Citation: Rupnarain v. Aviva Insurance Company of Canada, 2024 ONLAT 22-001515/AABS

Licence Appeal Tribunal File Number: 22-001515/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:

Ramdatt Rupnarain

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: **Gareth Neilson**

APPEARANCES:

For the Applicant: Ramdatt Rupnarain, Applicant
Elvis Viskovic, Representative

For the Respondent: Aviva Insurance Company of Canada
Lauren Kolarek, Counsel

Written Hearing: **Heard by way of written submissions**

OVERVIEW

[1] Ramdatt Rupnarain, the applicant, was involved in an automobile accident on May 26, 2017, 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 of Canada, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

PRELIMINARY ISSUES

[2] The respondent has raised two preliminary issues related to this file. The first preliminary issue raised asks that the tribunal exclude the updated records of Dr. So as they were produced to the respondent well outside of the production timelines ordered at the case conference. The respondent has brought a motion to the Tribunal asking for the same order. Therefore, I will make a ruling on the motion rather than address the issue as a preliminary one.

[3] The respondent has asked for an adverse inference to be drawn regarding the failure of the applicant to produce any clinical notes and records from Physiotherapy Active Rehabilitation. This is not a true preliminary issue but rather an argument to be made by the respondent in their submissions. The onus is on the applicant to prove that they are entitled to the accident benefits being sought at this hearing. If the applicant adheres to the Orders made by the Tribunal, the applicant has the right to decide which reports they intend to rely upon. Drawing an adverse inference based solely on the fact that the applicant chose not to rely on a certain report or reports, would be highly prejudicial to the applicant.

ISSUES

[4] The issues in dispute are:

i. Is the applicant entitled to $2,960.60 for a gym membership and personal trainer, proposed by Advanced Healthcare Management Inc. in a treatment plan/OCF-18 ("plan") that was denied on May 4, 2020?

ii. Is the applicant entitled to $7,902.00 ($11,718.72 less $3,816.72 approved) for a chronic pain management program, proposed by Advanced Healthcare Management Inc. in a plan that was partially approved on April 8, 2022?

iii. 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?

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

RESULT

[5] The applicant is not entitled to $2,960.60 for a gym membership and personal trainer.

[6] The applicant is not entitled to $7,902.00 for a chronic pain management program.

[7] The applicant is not entitled to an award.

[8] The applicant is not entitled to interest.

MOTION

[9] The order sought by the respondent is as follows:

An order excluding the following documents and submissions referencing same from the hearing record that were submitted and relied upon by the applicant.

a. Clinical Notes and Records of Dr. Stevenson So from June 7, 2019 to September 18, 2021 (Tab C of the applicants written hearing submissions); and

b. The January 31, 2022 Independent Medical Evaluation Report by Dr. Igor Wilderman (Tab F of the applicant's written hearing submissions).

[10] The respondent argues that the clinical notes and records of Dr. Stevenson So from June 7, 2019 to September 18, 2021 were not produced by the applicant until they appeared in the applicant's written submissions. The respondent argues that this is prejudicial to the respondent as they were not able to investigate or respond to the records of Dr. So.

[11] The applicant argues that the clinical notes and records were a part of an assessment done by Dr. Wilderman which was served on the respondent. The applicant argues that because the respondent had the report of Dr. Wilderman, they were in possession of the clinical notes and records in question. The applicant further argues that the respondent did not request these records, and if they had, the applicant would have produced them. The applicant also argues that excluding the clinical notes and records would be prejudicial.

[12] It is important to note that the applicant provided two motion submissions. As per the LAT order, motion submissions from the applicant were due by September 19, 2023 and limited to 6 pages. The applicant filed their first submission properly on September 19, 2023. The second submission is dated September 22, 2023 and was received by the LAT on the same day. The second submission contravenes the LAT order and has been excluded as a submission for that reason.

[13] The Order released by Vice-Chair Tyler Moore on January 27, 2023 is quite clear. Vice-Chair Moore ordered the following:

> i. By no later than 60 calendar days from the case conference, both parties shall exchange all other documents not previously disclosed upon which they intend to rely at the hearing.

[14] While I understand the argument made by the applicant that the clinical notes and records of Dr. So were a part of documents used by Dr. Wilderman in his assessment, that is not sufficient to satisfy the production order of Vice-Chair Moore. It is incumbent upon the applicant, based on the Order, to produce any documents that the applicant intends to rely upon at the hearing and exchange them with the respondent's counsel. The applicant's assertion that the respondent could have asked for the documents or that any omission was simply an error, is not satisfactory. The respondent has the right, under the Order, to have any documents produced that the applicant intends to rely upon. The respondent in this case is not the adjuster on file or another expert witness of the respondent, but in fact counsel. The LAT issues production orders as a part of process that ensures procedural fairness. Allowing documents in a written submission that were not previously disclosed to the other party is procedurally unfair and is highly prejudicial. I agree with the respondent. The clinical notes and records of Dr. Stevenson So, from June 7, 2019 to September 18, 2021, are hereby excluded as evidence at this hearing.

[15] The respondent has sought the exclusion of a January 31, 2022 report by Dr. Igor Wilderman. The respondent argues that the report should be excluded because Dr. Wilderman was given the clinical notes and records of Dr. So from the time period of June 7, 2019 to September 18, 2021, and the respondent was not given same.

[16] The applicant argues that the clinical notes and records helped form the basis of the chronic pain therapy plan that was partially approved. The applicant again argues that the respondent was in possession of the clinical notes and records as part of this plan that was partially approved.

[17] In this case, I agree with the applicant. The report of Dr. Wilderman was properly produced to the respondent. The respondent is not prejudiced by this report containing the clinical notes and records from Dr. So as their own expert was in possession of the full report. The motion to have the January 31, 2022 report by Dr. Igor Wilderman excluded as evidence is denied.

ANALYSIS

[18] The onus is on the applicant to prove that the accident benefits sought are reasonable and necessary and are because of the motor vehicle accident in question. The applicant must prove a causal link between the accident, their injuries and the accident benefits being sought.

Is the applicant entitled to $2,960.60 for a gym membership and personal trainer, proposed by Advanced Healthcare Management Inc. in a treatment plan/OCF-18 ("plan") that was denied on May 4, 2020?

[19] The applicant is not entitled to $2,960.60 for a gym membership and a personal trainer as the applicant failed to prove that the treatment plan is reasonable and necessary.

[20] The onus is on the applicant to prove that the treatment plan in dispute is reasonable and necessary and that the injuries that the treatment plan seek to address, are as a result of the motor vehicle accident in question. The applicant must also prove that the plans are reasonable and necessary and that the treatment plan in dispute will help achieve a stated goal of recovery.

[21] The applicant relies on the reports of Dr. Gilbert Yee from December 5, 2019 and Dr. Igor Wilderman from January 31, 2022. The applicant argues that Dr. Yee recommended treatment for modalities that include a gym membership and a personal trainer. The applicant argues that the report of Dr. Wilderman supports the assessment of Dr. Yee and that Dr. Wilderman recommends that the applicant "start doing exercises at the gym under the supervision of a personal trainer or kinesiologist."

[22] The respondent relies on the evidence in the conclusions of Physiatrist Dr. John Heitzner, the clinical notes and records of Dr. So and the lack of contemporaneous evidence produced by the applicant. The respondent argues that the applicant has only visited his family doctor, Dr. So, nine times in the six and a half years since the accident and at no time did the family doctor refer the applicant to a specialist or advise the applicant to seek any treatment for injuries sustained in the accident since June 23, 2017.

[23] Clinical notes and records of the family doctor and contemporaneous evidence will be given more weight than evidence that comes from assessments conducted years after the accident. The Tribunal has always preferred contemporaneous evidence over evidence that is asynchronous in nature. It is clear that the applicant visited his family doctor, Dr. So, frequently after the accident and Dr. So did not refer the applicant to any specialists to deal with his impairments. This suggests that Dr. So did not believe that outside of some physiotherapy, which the applicant received, that any further treatment was necessary.

[24] The report from Dr. Yee is confusing as there are multiple dates on the report that are inaccurate, including the date of loss, however what is significant about the report from Dr. Yee is not the findings, but the fact that the applicant did not seek any treatment recommended by Dr. Yee nor did the applicant submit claims for accident benefits based on Dr. Yee's report. It makes sense that if the applicant needed the treatment plan that is in dispute, that the applicant would have submitted a claim to the insurer for said treatment.

[25] The report from Dr. Wilderman is more than 4.5 years after the accident and was a virtual assessment. This is a significant length of time from the date of loss and, accordingly, I assign it less weight than the clinical notes and records of the applicant's family doctor because that the CNRs are contemporaneous to the accident. Additionally, the assessment was done virtually which is not as reliable as an in-person assessment. For this reason, I prefer the evidence of Dr. Heitzner, who performed an in-person assessment and found that the applicant had reached maximum recovery and that the treatment plan in dispute is not reasonable or necessary.

[26] For these reasons I find that the applicant is not entitled to $2,960.60 for a gym membership and a personal trainer.

Is the applicant entitled to $7,902.00 ($11,718.72 less $3,816.72 approved) for a chronic pain management program, proposed by Advanced Healthcare Management Inc. in a plan that was partially approved on April 8, 2022?

[27] I find that the applicant is not entitled to $7,902.00 for a chronic pain management program as the applicant has not proven that the treatment plan is reasonable or necessary. I also find that the applicant did not meet his burden of proof that the treatment plan in dispute is necessary because of the motor vehicle accident in question.

[28] The applicant bears the onus to prove that the treatment plan in dispute is reasonable and necessary and that the injuries that the treatment plan seek to address, are as a result of the motor vehicle accident in question. The applicant must also prove that the plans are reasonable and necessary and that the treatment plan in dispute will help achieve a stated goal of recovery.

[29] The applicant again relies on the evidence provided by Dr. Igor Wilderman. The applicant also points to the respondent's assessor, Dr. Heitzner, who diagnosed the applicant with "Adjustment Disorder with mixed anxiety and depression, moderate and Somatic Symptom Disorder predominantly with pain, persistent." The applicant argues that the respondent erred in its reasoning behind the partial approval of the plan. The applicant maintains that the treatment plan suggested was an integrated plan that involved both physical and psychological treatment and that the "partial approval was essentially a denial of the full program, as the program is designed to integrate the two disciplines."

[30] The respondent concedes that the applicant has Adjustment Disorder and argues that this is the reason the plan was partially approved. The respondent relies on the s. 44 reports of Dr. Heitzner and Dr. Lawson. The respondent argues that Dr. Heitzner opined, "it is unlikely that any further therapy, especially the type being suggested, at this point almost five years after the accident, is going to lead to any significant change in his current level of function". The respondent further argues that at the time the plan was submitted the applicant had not seen his family doctor in almost 2 years nor had the applicant sought any treatment since June 23, 2017.

[31] The applicant has failed to show that the injuries sustained in the accident warrant the chronic pain management program being suggested. It is certainly possible that the applicant needs therapy for chronic pain. The applicant is a senior who works at a physically demanding job. However, the evidence does not show that the treatment plan being sought is as a direct result of the accident. If the accident in question caused injuries significant enough to warrant such a treatment plan, the contemporaneous evidence would likely show that the family doctor referred the applicant for such treatment. Furthermore, the evidence would likely show that the applicant sought out treatment for chronic pain because of the accident. This is simply not the case. There is no evidence that the family doctor sent the applicant to a specialist to deal with chronic pain, nor did the applicant submit to the insurer a request for chronic pain treatment, until almost five years after the accident. I accept the applicant's argument that the treatment plan in dispute is meant to be a comprehensive physical and psychological plan, but that in itself does not warrant both components being

approved. I prefer the evidence of Dr. Heitzner because, as mentioned previously, the assessment was done in person. Dr. Heitzner found that the physical portion of the suggested plan was not reasonable or necessary, citing that the applicant had achieved maximum recovery and I accept that.

[32] Furthermore, I do not accept Dr. Wilderman's findings on chronic pain. The report indicates that the applicant scored 6 out of 6 regarding a chronic pain syndrome diagnosis. I find that this diagnosis is not persuasive in part because the assessment was done virtually. The family doctor did not refer the applicant to a specialist after the accident, the applicant did not seek treatment for chronic pain after the accident and the assessment of Dr. Wilderman was done nearly 5 years after the accident.

[33] The applicant has failed to prove that the treatment plan in dispute is reasonable or necessary nor has the applicant proven that the applicant is entitled to said treatment as a direct result of injuries sustained in the May 26, 2017 motor vehicle accident. For these reasons the applicants is not entitled to the treatment plan in the amount of $7,902.00 for a chronic pain management program.

Interest

[34] The applicant is not entitled to any interest pursuant to s. 51 as there are no benefits payable.

Award

[35] The applicant sought an award under s. 10 of Reg. 664. The applicant is not entitled to an award as the treatment plans are not reasonable or necessary and the respondent did not unreasonably withhold treatment to the applicant.

ORDER

[36] I order as follows:

i. The applicant is not entitled to $2,960.60 for a gym membership and personal trainer.

ii. The applicant is not entitled to $7,902.00 for a chronic pain management program.

iii. The applicant is not entitled to interest.

iv. The applicant is not entitled to an award.

Released: January 31, 2024

Gareth Neilson
Adjudicator