Citation: Munro v. Belair Direct, 2021 ONLAT 19-013690/AABS

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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:

David Munro

Applicant

and

Belair Direct

Respondent

DECISION

ADJUDICATOR: **Jesse A. Boyce, Vice-Chair**

APPEARANCES:

For the Applicant: Michelle F. Jorge, Counsel

For the Respondent: Matthew C. Owen, Counsel

HEARD: **Via Written Submissions**

OVERVIEW

[1] The applicant sustained catastrophic impairments as a result of an accident on January 30, 2016 that also caused the death of his son. The applicant was then injured in a second accident that occurred on January 5, 2017. The respondent, Belair Direct, has paid accident benefits on an ongoing basis pursuant to the *Statutory Accident Benefits Schedule* - Effective September 1, 2010 (the "*Schedule*")[1] for the applicant's physical, psychological and cognitive impairments.

[2] For the purposes of this written hearing, Belair Direct denied the first two benefit claims listed in dispute on the basis that they were incurred prior to being submitted, in accordance with s. 38 of the *Schedule*. Belair Direct denied the remaining benefit claims because they were not reasonable and necessary under s. 15 of the *Schedule*. The applicant disagreed and applied to the Tribunal for resolution of the dispute.

ISSUES IN DISPUTE

[3] The issues in dispute[2] are as follows:

a. Is the applicant entitled to a medical and rehabilitation benefit in the amount of $11,598.53[3] for various goods and services including nursing services, psychological services, medication, supplements and devices, denied submitted on an OCF-6 submitted June 4, 2018, denied by the respondent July 4, 2018?

b. Is the applicant entitled to $28,369.53 for a 3D system and for services from Mind Valley Mediation, submitted on an OCF-6 expense claim form dated October 17, 2019, denied by the respondent on November 4, 2019?

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[1] O. Reg. 34/10, as amended.

[2] The Case Conference Order identified additional items (being $1,827.20 for sensory deprivation float therapy services; $42,420.46 for a whirlpool soaker tub and contractor fees; and $5,188.90 for an iPhone, iPad, accessories and service plan) that were not pursued by the applicant on reply as a result of Belair Direct's motion that they were premature due to non-attendance at s. 44 examinations as a result of the pandemic. Accordingly, those issues are not part of this hearing.

[3] In submissions, the parties could not agree on the exact amount remaining in dispute for the OCF-6 identified in this issue, following purported payments and settlement discussions. The Case Conference Order indicates that the amount in dispute was agreed to be $15,899.20. The applicant's submissions cited $14,694.76 but he did not provide analysis on every item. Belair Direct argued that the OCF-6 was for $16,114.92. In his reply, the applicant stated that the outstanding amount was $11,598.53, which is the figure used for the purposes of this hearing.

c. Is the applicant entitled to $30,200.00 for a portable modulation stimulator device recommended by Vikas Dhawan, chiropractor, in a treatment plan (OCF-18) dated August 16, 2019, denied by the respondent on January 6, 2020?

d. Is the applicant entitled to $34,326.00 for naturopathic treatment and an ozone generator device recommended by Danielle Naumann, occupational therapist, in a treatment plan (OCF-18) dated February 9, 2020, denied by the respondent on March 3, 2020?

e. Is the applicant entitled to $12,315.86 for an infrared sauna recommended by Danielle Naumann, occupational therapist, in a treatment plan (OCF-18) dated December 3, 2019, denied by the respondent on March 5, 2020?

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

g. Is the applicant entitled to his costs because the respondent's conduct or course of conduct has been unreasonable, frivolous or vexatious or the respondent has acted in bad faith?

RESULT

[4] The applicant is entitled to payment for the following items identified in the OCF-6 dated June 4, 2018, identified in issue (a): item 5, being $110.00 for the eye exam; and any overdue payments from Living Science Wellness under item 14 that have not been paid. Interest applies on any overdue payments under s. 51.

[5] The applicant is not entitled to payment for any of the remaining expenses in either OCF-6 or for any of the OCF-18s, as he has not demonstrated that these treatment plans are reasonable and necessary. I decline to order a costs award.

ANALYSIS

a. OCF-6 in the amount of $11,598.53 for various goods and services

[6] The OCF-6 form requested payment for 18 separate items purportedly incurred by the applicant between June 2016 and September 2018. On submission, Belair Direct funded $215.72 for items 9 and 11, being parking fees. Its explanation of benefits letter stated that item 12, being $2,355.50 for nursing services provided by Ms. MacMillan, was previously approved. Belair Direct denied the remaining items because it did not have medical documentation to support that they were reasonable and necessary and, with regard to items 1, 2, 5, 6, 7, 10, 13, 14, 16

and 18, that they were not payable in accordance with s. 38 of the *Schedule*, as they were not submitted via OCF-18 prior to being incurred. In his reply, the applicant confirmed that item 1, being services in the amount of $287.19, was approved at the case conference by Belair Direct. In submissions, the applicant also withdrew items 3 and 17, being $68.97 for postage and delivery costs. In submissions, Belair Direct stated that items 13 and 14 were paid.

[7] With regard to the remaining items, Belair Direct maintains that none of the items identified in the OCF-6 were submitted to it prior to being incurred, in contravention of s. 38, and that some of the items listed are not accident benefits at all. First in order, item 2 claims the cost of a Fisher Wallace Stimulator, plus shipping costs, totalling $737.00. The applicant purchased this device on October 13, 2016, prior to submitting an OCF-18 to Belair Direct, and it does not appear that it was recommended by any health practitioners. Accordingly, I agree that the applicant is not entitled to payment for this device because Belair Direct is not liable to pay a medical or rehabilitation expense that was incurred before the applicant submits a treatment and assessment plan under s. 38 and none of the exceptions apply. Section 38(2) acts as a complete bar to recovery of this cost.

[8] Next, item 7 is $623.62 for the cost of a Heilsa Indoor infrared sauna that was purchased by the applicant on April 27, 2016. The applicant offered no specific submissions on the reasonableness and necessity of this item, nor did he provide evidence that an OCF-18 was submitted or that this item was recommended by a health practitioner prior to being incurred. As above, s. 38(2) acts a complete bar to recovery of costs incurred prior to the submission of an OCF-18. Accordingly, the applicant is not entitled to the cost of this item.

[9] Items 4 and 18 are for a shiatsu massager ($134.99 from Costco), two foot and calf massagers and two “3D kneading cushions” ($343.49 from Showcase) in the total cost of $478.48. Again, these items were purchased prior to the submission of an OCF-18, which triggers s. 38(2). Aside from his explanation from the transcript about how the massagers differ, the applicant provided no specific submissions to explain why these seemingly duplicative items were reasonable and necessary or why they would fall under any of the s. 38(2)(c)(ii) exceptions and, as a result, they are not payable.

[10] Item 15 is $110.00 for an eye examination that the applicant attended for after the accident. Belair Direct submits that no OCF-18 was submitted before the expense was incurred, triggering s. 38. In addition, it points to the applicant’s responses from the transcript that he was not prescribed any eyewear and only occasionally relies on reading glasses. However, I agree with the applicant that

the medical evidence supports a recommendation for vision therapy and to asses post-traumatic visual concerns. In any event, the $110.00 total for the eye exam falls within the $250 exception under s. 38(2)(c)(ii), so it is automatically payable.

[11] Item 16 lists $4,344.79 for an "EXT120 Ozone Water Purifier" and attachments, as supplied by Longevity Resources. The applicant purchased the item prior to submission of an OCF-18, but the date of purchase was not identified. In addition to relying on s. 38, Belair Direct submits that the device is not approved by Health Canada for medicinal use and insurers are not liable to pay for goods or services that are experimental in nature, making the item not reasonable and necessary. While the applicant asserts that the device is certified for medical use, he offered no specific submissions on the reasonableness and necessity of the item for his accident-related impairments and, in any case, I agree with Belair Direct that the cost of the device exceeds the $250 exception under s. 38(2) and, as the applicant purchased it prior to the submission of an OCF-18, it follows that it is not payable.

[12] As I understand it, the remaining expenses listed under item 5 ($1,377.50 from Living Science Supplements), item 6 ($851.47 from Biotics Research Canada), item 8 ($68.50 from Professional Formulas), item 10 ($663.20 from Aperture Energetics) and item 14 ($2,275.00 from Living Science Wellness, which Belair Direct submits has been paid) are all vitamins and supplements in the cumulative amount of $5,235.67, purchased by the applicant prior to submitting an OCF-18.

[13] The applicant submits that the *Schedule* does not specifically exclude vitamins and supplements and that it provides that reasonable and necessary "pills" prescribed by a regulated health practitioner can be incurred prior to submitting an OCF-18. He argues that the vitamins and supplements are crucial for his pain recovery and relief, as echoed by at least five of his treating practitioners. He submits that "he is entitled to be reimbursed for items 5, 8 and 14 and partially reimbursed for items 6 and 10" but did not articulate why the latter items were only partially payable. In any event, he submits that each vitamin and supplement separately fall under the $250 exception, presumably s. 38(2)(c)(i).

[14] In response, Belair Direct submits that s. 38 acts as a complete bar because it was not provided an opportunity to review the claim in advance. Further, it argues that the vitamins and supplements claimed are not drugs or goods, as contemplated by s. 38(2)(c)(i) or captured by any of the categories under s.38(2)(c)(ii), but rather are natural health products. To this end, it submits that in enacting s. 38(2), the legislature did not intend for an applicant to be able to incur

$3,000 to $5,000 worth of natural health products prior to submitting an OCF-18 for review, thereby circumventing s. 38(2) altogether.

[15] I agree with Belair Direct. While it is clear on the medical evidence that the applicant believes that he derives benefit from these vitamins and supplements and his physicians have encouraged his exploration into alternative remedies to complement his treatment, contrary to his claim, the s. 38(2)(c)(i) exception does not provide that reasonable and necessary "pills" prescribed by a regulated health practitioner can be incurred prior to submitting an OCF-18. Rather, the exception for not submitting an OCF-18 applies to "drugs prescribed by a regulated health professional."

[16] On review of the applicant's transcript and his submissions, I find it clear that the vitamins and supplements he purchased—for example: flax seed oil, Biomega-3, pea protein, B12, muscle and joint drops, fatty acid drops, Vitamin C, *etc*.—are natural health products which are distinct from the type of drugs contemplated by the *Schedule*, which require a prescription from a medical doctor and are heavily regulated. While these vitamins and supplements may be in "pill" form like most drugs are, it is not accurate to state that they are "drugs" that require a prescription in order to fall within the exception. Further, I agree with Belair Direct that these vitamins and supplements do not fall under any of the "goods" exceptions under s. 38(2)(c)(ii) even if they, individually, all fall under the cost of $250. Where all of these items were seemingly purchased prior to the submission of an OCF-18, and where Belair Direct does not agree that they are essential for the applicant's treatment or rehabilitation, it follows that none of the items are payable.

[17] The Tribunal would have benefitted from more detailed submissions from the applicant on why items 6 and 10 were partially payable and which prescriptions are for drugs prescribed by a medical doctor that would fall under the exception. In evidence are a series of receipts—some for "Prescriptions" from Shoppers Drug Mart, others are just receipts for items from Natural Food Pantry, for example—however, it is unclear which prescription receipts pertain to drugs prescribed by a medical doctor that would invite payment, as alleged. Where the applicant has failed to provide particulars, he has not met his burden of proof.

[18] Finally, Belair Direct asserts that item 14, being $2,275.00 for products provided by Living Science Wellness Centre between April and June 2017 was approved and paid for. The applicant's affidavit describes item 14 as an Ozone Generator which was purchased on the recommendation of his naturopathic doctor but on reply asserts that this item was not paid for. While there is an invoice in evidence

indicating the item was purchased, it has been denied on the basis of s. 38(2) and I was not directed to conclusive evidence to support that any payments were made or that Belair Direct indicated that it would pay for the item. Further, Belair Direct denied the same item claimed in the OCF-6 that was submitted on October 18, 2019 and addressed below as issue (b) and above at para. 10. There are several invoices from Living Science Wellness in evidence which fits the description in the OCF-6, however, it remains unclear if Belair Direct has remitted payment for these items. In any case, based on para. 14 of its submissions, it appears Belair Direct has agreed to pay for $2,275.00 in products from Living Science Wellness Centre.

[19] Accordingly, I find the applicant is entitled to payment for the following items identified in the OCF-6: item 5, being $110.00 for the eye exam; and any overdue payments from Living Science Wellness under item 14 that have not already been paid. Interest applies on any overdue payments, pursuant to s. 51.

b. OCF-6 in the amount of $28,369.53 for a 3D system and for services from Mind Valley Mediation

[20] This OCF-6 was submitted by the applicant on October 18, 2019 and seeks reimbursement for a Curatron 3D Mattress System supplied by PEMF-TECH ($21,077.30 plus $31.41 shipping); the Ozone Generator that was claimed in the OCF-6 identified in issue (a), above ($4,344.79); and, a series of internet-based meditation subscriptions from Mind Valley Meditation ($2,906.03). Belair Direct denied the expenses because they were incurred prior to the submission of an OCF-18. The applicant submits that the items are crucial for his optimal recovery and pain relief. Specifically, he asserts that the Curatron 3D System promoted pain relief from his fractures and that the meditative techniques offered by the Mind Valley programs are effective.

[21] First, the Ozone Generator/Water Purifier was addressed above at para. 10, so analysis is not required here, as it was not submitted via OCF-18 and is therefore not payable.

[22] However, I also find none of the remaining items to be payable, as they were incurred prior to the submission of an OCF-18 and, in any event, the applicant has not demonstrated that they are reasonable and necessary. As Belair Direct notes, the applicant points to no corroborating medical evidence or expert opinion to support that the use of the rather expensive Curatron 3D Mattress system is reasonable and necessary for treating the applicant's specific symptoms, even if it promotes pain relief. Further, he did not offer a reply to speak to Belair Direct's assertion—from Curatron's own website—that the device

is not recommended for medical treatment and is experimental in nature. Where the cost is significant at $21,100.000, where the device is experimental and where the applicant failed to submit an OCF-18 prior to purchasing the device, it follows that he is not entitled to payment under s. 38(2).

[23] Last, I find that the $2,906.03 in meditation subscriptions are not payable. Again, the applicant did not submit an OCF-18 prior to incurring the costs of these items and they do not fall within any of the exceptions under s. 38(2). While the applicant may find them effective, Belair Direct is not liable to pay for expenses incurred prior to submission of an OCF-18 and, in any event, the applicant has fallen well-short of meeting his burden of demonstrating that these subscriptions are reasonable and necessary at the costs submitted.

[24] Accordingly, the applicant is not entitled to payment for any of the expenses identified in the OCF-6 dated October 18, 2019 as the expenses were incurred prior to the submission of an OCF-18 and none of the exceptions apply. Further, the applicant has fallen well-short of meeting his burden to demonstrate that these items are reasonable and necessary.

c. OCF-18 totalling $30,200.00 for a portable modulation stimulator

[25] This claim was submitted by Dr. Dhawan, chiropractor, via an OCF-18 dated August 16, 2019. It proposes $30,200.00 for a portable modulation stimulator device/program used to stimulate pain relief while assisting with deficits in relation to traumatic brain injuries, plus the cost of the OCF-18. The applicant submits that as he is catastrophically impaired and has not responded to traditional treatment, the device/treatment is necessary to help promote pain relief and muscle mobility. Ms. MacMillan, neurological practitioner, apparently recommended the device for people who have experienced a concussion and the applicant's referral for treatment was made by Dr. Premji, his family physician.

[26] However, Belair Direct denied the OCF-18 on the basis of a s. 44 neurological report by Dr. Mendis, who opined that the use of the device was not standard care in neurological practice and may be considered experimental, which was apparently echoed by the applicant's psychiatrist, Dr. Malone and by his physician, Dr. Premji, despite the eventual referral. Belair Direct asserts that s. 15(2)(a) provides that an insurer is not liable to pay for goods and services that are experimental in nature and that the device is not reasonable and necessary.

[27] I agree with Belair Direct. Despite the applicant's assertion that the device is "well-known", it appears that the device and treatment is considered experimental, at least by the majority of practitioners who assessed this claim.

Insurers are not required to fund goods and services that are experimental in nature and the applicant's submissions do not provide much analysis to explain why such a costly and lengthy program is reasonable where the applicant has not undergone or incurred any of the treatment to speak to its potential benefits. More problematically, the OCF-18 identifies a rather costly and significant investment in time for an unclear benefit, as it proposes a 14 week program comprised of "training" for 3 hours per day for 6 days per week, plus a 6-8 hour assessment and "a battery of tests". The program itself seems to focus on balance, gait and awareness training, none of which the applicant speaks to in his submissions on why this treatment would be reasonable and necessary. While there is a lengthy explanation in the additional comments of the OCF-18, it is also not tailored to the applicant and there is a dearth of medical evidence and opinion to support it.

[28] While I appreciate the applicant's willingness to experiment with alternative approaches to relieve his symptoms, on the medical evidence before me, I have no reason to interfere with the opinion of Dr. Mendis, a neurologist, who found that the use of the device was not standard care in neurological practice, that it may be considered experimental in nature and, from a neurological perspective, that it was not reasonable and necessary. Where an insurer is not required to fund experimental treatment under s. 15(2)(a), where the applicant has not met his burden to demonstrate that the OCF-18 is reasonable and necessary and where no treatment has been incurred, I find that the treatment plan is not payable.

d. OCF-18 totalling $34,326.00 for naturopathic treatment and an ozone generator device

[29] This OCF-18 was submitted on February 19, 2020 and proposes $25,000 for previously incurred naturopathic treatments and $5,200 for the same Ozone Generator purchased prior to the submission of an OCF-18 and as addressed in issues (a) and (b), above, plus $200 for the cost of completing the OCF-18. The additional comments section of the OCF-18 indicates that the lump sum covers treatments already completed and costs incurred by the applicant over the previous three years and identifies the services provided by his naturopaths.

[30] Belair Direct referred the applicant for a s. 44 assessment with Dr. Aiello, who found that OCF-18 was not reasonable and necessary, that the applicant self-reported only a 20% improvement over 4.5 years while receiving these treatments and that the applicant had achieved maximal medical recovery. Belair Direct relies on the s. 44 assessment in denying the OCF-18 and further submits

that the treatment was incurred prior to submission of an OCF-18 and that the treatment is experimental in nature, so it is not liable to fund treatment under s. 15(2)(a).

[31] The applicant submits that he relies heavily on naturopathic treatments for his recovery, which includes IV nutrients, ozone, homeopathic remedies, supplements, and pain injections. In his affidavit, he states that by seeing a naturopath, he sleeps better, has more energy, and an improved appetite, it helps with his anxiety, constant neck pain, headaches, and right wrist injury. He states that immediately after naturopathic treatments, that he feels "better for hours or days after." Further, he submits that since each visit costs on average $250 per session, that these naturopathic treatments fall under the $250 threshold and do not require pre-approval via an OCF-18. Finally, he submits that there is ample evidence to support that this OCF-18 is reasonable and necessary and, in light of his profession, that he is in a better position than most to assess what can and will assist him in his rehabilitation.

[32] First, and again, the Ozone Generator/Purifier is not payable, as this is the third claim for the same device that the applicant purchased prior to the submission of an OCF-18. As above, the applicant is not entitled to payment for this item.

[33] Second, the applicant admitted, and the OCF-18 confirms, that all of the treatment identified was incurred over three years prior to its submission and that the $25,000 is an estimate. Again, s. 38(2) provides that an insurer is not liable to fund treatment that was incurred before the insured submits an OCF-18 unless an exception applies. While the applicant asserts that the lump sum is payable because each session costs $250, he has not demonstrated that the treatment falls under any of the categories identified in s. 38(2)(c)(ii), as naturopathic treatment is not contained in the clauses under s. 15(1)(d) to (f) or in those under s. 16(2)(h) to (j) to render the expense payable, as required. Further, Belair Direct has provided no indication that it finds the treatment essential for this claim to fall under s. 38(2)(d). While I am alive to the benefit that the applicant reports from this treatment, I agree with Belair Direct that it is not obligated to provide payment for services or treatments incurred prior to the submission of an OCF-18, which the applicant concedes was not done. Accordingly, the applicant is not entitled to payment for any of the items in the OCF-18.

e. OCF-18 totalling $12,315.86 for an infrared sauna

[34] This treatment plan pertains to the cost of a second, different indoor infrared sauna, as recommended by occupational therapist, Ms. Naumann. As detailed at para. 7 of issue (a), above, the applicant purchased an indoor infrared sauna

prior to the submission of an OCF-18 that he already uses multiple times per week. This claim, however, is for a different, larger model that will allow him to lay down inside, which his current model does not allow. Belair Direct denied the OCF-18 on the basis of a s. 44 report from Dr. Aiello, who opined that there was no evidence showing that infrared saunas could significantly improve concussion-related symptoms. Ms. Naumann prepared a rebuttal report stating that the sauna treatments were effective in managing "some of his pain symptoms and post-concussive symptoms" and referencing research trials in support. In his affidavit, the applicant submits that he requires a bigger infrared sauna to allow him to receive his treatment while positioned prone, which is considered the best practice.

[35] I find the applicant has not demonstrated that the OCF-18 for an infrared sauna is reasonable and necessary. The applicant already has an indoor infrared sauna that he reported using every day. Clearly, he is deriving benefit from his current model even if it only allows him to sit and stand. The applicant's submissions do not speak to why it would then be reasonable or necessary to spend over $12,000 to get a larger model so that he can lie down instead or how much more beneficial doing so would even be for his symptoms. The applicant has not demonstrated why the cost is reasonable where he already owns an indoor sauna, he has not provided particulars about the device proposed and has not successfully demonstrated that a larger model is necessary. Accordingly, I find that the OCF-18 is not reasonable and necessary or payable.

f. Costs

[36] In submissions and in his affidavit, the applicant sought his costs under Rule 19 of the Tribunal's *Common Rules of Practice and Procedure* because Belair Direct's "conduct or course of conduct has been unreasonable, frivolous or vexatious and it has acted in bad faith." He did not provide particulars to support his claim. In any event, I find no evidence that Belair Direct has acted unreasonably, frivolously, vexatiously or in bad faith to support a costs award.

ORDER

[37] The applicant is entitled to payment for the following items identified in the OCF-6 dated June 4, 2018, identified in issue (a): item 5, being $110.00 for the eye exam; and any overdue payments from Living Science Wellness under item 14 that have not already been paid. Interest applies on any overdue payments, pursuant to s. 51.

[38] The applicant is not entitled to payment for any of the remaining expenses in either OCF-6 or for any of the OCF-18s, as he has not demonstrated that these treatment plans are reasonable and necessary. I decline to order a costs award.

Released: May 28, 2021

Jesse A. Boyce
Vice Chair