



Citation: Fu v. Aviva General Insurance, 2022 ONLAT 20-010705/AABS

Licence Appeal Tribunal File Number: 20-010705/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:

Lai Jun Fu

Applicant

and

Aviva General Insurance

Respondent

DECISION

ADJUDICATOR:

Brian Norris

APPEARANCES:

For the Applicant:

Yu Jiang, Paralegal

For the Respondent:

Hooman Zadegan, Counsel

HEARD:

By Way of Written Submissions

OVERVIEW

- [1] Lai Jun Fu, (“the Applicant”), was involved in an automobile accident on **April 16, 2019**, and sought benefits from Aviva General Insurance, (“the Respondent”), pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (“the Schedule”). The Applicant was denied income replacement benefits (“IRBs”) and a physiotherapy treatment plan by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”) for resolution of this dispute.

ISSUES

- [2] The issues in dispute for this hearing are:
- I. Is the Applicant entitled to IRBs in the amount of \$280.00 per week for the period from February 24, 2020 to-date and ongoing?
 - II. Is the Applicant entitled to a medical benefit in the amount of \$4,654.52 for a physiotherapy treatment plan by Total Recovery Rehab Centre, dated August 19, 2019?
 - III. Is the Applicant entitled to interest pursuant to section 51 of the *Schedule*?

RESULT

- [3] I find that the Applicant has not met his onus to prove entitlement to IRBs and the treatment plan in dispute. No interest is payable.

BACKGROUND

- [4] A vehicle made an improper left turn and struck an oncoming vehicle which then spun and struck the vehicle the Applicant was driving. The Applicant sought no hospital or walk-in clinic care following the accident. Instead, he started physiotherapy treatment on the recommendation of his legal representative.
- [5] The Applicant submits that he suffers from psychological symptoms and injuries such as low mood, difficulty sleeping, and anxiety and headaches. He also submits that he experiences physical pain in his neck, left shoulder, and low back pain and that this constellation of psychological and physical injuries prevents him from completing his duties as a chef and claims entitlement to IRBs as a result.

- [6] In addition to his claim for IRBs, the Applicant claims entitlement to a physiotherapy treatment plan.
- [7] The Respondent contends that that Applicant has not met his onus to prove that his injuries would be present but for the subject accident. It further submits that, if causation is established, that the Applicant has not met his onus to demonstrate that he suffers a substantial inability to complete his essential work tasks.
- [8] The Respondent also submits that the disputed physiotherapy treatment plan is not reasonable and necessary because the Applicant has excellent range of motion ("ROM") and produced no objective evidence of a musculoskeletal impairment attributable to the accident.
- [9] I agree with the Respondent and find that the Applicant is not entitled to the benefits claimed. My reasons are as follows.

ANALYSIS

Income Replacement Benefits ("IRBs")

- [10] The Applicant is entitled to IRBs if he can prove on a balance of probabilities that he is unable to perform the essential tasks of his employment as a result of the accident.
- [11] Upon review of the submissions and evidence, I find that the Applicant has not met his burden to prove that he is entitled to IRBs as claimed.
- [12] The Applicant's medical evidence is unpersuasive. The Applicant relied on the clinical notes and records ("CNRs") of his treatment provider, Total Recovery Rehab and a psychological assessment report. The entirety of the Total Recovery Rehab records provides virtually no information on the Applicant's ability to work during the period he claims entitlement to IRBs. The intake form notes that the Applicant is unable to work a physically demanding job due to accident-related injuries but provides no further information about the job or the reasons why he is otherwise unable to perform the essential tasks of employment. Additionally, the treatment records make no mention of employment. The Applicant claims entitlement to IRBs for a period nearly a year following the accident, yet his disability certificate dated April 23, 2019 anticipated a duration of disability of 9-12 weeks. No other disability certificate was provided.
- [13] Further, the two reports provided by the Applicant do not address his ability to work. The in-home assessment report completed by registered nurse A. Randall

and chiropractor G. Palantzas, dated March 3, 2020 does not speak to the Applicant's ability to work., Instead, it notes that he was unemployed at the time of the accident and enrolled as a full-time college student. In any event, I reject the findings in this report because the report notes that the Applicant's bilateral shoulder, cervical spine, thoracic spine, and lumbar spine ROM is restricted to between 51-70% of normal, on all planes, due to severe pain. Yet, the initial intake forms from Total Recovery Rehab note that the Applicant had overall back ROM of 70% and shoulder ROM of 75%. Either the evidence from the assessment is inaccurate or it demonstrates that his impairments deteriorated over time, despite receiving treatment and reporting to insurer's examination ("IE") assessors that his condition improved 20-30% since the accident. In any event, they are unconvincing evidence of the Applicant's claims.

- [14] The psychological assessment report by B. Cook, psychological associate, dated April 21, 2020, is unpersuasive. The report does not mention that the Applicant is unable to work or should not work. The report includes no commentary regarding whether the Applicant's psychological functioning impacts his ability to complete his essential tasks as a chef. Instead, the report simply notes that the Applicant was working part-time at the time of the accident and is no longer working. I note that this statement is contradicted by the Applicant's pay stubs, which state that he was working 40 hours per week prior to the accident. Further, the report notes that psychometric testing was conducted as part of the assessment and the validity testing in the Personality Assessment Inventory demonstrated that the Applicant provided unusual and bizarre responses that are beyond the acceptable parameters and that it was "quite evident by his response pattern that there was some random and/or idiosyncratic responding style". Psychological associate Cook concluded that the Applicant exhibited a slight tendency to magnify his psychological symptoms but nevertheless determined that the Applicant appeared to have some mental health issues in the aftermath of the accident. However, there is no other commentary or relevant information with regard to the Applicant's ability to work as a chef.
- [15] I find the IE reports of Dr. S. Moshiri, psychologist, and Dr. E. Dessouki, orthopaedic surgeon, dated February 4, 2020 to be most persuasive. Dr. Moshiri interviewed and assessed the Applicant, which included objective psychometric testing, and determined that he sustained an Adjustment Disorder with Mixed Anxiety and Depressed mood as a result of the accident. The reports notes that the Applicant felt his physical condition improved by 20% since the accident but found no improvement psychologically. Dr. Moshiri also recorded that the Applicant indicated that it was his physical injuries, not his psychological injuries, that were preventing him from working. Dr. Moshiri concluded that, despite the

diagnosis, the Applicant's psychological symptoms are not significant enough to cause any substantial inability to perform the tasks of his pre-accident employment. There is nothing in the Applicant's medical records that indicates that any medical professional holds an opinion on the Applicant's ability to work that is different from Dr. Moshiri.

- [16] Dr. Dessouki interviewed and assessed the Applicant and determined he does not suffer an substantial inability to complete his essential tasks as a chef. The Applicant's primary physical complaints were neck and left shoulder pain. Contrary to the in-home assessment report, here the Applicant reported an improvement in his condition of 20-30% overall and, during the physical examination, exhibited a full ROM in all planes of his neck, back, and shoulders. Dr. Dessouki found that the Applicant did not sustain an impairment as a result of the accident and achieved maximal medical recovery with no objective evidence of residual musculoskeletal impairment. The report concludes that the Applicant does not suffer from a substantial inability to perform the essential demands of his pre-accident employment and that the disputed treatment plan is not reasonable and necessary, which I will now address.

PHYSIOTHERAPY TREATMENT PLAN DATED AUGUST 19, 2019

- [17] The Applicant submits that the treatment plan is reasonable and necessary because he received pain relief from treatment. His evidence in support of this treatment plan is discussed above. In short, the only document that suggests that the treatment plan is reasonable and necessary, is the very treatment plan in dispute. Sole reliance on a treatment plan is insufficient to establish whether it is reasonable and necessary. Thus, the Applicant has not met his onus to demonstrate that the treatment plan is reasonable and necessary for his accident-related injuries.
- [18] The physiotherapy treatment plan in dispute, completed by physiotherapist A. Afifi, seeks funding for a reassessment fee, physiotherapy, active therapy, massage therapy, transportation, and progress report. Seeks to increase strength and ROM, reduce the Applicant's pain, and return him to the activities of normal living. Notably, a return to pre-accident work activities is not selected as a functional goal. The treatment plan notes soft-tissue, sprain and strain injuries to the Applicant's neck, back, hips, shoulder, as well as chronic post-concussion headaches and other, primarily psychological, injuries.
- [19] Upon review of the evidence, I find that the prevailing medical opinion on the Applicant's physical health is from Dr. Dessouki. Further, I prefer Dr. Dessouki's opinion over that of physiotherapist Afifi. As noted above, Dr. Dessouki found that

the Applicant sustained no accident-related impairment and that the treatment plan is not reasonable and necessary.

- [20] As noted previously, the in-home assessment by Dr. Palantzas and registered nurse Randall is unpersuasive as it is likely an inaccurate reflection of the Applicant's overall functionality. Further, there is no information in the treatment records from Total Recovery that compels me to disagree with Dr. Dessouki's findings and conclusion. As a result, I find that the Applicant has not met his onus to demonstrate that the physiotherapy treatment plan is reasonable and necessary.

CONCLUSION AND ORDER

- [21] The Applicant was involved in an accident and developed an Adjustment Disorder with Mixed Anxiety and Depressed Mood and minor physical injuries as a result of the accident. However, he has not demonstrated that his accident-related injuries prevent him from completing his essential tasks as a chef. Thus, he is not entitled to IRBs. Similarly, the Applicant has not shown that the physiotherapy treatment plan in dispute is reasonable and necessary as a result of the accident. Thus, the Applicant is not entitled to the treatment plan in dispute.
- [22] The Application is dismissed.

Released: September 19, 2022



Brian Norris
Adjudicator