LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Ontario

Date: 2018-02-26
Tribunal File Number: 17-002213/AABS
Case Name: 17-002213 v Aviva Insurance Canada

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:

Applicant

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR: **Brian Norris**

APPEARANCES:

For the Applicant: Ryan Naimark & David José, Counsel

For the Respondent: Brian Yung, Counsel

HEARD: **In Writing on November 7, 2017**

OVERVIEW

[1] The applicant was injured in an automobile accident on July 1, 2014 and sought benefits from the respondent pursuant to O. Reg. 34/10, known as the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule").* The respondent refused to pay for certain attendant care benefits and costs of examinations. As a result, the applicant has applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of this dispute.

ISSUES:

[2] The disputed claims in this hearing are:

1) Is the applicant entitled to attendant care benefits in the amount of $1,424.24 per month for the period July 14, 2014 to March 30, 2015?

2) Is the applicant entitled to payments for the costs of examinations recommended by HAL Disability as follows;

    a. $2,200.00 for a chronic pain assessment submitted in a treatment plan dated October 28, 2015, denied by the respondent December 12, 2015; and

    b. $2,200.00 for an orthopaedic assessment submitted in a treatment plan dated October 26, 2015, denied by the respondent on November 27, 2015?

3) Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[3] The applicant is not entitled to any attendant care benefits in addition to that which they have already received.

[4] The applicant is entitled to the chronic pain assessment dated October 28, 2015.

[5] The applicant is not entitled to the orthopaedic assessment submitted in a treatment plan dated October 26, 2015.

BACKGROUND

[6] The applicant was a rear-seated passenger in a vehicle which was struck by another vehicle on the passenger-side. The applicant suffered fractures to the

4th and 5th ribs on the right side and a fractured pelvis. The applicant was later diagnosed with disc herniation which affected the left S1 nerve.

[7] The applicant claims entitlement to attendant care benefits for the period July 8, 2014 up to and including March 29, 2015 totalling $14,954.52. The respondent agreed to fund attendant care services for the period October 31, 2014, when they received a Form 1, until February 4, 2015, when the respondent denied the benefits on the recommendation of the respondent's insurance examination assessor. The total amount of attendant care benefits paid to the claimant to-date is $4,522.12. The applicant disputes the respondent's denial of the remaining $10,432.40 in attendant care benefits.

[8] In October 2015, the applicant submitted two treatment and assessment plans requesting approval for a chronic pain assessment and an orthopaedic assessment. The respondent denied funding for the assessments and now the applicant disputes those denials.

ISSUE ONE: ATTENDANT CARE

[9] The parties agreed that the monthly amount of attendant care benefits available to the applicant is $1,424.24. There is no dispute regarding the provider's professional qualifications. The dispute before me, as it relates to attendant care, is what is the period of entitlement for the applicant?

Period of entitlement: When does it start?

[10] The applicant takes the position that they are entitled to attendant care services incurred for the period July 8, 2014 up to and including March 29, 2015. The applicant submitted evidence in the form of a Discharge Report from St. Joseph's Health Centre indicating the use of crutches upon discharge from the hospital and an Attendant Care Needs Assessment Report and Form 1 dated September 13, 2014.

[11] The respondent submits that the period of entitlement starts when it received the Form 1 and not any time before. The respondent submits it received the Form 1 on October 31, 2014. This date of receipt is also noted in a letter dated April 23, 2015 from the respondent to the applicant, which is part of the applicant's evidence. It is the respondent's position that the applicant is only entitled to attendant care benefits for the period from October 31, 2014 when it received the Form 1, to February 4, 2015, when the respondent denied the benefits on the recommendation of the respondent's insurance examination assessor. The respondent directs me to section 42(5) of the *Schedule* which states that an insurer may, but is not required to, pay an expense incurred before an assessment of attendant needs is submitted.

[12] Upon review of the submissions and evidence, I find that the applicant provided the Form 1 on October 31, 2014 and is entitled to attendant care benefits starting on that date. The applicant was provided with the respondent's submissions outlining this position and the applicant chose not to provide any refuting submissions, nor did the applicant provide any evidence to suggest that the Form 1 was submitted on a date other than October 31, 2014.

[13] Section 42(5) of the *Schedule* provides that the respondent may, but is not required to, pay attendant care expenses before an assessment is conducted. The applicant states that the expenses were incurred and infers that the expenses are payable as a result without any reason as to why the Form 1 wasn't provided prior to October 31, 2014. This is not a sufficient explanation to justify entitlement to the attendant care services during the period from the date of the accident to the date of the Form 1 nor is it sufficient for me to justify deeming the expense as incurred pursuant to section 3(8).

Period of entitlement: When does it end?

[14] The applicant submits that $20,060.00 of attendant care services were received from July 8, 2014, the time of discharge from the hospital, to March 30, 2015. The applicant claims entitlement to $14,954.52 of the expenses, in accordance with the Form 1 dated September 13, 2014. The applicant submits that all the criteria in section 3(7)(e) of the *Schedule* has been met, making the $14,954.42 an incurred expense per the *Schedule*.

[15] The respondent submits that the applicant's entitlement to an attendant care benefit ended on February 4, 2015 pursuant to the respondent's letter dated January 15, 2015. In the letter, the respondent advised the applicant it would stop paying for attendant care benefits incurred after February 4, 2015 on the recommendation found in the respondent's insurer's examination report. The respondent submits that the applicant was completely independent with personal care at the time of the denial and refers me to an Attendant Care Assessment Report dated January 15, 2015 as evidence of the applicant's independence with personal care.

[16] The applicant was provided with an opportunity to reply, but did not make submissions refuting the respondent's evidence that the applicant was independent with personal care as of January 15, 2015. The only evidence before me in support of the need for attendant care beyond February 4, 2015 are the Statement(s) of Attendant Care Services Provided, which cover the period July 8, 2014 to March 31, 2015.

[17] Having incurred attendant care services does not automatically entitle an insured to an attendant care benefit. Pursuant to section 19 of the *Schedule*, it is the reasonableness and necessity for attendant care services which entitle an insured to the benefit. Considering this and the submissions and evidence before me, I find that attendant care services are no longer reasonable or necessary as of January 15, 2015. Considering the notice provided by the respondent, the period of entitlement ends on February 4, 2015.

What is payable?

[18] The applicant submitted a Form 1 to the respondent. The Form 1 entitles the applicant to an attendant care benefit up to $1,424.24 per month. The period of entitlement spans from October 31, 2014 up to and including February 4, 2015, which is 3 months and 5 days. This makes the total amount payable $4,509.30 ($1,424.24 x 3 months, plus $1,424.24 x $^{5}/_{30.1}$). The respondent has paid $4,522.12 towards attendant care services, satisfying its obligation.

ISSUE 2: IS THE APPLICANT ENTITLED TO A CHRONIC PAIN ASSESSMENT?

[19] The applicant claims entitlement to a chronic pain assessment recommended in a treatment plan dated October 28, 2014. The goals of the treatment plan are to design and develop strategies to assist with pain management and resolution and to improve everyday functioning. The applicant submits that conducting a chronic pain assessment is consistent with the recommendation in Dr. A. Pillai's Psychological Assessment Report dated February 15, 2015. The applicant also submits that Dr. L. Weisleder's Orthopaedic Surgery Assessment Report dated November 26, 2014, commissioned by the respondent, confirms that the applicant's impairment is pain related. Lastly, the applicant submits that the multidisciplinary medical and legal assessment and post-104 IRB determination report dated June 5, 2017 recommends that the applicant address physical, psychosocial, and cognitive components of activity routines—which the applicant submits would have been addressed in the disputed chronic pain assessment.

[20] The respondent submits that a chronic pain assessment is not reasonable and necessary. It submits that the applicant's impairments in range of motion of the neck, shoulders and lower back are pain related and do not warrant a chronic pain assessment. It also submits that the applicant does not meet the criteria for Post-Traumatic Stress Disorder, major depression, or a specific anxiety disorder, which it indicates *could* render the treatment plan reasonable and necessary. The respondent provided Dr. Weisleder's Orthopaedic Surgery Assessment Report dated November 26, 2014 and Dr. A. Zielinsky's

Psychiatric Report dated December 11, 2015 as evidence in support of its position.

[21] Entitlement to payment for the cost of examinations is governed by section 25(1)3 of the *Schedule.* This section establishes that an insurer shall pay for reasonable fees charged by a health care practitioner for reviewing and approving a treatment plan under section 38, including any assessment necessary for that purpose.

[22] Having reviewed the submissions and the evidence, I find that a chronic pain assessment is necessary. The evidence confirms that the applicant had on-going pain-related reduction in range of motion of the neck, shoulders and low back. The evidence also confirms that the applicant was diagnosed with psychological injuries. The evidence provided by the applicant is credible, the complaints contained in the evidence are consistent, and when assessed altogether, the evidence supports the need for a chronic pain assessment. The combination of psychological and physical injuries can lead to chronic pain syndrome and warrant further investigation. I find the fees proposed for the assessment are reasonable as they are in accordance with section 25(5) of the *Schedule*.

ISSUE 3: IS THE APPLICANT ENTITLED TO AN ORTHOPAEDIC ASSESSMENT?

[23] The applicant claims entitlement to an assessment proposed October 26, 2015. In submissions to the Tribunal, the applicant characterized the assessment as both a “whole body assessment” and a “psychological assessment”. For clarity, I will refer to this assessment as an orthopaedic assessment, as it was proposed by an orthopaedic surgeon.

[24] The applicant submits that the multidisciplinary medical and legal assessment and post-104 IRB determination report dated June 5, 2017 recommends that the applicant address physical, psychosocial, and cognitive components of activity routines—which the applicant submits would have been addressed in the disputed orthopaedic assessment. The applicant also submits that the insurer’s examination report supported continued psychological counselling and that, as a psychiatrist, the insurer’s assessor is therefore not qualified to render an opinion on the merits of the balance of the orthopaedic assessment.

[25] The respondent’s position is that the orthopaedic assessment is not reasonable and necessary because the applicant’s impairments in the range of motion in the neck, shoulders, and lower back were pain-related. The position is based on the finding of Dr. Weisleder’s insurer’s examination report dated November 26, 2015. Additionally, the respondent submits that multidisciplinary

assessments were conducted in 2017 for the purpose of determining entitlement to an income replacement benefit and that another orthopaedic assessment would be unfair to the respondent.

[26] As noted previously, I have found that the applicant suffered from psychological and physical injuries which are lingering and warrant further investigation in the form of a chronic pain treatment plan.

[27] The goal of the orthopaedic assessment is to get a better understanding of the applicant's physical injuries and to help the applicant increase functionality. This is unnecessary. The medical records, as highlighted by the applicant, include diagnostic imaging which reveals a disc herniation with associated mass effect on the left S1 nerve root. The records are clear about the applicant's physical injuries. It is the applicant's combination of ongoing pain and psychological injuries which are restricting functionality. Additionally, the chronic pain assessment, which I have found to be reasonable and necessary, will establish a diagnosis, the extent of the applicant's injuries, and make recommendations for recovery.

[28] Considering the evidence, submissions, and that I have found the chronic pain assessment to be reasonable and necessary, I find the orthopaedic assessment not reasonable and necessary.

CONCLUSION

[29] The applicant has suffered physical and psychological injuries as a result of the motor vehicle accident. The impairments as a result of the injuries do not warrant any attendant care services in addition to the services provided to-date.

[30] The applicant is entitled to the chronic pain assessment submitted in a treatment plan dated October 28, 2015 as the proposed plan is reasonable and necessary.

[31] The applicant is not entitled to the orthopaedic assessment submitted in a treatment plan dated October 26, 2015 as the proposed plan is not reasonable and necessary.

Released: February 26, 2018

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Brian Norris, Adjudicator