American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

OrthoMotion Rehab DME, LLC (Applicant)	AAA Case No.	17-19-1127-1678
	Applicant's File No.	n/a
- and -	Insurer's Claim File No.	18-49008
	NAIC No.	Self-Insured
County of Suffolk (Respondent)		

ARBITRATION AWARD

I, Corinne Pascariu, 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: Assignor

1. Hearing(s) held on 11/17/2020
   Declared closed by the arbitrator on 11/17/2020

   Marc Schwartz, Esq. from Marc L. Schwartz P.C. participated by telephone for the Applicant

   Joe Lupo, Esq. from VR Management Services Inc f/k/a Vision Risk Services participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **$ 4,639.50**, 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
   Background
   Assignor is a female who was 60-years-old when she was injured as the passenger in a vehicle involved in an accident on May 16, 2018. On November 20, 2018, she was required to appear at medical examination conducted by Stuart Hershon, M.D. Based on the examination, Dr. Hershon determined that assignor no longer required orthopedic treatment. Accordingly, Respondent terminated benefits for orthopedic treatment effective December 5, 2018. On February 28, 2019, assignor underwent a a right shoulder arthroscopy. The next day, Applicant leased post-operative durable medical equipment to her from March 1, 2019 - March 28, 2019.
   Issue

The issue is whether Respondent was justified in denying the claim on the ground of lack of medical necessity. If not, the issue is whether Respondent can establish that the amount Applicant is seeking in reimbursement exceeds the permissible reimbursable amount under the fee schedule.

4. Findings, Conclusions, and Basis Therefor

This decision is based upon the oral arguments of counsel at the hearing and the documents submitted. I have reviewed the documents contained in the ADR Center maintained by the American Arbitration Association as of the date of this award and considered the oral arguments of the parties' representatives. There were no witnesses.

To receive payment of a claim, Applicant "need only file a 'proof of claim' (11 NYCRR 65.11(k)(3)), and the insurers are obliged to honor it promptly or suffer the statutory penalties." Dermatossian v. New York City Transit Authority, 67 N.Y.2d 219, 224, 501 N.Y.S.2d 784, 787 (1986). Furthermore, the No-Fault law requires a carrier to either pay or deny a claim for No-Fault benefits within thirty (30) days from the date an applicant supplies proof of claim. See, Insurance Law §5106 (a) and 11 NYCRR 65-3.8.

Upon reviewing the evidence submitted by the Applicant, I find the Applicant submitted sufficient credible evidence to establish a prima facie case with the respect to the services that are the subject of this arbitration. Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co., 25 N.Y.3d 498, 14 N.Y.S.3d 283 (2015).

Respondent's denial was timely issued.

Medical Necessity:

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. 20140. 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 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, 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).

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 2009 NY Slip Op 00351 (App Div 2d Dept., Jan. 20, 2009), such as by a qualified expert performing an independent medical examination, conducting a peer review of the injured person's treatment, or reconstructing the accident. Id.

Collateral Estoppel:

"Under the doctrine of collateral estoppel, a party is precluded from relitigating an issue which has been previously decided against it in a prior proceeding where it had a full and fair opportunity to litigate the issue (*see D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659 [1990]). 'The two elements that must be satisfied to invoke the doctrine of estoppel are that (1) the identical issue was decided in the prior action and is decisive in the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior issue (*see Kaufman v. Lilly Co.* [65 N.Y.2d 449, 455 (1985)])' (*Luscher v. Arrua*, 21 AD3d 1005, 1007 [2005]). 'The burden is on the party attempting to defeat the application of collateral estoppel to establish the absence of a full and fair opportunity to litigate' (*D'Arata*, 76 N.Y.2d at 664; *see also Kaufman*, 65 N.Y.2d at 456)."Up to date Medical Service, P.C. v. State Farm Mutual Automobile Ins. Co., 22 Misc.3d 128(A), 880 N.Y.S.2d 227 (Table), 2009 N.Y. Slip Op. 50046(U) at 2, 2009 WL 78376 (App. Term 2d & 11th Dists. Jan. 9, 2009).

The issue of medical necessity of orthopedic treatment subsequent to the medical examination by Dr. Hershon was determined by Arbitrator Watford in the matter of Ambulatory Anesthesia, PC v. County of Suffolk, AAA Case No. 17-19-1128-5395 (Gregory Watford, Arb. Jan 25, 2019). Arbitrator Watford provided the following analysis and findings:

> *"Dr. Hershon conducted an orthopedic IME on Assignor. He reviewed the medical records of Assignor, conducted an initial interview and then conducted a physical examination of Assignor. According to Dr. Hershon, during the IME interview Assignor complained of neck pain that radiated to her arm, mid back pain, right shoulder pain and low back pain that radiated to her legs and feet. Dr. Hershon conducted a physical examination of Assignor's cervical, thoracic and lumbar spines where he observed normal range of motion on all planes. Orthopedic testing was negative, there was no tenderness noted and there were no sensory deficits. Examination of Assignor's right shoulder produced normal range of motion, no tenderness and negative orthopedic tests. Dr. Hershon concluded that Assignor's cervical, thoracic and lumbar sprain/strains had resolved. He also concluded that Assignor's right shoulder sprain had resolved.*
>
> *I find that the IME of Dr. Hershon has set forth sufficient factual basis and medical rationale for his opinion that at the time of his examination, medical services were no longer medically necessary and therefore has established, prima facie, a lack of medical necessity for those services rendered by Applicant.*
>
> *If the carrier has satisfied its burden of demonstrating the lack of medical necessity, the applicant ultimately carries the burden of persuasion on the issue of medical necessity and must rebut the carrier's evidence or succumb. A.B Med Servs., P.L.L.C. v. State Farm Mutual Auto Ins Co., 7 Misc. 3d 822, 795 N.Y.S 2d 843 (N.Y. App. Term, 2 nd Dept. - 2005) citing Baumann v. Long Is. R.R., 110 A.D.2d 739, 741 487 N.Y.S.2d 833 (N.Y. App. Div., 2 nd Dept. - 1985); See also,*

Canarsie Family Med Practice, PLLC v. American Tr. Ins. Co., 26 Misc 3d 132(A), 2010 NY Slip Op 50070(U) (N.Y. App. Term, 2 nd Dept - 2010); Crotona Hgts. Med., P.C. v. Geico Ins. Co., 25 Misc 3d 142(A), 2009 NY Slip Op 524664/4/17 (U) (N.Y. App. Term, 2 nd Dept - 2009).

Applicant has not submitted a rebuttal for consideration and relied upon the submissions contained in the ECF. Applicant's counsel relied upon an MRI report, dated 7/19/18, which indicated that Assignor had a full thickness tear of the supraspinatus tendon, a tear of the insertional fibers of the subscapularis tendon, and a tear/tendinopathy of the intra-articular biceps tendon. Applicant's counsel also relied upon a 10/29/18 evaluation report for Assignor's right shoulder which documented decreased muscle strength, reduced range of motion and positive orthopedic testing. Said report also indicated that Assignor received a cortisone injection more than one month prior to 10/29/18, and referenced the shoulder MRI. The report also diagnosed Assignor with a tear of the right rotator cuff. Applicant's counsel also argued that Dr. Hershon failed to list the right shoulder MRI report as one of the documents that he reviewed.

Comparing the relevant evidence and arguments presented by both parties against each other, I am persuaded by the Applicant's arguments and evidence. I find the 10/29/18 right shoulder evaluation report is contemporaneous to the 11/20/18 IME. The orthopedic tests documented in the report directly contradict the tests performed during the IME. Moreover, Assignor had continued complaints of pain to the right shoulder during the IME. Furthermore, the MRI of Assignor's right shoulder documented several tears which were addressed during the 2/28/19 surgery.

Based upon the foregoing, I find that Applicant did sufficiently rebut the IME report to demonstrate that at the time of the IME, Assignor's injuries to her right shoulder had not fully resolved.

For these reasons, Applicant's claim is granted."

I have reviewed Arbitrator Watford's prior award as well as the evidence provided and find that the case presented the identical issue with respect to the medical necessity of orthopedic treatment provided subsequent to the examination by Dr. Herhson. Arbitrator Watford determined the necessity of the post-medical examination arthroscopy and this matter deals with the post-medical examination durable medical equipment provided as a result of the arthroscopy which Arbitrator Watford deemed to be medically necessary. Moreover, no additional arguments were presented at the hearing that would persuade me to come to a different determination herein. As such, I incorporate Case No. 17-19-1128-5395 by reference, and find that the findings of fact and law therein persuasive and control the result in this case.

Based on the forging, I award $4639.50 in satisfaction of the claim.

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**
	OrthoMotion Rehab DME, LLC	**03/01/19 - 03/28/19**	**$4,639.50**	**Awarded: $4,639.50**
Total			**$4,639.50**	**Awarded: $4,639.50**

B. The insurer shall also compute and pay the applicant interest set forth below. 04/30/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

   Interest runs from the day listed above until the date that payment is made at two percent per month, simple interest on a pro rata basis using a thirty-day month.

C. Attorney's Fees

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

   As the claim was filed subsequent to the Sixth Amendment to 11 NYCRR §65-4 (Insurance Regulation 68-D) which took effect on February 4, 2015, Attorney's Fees shall be calculated pursuant to the amended terms, as follows: 20 percent of the amount of first-party benefits, plus interest thereon, subject to a maximum fee of $1,360. [11 NYCRR §65-4.6(d)]. There is no minimum fee.

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

11/29/2020
(Dated)

Corinne Pascariu

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:
2079724f2fae7716995f0c43cc5686df

Electronically Signed

Your name: Corinne Pascariu
Signed on: 11/29/2020