

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

BV Nassau County Physical Therapy PC
(Applicant)

- and -

State Farm Mutual Automobile Insurance
Company
(Respondent)

AAA Case No. 17-22-1280-6640

Applicant's File No. DK22-291549

Insurer's Claim File No. 3235V890H

NAIC No. 25178

ARBITRATION AWARD

I, Sandra Adelson, 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 patient

1. Hearing(s) held on 07/18/2024
Declared closed by the arbitrator on 07/18/2024

Evan Polansky, Esq. from Korsunskiy Legal Group P.C. participated virtually for the Applicant

Jenna Pettograsso, Esq. from Rivkin & Radler LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$614.00**, 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 patient was a 64 year old male driver who was involved in a motor vehicle accident which took place on 6/24/22. The applicant seeks payment for performing activity limitation testing on 9/7/22.

Respondent issued a denial which stated that " You have failed to comply with your obligation to present a proper proof of claim, as required under 11 N.Y.C.R.R. 65-1, by failing to provide the verification, including the examination under oath that we have requested that you attend on October 25, 2022 and November 15, 2022. Therefore, you

have failed to satisfy a condition of coverage, and your claim is denied. Unless otherwise noted, all fees should be in accordance with the medical fee schedule as per the rules and regulations authorized by the State of New York, Department of Insurance, 28."

4. Findings, Conclusions, and Basis Therefor

The record consisted of claimant's submission, respondent's submission, as well as documents not enumerated within this decision, but which are contained in the case file maintained by the American Arbitration Association. THE ARBITRATOR SHALL BE THE JUDGE OF THE RELEVANCE AND MATERIALITY OF THE EVIDENCE OFFERED pursuant to 11 NYCRR 65-4.5 (o) (1) (Regulation 68-D). Based on a review of the documentary evidence, this claim is decided as follows:

It is now well-settled that a medical provider establishes a prima facie case of entitlement to payment of no-fault benefits upon the submission of a proper claim form setting forth the fact and amount of the losses sustained as well as the additional fact that that the payment of no-fault benefits was then overdue. Insurance Law 5106(a); *Mary Immaculate Hospital v. Allstate Insurance Co.*, 5 A.D.3d 742; *Amaze Medical Supply, Inc. v. Eagle Insurance Co.*, 2 Misc 3d 128(A).

The burden then shifts to the respondent. The respondent's denial for lack of medical necessity must be supported by a peer review or other competent medical evidence [such as an IME report] which sets forth a clear factual basis and medical rationale for denying the claim. *Healing Hands Chiropractic, P.C. v. National Assurance Co.*, 5 Misc 3d 975; *Citywide Social Work, et. al. v. Travelers Indemnity Co.*, 3 Misc 3d 608.

In this claim, respondent denied the disputed services based upon the provider's failure to appear for two EUO examinations which were scheduled for 10/25//22 and 11/15//22.

The insurer is entitled to judgment where it proves that two separate requests for an EUO were duly mailed to the provider and the latter failed to appear on either of the dates. *Apollo Chiropractic Care, P.C. v. Praetorian Ins. Co.*, 27 Misc.3d 139(A), 932 N.Y.S.2d 420 (Table), 2010 N.Y. Slip Op. 50911(U), 2010 WL 2026636 (App. Term 1st Dept. May 24, 2010).

In support of the EUO no-show defense, respondent submitted the denial, the EUO scheduling letters dated 9/29/22 and 10/28/22, proofs of mailing of the EUO scheduling letters which included the insurer's claim number, as well as an affidavit of the attorney

from Rivkin & Radler assigned to conduct the EUO examinations on 10/25/22 and 11/15/22 who attested to the provider's failure to appear at each of the scheduled EUO examinations.

Upon reviewing the evidence, respondent's proof established its EUO no-show defense. Respondent's evidence shows that the EUO scheduling letters contained the requisite statutory language. Additionally, the respondent submitted credible proof that the letters were mailed, and that the provider failed to appear for the EUO examinations in issue.

The submission from applicant does not include any evidence to dispute the fact that the provider failed to appear at each scheduled EUO examination. However, applicant argued that the second EUO scheduled letter dated 10/28/22 afforded short notice. The evidence established that the proof of mailing for the second EUO scheduling letter was stamped by the USPO on 11/2/22. Allowing five days for mailing, which would establish that the second EUO scheduling letter was received by respondent on 11/7/22. Applicant argues that 8 days prior to the EUO was insufficient notice.

I disagree. Upon a review of the case law submitted to the record, I concur with arbitration award of Arbitrator Frank Marotta in Case No. 17-23-1286-6363, Park Chemists 4 AV LLC and State Farm Mutual Insurance Company. The latter claim presented an analogous situation to one in the case at bar, in that, applicant in Park Chemists, supra also alleged short notice in the mailing of the second EUO letter. Arbitrator Marrotta held that

"The Respondent also provides an EUO scheduling notice to the Applicant dated 12/22/22 similar to the 11/28/22 notice. The 12/22/22 notice is designated as a second request notice and provides an Appendix of claims which includes the one submitted for services to this Assignor on 11/15/22. The EUO was scheduled for 1/11/23 at 10:00 Am to take place at Rivkin Radler, LLP 926 RXR Plaza Uniondale, NY 11556. The Respondent's second notice again advises the Applicant that changes can be made to the date, time, location, and method of conducting the EUO to accommodate the Applicant.

In further support the Respondent provides proof that their 11/28/22 scheduling notice was mailed to the Applicant on 11/30/22 and the 12/22/22 scheduling notice was mailed to the Applicant on 12/27/22. Respondent's proof of mailing is sufficient to give rise to a rebuttal presumption that the notices were received. *New York Presbyterian Hospital v Allstate Ins. Co.*, 2006 NY Slip Op 03558, 29 AD 2d 547 (2nd Dept 2006); *Residential Holding Corp. v Scottsdale Insurance Company*, 286 A.D.2d 679, 729 N.Y.S.2d 776 (2dDept. 2001).

In further support of its defense, the Respondent provides an Affirmation by Ryan Goldberg, Esq, a partner with Rivkin Radler noting that he is one of the attorney's authorized to conduct EUOs on behalf of the Respondent and that on 12/21/22 and 1/11/23 he was present in the office to conduct the EUO. Had the Applicant appeared he would have conducted the EUO or assigned another attorney to conduct the EUO of the

Applicant. According to Mr. Goldberg no one affiliated with the Applicant appeared on either date had they appeared for the EUOs.

The Respondent thereafter denied the Applicant's claim based on their failure to appear for the EUO on 12/21/22 and 1/11/23. Respondent's denial dated 1/12/23 was mailed to the Applicant on 1/17/23.

At the hearing the Applicant argued that the scheduling letters gave short notice for the EUOs. While the initial EUO notice is dated 11/28/22 it was not mailed until 11/30/22. Considering CPLR 2013 the scheduling notices would not have been received until five days after their mailing and therefore would not give the Applicant sufficient time to address the EUO. In support the Applicant provides a decision by Arbitrator Stacy Presser finding such a notice neither reasonable nor adequate.

This issue was previously raised by the Applicant in the matter of Global Tech Diagnostic Inc. and State Farm Mutual Automobile Insurance Company, AAA Case No.17-22-1275-6764. In my decision dated 4/15/24, I consider Applicant's argument and Arbitrator Presser's decision noting

"There is no evidence that the matter before Arbitrator Presser shared the same facts as those in the instant matter. It is noted that in the matter before Arbitrator Presser, the short notice involved the initial scheduling letter and in the instant matter the Applicant is arguing the rescheduling letter gave short notice of the EUO in the instant matter. For the reasons noted I find for the Respondent and deny the Applicant's claim."

I find the facts established in the instant matter similar to those in the matter I decided earlier,

see 17-22-1275-6764. In both cases, the initial scheduling of the EUO is not scheduled on short notice and while the follow up scheduling notice was not mailed until 12/27/22 the facts are distinguishable from those expressed by Arbitrator Presser. More importantly, the Applicant was on notice of the EUO request since the Applicant failed to appear at the initial EUO and further the Applicant had the opportunity to communicate with the Respondent in the matter schedule a date, time and/or location for the EUO that is convenient for the Applicant. The proof is sufficient to establish that the notice was received but there is no proof that the Applicant attempt to communication with Respondent or Rivkin's office regarding the EUO.

It is well settled that a failure to appear for an EUO is a breach of a condition precedent to coverage under a policy and a proper basis to deny a no-fault claim. See 11 NYCRR§65-1.1 (d), IDS Prop. Cas. Ins. Co. v. Stracar Med. Services, P.C., 116 AD3d 1005,985 NYS 2D 116 (2nd Dept. 2014). To establish its defense as a matter of law an insurer must demonstrate that it twice duly demanded the EUO, and that the Assignor twice failed to appear resulting in timely denials of the claims. Interboro Ins. Co. v. Clennon,113 A.D.3d 596, 597 (2nd Dept. 2014). Considering the proof provided I find that the Respondent has met its burden with the proof provided and therefore the denial should be sustained.

For the reasons noted above Applicant's claim is denied in its entirety."

I agree with Arbitrator Marotta's analysis that there was no evidence that the matter before Arbitrator Presser shared the same facts as those in the instant matter. It is noted that in the matter before Arbitrator Presser, the short notice involved the initial scheduling letter. In the present arbitration, the applicant argues that the rescheduling letter dated 10/28/22 gave short notice. However, applicant was already on notice that an EUO had been requested by the receipt of the first EUO scheduling letter. In fact, the EUO scheduling letters included in the arbitration record also included verbiage allowing for changes to the scheduled date. The subject language in the scheduling letters stated: "If that date, time and/or location are inconvenient or you prefer to appear for an EUO by video teleconference or teleconference, please contact Ryan Goldberg at Rivkin Radler LLP (516) 357-3000 and we will reschedule the EUO for a date and time, manner, as well as a location that is reasonably convenient for you."

I do not find that there was short notice in the mailing of the second EUO scheduling letter. I also find that respondent established its defense, in that it twice duly demanded the EUO, and that the Assignor twice failed to appear resulting in timely denials of the claims. *Interboro Ins. Co. v. Clennon*, 113 A.D.3d 596, 597 (2nd Dept. 2014). Therefore in considering the proof provided, I find that the Respondent has met its burden with the proof provided and therefore the denial should be sustained.

The 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 Suffolk

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

08/06/2024
(Dated)

Sandra Adelson

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:
3aab5915491d3ceeddfcec577c376209

Electronically Signed

Your name: Sandra Adelson
Signed on: 08/06/2024