Citation: Adam v. Aviva Insurance Company, 2023 ONLAT 19-006801/AABS - R

RECONSIDERATION DECISION

Before:	**Clive Forbes**
Licence Appeal Tribunal File Number:	**19-006801/AABS**
Case Name:	**Jamela Adam v. Aviva Insurance Company**

Written Submissions by:

For the Applicant:	Michelle Velvet, Counsel
For the Respondent:	Rajesan Rajendran, Counsel

BACKGROUND

[1] This request for reconsideration was filed by the applicant. It arises out of a decision dated February 2, 2023 (“decision”), in which I found the applicant had failed to demonstrate entitlement to post 104-week income replacement benefits (“IRB”); that a determination of IRB quantum is not required; that no award is payable pursuant to section 10 of Regulation 664, and the applicant is not entitled to any interest pursuant to s. 51 of the *Statutory Accident Benefits Schedule Effective September 1, 2010 (including amendments effective June 1, 2016) (“Schedule”).*

[2] The applicant has requested a reconsideration pursuant to Rule 18.2(a), (b), and (d). She seeks to vary the decision to find the applicant is entitled to post-104 IRBs, and requests that the Tribunal reconsider and provide findings of fact in relation to the issue of the applicant’s entitlement to an award. The respondent asks that the request for reconsideration be dismissed.

RESULT

[3] The Applicant's request for reconsideration is dismissed.

ANALYSIS

[4] The grounds for a request for reconsideration are contained in Rule 18.2 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version 1 (October 2, 2017) as amended (“Rules”)*. The applicant’s request relies on the following criteria: 18.2(a) that I acted outside my jurisdiction or violated the rules of procedural fairness; 18.2(b) that I made an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made; and 18.2(d) that there is evidence that was previously not before the Tribunal that would likely affect the outcome of the decision. Reconsideration involves a high threshold. The requestor must show how or why the decision falls into one of the categories in Rule 18.2.

[5] The Applicant submits that I erred:

i. In fact, and in law, in finding that the respondent provided a medical reason in its letter stopping the applicant’s IRB.

ii. In law and denied the applicant procedural fairness in finding that the respondent provided a medical reason that met the notice requirements of the *Schedule,* as those terms are understood in the jurisprudence.

iii. In law, in misapprehending the applicant's argument in respect of the effect of non-compliance with s. 37 notice of requirements and in failing to consider s. 36 of the *Schedule* in determining same.

iv. In law, in failing to consider both the applicant's psychological impairments as well as her physical impairments when considering whether the applicant met the post 104-week IRB test.

v. In law, and in fact in not finding that the applicant met the post 104-week IRB test when both her physical and psychological impairments are considered.

vi. In law, in failing to quantify the applicant's entitlement to post 104-week IRBs in light of my findings that the applicant's post-accident employment with the TTC is a better alternative to her pre-accident employment with Family Day.

vii. In law, when I failed to consider the evidence of the witnesses at the hearing and the applicant's treating providers when considering whether the applicant met the post 104-week IRB test.

viii. In law, when I failed to make findings of fact in respect of the applicant's entitlement to an award.

[6] The applicant also seeks to introduce new evidence that was not provided as part of my decision. I will discuss the new evidence at the outset.

New Evidence under Rule 18.2(d)

[7] I find the applicant has not established grounds for reconsideration under Rule 18.2(d) for the following reasons. The applicant submits that the Court of Appeal decision in *Varriano v. Allstate Insurance Company of Canada, 2023 ONCA 78* was evidence not before the Tribunal when rendering its decision, could not have been obtained previously by the party now seeking to introduce it, and would have likely affected the result. This decision was released on February 6, 2023, four days after the Tribunal rendered its decision that the applicant was not entitled to post 104-week IRB.

[8] The applicant argues that had the Court of Appeal decision in *Varriano* been available before my decision, the Tribunal would have had a binding authority on the issue of what constitutes "medical reasons" and when they are required under s. 37 of the *Schedule*. The applicant also cites paragraph 31 in *Varriano*

where it held that “if the insurer relies on medical and non-medical reason to deny benefits, the insurer must advise the insured person of both”

[9] I disagree with the applicant that *Varriano* is new evidence, and that it would meet the test under Rule 18.2 (d). Properly understood, “evidence” is that which tends to increase or decrease the likelihood of a disputed fact. For example, a party’s position that their car is red in colour may be proven to be more likely true through evidence such as oral testimony, photographs, or demonstratively by showing the car itself. Case law, whether decided recently or in years gone by, is not “evidence” in the strictest sense of the concept. Where new, binding case law can be properly categorized is in an argument that the tribunal made an error of law in its decision, e.g., Rule 18.2(b). This is not new evidence, and it does not change the result of the original decision.

Rule 18.2(a) and (b) – No violation of procedural fairness or error of fact or law

[10] The test to be met on a request for reconsideration under Rule 18.2(a) is whether the Tribunal acted outside its jurisdiction or violated the rules of procedural fairness. The test to be met under Rule 18.2(b) is that the error must be significant enough that the Tribunal likely would have reached a different decision had the error not been made. Both involve a high threshold.

No error of fact that medical reasons were provided in the respondent’s IRB stoppage letter

[11] I find that the applicant has not established grounds for reconsideration under Rule 18.2(b) for the following reasons. The applicant argues that I made error of fact in finding that medical reasons were provided in the respondent’s IRB stoppage letter. She submits that the respondent’s IRB stoppage letter does not disclose a medical reason for the stoppage of the IRB as the term “medical” is understood in ordinary language or as the term “medical reasons” is understood in the jurisprudence. She argues that there is no mention of her physical or psychological impairments sustained in the accident, and, on what basis it was found that she did not meet the post 104-week IRB test, which is a legal and not a medical determination.

[12] I disagree. Furthermore, I find the applicant’s submissions are largely an attempt to use the reconsideration process as an opportunity to reargue the merits of her case. The Tribunal has long recognized that a reconsideration is not an opportunity to simply reargue one’s case or to present new arguments. Reconsideration is not a forum for reweighing evidence, unless grounds for reconsideration under Rule 18.2 have been established.

[13] As stated in my decision from paragraphs 19 to 22, I found that the respondent provided both medical and other reasons for the stoppage of IRB, and this is consistent with the Court of Appeal decision in *Varriano*. Also, as mentioned in paragraph 22 of my decision, in addition to the medical reasons that were contained in the June 19, 2019, IRB stoppage letter, the applicant was also provided with all the s. 44 IE medical reports dated June 11, 2019.

[14] In addition, in paragraphs 20-24 of my decision, I found that the IRB stoppage letter indicated that the s. 44 IE assessor Dr. Rabinovitch, physiatrist, who provided a physical medical opinion following assessment of the applicant, opined that based on the direct result of injuries sustained in the accident the applicant does not suffer a complete inability to engage in any employment for which she is suited by education, training or experience. I also found that the letter stated that Ms. Ladak, psychological associate, indicated that from a psychological perspective the applicant didn't meet the post 104-week IRB test.

[15] It was not an error to find that the respondent provided medical reasons in its IRB stoppage letter dated June 19, 2019. Furthermore, the s. 44 IE medical reports that were enclosed with the stoppage letter provided even more medical and other reasons details in ordinary language.

No violation of procedural fairness or error of law in not misapprehending the applicant's argument in respect of the effect of non-compliance with s. 37 and in not failing to consider s. 36 of the Schedule in determining same

[16] I find that the applicant has not established grounds for reconsideration under Rule 18.2(a) and (b) for the following reasons. The applicant submits that it is procedurally unfair to over-simplify and mischaracterize her argument in respect of non-compliance by omitting reference to s. 36 of the *Schedule,* that she claimed was relevant. She argues that I made findings based only on compliance with s. 37(4) and (5) *Schedule* and I did not address what would be the consequence if the respondent was in non-compliance. She further submits that I made no mention of s. 36 of the *Schedule* or her arguments in relation to it.

[17] I do not agree with the applicant. In my decision, from paragraphs 14 to 22, I addressed the issue of compliance with s. 37(4) and (5) of the *Schedule.* I found that the respondent was in compliance. Having found that the respondent was in compliance, it was neither necessary nor relevant for me to address the applicant's argument about non-compliance and how that would relate to s. 36 of the *Schedule*. Also, I agree with the respondent that if a failure to comply with s. 37 of the *Schedule* was found, the consequences based on s. 36 and s. 38 of the *Schedule* would not be applicable.

[18] I see no procedural unfairness or error of law that would have affected the outcome of my decision. Lastly, even if I misapprehended the applicant's argument, it would not have changed the outcome of my decision since the respondent was found to be in compliance with s. 37 of the *Schedule*.

No error of law in not failing to consider both the applicant's psychological impairments as well as her physical impairments when considering whether the applicant met the post 104-week IRB Test

[19] I find that the applicant has not established grounds for reconsideration under Rule 18.2(b) for the following reasons. The applicant argues that had I considered the effect of both her physical and psychological impairments on her ability to engage in employment, I would have found that her chronic back, shoulder and neck pain, sitting and standing intolerances, headaches and psychological impairments resulted in her having a complete inability to engage in any employment or self-employment for which she is suited by education, training or experience. She alleges that I did not fully consider her physical impairments because at paragraph 55 of my decision I stated that "one of the primary reasons the applicant raised for her inability to continue work is related to her psychological impairments".

[20] I disagree. I agree with the respondent that in my decision from paragraphs 38 to 50, I considered the s. 25 reports of the applicant inclusive of the chronic pain report of Dr. Rivlin dated April 27, 2020, and accordingly the applicant's pain condition. In addition, from paragraphs 51 to 59 of my decision, the s. 44 reports of the IE assessors, including Dr. Rabinovitch, physiatrist, and the applicant's family physician Dr. Usman's clinical notes and records (CNRs) were all considered in my determination that the applicant did not meet the post 104-week IRB test. As a result, I fail to see any error of law or fact such that I would likely have reached a different result had the error not been made.

No error of law in not failing to consider the evidence of the witnesses and treating providers

[21] I find that the applicant has not established grounds for reconsideration under Rule 18.2(b) for the following reasons. The applicant argues that if I did not name all the witnesses who testified at the hearing there is no basis upon which it can be found that I considered the evidence of witnesses not mentioned in my decision. She also submits that I did not mention Dr. Doran's accident benefits assessment report dated February 7, 2019. She argues that the opinions expressed by Dr. Doran would likely be unchanged in the post 104-week period

that commenced approximately 4 months after the assessment and suggest this was an error under Rule 18.2(b).

[22] I disagree. Assigning less or more weight or preferring certain evidence is not an error, and it is an intrinsic function of the Tribunal. The reconsideration process involves a high threshold. It is not an invitation for the Tribunal to reweigh evidence, or an opportunity for a party to re-litigate its position where it disagrees with the decision, or the weight assigned to the evidence. Throughout my decision I highlighted the evidence that I considered more relevant to the issue in dispute and assigned weight accordingly.

[23] Furthermore, Dr. Doran's report dated February 7, 2019, which is before entitlement to post 104-week IRB commenced, did not address the applicant's pain condition as it relates to meeting the post 104-week IRB test. As mentioned earlier, I found the chronic pain report of Dr. Rivlin dated April 27, 2020 more relevant as it relates to post 104-week IRB. In any case, my preference for certain evidence or the finding of an assessor is not an error of law or fact that would have affected my decision.

[24] Lastly, it is well-established that the reasons of the Tribunal are not to be measured against a standard of perfection. As the Supreme Court in *Vavilov*, 2019 SCC 65 stated at paragraph 91, the fact that a tribunal's reasons do not include *all* the arguments, statutory provisions, jurisprudence or other details that a reviewing judge would have preferred does not on its own create a basis to set aside the decision.

[25] As a result of the above, I am not persuaded that I made an error of law or fact such that I would likely reach a different result had the error not been made.

No error of law in failing to quantify the applicant's entitlement to post 104-week IRBs in light of finding the post-accident employment with the TTC is a better alternative to her pre-accident employment

[26] I find that the applicant has not established grounds for reconsideration under Rule 18.2(b) for the following reasons. The applicant submits that I erred in law because I failed to quantify her entitlement to post 104-week IRB in light of my finding that her post-accident employment with the Toronto Transit Commission (TTC) is a better alternative to her pre-accident employment with Family Day.

[27] I disagree. I agree with the respondent that the applicant's reconsideration submissions amount to a request that I reweigh the evidence and this is not the purpose of reconsideration. Furthermore, in my decision from paragraphs 24 to

37 I addressed the applicant's post-accident education and employment history. In paragraph 37 I concluded that the applicant's post-accident fulltime job with the TTC is a much better alternative to her fulltime pre-accident employment with Family Day and found she had not established on a balance of probabilities that she meets the post 104-week IRB test. Also, she did not provide income tax records for 2019, 2020 and 2021 and no employment records were provided for the TTC. In short, assuming that the applicant was correct, it was her burden to prove the quantum of the post-104 IRB and her failure to adduce the necessary supporting evidence meant she could not meet that burden.

[28] The applicant has not directed me to any errors of law or fact that were made. She restates her original submissions and uses the reconsideration request to try and bolster her original submissions from the hearing.

No violation of procedural fairness or error of law in not failing to make a finding of fact in relation to the applicant's claim for an award

[29] I find that the applicant has not established grounds for reconsideration under Rule 18.2(a) and (b) for the following reasons. The applicant submits that it is imperative that I make findings of fact in relation to the issues in dispute, even when I find that she did not prove entitlement. She argues that it is an error of law and procedurally unfair for me to not indicate what her award claim would have been if she was successful. She submits that because at paragraph 23 of my decision I stated what I would have found if there was non-compliance with s. 37(4) of the *Schedule*, I should have made a similar finding regarding her award claim in the event that she was successful.

[30] I respectfully disagree. In my decision, I considered and reviewed the evidence and set out my reasons. At paragraph 60, I found the applicant had not demonstrated entitlement to post 104-week IRB. As such I made a finding of fact at paragraph 61 that the respondent cannot be found to have unreasonably withheld or delayed payment of the benefits pursuant to section 10 of Regulation 664. Thus, no award is payable in that regard. Notwithstanding my finding at paragraph 23 of my decision, to suggest that for every finding of fact I need to make an alternate finding if the outcome was the opposite is not consistent with an efficient, proportional and timely resolution of the merits of the proceedings before the Tribunal and neither am I required to do so.

[31] As a result of the above, I am not persuaded that I made an error of law or fact or violation of procedural fairness such that I would likely have reached a different result had the error not been made.

CONCLUSION

[32] For the reasons noted above, I dismiss the Applicant's request for reconsideration.

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Clive Forbes
Adjudicator
Tribunals Ontario – Licence Appeal Tribunal

Released: May 25, 2023