Citation: Aiken v. Aviva General Insurance Company 2021 ONLAT 19-002676/AABS – R

RECONSIDERATION DECISION

Before: Sandeep Johal, Vice Chair

Date: June 16, 2021

File: 19-002676/AABS

Case Name: Kemisha Aiken v. Aviva General Insurance Company

Written Submissions by:

For the Applicant: Michelle F. Jorge, Counsel

For the Respondent: Nathalie V. Rosenthall, Counsel

Nathan M. Fabiano, Counsel

OVERVIEW

[1] This request for reconsideration was filed by the applicant (the insured). It arises out of a decision in which I found that the applicant was barred by virtue of s. 55(1)2 of the *Schedule* from commencing her tribunal application to dispute her entitlement to a post-104 week income replacement benefit ("IRB") until she attended three insurer examinations ("IEs") under s. 44.

[2] The applicant submits that I made errors of law and fact such that the Tribunal would likely have reached a different decision.

[3] The applicant asks the Tribunal to reconsider the original decision,[1] and order that the applicant is entitled to pursue her application to dispute her entitlement to the IRB without having to attend any further IEs. The applicant makes her reconsideration request under the old Rule however this request was processed under the current reconsideration Rule.[2]

RESULT

[4] For the following reasons, the applicant's request for reconsideration is dismissed**.**

ANALYSIS

[5] The grounds for a request for reconsideration are contained in Rule 18.2 of the Tribunal's *Common Rules of Practice and Procedure*.[3] A request for reconsideration will not be granted unless one or more of the following criteria are met:

a. The Tribunal acted outside its jurisdiction or violated the rules of procedural fairness;

b. The Tribunal made an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made;

c. The Tribunal heard false or misleading evidence from a party or witness, which was discovered only after the hearing and likely affected the result; or

[1] *K.A. v Aviva General Insurance Company*, 2020 CanLII 61469 (ON LAT)
[2] Rule 18.1 Effective February 7, 2019.
[3] Effective February 7, 2019.

d. There is evidence that was not before the Tribunal when rendering its decision, could not have been obtained previously by the party now seeking to introduce it, and would likely have affected the result.

[6] The applicant submits that Rule 18.2(b) applies in this case and, specifically, alleges that I erred in making the following findings:

i. That the applicant did not provide a reasonable explanation for her non-attendance at the IEs;

ii. That it would be unfair to allow the application to proceed when the respondent has not had an opportunity to conduct IE assessments;

iii. The IE notices were in accordance with the *Schedule* and reasonably necessary.

[7] The applicant also seeks to introduce new evidence that was not provided as part of the preliminary issue decision.

New Evidence under Rule 18.2(d)

[8] In the applicant's request, she points out that, as of June 1, 2020, she was approved for the Ontario Disability Support Payments ("ODSP") and that the test for ODSP and an IRB are largely the same.

[9] The respondent submits that the applicant is attempting to add new evidence despite the fact that Rule 18(d) provides that new evidence may support a request for reconsideration only when such evidence could not have been reasonably obtained earlier and would likely have affected the result.[4]

[10] The applicant seeks to rely on this new evidence for the first time for the purposes of the reconsideration, but the applicant makes no further submissions on why it should be accepted as new evidence in accordance with Rule 18.2(d).

[11] In my view, even if I were to allow the applicant to rely on the new evidence for the purpose of the reconsideration, it would not have affected the result of my decision. The original decision was a preliminary issue decision on whether the applicant was entitled to proceed with her application as a result of non-attendance at an IE assessment.

[4] *I.K. v. Primmum Insurance Company*, 2018 CanLII 13162 at para. 27.

[12] The applicant, with this new evidence, seeks to argue the merits of her claim for an IRB by suggesting that the test to qualify for an ODSP is similar to that of a claim for an IRB.

[13] However, that argument is not applicable for the purposes of the preliminary issue decision or this reconsideration. Even if I accepted the applicant's submission, the new evidence of her approval to receive an ODSP disability benefit would not have changed anything given that, despite her claim, a determination of entitlement to ODSP does not answer the question of whether the IE"s were reasonably necessary. The original decision was not a decision on the merits of the applicant's claim for an IRB, and any new evidence in support of that position goes beyond the scope of the preliminary issue hearing for a s. 44 non-attendance.

[14] As a result, I am not persuaded that the new evidence of the applicant's ODSP entitlement would likely have affected the result of the original decision.

The Tribunal did not err under Rule 18.2(b)

No reasonable explanation for non-attendance

[15] In order to grant a request under Rule 18.2(b), I must not only have made an error of law or fact, but that error must be such that I would likely have reached a different result had the error not been made. On the evidence before me, I am not convinced that I made an error of law or fact in finding that the applicant failed to provide a reasonable explanation for not attending the IE assessments.

[16] The applicant submits that she provided a reasonable explanation for her non-attendance at the IE assessment: specifically, she already attended pre-104 weeks IRB assessments, and that she provided an email to the respondent that she would be willing to attend if the respondent would pay the applicant IRB's until the 104 week mark.

[17] The respondent submits that the applicant is using the request for a reconsideration as an attempt to reargue the issue of providing a reasonable explanation for non-attendance. According to the respondent, the applicant is merely restating evidence that was before me during the written preliminary issue hearing, and the applicant's submissions do not demonstrate how the original decision was based on an error of fact or law that would have likely affected the result.

[18] I agree with the respondent. I addressed the issue of whether the applicant had offered a reasonable explanation for her non-attendance at paragraphs 33-34 and 44-45 of my original decision. Furthermore, I have not been pointed to any evidence from the *Schedule* or otherwise, that placing a condition of payment of the benefit, in exchange for attending the IE is a reasonable explanation, and I am not persuaded that it is.

[19] Based on a review of the evidence, I find no error in the conclusion reached in the original decision. The applicant provided reasons for her non-attendance at the preliminary issue hearing and those were not accepted by me as part of the original hearing.

[20] As a result, I am not persuaded by the applicant's submissions that I made an error of law or fact such that the I would likely have reached a different result had the error not been made.

No error in finding that it would be unfair to allow the application to proceed when the respondent has not had an opportunity to conduct IE assessments

[21] The applicant submits that s. 55(2) permits the Tribunal to allow an applicant to apply for an IRB despite not attending at an IE assessment. Furthermore, the applicant submits that the applicant's injuries have been objective, but the respondent still refuses to pay for an IRB.

[22] The respondent submits that the applicant's submission is another attempt at restating an argument that was already raised at the preliminary issue hearing. According to the respondent, this argument was stated and rejected in paragraph 59 of my original decision.

[23] I agree with the respondent. The applicant has not pointed me to any errors made in the original decision. Rather, she simply restates her position and, in essence, asks me to arrive at a different conclusion. This is not the purpose of a reconsideration.

[24] The original decision addressed the applicant's submissions of the number of assessments she had attended with respect to the pre-104-week IRB test and that the post-104-week IRB is a completely different test. Paragraph 52 of my original decision addressed the difference and provided an explanation as to why I found that attending a pre-104-week IRB assessment is not a reasonable explanation for not attending a post-104-week IRB assessment.

[25] As a result of the above, I am not persuaded that I made an error of law or fact such that the I would likely have reached a different result had the error not been made.

No error in finding that the IE notices were in accordance with the *Schedule* and reasonably necessary.

[26] The applicant submits that she was denied the pre-104 IRB as a result of respondent's IEs and, therefore, the post-104-week IRB is not necessary. Furthermore, the applicant submits that the case law relied upon by the respondent and referred to in the decision are distinguishable or, alternatively, that I misapplied the cases outlined.

[27] The applicant submits that I misapplied what "properly scheduled IE" means from the case of *17-002864 v. Aviva Insurance Company,*[5] and that the case of is *17-005291 v. Travelers Canada,*[6] which sets out the criteria to address in assessing the reasonableness of the proposed IE, is distinguishable.

[28] I addressed both cases in paragraphs 28-31 of my original decision, and the facts of this case were applied to the principles outlined in those decisions. The resulting reasons were outlined in paragraphs 32-39 and 41-48.

[29] I agree with the respondent when it submits that both cases were referred to in the respondent's submissions for the preliminary issue hearing and the applicant chose not to provide submissions on them at that time. The applicant's submissions do not point to, or indicate, how I erred or acted outside my jurisdiction other than to suggest that I did.

[30] The applicant also submits that to allow her to be re-assessed for a benefit that was already denied would not be fair and the *Schedule* does not allow for that to be done. I also addressed this argument in my original decision by setting out that the pre-104-week IRB and the post 104-week IRB, although the same benefit, involve distinct and unique tests to establish their entitlement. I explained this in paragraphs 52 and 54 of my original decision.

[31] In short, the applicant is re-arguing her case based on the criteria in *17-005291 v. Travelers Canada* regarding whether the IE assessments were reasonably necessary. I see no error of law or fact in my previous analysis.

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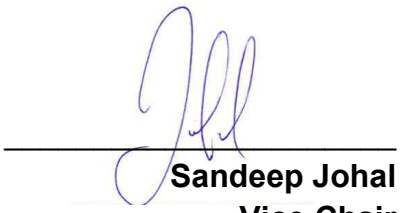
[5] 2018 CanLII 13184 (ON LAT).
[6] 2018 CanLII 13172 (ON LAT).

CONCLUSION

[32] For the reasons noted above, I **dismiss** the applicant's Request for Reconsideration.

Released: June 16, 2021



Sandeep Johal
Vice Chair