

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Eleyinafe Medical Care, P.C.
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-19-1118-0788
Applicant's File No.	DK18-64043
Insurer's Claim File No.	0494613580101031
NAIC No.	35882

ARBITRATION AWARD

I, Kihyun Kim, 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: the Assignor

1. Hearing(s) held on 10/16/2020
Declared closed by the arbitrator on 10/16/2020

Evan Polansky, Esq. from Korsunskiy Legal Group P.C. participated by telephone for the Applicant

Tali Hernstat, Esq. from Geico Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 3,119.44**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.
The parties stipulated to Applicant's prima facie case and to Respondent's timely denial.

The parties also stipulated that Applicant's billing is consistent with fee schedule.

3. Summary of Issues in Dispute
The issue presented is whether the EMG/NCV studies of the upper and lower extremities were medically necessary.

The Assignor (GR-C) was a 38-year-old female who was the driver of an automobile that was involved in an accident on September 6, 2018. Applicant seeks reimbursement

in the amount of \$3,119.44 for EMG/NCV studies of the upper and lower extremities of the Assignor conducted on November 7, 2018. Reimbursement was denied based on the peer review by Ralph Della Ratta, M.D., dated December 27, 2018.

4. Findings, Conclusions, and Basis Therefor

This arbitration was conducted using the documentary submissions of the parties contained in the ADR Center, maintained by the American Arbitration Association. I have reviewed the documents contained therein as of the closing of the hearing, and such documents are hereby incorporated into the record of this hearing. Both parties appeared at the hearing by counsel, who presented oral argument and relied upon their documentary submissions. There were no witnesses.

At the hearing, Respondent acknowledged receipt of Applicant's bill in this matter and the parties stipulated to Applicant's prima facie case and to Respondent's timely denial. The parties also stipulated that Applicant's billing is consistent with fee schedule.

The Assignor is a 38-year-old female who was injured in an automobile accident on September 6, 2018. Following the accident, the Assignor sought treatment and testing for her injuries from various providers, including Applicant.

On November 7, 2018, the Assignor underwent EMG/NCV studies of the upper and lower extremities conducted by Opeoluwa Eleyinafe, MD. Applicant billed Respondent for the EMG/NCV studies and Respondent timely denied Applicant's claims based upon the peer review, dated December 27, 2018, by Ralph Della Ratta, M.D., who found the EMG/NCV studies to be medically unnecessary.

Applicant now seeks reimbursement in the amount of \$3,119.44 for EMG/NCV studies of the upper and lower extremities of the Assignor conducted on November 7, 2018.

Legal Framework - Medical Necessity - Peer review

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment (*Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13 [2d Dept. 2009]), such as by a qualified expert performing an independent medical examination or conducting a peer review of the injured person's treatment. *See 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).

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 W. Ins. Co.*, 42 Misc 3d 141(A), 2014 NY Slip Op 50219(U) (App. Term 2d, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its 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.*, 13 Misc 3d 136(A), 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 Med. Supply, LLC v. A. Cent. Ins. Co.*, 41 Misc 3d 133(A), 2013 NY Slip Op 51800(U) (App. Term 1st Dept. 2013). However, there are myriad 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 Ins. Co.*, 7 Misc.3d 544, 547 (Civ. Ct. Kings Co. 2005). "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." *Id.*, at 547 (*citing City Wide Social Work & Psychological Servs. v. Travelers Indem. Co.*, 3 Misc. 3d 608, 612 [Civ. Ct., Kings County 2004]).

To meet the burden of persuasion regarding medical necessity - in the absence of factually contradictory records - the applicant must submit a rebuttal which meaningfully refers to and rebuts the assertions set forth in the peer review report. *See generally, Pan Chiropractic, P.C. v Mercury Ins. Co.*, 24 Misc 3d 136[A], 2009 NY Slip Op 51495[U] (App Term, 2d, 11th & 13th Jud Dists 2009).

Peer - Ralph Della Ratta, M.D., dated December 27, 2018

Respondent relies upon the peer review report of Ralph Della Ratta, M.D., dated December 27, 2018, in asserting lack of medical necessity for the EMG/NCV studies of the upper and lower extremities of the Assignor conducted on November 7, 2018. At the outset, the peer report lists the various medical records that Dr. Della Ratta reviewed and provides a brief medical history of the accident and the treatment that the Assignor received.

As an initial matter, Dr. Della Ratta noted that the initial examination of October 3, 2018 was "a woefully incomplete and inadequate physical assessment of this claimant by Dr. Eleyinafe, omitting a more detailed musculoskeletal exam, provocative maneuvers, as well as a more detailed neurologic exam in a claimant presenting with spinal complaints." He asserted that these should all be mandatory components of a physical examination in a claimant such as this.

He also asserted that, "[i]t would be difficult to correlate findings on MRI investigation and offer treatment advice when an incomplete physical exam has been rendered, such as was the case here."

Dr. Della Ratta further noted that the "Initial consultation PMR/Neurology on November 7, 2018 was similarly an incomplete and inadequate physical assessment of the Assignor.

Dr. Della Ratta opined that, based upon the information provided, there was no evidence of medical necessity for the upper and lower extremity electrodiagnostic testing performed on November 7, 2018. Dr. Della Ratta stated that:

Electrodiagnostic testing is primarily used to distinguish polyneuropathy or mononeuropathy disorders. In particular, there are concerns when evaluating for higher level neurologic involvement like myelopathy. All of these records link this claimant's symptomatology to the motor vehicle accident of 9/06/18. Therefore, there was no diagnostic dilemma here for a peripheral nerve disorder nor has Dr. Eleyinafe raised any red flags for higher level neurologic involvement.

Dr. Della Ratta also maintained that this type of testing does not replace the neurological clinical assessment, which he found was incomplete in Dr. Eleyinafe's hands. He asserted that this type of testing should be pursued when it may potentially alter treatment, which was not the case here. He found that the Assignor was kept in the same conservative office-based treatments that led up to the November 7, 2018 office visit. Dr. Della Ratta asserted that none of the documentation supported the need for upper and lower extremity electrodiagnostic testing on November 7, 2018 and he recommended that it be disallowed.

I find that the peer review adequately demonstrates a medical rationale and factual basis to support Respondent's defense that the EMG/NCV studies of the upper and lower extremity were not medically necessary. Accordingly, the burden now shifts to Applicant, who bears the ultimate burden of persuasion. *See, Bronx Expert, supra.*

Rebuttal - Opeoluwa Eleyinafe, M.D., dated December 6, 2019

To refute the December 27, 2018 peer review by Dr. Della Ratta, Applicant relies principally upon a rebuttal, dated December 6, 2019, from Opeoluwa Eleyinafe, M.D., the physician who conducted the testing. Initially, Dr. Eleyinafe's rebuttal summarizes the Assignor's accident and treatment history before addressing the arguments in the peer review. He noted, among other things that, the Assignor had responded sub-optimally to the conservative treatment as noted in physical therapy chart notes and acupuncture progress notes and still continued to have intractable pain in the neck and low back.

Dr. Eleyinafe opined that, based upon a review of documents, taking into consideration the patient's history, the history of the injury, the patient's complaints, the clinical findings and a review of the medical history, and in accordance with the generally accepted standards of care in the relevant medical community, the EMG/NCV studies performed on November 7, 2018 were medically necessary, within a reasonable degree of medical certainty.

Dr. Eleyinafe stated that "the EMG test helps to clarify the cause of symptoms by confirming and localizing the presence of nerve or muscle damage when exam findings and/or other diagnostic tests are not clear. The EMG often helps the provider to determine the exact location of the nerve damage, the severity of damage and provide information on when the injury may have occurred. This information is very useful when deciding between which best evidence-based medical treatments to offer." He

noted that per AANEM guidelines, some of the most common conditions that are evaluated with the help of the electro diagnostic studies are:

- Neck pain
- Back pain
- Shoulder and arm pain, numbness, altered sensation (e.g., pins and needles) weakness, cramps, fasciculations, muscle atrophy or hypertrophy (focal or diffuse)
- Hip and leg pain, numbness, altered Lumbosacral radiculopathy sensation (i.e., pins and needles), Lumbosacral plexopathy weakness, cramps, fasciculations

Dr. Eleyinafe asserted that the study was carried out to determine the exact location of the injury. He stated that: "It was evident that the patient had neck pain radiating to left side of neck/arm, shoulder pain, mid back pain, lower back pain radiating to both sides of the back/lower extremities/toes, and right knee pain. Tingling sensations were noted at the left upper extremities. Weakness was noted at the right knee."

Dr. Eleyinafe noted that AANEM guidelines provide that, "electrodiagnostic studies are reasonable and medically necessary under certain clinical circumstances, including: clarifying a differential diagnosis, aiding in selecting treatment options, determining the severity of abnormalities and to localize the correct locations for injection of intramuscular agents." He explained:

Neurological examination revealed moderate mechanical deficit at cervical and lumbar spine. Therefore, EMG/NCV testing was intended to clarify this clinical suspicion and differentiate nerve root lesion from peripheral nerve lesion and were medical necessary to confirm radiculopathy and determine whether this patient was suffering from other neurogenic injuries such as plexopathy or peripheral neuropathy.

Dr. Eleyinafe asserted that the EMG/NCV is the most important means of testing for radiculopathy. He found that it "complements imaging of the spine. Electromyography in combination with nerve conduction testing is valuable in excluding entrapment neuropathies and polyneuropathy, conditions that frequently mimic radicular symptoms. This unique modality is successful because it precisely identifies the nerve or nerves that cause the pain, allowing the physicians to administer proper treatment to resolve it."

Dr. Eleyinafe stated that the EMG/NCV test was recommended to identify the severity, modify the plan of care changing conservative treatment to more aggressive modalities interventional pain management as applicable. He further stated that the testing was conducted not only to diagnose radiculopathy but also to establish the origin of pain, specifically to determine if the pain is a result of damage to nerve roots by intervertebral discs pathology, arthritis of the intervertebral joints or other diseases of the nerves, muscle and/or spine and determine the level of the nerve roots damage. He noted that even a thorough clinical exam cannot accurately confirm a diagnosis of radiculopathy or other neurogenic injuries, such as peripheral neuropathy, and maintained that the performance of the studies provides a treating physician with valuable medical information for the treatment of this patient that cannot be determined by clinical exam. He asserted that a clinician's assessment is often not adequate to decide whether there is

a lesion, severity of lesion or location of lesion. He found that physical exam findings such as loss of reflex, sensory abnormality or weakness is a strong reason to perform an EDX test and not to find a reason to avoid EMG, which can localize the problem.

Dr. Eleyinafe stated that in order to provide comprehensive care, the first step would be to administer EDX testing to determine if a radicular process is or is not present. He explained that: "Where a focal neuropathy (nerve entrapment) or radiculitis (nerve irritation) is electro-diagnostically discovered and documented to be causing severe demyelination or severe denervation, it helps guide clinical decision-making regarding the need for surgical referral. If a surgical referral is made, the surgeon needs the electro-diagnostic assessment of the level or area of where the nerve entrapment or nerve irritation is occurring. Since the patient did have radiculopathy a documented diagnosis would still be required in order to change the treatment plan to include: pain management evaluation; epidural injections; change in the therapy regimen; change in medications; manipulation under anesthesia; and neurosurgical intervention. This means when radiculopathy is diagnosed/confirmed through NCS, this would alter the focus of conservative care to provide optimum use of conservative care time, for instance, by prescribing more time for traction and/or manual therapy. In addition, the patient could benefit from paravertebral nerve blocks or epidural steroid injections for which, as stated above, a documented diagnosis of radiculopathy would be necessary." Dr. Eleyinafe maintained that EMG/NCV information was crucial for precise diagnosis of the patient's condition and his further treatment.

Dr. Eleyinafe asserted that there are no specific guidelines delineating the absolute structured path for treatment to be universally prescribed to all patients, and maintained that great deference should be given to the treating provider charged with the responsibility to examine, diagnose and treat a patient who presents with symptoms and positive clinical findings.

Dr. Eleyinafe also questioned the guidelines and articles cited by the peer review doctor, which he found were not the accepted standard of care for treatment of No-Fault patients and many of which were not a peer reviewed authority. He asserted these guidelines and articles should not be considered as authority to support the denial of the services at issue.

Dr. Eleyinafe asserted that suspected cervical and/or lumbosacral radiculopathies are in fact the most frequent reason for referring a patient for an EMG/NCV study. He further asserted that it is the most sensitive clinical neurophysiologic test for evaluating patients with a suspected radiculopathy. Dr. Eleyinafe cited various articles that support use of EMG/NCV studies in diagnosis of radiculopathy.

Dr. Eleyinafe stated that, "regardless of how these test results would have ultimately been used, the fact remains that in this specific case, the subjective complaints, the clinical findings and resulting differential diagnoses point to suspected peripheral nerve involvement, the only diagnostic test that can help confirm a definitive diagnosis and thereby allow the treating physician to alter the treatment plan accordingly is the EMG/NCV study." Dr. Eleyinafe maintained that the treating provider is in the most optimal position to determine the necessity of neurodiagnostic testing for the furtherance of diagnosis and treatment of his/her patient.

Dr. Eleyinafe asserted that the EDX studies performed as a supplement to a careful history and physical examination were medically indicated, and opined that EMG/NCV studies for upper and lower extremities were medically necessary in this case.

Analysis - Medical Necessity - EMG/NCV upper lower - DOS 11/7/18

After reviewing all of the submissions and taking into account the oral arguments of the parties, I find that Applicant established, by a preponderance of credible evidence, that the EMG/NCV studies of the upper and lower extremities conducted on November 7, 2018 were medically necessary. Overall, I find that the rebuttal and Applicant's supporting medical records adequately address and rebut the arguments and opinions in the peer review and explain the necessity of the EMG/NCV testing at issue. The testing was recommended and conducted on November 7, 2018, two months after the accident, as the Assignor's symptomology continued despite approximately five weeks of conservative treatment. While the peer reviewer raised some arguably legitimate concerns regarding the level of detail and completeness of the multiple evaluations performed by Dr. Eleyinafe, the contemporaneous PM&R/Neurology consultation report nevertheless documented neck pain radiating to both sides of the neck associated with weakness; lower back pain radiating to the right leg with associated weakness and numbness; decreased sensation in the upper and lower extremities, abnormal deep tendon reflexes and reduced motor strength at upper and lower extremities with pain. These findings which were largely consistent with findings in other reports in the record, support Applicant's assertions of a plausible differential diagnosis and the need for the EMG/NCV studies. A reasonable course of conservative care had also been conducted. When faced with two inconsistent, but credible opinions, deference would be accorded to the treating provider, who actually performed examinations, established treatment and diagnostic plans, made diagnoses and performed medical services for the Assignor. Ultimately, I find the rebuttal and Applicant's supporting medical records and arguments to be more credible and persuasive than the peer review. Based on the totality of the evidence in the record, I find that Applicant has rebutted Respondent's defense and established the medical necessity of the EMG/NCV studies. As Applicant has sustained its burden of persuasion. Applicant is entitled to reimbursement in the amount of \$3,119.44 for EMG/NCV studies of the upper and lower extremities of the Assignor conducted on November 7, 2018.

Conclusion

For the reasons set forth herein, Applicant is awarded reimbursement in the total amount of \$3,119.44, with attorney's fees, interest and the arbitration filing fee as set forth below. This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically 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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Status
	Eleyinafe Medical Care PC	11/07/18 - 11/07/18	\$3,119.44	Awarded: \$3,119.44
Total			\$3,119.44	Awarded: \$3,119.44

B. The insurer shall also compute and pay the applicant interest set forth below. 01/22/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest shall be computed from January 22, 2019, the AR-1 filing date, at the rate of 2% per month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

C. Attorney's Fees

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

Respondent shall pay the Applicant's attorney's fees in accordance with 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 Nassau

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

11/15/2020
(Dated)

Kihyun Kim

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:
26704e386dfba1480bcb1b9a1c04a452

Electronically Signed

Your name: Kihyun Kim
Signed on: 11/15/2020