

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Ocean Medical Office PC
(Applicant)

- and -

Esurance Property and Casualty Insurance
Company
(Respondent)

AAA Case No. 17-24-1342-7977

Applicant's File No. NA

Insurer's Claim File No. 230291634-002

NAIC No. 30210

ARBITRATION AWARD

I, Anne Malone, 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: EIP

1. Hearing(s) held on 09/09/2024
Declared closed by the arbitrator on 09/09/2024

David Darvish, Esq. from David R. Darvish, PC participated virtually for the Applicant

Angela Venetsanos, Esq. from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$3,502.00**, 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 61 year old EIP reported involvement in a motor vehicle accident on April 10, 2023; claimed related injury and underwent shockwave therapy provided by the applicant on five dates of service from April 26, 2023 to August 7, 2023.

The applicant submitted a claim for these medical services, payment of which was timely denied by the respondent based upon peer reviews by Shruti Patel, M.D. dated June 9, 2023, June 26, 2023, July 21, 2023 and August 15, 2023.

The issue to be determined at the hearing is whether the respondent established that the medical services at issue were not medically necessary.

4. Findings, Conclusions, and Basis Therefor

This hearing was held on Zoom and the decision is based upon the documents reviewed from the Modria File as well as the arguments made by counsel and/or representative at the arbitration hearing. Only the arguments presented at the hearing are preserved in this decision; all other arguments not presented at the hearing are considered waived.

In order to support a lack of medical necessity defense respondent must "set forth a factual basis and medical rationale for the peer reviewer's [or examining physician's] determination that there was a lack of medical necessity for the services rendered." Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219(U) (App. Term2d, 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 Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006.)

The Civil Courts have held that a defendant's peer review or report of medical examination must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review or medical examination 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 specifics as to the claim at issue, is conclusory or vague. See Nir v. Allstate, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005.)

In support of its contention that the Shockwave Therapy (SWT) provided by the applicant was not medically necessary, respondent relies upon the reports of the peer reviews by Dr. Patel, who reviewed the medical records of the EIP, noted the injuries claimed and the treatment rendered to him. Dr. Patel considered possible arguments and justification for the need for the medical services at issue and determined that they were not warranted under the circumstances presented.

He specifically discussed in each of the peer reviews the medical standard of care for acute pain management is to start with conservative therapy, including physical therapy and NSAIDS. He noted that SWT is often indicated as a secondary conservative treatment for recalcitrant musculoskeletal conditions that are unresponsive to standard care.

However, he also noted that studies and standard of care have not shown the efficacy of SWT in management of musculoskeletal pain.

Dr. Patel supported, with relevant medical literature, his opinion that the SWT provided to this EIP were not medically necessary for him at the time they were provided.

Respondent has met its evidentiary burden. The peer review adequately sets forth the factual basis and medical rationale to support the conclusion that the medical services at issue were not indicated for this EIP at the time they were provided. Therefore, pursuant to Bronx Expert Radiology, *supra* the burden shifts to the applicant, which bears the ultimate burden of persuasion to establish that the medical services at issue were medically necessary.

The applicant did not submit a formal rebuttal. However, the applicant relies upon the submissions, including a report of an IME performed by Dr. Levin on September 13, 2023. At that time the EIP reported headaches and pain in the neck, low back, right shoulder and knee.

The report indicated that the EIP was not employed at the time of the subject accident but began work on August 12, 2023, two days post-accident. The IME was which was objectively negative and unremarkable. Range of motion was determined with the assistance of a goniometer. The report presented a factually sufficient, cogent medical rationale in support of respondent's lack of medical necessity defense. Dr. Levin performed a complete and comprehensive examination of the EIP which did not identify any objective positive findings and determined that his injuries were resolved.

Based upon the physical examination and medical records reviewed, Dr. Levin stated that "treatment rendered to the claimant to date including length and frequency has been reasonable, necessary and appropriate."

The applicant relied upon this statement to support the need for the SWT at issue here. However, according to the list of medical records reviewed by Dr. Levin he did not specifically review any reports of the SWT treatment at issue.

I do not accept that this general statement necessarily meant that Dr. Levin agreed that every specific test, medication or consultation, no matter when performed was medically necessary. Nor do the peer reviews argue that any medical treatment or DME was medically necessary, they refer only to the specific SWT testing at issue in this claim.

Since the applicant did not provide a rebuttal to the peer review it did not respond to the respondent's argument that the medical services provided to the EIP were a deviation from a reasonable medical standard of care. The medical records alone are not sufficient to rebut the conclusions of Dr. Stauber. In addition, the respondent did not provide any citations to refute the medical literature relied upon by him.

Based on the foregoing, I find that the respondent established that the SWT at issue was not medically necessary.

Accordingly, the claim is dismissed with prejudice.

Any further issues submitted in the record are held to be moot and/or waived insofar as they were not raised at the time of this hearing. This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator.

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 CT

SS :

County of Fairfield

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

09/10/2024
(Dated)

Anne Malone

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:
b29e6a264a008fbff44a63131d664f59

Electronically Signed

Your name: Anne Malone
Signed on: 09/10/2024