American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Spine & Pain Consultant, PLLC (Applicant)	AAA Case No.	17-19-1146-1427
	Applicant's File No.	A24845
- and -	Insurer's Claim File No.	0529626952-02
	NAIC No.	17230
Allstate Insurance Company (Respondent)		

ARBITRATION AWARD

I, Heidi Obiajulu, 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: Injured Party

1. Hearing(s) held on 07/31/2020
   Declared closed by the arbitrator on 07/31/2020

   Amisha Dukarm, Esq. from Munawar & Hashmat LLP participated by telephone for the Applicant

   Maria Litos, Esq. from Law Offices Of Karen L. Lawrence participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **$ 1,370.29**, was NOT AMENDED at the oral hearing.
   Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

   Was the disputed evaluation and management service, CPT code 99213-25, and lumbar radiofrequency ablation performed on 05/10/19 medically necessary based on the independent medical examination by Dr. Joseph C. Elfenbein, MD? The then 29-year-old male driver was involved in a motor vehicle accident occurring on December 31, 2018, and received treatment for an injury to his back.

4. Findings, Conclusions, and Basis Therefor

The below decision is based on the documents contained in the Electronic Case folder maintained by the American Arbitration Association (hereinafter referred to as AAA) as of the date of this hearing.

The applicant, as assignee of the Injured Party, seeks the reimbursement, with interest and counsel fees, under the No-Fault Regulations, for an evaluation and management service (hereafter referred to as E/M service) and lumbar radiofrequency ablation performed on 05/10/19, in the amount of $1370.29.

This case arises out of a motor vehicle accident occurring on December 31, 2018, in which the Injured Party (OG), a then 29-year-old male sustained multiple injuries including to his back while driving the insured vehicle when it was hit on the front side by the adverse vehicle. After the accident, he sought treatment at Eisenhower Urgent Care.

Subsequently, the Injured Party was commenced on conservative care including nonsteroidal anti-inflammatory drugs.

On 02/05/19, Dr. Kenneth B. Chapman, MD evaluated the Injured Party and reported that he presented with mid and low back pain, flank pain, and bilateral knee pain. The back pain radiated to the left flank. He noted that the Injured Party had undergone a lumbar X-ray and MRI study, and had treated with ice, heat, muscle relaxants, nonsteroidal anti-inflammatory drugs, physical therapy, and non-opioid and opioid analgesics, and an exercise regimen. Despite the above treatment for a month, he noted that the Injured Party presented with persisting low back pain and functional limitations. Physical examination of the thoracolumbar spine revealed tenderness in the bilateral thoracic paraspinal with tender trigger points in the left ribs from T7-10 with no swelling, normal sensation, and facet tenderness in the thoracic region, no tenderness in the lumbosacral spine, normal sensation and reflexes, restricted ranges of motion (see the report for ranges), a positive facet loading maneuver and Gaenslen's test on the left, and a negative SLR test, Patrick test, and Femoral nerve traction test. He performed an X-ray of the thoracic spine and commenced the Injured Party on Cyclobenzaprine HCL 10 mg and Naproxen 500 mg. He also ordered X-rays of the ribs.

On 04/02/19, Dr. Ajax Yang, MD re-evaluated the Injured Party and reported that he presented with persisting constant lumbar spine pain rated at 3/10 and occasionally 10/10 on the pain scale; the pain was described as non-radiating, throbbing, and unchanged. He opined that there was poor symptom control. His physical examination was unchanged. He diagnosed lumbar facet mediated pain secondary to the accident and recommended lumbar medial branch blocks for diagnostic and therapeutic purposes. He also discussed the lumbar MRI findings and indicated they revealed multilevel disc herniation (at L3/4, L4/5, and L5/S1 with exiting nerve root impingement). He performed lumbar medial branch block injections.

On 04/16/19, Dr. Ajax Yang, MD re-evaluated the Injured Party and reported that the bilateral lumbar medial branch blocks performed on or about 04/02/19 reduced the back pain by 80% for 4 days but that the back pain was present for this exam and rated as 3/10 with a maximum pain level of 10/10. He noted that the pain was constant,

non-radiating, and throbbing. Physical examination was essentially unchanged from earlier exams. He recommended repeat lumbar medial branch block injections for diagnostic and therapeutic purposes. He noted that a positive response to the repeat injections and a return of pain would suggest that radiofrequency ablation of the medial branch nerves should be considered.

On 05/10/19, Dr. Ajax Yang, MD re-evaluated the Injured Party and reported that he had a positive response to the repeat lumbar medial branch blocks with 80% pain relief for 4 days but that the lower back pain returned and was present; the pain was rated 5/10 and a maximum pain level of 10/10 on the pain scale. The low back pain was described as non-radiating, throbbing, constant, and daily exacerbated for hours at a time. His physical examination was unchanged from earlier exams. He noted that the Injured Party had extensive lumbosacral rigidity and significant spondylosis revealed in the lumbar MRI study. Based on the Injured Party's response to the lumbar medial branch blocks and the persisting subjective complaints and positive clinical findings, he performed the disputed lumbar radiofrequency ablation.

Thereafter, the applicant submitted its claim form to the respondent.

Within 30-days of its receipt of the applicant's claim form, the respondent denied reimbursement on the grounds that the disputed lumbar radiofrequency ablation was medically unnecessary based on the independent medical examination (hereafter referred to as IME) by Dr. Joseph C. Elfenbein, MD.

After it received the respondent's denial, the applicant commenced this arbitration seeking reimbursement of its claim.

At the outset, I find that the applicant established its prima facie case with the submission of its claim form and the copy of the respondent's denial of claim form, which demonstrates that the respondent received the applicant's claim form, that more than 30-days elapsed since its receipt of same, and that the respondent denied reimbursement of the applicant's claim, which shows that the applicant's claim is now due and owing. See Insurance Law section 5106 [a]; Viviane Etienne Medical Care, PC v. County-Wide Ins. Co 25 N.Y.3d. 498, (NY, June 10, 2015), Westchester Medical Center v. Nationwide Mut. Ins. Co., 78 A.D.3d. 1168, (N.Y.A.D. 2nd Dept., November 30, 2010).

Once an applicant establishes a prima facie case, the burden then shifts to the insurer to prove its defense.

However, even before determining whether the respondent met its burden of proof, it must first be determined whether the respondent's lack of medical necessity defense survives preclusion.

In a no-fault action, a defense (other than one based upon a lack of coverage) survives preclusion only if raised in a denial that is (1) timely, Presbyterian Hosp. in the City of New York v. Maryland Casualty Ins. Co., 90 NY.2d 274, (N.Y. , June 10, 1997), Central Gen. Hosp. v. Chubb Group of Ins. Co., 90 N.Y.2d 195 (1997), (2) includes the

information called for in the prescribed denial of claim form, 11 NYCRR § 65-3.4 (c) (11); Nyack Hosp. v. Metropolitan Prop. & Cas. Ins. Co., 16 A.D.3d 564 (2d Dept. 2005); Nyack Hosp. v. State Farm Mut. Auto. Ins. Co., 11 A.D.3d 664, (App. Div. 2nd Dept. Oct. 25, 2004), or is not fatally defective, and (3) "promptly apprise(s) the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated", General Accident Ins. Group v. Cirucci, 46 N.Y.2d 862, 864, (1979); New York University Hosp. Rusk Ins. v. Hartford Acc. & Indem. Co., 32 A.D.3d 458, (2d Dept. 2006).

Applying the above case law and criteria to the respondent's denial, I find that its lack of medical necessity defense is preserved because the denial was issued in a timely manner, included the information called for in the prescribed denial of claim form, and promptly apprised the applicant with a high degree of specificity of the basis of the denial.

Therefore, the issue is whether the respondent met its burden of proof in establishing its lack of medical necessity defense.

Regarding its lack of medical necessity defense, the respondent relies on the IME report and opinions by Dr. Joseph C. Elfenbein, MD. To rebut that defense, the applicant relies on the legal arguments of its attorney and the rebuttal report by Dr. Kenneth B. Chapman, MD.

The applicant's attorney argued that the respondent failed to establish its prima facie case that the disputed lumbar radiofrequency ablation was medically unnecessary with Dr. Elfenbein's IME report because the IME examiner never actually opined that no further PMR treatment was medically unnecessary. She also noted that the IME examiner did not perform the facet loading testing or Gaenslen test that was performed by the treating provider in the re-evaluation performed on 04/02/19. Finally, she argued that the IME examiner was an orthopedist and not a PMR specialist [thus arguing that less evidentiary weight should be afforded his opinion]. Hence, she contended that the respondent failed to meet its burden of proof in establishing its lack of medical necessity defense. Alternatively, if the IME report was found to be legally sufficient to meet the respondent's burden of proof, she argued that the applicant rebutted the respondent's defense with the letter of medical necessity by Dr. Chapman.

The respondent's attorney retorted that the respondent established its prima facie defense that the disputed lumbar radiofrequency ablation was medically unnecessary with the IME report and opinions by Dr. Elfenbein, MD because she contended that he reported purely negative IME findings and opined that the lumbar spine sprain /strain was resolved and there was no need for orthopedic treatment including physical therapy, household help, special transportation, DME/supplies, prescription medications, massage therapy, or **surgery.**

Reviewing the relevant evidence in the record and considering the oral arguments made by the parties, I find as follows:

In determining whether an insurer met its burden of proof in establishing its lack of medical necessity defense, the courts have found that an insurer must submit an IME report/peer review with a detailed basis and medical rationale for the denial of benefits in order to prevail. SeeVladimir Zlatnick, M.D., P.C. v. Travelers Ins. Indemnity Co., 12 Misc. 3d 128A (App. Term 1st Dept. 2006) and Nir v. Allstate, 7 Misc.3d 544, 546-47 (Civ. Ct., Kings Cty. 2005). ("At a minimum, (the respondent) must establish a factual basis and medical rationale for the lack of medical necessity of (applicant's) services"). Once the respondent submits an IME report or peer review that has a sufficient factual basis and medical rationale, then the courts have routinely found that the respondent has established its prima facie defense that the disputed medical service is medically unnecessary. A Khodadadi Radiology, P.C. v. NY Cent. Mut. Fire Ins. Co., 16 Misc.3d 131(A), (N.Y. Sup. App. Term Jul 03, 2007). Then, the burden of persuasion regarding the medical necessity of the medical services shift to the applicant to submit competent medical evidence to refute the respondent's prima facie defense that the disputed medical service/test was medically unnecessary. See Pan Chiropractic PC v. Mercury Ins. Co., 24 Misc.3d. 136 (A) (July 9, 2009).

Applying the above case law and criteria to the medical evidence in the record, I find that the respondent established its prima facie case that the disputed lumbar radiofrequency ablation was medically unnecessary with the IME report by Dr. Elfenbein, MD despite his expertise in orthopedics because he did opine that no surgery was medically unnecessary which I find includes the lumbar radiofrequency ablation. The fact that his expertise was in orthopedics and not PMR treatment goes toward the evidentiary weight afforded his opinion.

Thus, the question becomes whether the applicant's rebutted that defense.

The burden is on the provider "to present evidence as to why that additional treatment was needed either because … assignor's condition had changed after the IME or because (the examiner's) opinion following the IME was erroneous." New Horizon Surgical Ctr., LLC v. Allstate Ins. Co., 52 Misc.3d 139(A), 2016 NY Slip Op 51124(U) (App Term 2d, 11th & 13th Jud Dists. July 13, 2016).

Standing alone, an injured person's "subjective complaints of pain cannot overcome objective medical tests." Arnica Acupuncture, P.C. v. Interboard Ins. Co., 137 A.D.3d 421, (N.Y.A.D, 1st Dept. March 1, 2016).

It is ultimately the provider who must prove, by a preponderance of the evidence, that the services were reasonable and necessary. See Dayan v. Allstate Ins. Co., 49 Misc. 3d. 151(App Term 2d Dept. Nov. 30, 2015); Park Slope Med. & Surgical Supply, Inc. v Travelers Ins. Co., 37 Misc.3d 19, 22 n (App Term, 2d, 11th & 13th Jud Dists. 2012).

The applicant relies on the rebuttal by Dr. Kenneth B. Chapman, MD who opined that Dr. Elfenbein's IME report and opinions were legally insufficient to support his conclusion that no further treatment was warranted because he reported reduced lumbar flexion in that he reported that the lumbar flexion was 60 degrees. Dr. Chapman noted that full lumbar flexion is 90 degrees and that therefore a reading of 60 degrees in

flexion is actually evidence of reduced lumbar flexion. Also, Dr. Chapman argued that the IME examiner opined that there was no need for further treatment from an orthopedic point of view but not that there was no need for treatment from a pain management point of view. Finally, Dr. Chapman questioned the reported negative IME findings based on the positive clinical findings for the 04/02/19 exam [and follow-up exams]; he noted that the provider reported reduced lumbar ranges of motion, a positive loading maneuver test, and Gaenslen's test. He noted that the **lumbar medial branch block was prescribed due to the facet medial pain. (**He didn't comment on the medical necessity of the lumbar radiofrequency ablation performed). However, Dr. Yang provided the basis for the lumbar radiofrequency ablation- that the Injured Party benefited from the lumbar medial branch blocks performed on 04/02/19 and on or about 04/16/19 and that, therefore, the protocol for performing lumbar radiofrequency ablation had been satisfied. It's also noted that for a follow-up on 05/24/19, Dr. Chapman (see his addendum note on that report) indicated that the disputed surgery reduced pain significantly, reduced functional limitations, and improved ROM.

Applying the above case law to the medical evidence in the record, I find that the applicant rebutted the respondent's IME by Dr. Elfenbein, for the following reasons. First, I am more persuaded by the letter of medical necessity by Dr. Chapman that the reported lumbar flexion was consistent with the reported positive findings that led to the lumbar medial branch blocks and disputed lumbar radiofrequency ablation, as well as the fact that Dr. Elfenbein never opined that no further PMR treatment was warranted. Also, I am persuaded by Dr. Yang's reports that the generally accepted practices /protocol for performing a lumbar radiofrequency ablation was followed. The bottom line is that based on the totality of the medical evidence in the record, I am persuaded that the disputed E/M service (which the IME examiner also did not comment on the medical necessity of] and lumbar radiofrequency ablation performed on 05/10/19 were medically necessary. **Accordingly, for the above reasons, I find in favor of the applicant in the amount of $1370.29, as the reimbursement of the E/M service and lumbar radiofrequency ablation on 05/10/19.**

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 applicant is AWARDED the following:

A.

Medical		**From/To**	**Claim Amount**	**Status**
	Spine & Pain Consultant, PLLC	**05/10/19 - 05/10/19**	**$64.07**	**Awarded: $64.07**
	Spine & Pain Consultant, PLLC	**05/10/19 - 05/10/19**	**$1,306.22**	**Awarded: $1,306.22**
Total			**$1,370.29**	**Awarded: $1,370.29**

B. The insurer shall also compute and pay the applicant interest set forth below. 10/28/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant's award in the amount of $1370.29 shall bear interest at a rate of two percent per month, calculated on a pro-rata basis using a 30-day month from 10/28/19, the date that the applicant initiated this arbitration, to the date of the payment of the award.

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

As this matter was filed **after** February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, in accordance with newly promulgated 11 NYCRR 65-4.6(d).

D. The respondent shall also pay the applicant forty dollars ($40) to reimburse the applicant for the fee paid to the Designated Organization, unless the fee was previously returned pursuant to an earlier award.

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

State of New York
SS :
County of New York

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

07/31/2020
(Dated)

Heidi Obiajulu

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:
d56d3fd49c54ac7f1a08f2a78048d3eb

Electronically Signed

Your name: Heidi Obiajulu
Signed on: 07/31/2020