Citation: McIntyre v. Economical Insurance Company, 2023 ONLAT 21-005065/AABS - R

RECONSIDERATION DECISION

Before:	**Bruce Stanton, Adjudicator**
Licence Appeal Tribunal File Number:	**21-005065/AABS**
Case Name:	**Cory McIntyre v. Economical Insurance Company**

Written Submissions by:

For the Applicant:	Michael Brill, Counsel
For the Respondent:	Kadey Schultz, Counsel

BACKGROUND

[1] The applicant is seeking a reconsideration of my decision released March 16, 2023 ("decision"), in relation to my finding that the applicant was not entitled to a neuropsychological assessment, multidisciplinary catastrophic impairment assessment, and SPECT Scan.

[2] The grounds for requesting a reconsideration are found in Rule 18.2 of *The Licence Appeal Tribunal Common Rules of Practice and Procedure, dated October 2, 2017,* as amended (the "Rules"). It directs that to have a decision of the *Licence Appeal Tribunal* (the "Tribunal") reconsidered, the applicant must first satisfy at least one of the following criteria in Rule 18.2:

(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 evidence from a party or witness, which was discovered only after the hearing and likely affected the result; or

(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.

[3] The applicant is seeking a reconsideration pursuant to Rules 18.2(a), (b), and (d) but, contrary to Rule 18.1(c), he did not specify the relief or remedy he is seeking.

[4] I must decide if the applicant's request satisfies one or more of the criteria in Rule 18.2 before I can make an order pursuant to Rule 18.4(b), to confirm, vary or cancel my decision, or order a rehearing.

RESULT

[5] The applicant's request for reconsideration is denied.

ANALYSIS

Applicant's Request for Reconsideration

[6] In the applicant's request for reconsideration, he submits that I occasioned procedural unfairness (Rule 18.2(a)), erred in law and fact (Rule 18.2(b)), and

that new evidence that could not have been obtained prior to the hearing, would have affected the result (Rule 18.2(d)). Under Rule 18.2, the threshold for reconsideration is high. The party requesting reconsideration must demonstrate how or why my decision falls into one or more of the criteria set out in Rule 18.2.

Rule 18.2(a) – Procedural Unfairness

[7] The applicant has not satisfied grounds for reconsideration under Rule 18.2(a) for the following reasons.

[8] Under Rule 18.2(a) the applicant must demonstrate that the Tribunal acted outside its jurisdiction or violated the rules of procedural fairness.

[9] At paragraphs 5 and 6 of his submissions, the applicant claims that I failed to provide adequate reasons for disregarding medical evidence of neurologists Dr. Jha and Dr. Basile, and two IE assessors, Dr. Weinstein, psychiatrist, and Dr. Angel, neurologist, in relation to the neuropsychological assessment and the SPECT scan issues.

[10] The respondent submitted that that the Tribunal did not violate the rules of procedural fairness.

[11] In relation to the neuropsychological assessment, I considered and weighed the evidence the parties directed me to. For example, at paragraphs 21, 22 and 23 of my decision I reviewed and commented on the medical evidence, and at paragraph 24 I summarize the reasons for my finding. In his hearing submission, the applicant did not direct me to Dr. Jha's neuropsychological report in relation to this disputed assessment.

[12] On the SPECT scan issue, I considered the evidence the parties directed me to at (paragraphs 48, 49 and 50) and gave reasons why I did not assign more weight to Dr. Jha's report at paragraph 49. There is also an earlier discussion of his report at paragraph 41, in relation to the multidisciplinary CAT assessment issue. I found that his report and diagnosis of traumatic brain injury was inconsistent with other medical evidence.

[13] The applicant submits that I did not give adequate reasons for disregarding the evidence of Dr. Basile, neurologist. According to the documents submitted with the reconsideration request, Dr. Basile's assessment of the applicant occurred on April 26, 2022, three days before the hearing. This evidence was not submitted for the hearing. It cannot now be the basis for seeking reconsideration under Rule 18.2.

[14] I considered Dr. Weinstein's and Dr. Angel's evidence and commented on it at paragraphs 42 and 44 of my decision, in relation to the multidisciplinary CAT impairment assessment issue. The applicant did not direct me to these experts' reports in relation to either the neuropsychological assessment issue or the SPECT scan issue.

[15] The applicant's submissions with respect to procedural unfairness arise from my finding that the three treatment plans were not reasonable and necessary, and that I failed to provide adequate reasons. I see no violation of procedural fairness and find that these submissions result from a disagreement with my finding which is not grounds for reconsideration.

[16] I find the applicant has not satisfied the ground for reconsideration in Rule 18.2(a).

Rule 18.2(b) – Error in law or fact

[17] I find the applicant has not satisfied the grounds for reconsideration under Rule 18.2(b). I find there was no error in law or fact in my decision in this matter for the following reasons.

[18] In relying on Rule 18.2(b) as a ground for reconsideration, it is the applicant's burden to identify what errors in law or fact occurred, and if so, that they would have likely resulted in a different outcome had they not been made.

[19] In his submissions, the applicant submits that I erred in law or fact because I (i) did not find the three treatment plans were reasonable and necessary, (ii) concluded that the applicant's family physician, Dr. Nizzero, made no reference to a brain injury, and (iii) concluded the surveillance demonstrated the applicant was returning to work-like activities.

No error in law or fact with respect to evidence and treatment plans

[20] I find I made no error in law or fact with my finding on reasonableness and necessity of the treatment plans.

[21] The applicant submits at paragraph 2 and 3 of his submission that I erred in law or fact because I found the treatment plans were not reasonable and necessary. The applicant submits that "the medical evidence did support a finding" that they were reasonable and necessary.

[22] It is the applicant's burden to demonstrate that treatment plans in dispute are reasonable and necessary. In the hearing, I found, on a balance of probabilities, with the evidence before me, that he did not meet his burden.

[23] In his submissions, the applicant repeats his reasons why the treatment plans are reasonable and necessary, but does not identify an error of fact or law. His claim centres upon how I assigned weight to the medical evidence before me. For each of the three subject treatment plans, I explained the reasons for my findings, including which evidence I found more compelling, and which I assigned less weight to. At paragraphs 22, 23 and 24 I commented on the evidence the parties directed me to in relation to the neuropsychological assessment. Paragraphs 41 through 44 include my analysis of the evidence in relation to the multidisciplinary CAT assessment, and paragraphs 49 and 50 provide my review of the evidence in relation to the SPECT scan.

[24] In not identifying what error I made in law or fact regarding the treatment plans, I find the applicant has not met the test in Rule 18.2(b). Reconsideration is not a means to reargue the position a party took in the hearing. He may disagree with my finding, but after considering and weighing the evidence before me, my conclusion was that he had not met his burden.

Dr. Nizzero's records

[25] The applicant submits, at paragraph 7 of his submission, that I erred in law and fact by concluding that Dr. Nizzero made no reference to a brain injury.

[26] For the hearing, the applicant submitted the clinical notes and records ("CNR") of Dr. Nizzero for May 4, 2021 (CT scan results), May 26, July 5, and July 21, 2021. I reviewed the evidence the applicant directed me to. The CT scan result of May 4, 2021 was unremarkable. The May 26, 2021 records make mention of the applicant having a fall where he hit his head again. Before the fall, he'd been feeling less anxiety, going to therapy and feeling much better. Sleep was okay. The CNR notes, under the heading of I/P, "concussion – will send to another neurologist". On visits to Dr. Nizzero six and eight weeks later, on July 5th and 21st, the CNR's make no reference to any persisting concussion or brain injury.

[27] In his submissions for the reconsideration, the applicant submitted additional CNR's from Dr. Nizzero. The additional records, beyond those of May 4 and 26, July 5 and 21 discussed above, were not part of his submission for the hearing. My decision was based on what the parties directed me to in their submissions for the hearing.

[28] The respondent submitted Dr. Nizzero's CNR's beyond the four dates submitted by the applicant and it made several references to them its submissions, which I reviewed. After the respondent made its submissions for the hearing, the applicant had an opportunity to reply and make further submissions in respect to the additional CNR's prior to hearing. He did not. I find I did not make an error in fact or in law with respect to the Dr. Nizzero records I was directed to in the hearing.

Surveillance

[29] I find I did not make an error in considering surveillance evidence.

[30] In paragraph 8, the applicant submits that I erred in fact when I concluded the surveillance depicted the applicant returning to work-like settings and activities of daily living. My decision refers to surveillance in several paragraphs. At paragraph 41, I note that "Surveillance evidence shows the applicant engaging in work-like activities, starting a new business, connecting socially, shopping and attending appointments in the community."

[31] I note in paragraph 29 of the decision that surveillance evidence is consistent with the findings of occupational therapist, Dale Beacock, who conducted the IE in-home assessment of the applicant. My conclusions on the surveillance were made in consideration of the parties' submissions and its consistency with other medical evidence before me.

[32] The applicant takes issue with my finding and how I weighed the surveillance evidence before me but has not pointed to an error. In regard to surveillance evidence, I find the applicant has not met the requirement of Rule 18.2(b).

[33] The applicant has failed to identify what error in law or fact I made in relation to my determination of reasonableness and necessity of treatment plans, in considering Dr. Nizzero's CNR's, and in considering surveillance evidence. Accordingly, he has not satisfied the criteria in Rule 18.2(b) for reconsideration.

Rule 18.2(d) New Evidence

[34] I am not satisfied that new evidence provided by the applicant, post-hearing, could not have been obtained previously by the applicant, therefore it fails to satisfy the criteria of Rule 18.2(d).

[35] The applicant relies on Rule 18.2(d) in seeking a reconsideration of my decision and has submitted new evidence in support of the reasonableness and necessity of the three treatment plans. To grant a reconsideration on the ground of Rule

18.2(d) the applicant must show that evidence exists that was (i) not before the me when I was rendering my decision, (ii) could not have been obtained previously by the applicant, and (iii) would likely have caused a different decision.

[36] In paragraph 4 of his submission, the applicant submits that catastrophic impairment assessment reports completed on June 8, 2022 determined that the applicant meets a catastrophic impairment definition under criterion 7 and 8, and that this new evidence could not have been obtained earlier.

[37] However, the applicant has not explained why the new evidence could not have been obtained before the hearing. The applicant initiated his appeal on April 22, 2021 and a case conference was held on August 17, 2021 which ordered the written hearing, including the due dates for the disclosure of documents. The multidisciplinary catastrophic impairment assessment was an issue in dispute from the date of the application. Disclosures for the hearing were not due until February 25, 2022, ten months after the application and six months after the case conference.

[38] In summary, the applicant had up to 10 months to obtain and file the evidence he is now submitting as part of the process of seeking reconsideration, but provides no reasons why it could not have been obtained for the hearing.

[39] In the absence of any explanation for the delay in obtaining this new evidence, and in considering the amount of time that has been available to the applicant to obtain this evidence, I find that the applicant has failed to demonstrate the evidence could not have been obtained before the hearing, which is a requirement of Rule 18.2(d).

[40] The applicant has failed to meet the threshold for reconsideration as set out in Rule 18.2(d).

CONCLUSION

[41] For the reasons noted above, I deny the applicant's request for reconsideration and confirm the Tribunal's decision.

Bruce Stanton
Adjudicator
Tribunals Ontario – Licence Appeal Tribunal

Released: June 23, 2023