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RECONSIDERATION DECISION

Before: Thérèse Reilly, Adjudicator

Date: March 18, 2020

File: 18-002204/AABS

Case Name: H.S.H. v. Aviva Insurance Company of Canada

Written Submissions by:

For the Applicant: Yu Liang, Paralegal

For the Respondent: Suzanne Clarke, Counsel

OVERVIEW

- [1] This request for reconsideration was filed by the applicant, the insured. It arises out of a decision in which I found the applicant was not entitled to a medical benefit for chiropractic services, the cost of an assessment for a functional abilities evaluation (FAE), and CAT Assessment. The request for reconsideration applies only with respect to the decision relating to the CAT assessment.
- [2] The applicant submits that I made a significant error in law in finding that the proposed CAT assessment under section 25 of the *Statutory Accident Benefits Schedule* required the applicant to bear the burden of proof on a balance of probabilities that the CAT assessment was reasonable and necessary.
- [3] The applicant further submits that I made a significant error in law in analyzing the medical evidence and making a finding that there was insufficient medical evidence to support the physical and psychological components of the CAT application and assessment.
- [4] The respondent denies any errors of law in the decision and rejects the assertion that I incorrectly interpreted “reasonableness” in section 25(1)(5) as imposing a burden on the applicant to prove that the CAT assessment was reasonable and necessary. It also rejects the allegation that I made a significant error in law in analyzing the medical evidence and concluding there was insufficient medical evidence to support the components of the CAT application and assessment. The respondent requests an award for costs in respect of this request for reconsideration.

RESULT

- [5] The applicant’s request for reconsideration is denied. The request for costs is denied.

ANALYSIS

- [6] The grounds for a request for reconsideration 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 made an error in 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 would likely have 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 affected the result.

[7] The applicant argues as set out below that 1) I acted beyond the scope of my authority by addressing an issue she claims was not before me and 2) pursuant to Rule 18.2(b), I made an error in law or fact.

[8] The applicant set out the following arguments in her request for reconsideration:

- a. Section 25(1) of the Schedule outlines what an insurer must pay. Under section 25(1)(5) an insurer must pay reasonable fees for preparing an application under section 45 for a determination of whether the insured person has sustained a catastrophic impairment including any assessment or examination for that purpose.
- b. I erred in law by incorrectly interpreting “reasonable fees” in section 25(1)(5) as imposing a burden on the applicant to prove that the CAT assessment under section 25(1)(5) is reasonable and necessary – as opposed to only whether the fees are reasonable.
- c. I erred by incorrectly interpreting “including any assessment or examination for that purpose” in section 25(1)(5) as imposing a burden to prove the CAT Assessment itself was necessary as opposed to only whether the fees for the assessment or examination were reasonable. She states the words “any assessment or examination necessary for that purpose” in section 25(1)(5) relate to preparing an application under section 45 for a determination of whether a person sustained a CAT impairment, and do not create “a stand-alone test of whether an assessment or examination is reasonable and necessary”.
- d. Only a qualified medical professional can complete an application for a CAT designation and propose any necessary assessments for that purpose. She maintains I went beyond the scope of my authority in the

analysis of the medical evidence and finding there was insufficient evidence to support the physical and psychological components of the CAT application and assessment. In so doing, I effectively made a determination that the applicant did not meet the test for a CAT determination. This issue was not before me. The sole issue was whether the fees proposed were reasonable.

- [9] The respondent submits that I correctly interpreted the burden under section 25(1)5 of the *Schedule* by imposing a burden on the applicant to prove that the CAT Assessment was reasonable and necessary. My decision is consistent with Tribunal decisions that have confirmed that the reasonable and necessary tests apply to the request for funding of a CAT assessment.
- [10] Further, section 25 must be read in conjunction sections 15(1) and 38 of the *Schedule*. When these sections are read together, the applicant has the burden to prove that an assessment is reasonable and necessary.
- [11] The reference to reasonable fees in section 25(1)5 does not automatically entitle an applicant to the funding of assessments submitted to an insurer for approval.
- [12] The respondent submits that I did not make an error in law by analyzing the medical evidence and concluding that there was insufficient medical evidence to support the components of the CAT assessment.

Requirements under Rule 18.2 (b)

- [13] In order to interfere with the original decision under rule 18.2(b), I must not only have made an error of law or fact, but that error must be such that, if corrected, I likely would have come to a different conclusion. The applicant in her submissions incorrectly refers to the issue as did the Tribunal make a significant error in law. The correct reference is whether the Tribunal made an error in law. Nonetheless, I am not persuaded by the applicant's submissions that I made an error in law or fact. As will be discussed below, I see no reason to interfere with the Tribunal's decision that the CAT assessment was not reasonable and necessary.

The Burden of Proof and requirements of Section 25(1)(5)

- [14] I agree with the respondent that I correctly interpreted the burden under section 25(1)5 of the *Schedule* by imposing a burden on the applicant to prove that the CAT assessment was reasonable and necessary. My decision is consistent with

Tribunal decisions that have confirmed that the reasonable and necessary tests apply to the request for funding of a CAT assessment, as discussed below.

- [15] Section 25(1)(5) states an insurer must pay reasonable fees for preparing an application under section 45 for a determination of whether the insured person has sustained a catastrophic impairment and this includes any assessment or examination for that purpose.
- [16] Section 25(1)(5), however, must be read together with section 38(8). Section 38(8) applies to treatment plans and assessments submitted to an insurer. An insurer within 10 business days of receiving a treatment and assessment plan must give the applicant a notice that sets out the assessments or examinations it agrees to pay for, identify the assessments or examinations it does not agree to pay for, state the medical and other reasons why the insurer does not consider any assessment or the proposed costs of them not to be reasonable and necessary.
- [17] When read together, section 25(1)(5) and section 38(8) make clear that the applicant who submits an assessment to an insurer bears the burden to prove that the assessment and any proposed costs of an assessment are both reasonable and necessary. It is not sufficient to only prove that the proposed fees are reasonable. The proposed costs of an assessment and the assessments must be both reasonable and necessary.
- [18] I also disagree with the applicant's assertion that the words "any assessment or examination necessary for that purpose" in section 25(1)(5) relate to preparing an application under section 45 for a determination of whether a person sustained a CAT impairment, and do not create "a stand-alone test of whether an assessment or examination is reasonable and necessary". This is not consistent with Tribunal decisions.
- [19] The wording of section 25 (1)(5) makes it clear that a CAT application differs from a CAT assessment. As stated by Adjudicator Lester in her Reconsideration Decision of *C.A. v. Intact Insurance Company*¹:

Section 25(1)(5) obligates the insurance company to pay for expenses incurred on behalf of the applicant for reasonable fees charged for preparing the application for a catastrophic determination under section 45. In other words, the obligation is

¹ *C.A. v. Intact Insurance Company*, 18-000578, September 3, 2019, written submissions of the respondent, tab 5.

on the insurance company to pay for fees in connection with filling out the application for catastrophic determination, that is the OCF-19, not the catastrophic assessments itself. This is akin to section 25(1)(1) where the insurance company is obligated to pay for reasonable fees in connection with preparing a disability certificate (OCF-3).

- [20] The applicant presented no case law to support its position. The respondent submitted several Tribunal decisions that place the burden on an applicant to prove the assessment is reasonable and necessary. The Tribunal has decided this issue and confirmed that the "reasonable and necessary" tests applies to the request for funding for an assessment. For example, in determining that proposed CAT assessments were not reasonable or necessary, Vice-Chair Flude in the LAT decision *17-006956 v Guarantee Company of North America*,² held:

In addressing the issue of reasonableness and necessity of a catastrophic impairment assessment...the applicant bears the onus on a balance of probabilities, to show entitlement to the assessment. I also note that, but their nature assessments are speculative. They are conducted to determine if an applicant has a specific condition or meets a specific threshold. There is a likelihood that the assessment will prove negative.

- [21] I find the argument that I incorrectly interpreted the burden of proof requiring an applicant to prove the CAT assessment is reasonable and necessary is without merit. There is no basis to interfere with my decision that the applicant had to establish the CAT assessment was reasonable and necessary.

Insufficient Medical Evidence

- [22] The applicant submits that I went beyond the scope in analyzing the medical evidence and finding there was insufficient medical evidence to support the physical and psychological components of the CAT assessment thereby effectively making a determination that the applicant did not meet the test for a CAT determination.
- [23] Based on my discussion above, the issue for consideration in my decision was whether the CAT assessment under section 25(1)(5) is reasonable and necessary was within the scope of my authority.

² *17-006956 v Guarantee Company of North America*, 2018 CanLII 110952 (ON LAT), at para 37, Written submissions of the respondent, tab 7, paragraph 10.

- [24] The applicant submits that only a qualified medical professional can complete an application for CAT and can propose any assessment for that purpose. This may be so, but a determination on a benefit or assessment cannot be made solely on the opinion and recommendation of one medical professional. I assessed the medical evidence presented of the medical doctors, experts and IE assessors. Based on a review of the evidence, I find no error in my conclusions or the weight assigned to the medical evidence.
- [25] Secondly, I did not make any decision or finding in respect of any CAT application or determination. My decision was solely in respect of a CAT assessment and whether it was reasonable and necessary. A finding in respect of a CAT assessment does not equate to a finding that an applicant is catastrophically impaired. A claim for a CAT assessment is considered a medical benefit under the provisions of section 38 of the *Schedule*. A claim that an insured is catastrophically impaired is not a benefit and involves different considerations and medical evidence as identified in section 3.1 of the *Schedule*.
- [26] My decision did not render a decision on whether the applicant was catastrophically impaired. The medical evidence presented and my decision addressed whether the CAT assessment itself was reasonable and necessary. Paragraphs 16 and 28 of the decision support this. There is no reference in the decision of a finding to support the physical and psychological components of the CAT application. The sole issue is with respect to a CAT assessment.
- [27] In summary, I reviewed the medical evidence and noted the insurer's denial based on the Insurer's Examination Report completed by Dr. Mohamed Khaled, who concluded there was no evidence that the applicant sustained any ongoing accident-related impairments from the soft tissue injuries sustained as a result of the accident. After a review of the clinical notes and records of the family physician and Dr. Khaled's report, I concluded that the medical evidence did not support ongoing medical conditions that would necessitate the CAT assessment. As such, I concluded as outlined in paragraphs 21 to 28 and 30 of the decision that the CAT assessment was not reasonable nor necessary.
- [27] I find I did not make an error in law in analyzing the medical evidence and concluding that there was insufficient medical evidence to support the components of the CAT assessment. As the request for reconsideration does not meet the criteria under Rule 18, I see no reason to interfere with the Tribunal's decision.

COSTS

[28] The respondent is seeking costs of \$1000 under Rule 19.1 of the LAT *Rules of Practice and Procedures*, which outlines that, where a party believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith, that party may make a request to the Tribunal for costs. The respondent argues that this request for reconsideration was unreasonable, frivolous, and made without due diligence. I disagree. This is not an appropriate case for an award for costs, as there is no evidence that the applicant acted unreasonably, frivolously, vexatiously or in bad faith. The request for costs is dismissed.

CONCLUSION

[29] For the reasons noted above, I **dismiss** the applicant's Request for Reconsideration. I **dismiss** the request for costs.

Released: March 19, 2020



Thérèse Reilly, Adjudicator
Tribunals Ontario – Safety, Licensing Appeals and Standards Division