

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Alexandre DeMoura M.D. PC dba New
York Spine Institute
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-16-1046-2818
Applicant's File No.	TM-16-1588
Insurer's Claim File No.	0270798250101104
NAIC No.	35882

ARBITRATION AWARD

I, Frank Marotta, the undersigned arbitrator, designated by the American Arbitration Association pursuant to the Rules for New York State No-Fault Arbitration, adopted pursuant to regulations promulgated by the Superintendent of Insurance, having been duly sworn, and having heard the proofs and allegations of the parties make the following **AWARD**:

Injured Person(s) hereinafter referred to as: EIP-CB

1. Hearing(s) held on 04/18/2017
Declared closed by the arbitrator on 04/18/2017

Naomie Jean-Philippe, Esq. from Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf LLP participated in person for the Applicant

Gabrielle Hunter-Ensor, Esq. from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, \$ **563.76**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated and agreed that Applicant established its prima facie burden of proof as to entitlement to the assigned no-fault benefits; Respondent's denial of the subject claim was timely issued and that the amount in dispute does not exceed the maximum permissible charges under the New York State Workers' Compensation Fee Schedule (WCFS).

3. Summary of Issues in Dispute

The record reveals that the EIP-CB, a 40 year old female, reportedly sustained injuries in a motor vehicle accident on March 6, 2015. The Applicant submitted a claim for a

cervical facet block on September 21, 2015, follow up office visits on February 16, 2016 and March 15, 2016 and a physical therapy initial evaluation on April 7, 2016. On January 5, 2016 the Respondent issued a general denial terminating benefits based on a medical examination (IME) by Dr. Gary Florio effective January 7, 2016 and subsequent claim specific denials for the follow up office visits on February 16, 2016 and March 15, 2016 based on Dr. Florio's IME. The Respondent denied the facet block injection based on a peer review report by Dr. Ayman Hadhoud and the initial physical therapy consultation based on an IME conducted by Dr. Spataro. The issue for determination is whether the services provided were medically necessary.

4. Findings, Conclusions, and Basis Therefor

The Applicant filed this claim in the amount of \$563.76 for disputed fees in connection with a cervical facet block, follow up office visits and physical therapy initial evaluation with the EIP between September 21, 2015 and April 7, 2016 following a motor vehicle accident that occurred on March 6, 2015. Respondent timely denied reimbursement for the follow up examinations and physical therapy evaluation based on IMEs by Drs. Spataro and Florio and the cervical facet block based on a peer review report by Dr. Ayman Hadhoud.

This hearing was conducted using the documents contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association. All documents contained in the ECF are made part of the record of this hearing and my decision was made after a review of all relevant documents found in the ECF as well as the arguments presented by the parties during the hearing.

The parties stipulated and agreed that Applicant established its prima facie burden of proof as to entitlement to the assigned no-fault benefits; Respondent's denial of the subject claim was timely issued and that the amount in dispute does not exceed the maximum permissible charges under the WCFS.

Once the Applicant establishes an entitlement to reimbursement of assigned benefits the medical necessity for the services provided is presumed and the burden shifts to the Respondent who may rebut the Applicant's prima facie showing by establishing that the services provided were not medically necessary based either on a medical examination or a peer review report. Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp., 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003).

The Applicant submitted a claim for a facet joint injection administer on September 21, 2015. The Respondent denied the claim based on a peer review report by Dr. Hadhoud dated November 19, 2015. After review I find the Respondent met its burden of proof with the peer review report which sets forth a factual basis and medical rationale to support his opinion that there was no medical necessity for the facet joint/medial nerve block procedure performed on September 21, 2015. Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists.

2014); Jacob Nir, M.D. v. Allstate Ins. Co., 7 Misc.3d 544, 546-47 (Civ. Ct. Kings Co. 2005).

Dr. Hadhoud provides a history of the EIP as a 40 year old female who was involved in a motor vehicle accident on March 6, 2015. The EIP reported complaints of neck and underwent a MBB at C4, 5 & 6 on August 25, 2015. It was reported to decrease her pain from 10/10 to 0/10 for the first hour and 3/10 for the following 4 hours. Dr. Hadhoud indicates that there was no reason to perform such invasive procedure specifically when the MRI of the EIP's cervical spine performed on April 20, 2015 and the x-rays of the thoracic spine on March 6, 2015 showed no problem with the facet joint of the cervical or thoracic spine. According to Dr. Hadhoud, facet joint lesions are typically due to an arthritic process and therefore would not be the reason for the EIP's pain in the clinical context presented and would be totally irrelevant to the EIP. Dr. Hadhoud points out that this is further confirmed by the diagnosis of cervical facet arthropathy. Dr. Hadhoud goes on to note that the EIP was started on conservative treatment (i.e. physical therapy) on April 8, 2015 and had already received the same procedure on August 5, 2015. A report by Dr. Mottahedeh dated August 26, 2015 reveals that the EIP had gained significant relief of pain from 8/10 to 0-3/10. Despite the fact that Dr. Mottahedeh documented such improvement she still scheduled the EIP on that day for the September 21, 2015 medial branch block with no evaluation of the EIP between August 26, 2015 and September 21, 2015 to assess the need for the September 21, 2015 procedure. Dr. Hadhoud cites to *Physiatric Procedures in Clinical Practice* by Drs. Lennard, Dreyfuss, Lagattuta, Kaplansky and Heller, noting that, *"prior to any Zygapophyseal (facet) joint injection, a patient should have a thorough regional spine/extremity physical examination that focuses on the painful spinal segments and associated secondary sites of dysfunction in the kinetic chain. Plain films should be considered prior to z-joint injections to rule out fractures, infection or neoplasm"*. Dr. Hadhoud notes that the physician scheduled the procedure 4 weeks prior to the injection being performed. To further establish that there was no actual lesion in the facet joints that required the injection, Dr. Hadhoud refer to the reports of the physician who performed the procedure in which there was no documentation of a positive facet loading test. Dr. Hadhoud's November 19, 2015 peer review report is sufficient to rebut the presumption of medical necessity that attaches to the Applicant's submitted bill.

Once a respondent provides sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the applicant who must then present its own evidence of medical necessity, West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 824 N.Y.S.2d 759 (Table), 2006 N.Y. Slip Op. 51871(U) at 2, 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006), as ultimately it is the Applicant who has the burden of proof on issues of medical necessity. Dayan v. Allstate Ins. Co., 49 Misc.3d 151 (A), 2015 N.Y. Slip Op. 51751(U), 2015 WL 7900115 (App. Term 2d, 11th & 13th Dists. Nov. 30, 2015); Park Slope Medical and Surgical Supply, Inc. v. Travelers Ins. Co., 37 Misc.3d 19, 22 n., 952 N.Y.S.2d 372, 374 n. (App. Term 2d, 11th & 13th Dists. 2012).

After a review of the documents contained in the ECF and in consideration of the arguments made by the parties, I find that Applicant has not successfully refuted opinion of Dr. Hadhoud and has failed to establish the medical necessity of the disputed services

by a fair preponderance of the evidence. The Applicant submits no formal rebuttal to Dr. Hadhoud's November 19, 2015 but relies on the medical records before and after the procedure to support its medically necessity.

The record reveals that the EIP was initially seen in the emergency room at Nassau University Medical Center on March 6, 2015 and thereafter presented to New York Spine Institute (NYSI) beginning on April 6, 2015 with complaints of neck and shoulder pain and received various forms of treatment including physical therapy, trigger point injection, medication and medial branch block for facet pain. Applicant Counsel argues that the records submitted reveal that the EIP was diagnosed with cervical facet syndrome and pain at C4-6, and received the medial branch block injections including the one on September 21, 2015 for medically necessary relief. The Applicant Counsel notes that, contrary to Dr. Hadhoud's peer review assessment that there was no problem with the facet joint of the cervical or thoracic spine the EIP was diagnosed with cervical facet syndrome (see NYSI report of August 26, 2015) prior to the September 21, 2015 procedure and the medial branch block injections were recommended as early as July 20, 2015. Even considering the arguments made by the Applicant's Counsel at the hearing, I still find the proof insufficient to overcome Dr. Hadhoud's opinion that the September 21, 2015 procedure was not medically necessary. The Applicant has provided no expert opinion to contradict the argument made by Dr. Hadhoud that the diagnostic tests (MRI of the EIP's cervical spine performed on April 20, 2015 and the x-rays of the thoracic spine on March 6, 2015) revealed no problem with the facet joint of the cervical or thoracic spine nor his indication that the September 21, 2015 procedure was scheduled on August 26, 2015 without any follow up or evaluation of the EIP between these dates to assess the need for the procedure in question. In order for an Applicant to prove that the disputed expenses were medically necessary, it must meaningfully refer to, or rebut, the conclusions set forth in the peer review. Yklik, Inc. v. Geico Ins. Co., 2010 NY Slip Op. 51336(U) (App Term 2d, 11th & 13th Dists. July 22, 2010); Pan Chiropractic, P.C. v. Mercury Ins. Co., 24 Misc.3d 136(A), 2009 N.Y. Slip Op. 51495(U) (App Term 2d, 11th & 13th Dists. July 9, 2009). Where the assertions of a peer reviewer setting forth a factual basis and medical rationale for his determination that there was a lack of medical necessity for services rendered are unrebutted by the provider, a judgment should be granted to the insurer. A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co., 16 Misc.3d 131(A), 841 N.Y.S.2d 824 (Table), 2007 N.Y. Slip Op. 51342(U), 2007 WL 1989432 (App. Term 2d & 11th Dists. July 3, 2007). Herein the Applicant has failed to establish the medical necessity for the disputed service by a preponderance of the evidence. Since the Applicant failed to refute the Respondent's prima facie showing of lack of medical necessity, Respondent's denial of the services in question must be upheld. Dayan, supra.

In support of their denials of the follow up examination by NYSI on February 16, 2016 and March 15, 2016, the Respondent relies on the IME report of Dr. Gary Florio dated December 16, 2015. Dr. Florio provides a history of the EIP as a 40 year old female who reportedly sustained injuries in a motor vehicle accident on March 6, 2015. She was initially treated and released by Nassau University Hospital, reports receiving a cervical facet block injection on August 5, 2015 and trigger point injections to the cervical spine and left shoulder regions. At the time of the IME, the EIP reported complaints of neck pain radiating to the left upper extremity, left shoulder pain and lower back pain. Dr.

Florio examined the EIP's cervical, thoracic and lumbar spine as well as her left shoulder. After review I find that the Respondent met its prima facie burden of proof establishing that post-IME services in question were not medically necessary with the IME report of Dr. Florio who performed examinations of the EIP and concluded based on his findings that the EIP sustained sprain/strain injuries of her left shoulder as well as her cervical and lumbar spine all of which have resolved from an objective standpoint. While Dr. Florio's examination report notes palpation of the EIP's spine did result in complaints of tenderness in the cervical and lumbar regions he reported no objective abnormalities in range of motion, clinical testing or motor strength, sensation and reflexes which were all within normal limits. A similar lack of objective findings were noted during his examination of the EIP's shoulder. Based on his examination Dr. Florio noted that there was no further need for treatment from a PM&R perspective which included physical therapy, massage therapy and diagnostic testing. Dr. Florio's report is sufficient rebut the presumption of medical necessity that attached to the Applicant's submitted bills.

Once the Respondent's proof is sufficient to demonstrate a factual basis and medical rationale for the determination that there was a lack of medical necessity for any further treatment, then the burden shifts to the Applicant to present evidence as to why the subject treatment was needed whether because the EIP's condition had changed after the IME or because the IME doctor's opinion following the IME was erroneous. New Horizon Surgical Center LLC v Allstate Ins. Co., 52 Misc. 3d 139 (A); 2016 NY Slip Op 51124 (U) (App. Term 2d, 11th & 13th Jud Dist. July 13, 2016).

After a review of the documents contained in the ECF and in consideration of the arguments made by the parties at the hearing, I find that the Applicant has not successfully refuted the finding of the Dr. Florio's IME report and has failed to establish the medical necessity for the February 16, 2016 and March 15, 2016 follow up examinations by a fair preponderance of the evidence. Although the EIP received her treatment at NYSI, the Applicant did not provide an evaluation of the EIP contemporaneous with Dr. Florio's IME. Applicant provided no contemporaneous assessment of the EIP before or shortly after the time of the IME that documents findings to warrant the office visits in question, nor have they provided an explanation for the gap in treatment from September 21, 2015 or the IME and the follow up visits in question. Where an IME report provides a factual basis and medical rationale for an opinion that services were not medically necessary the burden shifts to the Applicant to prove the medical necessity of the disputed services. West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 824 N.Y.S.2d 759 (Table), 2006 N.Y. Slip Op. 51871(U) at 2, 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006). When a provider fails to present any evidence to refute a Respondent's prima facie showing that the services were not medically necessary the claim should be denied. AJS Chiropractic, P.C. v. Mercury Ins. Co., 22 Misc.3d 133(A), 880 N.Y.S.2d 871 (Table), 2009 N.Y. Slip Op. 50208(U), 2009 WL 323421 (App. Term 2d & 11th Dist. Feb. 9, 2009). In find, based in the records provided, that the Applicant failed to meet its burden of proof by providing sufficient proof to establish the medical necessity for the post IME follow up report. Since the Applicant failed to rebut the insurer's prima facie showing of lack of medical necessity, Respondent's denials are upheld and the Applicant's claim for follow up office visits are denied. Synergy Medical v. Praetorian Insurance Company,

40 Misc.3d 127(A), 2013 N.Y. Slip Op. 51047(U) (App. Term 1st Dept. 2013); Hong Tao Acupuncture, P.C. v. Praetorian Insurance Company, 35 Misc.3d 131(A), 2012 N.Y. Slip Op. 50678(U) (App. Term 2d , 11th and 13th Jud. Dists. 2012).

The above Notwithstanding, the Respondent provided proof in the form of a canceled check #183409189 dated September 21, 2016 in the amount of \$101.60. The record reveals that the check issued was for the billed amount of \$92.98 and was for the services provided by Dr. Mottahedeh on March 15, 2016. The record further reveals that the check was cashed and the funds paid on September 27, 2016; prior to the filing of the arbitration on October 9, 2016.

The Respondent issued a denial on the Applicant's claim for an April 7, 2016 physical therapy evaluation billed in the amount of \$72.92 by Physical Therapist Michael Friar based on an IME by Dr. Spataro conducted on May 28, 2015. The Respondent did not provide a copy of Dr. Spataro's IME report but did provide a proof of payment for the service by Michael Friar on April 7, 2016 in the form of a canceled check #183409190 dated September 21, 2016. The record reveals that the checked issued was for the billed amount of \$72.92 and was for the services provided on April 7, 2016. The record further reveals that the check was cashed and the funds paid on September 27, 2016; prior to the filing of the arbitration on October 9, 2016. After a review of the documents contained in the ECF and in consideration of the arguments made by the parties at the hearing I find that the Applicant was reimbursed for this service.

For the reasons noted above, the Applicant claim is denied in its entirety.

5. Optional imposition of administrative costs on Applicant.
Applicable for arbitration requests filed on and after March 1, 2002.

I do NOT impose the administrative costs of arbitration to the applicant, in the amount established for the current calendar year by the Designated Organization.

6. I find as follows with regard to the policy issues before me:

- ☐ The policy was not in force on the date of the accident
- ☐ The applicant was excluded under policy conditions or exclusions
- ☐ The applicant violated policy conditions, resulting in exclusion from coverage
- ☐ The applicant was not an "eligible injured person"
- ☐ The conditions for MVAIC eligibility were not met
- ☐ The injured person was not a "qualified person" (under the MVAIC)
- ☐ The applicant's injuries didn't arise out of the "use or operation" of a motor vehicle
- ☐ The respondent is not subject to the jurisdiction of the New York No-Fault arbitration forum

Accordingly, the claim is DENIED in its entirety

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of New York

SS :

County of Nassau

I, Frank Marotta, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

05/09/2017

(Dated)

Frank Marotta

IMPORTANT NOTICE

This award is payable within 30 calendar days of the date of transmittal of award to parties.

This award is final and binding unless modified or vacated by a master arbitrator. Insurance Department Regulation No. 68 (11 NYCRR 65-4.10) contains time limits and grounds upon which this award may be appealed to a master arbitrator. An appeal to a master arbitrator must be made within 21 days after the mailing of this award. All insurers have copies of the regulation. Applicants may obtain a copy from the Insurance Department.

ELECTRONIC SIGNATURE

Document Name: Final Award Form
Unique Modria Document ID:
46e4a32370e9feddde1f98ca6ca83721

Electronically Signed

Your name: Frank Marotta
Signed on: 05/09/2017