Citation: Date v. Aviva Insurance Company, 2023 ONLAT 21-014427/AABS

Licence Appeal Tribunal File Number: 21-014427/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:

Cheril Date

Applicant

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR: **Harry Adamidis**

APPEARANCES:

For the Applicant: Marcello Novello, Paralegal

For the Respondent: Yann Grand-Clement, Counsel

HEARD: **By written submissions**

OVERVIEW

[1] Cheril Date, the applicant, was involved in an automobile accident on December 13, 2016, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). The applicant was denied benefits by the respondent, Aviva Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

ISSUES

[2] The issues in dispute are:

i. Is the applicant entitled to $2,400.00 for a chronic pain assessment, proposed by Shoreham Chronic Pain and Assessment in a treatment plan/OCF-18 ("plan") submitted December 2, 2020 and denied May 14, 2021?

ii. Is the applicant entitled to $382.44 ($682.44 less $300.00 approved) for physiotherapy services, proposed by Eglinton West Physiotherapy in a treatment plan submitted March 4, 2020 and denied July 15, 2020?

iii. Is the applicant entitled to $365.05 ($790.05 less $425.00 approved) for physiotherapy services, proposed by Eglinton West Physiotherapy in a treatment plan submitted March 3, 2020 and denied July 15, 2020?

iv. Is the applicant entitled to $1,580.00 for physiotherapy services, proposed by Eglinton West Physiotherapy in a treatment plan submitted April 5, 2019 and denied June 18, 2019?

v. Is the respondent liable to pay an award under s. 10 of O. Reg. 664 because it unreasonably withheld or delayed payments to the applicant?

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

RESULT

[3] This application is dismissed.

ANALYSIS

Treatment plans

[4] The applicant is not entitled to any of the treatment plans in dispute.

[5] To receive payment for a treatment and assessment plan under s. 15 and 16 of 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. To do so, 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 them are reasonable.

Chronic pain assessment

[6] The applicant submits that she continues to experience ongoing pain. She relies on the clinical notes and records of Dr. Veronica Odu, physician, which document the applicant's ongoing pain complaints since the time of the accident. The applicant also relies on the Independent Chronic Pain Assessment dated December 27, 2017 of Dr. Gofeld, a pain specialist. He opines that the accident caused serious impairments and exacerbated the applicant's pre-existing conditions. A chronic pain assessment will identify the causes of chronic pain and provide a strategy to better cope with this condition.

[7] According to the respondent, the applicant has already had numerous chronic pain assessments. Many years have passed since the accident and the applicant's accident-related injuries have resolved. The respondent submits that another chronic pain assessment is not reasonable and necessary.

[8] I note that the respondent approved a treatment plan dated November 7, 2017 for a chronic pain assessment. Dr. Gofeld conducted this chronic pain assessment on December 27, 2017. He opines that the applicant had chronic pain before the accident, and that she sustained "a serious impairment of physical, mental and psychological function" in the accident. He also makes treatment recommendations.

[9] The applicant's pain was assessed by Dr. Nadia Salvo, physician, of the Humber Chronic Pain Clinic. In her correspondence dated July 22, 2019, she provides details of the assessment, identifies the applicant's pain issues, and makes treatment recommendations. The same was done by Dr. Kevin Rod, physician. In his correspondence dated July 8, 2020, he also identifies the applicant's pain issues and makes treatment recommendations.

[10] The IE Addendum Report of Dr. Howard Platnick, physician, dated May 10, 2021, confirms that the applicant has ongoing shoulder and lumbar pain. He opines that the applicant sustained cervical and lumbosacral myofascial strain injuries in the accident and that these injuries have since resolved. He further opines that this plan is not reasonable and necessary.

[11] The applicant's pain has been assessed and treatment recommendations have been made at least three times in the past. The applicant has not explained why a further chronic pain assessment is needed. In my view, the applicant's pain issues have already been examined and another assessment constitutes a duplication of services that have already been provided to the applicant. For this reason, I find that this treatment plan is not reasonable and necessary.

Physiotherapy

Issues 2 and 3

[12] Both treatment plans were approved by the respondent. However, the respondent did not pay the full amount of the invoice from the service providers because of a discrepancy regarding the amount of time spent in treatment. The applicant's statutory declaration states that the sessions were one hour. The facility sign-in sheets show that the sessions were 30 minutes. As such, the applicant's entitlement to benefits is not in dispute. Rather, it is the amount of time spent in treatment and the payment of invoices for that treatment.

[13] The applicant submits that someone has tampered with the sign-in sheet referenced by the respondent. She also provides two new items of evidence in her reply submissions. One is a letter from Eglington West Physiotherapy, the service provider, explaining that the therapy sessions are split into three components that collectively add up to an hour. The second item is another sign-in sheet, documenting services provided to the applicant. According to the applicant, this new evidence proves that she received the services invoiced by the service provider.

[14] The respondent made a sur-reply. It submits that the applicant's reply should be struck because it includes new evidence that was not previously disclosed. The respondent also points out that the letter from the service provider is undated and the sign-in sheet is an entirely new sign-in sheet and not an unredacted version of the sign-in sheet already in evidence.

[15] To begin with, the applicant has submitted new evidence in her reply that was previously unknown to the respondent. Under these circumstances, I find that procedural fairness requires me to allow the respondent to make a sur-reply.

[16] The applicant provides no reasons to explain why the new disclosure is late. She also makes no submissions on why the late disclosure should be accepted into evidence. The LAT's *Common Rules of Practice & Procedure* gives the Tribunal the authority to accept late disclosure. However, this cannot be done if a party provides no basis for allowing late documents into evidence. Consequently, I exclude the letter from Eglington West Physiotherapy and the second sign-in sheet from this proceeding. I am not striking the applicant's entire reply as requested by the respondent. The majority of the reply is not problematic and giving no weight to the late documents cures the issue raised by the respondent.

[17] What I am left with is the applicant's allegation that the sign-in sheet found at Tab 40 has been altered. The applicant does not explain why she thinks this document is fraudulently altered. She merely makes the allegation and stops there. In my view, this is an insufficient basis to find that someone has tampered with this document. Moreover, there is no evidence that shows the applicant attended full one hour physiotherapy sessions.

[18] As such, the applicant has not satisfied me, on a balance of probabilities, that she received the treatment indicated on the invoices, nor that the invoices should be paid.

Issue 4

[19] The applicant submits that this treatment plan was denied based on the s. 44 opinion of Dr. Gilbert Yee, orthopedic surgeon. According to the applicant, Dr. Yee's opinion is critically flawed because he did not have the complete record of Dr. Odu.

[20] According to the respondent, Dr. Yee did not recommend the treatment plan for physiotherapy in the amount of $1,580.00 because this type of treatment would not be beneficial this late after the accident. The denial is proper and the applicant has not satisfied her onus to show that this treatment is reasonable and necessary.

[21] The applicant raises concerns about the denial of the treatment plan. However, she makes no submissions on why this treatment pan is reasonable and necessary, which is her burden to do. As such, she has provided no basis upon which to find that she is entitled to this plan.

[22] Consequently, I find that the applicant has not established, on a balance of probabilities, that this treatment plan is reasonable and necessary.

Interest

[23] As there are no overdue payment of benefits, no interest is owed pursuant to s. 51 of the *Schedule.*

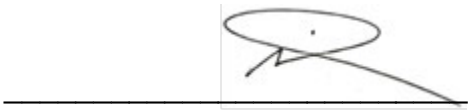
Award

[24] As no benefits are payable, there is no basis for an award under s. 10 of Reg. 664.

ORDER

[25] This application is dismissed.

Released: November 22, 2023



Harry Adamidis
Adjudicator