion, and return to activities of daily living.
- [32] In the OCF-18 for \$3,216.24 dated January 2, 2020 by S. Kaur, physiotherapist included an initial assessment, chiropractic, physiotherapy, and massage therapy treatments. The goals of this treatment plan were pain reduction, increase in strength, increased range of motion, and return to activities of daily living.
- [33] In the OCF-18 for \$3,800.37 dated September 11, 2020 by C. Schmidt, physiotherapist included exercise, mobilization, TENS unit accessories, biofreeze gel, two hot/cold gel packs and an elastic bandage. The goals of treatment were identified as pain reduction, increased range of motion, increase in strength, and a return to activities of daily living.

[34] To add to my earlier analysis and findings, the applicant continually advised her family physician Dr. Rayar that her activities of daily living were unaffected by pain. Ms. Abballe, and Mr. Sansani, both occupational therapists noted the applicant's movements and strength were within functional limits. Similarly, physiatrist Dr. Millard noted no ongoing musculoskeletal impairments. Given the clinical notes and records, the expert reports provided (examined above), I am not persuaded that further facility-based treatment is reasonable and necessary at this juncture. Dr. Safir indicated that additional assistive devices were not reasonable and necessary, nor has the applicant provided any objective evidence to demonstrate that these assistive devices would otherwise contribute to the goals set out in the treatment plan dated September 11, 2020. Based upon the evidence tendered, the applicant may otherwise address any residual accident-related pain through self-directed home exercise and stretching.

The orthopaedic assessment is statute-barred

- [35] This treatment plan is barred pursuant to s. 38(2) of the *Schedule*. In the alternative, I am not persuaded an orthopaedic assessment in the amount of \$2,486.00 is reasonable and necessary pursuant to the *Schedule*.
- [36] The OCF-18 dated September 10, 2020 by Dr. F. Tavazzani, physician, lists an examination and documentation support activity. The goals of the treatment plan include a determination of musculoskeletal injuries and a return to activities of daily living.
- [37] Pursuant to s. 38(2) of the *Schedule*, the respondent is not liable to pay an expense in respect of an assessment that was incurred before the insured person submits a treatment and assessment plan. Dr. Tavazzani's report was dated July 28, 2020, and the OCF-18 was dated September 10, 2020, and denied by the respondent on September 23, 2020.
- [38] I have not otherwise been provided with any evidence to suggest that the respondent provided notice under s. 39(1) indicating it would pay for this assessment without a treatment plan. Thus, this OCF-18 is denied.

A psychological assessment and psychological services are reasonable and necessary

- [39] I am persuaded that the psychological assessment in the amount of \$2,200.00 and psychological services in the amount of \$3,566.18 are reasonable and necessary pursuant to the *Schedule*.

- [40] The OCF-18 for a psychological assessment in the amount of \$2,200.00 is dated January 18, 2019 and was also prepared by Dr. N. Sharma, psychologist. The goals of the assessment included a determination of any psychological impairments as a result of the accident, and a determination of what psychological treatment to be provided.
- [41] The OCF-18 for psychological services in the amount of \$3,566.18 is dated May 31, 2019 and was prepared by Dr. N. Sharma, psychologist. The services claimed included psychotherapy and a clinical progress review report. The goals of the treatment plan included improvement in coping with pain, decrease in depression and anxiety, improving stress management skills, and provision of supportive counselling services.
- [42] Dr. Rayar's clinical notes and records between 2014 and 2019 do not make any reference to psychological symptoms arising from the accident. However, the applicant relies on three expert reports which I find two out of three provide compelling evidence related to accident-related psychological impairment.
- [43] The psychological report provided by Dr. A. Shaul, psychologist, dated August 10, 2016 concluded the applicant suffered from features of adjustment disorder, and specific phobia (crossing the street). Only three psychometric tests were undertaken as part of this assessment, and I find that this is the weakest of the expert reports tendered on this issue. Dr. Shaul recommended seven counselling sessions and relaxation techniques to reduce anxiety.
- [44] However, both subsequent psychological experts provided similar diagnoses, both finding the applicant suffered from adjustment disorder and somatic symptom disorder. Dr. Sharma, psychologist, in the report dated February 14, 2019 conducted seven psychometric tests and diagnosing the applicant with somatic symptom disorder with predominant pain, and adjustment disorder. Specifically, the applicant's ability to cope with combined difficulties following the accident has been a significant barrier for her, and she may have significant difficulty performing her future duties as a journalist. Dr. Sharma noted that on a balance of probabilities it was expected the applicant's impairments were permanent.
- [45] The most compelling report was provided by Dr. B. Budisin and Dr. H. Lad, neuropsychologists, dated July 31, 2020. Following a battery of eighteen psychometric tests, they diagnosed the applicant with adjustment disorder with mixed anxiety (features of specific phobia related to crossing the street and vehicles), depressed mood – persistent, and somatic symptom disorder with predominant pain, persistent – mild. Despite the assessment being more than

five years post-accident, they noted the applicant continued to struggle emotionally, including bouts of low mood, sadness, withdrawal, and avoidance behaviours. Her pain symptoms continue to cause a significant reduction in her level of functioning. They concluded that the applicant's prognosis was poor and expect that her impairment is permanent.

- [46] I find nothing in the Psychological IE Report dated May 17, 2019, and the addendum report dated June 27, 2019 provided by Dr. A. Syed, psychologist, that would upset the findings of Dr. Sharma, Dr. Budisin, and Dr. Lad. After administering nine psychometric tests and the clinical interview, Dr. Syed concluded the applicant was not suffering from any psychological impairment warranting a diagnosis as a result of the accident. At the time of the assessment, she noted that the accident had occurred more than four years previously. Despite noting no diagnosable psychological impairment, Dr. Syed did note the applicant may experience some symptoms of anxiety, which are mostly situational in nature. Following a review of Dr. Shaul's report, Dr. Syed indicated her original opinion remained unchanged. From a psychological perspective, the applicant had reached maximum medical improvement.
- [47] Despite the lack of reporting to her family physician, I am persuaded the applicant continues to suffer psychological impairments as a result of the accident. In her clinical interview with Dr. Syed, the applicant endorsed that she felt 60% disabled, more than five years following the accident. The applicant has presented three separate psychological reports. While I do not consider Dr. Shaul's initial report persuasive, the subsequent reports tendered by Dr. Sharma and Drs. Budisin and Lad depict an applicant still suffering from significant psychological impairments following the accident. These reports were the most thorough provided, and they were based on data from more than 26 objective psychometric tests combined. I am also aware that these results were obtained by separate clinicians, approximately seventeen months apart. Furthermore, both of these reports provided strikingly consistent findings regarding the applicant's psychological state. While I do not find any inherent weakness in the two reports provided by the respondent, I simply find the two latter reports provided by the applicant more compelling and persuasive.
- [48] Given the strength of the applicant's reports, I do not doubt the applicant continues to suffer from perceived issues related to pain and functionality resulting from the accident. Particularly given the consistent diagnoses of somatic symptom disorder and adjustment disorder. As a result, I am persuaded that the psychological services and psychological assessment at issue are both reasonable and necessary pursuant to the *Schedule*.

The applicant is not entitled to the cost of a neurocognitive, nor a psychological assessment

- [49] These assessments are barred pursuant to s. 38(2) of the *Schedule*. Thus, the OCF-18s for \$2,200.00 and \$2,070.00 are not payable.
- [50] The OCF-18 in the amount of \$2,200.00 dated April 1, 2020 by Dr. Lad, neuropsychologist was for a neurocognitive assessment and documentation support activity.
- [51] The OCF-18 in the amount of \$2,070.00 dated April 1, 2020 by Dr. Lad, neuropsychologist was for a psychological assessment and documentation support activity.
- [52] Payment of these OCF-18s are barred pursuant to s. 38(2) of the *Schedule*, as the respondent is not liable to pay an expense in respect to assessments that were incurred before the insured person submitted the treatment and assessment plans. Although both OCF-18s are dated April 1, 2020, they were not submitted to the respondent until August 5, 2020. These assessments were undertaken prior to that date, as the report for both assessments is dated July 31, 2020.
- [53] I have not otherwise been provided with any evidence to suggest that the respondent provided notice under s. 39(1) indicating it would pay for these assessments without a treatment plan. Thus, these OCF-18s are denied.

The applicant is entitled to applicable interest

- [54] The applicant is entitled to applicable interest related to the psychological assessment and treatment plans dated January 18, and May 31, 2019, pursuant to s. 51 of the *Schedule*.

The applicant is not entitled to an award

- [55] The applicant has failed to provide any substantive submissions with regard to the award claimed. As a result, I am not persuaded the respondent unreasonably withheld or delayed payment of benefits to justify an award pursuant to s. 10 of Regulation 664. Thus, the claim for an award is denied.

The applicant is not entitled to costs

- [56] The applicant's request for costs is denied. Costs are a discretionary remedy imposed when a party has acted unreasonably, frivolously, vexatiously, or in bad

faith pursuant to Rule 19.1 of the *Common Rules*. The threshold for costs is high, and they are rarely awarded. Again, the applicant has failed to provide any submissions with regard to this application for costs. As such, the request for costs is denied.

ORDER

[57] I find that:

- i. The applicant is entitled to a psychological assessment in the amount of \$2,000.00 and psychological services in the amount of \$3,566.18, plus interest;
- ii. The applicant is not entitled to the balance of the treatment plans and assessments in dispute;
- iii. The applicant is not entitled to an award nor costs.

Released: April 12, 2023

Ian Maedel
Vice-Chair