LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Date: 2018-10-30
Tribunal File Number: 17-007098/AABS
Case Name: 17-007098 v RBC Insurance Company (o/a Aviva General Insurance)

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:

M.G.

Applicant

and

RBC Insurance Company (o/a Aviva General Insurance)

Respondent

DECISION

ADJUDICATOR: **Jesse A. Boyce**

APPEARANCES:

Counsel for the Applicant: Kate Logushova

Counsel for the Respondent: Amanda Faulkner

Written Hearing on: **October 5, 2018**

OVERVIEW

[1] The applicant, M.G., was injured in a motor vehicle accident on April 11, 2016. As a result of the accident, he suffered injuries to his cervical, thoracic and lumbar spine, to his left hip, knees and has gone on to exacerbate pre-existing medical conditions including, but not limited to, right hip pain. M.G. sought benefits from the respondent, RBC Insurance (now "Aviva"), pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the "*Schedule*").

[2] Aviva stopped payment of M.G.'s non-earner benefits ("NEBs") on September 3, 2017 on the basis that he no longer suffered a complete inability to carry on a normal life. Aviva denied his claims for chiropractic treatment and the costs of examinations related to attendant care, chronic pain and functional abilities evaluations on the basis that these treatment plans were not reasonable and necessary. M.G. disagreed and submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal" or "LAT") for dispute resolution.

[3] A case conference was held but the parties were unable to come to a resolution and proceeded to this written hearing.

ISSUES IN DISPUTE

[4] The following are the issues to be decided, as per the Case Conference Direction of Adjudicator Watson, dated March 23, 2018:

i. Is the applicant entitled to non-earner benefits in the amount of $185.00 per week from September 2, 2017 to date and on-going?

ii. Is the applicant entitled to a medical benefit in the amount of $3,808.18 for chiropractic services recommended by Medi Plus Physiotherapy and Rehabilitation dated April 2, 2016, and denied on August 18, 2016?

iii. Is the applicant entitled to a cost of examination for an attendant care assessment conducted by Medi Plus Physiotherapy and Rehabilitation in the amount of $1,488.40 dated August 4, 2016 and denied on September 20, 2017?

[1] O. Reg. 34/10.

iv. Is the applicant entitled to a cost of examination for a chronic pain assessment conducted by Medi Plus Physiotherapy and Rehabilitation in the amount of $1,999.15 dated September 12, 2017, and denied on October 2, 2017?

v. It the applicant entitled to a cost of examination for a functional abilities evaluation conducted by Dr. J. A. Nathanson of Assessment Rehabilitation Treatment Centre in the amount of $1,900.00 dated September 12, 2017, and denied on October 11, 2017?

vi. Is the applicant entitled to interest on any overdue benefits?

RESULT

[5] I find that M.G. does not suffer from a complete inability to carry on a normal life as a result of the accident and is not entitled to NEB's for the period in dispute.

[6] M.G. is entitled to the medical benefit for chiropractic treatment and the cost of examination for the Chronic Pain Assessment, as both are reasonable and necessary.

[7] M.G. is not entitled to the costs of examinations for the Attendant Care Assessment or the Functional Abilities Evaluation as they are not reasonable and necessary.

[8] M.G. is entitled to interest on the payment of any overdue benefits, in accordance with s. 51 of the *Schedule*.

ANALYSIS

Non-Earner Benefits

[9] In order to continue receiving NEB's, M.G. must prove that he suffers a complete inability to carry on a normal life.[2] A person suffers a complete inability to carry on a normal life as a result of an accident if the person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.[3] I find on the evidence that M.G. is not entitled to non-earner benefits for the period in dispute.

[2] The factors that inform the determination of NEB entitlement are outlined in the seminal case *Heath v. Economical Mutual Insurance Company,* 2009 ONCA 391 (CanLII).
[3] O. Reg. 34/10, at s. 3(7)(a).

[10] M.G. submits that he suffers from a complete inability to carry on a normal life on the basis that he has sickle-cell anemia and this condition, combined with the impairments he suffered as a result of the accident and a previous hip replacement, mean that he can no longer manage his pre-accident activities of daily living or engage in recreational and social pursuits. I find that the evidence does not support this position.

[11] Aviva initially paid NEB's on the basis of an OCF-3 Disability Certificate for the period October 11, 2016 to June 25, 2017. Aviva then requested Insurer's Examinations ("IE's") on June 21, 2017 to determine M.G.'s continuing entitlement to NEB's. M.G. attended for physiatry, occupational therapy and psychological IE's. Aviva stopped payment of the NEB's on the basis of these reports, which found that he does not suffer a complete inability to carry on a normal life. On review of the multi-disciplinary IE Reports, I find that M.G. does not suffer from a complete inability to carry on a normal life because his pain, while present, is not debilitating, he is independent in his routines and his daily activities have increased. Further, although he suffers from adjustment disorder and depressed mood, his impairments do not render him completely unable to perform his activities of daily living or pursue his interests.

[12] Where pain is a primary factor, it must be considered whether performing the activity with pain is such that the individual is practically prevented from engaging in those activities.[4] On review of the medical documentation and M.G.'s self-reporting, I find that M.G. suffers from pain but that his pain is manageable and does not practically prevent him from independent self-care or engagement in other activities. For example, according to M.G., the only activity he is able to complete without difficulty or restriction is his personal toileting. However, M.G. also states that he is able to dress himself, walk for periods of time, climb stairs, sit and stand without assistance. M.G. also states that he can complete the following tasks with pacing: riding in and driving a vehicle, using public transportation, washing dishes and doing laundry.

[13] *Heath* requires an assessment of the applicant's pre-accident activities and life circumstances over a reasonable period of time prior to the accident. However, there was no evidence led or submissions on M.G.'s pre-accident activities and how his impairments as a result of the accident have led to a complete inability to carry on with them post-accident. Similarly, there was no evidence provided on the amount of time M.G. spent on each of his pre-accident activities or on how much value and importance he placed on each. In the absence of this

[4] *Heath*, at para 50.

information, it is difficult to compare his pre and post-accident capabilities with respect to the activities he ordinarily engaged in or valued.

[14] In submissions, M.G. offers a similar argument with regards to the IE Reports, noting that the assessors did not complete a thorough analysis of his pre and post-accident activities. While this is generally true, I note that the IE assessors are only able to base their analyses on the self-reporting of the applicant. Like the IE assessors, I have no evidence to base M.G.'s claims on. I do not know how much time he spent on his pre-accident activities. I only have bald assertions that he cannot carry on his pre-accident activities and housework as a result of the accident. In contrast, in various reports, M.G. claims that he is independent in his self-care, volunteers at a music studio, does housework, exercises on occasion, and performs work on his computer.

[15] While the Attendant Care Assessment Report prepared by Ibrahim Ismayilov offers insight into M.G.'s capabilities in the physical demands section, these subjective post-accident assessments (the categories are sitting, standing, reaching, etc.) are not, in my view, evidence that M.G. suffers a complete inability to carry on a normal life. Put another way: the capabilities identified in the Report are not activities unique to M.G. and do not establish that the changes in M.G.'s life post-accident continuously prevent him from engaging in substantially all of his pre-accident activities. While it is evident that M.G. is experiencing pain and has psychological impairments, the evidence provided for this written hearing is not sufficient to meet the high threshold of the test.

[16] There is an undertone of hopelessness in M.G.'s reporting, arising perhaps from his frustration with his physical impairments. This frustration has, evidently, developed into an adjustment disorder and depression that compounds his impairments. While this frustration was apparent throughout the file, it does not, in my view, satisfy the test to continue receiving NEB's.

[17] On this basis, I find that M.G. is not entitled to NEB's for the period in dispute.

Chiropractic Treatment

[18] In order for M.G. to receive payment for medical and rehabilitation benefits under the Schedule, the benefits in dispute must be reasonable and necessary, pursuant to ss. 14-17. I find on the evidence that the chiropractic treatment in the amount of $3,808.18 is reasonable and necessary.

[19] Aviva originally denied the treatment on the basis that M.G. was in the Minor Injury Guideline (the "MIG"). It later removed M.G. from the MIG but denied the

treatment anyway on the basis of Dr. Marchuk's paper review that indicated that further facility-based treatment was unlikely to aid in M.G.'s recovery and that similar treatment had resulted in minimal improvement.

[20] I disagree and find the treatment to be reasonable and necessary. It is evident throughout the file that M.G. continues to experience intermittent pain due to his back, shoulder and hip injuries, sometimes rising to the level of 8/10 on the pain scale. In the medical documents, M.G. indicates that previous chiropractic treatment was beneficial for his symptom relief.[5] To date, M.G. reports that treatment twice weekly provided relief but that he has still experienced less than a 50% improvement overall. Pain relief is a legitimate goal for treatment. I find on the evidence that his impairments result in enough discomfort and pain that it is reasonable to continue to at least attempt to have a professional treat him. The treatment plan only calls for 15 sessions of therapy and massage. In my view, this will provide a reasonable sample size to determine whether the treatment is beneficial to M.G.'s long-term comfort and improvement or if he has indeed achieved maximal recovery.

[21] Accordingly, I find that the chiropractic treatment in the amount of $3,808.18 is reasonable and necessary.

Costs of Examinations

(a) Attendant Care Assessment

[22] I find that the cost of examination for the Attendance Care Assessment in the amount of $1,448.40 is not reasonable and necessary.

[23] The evidence offered by M.G. of his inability to be independent in his self-care was sparse. As detailed above, M.G. reported that he is independent in his self-care, that he has no difficulty or restriction in his personal toileting or grooming, he is able to dress himself including putting on socks and shoes, he can walk for periods of time, climb stairs, sit and stand without assistance. With self-pacing, he can ride in a vehicle, use public transportation, prepare meals and wash dishes and he is currently volunteering at a music studio on his own. Further, M.G. resides with his mother, who already completes the majority of the household tasks and his lack of functional impairment in this regard was confirmed in the Occupational Therapy IE Report. Simply put: I was provided with no clinical reason why an in-home attendant care assessment is reasonable or necessary.

[5] Physiatry Assessment Report, at pg. 6.

[24] On this basis, I find that the cost of examination for the Attendant Care Assessment is not reasonable and necessary.

(b) Chronic Pain Assessment

[25] With regards to the Chronic Pain Assessment in the amount of $1,999.15, I find that M.G. is entitled to the cost of this examination because he continues to experience pain post-accident, his pain is continuous and that it is reasonable to explore whether his pain is chronic.

[26] In several reports, M.G. indicates that his pain can rise to extreme levels and throughout the medical documentation, he consistently self-reports that the pain is present daily. Although self-reporting can be subjective, I find that M.G.'s complaints of pain are consistent and that the pain, while intermittent, can alternate between dull and sharp and affects multiple sites on his body. He treats the pain through rest and pain relievers such as Tylenol 1, Tylenol 3 and Robaxacet, which provide only short-term relief. In my view, a chronic pain assessment, when combined with the treatment I have already found to be reasonable and necessary, will form an appropriate and proportional strategy to resolve, or at minimum, identify the source of, M.G.'s ongoing pain.

[27] Aviva argues that if the goal is to receive a diagnosis of chronic pain, then the assessment is not reasonable and necessary because Dr. Nathanson already diagnosed M.G. with chronic pain in his Functional Abilities Evaluation. I disagree. There is no indication that M.G.'s goal is to receive a diagnosis of chronic pain or chronic pain syndrome. Rather, the goals indicated in the OCF are simply to establish the current diagnosis, the extent of the injuries, the prognosis and determine recommendations for recovery. I find that it is evident that M.G. has pain, so this assessment is reasonable because it will help to determine how best to address that pain.

[28] Accordingly, I find the Chronic Pain Assessment to be reasonable and necessary.

(c) Functional Abilities Evaluation

[29] I find that M.G. is not entitled to the cost of this examination in the amount of $1,900.00 because he has not provided evidence of functional impairment in his day to day life.

[30] As detailed above, I find that M.G. has not provided evidence of functional impairment. The treatment plan in dispute is vague in its description of the

activities of impairment and the reasons for the evaluation in general. There is no breakdown of the amount of time required for the evaluation except that it will take four weeks and every possible box for treatment goals is checked with the caveat that it is to be "commented on following the Functional Abilities Evaluation" by Dr. Nathanson.

[31] While the Assessment of Function/Impairment Report prepared by Dr. Nathanson is quite detailed, on review, there is minimal loss of range of motion in M.G.'s shoulder, neck and back, which is consistent with the findings of the Occupational Therapy IE Report, which found functional, active range of motion. Additionally, the diagnoses offered by Dr. Nathanson are, frankly, not proportional to the rest of the medical evidence in the file. Further, the Report seems to largely be a rehashing and reorganizing of information contained elsewhere. Accordingly, I follow the opinion of Dr. Marchuk from his paper review and find that the evaluation is not reasonable and necessary, despite being incurred by M.G.

[32] As a result, I find the Functional Abilities Evaluation is not reasonable and necessary.

Procedural Issues, etc.

[33] In written submissions, Aviva raised s. 38(3)(a) and (b) of the *Schedule* as a procedural defence, arguing that it has not received signed copies of the OCF-18's in dispute and the treatment plans are therefore not payable. On review of the denial letters sent to M.G. by Aviva on August 18, 2016 and September 20, 2017, respectively, this defect was not raised. In any event, this is a minor defect and as there are no indications of fraud, it is a defect that is easily cured and did not factor into this decision.

[34] Similarly, Aviva objected to the admission of two letters of support from friends of M.G. who detailed their observations of M.G. pre and post-accident. These letters were not identified at the case conference and Aviva did not have the opportunity to cross-examine the individuals on their statements. While one of the letters was illegible, the other was not particular helpful to M.G.'s case and was afforded no weight as a result.

Interest

[35] As I have found that M.G. is entitled to some of the benefits in dispute, he is also entitled to interest on those overdue benefits, pursuant to s. 51 of the *Schedule*.

CONCLUSION

[36] For these reasons, M.G. is not entitled to NEB's for the period in dispute.

[37] M.G. is entitled to the chiropractic treatment and the cost of the Chronic Pain Assessment.

[38] M.G. is not entitled to the cost of the Attendant Care Assessment or the Functional Abilities Evaluation.

[39] Interest is payable on all overdue benefits, pursuant to s. 51 of the *Schedule*.

Released: October 30, 2018

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Jesse A. Boyce, Adjudicator