



Citation: Osman v. BelairDirect, 2023 ONLAT 21-004152/AABS - R

RECONSIDERATION DECISION

Before: Kevin Lundy

**Licence Appeal Tribunal
File Number:** 21-004152/AABS

Case Name: Maryan Osman v. BelairDirect

Written Submissions by:

For the Applicant: Sam Elbassiouni, Paralegal

For the Respondent: Eric Grossman, Counsel
Matthew Owen, Counsel

BACKGROUND

- [1] This request for reconsideration was filed by the applicant in this matter. It arises out of an order dated April 23, 2023.
- [2] The issues before the Licence Appeal Tribunal (the 'Tribunal') were as follows:
1. Is the applicant entitled to an income replacement benefit in the amount of \$400.00 per week from May 28, 2019 to May 27, 2021?
 2. Is the applicant entitled to \$87.19 (\$1,267.88 less \$1,180.69 approved) for chiropractic services, proposed by Danforth Health and Wellness in a treatment plan/OCF-18 ('plan') dated February 4, 2019?
 3. Is the applicant entitled to \$3,602.00 for physiotherapy services, proposed by Danforth Health and Wellness in a plan dated March 6, 2019?
 4. Is the applicant entitled to \$2,758.52 for chiropractic services, proposed by Danforth Health and Wellness in a plan dated May 31, 2019?
 5. Is the applicant entitled to \$1,296.99 (\$5,100.00 less \$3,803.01 approved) for social rehabilitation counselling services, proposed by Novo Medical in a plan dated July 3, 2019?
 6. Is the applicant entitled to \$4,820.00 for social rehabilitation counselling services, proposed by Novo Medical in a plan dated September 2, 2020?
 7. Is the applicant entitled to \$528.09 (\$2,090 less \$1,561.91 approved) for a social work assessment, proposed by Novo Medical in a plan dated May 9, 2019?
 8. Is the applicant entitled to \$2,200 for a neurological assessment, proposed by Novo Medical in a plan dated May 15, 2019?
 9. Is the applicant entitled to \$3,940.25 for a neuropsychological assessment, proposed by Novo Medical in a plan dated September 23, 2020?
 10. Is the applicant entitled to \$200.00 (\$2,009.73 less \$1,809.73 approved) for a driving reintegration assessment, proposed by Novo Medical in a plan dated November 10, 2020?

11. Is the applicant entitled to \$703.90 (\$2,200.00 less \$1,496.10 approved) for a psychological assessment, proposed by Gladshiteyn & Basaklova Psychological Corporation in a plan dated January 7, 2019?
12. Is the applicant entitled to \$87.19 (\$200.00 less \$112.81 approved) for completion of a disability certificate (OCF-3) by Danforth Health and Wellness, dated December 28, 2018?
13. Is the respondent liable to pay an award under section 10 of O. Reg. 664 because it unreasonably withheld or delayed payments to the applicant?
14. Is the applicant entitled to interest on any overdue payment of benefits?

- [3] The Tribunal found that the applicant failed to demonstrate entitlement to any of the disputed benefits. As no benefits were overdue, no interest was payable.
- [4] The applicant submits that the Tribunal made errors of law or fact such that the Tribunal would likely have reached a different result had the errors not been made.
- [5] The applicant is seeking:
- a. An order finding that she meets the pre-104 IRB test;
 - b. An award of interest on all overdue amounts; and
 - c. An order finding the respondent liable to pay an award at 50% for the unreasonable withholding of the income replacement benefit.
- [6] Pursuant to subsection 17(2) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, S.O. 2009, c. 33, Sched. 5, I have been delegated responsibility to decide this matter in accordance with the applicable rules of the Tribunal.

RESULT

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

ANALYSIS

- [8] The grounds for a request for reconsideration to be allowed are contained in Rule 18 of the Tribunal's Common Rules of Practice and Procedure. Reconsideration is only warranted in cases where an adjudicator has made a significant legal or evidentiary mistake preventing a just outcome, where false evidence has been

admitted, or where genuinely new and undiscoverable evidence comes to light after a hearing.

- [9] The applicant's request for reconsideration only requests that the Tribunal reconsider its decision in respect of income replacement benefits up to the 104 week mark.
- [10] Reconsideration is not a venue for a party to make the same or similar arguments in hopes of reaching a different conclusion. I agree with the respondent that the entirety of the applicant's submissions amounts to an attempt to relitigate the original hearing before the Tribunal. Rather than identifying a significant error of fact or law, the applicant simply presents evidence that was already presented at the hearing and asks the Tribunal to re-evaluate it in the hope that a different conclusion will be reached. This is not a permissible ground for exercising the Tribunal's extraordinary and discretionary power to overturn a decision.
- [11] At the hearing, the applicant's evidence and submissions were that she sustained a concussion as a result of the accident, that Dr. Hastings diagnosed her with a concussion, that this concussion resulted in a loss of consciousness at work on November 30, 2018, and that Dr. Hastings advised her to remain off work following this incident. In my decision, I considered all of the evidence and ultimately rejected the applicant's explanation because her direct testimony and submissions were either directly contradicted by other evidence or it was entirely or largely unsubstantiated. To that end, I considered the following:
- a. The applicant continued to work at regular hours and with no accommodations from her employer or any changes in her duties to commute to work or to off-site locations to assist clients from the date of the accident to November 30, 2018;
 - b. I found that the applicant submitted no persuasive evidence that she had told anyone at her place of employment that she had been in a car accident before the November 30, 2018 incident;
 - c. Dr. Hastings did not in fact diagnose the applicant with a concussion but instead found that there was no evidence of a traumatic brain injury;
 - d. Clinical notes and records from Dr. Hastings did not support the applicant's claim that he advised her that she should remain off of work after the November 30, 2018 incident; and

- e. The applicant did not inform any of her treatment providers of her alleged loss of consciousness at her work until she mentioned it to her family doctor some six months later despite earlier attendances where she could have mentioned it.
- [12] In light of all of the relevant evidence on this issue, I found that the applicant failed to establish that she stopped working on November 30, 2018 due to a loss of consciousness directly related to the accident. As a result, I found that the applicant had failed to establish that, but for the accident, she would have remained substantially able to perform the essential tasks of her pre-accident employment.
- [13] The applicant also submits that the evidence of the section 44 functional capacity assessor was given inadequate weight and that the assessor's opinion "alone should be sufficient for the Tribunal to come to a conclusion" that the applicant met the pre-104 disability test. Specifically, she asserts that I "disregarded" the findings of the FCE assessor altogether. This is a somewhat curious allegation given that I devoted three full paragraphs to the details of Ms. Lee's evaluation and determined that it represented reliable evidence. Ms. Lee's written report was properly accorded reduced evidentiary weight compared to the direct testimony of the other witnesses simply because she did testify at the virtual and the parties relied solely upon her written report, a decision to which the applicant consented.
- [14] The decision confirms that I reviewed Ms. Lee's FCE report and noted that the applicant had prematurely terminated tasks or refused to participate in a number of tasks due to self-reported, subjective pain complaints. Ms. Lee concluded that "the limited results of the evaluation" are not considered to be "a reliable indication of Ms. Osman's current functional tolerance or true abilities." I specifically referenced and relied upon Ms. Lee's conclusions on this point in the decision and found that her evidence concurred with the other section 44 assessors, who also did not find any impairment sufficient to preclude the applicant from performing the essential tasks of her pre-accident employment. As a result, the text of the decision confirms that I fully considered Ms. Lee's conclusions, weighed the evidence and arrived at a finding of fact, albeit not to the end result that the applicant would have preferred. As noted above, the reconsideration process is not intended to offer the unsuccessful party a second chance at the adjudicative process.
- [15] The balance of the applicant's submissions represent cherry-picking various slivers of diagnoses that have been rendered over the years by both the

applicant's witnesses and the section 44 assessors, without the context in which they were made or how they relate to the findings in the decision.

- [16] For example, the applicant alleges that Dr. Watson diagnosed her with a somatoform disorder, adjustment disorder and anxiety comparable to an individual with PTSD. I agree with the respondent that this bald statement drastically misrepresents the evidence at the hearing. The applicant refers to a paper review that Dr. Watson completed in January 2021 to support this submission. The applicant fails to mention that Dr. Watson conducted an extensive 7.5 hour neurocognitive and psychological assessment in December 2020 in which he spent several pages describing significant validity issues that raised "a strong possibility of feigning of any reported symptomatology" and that the results did not meet the objective standards and were "more indicative of symptom exaggeration or possible fabrication." Dr. Watson also noted that the validity issues and lack of effort were not unique to his assessment and recognized that Ms. Lee had also noted that the limited results of the FAE also were not considered reliable. All of this was considered at length in the decision and I accepted Dr. Watson's evidence on this issue as "substantially uncontested" at paragraphs 69-72 of the decision.
- [17] With respect to the problems with Dr. Getahun's diagnosis of chronic pain, I stated in the decision that Dr. Getahun used an old and outdated edition of the AMA Guides to support this diagnosis because it was more lenient than the current AMA Guides. Furthermore, I also described various deficiencies in Dr. Getahun's procedure in administering the physical assessment virtually over Whatsapp. Having considered these issues and the evidence as a whole, I ultimately preferred the respondent's expert evidence with respect to the extent of the applicant's physical impairments.
- [18] Similarly, while I agreed that Dr. Moshiri concluded that the applicant's diagnosis was an adjustment disorder, significantly, he also opined that her psychological diagnosis did not result in a substantial inability to perform the essential tasks of her employment, evidence that I accepted and included in the decision.
- [19] Lastly, the engineering evidence overwhelmingly indicated that the force of the collision would have caused minor jostling in the vehicle comparable "at most" to jumping and landing in one place and would have been unlikely to cause an impairment. This evidence was not contested to any substantive degree at the hearing.
- [20] Ultimately, I addressed all of the evidence presented by both parties and preferred the evidence given by the respondent's witnesses, finding that the

applicant failed to meet her evidentiary burden to establish entitlement to further income replacement benefits. As such, I find that there has been no error of fact or law.

CONCLUSION

[21] For the reasons above, I find that the applicant has not established the grounds for reconsideration pursuant to Rule 18.2. The request is therefore dismissed.

Kevin Lundy
Adjudicator
Tribunals Ontario – Licence Appeal Tribunal

Released: July 20, 2023