Citation: Obaseki v. Aviva General Insurance, 2021 ONLAT 19-011813AABS

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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:

Matthew Obaseki

Applicant

and

Aviva General Insurance

Respondent

DECISION

ADJUDICATOR: **Jesse A. Boyce, Vice-Chair**

APPEARANCES:

For the Applicant: Michael S. Wentzel, Counsel

For the Respondent: Jessica N. Telfer, Counsel

HEARD: **Via Written Submissions**

OVERVIEW

[1] The applicant was involved in an automobile accident on January 11, 2019, and sought benefits from the respondent, Aviva, pursuant to the *Statutory Accident Benefits Schedule* - Effective September 1, 2010 (the "*Schedule*").[1] Aviva denied the benefit in dispute on the basis that it was not reasonable and necessary. The applicant disagreed and applied to the Tribunal for resolution of the dispute.

[2] At the case conference, there were initially five issues in dispute: a Minor Injury Guide (MIG) determination, an income replacement benefit (IRB) determination, the balance of a partially approved treatment plan, interest and an award. However, the applicant has since been removed from the MIG by Aviva and withdrawn his IRB claim. In turn, the treatment plan previously in dispute has been substituted for a more recently denied plan, identified below. The issues of interest and a s.10 award remained for this written hearing.

ISSUES IN DISPUTE

[3] The issues in dispute are as follows:

i. Is the applicant entitled to a treatment plan for physiotherapy in the amount of $4,304.96 as recommended by Alpha Thistletown Physiotherapy & Rehab dated May 4, 2019?

ii. Is the applicant entitled to an award under s. 10 of O. Reg. 664?

iii. Is the applicant entitled to interest on the overdue payment of benefits?

RESULT

[4] The applicant is not entitled to the treatment plan in dispute, interest or an award.

ANALYSIS

Is the treatment plan reasonable and necessary?

[5] In order to receive payment for medical and rehabilitation benefits under the *Schedule*, the applicant must demonstrate that the treatment is reasonable and necessary on a balance of probabilities. To do so, the applicant should demonstrate that the goals of treatment are reasonable, that the goals are being met to a reasonable degree and that the cost and time associated with same is

[1] O. Reg. 34/10, as amended.

reasonable. I find the applicant is not entitled to the treatment plan as he has not demonstrated that it is reasonable and necessary.

[6] The OCF-18 in dispute is dated May 4, 2019 and recommends 18 sessions of physiotherapy, active therapy and massage totalling $4,304.96. The goals of the plan are identified as pain reduction, increasing range of motion and strength and a return to activities of daily living. The applicant relies on an MRI dated March 25, 2020 finding degenerative changes; a medical report from Dr. Zaki dated September 5, 2019 recommending physiotherapy and massage; the clinical notes and records of Dr. Zaki; and the treatment notes from the provider Alpha Thistletown. The applicant further submits that he incurred $1,964.80 in treatment and that Aviva's denials were improper and confusing.

[7] In response, Aviva submits that the applicant was removed from the MIG based on a psychological diagnosis of Adjustment Disorder and, to this end, submits that even when an individual is taken out of the MIG for psychological reasons, that does not make physical treatment proposed outside of the MIG automatically payable. Aviva asserts that the applicant's complaints, pain ratings and diagnoses are reflective of minor physical injuries, as Dr. Zaki's records note only four post-accident visits, where the applicant's complaints were of neck pain (which he self-rated as a 3/10) and back pain (which he self-rated as a 4/10), and Dr. Zaki's diagnoses have been confined to cervical strain and back pain/strain, which are minor injuries. Aviva further relies on the s. 44 report of Dr. Fung who determined that the applicant sustained soft-tissue injuries as a result of the accident and that further facility-based treatment was not reasonable and necessary as "there were no objective clinical findings to support any substantive accident-related musculoskeletal, neurological, or osseous impairments related to the motor vehicle accident."

[8] I agree with Aviva. On review, I find there is limited objective medical evidence to support an ongoing physical impairment as a result of the accident that would require further facility-based treatment. Given the applicant's minor pain complaints and his infrequent attendance at his family physician post-accident, I agree that any accident-related physical impairments sustained were minor, and the applicant has not pointed to an objective opinion to suggest otherwise. While I am alive to his pain complaints, I note he did not follow up on Dr. Zaki's initial Polyclinic referral and that he self-reported that he continued to be independent with his activities of daily living, including continuing to drive as a Lyft driver and helping his wife with day-to-day chores. On balance, I find on the medical evidence that his self-reporting is in line with the diagnosis of soft-tissue injuries provided by Dr. Fung in his s.44 report and in his own OCF-3.

[9] Further, I agree with Aviva that it is doubtful that the applicant was receiving benefit from the treatment proposed that would meet his burden of demonstrating that continued treatment was reasonable and necessary. For example, in his January 10, 2020 visit, the applicant noted that his neck pain was still a 3/10 at one-year post-accident, despite having received treatment amounting to $5,464.80 for largely soft-tissue injuries. While pain relief can be a legitimate goal for treatment, it does not follow that payment is automatically reasonable and necessary where there is limited evidence of improvement.

[10] Finally, I also agree with Aviva that the applicant has not demonstrated that the degenerative changes in his spine should be ascribed to the accident, thus warranting further facility-based treatment. There is no evidence to support this position where Dr. Fung did not ascribe the degenerative changes to the accident and where Dr. Zaki offered no opinion on same. Putting all of these facts aside, I find, in any event, that the applicant's submissions on the specific treatment he seeks did not demonstrate that the treatment is reasonable and necessary for his accident-related impairments, as they rely entirely on his self-reporting. There is no engagement or discussion of how the goals of treatment were being met to a reasonable degree or why the cost ($4,304.96) and duration (18 sessions) of the proposed treatment are reasonable and necessary to meet the stated goals. Accordingly, I find the applicant has not demonstrated that the OCF-18 is reasonable and necessary. As no benefits are overdue, it follows that no interest is payable under s. 51.

Aviva's denials were proper

[11] As noted, the applicant also asserted that Aviva's denials were "ambiguous" and "unfounded" and "left him confused." Problematically, the applicant did not offer reply submission to rebut the chronology of events offered by Aviva. On review, I find Aviva's adjustment of the file and its denials of the treatment plans were reasonable and proper and in accordance with the *Schedule*.

[12] For example, I agree that the May 27, 2019 letter denied the treatment plan based upon a lack of supporting evidence, and the denial of the treatment plan was later confirmed by way of another letter dated October 13, 2020, after partial production of medical records and the subsequent completion of the s. 44 report from Dr. Fung. Meanwhile, I agree that the purpose of the June 26, 2020 letter was to schedule the two s. 44 assessments, while the August 11, 2020 letter was to re-schedule Dr. Fung's assessment. The June 26, 2020 letter originally scheduling both s. 44 assessments was sent over two months prior to the applicant being removed from the MIG. The s. 44 psychological assessment was

able to proceed on the original date, and the applicant's removal from the MIG on July 28, 2020 was done based on the conclusions of that report, as noted above.

[13] Aviva submits that no clarification was sought by the applicant or by his legal representatives after receipt of the June 26, 2020 or August 11, 2020 letters, presumably because none was required, as he attended the rescheduled examination with Dr. Fung, who was able to conclude that the OCF-18 in dispute was not reasonable and necessary. I agree that in circumstances where a psychological diagnosis results in removal from the MIG, an assessor is still entitled to conclude that physical injuries were minor in nature, even though the MIG limit would no longer apply. On the evidence, and with no rebuttal from the applicant, I am unable to conclude differently and find Aviva's denial letters to be proper and in accordance with its rights under the *Schedule*.

Award

[14] The applicant also sought an award under s. 10 of O. Reg. 664, submitting that Aviva unreasonably relied on Dr. Fung's report, that it refused to reconsider additional medical documentation he provided even though Aviva indicated that it would and that its failure to consider the abundance of medical documentation left him without treatment and was done in bad faith.

[15] In response, Aviva asserts that the applicant has failed to comply with its s. 33 requests and the Tribunal's case conference Order for productions, submitting that the pre-accident records from the family doctor, the records from Humber River Hospital, and the decoded OHIP summary from one year pre-accident to date, all remain outstanding and that the applicant was also non-compliant with requests for financial documents related to his withdrawn IRB claim. Further, Aviva submits that the applicant's award request is devoid of merit, as it arranged for s. 44 assessments based on the documents which had been provided, though the majority of the requested documents were outstanding. Aviva submits that it then confirmed the denial of the treatment plan on the basis of Dr. Fung's conclusions and removed the applicant from the MIG based on the psychological diagnosis of Dr. Siegel.

[16] Under s. 10, the Tribunal may award up to 50 percent of the total benefits payable if it determines that the insurer acted unreasonably, frivolously, vexatiously or in bad faith. I find an award is not appropriate. First, I find that Aviva's denials were proper, that it relied on s. 44 assessments in rendering its decisions and that it reconsidered its position fairly based on the evidence that was provided to it. Second, and in any event, as no benefits are overdue, it follows that the Tribunal cannot order an award under s. 10.

ORDER

[17] The applicant has not demonstrated entitlement to the treatment plan in dispute, interest or an award.

Released: March 19, 2021

Jesse A. Boyce
Vice Chair