

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Liberty Rhea Ranada Ebarle PT PC
(Applicant)

- and -

Affirmative Direct Insurance Company
(Respondent)

AAA Case No. 17-23-1283-4371

Applicant's File No. 369725

Insurer's Claim File No. AD21102503

NAIC No. 10413

ARBITRATION AWARD

I, Nancy Kramer Avalone, 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 WP

1. Hearing(s) held on 11/01/2023
Declared closed by the arbitrator on 11/01/2023

Neil Menashe, Esq. from Neil Menashe Attorney at Law P.C. participated virtually for the Applicant

Joshua Mak, Esq. from *Abrams Fensterman, LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,472.05**, 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 instant dispute arises out of a motor vehicle accident that occurred on 09/27/2021, involving Assignor WP, a 59-year old female. Applicant is seeking reimbursement for providing physical therapy treatment to Assignor WP from 08/24/2022 through 11/17/2022.

Applicant's submission included specific denial of claim forms for dates of service 01/26/2022 through 02/03/2022 based on the Independent Medical Examination ("IME") by Stuart Stauber, MD. Based on the doctors' report, all future treatment was terminated on 01/20/2022.

At the hearing on the matter there was a misinterpretation of the evidence and the consensus at that time was that the claims were all denied based on the IME of Magda Fahmy, MD which terminated the benefits on 11/25/2022, after the services at issue were performed. However, further review of the Record showed that there was more than one denial of claim form for the services, including one submitted by the Applicant.

The Respondent submitted a general denial of claim form dated 11/18/22 which cited the IME of Magda Fahmy, MD on 11/03/2022 and stated, "no need for further treatment, diagnostic testing, household help, special supplies or special transportation. . . .Therefore, all Physical Medicine & Rehabilitation (PM&R) benefits are denied effective 11/25/2022."

In addition, the Respondent submitted a general denial of claim form dated 01/13/2022 which stated, " in reference to the medical exam by Dr. Stuart Stauber MD on 01/04/2022, . . . there is no need for further Internal Medicine treatment, physical therapy, diagnostic testing, household help, special supplies or special transportation . . . Therefore, all benefits are denied effective 1/20/2022."

Thus, the issue presented is whether the post-IME services were medically necessary.

There were no issues raised with respect to the submission of the claims or issuance of the denial of claim forms. After reviewing the Record, I find that Applicant established its *prima facie* case of entitlement to No-Fault compensation, and Respondent issued timely denial of claim forms preserving all defenses contained therein.

4. Findings, Conclusions, and Basis Therefor

The instant matter was decided based upon the submissions of the parties as contained in the electronic file ("E-file") maintained by the American Arbitration Association (MODRIA), and the oral arguments of the parties' representatives. The hearing was held via a web-based video conferencing platform (ZOOM). I have reviewed the documents contained in the E-file, heard the arguments of the parties, and make my decision in reliance thereon.

Pursuant to 11 NYCRR § 65-4.5(o)(1), an arbitrator shall be the judge of the relevance and materiality of the evidence offered. 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.

Medical Necessity Issue.

Under Sec. 5102 of the New York Insurance Law (McKinney 1985), No-Fault first party benefits are reimbursable for all medically necessary expenses on account of personal injuries arising out of the use or operation of a motor vehicle.

An Applicant establishes its prima facie entitlement to reimbursement by proof that it submitted its claim, setting forth the fact and amounts of the losses sustained, and that payment of no-fault benefits was overdue. Insurance Law § 5106(a); *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (App. Div. 2004); *Viviane Etienne Med. Care v. Country-Wide Ins. Co.*, 2015 NY Slip Op 04787, 25 N.Y.3d 498, 14 N.Y.S.3d 283, 35 N.E.3d 451 (2015). After reviewing the records, including the bill and the denial of claim form, I find that Applicant established its prima facie case of entitlement to No-Fault compensation.

Lack of medical necessity is a valid defense to an action to recover No-Fault benefits. *AJS Chiropractic, P.C. v Travelers Ins. Co.*, 25 Misc.3d 140(A) (App Term 2009).

The Respondent must, at a minimum, establish a detailed factual basis and a sufficient medical rationale for its asserted lack of medical necessity. *Delta Diagnostic Radiology, P.C. v. Progressive Casualty Ins. Co.*, 21 Misc.3d 142A, 880 N.Y.S.2d 223 (2nd Dept. 2008). Additionally, it must be proven that said rationale is supported by evidence of the generally accepted medical/professional practices. *Nir v Allstate Ins. Co.*, 7 Misc.3d 544 (Civ Ct, Kings County 2005).

When the insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the Applicant/provider which must then present its own evidence of medical necessity. See generally, *W. Tremont Med. Diagnostic, P.C. v. Geico Ins. Co.*, 2006 NY Slip Op 51871(U), 13 Misc. 3d 131(A), 824 N.Y.S.2d 759 (App. Term).

Where the denial is predicated upon a peer review report, and the peer review report establishes prima facie, that there was no medical necessity for the services performed, the provider must refute the peer review doctor's determination. See *A Khodadadi Radiology, P.C. v. NY Cent. Mut. Fire Ins. Co.*, 16 Misc. 3d 131(A), 841 N.Y.S.2d 824, 2007 NY Slip Op 51342(U), (App. Term 2007).

Similarly, where the insurer denies the claim based upon an Independent Medical Examination (IME) of the Assignor, and the IME establishes prima facie that there was no medical necessity for continued treatment, the Applicant/provider bears the burden of demonstrating that the treatment at issue was medically necessary by a preponderance of the credible evidence. See, *Amato v. State Farm Ins. Co.*, 40 Misc. 3d 129(A), 2013 NY Slip Op 51113(U), (App Term 2013).

Findings of fact.

To support their position, the Respondent submitted the IME report of Dr. Magda Fahmy, psychiatrist, dated 11/02/2022. Based on Dr. Fahmy's report all future benefits were terminated on 11/25/2022. As the services at issue herein are from 08/24/2022 through 11/27/2022, the IME did not serve to terminate these services.

The IME of Dr. Stauber, dated 01/04/2022, terminated all future No-Fault internal medicine treatment, physical therapy, diagnostic testing, household help, special supplies, and special transportation benefits on 01/20/2022. The Assignor reported that she was transported to the local hospital from the accident scene where she was evaluated, treated and discharged. She presented to the IME with complaints of pain in the cervical and lumbar spine with tingling and numbness in the right arm and leg. She ambulated with an antalgic gait. The exam report noted palpation of the cervical spine detected spasming present. Both the compression test and Spurling's test were positive on the right side. The Assignor refused to perform range of motion of the lumbar spine, due to pain. Upon palpation the lumbar spine was positive for tenderness. Straight leg raising was positive on the right side.

The examining physician provided the following impression: Cervical sprain/strain - Unresolved; Cervical Radiculopathy - Unresolved; Lumbar sprain/strain - Unresolved; Lumbar Radiculopathy - Unresolved. Dr. Stauber concluded that no further medical treatment was necessary despite his clinical findings of spasm, positive orthopedic tests.

After reviewing the totality of the credible and admissible evidence and considering the arguments of the parties, I find that the Respondent has not established lack of medical necessity for further treatment by a preponderance of the evidence. In coming to this conclusion I am in agreement with fellow arbitrator Teresa Girolamo, Esq., (see AAA Case No.: 17-22-1261-0549.) The claim is awarded to the Applicant. *This award is in full disposition of all claims for No-Fault benefits presently before this Arbitrator.*

Applicant is entitled to statutory interest, attorney fees and the filing fee, as set forth in Sections 6. B, C and D, below.

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
	Liberty Rhea Ranada Ebarle PT PC	08/24/22 - 11/17/22	\$2,472.05	Awarded: \$2,472.05
Total			\$2,472.05	Awarded: \$2,472.05

- B. The insurer shall also compute and pay the applicant interest set forth below. 01/20/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from the date noted 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

Respondent shall pay the Applicant attorney's fees in accordance with 11 NYCRR §65-4.6(d). As this matter was filed after 02/04/2015, this case is subject to the provisions promulgated by the Dept. of Financial Services in the Sixth Amendment to 11 NYCRR §65-4 (Ins. Reg. 68-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 NY

SS :

County of Nassau

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

11/22/2023
(Dated)

Nancy Kramer Avalone

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:
4421a1783b1c16233018f4d42ff6b210

Electronically Signed

Your name: Nancy Kramer Avalone
Signed on: 11/22/2023