Citation: Philip v. Aviva Gen. Ins. Co., 2022 ONLAT 19-014438/AABS

Licence Appeal Tribunal File Number: 19-014438/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:

Tharsini Philip

Applicant

and

Aviva General Insurance Company

Respondent

DECISION

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

APPEARANCES:

For the Applicant: Rajwant Singh Bamel, Counsel

For the Respondent: Alexander V. Dos Reis, Counsel

HEARD: In Writing

BACKGROUND

[1] The applicant was injured in an automobile accident on December 23, 2017, and sought benefits from the respondent, Aviva, pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* ("*Schedule*"). Aviva approved certain benefits but denied the benefit in dispute on the basis that it was not reasonable and necessary. The applicant disagreed and applied to the Tribunal for resolution of the dispute.

ISSUES IN DISPUTE

[2] The following issues are in dispute:

i. Is the applicant entitled to $1,230.92 for an assessment for attendant care benefits, OCF-18 dated January 17, 2018?

ii. Is the respondent liable to pay a special award under O. Reg. 664 for unreasonably withholding or delaying payments to the applicant?

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

RESULT

[3] The applicant is not entitled to the assessment, interest or an award.

ANALYSIS

Is the assessment plan reasonable and necessary?

[4] To receive payment for a treatment plan under the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. The applicant should identify the goals of treatment, how the goals would be met to a reasonable degree and that the overall costs of achieving same are reasonable.[1]

[5] At issue is an Attendant Care Assessment/Form 1 Assessment in the amount of $1,230.92, submitted by chiropractor Dr. Hefford on February 20, 2018. The applicant points to her pre-existing injuries—a left hip fracture and surgery, neck and low back injuries and hypothyroidism—as well as the OCF-3 Disability Certificate as evidence of how her self-care, hygiene, family and caregiving time, cleaning, laundry, meal preparation and driving ability have been drastically reduced post-accident. She asserts that these impairments have been confirmed

[1] *See*, *General Accident Assurance Co. of Canada v. Violi* (FSCO Appeal P99-00047)

in the psychological report of Dr. Shaul and the chronic pain report of Dr. Karmy, making the assessment a reasonable and necessary expense.

[6] In response, Aviva relies on the s. 44 multidisciplinary report where Dr. Loritz, GP, and occupational therapist, Ms. Rutledge, found the OCF-18 not reasonable and necessary. Aviva submits that the applicant's reports of her inability to provide self-care and perform daily tasks was only reported to Dr. Karmy and Dr. Shaul two years after the submission of the OCF-18 in dispute, meaning there is no contemporaneous evidence to support the plan and, in any event, her reported complaints are unrelated to attendant care benefits, but rather are more in line with caregiving and housekeeping needs. Aviva asserts that the applicant's pre-existing impairments were resolved, and the medical imaging revealed no evidence of objective physical impairments. Finally, Aviva raises credibility concerns with both the applicant's description of the accident, her reporting and, in turn, the reports of Dr. Karmy and Dr. Shaul.

[7] I agree with Aviva and find that the applicant has not demonstrated that the OCF-18 in dispute is reasonable and necessary. To begin, I agree with Aviva that the lack of supporting, contemporaneous objective evidence undermines the s. 25 reports that were prepared two years after the OCF-18 in dispute was submitted. It is unclear how the applicant's decades-old pre-existing impairments are relevant to this assessment, as there are no clinical notes to corroborate ongoing issues and Dr. Karmy and Dr. Loritz's reports indicates she recovered completely. In this vein, putting aside the fact that it was completed two years after the OCF-18 was submitted, I agree that Dr. Karmy's findings in his report appear to be wholly disproportionate to the bulk of the medical evidence and, frankly, the applicant's own self-reporting about her abilities.

[8] On the evidence available, I find the applicant has reported that she can engage in many tasks, even if some tasks require self-reported pacing: driving, light cleaning, self-care and hygiene, including grooming, bathing, dressing and undressing, working full-time, most of her housekeeping, laundry, grocery shopping, walking and providing care for two children. While highly subjective, the "Non-Earner Benefit Chart" appended to the OCF-3 reveals an applicant who is largely capable of doing all of her pre-accident activities, with limited or no indicated pain. There is simply no explanation for the purported deterioration (and increase in symptoms and diagnoses) in the two years between the completion of the OCF-3 and Dr. Karmy's report. I afford it limited weight. Similarly, I place no weight on the report of Dr. Shaul in this dispute, as there is no indication in the medical evidence that the applicant's psychological symptoms require investigation into the need for attendant care.

[9] I prefer the s. 44 reports provided by Aviva, as they are more in line with the bulk of the medical evidence and the applicant's self-reporting. For example, Dr. Loritz found that the applicant has no significant functional impairments or limitations in her self-care and housekeeping abilities, which is generally in line with the applicant's self-reporting. Where there is no medical imaging or contemporaneous clinical notes provided to demonstrate objective injuries that would justify the need for investigation into attendant care, I have no reason to interfere with Ms. Rutledge's determinations that the applicant demonstrated sufficient mobility, range of motion, strength and cognitive abilities to perform her daily home and work tasks in a safe and independent manner. Indeed, I find these opinions are supported by the applicant's own reporting.

[10] In any event, the applicant's submissions do not directly engage with the test articulated above. There is no discussion of the goals of the assessment, how they would be met to a reasonable degree or why the cost of the assessment, against my findings above, would be a reasonable expense nearly five years post-accident. It is not sufficient to argue that an OCF-18 is reasonable and necessary on the basis that an insurer has approved other treatment, and especially so where the evidence presented does not support entitlement or need. The applicant is not entitled to the assessment as she has failed to demonstrate that it is reasonable and necessary. As no benefits are overdue, it follows that no interest is payable under s. 51.

[11] Finally, the applicant sought an award under s. 10 of O. Reg. 664, arguing that Aviva unreasonably withheld or delayed payment and conducted itself in bad faith by failing to give any weight to her medical evidence and maintaining its denial of this plan despite approving other treatment claimed in her application. For the reasons above, an award is not appropriate. There is a dearth of medical evidence to support the OCF-18 and Aviva was entitled to rely on its s. 44 reports. As the benefit is not payable, it follows there is no basis for an award.

CONCLUSION

[12] The applicant is not entitled to the assessment, interest or an award.

Released: January 25, 2022

Jesse A. Boyce
Vice-Chair