



Citation: **Sivaramesh v. TD General Insurance Company, 2024 ONLAT 21-012672/AABS - R**

RECONSIDERATION DECISION

Before: Harry Adamidis

Licence Appeal Tribunal File Number: 21-012672/AABS

Case Name: Balakrishnan Sivaramesh v. TD General Insurance Company

Written Submissions by:

For the Applicant: Godfrey Bakeerathan, Counsel

For the Respondent: Kari-Anne Layng, Counsel

OVERVIEW

- [1] On November 29, 2023, the applicant requested reconsideration of the Tribunal's decision dated November 9, 2023 ("decision").
- [2] In the decision I found that the applicant is liable to repay the income replacement benefit (IRB) in the amount of \$10,988.42 based on willful misrepresentation. I also found that the respondent is not entitled to interest.
- [3] The grounds for a request for reconsideration are found in Rule 18.2 of the *Licence Appeal Tribunal Rules, 2023* ("Rules"). To grant a request for reconsideration, the Tribunal must be satisfied that one or more of the following criteria are met:
- a) The Tribunal acted outside its jurisdiction or committed a material breach 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; or
 - c) 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.
- [4] The applicant requests reconsideration under 18.2(b) of the Rules. He submits that I made errors of fact which would have resulted in a different decision.
- [5] The applicant seeks a new finding that he is not liable to repay the IRB. The respondent submits that the request for reconsideration should be dismissed.

RESULT

- [6] The request for reconsideration is dismissed.

ANALYSIS

- [7] The test for reconsideration under Rule 18.2 involves a high threshold. The reconsideration process is not an opportunity for a party to re-litigate its position where it disagrees with the Tribunal's decision, or with the weight assigned to the evidence. The requestor must show how or why the decision falls into one of the categories in Rule 18.2.

Request for reconsideration under 18.2(b)

- [8] I find that the applicant's arguments are about the interpretation of surveillance evidence and do not demonstrate errors of fact or grounds for reconsideration. It is the Tribunal's role to weigh and assess evidence. The applicant does not agree with my assessment, but this is not a ground for reconsideration.
- [9] The applicant submits that there are errors of fact in the decision. The first error of fact involves my analysis of a surveillance video that shows the applicant cleaning his driveway with an air compressor, cleaning his front yard, and landscaping the base of a tree. The video also appears to show the applicant repairing his fence. Two days later, on November 17, 2021, he attended an IE with Dr. Peterkin, psychiatrist. The applicant told Dr. Peterkin that "he is not able to help with housework physically, but does supervise his children." In paragraph 47 of the decision, I found that the applicant willfully misrepresented the extent of his functional limitations to Dr. Peterkin.
- [10] The applicant submits that I did not consider the 15 minutes of break time he took during the video surveillance and the times where it was unclear what the applicant was doing. Without clarity in these two periods of time, it is hard to determine that the applicant willfully misrepresented himself.
- [11] The respondent submits that even if I accept the applicant's submissions, no error was made in the decision because the applicant engaged in activities that are inconsistent with the limitations he reported to Dr. Peterkin.
- [12] I agree that the applicant was not visible during two brief periods of time in the video and this is acknowledged in paragraph 33 of the decision. I also agree that there are times where it is unclear what the applicant is doing and there are also gaps of time in the surveillance video. These two latter points are not noted in the decision. However, this is not an error because the applicant does not dispute that the video shows the applicant completing household chores and that he then told Dr. Peterkin that he is unable to complete any housework. The applicant disagrees with my analysis of the evidence, but this is not an error of fact. As such, I find there is no error of fact in my assessment of the video surveillance from November 15, 2021.
- [13] Video surveillance from March 31, 2022 covers a four hour period during which the applicant disposed of garbage in an outdoor garbage bin, drove an elderly man to a grocery store, then to a Shoppers Drug Mart, and then returned home. The video then shows that the applicant drove again to a grocery store, walked approximately 100 meters from his parking spot to the entrance of the store,

pushed a shopping cart in the store, lifted four cases of water - each case containing 24 500ml bottles – into the shopping cart, went to the self-checkout and used the scanning gun to purchase his items. He then returned to his car and loaded the four cases of water into his trunk, returned the shopping cart and drove away. In paragraph 41 of the decision, I noted that there is no indication in the video that the applicant had any difficulty with completing these tasks.

- [14] Dr. Betty Kershner, psychologist, examined the applicant about one month before the video surveillance. She writes in her report, dated February 22, 2022:

He does not feel helpful with chores: he “cannot do anything”. He feels useless and self-esteem is damaged. Mr. Balakrishnan cannot play with his children. He does not talk to others, just the one friend, due to pain. He is not interested, being unable to participate, in anything. He prefers to avoid others.

- [15] In paragraph 41 of the decision, I found that the video surveillance is inconsistent with the applicant’s statements to Dr. Kershner, in particular the statement that he “cannot do anything” and his endorsement of “I don’t have enough energy to do anything” on the Beck Depression Inventory – II (BDI-II) psychometric test.

- [16] The applicant submits that I made a number of errors of fact. He disputes that he did not appear to struggle in the video because his face was covered with a mask. He also notes that the video shows he had difficulty lifting the cases of water. In regard to the “can’t do anything” statement in Dr. Kershner’s report, this is a pre-formatted answer for the BDI-II test. He checked off this box based on how he felt that day. He argues this is accurate and not inconsistent because his circumstances change from day to day. He submits that the clinical notes and records of Dr. Amudhinie Thanendran, his psychiatrist, show that his lower back pain can flare up. This shows that he has good days, when he is more functional, and bad days when he is less functional. When considered in context, the evidence substantiates his functional limitations. Consequently, it was an error of fact to find that the applicant misrepresented his functional abilities to Dr. Kershner.

- [17] The respondent submits that the main point being raised by the applicant is that he disagrees with my interpretation of the March 31, 2022 surveillance video. In its view, this does not constitute a ground for reconsideration.

- [18] Dr. Kershner wrote a psychological assessment in which she diagnoses the applicant with post-traumatic stress disorder, major depression, and a sleep disorder. She made this diagnosis based on what the applicant told her, including

that he “cannot do anything.” The video clearly shows that this is incorrect, and I did not make an error in this finding. He not only does things for himself, he is also seen assisting an elderly person with grocery and drug store errands.

- [19] The applicant notes that his face was covered and that there are points in the video where he appears to struggle. According to the applicant, my finding that the applicant did not struggle in the video is critically flawed. I have seen the video and interpret this evidence differently. This difference of interpretation does not constitute an error of fact.
- [20] The applicant asserts, for the first time in his application for reconsideration, that his “cannot do anything” statement is a pre-formatted answer from the BDI-II psychometric test. However, there is no evidence of this. Dr. Kershner lists 17 of the applicant’s answers from the BDI-II in her report. The “cannot do anything” statement is not one of them. Consequently, attributing this statement to the applicant is not an error of fact or a ground for reconsideration.
- [21] The applicant asserts that he has “good days” and “bad days.” This can be inferred from his statement to Dr. Thanendran indicating that his back pain can flare-up. This is a new submission. The applicant did not testify at the hearing and he did not make submissions on “good” and “bad” days. He cannot now raise a new argument and re-litigate his case on reconsideration. As such, I see no error of fact.
- [22] Video surveillance from August 24, 2022 shows the applicant dressed in coveralls and attending a job site. He is seen carrying a ladder into a house that has been gutted to the studs and framing. In paragraph 46 of the decision, I found that this shows that the applicant is able to attend a job site and perform physical work.
- [23] The applicant submits that this finding is flawed because the Will Say Statement of Elengkumaran Thiyagarajah, the alleged employer of the applicant, states that the applicant only accompanied him to a couple of jobsites as a learning experience. The same statement also says that the applicant did not take part in any physical work at the job site. As such, finding that the applicant performed work is an error of fact.
- [24] The respondent submits that the applicant failed to acknowledge and reckon with the countervailing evidence. The video shows the applicant in coveralls and carrying a ladder on a jobsite. As such, the findings in the decision were within my prerogative to make.

- [25] I agree with the respondent. My finding is properly justified and supported by the evidence.
- [26] The Will Say Statement of Mr. Thiyagarajah was fully considered and, in paragraph 45 of the decision, I found that it provided “an explanation for what is seen in the video.”
- [27] I did not find that the applicant was an employee of Mr. Thiyagarajah. Instead, I found that the applicant attended the job site and performed work.
- [28] I further note that the statement of Mr. Thiyagarajah says that the applicant was assured that he “would not need to have to carry out any tasks associated with the jobs.” If this were true, then the applicant would not have been filmed carrying a ladder into a house that was being renovated. Mr. Thiyagarajah’s statement is inconsistent with what is shown in the video. Consequently, I find that there is no error of fact in my analysis of the video from August 24, 2022.
- [29] I have reviewed the errors of fact raised by the applicant. He has not persuaded me that I made errors of fact that would likely have resulted a different outcome if such an error had not been made. Consequently, I find that the applicant has not established grounds for reconsideration under Rule 18(2)(b).

CONCLUSION

- [30] The applicant’s request for reconsideration is dismissed.

Harry Adamidis
Adjudicator
Tribunals Ontario – Licence Appeal Tribunal

Released: February 9, 2024