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Ontario

RECONSIDERATION DECISION

Before: D. Gregory Flude, Vice-Chair

Date: December 20, 2019

File: 18-002880/AABS

Case Name: V.R. v. Aviva Insurance Company

Written Submissions by:

For V.R.: Arthur Semko, Paralegal

For the Respondent: Brittany Tinslay, Counsel

OVERVIEW

[1] V.R. asks for a reconsideration of my decision released on April 24, 2019. My decision denied the applicant three chiropractic treatments and a chronic pain assessment on the basis that they were not reasonable and necessary.

[2] The applicant makes the request pursuant to Rule 18.2 (a) and (b) of the Licence Appeal Tribunal (LAT) Rules of Practice and Procedure Version 1 (April 2016) (the "LAT Rules"). The applicant submits the Tribunal violated procedural fairness by overlooking or mischaracterizing the applicant's evidence. In the alternative, the applicant submits the Tribunal made a significant error in law by failing to fully consider all the notice requirements provided in section 38(8).

[3] Pursuant to s. 17(2) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act*, I have been delegated responsibility to decide this matter in accordance with the applicable rules of the Tribunal.

[4] Rule 18.2 of the *Licence Appeal Tribunal*, *Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)* (the "Rules") sets out the grounds upon which a party may seek reconsideration of a decision. Rule 18.1 requires V.R. to identify which ground he relies on. V.R. has identified Rule 18.2(b): "The Tribunal made a significant error of law or fact such that the Tribunal would likely have reached a different decision had the error not been made."

[5] It is not clear from V.R.'s reconsideration submissions that he is seeking reconsideration of my decision to deny the three chiropractic treatment plans as he focusses almost exclusively on my finding, based on the medical evidence before me, that a chronic pain assessment is not reasonable and necessary. Notwithstanding the limitations in V.R.'s submissions I will reconsider my whole decision.

ISSUE:

What is the alleged error in law?

[6] The alleged error of law is set out in paragraphs 4 to 6 of the reconsideration submissions. It may be condensed to this proposition: I made an error of law because I preferred the evidence of Aviva's medical expert, Dr. Todd Levy, over the evidence of V.R.'s medical expert, Dr. Michael West. In V.R.'s submission, Dr. Levy's evidence that there was no objective basis to indicate that V.R. may suffer from chronic pain syndrome was wrong, and my acceptance of it was an error in law.

[7] Aviva submits that it is solely the prerogative of an adjudicator to consider the evidence in a hearing and assign the appropriate weight to which it should be

given. That is, an adjudicator may accept some or all of the evidence of any given witness, assuming that is done on a principled basis. In Aviva's submission, my decision does no more than reached an outcome based on the manner in which I properly weighed the relevant evidence.

RESULT

[8] Having reviewed my decision and considered the submissions of the parties, I can find no error of law.

New Evidence

[9] Aviva argues that V.R. put forward new evidence that he did not rely on at the hearing and that this new evidence should be excluded.

[10] The new evidence in question is set out in paragraph 7 of V.R.'s reconsideration submissions. It is an extract from an academic paper on the recognition of chronic pain syndrome: Hall, Hamilton (MD), Mcintosh, Greg (BHK), Melles, Tony (BSc PT), *Recognition and Management of the Chronic Pain Syndrome* published in the Canadian Journal of Continuing Medical Education 1995; 7(2): 39-48. It was not part of V.R.'s evidence at the hearing and was not commented upon by Dr. West or put to Dr. Levy.

[11] The test for admission of new evidence is set out in Rule 18.2(d): "There is new evidence that could not have reasonably been obtained earlier and would have affected the result." V.R. has presented no justification for why this evidence could not have been reasonably obtained earlier. The paper is not new, since it was published in 1995. Absent an explanation of why it was not reasonably discoverable, V.R. has failed the first part of the new evidence admissibility analysis.

[12] I am of the view that, far from affecting the result, the quoted extract actually supports my decision. It accords almost exactly with Dr. Levy's evidence that chronic pain syndrome is characterized by a centralization of pain away from pain foci after the physical causes of the pain are no longer present. It is this characteristic that the paper refers to when it states the problem: "Presents with a lack of objective physical findings."

[13] The paper fails to meet either branch of the test for admissibility set out in Rule 18.2(d) and I will not consider it.

FACTS AND ANALYSIS

[14] The facts are fully laid out in my decision at first instance, so I will not fully canvass them here. However, I will recap them briefly. V.R. was injured in motor vehicle accident on August 5, 2016. Aviva initially determined that his injuries

were minor and provided $3,500 of treatment pursuant to sections 3 and 18 of the *Statutory Accident Benefits Schedule – Effective September 1, 2010*, O. Reg. 34/10. In 2017, an insurer's examination (IE) found V.R. to have suffered psychological impairments and, thus, Aviva approved a course of psychological treatment. From then on, Aviva no longer considered V.R.'s injuries to be minor, but it has continued to deny further chiropractic treatment based on a further IE that determined V.R. would get more benefit from a home-based exercise program than from passive treatments.

[15] The psychological treatment program started in April 2017 and continued until January 2018. The notes from the treating psychologist show marked physical and psychological improvement over the summer and into the fall of 2017. By mid-to-late summer, V.R. reported that his sleep had returned to normal, he was exercising regularly and feeling very positive about life. As the year wore on, it appears the V.R. had become dissatisfied with his career path and, as a result, quit his job to pursue other activities, which he had yet to identify. One possibility he cited was becoming an aviation mechanic, although that pursuit seems to have been abandoned.

[16] In addition to the psychological treatment clinical notes and records, V.R.'s family doctor's clinical notes and records show scant reference to ongoing back pain. V.R. did not visit his family doctor for back pain related treatment until many months after the accident. It is not until 10 months after the accident that he first mentioned the accident to his doctor. Thereafter, there are several more visits during which the doctor records intermittent back pain.

[17] The medical record stands in stark contrast to the oral evidence V.R. gave at the hearing and to the subjective facts reported by V.R. to Dr. West that became the basis of Dr. West's report. Specifically, V.R. reported continual and debilitating pain in the range of 8 out of 10 where 10 is the worst pain imaginable. He testified that he quit his job because the pain from standing all day was too much for him (he reported sitting was a problem early in his psychological treatment).

[18] Based on the above inconsistencies, I preferred the contemporaneous medical evidence set out in the medical records. Since Dr. West's opinion was largely based on V.R.'s unsupported subjective reporting of symptoms, I discounted that report.

Legal test for chronic pain syndrome.

[19] While it is not clear from his submissions, it appears that V.R. submits that there is a legal test for chronic pain syndrome set out by the Supreme Court of Canada in *Martin v. Worker's Compensation Board of Nova Scotia*, [2003] 2 S.C.R. 504 (*Martin*) at para 1, p. 513. This position is based on a misreading of the law.

[20] *Martin* was a constitutional challenge that arose out of a policy implemented by the Worker's Compensation Board of Nova Scotia that excluded compensation for chronic pain syndrome. In the first paragraph of the decision, the Court was at pains to state that chronic pain syndrome was a real condition. The court stated as follows:

> There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques.

[21] The focus of the Court's analysis was the persistence of pain beyond the normal healing time, not supported by objective findings at the site of the injury. This statement reflects Dr. Levy's evidence that the pain becomes centralized away from the pain foci after the physical cause of the pain are no longer present.

[22] The logical inference from V.R.'s submission that chronic pain syndrome has no objective basis is that it does not, in fact, exist. V.R. would deny a tribunal the ability to look at expert medical evidence to determine the existence of chronic pain syndrome because there are no objective findings that a medical expert can point to in support of an opinion. This analysis, of course, applies equally to the opinion of V.R.'s expert, Dr. West. How can he diagnose V. R. with chronic pain syndrome if there are no objective indicia of the condition?

CONCLUSION

[23] Having considered the parties' submissions, I uphold my decision at first instance. The substance for this request for reconsideration is simply that I give more weight to Dr. West's findings that to those of Dr. Levy. V.R. has not pointed to any significant error of law or fact the might have impacted my initial weighing of this evidence and, ultimately, my decision to deny him the requested benefits. Thus, he has failed to meet the test set out in Rule 18. For these reasons, his reconsideration request is denied.

Released: December 20, 2019

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D. Gregory Flude
Vice-Chair