Citation: Raad v. TD General Insurance Company, 2024 ONLAT 22-009769/AABS

Licence Appeal Tribunal File Number: 22-009769/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:

Wisam Raad

Applicant

and

TD General Insurance Company

Respondent

DECISION

ADJUDICATOR: **Lisa Holland**

APPEARANCES:

For the Applicant: Armin Mosaffa, Counsel

For the Respondent: Gina Nardella, Counsel

HEARD: **By Way of Written Submissions**

OVERVIEW

[1] Wisam Raad, the applicant, was involved in an automobile accident on September 21, 2021, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). The applicant was denied benefits by the respondent, TD General 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. Are the applicant's injuries predominantly minor as defined in s. 3 of the *Schedule* and therefore subject to treatment within the $3,500.00 Minor Injury Guideline ("MIG") limit? Note: The parties agree the MIG limits have been exhausted.

ii. Is the applicant entitled to a non-earner benefit in the amount of $185.00 per week from January 6, 2022 to date and ongoing?

iii. Is the applicant entitled to $2,215.29 for physiotherapy services, proposed by Dr. Tara Howard in a treatment plan/OCF-18 ("plan") dated March 29, 2022?

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

RESULT

[3] The applicant has not demonstrated on a balance of probabilities that he sustained injuries as a result of the accident that warrant removal from the MIG.

[4] As the MIG limits have been exhausted, it is not necessary for me to consider whether the disputed treatment plan for physiotherapy services is reasonable and necessary.

[5] I find that the applicant is also not entitled to a non-earner benefit or interest.

ANALYSIS

The applicant has not sustained accident-related injuries that warrant removal from the MIG

[6] I find that the applicant has not demonstrated that he suffers from accident-related chronic pain with functional impairments, psychological impairments or cognitive impairments which warrant removal from the MIG.

[7] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to $3,500.00 if the insured sustains impairments that are predominantly a minor injury in accordance with the MIG. Section 3(1) defines a "minor injury" as "one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury."

[8] An insured may be removed from the MIG if they can establish that their accident-related injuries fall outside of the MIG or, under s. 18(2), that they have a documented pre-existing condition combined with compelling medical evidence stating that the condition precludes recovery if they are kept within the confines of the MIG. The Tribunal has also determined that chronic pain with functional impairment or a psychological condition may warrant removal from the MIG. In all cases, the burden of proof lies with the applicant.

[9] I find that the applicant has not met his onus to prove that his accident-related impairments warrant removal from the MIG.

The applicant has failed to demonstrate that he suffers from accident-related injuries that warrant removal from the MIG

[10] I find that the applicant has not established injuries that he requires treatment beyond the MIG funding limit.

[11] The applicant submits that he should be removed from the MIG based on the following:

a. His diagnosis of chronic pain;

b. His psychological and cognitive impairments, and;

c. His pre-existing conditions.

a) Chronic pain

[12] The applicant has not demonstrated on a balance of probabilities that his accident-related injuries fall outside the MIG on the basis of chronic pain.

[13] The applicant seeks removal from the MIG on the basis of his chronic pain and functional impairments. The applicant relies on the clinical notes and records ("CNRs") of Dr. Bradley Kaplansky and his referral to Vaughan Pain Clinic where the applicant received pain injections for his neck and back pain starting from April 2, 2022.

[14] The applicant also points to the CNRs of Dr. Subhra Mohapatra of the Vaughan Pain Clinic. The applicant has only produced the initial consultation report of Dr. Mohapatra dated April 2, 2022. Dr. Mohapatra notes the applicant's involvement in several motor vehicle accidents, an MRI of the applicant's lumbar spine in 2019 which shows a disc protrusion at level L4-5 and his chronic pain syndrome. Dr. Mohapatra does not indicate whether the applicant suffers from chronic pain with functional impairments as a result of the accident. Dr. Mohapatra indicates that the applicant performs his activities of daily living with difficulty and she recommends home exercises, aqua therapy, yoga and cardiovascular fitness.

[15] The applicant makes no submissions regarding his functional limitations under the American Medical Association's *Guides to the Evaluation of Permanent Impairment, 6th ed.* (the "*Guides*"). Although, there is no statutory requirement that the applicant must satisfy the criteria in the *Guides* for MIG removal. In addition, the applicant has produced sparse CNRs of his treating physicians which do not mention any complaints of chronic pain with functional limitations as a result of the accident. The applicant reported to his psychiatrist, Dr. Michelle Clarke a month before the accident that he can't tolerate prolonged standing and his back pain has worsened over time.

[16] The respondent submits that in an Insurer's Examination ("IE") report dated May 27, 2022, Dr. Yong Kyong Michael Ko, physiatrist found that the applicant sustained minor injuries to his neck and aggravated injuries to his back and knees as a result of the accident. Dr. Ko and Dr. Andrej Gwardjan, physiatrist concluded that the applicant's injuries are soft tissue in nature and fall within the definition of minor injury under the *Schedule*.

[17] The respondent submits that the applicant has not demonstrated that he meets 3 of the 6 criteria under the *Guides* for chronic pain syndrome. The respondent submits that the applicant reported to Dr. Hasan that he is independent with personal care and mobility. The applicant further reported he was not

responsible for housekeeping tasks before the accident. The respondent further submits that Andrew Phillips, occupational therapist observed the applicant complete housekeeping activities after the accident. Mr. Phillips found that the applicant is independent for his personal care and he has returned to driving and limited socializing due to COVID. The respondent argues there is no formal diagnosis of accident-related chronic pain and the applicant has not provided evidence of functional impairment.

[18] The applicant has produced contradictory evidence from his treating physicians regarding whether his chronic back pain is accident-related. The evidence supports a finding of a pre-existing disc protrusion in the lumbar spine which adversely affected the applicant's functional abilities for standing and walking. There is minimal medical evidence to contradict that the applicant sustained uncomplicated soft tissue injuries with no residual functional impairment. Therefore, the applicant has not demonstrated that his accident-related injuries fall outside the MIG on the basis of chronic pain.

b) Psychological and cognitive impairment

[19] I find that the applicant has not proven on a balance of probabilities that he sustained a psychological condition as a result of the accident such that he should be removed from the MIG on this basis.

[20] The applicant submits that he should be removed from the MIG on account of his psychological impairments. The applicant relies on the CNRs of Dr. Kaplansky and Dr. Clarke in support of his position. On April 19, 2022, Dr. Clarke indicates the applicant has normal cognition and his panic attacks are controlled with medication. Dr. Clarke's records also indicate that the applicant's panic attacks have been controlled with medication since 2013. However, Dr. Clarke does not mention an accident-related psychological impairment.

[21] The applicant further submits that Dr. Kaplansky indicates the applicant has developed chronic pain with psychological overlay as a result of the accident. However, the applicant does not mention any psychological concerns to Dr. Clarke. The applicant also submits that on June 30, 2022, he reported to Dr. Clarke that he was panicky and afraid to drive. However, Dr. Clarke notes in early 2022 that the applicant is happy with his new car.

[22] The respondent relies on an IE report of Dr. Syed dated May 27, 2022. Dr. Syed found the applicant's responses unreliable. Dr. Syed was unable to ascertain any mental impairment as a result of the accident.

[23] In addition, in Dr. Hasan's IE report dated December 19, 2022, the applicant denied panic and anxiety after the accident.

[24] I find that the applicant has not met his onus of establishing entitlement to treatment beyond the MIG in the absence of a psychological diagnosis because the medical evidence suggests there is no mental impairment as a result of the accident. Since the applicant has been followed by Dr. Clarke for several years before and after the accident, I am persuaded by the lack of an accident-related psychological diagnosis from Dr. Clarke.

c) Pre-existing conditions

[25] The applicant has not established on a balance of probabilities that he had a documented pre-existing condition with compelling medical evidence showing that his pre-existing condition cannot be treated within the confines of the MIG.

[26] The applicant submits that he should be removed from the MIG based on the following pre-existing conditions:

a. His pre-existing tail bone fracture

b. His pre-existing back, shoulder and bilateral knee conditions, and;

c. His pre-existing bipolar disorder and depression.

i) The applicant has not established that his pre-existing tailbone fracture requires treatment outside the MIG

[27] The applicant submits that his pre-existing tailbone fracture which he sustained in a previous motor vehicle accident on November 26, 2016 is a pre-existing condition that warrants removal from the MIG. The applicant has not produced any documentation in support of a pre-existing condition of a tailbone fracture.

[28] The respondent, however, relies on the report of Dr. Gwardjan dated August 17, 2023 which indicates that although the applicant's tailbone fracture may have been exacerbated as a result of the accident, the applicant's injuries can be treated within the MIG.

[29] For all these reasons, I find that the applicant has not produced compelling medical evidence of a pre-existing tailbone fracture and therefore, it is not necessary for me to consider whether he requires treatment outside the MIG.

ii) The applicant has not established that his pre-existing back, shoulder and bilateral knee conditions require treatment outside the MIG

[30] The applicant submits that his pre-existing back, shoulder and bilateral knee pain was aggravated as a result of the accident. The applicant has not produced documented compelling medical evidence of pre-existing conditions involving his back, shoulder and bilateral knees. The applicant points to the CNRs of Dr. Kaplansky after the accident who notes that the applicant achieves short term relief with physiotherapy and pain injections.

[31] The respondent relies on the report of Dr. Gwardjan dated August 17, 2023, which indicates that the applicant sustained soft tissues injuries as a result of the accident, with exacerbation of pre-existing symptoms. In an addendum report by Dr. Ko dated December 19, 2022, on review of an ultrasound of the shoulders, dated August 17, 2022, Dr. Ko concluded the applicant's pre-existing shoulder condition is treatable within the MIG.

[32] For all these reasons, I find that the applicant has not produced documentation by a health practitioner of compelling medical evidence of pre-existing conditions involving his back, shoulder and bilateral knees that would require treatment outside the MIG.

iii) The applicant has not established that his pre-existing bipolar disorder and depression warrants removal from the MIG

[33] The applicant submits that his pre-existing bipolar disorder and depression warrants removal from the MIG. The applicant submits that his bipolar disorder and depression is exacerbated as a result of the accident. The applicant further submits that he is panicking, breathing heavily and afraid to drive since the accident.

[34] The respondent relies on the report of Dr. Hasan dated December 19, 2022. Dr. Hasan indicates the applicant was disabled before the accident due to bipolar disorder and there did not appear to be any exacerbation of his pre-existing condition as a result of the accident. Dr. Hasan also opined that the applicant's pre-existing bipolar disorder would not prevent him from achieving maximal recovery under the MIG.

[35] The respondent further submits that Dr. Clarke confirms the applicant's bipolar condition has been under control, despite his involvement in several motor vehicle accidents. In a report dated May 23, 2018, Dr. Clarke indicates that the applicant's bipolar affective disorder has been stable, he has neck, back and

knee pain from several automobile accidents and he requires medication for sleeping.

[36] I find that although the applicant's pre-existing bipolar disorder and depression is documented by Dr. Clarke, there is no compelling medical evidence that the pre-existing condition of bipolar disorder and depression prevents the applicant from achieving maximal recovery under the MIG. Therefore, the applicant is not removed from the MIG on this basis.

The applicant is not entitled to the disputed treatment plan

[37] I find that the treatment plan in dispute for physiotherapy services is not payable.

[38] As I have found that the applicant has not met his onus of demonstrating on a balance of probabilities that his accident-related injuries warrant removal from the MIG and the parties agree that the MIG benefits have been exhausted, it is not necessary for me to consider whether the treatment plan is reasonable and necessary.

The applicant is not entitled to a non-earner benefit ("NEB")

[39] I find that the applicant has not established entitlement to a NEB as there is no compelling evident to support this claim.

[40] Section 12(1) of the *Schedule* provides that an insurer shall pay an NEB to an insured person who sustains an impairment as a result of the accident, if the insured person suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident.

[41] Section 3(7)(a) defines a "complete inability to carry on a normal life" as "an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident."

[42] The Court of Appeal set out the guiding principles for NEB entitlement in *Heath v. Economical Mut. Ins. Co.,* 2009 ONCA 391, ("*Heath*") which, generally, focuses on a comparison of the applicant's pre- and post-accident activities.

[43] On the evidence before me, I am unable to engage in an analysis under *Heath* to determine if the applicant suffers from a complete inability to carry on a normal life. The applicant has not provided any specific submissions on his substantive entitlement to NEBs. The applicant relies on the clinical notes and records of Dr. Kaplansky, Vaughan Pain Clinic and Dr. Clarke which do not provide any details of his pre-accident activities or demonstrate how his participation in those

activities has been limited as a result of the accident. There are no submissions on which activities were most important to him, how he is prevented from engaging in the activities he normally engaged in pre-accident or evidence of the frequency and time commitments of his pre-accident activities. In the absence of this information, it is difficult to compare the applicant's pre- and post-accident capabilities with respect to the activities he ordinarily engaged in or valued.

[44] I agree with the respondent that the medical evidence does not establish a complete inability to carry on a normal life as a result of the accident. The respondent relied on multidisciplinary IE reports dated January 6, 2022 by Dr. Syed, Dr. Ko and Andrew Phillips, which found the applicant was capable of performing all his pre-accident personal care and housekeeping activities. In addition, the respondent argues that Dr. Syed found that the applicant has no mental impairments or inability to carry on a normal life and he has returned to driving.

[45] For the reasons set out above, I find that the applicant has failed to prove on a balance of probabilities that he suffered from a complete inability to carry on a normal life as a result of the accident from January 6, 2022 to date and ongoing. As a result, the applicant is not entitled to NEBs for this period.

Interest

[46] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule.* Since there are no benefits that are payable, interest does not apply.

ORDER

[47] For the reasons set out above, I find that:

i. The applicant's injuries are predominantly minor and therefore are subject to treatment within the MIG treatment limit. Therefore, it is not necessary to consider whether the plan for physiotherapy services is reasonable and necessary;

ii. The applicant is not entitled to a non-earner benefit in the amount of $185.00 per week from January 6, 2022 to date and ongoing;

iii. Interest does not apply, and;

iv. The application is dismissed.

Released: November 5, 2024

Lisa Holland
Adjudicator