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Ontario

RECONSIDERATION DECISION

Before: Avvy Go

Date: August 19, 2020

File: 18-012519/AABS

Case Name: Daljit Dhaliwal v Aviva General Insurance Company

Written Submissions By:

For the Applicant: David Carranza, legal representative

For the Respondent: Maia Abbas, counsel

OVERVIEW

This request for reconsideration arises from a decision released on May 11, 2020, in which I dismissed the applicant's claim for medical benefits.

Facts

1. The applicant was injured in a motor vehicle accident on October 29, 2016. She sought certain benefits pursuant to the *Statutory Accident Benefits Schedule – Effective after September 1, 2010* (the "*Schedule*").

2. The applicant, a mother of three, returned to her work on a modified basis on December 2, 2016.[1] She switched employers and started working on a day shift for a chicken processing plant in April 2018.[2]

3. I found that the applicant's injuries were predominantly minor injuries as defined in s.3 of the *Schedule* and therefore subject to the $3,500 limit on treatment in the Minor Injury Guideline ("MIG"). On that basis, I also found the applicant not entitled to a number of medical benefits she claimed for psychological and chiropractic services.

4. Pursuant to Rule 18.1 of the Tribunal's Common Rules of Practice and Procedure,[3] the applicant sought reconsideration of my decision.

5. In support of her request reconsideration, the appellant made the following arguments:

   (i) That I breached the rules of natural justice and procedural fairness by failing to review the evidence presented by the applicant which supported that her injuries could not be considered to fall under the MIG;

   (ii) That I committed an error of law by not considering that the respondent failed to properly deny the treatment plan by Dr. Malik Fawad of Physio Fix and Fitness, dated January 31, 2017, in accordance with Section 38(8) of the *Schedule*, and by extension, for not applying s.38(11) of the *Schedule*;

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[1] Representative for the applicant noted in his initial submission that the applicant did not return to work on modified basis until March 30, 2017, but the evidence before me, including information provided by the applicant during various assessments suggests that she returned to work in December, 2016. The applicant did not dispute my finding in this regard in her reconsideration request.

[2] Applicant's representative noted in his initial submission that the applicant continues to work for the same employer since the accident. But according to the report dated May 15, 2018, by Dr. Ralph Lubbers, one of the assessors retained by the respondent, the applicant began working on a day shift for a chicken processing facility in April 2018. This finding of mine was also not disputed in the applicant's reconsideration request.

[3] *The Common Rules of the Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission (effective October 2, 2017)*.

(iii) That I committed an error of fact by failing to recognize that the applicant suffered from chronic pain as a result of the motor vehicle accident, despite all the evidence to the contrary; and

(iv) That I committed an error of mixed fact and law by failing to consider the cost of the psychological assessment from Dr. Belyakova of Physio Fix and Fitness, dated March 17, 2017 was reasonable and necessary.

6. The applicant seeks an order varying the decision of May 11, 2020 "stating that her injuries do not fall within the Minor Injury Guideline, and that all denied treatment plans are reasonable and necessary," and that "she is entitled to interest on all overdue amounts". In the alternative, the applicant seeks a new hearing with a different adjudicator.

7. In response, the respondent asked the Tribunal to dismiss the applicant's reconsideration, on the ground that there was no breach of procedural fairness by the Tribunal and no error of law or fact in the decision.

8. By a letter dated June 4, 2020, the Associate Chair of the Tribunal informed the applicant that her matter will be assigned to a Tribunal adjudicator. I have been assigned to review the applicant's reconsideration request.

RESULT

9. The applicant's request for reconsideration is dismissed.

ANALYSIS

10. The grounds for a request for reconsideration to be allowed are contained in Rule 18 of the Tribunal's Common Rules of Practice and Procedure. A request for reconsideration will not be granted unless one or more of the following criteria are met:

    a. The Tribunal acted outside its jurisdiction or violated the rules of procedural fairness.

    b. The Tribunal made an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made;

    c. The Tribunal heard false evidence from a party or witness, which was discovered only after the hearing and likely affected the result; or

    d. There is new evidence that was not before the Tribunal when rendering its decision, could not have been obtained previously by the party now seeking to introduce it, and would likely have affected the result.

Error 1: Breach of Procedural Fairness

11. The applicant's argument with respect to the alleged breach of procedural fairness focused on the results of an MRI that she underwent on September 12, 2019 – almost three years after the accident.

12. The MRI findings read as follow:

> Alignment, vertebral body height and marrow signal is normal. The conus terminates at L1 and is normal for signal and morphology.
>
> At L3-L4 there is minimal desiccated concentric disc bulge. The facets joints show no degeneration. The central canal is patent. The right neural foramen is patent. The left neural foramen is minimally narrowed with possible abutment of the exiting left L3 nerve root.
>
> At L4-L5 there is moderate concentric desiccated disc bulge. There is mild ligamentum flavum hypertrophy more pronounced on the left side. The facets joints show moderate degenerative changes especially in the left side. These changes are encroaching upon the central canal, left neutral foramen and left lateral recess with likely indentation of the exiting left L4 and traversing left L5 nerve roots. The central canal as a result is also mildly narrowed. The right neural foramen is patent.
>
> At L45-S1 there is a mild concentric desiccated disc bulge. The facets joints show mild degeneration. The central canal is patent. The central canal is patent. The neural foramina are mildly narrowed with possible abutment of the exiting bilateral L5 nerve roots.
>
> Opinion: Multilevel degenerative changes most pronounced at L4-L5 as described.

13. Because the MRI results were not available prior to the deadline imposed by the Tribunal for exchange of documents, the applicant brought a motion to introduce the MRI results as part of her evidence in support of her proceedings before the Tribunal. Adjudicator Makhamra granted her motion.

14. The applicant took issue with the fact that my decision did not comment on the MRI results, despite the fact that the Tribunal allowed it to be introduced as part of her evidence. The applicant further argued that without reviewing the MRI results, I did not properly analyze it in conjunction with the rest of the evidence presented by the applicant, and that had I done so, it could have resulted in my reaching a different decision.[4]

15. As the respondent has rightly pointed out, the applicant seems to have misconstrued the legal concept of procedural fairness, which requires that a party have an

[4] Applicant's Request for Reconsideration, at paras. 30-31

opportunity to be heard and an opportunity to respond to the position taken against her.[5] In this case, by granting the applicant's motion to submit the MRI results, the Tribunal has indeed taken steps to comply with the procedural fairness requirement, notwithstanding that the MRI was conducted three years after the accident and the results were obtained after the deadline for the filing of evidence. In addition, the Tribunal has also granted the applicant an opportunity to make a supplementary submission and a reply submission. In so doing, the applicant's right to procedural fairness has been adequately respected. I therefore find that there has not been any breach of procedural fairness.

16. The applicant's real concern, in my view, is not so much with the lack of procedural fairness, but with the fact that my decision did not specifically refer to the MRI results. Further, the applicant argued that had I considered the MRI results, I would have come to a different conclusion. This argument assumes that I had not considered the MRI results in my initial decision.

17. As the case law has confirmed, a reconsideration is not an opportunity to reargue one's case, and that the Tribunal need not reweigh all the evidence on reconsideration[6]. Further, it is a well established legal principle that an adjudicator need not comment on any specific piece of evidence. This is so in particular if the evidence is not relevant to the determination of the issue before the Tribunal.

18. The applicant has failed to establish how the results of a MRI conducted almost three years after the accident would support her position that her injuries do not fall under the MIG, or more fundamentally, how the MRI results were linked to the motor vehicle accident in question. Dr. Guram, the staff radiologist of the hospital who dictated and reviewed the MRI results, was of the opinion that there were "multilevel degenerative changes" with respect to the applicant's spine. It is unclear how that finding is linked to the accident three years before the MRI was conducted.

19. In some cases, if an insured person can provide evidence about a pre-existing condition before the accident that will prevent the insured person from achieving full recovery from the minor injury if they are subject to the $3,500 limit, then they will not be subject to the MIG. In this case, the applicant did not argue that she has such a pre-existing condition, and the only evidence on record is that she has discussed the issue of menopause with her family doctor. The MRI results point to certain degenerative issues, but there is no evidence to support whether these issues were present before the accident. In any event, the applicant did not argue, when she submitted the MRI results, that it supported a finding of a pre-existing condition. In addition to providing evidence of a pre-existing condition, the applicant must also demonstrate how her pre-existing condition would prevent maximal recovery if she is subject to the MIG. No such evidence has been provided in this case.

[5] IMN v Intact Insurance Company, 2019 CanLII 101473 at para 9

[6] 17-002933 v TD Insurance Meloche Monnex, 2019 CanLII 72230 at paras.18 and 21

20. There is also no evidence to suggest that the degenerative changes noted in the MRI dated September 12, 2019 are related to the accident three years prior.

21. I note that in her previous response to the Respondent's submission, the applicant conceded that she is "not solely relying on the MRI",[7] but in addition to it, the other medical evidence that she has submitted. Here, once again, in her reconsideration, the applicant has not explained why the MRI results would have affected the outcome of her application.

22. In her further reply to the respondent's submission on reconsideration, the applicant continued to repeat her argument that the MRI was ignored by the adjudicator, despite the effort made by the applicant to have it introduced and which the applicant believes supports the fact that the applicant's injuries fell outside the MIG, and confirmed the "chronicity of her condition".

23. The applicant's argument, as I understand it, is that because there is an MRI showing she has degenerative conditions, three years after the accident, it therefore must support her position that her injuries fall outside of the MIG. However, since the applicant is unable to show either a) the degenerative changes noted in the MRI are related to the accident, or b) these conditions pre-existed the accident and prevented her from achieving full recovery, my decision that the applicant's injuries fall within MRI was not changed in any way by the MRI results. My decision in that regard stands, notwithstanding the additional submissions made by the applicant in her reconsideration request.

Error 2: Error of Law with respect to the denial of the treatment plan by Dr. Malik Fawad

24. The applicant further submitted that I made an error of law by not considering that the respondent failed to properly deny the treatment plan by Dr. Malik Fawad of Physio Fix and Fitness, dated January 31, 2017, in accordance with Section 38(8) of the *Schedule*, and by extension, for not applying s.38(11) of the *Schedule*.

25. In my initial decision, after making a finding that the applicant's injuries fall under the MIG, I went on to find as follow:

> [41] The respondent has submitted that the applicant is not entitled to any of the medical benefits in dispute because the MIG applies. Neither parties provided any information as to how much of the $3,500 limit within the MIG remains unused by the applicant. I must therefore assume, based on the respondent's submission, that the applicant has already exceeded the $3,500 limit within the MIG.

26. Based on that assumption, I found the applicant not entitled to the benefits claimed, without determining if any of the claimed benefits were reasonable and necessary.

[7] Applicant's Reply to Respondent's Additional Submissions dated February 24, 2020

For that reason, in my initial decision I did not consider the applicant's s.38(11) argument.

27. Having read the applicant's reconsideration submission, I agree that it was an error in law that I did not address the applicant's argument that the refusal of Dr. Fawad's treatment plan was improperly done. However, for the reasons set out below, I find that had I addressed this issue, I would not have reached a different decision in this case.

28. I will now address the applicant's argument as part of her reconsideration request.

29. If I understand the applicant's argument in her reconsideration request correctly, she takes issue with the "rigidity" in the way her case has been handled by the respondent, as the applicant stated as follow:

> Adjudicator Go's decision stating that the Applicant's injuries fell under the Minor Injury Guideline, affected the Applicant's entitlement to the benefits under the Schedule, sine [sic] once Adjudicator Go reached that conclusion, she did not require [sic] to make the determination whether the Treatment and Assessment Plans in dispute were reasonable and necessary.
>
> In her decision, Adjudicator Go did not take into account the rigid position assumed by the Respondent during the handling of their file, as they failed not only to review the updates and new evidence submitted by the Applicant, but also as they did not allow the examiners who had previously assessed the Applicant to review it, and produce an Addendum Report. This was not an oversight on the part of the Respondent, but rather a conscious decision to ignore the evidence presented by the Applicant.

30. The applicant submitted that I should have addressed her argument that the insurer has improperly denied the treatment plan without providing meaningful details about their decision based on medical or other information on file.[8]

31. In her submission in support of her initial application to this Tribunal, the applicant referred to the reconsideration decision of Executive Chair Linda Lamoureux, as she then was, in *T.F. v Peel Mutual Insurance Company*[9] to argue that where the respondent has failed to provide medical and any other reasons for their denial, the insurer's denial of the treatment plan would be improper. The applicant submitted that the respondent provided "no sufficient medical reasons" with respect to the treatment plan in question.

32. In their initial response, the respondent also relied on the same reconsideration decision to argue that the purported adequacy of reasons for denials should not be used as a tool to chip away at the claimant's onus of proof, and that where the insurer has no or limited information about the claimant's injuries, it is not able to provide

[8] Applicant's Request for Reconsideration, at paras. 45-52
[9] *T.F. v. Peel Mutual Insurance Company,* 16-003316/AABS

specific reasons for denials, but this should not invalidate its response. Citing the decision of *T.F.*, the respondent noted that "explanation will turn on the unique facts at hand. Therefore it would be unwise to attempt to outline a comprehensive approach to doing so"[10].

33. I would further note that, the former Executive Chair warned about imposing too high a standard of the adequacy of reasons in these claim adjustments when she stated:

> In evaluating the sufficiency of such notice, the Tribunal should be mindful of those who adjust insurance files. It would be naïve or impractical to expect them to articulate something resembling a medical opinion. Likewise, their reasons should not be measured by the inch or held to a standard of perfection. Moreover, reasonable minds may disagree about the content of an insured's file. Those allowances should be made. If it offers a principled rationale based fairly on an insured's file, an insurer will have satisfied its obligation under s.38(8).[11]

34. I have looked at the chronology of events surrounding the submissions of the treatment plans and treating medical documentation by the applicant. In a nutshell, as the respondent has pointed out in their initial submission, all but the newest disputed treatment plans were received prior to the majority of the treating medical documentation, thus giving the respondent little opportunity to review the evidence that was only gathered much later and then used to provide specific reasons for denial. As such, the respondent argued that the appropriate response was to request medical documentation that indicated injuries that were not minor, which was what the respondent's response indicated.

35. In effect, the applicant had not produced the medical records in a timely way to support her claim for the medical treatment. Instead the applicant now argues that the respondent should have been less "rigid" by reviewing medical documents that were submitted after the fact.

36. In this case, given the insufficient information provided by the applicant at the time the treatment plan was submitted, it was reasonable for the respondent to require the applicant to be examined under s.44, to determine if she has an impairment to which the MIG applies. The insurer's authority to do so comes under s.38(10) of the *Schedule* which states:

> (10) If the insurer has not agreed to pay for all goods, services, assessments and examinations described in the treatment and assessment plan or believes that the Minor Injury Guideline applies to the insured person's impairment, the notice under subsection (8) may notify the insured person that the insurer requires the insured person to undergo an examination under section 44.

[10] *Ibid*, at para 19, where former Executive Chair quoted from her own decision in *M.B. v. Aviva Insurance Canada* 2017 CanLII 87160 (ON LAT)
[11] *Ibid*, at para 22

37. The insurer's request, in my view, was also reasonable particularly given the injuries described by Dr. Fawad in the treatment plan to be "sprains" and "strains" of the applicant's spines, joints, wrist, and elbow – injuries that normally fall within the MIG.

38. Ultimately, while the respondent has an obligation to respond with reasons and to do so in a timely way, the applicant carries the burden of proof that the treatment sought is reasonable and necessary. Where the applicant has not provided sufficient medical documentation to support the treatment claimed, the respondent's response to require the applicant to attend assessments and produce documents constitutes an adequate response under s.38 of the *Schedule*.

39. In conclusion, although it was an error on my part in my initial decision not to analyze whether the insurer's denial has complied with s.38 of the *Schedule*, I find at the end of the day that I would not have reached a different result had the error not been made.

Error 3: Error or fact with respect to findings on chronic pain

40. In her reconsideration request, the applicant submitted that I made an error of fact by failing to recognize that the applicant suffered from chronic pain as a result of the motor vehicle accident. In support of this argument the applicant referred to the American Chronic Pain Association 2016 Edition guidelines on chronic pain, which defines chronic pain as persistent pain that could "adversely affect a person's well-being, level of function, and qualify of life".

41. The applicant said that I should "have not only considered the constant reporting by the Applicant about her condition to the different assessors", but I "should have also compared it with the evidence presented by way of imaging reports, and based on it to conclude that the Applicant was suffering from chronic pain".

42. This is the first time the applicant brought in reference to the American Chronic Pain Association definition of chronic pain. As the respondent rightly pointed out, the applicant is seeking to introduce a new argument which was available to her at the time of her initial submissions, which is not a proper use of the reconsideration process. I do not have to accept the applicant's submission in this regard.

43. But even if I were to consider the applicant's new argument, the applicant still has the burden of proving that she meets the definition of chronic pain, as defined by the American Chronic Pain Association. Without repeating my reasoning in my initial decision, suffice to say that the only reference to a chronic pain diagnosis in the entire medical record of the applicant was the clinical note of the applicant's family physician on February 1, 2018, and the only treatment prescribed by Dr. Sahheed at the time was Tylenol 3. I therefore found, as I continue to do so, that the applicant has failed to establish that she suffers from chronic pain.

Error 4: Error of mixed fact and law with respect to the cost of psychological assessment from Dr. Belyakova

44. Finally, the applicant submitted that I made an error of mixed fact and law by failing to consider the cost of the psychological assessment from Dr. Belyakova of Physio Fix and Fitness, dated March 17, 2017 was reasonable and necessary.

45. To start, I should make clear that I was assessing the treatment plan of Dr. Belyakova not in the context of determining whether it was reasonable and necessary, but in order to determine whether the applicant's injuries fall within the MIG. As noted above, whether or not the applicant's injuries fall within the MIG was the threshold question that I must first consider before addressing the reasonableness and necessity of any particular treatment. If the injuries fall within the MIG, and the applicant has already received benefits which exceed the $3,500 limit, then I need not consider whether the cost of Dr. Belyakova's assessment was reasonable or necessary.

46. However, in my initial decision, I also laid out in details my reasons for preferring the diagnosis given by Dr. Lubbers, the IE assessor, over that of Ms. Sally Hsu, a psychotherapist who conducted the assessment on behalf of Dr. Belyakova. In the end, I accepted Dr. Lubbers' finding that the applicant did not suffer from any clinically significant psychological impairment due to the accident. My reasons are set out in my decision from paragraphs 21 to 40.

47. In effect, the applicant is now asking me to reweigh the evidence. The applicant argues that I should not have concerned myself with the shortcomings of Dr. Belyakova's report. Contrary to what the applicant has suggested, it is precisely my role as an adjudicator to examine the strength and shortcomings of all the expert opinions offered by both parties, in order to reach a finding of fact.

48. I also agree with the respondent that the applicant's argument that I should have considered whether the proposed treatment would benefit the applicant in improving her quality of life, is not the proper test for determining whether she is entitled to treatment or assessment; nor is it a proper basis upon which to seek reconsideration.

49. In her reply submission, the applicant reiterated that she has benefited from the psychological treatment provided to her, without which she "would not have been able to report improvement in important aspects of her life such as driving, excessive worries, depression, sleeping, and socializing, which resulted in having a better quality of life, and the ability to resume activities of daily living".

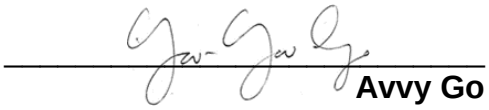
50. That the applicant has benefited from the psychological treatment provided to her in the past is welcome news indeed, but it is not the basis upon which I must determine whether her claim can be taken out of MIG. My reasons in this regard can be found in my initial decision and it is based in Dr. Ludders' finding that the applicant's score reveals a mild level of depressive symptomatology and a high elevation observed on

the somatic, pain and functional complaints scales and on measures of depression and anxiety. My finding in this regard has not changed.

Conclusion

51. For the reasons noted above, I dismiss the applicant's request for reconsideration.

Released: August 19, 2020



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