

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

CitiMed Complete Medical Care PC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-22-1262-3683
Applicant's File No.	RB-203-296269
Insurer's Claim File No.	0108130560101081
NAIC No.	35882

ARBITRATION AWARD

I, Farheen Sultan, 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 12/13/2023
Declared closed by the arbitrator on 12/13/2023

Elyse Ulino, Esq. from Baker & Narkolayeva Law P.C. participated virtually for the Applicant

Jerry Marino, Claims Representative from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$4,997.01**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that Applicant established its prima facie case of entitlement to No-Fault benefits and that Respondent's NF-10/Denial of Claim form was timely issued. The parties further stipulated that there were no issues regarding the fee schedule in this matter.

3. Summary of Issues in Dispute

The Assignor, P.B., a 61 year old male, was the driver of a motor vehicle that was involved in an accident on 12/30/21. At issue in this case is \$4,997.01 for the arthroscopic surgery of the right knee performed on date of service 3/14/22. Respondent

denied the claims based on the peer review of Dr. Howard Kiernan dated 4/15/22. The issue to be determined is whether Respondent has established its medical necessity defense.

4. Findings, Conclusions, and Basis Therefor

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. There were no witnesses. I reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon.

In order to support of 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 1 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 1 Dept. 2013). However, there are numerous 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). "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." Nir, supra.

Respondent denied Applicant's claims based on the peer review of Dr. Howard Kiernan dated 4/15/22. I note that in AAA Case No. 17-22-1250-7299 I have previously addressed this same peer report regarding this surgery. In that matter I held as follows:

Dr. Kiernan argues that the Assignor did not receive an appropriate trial of conservative treatment including physical therapy sessions for the right knee before the recommendation of surgery on 02/14/2022. He argues that a trial of

conservative management should have been attempted prior to proceeding with surgical intervention. He cites to literature which states that knee arthroscopy may be recommended in cases where there is a painful condition that does not respond to nonsurgical treatment. He contends that the MRI revealed a horizontal oblique tear at the posterior horn of the medial meniscus which could have been successfully treated with conservative treatment and non-surgical modalities. Finally, he cites to literature which notes that it is possible to treat meniscus tears conservatively without surgery using anti-inflammatory medications and physical therapy rehabilitation to strengthen muscles around the knee to prevent joint instability.

Respondent's peer review report is sufficient to establish a lack of medical necessity of the service at issue. Accordingly, the burden now shifts to applicant, who bears the ultimate burden of persuasion. Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006).

In response, Applicant submits the rebuttal report of treating surgeon Dr. Clifton Burt dated 3/9/23. Dr. Burt lists several indications for arthroscopic knee surgery and notes that the procedure may be helpful in diagnosing a range of problems. He also cites to literature which discusses the benefits of the procedure. Finally, he states that the patient had subjective imaging and clinical findings supporting diagnosis of meniscal tear, which warranted immediate surgical intervention.

Upon review and consideration, I find that the rebuttal report does not adequately discuss why non-operative treatment would not have been successful in the treatment of the Assignor's injuries. Further, the report does not sufficiently establish that arthroscopy should be considered when there has been no attempt at a physical therapy regimen. The rebuttal report summarily states that immediate surgical intervention was warranted without providing an adequate explanation as to why. Further, I find that the rebuttal report does not persuasively refute the arguments raised in the peer regarding the standard of a trial of conservative treatment modalities prior to surgical intervention. As such, I find that Respondent has successfully established its medical necessity defense in this matter.

Accordingly, Applicant's claim is denied.

It is noted that in the previous matter I erroneously stated that the rebuttal was authored by the treating surgeon, which was not the case. This error did not, however, affect my assessment of the rebuttal. In the present matter the rebuttal was authored by a different physician, Dr. Regina Moshe. In her rebuttal, Dr. Moshe argues that the Assignor received an adequate course of conservative treatment for the right knee prior to the arthroscopy. However, the medical records in submission do not include sufficient evidence to demonstrate that the Assignor underwent a consistent and adequate course of physical therapy aimed at the right knee prior to the surgery. Further, I am not

convinced by Dr. Moshe's assertions that a trial of conservative care was not necessary in this matter. As such, I find the rebuttal equally unpersuasive in this case.

Based on the foregoing, Applicant's claim is denied.

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 NY
SS :
County of Queens

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

12/14/2023
(Dated)

Farheen Sultan

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:
cd2447931638366e0bf4a4d0ec89ffc

Electronically Signed

Your name: Farheen Sultan
Signed on: 12/14/2023