American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

HMP Orthopedics PC (Applicant)	AAA Case No.	17-15-1023-6927
	Applicant's File No.	
- and -	Insurer's Claim File No.	0533094660101014
	NAIC No.	35882
Geico Insurance Company (Respondent)		

ARBITRATION AWARD

I, John Hyland, 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: WB

1. Hearing(s) held on 11/10/2016, 05/09/2017
   Declared closed by the arbitrator on 05/09/2017

   Matthew Viverito, Esq. from Costella & Gordon LLP participated in person for the Applicant

   Lauren Hirschfeld, Esq. from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 10,648.08**, was AMENDED and permitted by the arbitrator at the oral hearing.

   As per counsel, Applicant amended the amount at issue to $6,282.72 as per the Fee Schedule.

   Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

   The Assignor WB, a 56 year old male, was injured as a driver of a motor vehicle involved in an accident that occurred on June 8, 2015. WB suffered injuries to his neck, back, and right shoulder, which resulted in his seeking treatment. WB was referred for right shoulder surgery conducted on September 9, 2015 which was denied based upon

the peer review report of Dr. Howard Kiernan, M.D. The issue at this hearing is whether the right shoulder surgery was medically necessary.

4. Findings, Conclusions, and Basis Therefor

This case was decided based upon the submissions of the Parties as contained in the electronic file maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no witnesses. I reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon.

In order to support a lack of medical necessity defense Respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." See, Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of it lack of medical necessity defense, which if established shifts the burden of persuasion to Applicant. See generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006). The Appellate Courts have not clearly defined what satisfies this standard except to the extent that "bald assertions" are insufficient. Amherst Medical Supply, LLC v. A Central Ins. Co., 2013 NY Slip Op 51800(U) (App. Term 1st Dept. 2013). However, there are a myriad of civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity.

The civil courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review report's medical rationale will be insufficient to meet Respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. See generally, Nir v. Allstate, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005); See also, All Boro Psychological Servs. P.C. v. GEICO, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012). "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." Nir, *supra*.

An insurance carrier must, at a minimum, establish a detailed factual basis and a sufficient medical rationale for its asserted lack of medical necessity. Vladimir Zlatnick, M.D.,P.C. v. Travelers Indem. Co., 2006 NY Slip Op 50963(U) (App Term 1st Dept.,

2006); Delta Diagnostic Radiology, P.C. v. Progressive Casualty Ins. Co., 2008 Slip Op 52450(U), 21 Misc.3d 142(A) (App Term 2d Dept., 2008).

In support of its contention that the right shoulder surgery was not medically necessary Respondent relies upon the peer review report of Dr. Howard Kiernan, M.D., dated October 9, 2015. Dr. Kiernan reviewed the available medical records and acknowledges that there were positive orthopedic tests in regards to the right shoulder at certain points during the claimant's treatment. He also acknowledges that the MRI of the right shoulder revealed a possible labral tear. However, Dr. Kiernan opines that not enough time was given for conservative care. He correctly notes that there is no evidence of any physical therapy sessions in regards to the right shoulder. "[T]hree to six months of conservative care should be performed prior to considering surgery." Dr. Kiernan also cites to medical authority in support of his position. As such, he states that the surgery was not necessary.

Respondent has factually demonstrated the services rendered were not medically necessary. Accordingly, the burden now shifts to Applicant, who bears the ultimate burden of persuasion. See, Bronx Expert, *supra*.

In opposition to the peer report, Applicant offers a rebuttal affidavit from Dr. Richard Pearl, M.D., the treating physician, and various medical reports related to the assignor. Dr. Pearl notes the positive orthopedic tests and MRI of the right shoulder. Dr. Pearl claims that several months of conservative care were unsuccessful; however the records indicate that only the neck and back were treated with physical therapy. There is no mention of any treatment to the right shoulder. In fact, at the final examination (August 28, 2015) before the surgery, the Assignor had full range of motion in the shoulder and all orthopedic tests were negative.

Respondent also submits an addendum to Dr. Kiernan's peer review, dated November 9, 2016, in which the doctor stands by his opinion that the surgery was not necessary.

After reviewing all of the submissions, and taking into account the oral arguments of the parties, I find that Applicant has failed to rebut the assertions in the peer review report. Applicant has not refuted the opinion of the peer review doctor that the surgery and related services were not medically necessary.

As such, the claim is denied in its entirety.

Any further issues raised in the hearing record are held to be moot and/or waived insofar as not raised at the time of the hearing.

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

05/11/2017
(Dated)

John Hyland

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:
f197395871074a5cfab735a74af5bb53

Electronically Signed

Your name: John Hyland
Signed on: 05/11/2017