Citation: Nanthakumar v. Unifund Assurance Company, 2023 ONLAT 19-002406/AABS - R

RECONSIDERATION DECISION

Before:	**Rebecca Hines**
Licence Appeal Tribunal File Number:	**19-002406/AABS**
Case Name:	**Kalaiayarasi Nanthakumar v. Unifund Assurance Company**

Written Submissions by:

For the Applicant:	David S. Wilson, Counsel
For the Respondent:	Jonathan Schrieder, Counsel

OVERVIEW

[1] This reconsideration request follows a Tribunal decision dated June 8, 2023, in which I determined that the applicant did not sustain a catastrophic ("CAT") impairment and was not entitled to any of the disputed medical benefits, attendant care, housekeeping and home maintenance benefit, interest or an award.

[2] The applicant has requested a reconsideration of my decision regarding my finding in relation to the above. The applicant argues that I violated the rules of procedural fairness and made significant errors of fact and/or law such that I would have reached a different result had the errors not been made.

[3] The respondent submits that my decision is correct. Further, that the applicant's reconsideration request is an attempt to relitigate issues which already failed at the hearing.

RESULT

[4] The applicant's reconsideration request is dismissed.

PROCEDURAL ISSUE

[5] The respondent requested leave from the Tribunal in response to this reconsideration request that I allow the 17.5 pages for its submissions versus the 15-page limit provided for by the Tribunal because the applicant's submissions were over 30 pages. The applicant opposed this request on the basis that the respondent should have brought a motion in advance seeking this relief. However, it disregarded the process. Consequently, I should exclude the additional two and a half pages of the respondent's submissions.

[6] I decline the applicant's request to exclude the respondent's submissions because the applicant's submissions were 31 pages. Although I agree with the applicant that the respondent should have filed a motion requesting permission, I find it would be procedurally unfair to the respondent to exclude its submissions. Further, the applicant is not prejudiced by this because she had the opportunity to respond in reply submissions.

RECONSIDERATION CRITERIA

[7] The grounds for a request for reconsideration are contained in Rule 18 of *The Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety*

Commission Common Rules of Practice and Procedure (Effective February 7, 2019 ("*Rules*").

[8] Rule 18.2 states that 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 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 likely 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 likely have affected the result.

[9] The applicant relies on Rules 18.2 (a) and (b) in her request for reconsideration.

[10] The following remedies are available to the Tribunal on a request for reconsideration:

(i) dismiss the request;

(ii) confirm, vary, or cancel the decision or order; or

(iii) order a rehearing on all or part of the matter.

[11] The applicant did not identify what remedy she seeks on this reconsideration request.

ANALYSIS

Rule 18.2(a) - I did not violate the rules of procedural fairness.

[12] The applicant made several allegations that I breached the rules of procedural fairness or erred in law and/or fact, which would result in an alternative decision. Overall, I agree with the respondent that the applicant's request for reconsideration is an attempt to relitigate her position that already failed at the hearing and is akin to asking the Tribunal to re-weigh the evidence already considered. It is well established law that this is not the purpose of a

reconsideration request. Due to the high volume of allegations, I will address each in turn.

Yan v. Nadarajah

[13] The applicant submits that I breached the rules of procedural fairness by allowing the respondent to rely on the Divisional Court's decision in *Yan v. Nadarajah*, 2015 ONSC 7614 ("*Yan"*), and by permitting the respondent to cross-examine the applicant on this decision because it impeached her credibility. She submits that this caused significant prejudice and by my allowing this, I breached the collateral fact rule as set out in the Court of Appeal decision in *R. v. J.H.*, 2013 ONCA 693. This decision dealt with a sexual assault matter where evidence of whether the complainant made a false motor vehicle accident report was only relevant to her credibility as a witness at trial, and therefore was not admissible due to the collateral fact rule. The applicant submits that I wrongly interpreted the issue as one of surprise when it was really about inadmissible evidence.

[14] The respondent argues that s. 15 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22 ("SPPA") supports that a Tribunal may admit any evidence relevant to the subject-matter of the proceeding. Therefore, it was within my discretion to admit this decision because it was relevant to the applicant's credibility which was at the crux of this dispute. Further, the applicant did not provide any evidence to support her claim that by my allowing this evidence prejudiced the applicant. This was just one of many factors that demonstrated the applicant's lack of credibility.

[15] I agree with the respondent for the following reasons. Crucially, the decision in *Yan* was not determinative to my finding regarding the applicant's credibility. Therefore, I do not find the applicant was prejudiced by my admitting it. In paragraphs 28 to 31, I provide very detailed reasons for why I did not find the applicant to be a credible witness. None of my reasons in these paragraphs discussed *Yan* as being determinative, let alone important, to my finding on the applicant's credibility at the hearing.

[16] It is well established law that the rules of evidence before administrative tribunals are less stringent than the courts. Relevance to the subject-matter of the proceeding is the threshold factor in deciding whether to admit or exclude evidence, subject to the adjudicator's balancing of probative value and prejudicial effect. As highlighted by the respondent, I do not find I breached the rules of procedural fairness by admitting this decision because it was within my discretion to do so pursuant to s. 15 of the *SPPA*. Further, it was served on the applicant in advance of the hearing, and I determined that she was not surprised by it. The

applicant has failed to persuade me that I breached the rules of procedural fairness by allowing the respondent to rely on the decision and cross-examine her on it. However, even if I am wrong and I did breach the collateral fact rule, I do not find it would result in a different decision because *Yan* was not material to my finding regarding the applicant's credibility. My findings of her credibility were based on the hearing evidence itself.

Surveillance Video

[17] The applicant submits that I breached the rules of procedural fairness by denying her request to order the respondent to produce a surveillance video referenced in a report dated May 24, 2022, which may have contributed to my dismissal of the applicant's claims. She submits that I denied the request because it would result in a delay of the hearing, which would have been brief and would not have prejudiced the respondent at all.

[18] The respondent argues that I did not breach the rules of procedural fairness in denying the applicant's request. It asserts that the applicant was selective in quoting from paragraph 10 of my decision because I also indicated that she had ample time to make this request in advance of the hearing but did not.

[19] I agree with the respondent and do not find that I breached the rules of procedural fairness by declining the applicant's request for the respondent to produce the surveillance video. In my view, this procedural order was within my discretion to make, having considered the fact that the applicant had ample time in advance of the hearing to make this request but did not. I find that waiting until the commencement of the hearing to make a last-minute production request is avoidable, inappropriate and causes unnecessary delay. Further, I find the applicant's submission that not viewing this surveillance video contributed to my dismissal of her claims has no merit. I reviewed the surveillance reports and other videos available and did not find it helpful to the applicant's case because the ultimate factor in this was the reliability of her psychological complaints that she made in relation to her claim at the hearing.

Rule 18.2(b) - I did not make an error in law and/or fact which would result in a different decision.

Factual Error

[20] The applicant maintains that I made a factual error in paragraph 12 of my decision because I stated that she attended a walk-in clinic a few days after the accident complaining of neck, back, right shoulder and headaches. This was an

error of fact because she attended the doctor's the next day after the accident. The applicant submits that this error may have contributed to my finding that she was not credible because she did not seek immediate medical attention leading to my conclusion that it was not a significant accident. I acknowledge that I made a factual error in that I stated the applicant attended the clinic a few days later versus the next day. In my view, this error was not important to my finding regarding the applicant's credibility, was inconsequential and would not result in an alternative decision. Therefore, I do not find it necessary to address the respondent's submissions.

Evidence of Dr. Becker

[21] The applicant submits that I misapprehended the evidence of Dr. Becker because I rendered conclusions about her report in the absence of cross-examination. In particular, in paragraph 21 of my decision, I determined that Dr. Becker's 40% WPI was inflated and that the doctor's report provided little rationale to justify this number. The applicant submits that I ignored the decision of *Biss v. Van Egmond,* 2004 O.J. No. 5200 (Sup. Ct. J.), 2004 CanLII 48876 (ONSC) in which the court found that where the evidence is not inherently improbable, the failure to cross-examine invites acceptance. In addition, she submits Dr. Hope did not render an opinion that Dr. Becker's analysis was weak. Consequently, it was not open for me to find Dr. Becker's explanation unhelpful and give the opinion little weight. Finally, I determined that the doctor's 40% rating was not supported by the medical evidence and did not accept the applicant's self-reports to assessors in pre-screening psychological reports. The applicant also submits that I did not consider Dr. Becker's criticism of Dr. Mandel or Dr. Hope's reports in her assessment, which is an error of law. Finally, my failure to consider this evidence undermines my finding regarding the applicant's impairments and her credibility.

[22] The respondent submits that I did not error in law in my analysis of Dr. Becker's report. It contends that paragraph 21 of my decision provided a thorough explanation as to why I found Dr. Becker's rating inflated. First, it was not consistent with the doctor's rating of four moderate impairments under Criterion 8, and secondly it was not supported by the medical evidence at the time the assessment was completed. It argues that the applicant is attempting to reargue her case which is not the purpose of the reconsideration process.

[23] I agree with the respondent for the following reasons. First, I provided sufficient reasons for why I determined that Dr. Becker's rating was inflated, which is well within my discretion as the trier of fact. Second, I find it important to point out

that neither party called the psychological experts who prepared the CAT assessments at a hearing involving a CAT determination to explain the rationale for their opinions. Therefore, it was well within my discretion to weigh all of the evidence in order to determine which opinion was more persuasive depending on the totality of the evidence. That is what I did.

[24] In paragraphs 21 to 26, I provide very detailed reasons for why I did not accept Dr. Becker's opinion and that Dr. Mandel and Dr. Hope's opinions were more consistent with the medical evidence at the time of the assessments. I also determined that the validity issues encountered by these doctors were consistent with my findings on credibility. I do not find that I erred in law in rendering my decision, nor do I find it necessary to repeat my findings here. Further, the fact that I did not discuss Dr. Becker's criticism of Dr. Mandel or Dr. Hope in my decision, would not result in an alternative decision because it was the applicant's onus to prove her case. Based on the evidence before me she did not meet her onus. As highlighted by the respondent, it is well established law that the purpose of a reconsideration request is not to relitigate the matter or ask the Tribunal to re-weigh evidence already considered by it. In my view, this is what the applicant has done on this reconsideration request.

Evidence of Dr. Pillai, Dr. Kakar & Dr. Sedighdeilami

[25] The applicant submits that I did not properly consider the evidence of Dr. Pillai, Dr. Kakar and Dr. Sedighdeilami. In paragraph 35 I placed little weight on the applicant's self-reports of psychological symptoms to these doctors and I ignored the fact that Dr. Pillai conducted psychometric testing that was valid. She submits that my failure to consider this evidence was an error of fact such that would have resulted in a different decision had the error not been made.

[26] As highlighted by the respondent, the applicant spent six pages summarizing Dr. Pillai's report. The respondent submits that the applicant is simply asking that I re-weigh evidence I already considered. I agree.

[27] I also find the applicant did not fully address my finding in paragraph 35. There, I also indicated that I placed little weight on the evidence of Drs. Pillai and Kakar because of the large gap in time in the medical records noting any objective psychological impairment. I do not find that I erred in law by not placing more weight on these reports based on the totality of the medical evidence before me.

[28] In addition, as far as Dr. Sedighdeilami's report is concerned the applicant did not spend any time at the hearing or in closing submissions addressing the relevance of this report as per my instructions at the outset of the hearing.

Therefore, I do not find that I erred by not placing much weight on it. Moreover, as per my finding regarding her credibility I found her self-reports about her psychological complaints to assessors both inconsistent and unreliable. Therefore, addressing this report would not have resulted in a different decision since the report depended on accepting the applicant's complaints as reliable. Further, as highlighted by the respondent the case law is well established that there is no requirement for a decision maker to address every piece of evidence relied on by a party.

The Applicant's Credibility

[29] The applicant submits that I erred in my assessment of her credibility as it pertains to my statement in paragraph 28 of my decision that she "had a complete lack of recall to almost every question asked by the respondent during cross-examination." The applicant submits that this was an unfair and inaccurate mischaracterization of her evidence as were my comments that she disputed entries in her pre-accident medical record "when there was no reason to."

[30] The applicant also asserts that I erred in my finding pertaining to the inconsistencies in her reporting her pre- and post-accident function to assessors as far as driving and self-care. The applicant submits that this point does not support her lack of credibility. The applicant maintains that her evidence was not accurately referenced in the decision. Further, my misapprehension of the evidence constitutes a significant error.

[31] The respondent argues that I did not error in my assessment of the applicant's credibility or mischaracterize her evidence. It submits that the applicant was selective in quoting from paragraph 28 of my decision where I indicate that the applicant was able to recall details about her pre- and post-accident life in her in-chief testimony, but had a complete lack of recall during cross-examination.

[32] I agree with the respondent and do not find that I erred in my assessment of the applicant's credibility. In paragraphs 21 to 31 I provide a very detailed overview of why I did not find the applicant to be credible. I do not find it is necessary to repeat these findings here. I do not find that I mischaracterized the applicant's evidence. Moreover, the applicant did not submit copies of the transcript of the hearing, despite the fact there was a court reporter present to support her position that I unfairly characterized her evidence. In the absence of same, the applicant has failed to persuade me that I misapprehended her evidence.

Evidence of the Applicant's Daughter & Spouse

[33] The applicant submits that I ignored the evidence of her daughter in my finding on her credibility and my finding of fact that she did not receive the services of JNS Attendant Care. Further, that I provided insufficient reasons in my decision for rejecting this evidence. In the same vein, I also ignored the evidence of her daughter and spouse in relation to her impairments and did not provide cogent reasons for why I did not accept their evidence. The applicant submits that insufficient reasons is an error of law.

[34] The respondent maintains that my omission of the applicant's daughter or partner's evidence in my decision does not amount to an error of law which would result in a different decision. Moreover, an adjudicator is not required to refer to every piece of evidence or address every argument in their reasons. Ultimately, my decision was based on the fact that I did not find the applicant credible based on the totality of the evidence.

[35] Although, I acknowledge that my decision could have provided additional reasons for why I did not find the daughter or partner's evidence helpful, I do not find that this would amount to an error of law that would result in a different decision. As already highlighted in my decision, both the applicant and her daughter's testimony about her incurring the services of JNS for the time period claimed was inconsistent with the applicant's self-reports to every assessor in the time period she was allegedly incurring these services. The applicant reported to all assessors that her daughter was the sole person providing her with any ACB services. I did not find the applicant or her daughter's evidence credible for these reasons. Finally, as lay witnesses the evidence of the applicant's daughter and partner regarding her accident-related impairments was of limited value because neither are medical professionals. Therefore, the fact that I gave this evidence little weight would not result in a different decision.

The Second Omega CAT Report

[36] The applicant argues that I erred in law by not properly considering the second OMEGA CAT report because I did not give appropriate weight to the evidence of Drs. Pillai, Kakar and Sedighdeilami. As already highlighted above, I find I gave sufficient reasons for why I did not accept this evidence. Significant to my findings was the gap in the medical records and my finding in relation to the applicant's credibility. I do not find it necessary to repeat my findings here. I do not find that I erred in law or fact in my assessment of this evidence.

The Attendant Care Benefit

[37] The applicant submits that I erred in law in paragraph 45 of my decision because I note that the applicant is not entitled to ACBs because she did not apply for the benefit in accordance with s.42 within the 104-week mark. She submits there is nothing in s.42 which requires the application be made within 104 weeks of the accident. This is an error of law.

[38] The respondent argues that the applicant has misinterpreted my finding on this issue because in paragraphs 37 to 45 I indicate that the applicant did not apply for attendant care until June 1, 2017, which was undisputed by the applicant and well past the 104 week mark. It submits that I properly interpreted s.42(5) of the *Schedule* because this section only applies to emergency situations where an insured cannot apply for the benefit in a timely manner. It submits that no explanation was provided by the applicant for why she did not apply for the benefit for the first five years post-accident. Further, I did not error in law in my conclusion that the applicant is not entitled to attendant care beyond the 104 mark because I determined she was not CAT.

[39] I agree with the respondent and find the applicant's argument that I erred in law in my analysis of the attendant care issue in paragraphs 37 to 45 has no merit. I correctly interpreted the Schedule as it pertained to the facts before me and did not error in law.

The Treatment Plans for Medical and Rehabilitation Benefits

[40] The applicant made several allegations that I erred in my finding in relation to the treatment plans in dispute.

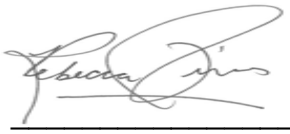
[41] I do not find the applicant's arguments pertaining to the treatment plans persuasive. At the hearing, the applicant fell far short of meeting her onus in demonstrating that any of the treatment plans are reasonable and necessary. I do not find it necessary to address the applicant's arguments further as she has failed to convince me that I erred in fact or law pertaining to my assessment of this evidence or lack thereof.

[42] As already noted above, it is well established law that the threshold for reconsideration is a high one. The purpose of the reconsideration process is not for the unsuccessful party to relitigate issues that were unsuccessful at the hearing. In my view, that is what the applicant has attempted to do in this reconsideration request.

[43] The applicant has failed to convince me on a balance of probabilities that I violated the rules of procedural fairness or erred in fact or law which would result in a different decision on any of the issues in dispute.

CONCLUSION

[44] The applicant's request for reconsideration of my decision is dismissed.



Rebecca Hines
Adjudicator
Tribunals Ontario - Licence Appeals Tribunal

Released: September 6, 2023