

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Bova Family Chiropractic
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-24-1339-7160

Applicant's File No. 22-42354

Insurer's Claim File No. 0578541040101031

NAIC No.

ARBITRATION AWARD

I, Corinne Pascariu, 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 08/30/2024
Declared closed by the arbitrator on 08/30/2024

Attorneys from The Morris Law Firm, P.C. participated by written submission for the Applicant

Kevin Smith from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,382.25**, 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

Assignor is a female who was 51-years-old when she was injured as the passenger in a motor vehicle involved in an accident on December 7, 2020. She subsequently commenced conservative treatment, including chiropractic treatment. On June 4, 2021, Assignor was required to appear at a medical examination which was conducted by Craig Horner, D.C. wherein the doctor found further chiropractic treatment was no longer medically necessary and based upon which no fault benefits were terminated effective June 18, 2021. Applicant seeks \$1382.25 in reimbursement for treatment provided July 6, 2022 - October 17, 2022.

Issue

The issue is whether Respondent was justified in denying the treatment on the ground that it was not medically necessary.

4. Findings, Conclusions, and Basis Therefor

The case was decided on the submissions of the parties as contained in the ADR Center maintained by the American Arbitration Association and the oral arguments of the parties' representatives. There were no witnesses. I reviewed the documents contained in the file for both parties and make my decision in reliance thereon.

To receive payment of a claim, Applicant "need only file a 'proof of claim' (11 NYCRR 65.11(k)(3)), and the insurers are obliged to honor it promptly or suffer the statutory penalties." Dermatossian v. New York City Transit Authority, 67 N.Y.2d 219, 224, 501 N.Y.S.2d 784, 787 (1986). Furthermore, the No-Fault law requires a carrier to either pay or deny a claim for No-Fault benefits within thirty (30) days from the date an applicant supplies proof of claim. See, Insurance Law §5106 (a) and 11 NYCRR 65-3.8. I find that Applicant established a prima facie case of entitlement to reimbursement of its claim, by submitting evidence that the prescribed statutory billing form was mailed and received, and that the Respondent failed to either pay or deny the claim within the requisite 30-day period. Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co., 25 N.Y.3d 498, 14 N.Y.S.3d 283 (2015); Mary Immaculate Hospital v. Allstate Insurance Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004).

Respondent's denial was timely issued.

Medical Necessity:

On June 4, 2021, Assignor was required to appear at a medical examination which was conducted by Craig Horner, D.C. wherein the doctor found further chiropractic treatment was no longer medically necessary and based upon which no fault benefits were terminated effective June 18, 2021. Applicant seeks \$1382.25 in reimbursement for treatment provided July 6, 2022 - October 17, 2022.

To meet its burden, at a minimum, the No-Fault insurer must establish a factual basis and medical rationale for its asserted lack of medical necessity of the health care provider's services. A.M. Medical Services, P.C. v. Deerbrook Ins. Co., 18 Misc.3d 1139(A), 859 N.Y.S.2d 892 (Table), 2008 N.Y. Slip Op. 50368(U), 2008 WL 518022 (Civ. Ct. Kings Co., Sylvia G. Ash, J., Feb. 25, 2008).

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, 871 N.Y.S.2d 680 (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).

The appellate courts have not clearly defined what satisfies the insurer's evidentiary standard except to the extent that "bald assertions" are insufficient. Amherst Medical Supply, LLC v. A Central Ins. Co., 41 Misc.3d 133(A), 981 N.Y.S.2d 633 (Table), 2013 NY Slip Op 51800(U), 2013 WL 5861523 (App. Term 1st Dept. Oct. 30, 2013). However, there are myriad 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 Ins. Co., 7 Misc.3d 544, 547, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings Co. 2005); *see also* All Boro Psychological Servs. P.C. v. GEICO, 34 Misc.3d 1219(A), 950 N.Y.S.2d 490 (Table), 2012 NY Slip Op 50137(U), 2012 WL 309328 (Civ. Ct. Kings Co., Reginald A. Boddie, J., Jan. 31, 2012).

"Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then present its own evidence of medical necessity (see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th ed])." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 824 N.Y.S.2d 759 (Table), 2006 N.Y. Slip Op. 51871(U) at 2, 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006). Assuming the insurer establishes a lack of medical necessity, it is ultimately the claimant who must prove, by a preponderance of the evidence, that the services or supplies were medically necessary. Dayan v. Allstate Ins. Co., 49 Misc.3d 151(A), 29 N.Y.S.3d 846 (Table), 2015 N.Y. Slip Op. 51751(U), 2015 WL 7900115 (App. Term 2d, 11th & 13th Dists. Nov. 30, 2015); Park Slope Medical and Surgical Supply, Inc. v. Travelers Ins. Co., 37 Misc.3d 19, 22 n., 952 N.Y.S.2d 372, 374 n. (App. Term 2d, 11th & 13th Dists. 2012).

Collateral Estoppel:

Arbitrator Fred Lutzen previously decided whether the services rendered by Applicant Bova Chiropractic subsequent to the IME were medically necessary in the case of Bova Family Chiropractic, P.C. v. Geico Ins. Co., AAA Case no. 17-23-1309-4983 (3/5/24 (Fred Lutzen, Arb.)). Like the claim before me, that award concerned treatment, provided by Bova subsequent to the termination of benefits based on Dr. Horner. In the prior award, Arbitrator Lutzen reviewed the available record and found the following:

On 6/4/2021, Dr. Horner reviewed the EIP's medical records and re-examined the EIP. Dr. Horner noted the EIP's current complaints (on 6/4/2021) included pain in the neck, mid-back, and low back. The EIP reported she "does not feel better now, compared to when she started treatments" and "it doesn't get better" when asked if she receives relief after treatment.

Dr. Horner reported the EIP had normal appearance and posture. Cervical spine examination revealed no spasms, minimal tenderness to palpation, and no evidence of disturbed alignment. Neurological examination was entirely normal in every respect, with intact sensory responses, 5/5 strength throughout, and symmetrical reflexes and +2.

Cervical compression test and cervical distraction test were negative. Cervical ranges of motion were reduced by 10 degrees in extension, right rotation, and left rotation. Flexion was normal/full. Right and left lateral flexion were reduced by 15 degrees. Examination of the thoracic spine revealed no paraspinal spasms, minimal paraspinal tenderness, and no evidence of disturbed alignment. Examination of the lumbar spine revealed no paraspinal spasms, minimal tenderness, and no evidence of disturbed alignment. Neurological examination was entirely normal in every respect, with intact sensory responses, 5/5 strength throughout, and symmetrical reflexes and +2. Seated straight leg raising and Kemp's tests were negative. Lumbar ranges of motion were normal/full.

Dr. Horner diagnosed the EIP with resolved sprains/strains of the cervical spine, thoracic spine, and lumbar spine. Dr. Horner opined there was no need for further chiropractic treatment, massage therapy, DME, or related services. Dr. Horner stated that tenderness is a subjective complaint and that ranges of motion are voluntary movements fully under the patient's control. He stated, "These decreased range of motion findings are also not substantiated by any objective abnormalities on neurologic examination. [¶] Objectively, the chiropractic examination demonstrated no objective positive findings."

According to the Second Department, an IME doctor who describes restrictions in range of motion as "self-restricted" must explain or substantiate, with objective medical evidence, the basis for such a conclusion. E.g., Cuevas v. Compote Cab Corp., 61 A.D.3d 812, 878 N.Y.S.2d 124 (2d Dept. 2009); Torres v. Garcia, 59 A.D.3d 705, 874 N.Y.S.2d 527 (2d Dept. 2009).

Dr. Horner satisfied the Second Department's standard as he provided a detailed explanation based on his objective physical examination to support his conclusion that the reduced ranges of motion were inconsistent with the normal 'objective' examination.

The report by Dr. Horner contains a sufficient medical rationale and relies on an accurate factual basis. It supports Respondent's defense as it demonstrates, *prima facie*, that the ongoing care after the IME would lack medical necessity. The burden now shifts to the Applicant to persuade otherwise.

Rebuttal Case

Applicant did not submit any medical records or examinations to rebut Dr. Horner's conclusion. The only medical reports submitted in this case are those submitted by Respondent and all pre-date the IME on 6/4/2021. The most recent medical report is from 1/25/2021, which is not too remote and not sufficiently contemporaneous to the date of the IME to rebut Dr. Horner's findings and determination.

While Applicant's counsel made persuasive arguments in favor of medical necessity, the evidence submitted herein does not support medical necessity for further chiropractic treatment beyond the date of the IME.

Conclusion

Having carefully considered the submissions of the parties, the relevant case law, and the arguments of respective counsel, I conclude that the preponderance of the credible evidence supports a finding in favor of Respondent.

The denials are sustained.

I find that the prior decision has collateral estoppel effect on this claim. The identical issue was raised in the previous proceeding. The medical necessity of treatment provided subsequent to the termination of benefits based on Dr. Horner's IME report was at issue in the prior proceeding as well as this one. Moreover, both parties had a full and fair opportunity to litigate the issue in the prior action. See, Buechel v. Bain, 97 NY2d 295, 303-304, cert denied 535 US 1096 (2002). See, also, McDonald v. Capital Dist. Transp. Authority, 137 AD2d 923, 924; 524 NYS2d 888 (3rd Dept. 1988). Thus, I find that collateral estoppel applies. I find in favor of Respondent and deny the claim.

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 NJ

SS :

County of Bergen

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

09/05/2024

(Dated)

Corinne Pascariu

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:
2c7fdb9767573f80215fa1445ad486f8

Electronically Signed

Your name: Corinne Pascariu
Signed on: 09/05/2024