

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

ElectroDiagnostic & Physical Med PC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-19-1144-8234
Applicant's File No. 2316066
Insurer's Claim File No. 0571263880101038
NAIC No. 35882

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 04/19/2021
Declared closed by the arbitrator on 04/19/2021

Catherine Ramsawak, Esq. from Israel, Israel & Purdy, LLP (Great Neck) participated in person for the Applicant

Chelsea Waller from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 701.38**, 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 male who was 64-years-old when he was injured as the driver of a motor vehicle involved in an accident on June 30, 2018. Following the accident, he commenced conservative treatment. On April 2, 2019, assignor was required present to a medical examination by Rajmani Krishnan, M.D. whereat he determined that assignor no longer required treatment. No-fault benefits for treatment including pain management and physical therapy and massage therapy, were terminated based on this examination effective April 14, 2019. Likewise, on July 8, 2019, assignor was required present to a medical examination by Richard Semble, M.D. whereat he determined that assignor no

longer required treatment. No-fault benefits for testing, physical therapy and massage therapy were terminated effective July 19, 2019. Applicant now seeks reimbursement for the fees in connection with treatment provided August 14, 2019 - September 11, 2019, subsequent to the termination of benefits. Applicant seeks \$701.38 in reimbursement.

Issue

The issue is whether it was justified in denying the claim on the ground of lack of medical necessity.

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.

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. 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., 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.

Medical Examinations by Rajmani Krishnan, M.D. and Richard Semble, M.D.

Respondent terminated no fault benefits for physical therapy, massage therapy and pain management based on an examination by Dr. Krishnan on April 2, 2019. Respondent also terminated no fault benefits for physical therapy, massage therapy and testing based on an examination by Dr. Semble on July 8, 2019. The reports were based upon each examiner's examination of assignor and a review of the available medical documents.

Assignor presented to the examination by Dr. Krishnan with neck and lower back pain which he described as being "for the most part, resolved". He examined his cervical and lumbar spine and upper and lower extremities. Orthopedic and neurological testing yielded normal findings. Range of motion was full. Based upon his findings, Dr. Krishnan diagnosed assignor with a resolved cervical and lumbar sprain and radiculopathy and opined that he no longer required pain management treatment, physical therapy or massage therapy.

Assignor presented to the examination by Dr. Semble with pain to his neck, back pain, shoulders and knees. He examined his cervical and lumbar spine, shoulders and knees. Orthopedic and neurological testing yielded normal findings. Range of motion was full. Based upon the examination findings, Dr. Semble diagnosed assignor with resolved cervical, lumbar, bilateral shoulder and bilateral knee sprain and opined that he no longer required diagnostic testing, physical therapy or massage therapy.

I find that this IME reports present sufficient evidence to establish a defense based on the lack of continued medical necessity. Therefore, the burden then shifts to the Applicant which must then present its own evidence of medical necessity. [See, Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th ed]), Andrew Carothers, M.D., P.C. v. GEICO Indemnity Company, 2008 NY Slip Op 50456U, 18 Misc. 3d 1147A, 2008 N.Y. Misc. LEXIS 1121, West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co. . 13 Misc.3d 131, 824 N.Y.S.2d 759, 2006 NY Slip Op51871(U) (Sup. Ct. App. T. 2d Dep't 2006)].

Medical Records

In furtherance of its position, Applicant submitted medical records including a report from contemporaneous examinations conducted by Orsuville Cabatu, M.D. and Anson Moise, M.D. on March 28, 2019, April 24, 2019, May 3 and 15, 2019, June 12, 2019 and July 24 and 30, 2019. He presented to the examinations with varying degrees of pain to his neck, back and right shoulder. They found that range of motion was decreased and orthopedic tests were positive. An MRI of the cervical and lumbar spine revealed herniations and bulges. Based on the examination findings, Dr. Moise recommended continued treatment as well as cervical epidural steroid injections which assignor underwent on April 12, 2019 and a lumbar medial branch blockade which assignor underwent on July 18, 2019.

Findings

As previously noted, the examination by Dr. Krishnan. and Dr. Semble met its burden of persuasion. However, the contemporaneous evaluations submitted by Applicant are significantly more comprehensive and persuasive. I find that they meet the burden of persuasion in rebuttal successfully refuting the IMEs. They showed that assignor continued to have pain in his cervical and lumbar spine. In addition, the epidural injection and branch block confirmed that assignor had cervical radiculopathy and lumbar facet syndrome.

and the MRIs revealed herniations and bulges which is more than a sprain as diagnosed by Dr. Krishnan and Dr. Semble. Finally, the reports indicated that the continued treatment provided assignor with some relief.

Therefore, I award \$701.38 in full 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
	Electrodiagnostic & Physical Med PC	08/14/19 - 08/27/19	\$405.60	Awarded: \$405.60
	Electrodiagnostic & Physical Med PC	08/29/19 - 09/05/19	\$135.20	Awarded: \$135.20
	Electrodiagnostic & Physical Med PC	09/11/19 - 09/11/19	\$92.98	Awarded: \$92.98
	Electrodiagnostic & Physical Med PC	09/09/19 - 09/09/19	\$67.60	Awarded: \$67.60
Total			\$701.38	Awarded: \$701.38

B. The insurer shall also compute and pay the applicant interest set forth below. 10/16/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from 10/16/19, 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

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 New Jersey, Bergen County

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.

05/18/2021

(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:
ec813859fa2d7d069e11716c8a2242af

Electronically Signed

Your name: Corinne Pascariu
Signed on: 05/18/2021