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Ontario

RECONSIDERATION DECISION

Before: **Avril A. Farlam, Vice Chair**

Date: **November 10, 2020**

File: **18-010618/AABS**

Case Name: **Balbir Dosanjh v. Aviva General Insurance**

Written Submissions by:

For the Applicant: Aminder Hayher, Counsel

For the Respondent: Brendan Sheehan, Counsel

OVERVIEW

[1] Balbir Dosanjh ("applicant") asks for a reconsideration of part of the Tribunal's Decision released on April 7, 2020 ("Decision") in which the applicant was entitled the cost of three treatment plans for chiropractic therapy, denied one treatment plan for in-home and attendant care examination and denied one treatment plan for an orthopaedic assessment.

[2] The applicant submits errors of law and fact were made with respect to the orthopaedic assessment. Aviva General Insurance ("respondent") asks that the reconsideration be dismissed.

RESULT

[3] The Applicant's Request for Reconsideration is dismissed.

ANALYSIS

[4] The criteria for granting reconsideration of a Tribunal decision that finally disposes of an appeal are set out in Rule 18.2 (a), (b), (c) and (d). Here the applicant relies on (b), that the Tribunal made an error of law or fact such that the Tribunal would likely have reached a different decision had the error not been made.

[5] Reconsideration is only warranted in cases where an adjudicator has made a significant legal or evidentiary mistake preventing a just outcome, where false evidence has been admitted, or where genuinely new and undiscoverable evidence comes to light after a hearing. The onus is on the party seeking reconsideration to establish one or more of the Rule 18 grounds for reconsideration to be successful. The Tribunal has previously stated, "It is well established that the test to be successful on a reconsideration request is a high one…"[1]

b. Errors of Law or Fact Such that the Tribunal Would Likely Have Reached a Different Result had the Error not been Made

[6] The applicant argues that I erred in law and made significant errors of fact in finding that the cost of the orthopaedic assessment in the amount of $2,680.00 is not reasonable and necessary after accepting and relying upon the orthopaedic assessment and the opinion of Dr. Nguyen (collectively "ortho assessment") to reach the conclusion that three other treatment plans were reasonable and

[1] *18-003314/AABS v. Wawanesa*, 2019 CanLII 101644 (ON LAT-Reconsideration) at para 13.

necessary. The applicant also argues that the applicant did not receive proper notice of denial of the ortho assessment under s. 38 (8) of the *Schedule* and, as a result, the cost of the ortho assessment is payable pursuant to s. 38(11). The applicant suggests that a negative inference should be drawn against the respondent for not producing the accident benefits file. The applicant also argues that notice of an examination by respondent's Dr. Safir was deficient. The applicant relies on several FSCO and Tribunal decisions.[2] Also, the applicant argues that a significant error of fact was made because the Decision does not reference part 9 (b) (i) of the ortho assessment which describes its purpose.

[7] Having reviewed the Decision, I am satisfied that it does not contain any such errors of law or fact. An adjudicator may accept evidence in whole or in part as part of the adjudicative process. Having accepted some of the evidence in the ortho assessment does not obligate the adjudicator to find that the cost of it is reasonable and necessary. There is a distinction between finding that the applicant sustained the impairments in question as opposed to finding that the proposed treatment is reasonable and necessary. That is a separate analysis. The Decision correctly states that the onus is on the applicant to establish that each of the treatment plans is reasonable and necessary. I found that the applicant did not do so based on the evidence presented and was entitled to so find. I did so for the reasons expressed in paragraphs 18, 19 and 20 of the Decision.

[8] The applicant's suggestion that the ortho assessment is a key part of the Decision which allowed three treatment plans and "but for" the ortho assessment the Decision would not have been reached is speculation and does not establish ground for reconsideration. The ortho assessment is only one portion of the evidence which I found the three treatment plans were reasonable and necessary as set out in paragraphs 6, 7, 8, 9, 10, 11 and 12 of the Decision. Primarily the ortho assessment was denied because the applicant was seen to be functional. The sole evidentiary basis in support of the ortho assessment was contradicted by surveillance and no other evidentiary basis to support the need for an ortho assessment remained. The reasonableness and necessity of the chiropractic treatment plans was supported by more evidence.

[2] *Violi v. General Accident Assurance Company of Canada*, FSCO No. P99-00047 (September 27, 2000), [2000] O.F.S.C.I.D. No. 171; *T.F. v. Peel Mutual Insurance Company,* 2018 CanLII 39373 (ON LAT), *R.P. v. Aviva Insurance Company of Canada,* 18-001808/AABS, 2019 CanLII 22220 (ON LAT).

[9] With respect to the applicant's part 9 (b) (i) argument, an adjudicator is not required to refer to every part of the evidence in the Decision.

[10] The applicant argues that I made a significant error of law or fact in failing to find that she is entitled to the cost of the ortho assessment because she never received a denial notice from the respondent. Without referencing any specific evidence, the applicant's submission at the hearing about this was: "The applicant submits that to date she has not received a denial notice from the Respondent to deny this benefit…" The evidence before me was that by correspondence dated February 5, 2018 the applicant received an appropriate denial. Further, the date of denial of all treatment plans and examinations were agreed upon prior to the hearing as set out in the Tribunal's April 8, 2019, June 24, 2019, and July 17, 2019 Orders. Therefore, I correctly found there was no basis for this argument and appropriately addressed it in paragraph 24 of the Decision. At the hearing the applicant did not argue that the denial notice was insufficient on substantive grounds. Reconsideration is not an opportunity to raise a new and different argument not made at the hearing.

[11] The applicant suggests that a negative inference should be drawn against the respondent for not producing the accident benefits file. This argument was not made at the hearing. The applicant did argue in support of her special award request that the respondent "…acted in bad faith by withholding information…" and submitted in reply submissions she requested the accident benefits file but did not receive it. However, the request for an adverse inference was not made. Reconsideration is not an opportunity to raise new arguments.

[12] Further, if the applicant needed to obtain documents for the hearing, she could have brought a motion as provided for in the Tribunal's April 8, 2019 Order.

[13] Lastly, adverse inference relates to evidence and having reviewed the Decision, I am satisfied that this argument would not likely have affected the result.

[14] The applicant also argues that the notice of examination with the respondent's Dr. Safir on July 3, 2019 is deficient and relies on ss. 38 (8) and 38 (11) of the Schedule. This argument was not made at the hearing, presumably because the applicant attended the examination so notice arguments were moot by the time of the hearing and because ss. 38(8) and 38 (11) do not apply to notices of examination. Again, reconsideration is not an opportunity to raise new arguments.

[15] Having reviewed the Decision, I am satisfied that it does not contain any significant errors of fact or law. I was entitled to assess and weigh the evidence.

Here I reached the conclusion that the ortho assessment was not reasonable and necessary for the reasons expressed in paragraphs 18 and 19 of the Decision. There is nothing in the non-binding case law submitted by the applicant that would indicate a reconsideration is warranted as a matter of law.

[16] I applied the correct legal test and found that the applicant failed to establish that the ortho assessment is reasonable and necessary. I considered the applicant's evidence and found it lacking.

[17] In this Decision I explained why findings of fact were made and conclusions reached. I find no misapprehension of the evidence or errors of law or fact were made as the applicant alleged. The weight to be given to evidence at the hearing is a matter to be determined by me. I found the applicant's evidence lacking on the ortho assessment for the reasons expressed.

[18] I find that the applicant has not established any ground for reconsideration. The grounds for reconsideration are limited and specific. As the applicant has requested reconsideration, the onus is on the applicant to prove her grounds and she has not done so. Instead, the applicant's submissions are an attempt to reargue the case and raise new arguments. A reconsideration is not an opportunity to reargue, raise new arguments or an appeal.

ORDER

[19] For the reasons noted above, I dismiss the Applicant's Request for Reconsideration.

Avril A. Farlam
Vice Chair
Tribunals Ontario – Safety, Licensing Appeals and Standards Division

Released: November 10, 2020