



Citation: Ozkan v. Aviva Insurance Company of Canada, 2024 ONLAT 22-009827/AABS

Licence Appeal Tribunal File Number: 22-009827/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:

Emel Ozkan

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: Harry Adamidis

APPEARANCES:

For the Applicant: Emel Ozkan, Applicant
Linda Wolanski, Counsel

For the Respondent: Marc Bedard, Adjuster
Brian Yung, Counsel

Court Reporter: Guido Riccioni

Interpreter: Kadriye Abuseyf (Turkish)

HEARD: by Videoconference: January 29 to February 2, 2024

OVERVIEW

- [1] Emel Ozkan, the applicant, was involved in an automobile accident on April 3, 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.

ISSUES

- [1] The issues in dispute are:
1. Has the applicant sustained a catastrophic impairment as defined by the *Schedule*?
 2. Is the applicant entitled to attendant care benefits in the amount of \$6,000.00 per month from March 28, 2022 ongoing?
 3. Is the applicant entitled to the assessments proposed by GLA Rehab Inc., as follows:
 - i. \$1,156 for other assistive devices, in a treatment plan dated March 29, 2022;
 - ii. \$4,250.86 for occupational therapy services, in a treatment plan dated March 29, 2022;
 - iii. \$6,085.50 for other medical goods and services, in a treatment plan dated March 29, 2022;
 - iv. \$2,200.00 for an occupational therapy functional assessment, in a treatment plan dated February 18, 2022; and
 - v. \$2,200.00 for a social worker assessment, in a treatment plan dated March 31, 2022?
 4. Is the applicant entitled to housekeeping and home maintenance benefits in the amount of \$100 per week from March 28, 2022 ongoing?
 5. Is the applicant entitled to \$2,400.00 for a physician catastrophic assessment, proposed by Galit Liffshiz & Associates Inc. in a treatment plan dated February 18, 2022?

6. Is the respondent liable to pay an award under s. 10 of Reg. 664 because it unreasonably withheld or delayed payments to the applicant?
7. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [2] The applicant is not catastrophically impaired.
- [3] The applicant is not entitled to the treatment plans, attendant care, nor housekeeping and home maintenance benefits.
- [4] The respondent is not liable to pay an award.

PROCEDURAL ISSUES

- [5] During the hearing, the respondent asked to submit worksheets into evidence that were completed during the insurer examination with Ms. Reema Shafi, occupational therapist. The respondent explained that the worksheets were not previously disclosed because it had just become aware of these documents. The respondent also submitted that the documents have probative value as referencing them would facilitate the testimony of Ms. Shafi.
- [6] The applicant objected to the respondent's request as she had already completed her testimony without knowing about the worksheets. She submitted that admitting the worksheets under these circumstances would be unfair because she no longer had a meaningful opportunity to comment on this evidence. The respondent made no submissions on whether the applicant would be prejudiced.
- [7] I did not admit the work sheets into evidence. Ms. Shafi's report is in evidence and she is able to testify on the tasks completed by the applicant without having to reference the work sheets. As such, the probative value of this evidence is minimal. Additionally, the applicant completed her testimony without knowing about this evidence. In my view, the resulting prejudice outweighs the value of the work sheets.

ANALYSIS

Catastrophic Impairment (CAT) – Criterion 8

- [8] I find that the applicant is not catastrophically impaired under Criterion 8.

- [9] An insured person is catastrophically impaired under Criterion 8 when an accident results, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (the Guides), 4th edition, in a marked impairment in three or more areas of function, or an extreme impairment in one or more areas of function, due to a mental or behavioural disorder. The four areas of function in Criterion 8 are: activities of daily living (ADL), social functioning, concentration, persistence and pace (CPP), and adaptation.

Mental or Behavioural Disorder

- [10] In determining whether an insured person is catastrophically impaired as a result of a mental or behavioural disorder, the Tribunal first considers whether the accident caused a mental or behavioural disorder, and then it considers the impact of the disorder on the person's life and the level of impairment to assess whether the impairments meets the criteria for a CAT designation.
- [11] The s. 25 Catastrophic Determination Psychological Assessment dated September 15, 2023, by Dr. Eyal Bodenstein, psychologist, diagnoses the applicant with a somatic symptom disorder, a major depressive disorder, anxiety, and specific phobias.
- [12] The s. 44 Catastrophic Impairment Determination Multidisciplinary Assessment Report dated July 6, 2023, by Dr. Natasha S. Williams, psychologist, diagnoses the applicant with a major depressive disorder, a pain disorder, and specific phobia.
- [13] The two reports agree that the applicant sustained psychological injuries of a major depressive disorder, a pain-related disorder, and specific phobia as a result of the accident. This evidence is sufficient to find, on a balance of probabilities, that the applicant has mental or behavioural disorders caused by the accident.

Level of Impairment

- [14] The applicant must demonstrate that her psychological impairments result in three Class 4 Marked Impairments or one Class 5 Extreme Impairment. Page 301 of the *Guides* sets out the five levels of impairment, ranging from a Class 1 No Impairment to a Class 5 Extreme Impairment, in the chart below:

Area or Aspect of Functioning	Class 1: NO Impairment	Class 2: MILD Impairment	Class 3: MODERATE Impairment	Class 4: MARKED Impairment	Class 5: EXTREME Impairment
Activities of Daily Living	No impairment is noted	Impairment levels are compatible with most useful functioning	Impairment levels are compatible with some, but not all useful functioning	Impairment levels significantly impede useful functioning	Impairment levels preclude useful functioning
Social Functioning					
Concentration, Persistence and Pace					
Adaption (in a work-like setting)					

Activities of Daily Living (ADL)

- [15] This area of functioning evaluates a person’s ability to engage in activities such as self-care, personal hygiene, communication, ambulation, travel, sexual function, sleep, and social and recreational activities.
- [16] The applicant submits that her psychological symptoms have become worse in recent years. In particular, her depression, pain experience, and sleep disturbances limit her ability to do self-care, childcare, house keeping, or engage in social activities. As a result, her spouse and her mother have taken up much of the housekeeping and childcare tasks that were completed by the applicant prior to the accident. The applicant also notes that it is very difficult for her to initiate ADL without prompting from her spouse or mother. She submits that she has a marked impairment in ADL.
- [17] The respondent submits that it is open for the Tribunal to find that the applicant has a moderate impairment in the ADL because the situational assessment by Ms. Shafi revealed that the applicant is more functional than her self-reported limitations suggest.
- [18] The applicant acknowledges having some functional ability in ADL, but that her psychological symptoms and lack of sleep leave her depressed, unmotivated, and fatigued. Her inability to initiate ADL is corroborated by the testimony of her spouse and her mother. Both family members testified that the applicant is unlikely to engage in various tasks associated with the ADL without prompting, such as self care, cooking, and cleaning.
- [19] During the Occupational Therapy In-Home Functional and Situational Assessment of Ms. Shafi, conducted at the applicant’s home, the applicant completed numerous ADL such as preparing a dessert for the family, changing

bedding, loading laundry, ironing two shirts, vacuuming and mopping the entire main floor of the residence, cleaning the oven, wiping windows and patio door surfaces clean, cleaning a bathroom, as well as participating in a variety of tasks designed to assess her functional cognition.

- [20] The applicant testified that she felt forced to complete these tasks, and that she was completely exhausted and non-functional following the assessment.
- [21] Ms. Shafi testified that she stood back as the applicant planned her own day and carried out the activities for the assessment. She also testified that the applicant was not forced to do anything and that the applicant was fully aware that she could take breaks and even naps if needed. During the seven hour assessment, the applicant completed numerous activities with breaks and used pacing strategies.
- [22] There appears to be a disconnect between Ms. Shafi's instructions and how those instructions were perceived by the applicant. In any event, there is no dispute that the applicant exhibited a higher level of functioning when directed to complete tasks by Ms. Shafi. This is consistent with the testimony of the applicant's spouse and mother. Both testified that the applicant accomplishes very little when left alone and is more functional when she is directed to initiate tasks associated with her ADL. This is significant because the *Guides* state that an assessment of ADL must consider "the extent to which the individual is capable of initiating and participating in these activities independent of supervision or direction."
- [23] Dr. Bodenstein rated the applicant as having a marked impairment in ADL based on the s. 25 occupational therapy report of Frankie Chan, occupational therapist, dated March 21, 2022 and Dr. Bodenstein's own observations from the assessment that he undertook on September 1, 2023. He identifies deconditioning, pain in the applicant's neck, shoulder, back and chest, as well as psychological impairments impacting her ability to engage in the ADL.
- [24] Dr. Williams found that the applicant has a moderate or a marked impairment depending on her mood, but made no comments on the applicant's inability to initiate tasks independently.
- [25] The report of Ms. Shafi shows that the applicant can complete many ADLs. However, the completion of many tasks is not what happens day to day. I give weight to the testimony of the applicant, her spouse, and her mother which shows that the applicant is significantly impeded from independently engaging in

her ADL without direction or supervision. The extent of this limitation leads me to conclude that she has a Class 4 marked impairment in the ADL.

Social Functioning

- [26] Social functioning refers to an individual's capacity to interact appropriately and communicate effectively with others. This includes the ability to get along with family members, friends, neighbours, grocery clerks, landlords, and other members of the public.
- [27] The applicant argues that she has a marked impairment in social functioning because her accident-related psychological disorders cause apathy and an inability to motivate herself to engage in social activity and maintain relationships. As a result, she is socially isolated, has a strained relationship with her husband, and is less involved with her children.
- [28] The respondent submits that the marked impairment rating by Dr. Bodenstein is flawed because he only considered the applicant's self reporting and failed to incorporate observations of the appropriateness of the applicant's interactions with assessors, including himself.
- [29] Both the applicant and her husband testified that she no longer attends social gatherings with friends or family. This is inconsistent with the applicant's mother's testimony that the applicant attends some family gatherings, but cannot "do things like before" due to her low energy. The applicant's husband and mother also testified that the applicant leaves home to complete errands such as going shopping with family members and occasionally drives the children to school. As such, she continues to engage in social interactions with close family members and leaves her home to enter the community for specific purposes. Overall, this shows that the applicant has decreased her social interactions and become somewhat socially isolated since the accident.
- [30] In regard to interactions with family members, I note that the testimony of the applicant's husband and mother confirm the applicant's account of being constantly fatigued and less engaged in her relationship with her husband and children. The applicant's mother also testified that the applicant is on edge and gets angry. However, she provided only one example of the applicant's intemperate behaviour; namely, when the applicant complains, "Oh mommy, come on." This appears consistent with the applicant's testimony that she gets agitated when she is asked to do things she does not want to do.

- [31] On the face of it, the only example of intemperate behaviour given by the applicant's mother, when the applicant says, "Oh mommy, come on," appears somewhat mild and does not clearly illustrate that the applicant behaves inappropriately with her mother, or that she is on edge and becomes easily angered.
- [32] Dr. Bodenstein states the following in his report:
- There was no evidence of elevated mood, grandiosity, hallucinations, unusual thought content, bizarre behaviour, concept disorganization, mannerisms and posturing. There was no evidence of hostility, suicidality, suspiciousness, unusual thought content or bizarre behaviour. Her clinical presentation was devoid of self-neglect, disorientation, or conceptual disorganization. She was co-operative and answered all questions. There was no evidence of any excitement or distractibility nor motoric hyperactivity.
- [33] He testified that these comments are meant to address whether the applicant exhibited psychological symptoms. He agreed that the fact that the applicant was not exhibiting such symptoms is consistent with normal behaviour.
- [34] In her report, Ms. Shafi observed that the applicant was polite and pleasant during the assessment and that her hygiene, grooming, and appearance were appropriate. As such, the applicant's demeanour and appearance during this assessment were consistent with good social functioning.
- [35] Ms. Shafi asked the applicant to contact a bakery to inquire on ordering a cake. The applicant was initially reluctant to do so because she did not wish to waste someone's time when there was no real intention of ordering a cake. This is meaningful because being considerate of others is consistent with good social functioning. The applicant ultimately did initiate contact with a bakery over the phone. According to Ms. Shafi's report, she was "courteous and polite and her inquiries were goal focussed. She was able to collect the required contact information, place the call, effectively handle unanticipated questions from the customer service representative, request additional information to clarify, make in-vivo hypothetical decisions and politely end the call." I find that this positive interaction is also consistent with good social functioning.
- [36] At the hearing, the applicant testified in a manner that is consistent with interacting appropriately and communicating effectively. She answered questions in a direct and focused manner while under the stressful circumstances of providing testimony over a three hour period.

[37] The applicant's social functioning has been impacted by her accident-related psychological disorders. Fatigue, low mood, and lack of motivation have caused her to be isolated and have impacted the quality of her relationships with close family members. Even so, her ability to appropriately interact and communicate effectively, especially with people outside of her family remains intact. This was demonstrated in the situational assessment and in her ability to effectively communicate during her testimony. In my view, her impairment levels are compatible with some, but not all useful functioning. For this reason I find that she has a Class 3 moderate impairment in social functioning.

Concentration, Persistence, and Pace (CPP)

[38] CPP refers to the ability to sustain focused attention long enough to permit the timely completion of tasks commonly found in work settings. For activities of daily living, concentration may be reflected in the ability to complete everyday household tasks.

[39] The assessment of Frankie Chan took place in the applicant's home. He assessed the applicant's cognitive functioning with two tests. He reported that the Repeatable Battery for the Assessment of Neurocognitive Status (RBANS) test showed that the applicant "had greatest difficulty in immediate memory, language, attention, and delayed memory sections with many errors made throughout." He views the test results as showing "performance far below the norm and severe cognitive impairment."

[40] He also administered the Test of Everyday Attention (TEA) which measures an individual's visual selective attention/speed, sustained attention, attentional switching, and auditory-verbal working memory. According to Mr. Chan, the applicant's performance across all domains is severely impaired and far below normal performance for her age group.

[41] Dr. Bodenstein testified that neurocognitive testing should be done by neuropsychologists because they have the specialized training to conduct such testing. He opined that occupational therapists do not have this specialized training and that the results of neurocognitive tests administered by occupational therapists should be "taken with a grain of salt." Despite this opinion, Dr. Bodenstein testified that he relied on Mr. Chan's neurocognitive findings because those findings were consistent with what the applicant reported during her psychological assessment.

[42] On April 4, 2023, Ms. Shafi tested the applicant's functional abilities over a seven hour period. Ms. Shafi notes that during the initial planning process, the applicant

“maintained her concentration and did not lose her line of thought.” The applicant was intentionally distracted while she planned her course of action and was “able to selectively attend to the distractor and then resume her attention back to maintaining focus on her overall goal without the need for cues or prompts.”

- [43] During the assessment the applicant completed numerous ADL. She prepared a dessert on the stove, cleaned her oven, ironed two shirts, vacuumed and then mopped the floor, cleaned the bathroom floor, cleaned bathroom counters, cleaned the toilet bowl, cleaned shower tiles, laundered bedsheets, changed bed linen including pillowcases, and cleaned windows. She accomplished these tasks in a timely fashion with breaks and pacing.
- [44] The applicant also completed various cognitive exercises such as meal planning, task-specific information gathering, organizing a medication dosette, appointment scheduling, information processing, weekly meal and grocery planning, budgeting, diarizing, and data entry.
- [45] An information processing exercise is described in Ms. Shafi’s report. The applicant watched a 7 minute video on the origin, contents, preparation styles, and technical details of various coffee drinks. She watched the video twice on her phone. During the second viewing, the applicant took notes on paper during and after the video playback. She was able to relay the requested information in the video to Ms. Shafi. The applicant was then asked six very precise questions that required her to navigate the video to various time stamps based on her memory of the initial viewings. The applicant answered four of the six questions from memory without replaying the video. She wrote down the two remaining questions and navigated through the video to the relevant segments. The applicant wrote her responses to the questions before providing the requested information.
- [46] Ms. Shafi made the following observations on the applicant’s functioning during the assessment:

Ms. Ozkan’s ability to concentrate on the proceedings of this examination was beyond sufficient. Generally, Ms. Ozkan was fully alert and oriented. There was no evidence of any disorder of thought processes or thought content. Her account of events and details pertaining to her pre-accident life, her current limitations and resulting capacity, the impact on her family dynamics etc. was adequate. She was able to retain all my questions, and none required repeating or paraphrasing. She was able to maintain her train of thought and follow the conversation despite multiple abrupt, yet relevant, topics switches introduced intentionally. There was no evidence

of any preoccupations or distractibility. Casual observations during task engagement showed no obvious impairment in executive functions as it relates to day-to-day functioning, specifically, concentration, attention (including sustained), working memory, short term memory. She demonstrated adequate logical reasoning, decision making and information processing capacity and when presented with real-life like scenarios was able to act appropriately in a timed manner. More specifically, she was able to engage in direct one-on-one conversations lasting extended periods, maintain energy levels needed to focus on continued active dialogue and sustain participation in various physically and cognitively demanding tasks over the course of a seven-hour day.

- [47] Dr. Bodenstein testified that he gave no weight to Ms. Shafi's observations because she lacks the specialized training of a neuropsychologist. In his view, as noted above in paragraph 41, the person administering tests must have this specialized training in order for cognitive testing to be reliable.
- [48] I note that the *Guides* do not require neurocognitive testing to be performed by a neuropsychologist.
- [49] The *Guides* state the following in regard to assessing CPP on page 294:
- ...capability may be assessed by the completion of such tasks as filing index cards, locating phone numbers, and disassembling and reassembling objects. Strengths and weaknesses in mental concentration may be described in terms of frequency of errors, the time it takes to complete a task, and the extent to which assistance is required to complete the task.
- [50] The task completion exercises administered by Ms. Shafi and the type of observations that she provides are consistent with what is recommended in the *Guides*. For these reasons, I am satisfied that her assessment should be given weight.
- [51] Dr. Bodenstein also testified that that he gave no weight to Ms. Shafi's report because the applicant needed breaks and utilized pacing techniques during the testing. In my view, the applicant's need for breaks and pacing speak to her level of impairment and does not constitute a basis for dismissing this report.
- [52] Dr. Bodenstein further opined at the hearing that the test results are likely not consistent with the applicant's day to day functioning. There is a possibility that the applicant would not be able to complete the tasks as well in subsequent

testing. In his experience, the results of two functional assessments are a more reliable measure of a person's functional abilities.

[53] While I agree that additional assessments would be helpful, the *Guides* do not require multiple tests of the same tasks to rate impairment. Again, I find that this is not a basis to dismiss Ms. Shafi's report.

[54] Rather, I find the applicant demonstrated the ability to maintain focus, retain pertinent information from memory, and complete cognitive tasks in a timely fashion. These results are in stark contrast to the results of Mr. Chan's testing which found that the applicant had poor working memory and a compromised ability to sustain attention. I give more weight to Ms. Shafi's assessment because her report is highly detailed and provides clear insight into how the tests were administered and how the applicant functioned. In contrast, Mr. Chan's report only provides the name of the test, the characteristics that were being tested, and the results.

[55] Additionally, Mr. Chan's testing found that the applicant has "severe cognitive impairment." This high level of cognitive impairment is not evident in the task completion exercises administered by Ms. Shafi. Consequently, I give more weight to Ms. Shafi's report because she documented the applicant's actual ability to function and complete tasks. This is unlike Mr. Chan's report, where there is no indication that he tested the applicant's functional ability to complete tasks as recommended in the *Guides*.

[56] In Ms. Shafi's report, the applicant demonstrated the ability to sustain her focus for the timely completion of everyday household and cognitive tasks. Her ability to do so, however, required breaks and pacing during the assessment process. In my view, this is consistent with a Class 3 moderate impairment in CPP because the applicant clearly demonstrated that her impairment levels are compatible with some useful functioning.

Adaptation

[57] Adaptation is the functional ability to adapt to stressful situations. When faced with such circumstances, an individual may withdraw or experience an exacerbation of signs and symptoms of a mental disorder.

[58] The parties agree that the applicant has a marked impairment in adaptation. This is because the applicant's psychological symptoms, including fatigue, low mood, and lack of motivation, continue to affect her ability to adequately adapt. For

these reasons, I find that she has a Class 4 marked impairment in adaptation as well.

- [59] Having found that the applicant only has two Class 4 marked impairments and no Class 5 extreme impairments, I further find that she is not catastrophically impaired under criterion 8.

The treatment plans and attendant care

- [60] The applicant made no submissions regarding her entitlement to the treatment plans and attendant care. As such, I find that there is no basis to justify her entitlement to these benefits.

Housekeeping and home maintenance benefits

- [61] Under section 23 of the *Schedule*, these benefits are available to persons who are catastrophically impaired. The applicant is not catastrophically impaired. Therefore, she is not entitled to these benefits.

Award

- [62] The respondent is not liable to pay an award.
- [63] The applicant sought an award under s. 10 of Reg. 664. Under s. 10, the Tribunal may grant an award of up to 50 per cent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits.
- [64] The applicant submits that she is entitled to an award based on the concerns raised in her letter dated September 12, 2023 to the respondent. The specific benefits referenced in the letter and the reasons to support an award are as follows:
- a. The adjuster did not arrange for the payment of any treatment for the applicant despite knowing, at least since July 13, 2017, that she was living with her mother as a result of the accident and needed help for herself and her kids. Instead, he arranged for an examination under oath. The results of the examination under oath have never been released.
 - b. Medication expenses were never reimbursed by the adjuster. These expenses are documented in two emails dated February 28, 2019 and March 8, 2019.
 - c. An occupational therapy assessment recommended treatment, a neuropsychological assessment, a tablet, and a cognitive training program. None of these items were ever funded.

- d. The report of Frankie Chan made numerous treatment plan recommendations, which were denied by the respondent.

- [65] In regard to the first point, that the adjuster did not arrange for the funding of any treatment but instead arranged for an examination under oath, the only evidence cited by the applicant is a log note dated July 13, 2017. This log note states that the applicant has reached the funding limit in the minor injury guideline and that arrangements will be made for insurer examinations. The adjuster asks for her availability to attend assessments and offers to arrange transportation to the assessments. There is no mention of an examination under oath. On the face of it, this log note is inconsistent with the applicant's submission that the respondent was not making any meaningful efforts to fund treatment.
- [66] For the second point, that the respondent was not funding invoices for medication, the applicant refers to two emails dated February 18, 2019 and March 8, 2019. I note that the date of these emails is in another language, but the year does appear to be 2019. The content of the emails is in English. Both emails state that medication is not being paid for by the respondent, but no further information is provided. The applicant does not point to invoices, the means by which the invoices were submitted to the respondent, nor any denials that are linked to these emails. In my view, the emails lack sufficient detail to show that the respondent was acting unreasonably.
- [67] The final two points relate to not funding treatment plans. The applicant's letter does not reference specific treatment plans that were denied. Without referencing specific denials, the applicant has not provided a starting point for assessing whether the respondent acted unreasonably.
- [68] For all these reasons, I find that there is no basis to conclude that the respondent has unreasonably denied or withheld the payment of benefits. For this reason, I find that the respondent is not liable to pay an award.

ORDER

- [69] The applicant is not catastrophically impaired.
- [70] She is not entitled to the treatment plans, attendant care, nor housekeeping and home maintenance benefits.

[71] The respondent is not liable to pay an award.

Released: July 4, 2024



Harry Adamidis
Adjudicator