American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Patriot Chiropractic, PC (Applicant)	AAA Case No.	17-19-1121-4310
	Applicant's File No.	SBG-11374-2332306
- and -	Insurer's Claim File No.	79009-02
	NAIC No.	24309
Hereford Insurance Company (Respondent)		

ARBITRATION AWARD

I, Gregory Watford, 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 (RB)

1. Hearing(s) held on 11/24/2020
   Declared closed by the arbitrator on 11/24/2020

   Joaquin Lopez from Sanders Barshay Grossman, LLC f/k/a Baker Sanders LLC participated by telephone for the Applicant

   Joshua Younger from Hereford Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **$ 2,479.86**, 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

   The dispute arises from the underlying automobile accident of October 3, 2018, in which the Assignor, then a 35-year old male, was a passenger. As a result of the impact, he complained of pain to his neck, mid back, low back, and bilateral shoulders with numbness radiating to the upper and lower extremities. Thereafter, he sought private medical attention where he was evaluated and recommended to begin conservative care treatments and was referred for diagnostic testing.

   On December 3, 2018, Assignor underwent electrodiagnostic testing in the form of EMG/NCV tests of the upper and lower extremities. In dispute in this case are the fees for the EMG/NCV tests. Applicant timely submitted bill to Respondent totaling

$2,479.86. Respondent timely denied the bill based upon the peer review report of Dr. Kevin Portnoy.

At the hearing, when asked, Respondent did not raise any fee schedule objections to the amounts billed by Applicant.

The issues to be decided in this case are:

Whether Applicant established entitlement to No-Fault compensation for electrodiagnostic testing services provided to Assignor.

Whether Respondent made out a prima facie case of lack of medical necessity and, if so, whether Applicant rebutted it.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the submissions and documents contained in the American Arbitration Association's ADR Center Electronic Case File (ECF). These submissions constitute the record in this case. This case was decided on the submissions of the parties as contained in the ECF and the oral arguments of the parties' representatives. There were no witnesses.

A claimant's prima facie proof of claim for no-fault benefits must demonstrate that the prescribed claim forms were mailed to and received by the insurer and are overdue. Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co., 25 N.Y.3d 498, 506, 14 N.Y.S.3d 283, 290 (2015). Applicant's proof of mailing is also in Respondent's denials, which acknowledged receipt of the bills.

After reviewing the record and evidence presented, I find that Applicant established a prima facie case of entitlement to reimbursement of its claim. Viviane Etienne Med Care, PC v. Countrywide Ins. Co., *Id*. Once an applicant establishes a prima facie case, the burden then shifts to the insurer to prove its defense. See Citywide Social Work & Psych. Serv. P.L.L.C v. Travelers Indemnity Co., 3 Misc. 3d 608, 2004, NY Slip Op 24034 (Civ. Ct., Kings County 2004).

A presumption of medical necessity attaches to a timely submitted no fault claim. Elmont Open MRI & Diagnostic Radiology, P.C. v. State Farm Ins. Co., 26 Misc.3d 1211(A), 906 N.Y.S.2d 779 (Table), 2010 N.Y. Slip Op. 50053(U) at 3, 2010 WL 157564 (Dist. Ct. Nassau Co., Fred J. Hirsh, J., Jan. 6, 2010). If an insurer asserts that the medical test, treatment, supply, or other service was medically unnecessary, the burden is on the insurer to prove that assertion with competent evidence such as an independent medical examination, a peer review or other proof that sets forth a factual basis and a medical rationale for denying the claim. (See A.B. Medical Services, PLLC v. Geico Insurance Co., 2 Misc. 3d 26 [N.Y. App. Term, 2nd & 11th Jud. Dists 2003];

Kings Medical Supply Inc. v. Country Wide Insurance Company, 783 N.Y.S. 2d at 448 & 452; Amaze Medical Supply, Inc. v. Eagle Insurance Company, 2 Misc. 3d 128 [N.Y. App. Term, 2nd and 11th Jud Dists 2003]).

The 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, Jacob Nir, M.D. v. Allstate Insurance Co., 7 Misc. 3d 544 (N.Y. City Civ. Ct. 2005).

A determination of medical necessity must be based on evidence in existence prior to the rendering of the service. Foster Diagnostic Imaging, PC v General Assur Co., 10 Misc. 3d 428 (Civ. Ct. Kings Cty 2005).

Dr. Portnoy drafted a peer review on behalf of Respondent regarding medical necessity of the EMG/NCV studies. Dr. Portnoy reviewed Assignor's medical records including evaluation reports, progress notes and diagnostic test results. He then summarized the accident and outlined the treatment of Assignor.

Dr. Portnoy noted that NCV studies can detect the cause of problems such as muscle weakness, numbness, spasm, paralysis, or pain and can determine if the problem involved the nerves, muscles, spinal cord, or brain. EMG studies measure the electrical activity of muscles. The NCV test allows the physician to tell the difference between an injury to the nerve axon (the nerve fiber) and the injury to the myelin sheath-the protective covering surrounding the nerve. It is also useful for telling the difference between a nerve disorder and a condition where nerve injury has affected the muscles. Being able to make these distinctions is important for the diagnosis and for determining the appropriate course of treatment.

"The NCV/EMG is used if there is a diagnostic dilemma, and invasive change to the current treatment plan is necessary and surgery is being considered after a course of conservative care for period of six (6) to eight (8) weeks. If the history and clinical evaluation reveal a radiculopathy or a peripheral neuropathy the claimant can be conservatively treated with chiropractic care without the need for the tests. Most radiculopathy symptoms resolved without the need for surgical intervention by means of chiropractic care, physical therapy, or acupuncture therapy. Therefore, NCV/EMG test would not be simply used to rule out radiculopathy or neuropathy."

After reviewing the records, Dr. Portnoy opined *"it is my professional opinion that the claimant was not in need of the tests. My opinion that the performance of the tests was not necessary is based upon the fact that the records do not indicate how the performance of the tests will aid in devising, altering, reducing the number of visits to his office, or enhancing the clinical prognosis of the claimant. There were no signs of rapid neurological deterioration of the claimant throughout the treatment course or evidence of spinal instability that required immediate surgical assessment of the surgical spine or lumbar spine or the upper or lower extremities. The claimant's*

treatment consists of chiropractic care and this is not an intervention dependent on the results of the tests. There was no description of any alternative invasive for surgical procedures under consideration to which the information obtained from the tests would have been necessary to providing optimal chiropractic treatment to this claimant. Decisions regarding the claimant's chiropractic care can be made in absence of the tests. The tests have no role in the treatment of back pain."

He further noted that although Assignor had *"upper and lower extremity neurological complaints, it is not uncommon for patients that sustained soft tissue injuries to present with positive neurological findings. This is due to the proximity of the spinal nerve roots to the injured spinal regions. After a soft tissue injury, the body's first reaction to the trauma is an inflammatory process, which can irritate the spinal nerve roots and cause radicular and neurological complaints. This type of condition would not require surgery or further diagnostic evaluation to continue conservative chiropractic care."*

He cited to medical literature to support his arguments.

I find that the peer review of Dr. Portnoy has set forth a sufficient factual basis and medical rationale for his opinion that the disputed services were not medically necessary and therefore has established, prima facie, a lack of medical necessity for those services rendered by applicant.

In 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, 2nd 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., 2nd Dept - 1985) the Court held that a plaintiff continues to bear the "burden of persuasion" and, if the carrier has satisfied the burden of coming forward, a "plaintiff must rebut it or succumb". Also see 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, 2nd Dept - 2010); Crotona Hgts. Med., P.C. v. Geico Ins. Co., 25 Misc. 3d 142(A), 2009 NY Slip Op 52466(U) (N.Y. App Term, 2nd Dept - 2009).

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. Ortho-Med Surgical Supply, Inc. v. Progressive Cas. Ins. Co., 2012 NY Slip Op 50149(U) (App Term 2d, 11th & 13th Jud Dists Jan. 24, 2012. High Quality Medical, P.C. v. Mercury Ins. Co., 2010 N.Y. Slip Op. 50447(U) (App Term 2d, 11th & 13th Dists. Mar. 10, 2010).

Applicant did not submit a rebuttal and relied upon the records contained in the ECF. Applicant's counsel argued that the 12/3/18 NCV/EMG consultation and initial evaluation report establish the justification for the testing in dispute. He noted that Assignor underwent conservative care treatment in the form of physical therapy, acupuncture, and chiropractic treatments for two months. He further argued that the testing was ordered to distinguish between radiculopathy versus neuropathy and that the test confirmed that Assignor had radiculopathy with no evidence of peripheral neuropathy.

Comparing the evidence and arguments submitted by the parties, I am persuaded by the evidence and arguments of Respondent that the electrodiagnostic tests in dispute were not medically necessary. I was persuaded by the peer review's argument *"If the history and clinical evaluation reveal a radiculopathy or a peripheral neuropathy the claimant can be conservatively treated with chiropractic care without the need for the tests. Most radiculopathy symptoms resolved without the need for surgical intervention by means of chiropractic care, physical therapy, or acupuncture therapy. Therefore, NCV/EMG test would not be simply used to rule out radiculopathy or neuropathy."* Consequently, I was not persuaded by Applicant's counsel's argument that the test was justified because it confirmed radiculopathy. I find that this argument by Applicant's counsel did not sufficiently rebut the peer review.

I was also persuaded by the other arguments contained in the peer review which remained unrebutted by the Applicant. I further find that 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 the EMG/NCV testing not rebutted by the Applicant. AJS Chiropractor, P.C. v. Travelers Ins. Co., 25 Misc.3d 140(A), 906 N.Y.S.2d 770 (Table), 2009 N.Y. Slip Op. 52446(U), 2009 WL 4639680 (App. Term 2d, 11th & 13th Dists. Dec. 1, 2009).

Based upon the forgoing, Applicant's claim for reimbursement is denied.

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, without merit, 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, Gregory Watford, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

12/24/2020
(Dated)

Gregory Watford

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:
0ddd5a459f460f351eec8fc9568ac13a

Electronically Signed

Your name: Gregory Watford
Signed on: 12/24/2020