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

Citation: N.L. vs. Certas Home and Auto Insurance Company, 2020 ONLAT 19-003924/AABS

Released Date: 07/17/2020
File Number: 19-003924/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:

N.L.

Applicant

and

Certas Home and Auto Insurance Company

Respondent

DECISION

ADJUDICATOR: **Jesse A. Boyce**

APPEARANCES:

For the Applicant: Nivedita Misra

For the Respondent: Jonathan B. Schrieder

Heard by way of written submissions

OVERVIEW

[1] N.L. was injured in an accident on July 28, 2016, and sought various benefits from the respondent, Certas, pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* ("*Schedule*"). After removing N.L. from the Minor Injury Guideline based on psychological impairments, Certas denied the benefits in dispute here on the basis that they were not reasonable and necessary. N.L. disagreed and submitted an application to the Tribunal for resolution of the dispute.

[2] In submissions, N.L. withdrew his claim for attendant care benefits. Further, the parties agreed that the issue of whether N.L.'s claim under issue (v), below, is statute-barred would be addressed in this written hearing, despite the Tribunal's Order indicating that it would be addressed in a preliminary issue hearing. The rest of the issues as listed in the application remain in dispute.

ISSUES IN DISPUTE

[3] The following issues remain in dispute:

i. Is the applicant entitled to payments for the cost of examinations in the amount of $1,672.11 for a Functional Abilities Assessment, recommended by Toronto Medical Centre in a treatment plan dated March 28, 2017 and denied by the respondent on April 4, 2017?

ii. Is the applicant entitled to a medical benefit in the amount of $1,824.81 for chiropractic treatment recommended by Toronto Medical Centre in a treatment plan submitted on March 28, 2017, and denied on April 5, 2017?

iii. Is the applicant entitled to payments for the cost of examinations in the amount of $2,104.00 for an Orthopaedic Assessment, recommended by Toronto Medical Centre in a treatment plan dated April 7, 2017 and denied by the respondent on April 13, 2017?

iv. Is the applicant entitled to a medical benefit in the amount of $2,941.64 for assistive devices recommended by Toronto Medical Centre in a treatment plan submitted on August 16, 2017, and denied on August 29, 2017?

v. Is the applicant entitled to a medical benefit in the amount of $1,230.00 for chiropractic treatment recommended by Toronto Medical Centre in a

treatment plan submitted on November 4, 2016, denied on March 24, 2018?

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

RESULT

[4] I find N.L. is not entitled to payment for any of the treatment and assessment plans in dispute as he has not satisfied his onus to prove that they are reasonable and necessary. As no benefits are overdue, interest does not apply.

ANALYSIS

Are the treatment and assessments plans reasonable and necessary?

[5] In order for the disputed treatment and assessment plans to be payable, N.L. must demonstrate that the benefits are reasonable and necessary under s. 15 of the *Schedule*. The parties agree that the test requires N.L. to establish that the specific treatment and examinations he seeks are reasonable costs to achieve the stated goals and will have a therapeutic or restorative impact on his accident-related impairments.

The medical evidence and N.L.'s complaints

[6] N.L. submits that Certas did not provide him with sufficient physical treatment for his accident-related impairments and that he incurred treatment that was denied. On review of the Disability Certificate ("OCF-3") dated August 5, 2016, I find the physical injuries identified are largely sprain and strain-type injuries to N.L.'s neck and back, in addition to headaches, sleep issues and nervousness. The OCF-3 oddly indicates that N.L. suffered a complete inability to carry on a normal life, despite there being no indication of functional impairment and the fact that N.L. never sought a non-earner benefit and withdrew his attendant care claim.

[7] In any event, N.L.'s current accident-related physical complaints consist of back pain, neck pain and occasional headaches. He submits that his back pain is accident-related and, as a student, is further aggravated by prolonged sitting. A December 2019 MRI determined he has mild osteoarthritis. N.L. also submits that the denial of treatment led to him taking more pain medications, which resulted in ulcer formations, heartburn and increased acidity. N.L. also explored a stutter he developed for several months with a neurologist, who ultimately determined there were no signs of neurological issues. In March 2020, N.L. was referred to a pain clinic and was given prescriptions for Meloxicam and Cyclobenzaprine, to be taken as needed.

[8] In response, Certas submits that none of the treatment or assessment plans are reasonable and necessary. Certas asserts that N.L.'s attendance at his family physician for accident-related complaints are sparse, that the diagnostic imaging revealed a normal study, that his mild osteoarthritis is not accident-related, that N.L.'s epigastric pain is not related to the accident, that the MRI revealed no abnormalities and that N.L.'s daily activities, personal care, social and recreational life remain unaffected. To this end, Certas relied on two s. 44 reports in denying the disputed treatment plans. First, the report from Dr. Harmantas, physician, found primarily soft tissue injuries and that N.L. had achieved maximal medical recovery from his accident-related injuries. Second, it relies on the report from Ms. Hisey, occupational therapist, who determined that N.L. did not require attendant care services because he was independent with self-care, demonstrated functional range of motion, strength, balance and mobility.

[9] With respect, it is unclear how N.L.'s epigastric pain—which does seem to have existed prior to the accident—renders any of the treatment plans reasonable and necessary, even if it was a result of a medication sensitivity. Further, it is also unclear why N.L.'s self-reported "sporadic" headaches and stuttering issues make the physical treatments and assessments reasonable and necessary where his own neurologist found no issues. Further, I agree with Certas that osteoarthritis is a degenerative disease and that N.L. has not provided any evidence linking this diagnosis to the accident. In any event, the diagnosis of mild osteoarthritis came over two years following the submission of the OCF-18s. N.L.'s submissions do not articulate why the onset of osteoarthritis makes treatment or assessments from two years earlier reasonable and necessary.

[10] Indeed, I find this was a prevailing theme in N.L.'s submissions. While N.L. opined at length about his various impairments, I agree with Certas that there is limited analysis linking his alleged impairments to the accident and even less analysis demonstrating why the specific treatment and assessment plans he seeks payment for are reasonable and necessary for his accident-related impairments, which, by all accounts, seem to only be intermittent back pain at this point. While pain is a legitimate goal for treatment, it is well-established that it is N.L.'s burden to prove that the benefits in dispute are needed for his specific impairment. On the evidence, I find N.L. has not met that burden. Instead, N.L.'s submissions seem to focus on his mitigation efforts, arguing that his pain, the fact he incurred some denied treatment along with prescribed pain medication, attended for diagnostic imaging and followed up with referrals makes payment for the benefits in dispute reasonable and necessary.

Functional Abilities Evaluation ("FAE")

[11] As I understand it, N.L. submits that if the FAE was approved by Certas, it would have provided guidance on appropriate treatment and would have resulted in N.L. not relying on pain medication that caused his peptic ulcer issues. Based on the OCF-3, it appears that the FAE was recommended in order to address N.L.'s functional status and determine the need for attendant care and other home assistance, as it determined that he had a complete inability to carry on a normal life and a substantial inability to perform housekeeping tasks. Certas denied this assessment based on Dr. Harmantas' report finding that there was no evidence of an ongoing musculoskeletal impairment requiring an assessment.

[12] On the evidence, I agree with Certas. Putting aside the fact that N.L.'s submissions do not specifically address the goals of this assessment, I find overwhelming evidence that N.L. has no functional impairment, as he was able to maintain his university studies post-accident and had no interruption to his self-care or his activities of daily living. While N.L. may have pain, I find no evidence that he has functional impairment as a result of the accident and certainly no evidence that he would meet the test for non-earner benefits or attendant care, especially where he withdrew the latter claim in submissions. I query the necessity of a FAE where N.L. continued with his studies, was actively participating in recreational sports, was able to travel often, has not demonstrated functional impairment and where there was no objective medical evidence of a physical impairment. Accordingly, I find the FAE is not payable as N.L. has not demonstrated why it reasonable and necessary.

$1,824.81 for chiropractic treatment

[13] Here, N.L. submits that he continued to attend for treatment and incurred this cost due to his ongoing pain and despite Certas' denial of the OCF-18 based on Dr. Harmantas' s. 44 report. Again, his submissions do not contain any analysis of the treatment plan itself, although there are attendance records and clinical notes in evidence. The OCF-18 was submitted on March 28, 2017 and denied on April 5, 2017. There is only one record of N.L. attending during this time, on March 28, 2017, and the payment summary submitted by N.L. on reply is illegible. There is a single notation of back discomfort in the family physician records from April 11, 2017, but there is no discussion of severity, chronicity or what causes the discomfort, nor is there mention of the accident. While the notation is illegible, N.L. submits that it recommends "modifying his lifestyle and seeking treatment."

[14] Suffice to say, on this note alone, I find N.L. has not satisfied his burden to prove that the treatment is reasonable and necessary for what the treatment notes describe as “intermittent pain” and where the treatment seemingly involved stretching, strengthening exercises that could easily be done at home and riding a stationary bike. While pain reduction is a legitimate goal, where there is no discussion of cost, of frequency or necessity for further facility-based care, I find no reason to interfere with Certas’ determination and find N.L. has not satisfied his burden to prove that the treatment is reasonable and necessary.

$2,104.00 for an Orthopaedic Assessment

[15] This assessment plan was submitted on April 7, 2017, immediately following the previous denial for the chiropractic treatment, addressed above. Certas denied this OCF-18 on the basis of Dr. Harmantas’ s. 44 report finding no accident-related musculoskeletal impairment warranting an assessment. N.L.’s sole submission on this OCF-18 was that “the assessment will help establish the need for ongoing treatment.” In reply, he cites an August 2019 referral from his family physician for physiotherapy for mechanical back pain as well as a January 2020 referral to a pain clinic, however, neither of these referrals reference the accident, but rather pain as a result of prolonged sitting while studying. Notably, over three and a half years post-accident, the pain clinic only prescribed medication for relief as needed and provided no indication that there are musculoskeletal impairments warranting further investigation.

[16] Again, while N.L. may have pain, I find he has not demonstrated that this pain is as a result of the 2016 accident or why an orthopaedic assessment is a reasonable and necessary expense nearly four years later. Aside from mild osteoarthritis discovered two years post-accident, all of the diagnostic results in evidence reveal unremarkable findings. Dr. Harmantas found no accident-related musculoskeletal impairment. Further, N.L. had been receiving chiropractic treatment for several months at the same clinic prior to the submissions of this assessment plan, so I query why $2,104 is a reasonable expense for an assessment to “establish the need for ongoing treatment.” Accordingly, I find N.L. has not demonstrated why the OCF-18 is reasonable and necessary for his accident-related impairments.

$2,941.64 for assistive devices

[17] N.L. offered no substantive submissions on why funding for various assistive devices—a mattress topper, back roll, seat cushion, long-handled mop, hand massager, pain relief gel, lightweight vacuum, anti-stress floor mat, heating pad, hot/cold packs, resistance bands, exercise ball, foot stool and free weights—

recommended by Ms. Lipka, registered nurse, in an attendant care assessment are reasonable and necessary. While the report recommends attendant care because N.L. had alleged difficulties completing his daily activities, as noted, N.L. withdrew his claim for attendant care. The report notes that the devices might help N.L. with his pain and recovery. Certas denied the claim on the basis of Ms. Hisey's report finding that N.L. was independent in his personal care activities, demonstrated functional range of motion, strength, balance and mobility and had achieved maximal medical recovery.

[18] On the evidence provided by N.L., I find he has not met his onus to demonstrate why the devices are reasonable and necessary or whether they were ever incurred. As noted, N.L. withdrew his attendant care claim, which in my view provides support for Ms. Hisey's determination that he is independent in his personal care and housekeeping tasks. Indeed, on the evidence, I find N.L. has no functional impairment in his daily activities or personal care tasks, and in the absence of evidence that he has incurred the devices or reasonably requires them to aid in his recovery, I find no reason to interfere with Certas' determination that they are not reasonable and necessary.

$1,230.00 for chiropractic treatment

[19] Under s. 56 of the *Schedule*, an applicant must commence an appeal within two years of a valid denial or else risk being statute-barred from pursuing the claim. I find this treatment plan was clearly and unequivocally denied by Certas on November 8, 2016 based on Dr. Harmantas' s. 44 report. However, N.L. did not appeal the denial until April 3, 2019, which is 104 days after the expiration of the two-year limitation period, meaning he is statute-barred from appealing.

[20] Problematically, N.L. did not provide analysis of the four factors that the Tribunal considers when exercising its discretion under s. 7 of the *Licence Appeal Tribunal Act* in order to extend a missed limitation period. Certas did, arguing that N.L. demonstrated no *bona fide* intention to appeal, that the four-month delay is significant and that he provided no details of when the treatment was incurred. I agree. Accordingly, I decline to exercise the Tribunal's discretion to extend the limitation period in order to consider whether the treatment is reasonable and necessary.

CONCLUSION

[21] N.L. is not entitled to payment for any of the treatment and assessment plans in dispute as he has not demonstrated that they are reasonable and necessary for his accident-related impairments. As no benefits are overdue, no interest applies.

Released: July 17, 2020

Jesse A. Boyce
Adjudicator