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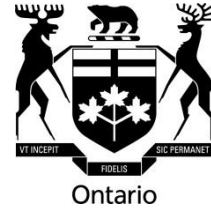
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Date: 2016-10-28

Tribunal File Number: 16-000775/AABS

Case Name: 16-000775 v Aviva

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

(Formerly known as RBC General Insurance Company)

Respondent

DECISION

Adjudicator:

Eleanor White

Counsel For the Applicant:

Dale Rosenberg

Counsel For the Respondent:

Kadey Schultz

Held in writing: October 18, 2016

OVERVIEW

1. The applicant, was injured in a slip and fall accident as he exited his vehicle onto an icy parking lot on February 13, 2013. He applied for and received benefits under the *Statutory Accident Benefits Schedule – Effective after September 1, 2010* (the “Schedule”).
2. The applicant’s predominant injury sustained in the accident was to the lower back, aggravating a documented pre-existing disc herniation with symptoms of sciatica. Information in the file indicated that his coverage was not restricted to that available under the *Minor Injury Guideline*.
3. The applicant submitted a treatment plan (OCF-18) for psychological therapy on April 24, 2014. It was denied by the respondent on April 29, 2014, as a result of the findings of a September 10, 2013 Insurer’s Examination (IE). That IE had been held to review an earlier treatment plan recommending psychological therapy. During the time between that IE and the treatment plan currently in dispute, the applicant was in a second accident. I find the treatment plan in question is neither reasonable nor necessary.

FACTS

4. The applicant first sought a psychological assessment on July 19, 2013 through a treatment plan prepared by Dr. Ana Bodnar, a psychologist. The respondent required the applicant to attend an IE by its psychologist, Dr. Gerry Dancyger, on September 10, 2013. Dr. Dancyger found that the applicant did not sustain any diagnosable disorder as a result of the accident. The respondent declined to pay for Dr. Bodnar’s recommended treatment.
5. After a second motor vehicle accident on December 2, 2013, Dr. Judith Pilowsky, psychologist from Total Patient Care, submitted a treatment plan recommending psychological assessment and treatment. In Dr. Pilowsky’s February 18, 2014 treatment plan and report dated March 13, 2014, she concluded that the applicant was suffering from psychological sequelae as a result of the first accident on February 13, 2013. She recommended twelve sessions of psychological therapy along with the renewed request for an assessment, for a combined amount of \$2,808.98. On April 29, 2014 the respondent denied the twelve sessions and the assessment recommended by Dr. Pilowsky.
6. The applicant takes the position that he is experiencing psychological issues as a result of the first accident on February 13, 2013 that requires assessment and treatment.

7. The respondent takes the position that Dr. Pilowsky's treatment plan for psychological assessment and therapy is neither reasonable nor necessary. They base this position on the findings of Dr. Gerry Dancyger in his report arising from the IE, dated September 10, 2013 and in part due to the emphasis on the first accident assigned by Dr. Pilowsky.
8. All evidence in this matter was submitted in writing.

ISSUES

- A. Is the applicant entitled to the medical benefit of psychological assessment and therapy as proposed in the disputed OCF-18 from Dr. Judith Pilowsky, dated February 18, 2014, as a result of sequelae of the injuries sustained in the accident of February 13, 2013?
 - B. If so, is the applicant entitled to any interest owing on an unpaid benefit?
-
- A. Did the applicant sustain a psychological impairment or develop psychological sequelae from injuries sustained in the accident of February 13, 2013?**
8. The earliest post-accident mention of non-physical symptoms is self-reported and is dated February 19, 2013, just 6 days after the accident. In his Application for Benefits, the applicant reports anxiety, depression and fatigue, fear of exiting vehicles, sleep disorder and nightmares. In contrast, the Disability Certificate completed by his family doctor, Dr. Forcina, on February 27, 2013 restricts the injuries to lumbosacral strain and right leg radiculopathy. The doctor makes note of the pre-existing sciatica and disc herniation (circa 2008/2009) and mentions a previously arranged follow-up appointment with Dr. Seligman, an orthopaedic specialist.
 9. The issue before me concerns an alleged psychological impairment arising from the February 13, 2013 accident, and the disputed treatment and assessment plan for psychological assessment and therapy, submitted by Dr. Judith Pilowsky in April, 2014. The genesis of that treatment plan was the first Treatment Plan for psychological assessment submitted by Dr. Ana Bodnar, dated July 18, 2013, based on a pre-screening report from Karen

Bernstein, MA, which was paid for by the applicant (Note whether this TP / assessment was paid for or not)

10. The initial treatment plan from Dr. Bodnar states under 'Additional Comments' that the physical injury and the pain in his lower back and down the right leg have caused an inability to return to full time work, to enjoy his life as he did prior to the accident and that "the psychological aftermath of the accident has been profound". The applicant specified his difficulty with irritability, concentration and memory of details.
11. Dr. Bodnar's submission prompted an IE conducted by Dr. Gerry Dancyger, psychologist. Dr. Dancyger reviewed all medical documentation and conducted both psychometric testing and an interview. His report, dated September 10, 2013, stated that there was:
 - i. no psychological impairment caused by the accident on February 13, 2013,
 - ii. no diagnosable accident-related psychological impairment on exam, and
 - iii. the proposed assessment was neither reasonable nor necessary.
12. The clinical notes and records (CNR) from the applicant's family doctor include notes from an office visit on August 18, 2011 (almost 2 years prior to the accident). On that date, the applicant had confided that his boss said he must have a 'mental disorder' as he was unable to focus, unable to finish a task. He would lose interest in what people were saying or would start 2 to 3 tasks simultaneously but not complete them. The applicant recalled he had experienced similar difficulties when he was in high school. In another entry in the clinical notes on February 4, 2012, Dr. Forcina wrote that he had referred the applicant to a psychologist, but the applicant had not attended for his visit. Both before and after the date of the subject accident, there was no other mention of any psychological problems in the family doctor's records.
13. In preparing her March 13, 2014 report, Dr. Pilowsky failed to note any review of medical documentation, or to explain the discrepancy between her findings and those of Dr. Dancyger. She misquoted the date of the second accident as September 2013, and not the date confirmed by the insurer, December 2, 2013. Dr. Pilowsky opined that although the second accident may have aggravated the injuries of the February 13, 2013 accident, the psychological impairment was a direct result of the February 2013 accident. Dr. Pilowsky diagnosed the applicant as meeting the DSM-5 criteria for a diagnosis of: *Major Depressive Disorder, single episode, moderate; symptoms of PTSD with in-vehicular anxiety; and Somatic Symptoms Disorder with Predominant pain, persistent and moderate.*

14. The respondent submits through surveillance reporting from Intrepid Investigations, dated March 9, 2015, that the applicant is not disabled from driving for work or life activities. The surveillance provided visual evidence (albeit one year later) of the applicant engaged in work for his own company, Dr. Backsplash, driving apparently without any difficulty and enjoying time with family, friends and his new son. Although not directly addressing psychological impairment, the report does give evidence of the applicant's ability to engage in work and life activities. The applicant has indicated from that shortly after the time of the accident he resumed his work activities within his own company, Dr. Backsplash but at a reduced level of work, due to his physical limitations as a result of the accident.

The Parties' positions

15. The applicant takes the position that the treatment plan in dispute should not have been denied. They cite the Disability Certificate (OCF-3) completed by the chiropractor, Dr. Goldstein, following the second accident, in December, 2013. Here, Dr. Goldstein recommended some psychological treatment as the applicant had complained of sleep disturbance following the accident.
16. The applicant states he was unable to return to his full-time employment with Tucker High Rise where he was employed as a labourer as he was physically and psychologically unable to do so.
17. The applicant cites Dr. Pilowsky's report to demonstrate the necessity of psychological therapy for the applicant based on test results and the doctor's diagnoses. It is important to note that Dr. Pilowsky links the cause of the psychological problems directly to the initial accident of February 13, 2013.
18. In addressing his failure to pursue psychological counseling on his own, the applicant argued that the financial burden of doing so is not within his means, due to the stoppage of IRBs and his diminished ability to work.
19. The respondent takes the position that the treatment plan submitted on April 24, 2014 by Dr. Pilowsky should be denied as it represents a duplication of the same services as those described in Dr. Bodnar's earlier treatment plan. In this context, the findings of Dr. Dancyger, again apply to this currently disputed treatment plan in that he found no need for psychological treatment as a result of the accident of February 13, 2013. As the only known event that would change the clinical condition between the dates of submission of the two similar treatment plans is the second accident of December 2013, that event should be of importance in Dr. Pilowsky's report. Instead, Dr. Pilowsky finds the causation of her diagnoses to be the first accident in February, 2013.

20. The respondent also relies on the absence of any other clinical evidence of psychological problems. The applicant has, it submits, not satisfied the onus to prove the need for psychological assessment and therapy. The respondent also points to the surveillance reports and argues that they do not support the findings in Dr. Pilowsky's report with respect to driver anxiety, depression and inability to participate in life.
21. The respondent makes the point that the applicant has not shown efforts that he has pursued any psychological counselling or therapy and yet finds the issue worthy of appeal on the eve of expiry of the two year limitation period to dispute entitlement to the subject plan.
22. The respondent states that there is no medical or legal basis for the applicant's claim and that the appeal should be dismissed and costs awarded to the respondent.

ANALYSIS

23. I find the disputed Treatment and Assessment Plan (OCF-18) submitted by Dr. Judith Pilowsky to be neither reasonable nor necessary. Dr. Pilowsky's plan closely duplicates the plan submitted by Dr. Ana Bodnar on July 18, 2013, subsequent to the first accident. The duplication of the recommendations in the treatment plan is pertinent because the first plan triggered the responding IE performed by Dr. Garry Dancyger, who reported no diagnosable psychological impairment arising from that accident. In addition, the duplication is important because Dr. Pilowsky states that despite the intervening event of a second accident, the issues leading to her diagnosis arise strictly from the first accident.
24. Given that Dr. Pilowsky tied her diagnosis to the first accident, its duplication of services again called for a close reading of Dr. Dancyger's report and rendered the recommendations of Dr. Pilowsky to be unsupported and unreasonable. Nowhere in her report did Dr. Pilowsky review available clinical notes or records of the family doctor, or the IE report. The only known significant intervening event between Dr. Dancyger's report and that of Dr. Pilowsky was the second accident; however she assigned that accident little weight without providing any explanation as to why. Dr. Pilowsky did not present a compelling argument with respect to the difference in findings from those of Dr. Dancyger, or her rationale for tying the applicant's symptoms to the accident of February 13, 2013.
25. The onus falls on the applicant to show the reasonableness and necessity of the recommended treatment and the condition it addresses. The applicant did not seek out any psychological treatment on his own. In fact, the family doctor had noted in his clinical notes and records that his patient had spoken about historical problems with focus and attention, with respect to problems

at work and had evidently not attended an arranged appointment with a psychologist in 2011. Otherwise, in his clinical notes and records subsequent to the accident, there was only mention of his lower back problems.

26. According to surveillance materials, the applicant has been able to pursue self-employment in his field and to enjoy his expanding family. I acknowledge his ongoing difficulties with his lower back and understand that the limitations from physical pain and reduced function are frustrating and stressful, but on reviewing all of the evidence, there is no substantiated evidence of a diagnosable psychological condition that is either significant enough to warrant treatment or to consider the disputed treatment plan reasonable and necessary.

B. Is there any interest owing?

27. As I have not found the disputed Treatment and Assessment Plan to be either reasonable or necessary, there is no outstanding medical benefit to which the applicant is eligible and therefore, no interest owing on the same.

COSTS

28. The respondent raised the issue of costs, stating that the claim is frivolous and vexatious and should be dismissed with costs made payable to the respondent. The respondent is supported by LAT Rule 19.1 that allows a party to make that request, however Rule 19.4 states that the party shall set out the reasons for the request and the particulars of the other party's conduct that are alleged to be, in this instance, 'frivolous and vexatious'. As the respondent has failed to do so, I dismiss the request for costs submitted by the respondent.

RESULT

29. I find on all of the evidence that:
- A. The applicant is not entitled to the medical benefit of psychological therapy as proposed in the disputed treatment and assessment plan from Dr. Judith Pilowsky, dated February 18, 2014, as a result of sequelae of the injuries sustained in the initial accident of February 13, 2013.
 - B. As the denial of the benefit is upheld, there is no issue of interest due to the applicant in this matter.

Eleanor White,
Adjudicator