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RECONSIDERATION DECISION

Before: Melody Maleki-Yazdi, Adjudicator

Date: June 29, 2020

File: 18-011431/AABS

Case Name: N.L. vs. Aviva Insurance Canada

Written Submissions By:

For the Applicant: Kim Mohammed-Sieudhan, Paralegal

For the Respondent: Patrick M. Baker, Counsel

OVERVIEW

- [1] The applicant requests reconsideration of a decision dated January 27, 2020, which found that she is statute-barred from applying to the Tribunal pursuant to s. 55 of the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the “*Schedule*”) for failing to attend the insurer’s examination (“IE”) for a psychological assessment.
- [2] The applicant submits that a reconsideration is warranted because the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) made two significant errors in the decision. First, the Tribunal erred in the application of the law in finding that the applicant is statute-barred from applying to the Tribunal for her failure to attend the IE for the psychological assessment. Secondly, the Tribunal failed to exercise its discretion afforded by the law under s. 55(2) and s. 55(3) of the *Schedule*.

RESULT

- [3] The applicant’s request for reconsideration is dismissed.

DECISION AND REASONS

- [4] Rule 18.2 of the *Common Rules of Practice and Procedure* sets out the criteria for granting a reconsideration:
- a) The Tribunal acted outside of its jurisdiction or violated the rules of procedural fairness;
 - b) The Tribunal made an error of law or fact such that the Tribunal would have likely 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 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 have likely affected the result.²
- [5] The applicant submits that rule 18.2(b) applies.

¹ O. Reg. 34/10.

² *Licence Appeal Tribunal, Animal Care Review Board and Fire Safety Commission Common Rules of Practice and Procedure*, October 2, 2017, as amended.

Rule 18.2(b) – The Tribunal made an error of law or fact such that the Tribunal would have likely reached a different result had the error not been made

Error 1: Erred in the application of the law in finding that the applicant is statute-barred from applying to the Tribunal

- [6] The applicant submits that the Tribunal erred in the application of the law in finding that she is statute-barred from applying to the Tribunal for her failure to attend the IE for the psychological assessment.
- [7] The applicant also submits that the Tribunal misinterpreted the law when it found that in order to decide on the issues relating to the chiropractic treatment plans and an orthopaedic assessment, the applicant would need to attend an insurer's psychological assessment. The applicant submits that the IE which the applicant missed was scheduled only to address the psychological assessment and not to address the other issues in dispute.
- [8] The Tribunal has not been persuaded by the applicant's submissions. Reconsideration is not an opportunity to reargue previously failed arguments.
- [9] The applicant previously argued that she had every intention of attending the examination and that she requested that the IE be rescheduled. The applicant also previously argued that there is no evidence that the respondent tried to or has rescheduled the IE. The Tribunal's decision addresses these arguments. The applicant submits that the Tribunal failed to give any weight to the applicant's evidence.
- [10] In the decision, the Tribunal opined that it appeared that the respondent scheduled the examination without consulting the applicant; however, in the weeks following the receipt of the notice letters, the applicant failed to notify the respondent that the date, time and/or location were inconvenient.
- [11] The Tribunal found that the respondent made an effort to contact the applicant once she failed to attend the IE although it did not specifically reschedule the IE. The Tribunal found that the applicant had not provided any evidence that she contacted the respondent to request for the assessment to be rescheduled. In the applicant's reconsideration submissions, she confirms that she does not have any evidence to support her request to reschedule the IE.
- [12] Furthermore, the Tribunal found that the applicant did not have a reasonable explanation for her failure to attend the IE. To date, the applicant has not provided an explanation for her failure to attend the IE.
- [13] As a result of the applicant's failure to attend the IE for the psychological assessment and in conjunction with no reasonable explanation for her failure to

attend, it remains the Tribunal's finding that an application of s. 55 bars the applicant from applying to the Tribunal until such time that she attends the IE. Therefore, as noted in the decision, the Tribunal did not embark on an analysis of the substantive issues in dispute because it found that the applicant was precluded from applying to the Tribunal until such time that she attends the IE.

Error 2: Failed to exercise discretion afforded by the law

- [14] The applicant submits that the Tribunal failed to exercise the discretion afforded by the law under s. 55(2) and s. 55(3) of the *Schedule* to allow an insured to apply despite being statute-barred under s. 55(1)2. The applicant has also previously argued this point. The applicant submits that since it was the respondent's duty to reschedule the IE to a date, time and location that were convenient for her pursuant to s. 44(9)(2)(i) of the *Schedule*, and that the respondent failed in its obligation, the Tribunal should have exercised its discretion and allowed the IE to take place prior to rendering a decision.
- [15] The Tribunal agrees with the respondent's submissions that discretionary powers are not bound by past decisions of a Tribunal or Court, and are applied on a case-by-case basis in accordance with the facts of that case.
- [16] In the decision, the Tribunal found that the applicant had no reasonable explanation for her non-compliance with the respondent's IE request, therefore, it declined to exercise the discretion afforded by s. 55(2). As noted above, to date, the applicant has not provided an explanation for her failure to attend the IE.
- [17] The Tribunal's finding remains that it declines to exercise the discretion afforded by s. 55(2).
- [18] For the reasons outlined above, the Tribunal did not make errors of fact and law that would have changed the outcome of the decision.

CONCLUSION

- [19] The applicant's request for reconsideration is dismissed.

Released: June 29, 2020



Melody Maleki-Yazdi

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