

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Far Rockaway Medical PC
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-21-1212-4630
Applicant's File No. SBG-11526-2418884
Insurer's Claim File No. -
NAIC No. 16616

ARBITRATION AWARD

I, Stacey Charkey, 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 08/02/2022
Declared closed by the arbitrator on 08/02/2022

Malgorzata Rafalko, Esq. from Sanders Grossman Aronova PLLC participated in person for the Applicant

Derek Lynch, Esq. from American Transit Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,916.46**, 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

This arbitration arises out of medical treatment for the assignor, a then 23 year old female, related to injuries sustained in a motor vehicle accident that occurred on 5/15/19. Applicant seeks reimbursement for upper extremity pain fiber nerve conduction studies (PFNCs) performed on 5/28/19. Respondent denied payment based upon a peer review by Dr. Peter Chiu dated 7/24/19.

The issue presented for determination is whether the upper PFNCs was medically necessary in light of Respondent's peer review.

4. Findings, Conclusions, and Basis Therefor

Applicant seeks reimbursement for PF-NCS testing of the upper extremities. This case was decided based upon the submissions of the Parties as contained in the electronic file maintained by the American Arbitration Association, and the oral arguments of the parties' representatives at a hearing conducted via ZOOM. There were no witnesses. I have reviewed the documents contained in the MODRIA case file maintained by AAA and make my decision in reliance thereon.

11 NYCRR 65-4.5 (o) (1) (Regulation 68-D), reads as follows: The arbitrator shall be the judge of the relevance and materiality of the evidence offered and strict conformity to legal rules of evidence shall not be necessary. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department Regulations.

At issue herein are PF-NCS studies of the upper extremities performed 5/28/19 in connection with injuries sustained by the assignor, a then 23 year old female who was involved in a motor vehicle accident on 05/15/19. Following the accident, assignor was evaluated at the hospital and was later released. There was no hospital admission, fracture or instability noted. The initial evaluation dated 05/16/19 by Dr. Yakov Yukabov (PA) revealed a normal motor exam and no sensory or reflex exam. The subjective complaints were neck, mid back, right shoulder, and low back pain. Assignor was recommended for outcome assessment testing, Diclofenac Sodium Gel, and physical therapy. She was seen in follow-up evaluation on 06/19/19 by Dr. Etienne. Neurological examination demonstrated a normal motor exam and no sensory or reflex exam. Assignor was referred for physical therapy and underwent a series of tests including pf-NCS which was conducted at Applicant's facility. On 05/28/19 assignor underwent PF-NCS testing of the upper extremities.

In support of its contention that the services billed were not medically necessary, Respondent relies upon the peer review report of Peter Chiu M.D.

Applicant has established its prima facie case with proof that it submitted a proper claim, setting forth the fact and the amount charged for the services rendered and that payment of no-fault benefits was overdue (see Insurance Law § 5106 a; *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 AD 3d 742, 774 N.Y.S. 2d 564 [2004]; *Amaze Med. Supply v. Eagle Ins. Co.*, 2 Misc. 3d 128A, 784 N.Y.S. 2d 918, 2003 NY Slip Op 51701U [App Term, 2nd & 11th Jud. Districts]). The burden shifts to the insurer to prove that the services were not medically necessary.

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 [App Term, 2nd & 11th Jud Districts 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 [App Term, 2nd and 11th Jud Districts 2003]).

When an insurer relies upon a peer review report to demonstrate that a particular service was not medically necessary, the peer reviewer's opinion must be supported by sufficient factual evidence or proof and cannot simply be conclusory. As per the holding in *Jacob Nir, M.D. v. Allstate Insurance Co.*, 7 Misc.3d 544 (2005), the peer reviewer must establish a factual basis and medical rationale to support a finding that the services were not medically necessary, including setting forth generally accepted standards in the medical community. The opinion of the insurer's expert, standing alone, is insufficient to carry the insurer's burden to prove that the services were not medically necessary. *CityWide Social Work & Psychological Services, PLLC v. Travelers Indemnity Co.*, 3 Misc.3d 608, 777 N.Y.S.2d 241 (N.Y. Civ. Ct. Kings Co. 2004).

Dr. Chiu asserts that the PFNCS was not medically necessary. Dr. Chiu opines, in relevant part, that the assignor's medical records did not reveal progressive neurological deficits and the assignor did not present with a differential diagnosis. Dr. Chiu also points out that the PFNCS was conducted prematurely and before the initial phases of trauma had resolved- less than 6 weeks of the accident. Dr. Chiu opines that *the history and exam findings were indicative of a sprain/strain condition and they do not support any realistic differential diagnoses which would require nerve testing, especially current perception threshold / sensory nerve conduction test, sNCT. The standard of care for a sprain/strain injury is conservative treatment (eg physical therapy, chiropractic care, acupuncture, anti-inflammatory medications, home exercise program, etc). The standard of care for sNCT may include sensory impairment for clinical and research studies. The treating provider should clearly indicate how sNCT would alter treatment plan (eg. surgery; epidural steroid injection; etc) - which clearly did not occur in this case. In addition, there were no significant progressive neurological deficits, treatment response to conservative care or "red flags" (eg bowel/bladder dysfunction; paralysis; etc). The claimant had a whiplash (sprain/strain; contusion/strain) injury which would not require this type of nerve test as being causally related (eg. radiculopathy, myopathy [eg muscular dystrophy], peripheral neuropathy [eg ETOH, DM, medications], neuromuscular junction disorder [eg myasthenia gravis], polyneuropathy [eg diabetes], entrapment syndrome [eg carpal tunnel syndrome], etc) to this incident; hence, there was no medical necessity for this test.*

Dr. Chiu cites to medical authority that he believes supports his position.

Counsel for the applicant argued that the peer review report is conclusory, does not set a standard, and indicates that testing is not medically necessary and sufficient evidence to validate use of the testing. The peer review report of Dr. Chiu details the records reviewed relative to the PFNCS testing at issue relative to the 23-year-old male assignor. He explained that the history and subjective complaints and physical examination findings were consistent with a sprain/strain injury of the spine which would not warrant the testing at issue. It was unclear how the testing would alter the treatment plan as there was no indication that the claimant was a candidate for surgery or epidural injection at this time. The testing was performed with less than six weeks of conservative treatment, such as physical therapy. The peer review report provides citation to authority to support

the position that the assignor did not have sufficient conservative care, had soft tissue injuries, and the soft tissue sprain/strain injuries did not warrant epidural injections at this time, nor any other invasive surgical procedure at this time, and as such the diagnostic testing was not warranted, and would not and did not assist in any treatment plan.

The attorney for the applicant argued that the peer was conclusory, I find that not to be the case, as much as it did detail with citation to authority that the testing at issue was not medically necessary based on the record reviewed. Further, relative to the use of the test itself, the peer review actually did provide citation to authority and quoted from that authority. Dr. Chiu did dispute the usefulness of the study noting that the American Association of Sensory Electrodiagnostic Medicine, which highly supports the procedures, is an organization whose sole purpose is to certify physicians and technicians in small pain fiber electro diagnosis, with the training being paid for by the physicians and technicians, but that the testing is not taught in medical residency programs. Regardless, Dr. Chiu did explain why such testing was not warranted given this assignor's clinical presentation, lack of a differential diagnosis and lack of conservative care.

Where the Respondent presents sufficient evidence to establish a defense based on the lack of medical necessity, 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 Dept. 2006)].

In support of the claim, Applicant relies on the assignor's medical records. There is nothing in those records that refute the contentions raised by the peer reviewer. Applicant has failed to correlate the assignor's symptomatology to refute the peer review. The undersigned does take issue with the fact that the subject PFNCS studies were conducted 13 days after the accident before any meaningful treatment had been undertaken.

Comparing the evidence presented by both parties, I find I am persuaded by Respondent. I find, upon the evidence provided, that Respondent set forth a medical rationale and factual basis for denying payment. Applicant has not successfully refuted the peer review or established that the performance of the disputed tests/studies were within accepted medical practice.

I sustain the defense asserted in the denials. The fee schedule dispute is hereby rendered moot. Applicant's claim is denied. This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator.

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 Queens

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

08/25/2022

(Dated)

Stacey Charkey

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:
549f604edcbe6e34c712d478c30d1658

Electronically Signed

Your name: Stacey Charkey
Signed on: 08/25/2022