

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Konstantinos Tsoubris, PhD.
(Applicant)

- and -

MVAIC
(Respondent)

AAA Case No. 17-24-1335-4442

Applicant's File No. TKPHD 739.01

Insurer's Claim File No. 698111

NAIC No. Self-Insured

ARBITRATION AWARD

I, Eileen Casey, 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 08/29/2024
Declared closed by the arbitrator on 08/29/2024

Michael Lamond, Esq. from Michael J. Lamond PC participated virtually for the Applicant

Jeffrey Kadushin, Esq. from Marshall & Marshall, Esqs. participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,990.50**, was AMENDED and permitted by the arbitrator at the oral hearing.

The original amount claimed was \$1,990.50 for psychiatric evaluation, neurobehavior examination, psychological testing, neuropsychological testing and a review of records performed on August 1, 2023. Applicant's counsel withdrew the claim for the psychiatric evaluation based on proof of payment pursuant to the fee schedule and amended the amount claimed to \$1,908.67 for the neurobehavior examination, psychological testing, neuropsychological testing and a review of records.

Stipulations WERE made by the parties regarding the issues to be determined.

It was stipulated that Applicant established a prima facie case and Respondent issued a timely denial.

3. Summary of Issues in Dispute

The EIP (NP), a 40-year-old female, was a passenger in a motor vehicle involved in an accident on May 13, 2023. The amount claimed, as amended, is \$1,908.67 for neurobehavior examination, psychological testing, neuropsychological testing and a review of records performed on August 1, 2023. Respondent denied Applicant's claims based on an October 5, 2023 peer review by Dr. Michael Rosenfeld, psychologist. The issue is whether Respondent established a defense of lack of medical necessity based on the peer review.

4. Findings, Conclusions, and Basis Therefor

This decision is based upon the oral arguments and a review of the documents contained in the ADR Center maintained by the American Arbitration Association. The original amount claimed was \$1,990.50 for psychiatric evaluation, neurobehavior examination, psychological testing, neuropsychological testing and a review of records performed on August 1, 2023. Applicant's counsel withdrew the claim for the psychiatric evaluation based on proof of payment pursuant to the fee schedule and amended the amount claimed to \$1,908.67 for the neurobehavior examination, psychological testing, neuropsychological testing and a review of records.

The evidence demonstrates that the EIP (NP), a 40-year-old female, was a passenger in a motor vehicle involved in an accident on May 13, 2023.

The Peer Review (Lack of Medical Necessity) Defense

Lack of medical necessity is a defense to an action to recover no-fault benefits, which an insurer may assert upon a timely denial, based either on a medical examination or a peer review report. *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).

Respondent denied Applicant's claims based on an October 5, 2023 peer review by Dr. Michael Rosenfeld, psychologist.

In his report, Dr. Rosenfeld listed the records he reviewed and detailed the EIP's pertinent medical history. Dr. Rosenfeld said that on August 1, 2023 the EIP was evaluated by Konstantinos Tsoubri, Ph.D. and was diagnosed with post-traumatic stress disorder, adjustment disorder with mixed anxiety and depressed mood and pain disorder with psychological factors. Dr. Rosenfeld also said that crisis management therapy, acceptance and commitment therapy, cognitive behavioral therapy and biofeedback are recommended. Dr. Rosenfeld opined that the diagnostic interview was necessary and

appropriate, in that the EIP was evaluated for a possible psychiatric disorder. However, he asserted that the review of records was not necessary. He noted that there is a separate code for this procedure but said that it should only be used when there will be extensive records reviewed that will take considerable time for the psychologist to review. Dr. Rosenfeld contended that, in this instance, extensive records were not reviewed. He added that the EIP could have simply told the psychologist the location of the injuries sustained and about any prior medical history. He also noted that there is no detailed documentation as to what specific records were reviewed or how this was incorporated into the claimant's psychological care.

Dr. Rosenfeld also found that the psychological testing was not necessary. He asserted that the diagnostic interview alone is the main tool used by psychologists to determine a diagnosis and treatment plan, which is why this procedure is referred to as a "diagnostic" interview. He noted that the diagnostic interview is comprehensive in nature, and includes gathering of clinical and background information, such as the presenting complaints, social, medical, and psychiatric history, as well mental status information. He added that while psychological testing can be useful under certain clinical circumstances to augment the initial interview, this is typically only necessary when the case is complex, and the testing administered will augment findings from the initial interview. He stated that the case under review was straightforward in that the EIP experienced an obvious precipitant (i.e., the motor vehicle accident) and developed psychological symptoms in response to the stressor. He asserted that any information provided by these symptom checklists would have been readily available to the psychologist during the face-to-face clinical interview. He added that the use of this line of testing would not have altered the diagnosis or treatment plan. He also stated that according to the most updated and standard psychiatric reference text - the Diagnostic & Statistical Manual of Mental Disorders -- Fifth Edition (DSM-V- TR, American Psychiatric Publishing - 2022), the diagnosis of any psychiatric disorder, other than intellectual disabilities or cognitive disorders, is clinical in nature and does not require the use of psychometric testing.

Dr. Rosenfeld also found that the neurobehavioral testing/neuropsychological testing were not medically necessary. He stated that, in this case, the records indicate that the EIP was involved in a traffic accident with no head trauma or loss of consciousness noted. Dr. Rosenfeld said that, according to the DSM-V (2013) published by the American Psychiatric Press, in order to meet the clinical criteria for a Major or Mild Neurocognitive Disorder Due to a Traumatic Brain Injury, the following criteria must be met: There is evidence of a TBI, which includes an 'impact to the head or other mechanisms of rapid movement or displacement of the brain within the skull' with one or more of the following:

- Loss of Consciousness
- Posttraumatic Amnesia
- Disorientation and Confusion
- Neurological Signs (i.e. neuroimaging demonstrating injury, new onset seizures, a marked worsening of a pre-existing seizure disorder, visual field cuts, anosmia, hemiparesis).

Dr. Rosenfeld said that it is further noted that the 'neurocognitive disorder presents immediately after the occurrence of the traumatic brain injury or immediately after recovery of consciousness and persists past the acute post-injury period.' Dr. Rosenfeld asserted that, in this case, the EIP did not meet the above criteria. Therefore, the testing was not medically necessary.

When Respondent has timely raised and established lack medical necessity, the burden of proof then shifts to the Applicant to establish that the disputed services were reasonable and medically necessary. If the insurer medical examination or peer review is not rebutted, the insurer is entitled to denial of the claim. *A Khodadadi Radiology v. New York Central*, 16 Misc.3d 131(A), 841 N.Y.S.2d 824, 2007 N.Y. 51342(U), 2007 WL 1989432 (App. Term 2d & 11th Dists. 2007).

The 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, *Nir v. Allstate Ins. Co.* 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005).

Rebuttal

Applicant submitted an April 26, 2024 rebuttal from Dr. Konstantinos Tsoubri, the EIP's treating psychologist. Dr. Tsoubri noted that, on August 1, 2023, the EIP presented to his facility for a psychological evaluation. At this time, the EIP reported that her current symptoms consisted of feeling dizzy, loss of balance, poor coordination, feeling clumsy, headaches, nausea, vision problems, blurring, trouble seeing, sensitivity to light, sensitivity to noise, numbness, tingling in parts of the body, poor concentration, becoming easily distracted, fatigue, loss of energy, getting tired easily, difficulty falling or staying asleep, feeling anxious or tense, feeling depressed or sad, irritability, becoming easily annoyed, poor frustration tolerance, and feeling easily overwhelmed by things. The EIP reported no prior history of psychiatric illness or mental health treatment.

Dr. Tsoubri asserted that the symptoms the EIP experienced clearly show that this case was not straightforward but rather complicated the clinical interview. Therefore, he said that all testing should be exhausted prior to providing a diagnosis and treatment plan. He added that clinical psychological evaluations have been demonstrated to be a scientifically sound and effective undertaking for the identification of psychological impairments for treatment planning purposes and for the identification of psychological disability. He explained that research reveals that many psychological tests detect psychopathology as accurately and effectively as do medical tests. He contended that, in order for a psychological assessment to produce accurate and clinically useful findings, the assessment needs to be conducted carefully and comprehensively, which takes time.

He said that psychometrics are used in a wide range of settings to assist psychologists to understand and predict behavior, then to use this information to make decisions and guide future action. He explained that psychometric questionnaires may be used as a systematic and efficient way of gathering information and/ or screening to assist triage and to identify areas for in-depth investigation. He stated that, as per as per the article Overview of Psychological Testing: Cognitive tests of various types can be considered as process or product tests.

Dr. Tsoubris said that results of the initial examination indicated that the EIP experienced symptoms consistent with post-traumatic stress disorder, adjustment disorder with mixed anxiety and depressed mood, and pain disorder with psychological factors. He asserted that these tests augmented the clinical interview and provided more substantive data on the EIP's psychological condition resulting from the motor vehicle accident and assisted in the evaluation of her psychological and emotional status and in the prescription of the proper treatment for her condition. He explained that these tests were important to analyze the mental health of the EIP, to ascertain that the trauma has not impacted the EIP's mental well-being. He stated that, based upon the examination of the EIP, it is his professional opinion that her psychological impairment and debilitating pain are causally related to the accident in question. He concluded that the psychological testing performed was medically necessary.

Addendum

Respondent submitted a July 31, 2024 addendum by Dr. Rosenfeld. Dr. Rosenfeld noted that he reviewed the rebuttal. He stated that the motor vehicle accident and the resultant psychological sequelae would not fall into the category of a complex case. He explained that there is an obvious precipitant (i.e., the motor vehicle accident) and the EIP experienced psychological symptoms in response to this stressor. He asserted that complex cases occur are when there is a diagnostic dilemma or a complex differential diagnosis exists (i.e. Depression vs. Dementia, Depression vs. Substance Induced Mood Disorder, etc.). Dr. Rosenfeld said that this case was not complex and did not require the EIP completing simple, self-report checklists. He stated that his open remained unchanged.

Findings

Based on the foregoing, I am faced with conflicting medical opinions. Weighing the evidence, I am persuaded by the peer review and addendum of Dr. Rosenfeld and find that he established an adequate factual basis and medical rationale to support his opinion that the record review and testing in dispute deviated from generally accepted medical standards and was not medically necessary. I did not find the rebuttal to be convincing. Dr. Tsoubris did not adequately address the issues raised in the peer review and failed to demonstrate that the performance of the neurobehavior exam, psychological testing, neuropsychological testing and a review of records conformed to generally accepted medical standards. Therefore, the denial based on the peer review is sustained. Accordingly, Applicant's claim is denied in its entirety.

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

09/30/2024
(Dated)

Eileen Casey

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:

51e8f8f26ffe6fda24eed805f2f1b0f7

Electronically Signed

Your name: Eileen Casey
Signed on: 09/30/2024