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Ontario

RECONSIDERATION DECISION

Before: Brian Norris, Adjudicator

Date: November 25, 2019

File: 17-007448/AABS

Case Name: B. C. and Aviva Insurance Company

Written Submissions by:

For the Applicant: Humberto Geovo, Representative

For the Respondent: Patrick M. Baker, Counsel

OVERVIEW

[1] The request for reconsideration was filed by the applicant, B.C. It arises out of a decision which the Tribunal found the applicant to have suffered predominantly minor injuries as defined by the *Schedule* and subject to the $3,500.00 funding limit provided by the *Minor Injury Guideline* ("MIG").

[2] The applicant makes the request pursuant to Rule 18.2 (a) and (b) of the Licence Appeal Tribunal (LAT) Rules of Practice and Procedure Version 1 (April 2016) (the "LAT Rules"). The applicant submits the Tribunal violated procedural fairness by overlooking or mischaracterizing the applicant's evidence. In the alternative, the applicant submits the Tribunal made a significant error in law by failing to fully consider all the notice requirements provided in section 38(8).

[3] Pursuant to s. 17(2) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act*, I have been delegated responsibility to decide this matter in accordance with the applicable rules of the Tribunal.

RESULT

[4] The applicant's request for reconsideration is denied.

PROCEDURAL FAIRNESS

[5] The applicant submits the Tribunal failed to uphold procedural fairness by overlooking evidence and infers a different result would have occurred had the evidence been considered. Specifically, the applicant submits the disability certificates (the "OCF-3s") dated December 21, 2016 and August 21, 2017 were overlooked and the Tribunal failed to consider the applicant had been diagnosed with a psychological injury and chronic pain syndrome.

[6] The respondent disagrees and submits the process was procedurally fair as the Tribunal did not restrict the applicant in what could be tendered as evidence or submissions. Instead, the respondent characterizes the applicant's arguments as taking issue with the Tribunals determinations of fact and the Tribunal was not persuaded by the evidence before it.

[7] I find there was not a breach of procedural fairness. My reasons are as follows.

[8] As the respondent stated, the hearing proceeded in a procedurally fair manner – the parties had an opportunity to make submissions and present evidence.

[9] While I understand the decision did not specifically address certain pieces of the applicant's evidence, it does not automatically mean the evidence was not considered when making the decision. Contrary to the applicant's position, the decision was made with consideration of the OCF-3s, clinical notes and records, and expert reports. The latter of the two were expressly addressed in paragraphs 21 to 24 of the decision.

[10] Specifically, the applicant submits the Tribunal overlooked the note in the August 21, 2017 OCF-3 which indicated anxiety and insomnia as injuries and noted the applicant's condition "*has now turned into chronic pain syndrome*".

[11] Upon further review of the OCF-3s, I acknowledge the family physician noted that the applicant's recovery would take more than 12 weeks because the applicant's injuries had "*now turned into chronic pain syndrome*", contrary to my statement the doctor did not make such a diagnosis. I acknowledge the error. However, this single note does not alter my finding that the evidence showed that the applicant's functionality was not consistently impaired as a result of chronic pain. This is addressed in paragraph 21 of the decision. In paragraph 23, I found there was insufficient evidence in the physiatry assessment to show the applicant's range of motion was significantly impaired.

[12] Furthermore, I found the diagnosis of a chronic pain disorder in the physiatry assessment was without merit. As noted in paragraph 22, this diagnosis by the assessor is unpersuasive because it is not backed by objective medical evidence, unlike the other diagnoses made by the assessor in the same report.

[13] Likewise, the applicant's psychological injuries are addressed in paragraphs 21 and 24 of my original decision. I found no persuasive evidence of a psychological injury in the family doctor's CNRs and the physiatry assessment. The family physician's CNRs were absent any investigation or recommendations for psychological treatment and the OCF-3s only list two symptoms of a psychological injury. I found there was not sufficient evidence to establish a psychological injury which removes the applicant from the MIG and the funding limit it provides.

[14] The psychological diagnoses made in the physiatry assessment were made without conducting any formal psychological investigation. I found the assessor's opinion on the applicant's psychological state was unconvincing considering there was no psychometric testing or any other psychological investigation.

[15] Although it was not expressly stated in my decision because I felt the applicant had not met the evidentiary burden, I found the physiatrist's analysis provided by

the applicant was not as compelling as that of the respondent's psychologist. The psychologist conducted 5 different psychological tests with the applicant and concluded the applicant's psychological symptoms were not sufficient to warrant a formal diagnosis or referral to psychological services.

SIGNIFICANT ERROR IN LAW

[16] The applicant submits the Tribunal made a significant error in law because it did not consider its submissions on how the respondent failed to follow section 38(8) of the Schedule. The applicant argues the respondent failed to provide medical or other reasons for the denials.

[17] The respondent submits this is a new argument being advanced by the applicant and submits this is not a valid reason to reconsider the original decision. The respondent adds, in the alternative, the position taken by the applicant would fail because the respondent satisfied the requirements under section 38 (8).

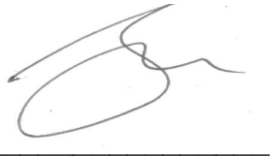
[18] I find this is a new argument being advanced by the applicant. The purpose of section 38(8) is to compel the respondent to reply to a treatment and assessment plan were within 10 days and advise of the benefits it will fund or not and the medical and other reasons for the decision. The initial submissions mentioned the respondent failed to deny the treatment plans pursuant to section 38(8) of the Schedule but did not provide any particulars surrounding this allegation. The denials sent by the respondent were within 10 days of receipt of the disputed treatment plans, address the benefits it will fund or not, and provides a reason for the decision. The applicant's submissions however, never mentioned a failure to provide medical or other reasons for the denial of benefits.

[19] A request for reconsideration is not an opportunity to advance new arguments or re-argue the same arguments. This argument was not addressed in my decision because it was without any specific reference as to how the respondent failed to comply with section 38(8). Therefore, it was not a relevant submission that needed to be included as a factor for the decision. A decision is not required to mention every argument the parties submit, particularly when no reasons are provided to substantiate the argument.

CONCLUSION

[20] The find there was no violation of procedural fairness, nor was there an error in law or fact. I dismiss the applicant's request for reconsideration.

Released: November 25, 2019



Brian Norris
Adjudicator