



Citation: Jackson v. Aviva General Insurance, 2023 ONLAT 22-002616/AABS

Licence Appeal Tribunal File Number: 22-002616/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:

Jeffrey Jackson

Applicant

and

Aviva General Insurance

Respondent

DECISION

ADJUDICATOR: **Deborah Neilson**

APPEARANCES:

For the Applicant: Jeffrey Jackson, Applicant (Not Present)
Madiha Qurashi, Counsel

For the Respondent: Linda Mantha, Claims Representative
Jonathan Charland, Counsel

Court Reporter: Reema Ali

**HEARD: in writing and by
Videoconference: July 31, 2023**

OVERVIEW

- [1] Jeffrey Jackson, the applicant, was involved in an automobile accident on December 10, 2019, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the “*Schedule*”). The applicant was denied benefits by the respondent, Aviva General Insurance, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.
- [2] The applicant claimed entitlement to non-earner benefits (“NEBs”), the cost of a neuropsychological assessment, a chronic pain assessment, a Regulation 664 award and interest. The respondent raised a preliminary issue that the applicant was barred from proceeding with his claims for NEBs and a chronic pain assessment as he failed to attend insurers’ examinations requested under s. 44 of the *Schedule* (“IE”s)
- [3] I heard the preliminary issue by written submissions with further oral submissions made at the hearing. I determined that the applicant was barred from pursuing his claim for non-earner benefits and a chronic pain assessment. After issuing my decision on the preliminary issue, the applicant requested an adjournment of the hearing, which was denied. The applicant subsequently withdrew his application on the remaining issues.

ISSUES

Preliminary Issue

- [4] The preliminary issue is whether the applicant is barred under s.55 of the *Schedule* from proceeding to a hearing for NEBs and the cost of a chronic pain assessment because he failed to attend IEs.

Substantive Issues:

- [5] The substantive issues to be decided in the hearing are:
 1. Is the applicant entitled to an NEB of \$185.00 per week from January 7, 2020 to December 8, 2021?
 2. Is the applicant entitled to the assessments proposed by 101 Assessments as follows:
 - (i) \$2,460.00 for a neuropsychological assessment, recommended by Dr. Gladshteyn in a treatment plan dated May 5, 2021; and

- (ii) \$2,460.00 for a chronic pain assessment, recommended by Dr. Grigory Karmy and Bill Nikols in a treatment plan dated May 5, 2021?
 - 3. Is the respondent liable to pay an award under s. 10 of Regulation 664 because it unreasonably withheld or delayed payments to the applicant?
 - 4. Is the applicant entitled to interest on any overdue payment of benefits?
- [6] The applicant advised at the outset of the hearing that issues 2(i) and 2(ii) as listed in the case conference Order dated January 19, 2023 were withdrawn and that the NEBs were being claimed for the period listed above and not as listed in the Order or his responding written submissions to the preliminary issue.

RESULT

- [7] The applicant's claim for NEBs and the cost of a chronic pain assessment is barred for his failure to attend IEs without any reasonable excuse. The applicant withdrew the remainder of the issues.

PROCEDURAL ISSUES

- [8] The applicant sought an adjournment of the hearing at the outset on the basis he was supposed to attend another IE, but the assessor did not show up, and the IE was rescheduled. However, the preliminary issue is whether the applicant failed to attend a number of IEs. The respondent submits that he is not entitled to NEBs for that period of time that he did not attend. In other words, does the applicant have a reasonable excuse for his failure to attend. The respondent opposed the adjournment.
- [9] The applicant agreed that the preliminary issue should proceed in writing as this was the parties' intention at the case conference, as evidenced by the case conference Order. However, the applicant was seeking an adjournment of the substantive issues because he was going to be called as a witness and failed to attend at the hearing. The applicant's council advised that the applicant was admitted to hospital on July 28, 2023 and was still in the hospital as of July 30, 2023. She was unable to contact him on the day of the hearing and he did not attend the hearing. However, the case conference Order did not state any witnesses were being called for the hearing. Nor did the applicant serve and file a witness list prior to 10 days before the hearing as required under Rule 9.2(b) of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)*. If the applicant intended to testify at the hearing, I would have expected

the case conference Order to state that or for the applicant to serve and file a witness list in accordance with Rule 9.2(b).

- [10] The applicant's counsel submitted that she did not have her client's instructions for proceeding with the hearing on the remaining issues of entitlement to a neuropsychological assessment, a Regulation 664 award and interest. I am not persuaded by this submission. The Tribunal will aim to hear and decide adjournment requests, especially those at the last minute, as quickly as possible. But the parties must always be ready to proceed if the adjournment request is denied. The Tribunal will almost never grant adjournment requests on the basis that a party did not prepare for the hearing having assumed the adjournment would be granted. Further, the applicant was at the case conference on January 19, 2023, at which time it was clear that the matter was going to a hearing. In fact, the hearing was subsequently scheduled on agreed dates with the parties. The applicant's counsel must have had instructions to proceed to a hearing for those steps to have been taken. Therefore, it is illogical for the applicant's counsel to now say that she does not have instructions to proceed with the hearing under those circumstances. Accordingly, I was unable to find that the matter should be adjourned on the basis the applicant's counsel did not have instructions.
- [11] The applicant submitted that an adjournment ought to be granted because two IEs, a chronic pain and a neurological assessment, remain to be conducted in connection with the issues in dispute before me. The chronic pain assessment was scheduled for July 28, 2023. The neurological assessment was scheduled for July 26, 2023, but did not take place. The applicant submitted that it was because the IE assessor failed to arrive to conduct the assessment. However, no evidence was before me to support this submission.
- [12] The respondent submitted that the applicant's reasons for requesting the adjournment were circular on the basis that the applicant sought an adjournment because he needed to attend IEs, yet he failed to attend at previous IEs. The respondent advised that the upcoming IE assessments have nothing to do with the claim for NEBs or the treatment plan for a neuropsychological assessment. The only issue in dispute that the upcoming IEs deal with is the chronic pain assessment. I agree that the applicant's reasons are circular and, therefore, are not persuasive.
- [13] I reheard the applicant's request for an adjournment on the remaining substantial issues after I issued my decision on the preliminary issues. The request for the adjournment was on the basis that the applicant intended to gather further evidence, in particular from the IEs the applicant intended to attend at some future point. The onus is always on the applicant to prove his case. It is expected

that the parties are prepared to proceed to a hearing by the time of the case conference. However, the applicant had another 120 days after the case conference to obtain evidence to support his claims. The hearing dates were chosen on agreement from the applicant and the respondent. The only reason there have been delays in IE reports being issued is due to the applicant's non-attendance. As no supporting evidence was provided to substantiate a reasonable explanation for the bulk of those delays, I cannot accept the applicant's submission that pending IEs are reason to grant an adjournment.

- [14] The applicant submits that to proceed with the hearing is a denial of his natural justice rights. I disagree. At the time of the hearing this matter was already 515 days old. This is more than ample time for the applicant to have gathered evidence to support his claims. Further, the respondent has already conducted an IE by way of a paper review on the remaining issue in dispute. There is no other rational reason for why the applicant seeks an adjournment. Accordingly, if the applicant is prejudiced, it is not because of any procedural unfairness or a denial of natural justice, but by his lack of preparation for the hearing. If there is any prejudice to the applicant, it is at his own creation. For these reasons, the hearing was not adjourned.

PRELIMINARY ISSUE

- [15] The preliminary issue to be decided is whether the applicant is barred under s.55 of the *Schedule* from proceeding to a hearing for NEBs and the cost of a chronic pain assessment because he failed to attend an IE. I find that the applicant is barred for the following reasons.
- [16] Section 55 of the *Schedule* bars the applicant from applying to the Tribunal if the respondent provided him with notice in accordance with s.44 that it required an IE under section 44, but the applicant did not comply with that section. Under s. 44 of the *Schedule*, the applicant is required to attend at IEs if the following conditions are met:
- a. IEs are to be conducted not more often than is reasonably necessary;
 - b. IEs are to be conducted by regulated health professionals or people who have expertise in vocational rehabilitation;
 - c. IEs are to be scheduled for a day, time, and place convenient to the applicant;
 - d. The respondent is required to provide notice of the IE to the applicant five or more business days before the IE; and

- e. The IE notice is required to provide the applicant with the medical and any other reasons for the IE, whether he was required to attend and, if so, the day, time and location of the IE and the name of the IE assessors, their regulated health profession, and their titles and designations indicating their specialization, if any.
- [17] The Tribunal may, under s.55(2) of the *Schedule* permit an insured person to apply to the Tribunal despite a failure to comply with s.44 subject, under s.55(3), subject to terms and conditions.
- [18] As noted in *16-003144 v Cumis General Insurance Company*, 2017 CanLII 22315 (ON LAT) (*16-003144 v Cumis*) at paragraph 36, IEs are an invasive procedure, but must be balanced with the respondent's right to assess an insured person who has put their medical condition into issue. Because IEs are such an invasion on a person's privacy, historically the case law dealing with a failure to attend IEs has applied the conditions set out under s.44 fairly strictly against an insurer. Where the notice requirements have not been complied with or the number and type of IEs is excessive, there was no requirement for an insured person to attend IEs. I agree with this reasoning.
- [19] In this case, the applicant takes no issue with whether the notice provisions in s.44 of the *Schedule* were complied with. However, the applicant submits that an assessment with an orthopaedic specialist was not reasonable or necessary. The applicant submits that I should exercise my discretion and allow the hearing to proceed as he had other health issues and other assessments booked and therefore could not attend the IEs. He submits that he suffers from anxiety from having too many medical appointments booked too close to each other. The respondent submits that there is no evidence supporting these submissions. The applicant also submits that he has since attended some of the assessments. The respondent submits that NEBs are not payable for any period before the applicant attended at IE assessments as the applicant has no reasonable excuse for his failure to attend.

The respondent's request for an orthopaedic IE was not unreasonable

- [20] The applicant did not take any issue with the types of IE assessments requested by the respondent except for a request for an orthopaedic IE scheduled for March 29, 2023. The applicant submits that it is evident that his injuries were complex and required a chronic pain assessment with a chronic pain specialist to establish a proper cause of treatment, and to sort out exactly what was needed for him to recover. He submits that an orthopaedic specialist does not have the specialization and knowledge for conducting an IE to determine the types of treatment the applicant requires and would not be able to give a full or useful medical understanding and recommendation.

- [21] The respondent relies on *Bachour v The Dominion of Canada General Insurance Company*, 2022 CanLII 124606 (ON LAT) ("*Bachour*") at paragraph 54, which held that the requirement in s.44(1) not to schedule more assessments than is reasonably necessary is not to be conflated with the reasonable and necessary test in s.15 and 16 of the *Schedule*. An insurer is not required to demonstrate to the applicant that the IEs are reasonable or necessary. I agree with this reasoning. Otherwise, s.44(1) of the *Schedule* would have stated that an insurer may only request IEs that are reasonable and necessary for the purpose of determining if an insured person is entitled to a benefit instead of "as often as is reasonably necessary."
- [22] The applicant did not object to the number of the IE assessments requested, but to the type of one of the IE assessments. Based on the reasoning in *Bachour*, this is not a consideration. However, orthopaedic specialists are qualified to treat acute and chronic pain management issues as set out in *Hinds v Travelers Insurance*, 2022 CanLII 124645 (ON LAT) at paragraph 24. Accordingly, there is a nexus between the orthopaedic IE assessment and the proposed chronic pain assessment in the disputed treatment plan.
- [23] The respondent's request for an orthopaedic IE was not made until 2023 and was to assess NEBs and the request for a chronic pain assessment. This is more than a year after NEBs would have no longer been payable and almost two years after the applicant submitted the treatment plan requesting a chronic pain assessment. I was provided with no evidence that the applicant or his legal representative notified the respondent that it objected to an orthopaedic IE. Accordingly, I am not persuaded that a request for an orthopaedic assessment in 2023 is the reason why the applicant did not attend the psychological and physician IEs scheduled in 2020 and 2021 for NEBs and in 2021 for NEBS and the chronic pain assessment.

The applicant only had one IE which conflicted with his medical appointments

- [24] The applicant submits that he had serious health issues unrelated to his accident injuries that resulted in him not being able to attend the IEs. He submits that his medical appointments conflicted with the IEs. The applicant also submits that he did not attend at the IEs that were scheduled because he suffers from anxiety from having too many medical appointments booked too close to each other. The respondent submits there is no evidence to support the submission. I am not persuaded by the applicant for the following reasons.
- [25] On May 19, 2021, the respondent provided the applicant with a blank sheet asking the applicant to provide the reasons for his failure to attend the IEs. He was advised that by signing the sheet, he agreed to participate in the assessments if the respondent rescheduled them. A completed form was not before me. Based on the evidence before me, the following are the IE

appointments that the applicant did not attend and his reasons for seeking to reschedule the IE or for not appearing:

Outcome	Type of IE requested and date of IE	Applicant's excuse or conflicting medical appointment
Cancelled at applicant's request	Psychological IE, October 28, 2020 at 1:00 pm	No reason provided
No show	Physician IE, November 3, 2020 at 10:00 am	Applicant submits he did not get a call from IE or transport
Cancelled at applicant's request	Psychological IE, December 7, 2020 at 10:00 a.m.	December 3, 2020 x-ray and December 7, 2020 fracture clinic appointment at 10:15
Cancelled at applicant's request	Physician IE, December 23, 2020 at 11:00 a.m.	Fracture clinic appointment Dec 17 at 11:20
No show	Physician IE, January 26, 2021 at 10 a.m.	January 11, 2021, surgery (aspiration of right elbow)
Cancelled at applicant's counsel's request	Psychological IE, February 3, 2021 at 10:45 a.m.	Applicant's paralegal was unable to reach applicant and confirm he would attend
No show	Physician IE, March 22, 2021 at 10 a.m. with transport	March 5, 2021 MRI left shoulder March 15, 2021 fracture clinic appointment
No show	Psychological IE, April 29, 2021 at 9:30 a.m. with transport	April 23, 2021 right elbow arthroscopy
No show	Physician IE, August 3, 2021 at 1:00 p.m.	June 15, 2021 right elbow arthroscopy June 21, 2021 fracture clinic attendance
No show	Psychological IE, September 8, 2021 at 9:30 a.m.	No excuse

- [26] IEs were also scheduled for March and April 2023 that were rescheduled. However, there was no evidence before me as to why they were rescheduled or whether the applicant was a no show for those assessments. Accordingly, I have not included them and give them very little weight.
- [27] The only appointment that was on one of the dates scheduled for the assessment was the December 7, 2020 date on which the applicant was required to attend at the fracture clinic. All of the other IEs were scheduled no closer than six days from the applicant's other appointments or procedures. Accordingly, I

am not persuaded that the IEs were booked too close to the applicant's other appointments or procedures.

- [28] There is evidence that the applicant has multiple health issues consisting of bursitis of the right arm that was treated in 2021, cardiac issues in 2022 and he was diagnosed with psychological impairments consisting of an Adjustment Disorder with Mixed Anxiety and Depressed Mood (Moderate Severity) (Persistent) and Somatic Symptom Disorder (Persistent or more than six months) (With Predominant Pain) by Dr. Randy Silverman, psychologist, in his IE report dated June 28, 2023. According to the report of Jennifer Cruz, nurse practitioner, dated September 12, 2022, the applicant has asthma, chronic pain from a motor vehicle accident in 2005 and was on a blood thinner, an acid inhibitor, medications for low blood pressure and angina, Lyrica, Arthrotec and Oxycodone. However, the applicant could not point me to any evidence to support that the IE assessments he missed were due to anxiety, panic attacks or that it was detrimental to his health to attend the assessments. Nor was there any evidence that when too many appointments are scheduled together, it causes him great anxiety. Nor was I provided with any evidence of what was meant by appointments being booked too close together.
- [29] The respondent submits that the applicant was able to attend a psychological assessment pursuant to s.25 of the *Schedule* in March 2021. The applicant reported his ability to do so to Dr. Silverman, psychologist, on June 14, 2023. No explanation was offered as to why the applicant was able to attend a comprehensive psychological assessment in March 2021 but not the IEs scheduled for February 3, and March 22, 2021 or any of the subsequent IEs. Accordingly, the evidence does not support the applicant's submission that he missed the IEs because of anxiety.
- [30] The applicant submitted that he did not attend the November 3, 2020 IE scheduled with a physician because he did not get a call from the IE assessment clinic and no-one picked him up to drive him to the IE. The September 30, 2020 letter advising of the IE asked the applicant to contact the assessment facility if he needed any transport to the and from the facility. There is no evidence that he notified the IE clinic that he required transportation to the assessment. Nor is there any evidence that the IE clinic was required to call him. In fact, the evidence in Dr. Silverman's IE report is that the applicant resumed driving after the accident. Therefore, he did not require transportation to the IE. Accordingly, I am not persuaded that this is a reasonable excuse for failing to attend the November 3, 2020 IE.
- [31] The applicant submitted that on the last appointment, which was for chronic pain assessment scheduled for July 12, 2023, the assessor did not show for the assessment and it has been rescheduled for September 27th, 2023. I was given

no evidence in support of the submission. Nor does it explain why the applicant failed to attend the IEs scheduled for 2020 and 2021.

- [32] Accordingly, I am not persuaded that the applicant has any reasonable excuse for his failure to attend the IEs without any notice, scheduled to address the applicant's claim for NEBs on November 3, 2020, January 26, 2021, March 22, 2021, April 29, 2021 and September 8, 2021 or both NEBs and the cost of a chronic pain assessment on August 3, 2021.

The scheduled IEs and the notice letters were not late

- [33] The applicant submits that the respondent failed to schedule the IEs in a timely manner. The applicant submits that he sent a disability certificate to the respondent on February 4, 2020 and that the respondent did not respond to it until September 2020. He submits that the first IEs were scheduled for December 2020 and January 2021, almost a year to the date the applicant was eligible for NEBs. I disagree as the evidence does not support the applicant's submissions.
- [34] Under s.36(3), no NEBS are payable for the period of time before the applicant submitted a completed OCF-3 disability certificate. Within 10 days of receiving a disability certificate, under s.36(4) an insurer is required to either start paying NEBs or tell the insured person why it is denying NEBS and, if it requires an IE, give the reasons for the IE. If an insurer fails to provide notice under s.36(4), then it is required to pay NEBS until it does.
- [35] First, there was no evidence before me that the disability certificate was sent in February 2020. The only evidence was the respondent's letters dated September 10, 2020 advising it had not received a disability certificate and September 14, 2020 stating that the disability certificate was received on September 11, 2020. Accordingly, the disability certificate was not sent to the respondent until September 11, 2020 and not in February 2020 as submitted by the applicant.
- [36] Second, IEs were initially scheduled for October 28, and November 3, 2020 as set out in the respondent's letter dated September 30, 2020 and not as submitted by the applicant. The December 2020 and January 2021 IEs were rescheduled at the applicant's request and because the applicant failed to show for the November 3, 2020 IE. Accordingly, I find that the respondent scheduled the IEs in a timely manner. Therefore, the timing of the IEs is not reason to exercise my discretion to allow the hearing to proceed on the NEBs and the chronic pain assessment.

The hearing on NEBs and the chronic pain treatment plan will not proceed

- [37] The applicant asks that I exercise my discretion under s.55(2) of the *Schedule*. He submits that he should be allowed to pursue his claim for NEBs and the chronic pain assessment together with his other claims despite his failure to attend the IEs because he was facing a number of other medical issues through 2021 and 2022. He submits because he attended an occupational therapy IE on November 25, 2020 and a psychological IE on June 14, 2023, that he has shown a willingness to attend the IEs. He submits that his situation is unique and, therefore, I should exercise my discretion to allow him to pursue his claims for NEBs and a chronic pain assessment.
- [38] The applicant relies on *17-007683 v. Aviva Insurance Canada*, 2019 CanLII 81958 (ON LAT) in which the Tribunal considered ss.55(2) and (3) to grant the insured person permission to proceed with her appeal. The Tribunal determined that the evidence that the insured person in that case simply failed to attend IEs without reasonable explanation was too weak to make a case that she be barred from proceeding with her appeal. That case is distinguishable because the evidence was that the insured person notified the insurer that she could not attend the scheduled IEs or she provided reasons as to why. The applicant in this case provided similar notice only with respect to four of the IEs. He failed to give any notice or reason that he was unable to attend the IEs scheduled for November 3, 2020, January 26, 2021, March 22, 2021, April 29, 2021, August 3, 2021 and September 8, 2021 and he failed to attend all of those IEs without reason. .
- [39] The applicant submits that barring his ability to proceed with his claim is a disproportionate response. I disagree. While I have a discretion to allow the applicant to proceed to a hearing, that discretion should not be exercised where there is no reasonable excuse for the failure to attend IEs. Otherwise, the Legislature would not have barred insured persons who fail to comply with s.44 of the *Schedule* from filing appeals with the Tribunal.
- [40] The respondent submits that it is procedurally unfair for the application to proceed without the applicant having submitted to an IE. It relies on *Baskaran v Co-operators General Insurance Company*, 2020 CanLII 98730 (ON LAT) ("*Baskaran*"). In *Baskaran*, the Tribunal at paragraph 17 quoted and followed the Divisional Court's decision in *Certas Direct Insurance Company v. Gonsalves*, 2011 ONSC 3986 (CanLII) that "fundamental to any administrative process, is the requirement that it be fair. At its most basic, procedural fairness requires that a party have an opportunity to be heard and that it be able to respond to the

position taken against it.” I am bound by the Divisional Court’s reasoning. I find that to allow the applicant in this case to proceed with his hearing on NEBs and the chronic pain assessment without having attended at all the IEs scheduled to address the issues would be procedurally unfair to the respondent.

- [41] I also agree with the respondent that it has been prejudiced by not being able to assess the applicant during the period for which there was coverage for NEBs. Under s.12(3)(c) of the *Schedule*, NEBs are not payable for more than 104 weeks after the accident or after December 10, 2021. This means that, even if the applicant were to attend IEs, the IE assessors could only provide an opinion of the applicant’s status at the time of the assessment and not during the coverage period. The applicant’s non-attendance at the IEs scheduled for 2020 and 2021 has frustrated the respondent from having a fair opportunity to provide a full response to the claim for NEBs.
- [42] Further, it is not clear that the respondent would be liable for paying an NEB for the period of time the applicant refused to attend the IEs in any event. No benefit is payable for the period of time prior to September 11, 2020 when the disability certificate was submitted. If an insurer requires the insured person to undergo an IE, under s.36(7) of the *Schedule*, within 10 days of receiving the IE report, it is required to either deny the NEB and give reasons for the denial or pay the NEB. Section 36 implies that the NEB is not payable for the period of time before an insured person attends at an IE.
- [43] Section 36 is silent on whether an insurer is required to pay the NEB for the period of time an insured person fails to attend the IE if the insured person subsequently attends the IE and is still entitled to the benefit. This is unlike s.37(8), which states that if the insured person fails to attend the IE and subsequently attends and is still entitled to NEBs, then NEBS are payable for the period of time the insured person failed to attend the IE if he or she has a reasonable excuse. Section 37 of the *Schedule* deals with continuing entitlement to NEBS. Section 36 only speaks to the insurer’s requirement to pay specified benefits such as NEBs when proper notice is not given within the requisite time lines. In this case, the respondent provided the notice within the proper timelines and the applicant does not dispute the adequacy of any of the notices sent by the respondent. Further, the applicant’s submission that he requires the evidence from the IEs in support of his request for an adjournment implies that he does not have enough evidence to substantiate entitlement to NEBs during the relevant period.

- [44] The evidence shows that the applicant is likely disentitled to NEBs under s.33(6) of the *Schedule* in any event as he failed to provide information requested by the respondent that was reasonably required to assist it in determining the applicant's entitlement to NEBs. The respondent denied the applicant's entitlement to NEBs on February 11, 2021 for his failure to produce medical documents from the applicant pursuant to s.33 of the *Schedule*. The applicant submits that the medical documents were produced with his case conference summary. Since the application was filed with the Tribunal on March 3, 2022 and the case conference was conducted in January 2023, the medical documents were not produced until well after the NEB coverage period.
- [45] Under s.33(6) of the *Schedule*, benefits are not payable for the period of time before a s.33 request is complied with. Once the requested medical documents are produced, s.33(8)(b) requires the respondent to pay the NEBs withheld during the period of non-compliance if the applicant has a reasonable explanation for the delay. However, the applicant has not provided any such explanation. Accordingly, I find that there is little chance of the applicant being successful in claiming NEBs were I to exercise my discretion and allow the applicant to proceed to a hearing on those benefits.
- [46] The applicant submits the recent psychological IE was conducted for the purpose of the NEBs as the notice indicated that was the reason. However, the IE assessor did not comment on entitlement to NEBs. The respondent submits that the IE was not conducted or requested for the purpose of NEBs, but for other treatment plans which are no longer before me. The evidence before me appears to support the applicant's submission as a letter dated May 19, 2023 notified the applicant that the June 14, 2023 psychological IE, a May 23, 2023 neurology IE, a June 22, 2023 occupational therapy IE and a July 12, 2023 orthopaedic IE were scheduled to address the applicant's entitlement to NEBs. The respondent submits that these were scheduled in good faith. I have no evidence to indicate that the respondent provided any other notice to the applicant advising that the assessments were no longer going to address NEBs or the chronic pain assessment. However, the evidence is that these assessments were also scheduled to determine the applicant's entitlement to other treatment plans recommending psychological treatment, an orthopaedic assessment and a neuropsychological assessment. Regardless of whether the applicant attends or has attended at the 2023 IEs, the respondent is still prejudiced by his non-attendance at the IEs requested in 2020 and 2021 during the coverage period. A willingness to attend IEs after the coverage period does not cure that prejudice.

- [47] I find that the prejudice to the respondent outweighs any willingness the applicant may now demonstrate to attend IEs. Accordingly, I declined to exercise my discretion under s.55(2) of the *Schedule*.

ORDER

- [48] Given that the applicant failed to attend IEs scheduled to assess his entitlement to NEBs and the chronic pain assessment without a reasonable excuse, I find he is barred from proceeding with his claims for both of these benefits at the Tribunal pursuant to s.55(1)2 of the *Schedule*.
- [49] The applicant's request for permission to proceed to a hearing on the substantive issues of NEB and a chronic pain assessment is dismissed.
- [50] As the remainder of the applicant's claims have been withdrawn, the Tribunal's file is closed.

Released: September 12, 2023

Deborah Neilson
Adjudicator