

On judicial review from a decision of the Manitoba Health Appeal Board delivered May 10, 2023.

Date: 20241230
Docket: CI 23-01-41544
(Winnipeg Centre)
Indexed as: Fehr v.
Manitoba (Health Insured Benefits, Insurance Division) et al.
Cited as: 2024 MBKB 191

COURT OF KING’S BENCH OF MANITOBA

B E T W E E N:

KELSEY FEHR AND KELLY FEHR,	)	<u>Michael D. Zacharias</u>
	)	for the applicants
applicants,)	
	)	<u>Brian T. Jones</u>
- and –	)	for Manitoba Health Insured
	)	Benefits, Insurance Division
)	
MANITOBA HEALTH INSURED BENEFITS,	)	<u>Melanie Wire</u>
INSURANCE DIVISION AND MANITOBA	)	for Manitoba Health Appeal
HEALTH APPEAL BOARD,	)	Board on a watching brief
)	
respondents.	)	Judgment delivered:
	)	December 30, 2024

SUCHE J.

INTRODUCTION

[1] This is a judicial review wherein the applicants seek an order quashing a decision of the Manitoba Health Appeal Board (the “Board”) dated May 10, 2023, on the grounds that it was unreasonable.

OVERVIEW

[2] The applicants are sisters who suffer from lipedema, a chronic incurable disease of connective tissue, which is painful and interferes with their mobility and significantly impacts their quality of life.

[3] Water-assisted or tumescent liposuction are treatments offered for lipedema in several countries, but not Canada. Pursuant to ***The Health Services Insurance Act***, C.C.S.M. c. H35 (the "**Act**"), Manitoba Health Insured Benefits, Insurance Division ("Manitoba Health") funds medical treatment not available in Canada provided certain conditions have been met.

[4] Exceptions to the types and conditions of funding are set out in the ***Excluded Services Regulation***, M.R. 46/93, (the "**Regulation**"). In issue here are subsections 18(b) and (c), which exclude funding for:

18. Services that are determined by the minister, after reviewing the available evidence, to be

...

(b) an emerging treatment or diagnostic procedure for an illness, injury or condition for which the efficacy of the service has not been established;
or

(c) any other services that are provided in conjunction with or in relation to services referred in clause (a) or (b).

[5] The applicants have applied on three occasions for funding for liposuction surgery in the U.S. In 2018, their vascular surgeon requested funding for a surgical assessment for water-assisted liposuction at the Lipedema Surgery Center in Georgia. Manitoba Health denied the request based on subsection 18(b) of the ***Regulation***. The applicants appealed to the Board, which denied the appeal.

[6] In September 2019, the applicants again applied for funding, this time to undergo total body lymph node-sparing liposuction. Their request was supported by Dr. Manfred Ziesmann, their plastic surgeon. Manitoba Health denied funding for either water-assisted or tumescent liposuction on the basis that water-assisted liposuction was excluded by the ***Regulation***, and tumescent liposuction was available in Winnipeg.

[7] The applicants appealed to the Board. The appeal was to be heard in May 2020, but just before the start of the hearing, Manitoba Health advised it would approve the surgery. This was confirmed by letter on July 23, 2020, which stated:

Please be advised that Manitoba Health Senior and Active Living (MHSAL) has approved [sic] funding for you to attend Stanford Health Center in Palo Alto, CA (USA) to receive total body liposuction for the medical condition of lipedema.

[8] The applicants went to Stanford Health Center in August 2021 for a surgery consultation, and then underwent tumescent liposuction there in April 2022. Both visits were fully funded by Manitoba Health.

[9] In June 2022, Dr. Ziesmann requested approval for funding so second surgeries could be performed. The Stanford Health Center surgeon who performed the procedures also wrote a letter in support of the request.

[10] When Kelly Fehr contacted Dr. Ziesmann's office to request the referral, she was told that Manitoba Health was no longer funding liposuction for lipedema. She subsequently spoke to a representative of Manitoba Health in early June 2022, who explained that the plastic surgery section at the Health Sciences Centre had determined

liposuction was no longer the standard of care for lipedema, and as a result funding would not be provided.

[11] Manitoba Health formally denied the applicants' request for funding on November 23, 2022. They appealed to the Board which, following a hearing on March 2023, released the decision in issue (the "Decision").

[12] The applicants say the Decision is unreasonable in several respects, which I summarize as follows:

- The Decision is not transparent, intelligible or justified, nor is it justifiable considering the relevant legal and factual matrix;
- In July 2020, when Manitoba Health approved funding for total body liposuction to be performed at Stanford Health Center, Manitoba Health was aware that a series of procedures would be performed over time. Having made the decision to fund total body liposuction, it was not open to Manitoba Health to deny the second surgeries; and
- The Board answered the wrong question when it concluded that liposuction is not the standard of care for lipedema. It did not consider, as it should have, the efficacy of the treatment option.

STANDARD OF REVIEW

[13] The parties agree that the test to be applied on a judicial review is reasonableness as set out in the majority decision in ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65. This requires a reviewing court to focus on the decision itself, including both the decision-maker's reasoning process and the

outcome. If the decision, when read as a whole, is transparent, intelligible and justified, it is reasonable. This requires an internally coherent and rational chain of analysis that is justified in relation to the facts and the law that apply.

[14] Fundamental to this standard of review is that a court is to refrain from deciding the issue itself or deciding a range of possibilities. In addition, the decision is not assessed against a standard of perfection, nor is a review a hunt for errors or an exercise in nitpicking. Rather, only material errors or shortcomings such that the decision fails to exhibit the requisite degree of justification, intelligibility and transparency are fatal. At the same time, if there are fundamental gaps in reasoning or an unreasonable chain of analysis, a court is not permitted to fill in the gap.

[15] In ***Smith v. The Appeal Commission***, 2023 MBCA 23, the Manitoba Court of Appeal helpfully summarized the principles identified in ***Vavilov***:

[75] Central to applying the reasonableness standard is the recognition that no two administrative decisions are alike; the relevant legal and factual context matters (*ibid* at paras 88-90). Surrounding contextual considerations generally relevant to assessing reasonableness, mindful that a factor's relative importance is always situational, include:

- (a) the expertise of the administrative body;
- (b) the governing statutory scheme;
- (c) other relevant statutory or common law;
- (d) the principles of statutory interpretation;
- (e) the evidence before the decision-maker and facts of which the decision-maker may take notice;
- (f) the submissions of the parties;
- (g) the past practices and decisions of the administrative body; and

(h) the potential impact of the decision on the individual to whom it applies.
(*ibid* at paras 31, 92-93, 106).

THE RECORD

[16] A preliminary issue, which was mostly resolved by consent, concerns the proper contents of the record.

[17] Both applicants filed affidavits. The parties agree that certain information in the affidavits, as well as exhibits attached, go beyond what is properly before the court.

[18] The record properly consists of:

- The transcript of the Board hearing;
- The parties' briefs filed with the Board, including all materials allowed;
- Notices of Appeal; and
- Additional documents attached as exhibits to the affidavit of Amanda Cloutier.

[19] Unresolved was whether information in the applicants' affidavits about the outcome of the treatments in 2022; subsequent treatments they have undergone, which they paid for themselves; and the costs they incurred in connection therewith should be included. The applicants say this is properly before the court because if I conclude tumescent liposuction is not excluded by the ***Regulation***, I should also order that they be reimbursed for these costs.

[20] I disagree. As pointed out by Manitoba Health, if I make such an order, the proper remedy is to order Manitoba Health to reimburse the applicants in accordance with the ***Regulation***. Thus, the portions of the affidavit of Kelly Fehr containing the additional

information referred to in [19] are not properly before the court. Only paragraphs 1, 9, 11, 16 to 20, 22, 23, 31 and 33 should be considered. This is what I have done. Paragraphs 3 to 5 of Kelsey Fehr's affidavit are also not properly part of the record, and therefore, I will not consider them in deciding this application.

ANALYSIS AND DECISION

[21] I agree with the applicants that the Decision has shortcomings with respect to one of the two questions before it. At its essence, the Board said it agreed with Manitoba Health's decision that the procedure was an emerging treatment, and therefore excluded by the **Regulation**. The Decision does not however, provide any analysis. Put simply, the Board did not answer the critical question of why it agrees with Manitoba Health.

[22] The importance of reasons by administrative tribunals explaining or justifying their decisions is well established. **Vavilov** comments on this:

[79] ... Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power: ... As L'Heureux-Dubé J. noted in *Baker*, "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given... And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate": ... (citations omitted)

[23] Where I differ from the applicants, is that when I read the Decision as a whole, in light of the record, including the parties' submissions, I find an internally coherent and rational chain of analysis that is justified by the facts and law involved.

[24] There were two questions before the Board. The first was whether Manitoba Health's approval of total body tumescent liposuction in July 2020 committed it to funding the series of treatments required. The Board pointed to Manitoba Health's letter of approval that stated further, or follow-up treatment, would require another letter from their specialist and prior approval of Manitoba Health.

[25] The Decision properly posed the question, gave its answer and explained why it decided this way. I find no deficiency, large or small, with this aspect of the Board's Decision. To decide the matter differently as the applicants ask, would be to substitute my decision for the Board's.

[26] As to the question whether the ***Regulation*** applied, the Board had two competing positions before it. The applicants maintained that tumescent liposuction was not an emerging treatment but was the standard of care for individuals with lipedema. In support of their position, they submitted several studies, medical journal articles, some of which discussed the studies; a standard of care document from the U.S., various guidelines from other countries, and the letter from the surgeon who performed their procedures at Stanford Health Center in April 2022. This stated, in part, that liposuction was the standard of care for lipedema.

[27] Manitoba Health, for its part, explained to the Board that it based its Decision on a 2022 report of the Canadian Agency for Drugs and Technologies in Health ("CADTH"). The report, according to Manitoba Health, made clear that the quality and nature of evidence was not sufficient to conclude that liposuction was the standard of care for lipedema. The section of plastic surgery in Manitoba had also informed Manitoba Health

that liposuction was not the standard of care for lipedema. This was part of its consideration.

[28] The 2022 report was a follow up to a report CADTH had issued in 2019, that reviewed the existing research regarding the use of liposuction for lipedema. In 2022, CADTH considered the same research, this time with the benefit of the details - or at least some details about the nature and type of the studies involved in the research.

[29] The 2022 CADTH report concludes as follows:

The quality of the evidence was limited, with sources of uncertainty such as systematic biases due to lack of randomization, and the use of instruments that have not been validated for the collection of data and assessment in lipedema-related complaints. Studies to validate tools to assess lipedema-related outcomes and define a minimally clinically important difference for the condition may also be necessary to put the benefit of liposuction for the treatment of lipedema in a clinical perspective.

[30] The meaning and interpretation of the 2022 report was an issue before the Board. The applicants argued its conclusion was substantively the same as the 2019 report; there was no new information, and importantly, the 2019 report was the basis on which their 2022 surgeries were approved.

[31] Manitoba Health addressed the standard of care in the U.S., as well as the studies, guidelines and directives submitted by the applicants. It pointed out that the studies the applicants had submitted to the Board were referenced in the CADTH reports. Guidelines from other countries were not standard of care documents, and while liposuction was the standard of care in the U.S., and perhaps other countries, it was not the standard of care in Canada. It disputed that no new information was available. In fact, much more information was available, specifically concerning the methodology of the studies. The

author of the CADTH report identified deficiencies in the studies, which led to the conclusion that the quality of the evidence was limited, and further studies were required.

[32] The record reveals that thorough and detailed submissions were made to the Board, and questions asked by the panel members. In the end, the Board was presented with two distinct and opposing views. The Decision does not explain why it agreed with Manitoba Health, but given the evidence and submissions, by saying it did so, the chain of reasoning becomes transparent and intelligible given the facts and in light of the **Act** and the **Regulation**.

[33] I also dismiss the argument that the Board considered the wrong question by saying liposuction was not the standard of care. The Decision states:

[41] The Board agrees with the Respondent that liposuction for the treatment of lipedema is currently not the standard of care *and that liposuction is an emergent treatment and thus is an excluded service* (italics added) according to regulations enacted under The Health Services Insurance Act, C.C.S.M. c. H35 (the "Act").

[34] Finally, the applicants raised several arguments regarding the nature of the evidence and the interpretation placed on same by the Board. On this, I will go no further than to observe that subsection 10(4) of the **Act** states an appeal is to be conducted on an informal basis, and the Board is not bound by the rules of evidence. In this case, the entirety of the medical evidence was in the form of studies, articles, reports and letters. I see no error of law or unreasonableness in how the Board evaluated the evidence.

CONCLUSION

[35] For the reasons outlined above, I am satisfied that the Decision of the Board in this matter, while not perfect, was reasonable. Accordingly, the application is dismissed.

[36] The parties may speak to costs if they are unable to agree on same.

_____ J.