

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

LR Medical PLLC
(Applicant)

- and -

Progressive Casualty Insurance Company
(Respondent)

AAA Case No. 17-24-1336-4446

Applicant's File No. 167024

Insurer's Claim File No. 20-3552161

NAIC No. 32786

ARBITRATION AWARD

I, Kihyun Kim, 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: the Assignor

1. Hearing(s) held on 06/27/2024
Declared closed by the arbitrator on 06/27/2024

Emilia Rutigliano, Esq. from Law Office of Emilia I. Rutigliano, P.C. participated virtually for the Applicant

Erin Ferrone, Esq. from Progressive Casualty Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,302.51**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated to Applicant's prima facie case and to Respondent's timely denials.

The parties also stipulated that Applicant's billing is consistent with the fee schedule.

3. Summary of Issues in Dispute

The issue presented is whether the post-IME cutoff services were medically necessary.

The Assignor (GN) was a 37-year-old male who was the driver of an automobile that was involved in an accident on December 16, 2020. Applicant seeks reimbursement in the aggregate amount of \$1,302.51 for x-rays of the cervical and lumbar spines of the

Assignor and two unlisted radiographic (ligament laxity) procedures provided to the Assignor, subsequent to the IME cutoff, on July 20, 2021. The IME cut-off became effective on May 14, 2021, based on the orthopedic examination by Ronald Mann, M.D., conducted on March 23, 2021.

4. Findings, Conclusions, and Basis Therefor

This arbitration was conducted using the documentary submissions of the parties contained in the ADR Center, maintained by the American Arbitration Association. I have reviewed the documents contained therein as of the close of the hearing and such documents are hereby incorporated into the record of this hearing. Both parties appeared at the hearing by counsel, who presented oral argument and relied upon their documentary submissions. There were no witnesses.

At the hearing, Respondent acknowledged receipt of the bills in question and the parties stipulated to Applicant's prima facie case and to Respondent's timely denials. The parties also stipulated that Applicant's billing is consistent with the fee schedule.

The Assignor was a 37-year-old male who was injured in an automobile accident on December 16, 2020. Following the accident, the Assignor sought treatment for his injuries from various providers, who started him on a course of conservative treatment including physical therapy and acupuncture services.

On March 23, 2021, the Assignor appeared for an orthopedic examination with Ronald Mann, MD, at the request of Respondent. Dr. Mann determined that there was no further medical necessity for treatment in the fields of orthopedic surgery or physical therapy to any of the examined areas.. On May 14, 2021, Respondent issued a general denial based upon the March 23, 2021 IME by Dr. Mann that stated that results of the Assignor's medical examination conclude further medical treatment to the head, cervical spine, thoracic spine, lumbar spine, sacral spine, pelvic spine, bilateral shoulders, bilateral elbows, bilateral wrists, bilateral hands, bilateral hips, bilateral knees, bilateral ankles, and bilateral feet, including physical therapy, massage therapy, household help, special transportation, injections, surgery, durable medical equipment, prescription drugs, and diagnostic testing is not medically necessary was not medically necessary and would be denied effective May 14, 2021.

Subsequent to the orthopedic general denial, on July 20, 2021, the Assignor underwent x-rays of the cervical and lumbar spines and Applicant performed two unlisted radiographic (ligament laxity) procedures with respect to such x-rays. Applicant billed Respondent for its services and Respondent timely denied Applicant's claims as medically unnecessary based on the March 23, 2021 IME by Dr. Mann.

Applicant now seeks reimbursement in the aggregate amount of \$1,302.51 for the x-rays of the cervical and lumbar spines of the Assignor and two unlisted radiographic (ligament laxity) procedures provided to the Assignor, subsequent to the IME cutoff, on July 20, 2021.

Legal Framework - Medical Necessity - IME

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment (*Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13 [2d Dept. 2009]), such as by a qualified expert performing an independent medical examination or conducting a peer review of the injured person's treatment. See *Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp.*, 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003). An insurance carrier may utilize an independent medical examination (IME) to determine whether an eligible injured person is entitled to further care and treatment or other first-party benefits. See *Rowe v. Wahnnow*, 26 Misc.3d 8, 11-12 (App Term, 1st Dept 2009, McKeon, P.J., dissenting). "An IME is a snapshot of the injured party's medical condition as of the date" it is conducted. *Amato v. State Farm Ins. Co.*, 2010 NY Slip Op. 20431 (Dist. Ct. Nassau Co., Fred J. Hirsh, J., Oct. 13, 2010).

An IME report can be the basis of a termination of benefits if ultimately found to be persuasive. An IME report must set forth a factual basis and medical rationale for the conclusion that further services are not medically necessary. *Ying Eastern Acupuncture, P.C. v. Global Liberty Ins.*, 20 Misc.3d 144(A), 873 N.Y.S.2d 238 (Table), 2008 N.Y. Slip Op. 51863(U), 2008 WL 4222084 (App. Term 2d & 11th Dists. Sept. 3, 2008). The determination that an eligible injured person no longer needs treatment is generally based upon an examiner's findings that result in the conclusion that: (1) the patient has fully recovered from the injuries; (2) the patient has made as full a recovery as is possible taking into account the nature and extent of the injuries, the patient's age, pre-existing conditions or other factors; and/or (3) additional treatment or testing will not provide any medical benefit to the patient. *Amato v. State Farm Ins. Co.*, 2010 NY Slip Op. 20431 (Dist. Ct. Nassau Co., Fred J. Hirsh, J., Oct. 13, 2010). Whether an IME report is persuasive and meets the carrier's burden is a factual decision, which must be rendered on a case by case basis.

If the IME report provides a factual basis and medical rationale for an opinion that services were not medically necessary, the burden shifts back to the Applicant to refute the IME findings and prove the necessity of the disputed services. See, *CPT Med. Servs., P.C. v. New York Cent. Mut. Fire Ins. Co.*, 18 Misc.3d 87 (App. Term 1st Dept.); *Eden Med., P.C. v. Progressive Cas. Ins. Co.*, 19 Misc.3d 143(A) (App Term 2d & 11th Jud. Dists., 2008); *Be Well Med. Supply, Inc. v. New York Cent. Mut. Fire Ins. Co.*, 18 Misc. 3d. 139 (A) (App. Term 2d Dept., Feb. 21, 2008; *A. Khodadadi Radiology, P.C. v. NY Cent. Mut. Fire Ins. Co.*, 16 Misc. 3d. 131 (A) (App Term 2d Dept.); *West Tremont Med. Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc. 3d. 131 (A) (App Term 2d Dept., 2006). If the Applicant fails to present any evidence to refute Respondent's showing, the claim should be denied, as the ultimate burden of proof on the issue of medical necessity lies with the Applicant. See Insurance Law § 5102; *Wagner v. Baird*, 208 A.D.2d 1087 (3d Dept. 1994); *AJS Chiropractic, P.C. v. Mercury Ins. Co.*, 22 Misc.3d 133(A), (App. Term 2d & 11th Dist. Feb. 9, 2002). The case law is clear that a provider must rebut the conclusions and determinations of the IME doctor with his own facts. As the Appellate Term, 2d, 11th & 13th Dists., recently stated: "it is ultimately plaintiff who must prove, by a preponderance of the evidence, that the services or supplies were medically necessary." *Park Slope Medical and Surgical Supply, Inc. v. Travelers Ins. Co.*, 37 Misc.3d 19, 22 (App. Term 2d, 11th & 13th Dists. 2012).

IME - Ronald Mann, M.D., dated March 23, 2021

Respondent relies upon the IME report, dated March 23, 2021, by Ronald Mann, M.D., in asserting a lack of medical necessity for the x-rays of the cervical and lumbar spines of the Assignor and two unlisted radiographic (ligament laxity) procedures provided to the Assignor, subsequent to the IME cutoff, on July 20, 2021. At the March 23, 2021 examination, Dr. Mann obtained the Assignor's history, reviewed various medical records and conducted a physical examination of the Assignor. Examination was done by observation and goniometer.

At the time of the examination, the Assignor stated that his back has been improving. No specific complaints were documented. Dr. Mann reported that the Assignor had a normal gait pattern, was in no acute distress, and got on and off the examination table without difficulty.

Examination of the cervical spine revealed ranges of motion were within normal limits (forward flexion 50°/50°, extension 45°/45°, rotation 80°/80°). Neurologically, Dr. Mann found that the Assignor was intact to both upper extremities with motor strength, deep tendon reflexes, and sensation intact. Spurling's test was negative.

Examination of the thoracolumbar spine revealed ranges of motion were within normal limits (forward flexion 90°/60°, right and left lateral bending 30°/25°). Straight leg raise testing was negative. Neurologically, Dr. Mann found that the Assignor was intact to both lower extremities with motor strength, deep tendon reflexes, and sensation intact.

The Assignor had full equal painless ranges of motion of both shoulders, both elbows, and both hands and wrists. He also had full equal painless ranges of motion of both hips, both knees, and both feet and ankles.

Dr. Mann diagnosis was thoracolumbar sprain/strain, resolved. Dr. Mann opined that there was no further medical necessity for treatment in the fields of orthopedic surgery or physical therapy to any of the examined areas. He also determined that the Assignor had no disability related to this accident. Dr. Mann further opined that there was no medical necessity for massage therapy, injections, surgery, diagnostic testing, durable medical equipment, household help, special transportation, or pain management for any of the examined areas. He also maintained that there was no medical necessity for prescription medications for any of the examined areas as he is taking none.

I find Dr. Mann's IME report sufficient to meet Respondent's burden of production. The burden now shifts to the Applicant, as it is the Applicant's burden, ultimately, to establish the medical necessity of the services at issue. *See* Insurance Law § 5102; *Shtarkman v. Allstate Insurance Co.*, 2002 NY Slip Op 50568(U), 2002 WL 32001277 (App. Term 9th & 10th Jud. Dists. 2002) (burden of establishing whether a medical test performed by a medical provider was medically necessary is on the latter, not the insurance company).

Analysis - Medical Necessity - X-rays/unlisted radiographic - DOS 7/20/21

At the hearing, Respondent's counsel asserted that Applicant was collaterally estopped from re-litigating the issue of medical necessity as Arbitrator Allison Schimel previously ruled against Applicant in linked case, *LR Medical PLLC and Progressive Casualty Insurance Company*, AAA Case No: 17-22-1271-0988 (June 8, 2023), upholding Respondent's medical necessity defense based on the same March 23, 2021 IME report by Dr. Mann at issue herein. In

Comparing the relevant evidence presented by both parties against each other including the IME report, Applicant's IME Rebuttal by Roman Shulkin, M.D., and the medical records, I find that the IME report sets forth a sufficient factual basis and medical rationale to establish lack of medical necessity of the disputed treatment. The burden shifted to the Applicant to refute the findings of the IME report, however Applicant's submission is devoid of any contemporaneous evaluations that might have adequately refuted the findings of the IME doctor. The rebuttal discusses the evaluations beginning on 7/20/21, which was four months after the IME and therefore not contemporaneous. Accordingly, I find in favor of Respondent and deny the claim. This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator.

Respondent's counsel noted that the prior award involved the same accident, the same Assignor, the same Applicant, the same Respondent, the same IME report, and the same issue of medical necessity and Applicant was given a full and fair opportunity to contest the prior determinations. *See Ryan v. New York Telephone*, 62 N.Y.2d 494, 478 N.Y.S.2d 823, 467 N.E.2d 487 (1984); *see also, Gilberg v. Barbieri*, 53 N.Y.2d 285, 441 N.Y.S.2d 49 (1981); *Rembrandt Industries, Inc. v. Hodges International, Inc.*, 38 N.Y.2d 502, 381 N.Y.S.2d 451 (1976).

Applicant's counsel acknowledged that Applicant was aware of the prior award, but asserted that collateral estoppel should not apply herein noting that different services were provided herein and Applicant uploaded a different rebuttal that explained the necessity of the services provided. Applicant's counsel conceded, however, that no new contemporaneous examination reports were uploaded to the record in this proceeding.

"Under the doctrine of collateral estoppel, a party is precluded from re-litigating an issue which has been previously decided against it in a prior proceeding where it had a full and fair opportunity to litigate the issue (*see D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659 [1990]). 'The two elements that must be satisfied to invoke the doctrine of estoppel are that (1) the identical issue was decided in the prior action and is decisive in the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior issue (*see Kaufman v. Lilly Co.* [65 N.Y.2d 449, 455 (1985)])' (*Luscher v. Arrua*, 21 AD3d 1005, 1007 [2005]). 'The burden is on the party attempting to defeat the application of collateral estoppel to establish the absence of a full and fair opportunity to litigate' (*D'Arata*, 76 N.Y.2d at 664; *see also Kaufman*, 65 N.Y.2d at 456)." *Uptodate Medical Service, P.C. v. State Farm Mutual Automobile Ins. Co.*, 22 Misc.3d 128(A), 880 N.Y.S.2d 227 (Table), 2009 N.Y. Slip Op. 50046(U) at 2, 2009 WL 78376 (App. Term 2d & 11th Dists. Jan. 9, 2009).

It is within the arbitrator's authority to determine the preclusive effect of a prior arbitration. *Matter of Falzone v. New York Central Mutual Fire Ins. Co.*, 15 N.Y.3d 530, 914 N.Y.S.2d 67 (2010), *aff'd*, 64 A.D.3d 1149, 881 N.Y.S.2d 769 (4th Dept. 2009).

The two prongs required to invoke collateral estoppel are present herein. This case involves the identical issue, lack of medical necessity based on the IME by Dr. Mann, and the party to be precluded, Applicant, had a full and fair opportunity to contest the issue. Thus, I find that Applicant is precluded from re-litigating the medical necessity issue as collateral estoppel applies. The prior award is dispositive of the medical necessity issues herein.

However, even assuming, *arguendo*, that collateral estoppel did not apply directly herein, Respondent's medical necessity defense would still be upheld herein as Applicant has failed to establish, by a preponderance of credible evidence, that the x-rays of the cervical and lumbar spines of the Assignor and the two unlisted radiographic (ligament laxity) procedures provided to the Assignor, subsequent to the IME cutoff, on July 20, 2021, were medically necessary. The IME was conducted on March 23, 2021, over three months after the accident, and the IME report documented what appeared to be a detailed and thorough examination with no positive findings noted. The services at issue were conducted approximately four months after the IME on July 20, 2021. While Applicant's counsel pointed to the rebuttal and findings from the July 20, 2021 examination to rebut the IME report, the examination report is deemed to be too far removed from the IME report by Dr. Seldman to be probative on the issue of medical necessity herein. As Applicant's counsel acknowledged at the hearing, there were no medical examination reports in the record that were contemporaneous with the IME. It has been held that: "An IME is a snapshot of the injured party's medical condition as of the date of the IME. The opinion of the doctor conducting an IME and issuing a report that no further treatment or testing is needed is nothing more than an expert's opinion that at the time the examination was conducted the claimant did not need any further treatment or testing." *Amato v. State Farm Ins. Co.*, *supra*. Also, "a person's condition can wax and wane after a motor vehicle accident" *See Huntington Medical Plaza, P.C. v. Travelers Indemnity Co.*, 43 Misc.3d 129(A), 990 N.Y.S.2d 437 (Table), 2014 N.Y. Slip Op. 50527(U), 2014 WL 1344448 (App. Term 2d, 11th & 13th Dists. Mar. 21, 2014), *aff'd*, 34 Misc.3d 874, 937 N.Y.S.2d 830 (Civ. Ct. Queens Co. 2011). Despite this, the law nevertheless permits an insurance carrier to utilize an independent medical examination to determine whether an eligible injured person is entitled to further care and treatment. I reviewed all of medical reports in the record, but did not find any contemporaneous records or any other records, including progress notes, that sufficiently explained how or why any continued treatment seven plus months after the accident and four months after the IME was medically necessary. There is simply insufficient objective evidence in the record to credibly and persuasively rebut the detailed findings, diagnoses and recommendations of no further treatment contained in the IME report. I also find that the findings of fact and rationale of the prior award by Arbitrator Schimel to be persuasive with respect to the medical necessity issues in this proceeding, and I adopt such findings and rationale to support my award herein. Applicant has not presented any evidence or argument that persuades me to rule differently herein. Ultimately, I find the IME report to be more persuasive and credible than Applicant's rebuttal, supporting medical documentation and oral arguments. Based

on the totality of the evidence in the record, Applicant has failed to rebut Respondent's defense and establish the medical necessity for the disputed services.

Based on all of the foregoing, Applicant's claims for reimbursement for the x-rays of the cervical and lumbar spines of the Assignor and two unlisted radiographic (ligament laxity) procedures provided to the Assignor, subsequent to the IME cutoff, on July 20, 2021, are denied.

Conclusion

For the reasons set forth herein, Applicant's claims are denied in their entirety. 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 and/or waived insofar as not specifically 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 NY

SS :

County of Suffolk

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

07/27/2024
(Dated)

Kihyun Kim

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
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Electronically Signed

Your name: Kihyun Kim
Signed on: 07/27/2024