Citation: Fagundes v. Intact Insurance, 2023 ONLAT 21-008699/AABS - R

RECONSIDERATION DECISION

Before: **Clive Forbes**

Licence Appeal Tribunal File Number: **21-008699/AABS**

Case Name: **Tracey Fagundes v. Intact Insurance**

Written Submissions by:

For the Applicant: Peter Cimino, Counsel

For the Respondent: Kevin So, Counsel

BACKGROUND

[1] This request for reconsideration was filed by the applicant. It arises out of a decision dated April 5, 2023 ("decision"), in which I found the applicant is not entitled to post-104-week income replacement benefits ("IRB") and the applicant is not entitled to any interest pursuant to s. 51 of the *Statutory Accident Benefits Schedule Effective September 1, 2010 (including amendments effective June 1, 2016) ("Schedule").*

[2] The applicant has requested a reconsideration pursuant to Rule 18.2(a) and (b). She seeks to vary the decision to find the applicant is entitled to post-104-week IRB and interest on any overdue payments. In the alternative, she seeks a rehearing of all of the issues outlined in my decision. The respondent asks that the request for reconsideration be dismissed.

RESULT

[3] The Applicant's request for reconsideration is dismissed.

ANALYSIS

[4] The grounds for a request for reconsideration are contained in Rule 18.2 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version 1 (October 2, 2017) as amended* ("Rules"). The applicant's request relies on the following criteria: 18.2(a) that I acted outside my jurisdiction or violated the rules of procedural fairness; and 18.2(b) that I made an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made.

[5] Reconsideration involves a high threshold. The requestor must show how or why the decision falls into one of the categories in Rule 18.2.

[6] The Applicant submits that I erred:

i. In law and/or fact by failing to conduct an analysis of the post-104 test for IRB, and incorrectly relied on the insurer's experts with respect to the post-104-week IRB test.

ii. In law and/or fact in applying the wrong post-104-week IRB test.

iii. In law and/or fact in misapprehending the evidence.

iv. In law by ignoring subjective evidence of the applicant.

v. In law by providing inadequate reasons for my decisions.

vi. I was biased against those having subjective pain complaints, diagnoses and impairments.

Rule 18.2(a) and (b) – No violation of procedural fairness or error of fact or law

[7] The test to be met on a request for reconsideration under Rule 18.2(a) is whether the Tribunal acted outside its jurisdiction or violated the rules of procedural fairness. The test to be met under Rule 18.2(b) is that the error must be significant enough that the Tribunal likely would have reached a different decision had the error not been made. Both involve a high threshold.

No error of law or fact in not failing to conduct an analysis of the post-104-week IRB test and correctly relying on all the evidence with respect to the post-104-week test.

[8] I find that the applicant has not established grounds for reconsideration under Rule 18.2(b) with respect to my analysis of the post-104-week IRB test for the following reasons. The applicant argues that I did not properly analyze and consider all of the evidence and I provided insufficient reasons for my decision. The applicant also submits that I incorrectly relied on the conclusions of the insurer's experts and incorrectly assigned less weight to the s. 25 reports of Dr. Fern, Ms. Christie and Dr. Shahmalak's report because they did not specifically address the post-104-week test.

[9] I disagree with the applicant that any such error exists. Furthermore, I find the applicant's submissions are largely an attempt to use the reconsideration process as an opportunity to reargue the merits of her case. The Tribunal has long recognized that a reconsideration is not an opportunity to simply reargue one's case or to present new arguments. Reconsideration is not a forum for reweighing evidence, unless grounds for reconsideration under Rule 18.2 have been established.

[10] I agree with the respondent that in my decision at paragraphs 7 to 34, I conducted a thorough analysis by considering and assessing the applicant's testimony and reviewing all of her medical and documentary records. When my decision is read in its entirety, it is clear that I considered all of the evidence, including the applicant's testimony and her medical records. The fact that I relied on the respondent's expert who considered and addressed the post-104-week

IRB test is not an error. In my decision I analyzed and provided reasons as to why more weight was placed on certain evidence and less weight on others.

[11] Assigning less or more weight or preferring certain evidence is not an error; it is an intrinsic function of the Tribunal. The reconsideration process involves a high threshold. It is not an invitation for the Tribunal to reweigh evidence, or an opportunity for a party to re-litigate its position where it disagrees with the decision, or the weight assigned to the evidence. Throughout my decision I highlighted the evidence that I considered more relevant to the issue in dispute and assigned weight accordingly. On this basis, I found that the applicant was not entitled to post-104-week IRB.

[12] I see no error of law or fact that would have affected the outcome of my decision.

No error of law or fact in applying the right post-104-week IRB test.

[13] I find that the applicant has also not established grounds for reconsideration under Rule 18.2(b) with respect to applying the right post-104-week IRB test for the following reasons. The applicant submits that I failed to understand and apply the post-104-week IRB test and it tainted my approach to the evidence, my findings and ultimately influenced my decision. She further submits I erred in law in my analysis of post-104 IRB entitlement because I assessed her ability to work in the context of abstract ideal settings. She also questions how could the Tribunal adopt the opinion of the s. 44 assessor Dr. Mandel with respect to post-104-week IRB test. She submits it is the role of the Tribunal to decide this test and it was patently clear that Dr. Mandel had no understanding of this test.

[14] I disagree with the applicant. In my decision from paragraphs 6 to 34, I correctly stated and applied the post-104-week IRB test to the evidence of the applicant, the expert witnesses, and the documentary record. In addition, at paragraph 29 of my decision, I stated that I agree with the s. 44 assessor Dr. Rusen that the applicant would be able to resume any employment alternatives with restrictions in place as suggested by the s. 44 vocational assessor Ms. Billet. Also, it was stated by Dr. Rusen that she could work jobs which allow her to shift between positions to alleviate tension in her lower back. The suggested jobs by Ms. Billet in her vocational report are not abstract ideal settings jobs as alleged by the applicant.

[15] Furthermore, in my decision from paragraphs 14 to 33 I provided an analysis of all the s. 25 and s. 44 experts' reports and highlighted the evidence that I considered more relevant to the issue in dispute, assigned weight accordingly, and came to my conclusion. At paragraph 22, I gave my reasons why I preferred

Dr. Mandel's opinion. As noted above, assigning less or more weight or preferring certain evidence is not an error; it is an intrinsic function of the Tribunal.

[16] As a result, I fail to see any error of law or fact such that I would likely have reached a different result had the error not been made.

No error of law or fact in not misapprehending the evidence and providing adequate reasons.

[17] I also find that the applicant has not established grounds for reconsideration under Rule 18.2(b) with respect to providing adequate reasons and misapprehending the evidence. The applicant submits that I misapprehended the evidence when I stated that her own experts suggest a class 2 impairment under the four domains of Criterion 8 and 26% whole person impairment ("WPI") under Criterion 7 as it relates to catastrophic impairment ("CAT"). She argues that her CAT reports filed with the Tribunal concluded that she had a 36% WPI under Criterion 7 and met the threshold for CAT under Criterion 8 with class 4 impairments in all four domains. She also submits that I failed to consider the evidence of the respondent's functional capacity evaluation, and this amounts to an error of law or fact. She submits that the reasons provided in my decision fail to meet the standards of justification, transparency, and intelligibility in the circumstances.

[18] I respectfully disagree with the applicant. Firstly, CAT was not an issue in dispute; only post-104-week IRB was before me. Secondly, while I agree I incorrectly stated the applicant's CAT report findings, this is not grounds for reconsideration. My decision that she was not entitled to post-104-weeks IRB was not based on any suggested CAT findings of s. 25 or s. 44 assessors, so this error would not have impacted the outcome of my decision. Thirdly, and as mentioned earlier, from paragraphs 5 to 34 I provided a detailed analysis of the evidence and my findings in coming to my conclusion. The fact that the applicant would have preferred that I reached a different conclusion renders the reasons neither insufficient nor unfair.

[19] It is well-established that the reasons of the Tribunal are not to be measured against a standard of perfection. As the Supreme Court in *Canada (Minister of Citizenship and Immigration)* v *Vavilov*, 2019 SCC 65 stated at paragraph 91, the fact that a tribunal's reasons do not include all the arguments, statutory provisions, jurisprudence or other details that a reviewing judge would have preferred does not on its own create a basis to set aside the decision.

[20] I see no error of law or fact that would have affected the outcome of my decision.

No violation of procedural fairness or error of law in not ignoring subjective pain complaints, diagnoses and impairments of the applicant.

[21] I find that the applicant has not established grounds for reconsideration under Rule 18.2(a) and (b) with respect to my treatment of her subjective evidence, diagnoses and impairment for the following reasons. The applicant submits that I only considered objective evidence in assessing impairment and this is an error of law and bias on the part of the Tribunal. She argues that her subjective evidence on her pain and function is not mentioned in my decision and there is no reason why it was not considered.

[22] I do not agree with the applicant for the following reasons. The fact that I stated at paragraph 10 of my decision that there "must be objective evidence that supports a complete inability to work in a suitable position based on the applicant's education, training and experience" does not mean I only considered objective evidence or that I was biased. In fact, at paragraphs 8, 9, 19, 24 and 28 of my decision, the subjective evidence of the applicant was considered in my analysis. Furthermore, I considered the applicant's subjective evidence while acknowledging the symptoms, diagnosis and functional limitations of the applicant as noted by her treating physicians and s. 25 experts at paragraphs 11, 16, 18, 20, 23, 24, 26 and 27 of my decision. Throughout my decision I reviewed and considered both the subjective and objective evidence of the applicant, the expert witnesses, and the documentary record.

[23] The test for a reasonable apprehension of bias is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would think that it is more likely than not that the tribunal, whether consciously or unconsciously, would not decide fairly: *Committee for Justice and Liberty et al. v National Energy Board et al.*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 394. There is a strong presumption of adjudicative impartiality. The burden lies on the party alleging bias to establish that there are "serious" or "substantial" grounds for such a finding: *Wewaykum Indian Band v Canada*, 2003 SCC 45 at paras 59, 76.

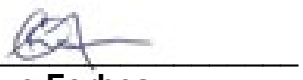
[24] The applicant's argument with respect to bias is that through my treatment of the applicant's evidence, I have demonstrated that I am biased against those having subjective pain complaints, diagnoses and impairments. She argues that my bias is further demonstrated by my failure to consider the applicant's subjective pain complaints and limitations identified during her testimony.

[25] I find the applicant has not overcome the strong presumption against adjudicative impartiality. Her submissions do not identify “serious” or “substantial” grounds for a finding of bias. Rather, they consist of broad assertions that my analysis of the evidence, which included consideration of both objective and subjective evidence as noted above, demonstrates bias against the applicant. I find that an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that I decided the application fairly. The applicant has not established that I breached my duty of procedural fairness.

[26] I see no procedural unfairness or error of law that would have affected the outcome of my decision. As a result of the above, I find the applicant has not established grounds for reconsideration pursuant to Rule 18.2(a) and (b).

CONCLUSION

[27] For the reasons noted above, I dismiss the Applicant's request for reconsideration.



Clive Forbes
Adjudicator
Tribunals Ontario – Licence Appeal Tribunal

Released: September 11, 2023