

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Shemesh Med Pro Corp.
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-24-1356-8872
Applicant's File No.	GM24-825375
Insurer's Claim File No.	8761150300000001
NAIC No.	35882

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 01/24/2025
Declared closed by the arbitrator on 01/24/2025

John Fagan, Esq. from Law Offices of Gabriel & Moroff, P.C. participated virtually for the Applicant

Christa Varone from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$3,301.10**, 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 denial.

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 DME was medically necessary.

The Assignor (MF) was a 29-year-old male who was a passenger in an automobile that was involved in an accident on December 18, 2023. Applicant seeks reimbursement in the amount of \$3,301.10 for the osteogenesis stimulator with waterproof tape provided

to the Assignor on March 5, 2024. Reimbursement was denied based on the peer review by Shruti Patel, M.D., dated April 25, 2024.

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 closing of the hearing, and such documents are hereby incorporated into the record of this hearing. The hearing was held by Zoom video conference. Both parties appeared at the hearing by representatives, who presented oral argument and relied upon their documentary submissions. There were no witnesses.

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

The Assignor was a 29-year-old male who was injured in an automobile accident on December 18, 2023. Following the accident, the Assignor did not go to the hospital. The Assignor later sought treatment, testing and supplies for his injuries from various providers, , who started him on a course of conservative treatment, including physical therapy and chiropractic care.

On March 5, 2024, Applicant provided the Assignor with an osteogenesis stimulator with waterproof tape prescribed by Muhammad R. Zakaria, M.D. on February 6, 2024. Applicant billed Respondent for the DME, and Respondent timely denied Applicant's claims based upon the April 25, 2024 peer review by Shruti Patel, M.D., who found DME to be medically unnecessary.

Applicant now seeks reimbursement in the amount of \$3,301.10 for the osteogenesis stimulator with waterproof tape provided to the Assignor on March 5, 2024.

Legal Framework - Medical Necessity

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).

To support a lack of medical necessity defense Respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." *See Provvedere, Inc. v. Republic W. Ins. Co.*, 42 Misc 3d 141(A), 2014 NY Slip Op 50219(U) (App. Term 2d, 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 generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 13 Misc 3d 136(A), 2006 NY Slip Op 52116 (App Term 1st Dept. 2006). The Appellate Courts have not clearly defined what satisfies this standard except to the extent that "bald assertions" are insufficient. *Amherst Med. Supply, LLC v. A. Cent. Ins. Co.*, 41 Misc 3d 133(A), 2013 NY Slip Op 51800(U) (App. Term 1st Dept. 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 (Civ. Ct. Kings Co. 2005). "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." *Id.*, at 547 (*citing City Wide Social Work & Psychological Servs. v. Travelers Indem. Co.*, 3 Misc. 3d 608, 612 [Civ. Ct., Kings County 2004]).

To meet the burden of persuasion regarding medical necessity - in the absence of factually contradictory records - the applicant must submit a rebuttal which meaningfully refers to and rebuts the assertions set forth in the peer review report. *See generally, Pan Chiropractic, P.C. v Mercury Ins. Co.*, 24 Misc 3d 136[A], 2009 NY Slip Op 51495[U] (App Term, 2d, 11th & 13th Jud Dists 2009).

Peer Review - Shruti Patel, M.D., dated April 25, 2024

Respondent relies principally upon the peer review report of Shruti Patel, M.D., dated April 25, 2024, in asserting lack of medical necessity for the osteogenesis stimulator with waterproof tape provided to the Assignor on March 5, 2024. At the outset, the peer report lists the various medical records that Dr. Patel reviewed and provides a brief summary of the treatment that the Assignor received. Dr. Patel opined based on the medical records provided, that waterproof tape and electrical osteogenesis stimulator non spine provided on date of March 5, 2024 by Applicant were not medically necessary.

Dr. Patel stated that:

Electrical stimulation is a common adjunct used to promote bone healing in long bone fractures and post spinal fusion surgeries. The medical standard of care for using bone growth stimulators is as an adjunct to spinal fusion surgery for patients with any of the following risk factors for failed fusion: (1) One or more previous failed spinal fusion(s); (2) Grade III or worse spondylolisthesis; (3) Fusion to be performed at more than one level; (4) Current smoking habit (Note: Other tobacco

use such as chewing tobacco is not considered a risk factor); (5) Diabetes, Renal disease, Alcoholism; or (6) Significant osteoporosis which has been demonstrated on radiographs.

Citing medical authority, Dr. Patel found that patients treated with electrical stimulation as an adjunct for bone healing have less pain and are at reduced risk for radiographic nonunion. Dr. Patel noted, however, that the functional outcome data are limited and requires increased focus in future trials. Similarly, an article that reviewed the evidence for the efficacy of bone growth stimulators as adjuncts for bone fusion concluded that there is insufficient evidence to recommend a treatment standard.

Dr. Patel found that in reviewing the documentation provided, the Assignor was in a motor vehicle accident, with complaints of musculoskeletal injuries; however, he found no indication of a non-union fracture and/or failed spinal fusion to fulfill the required criteria to use such a device. He maintained that the device "is an FDA-approved treatment for non-union fractures," and "is used for cases with fracture healing or post fusion surgery."

Rebuttal - Erica N. David-Park, M.D., dated July 22, 2024

To refute the April 25, 2024 peer review by Dr. Patel, Applicant relies principally upon a rebuttal, dated July 22, 2024, from Erica N. David-Park, MD. The rebuttal provides a brief summary of the history of the accident and the treatment that the Assignor received before addressing the arguments presented in the peer review. Dr. David-Park respectfully disagreed with the peer review and opined based upon a review of documents, taking into consideration the Assignor's history, the history of the injury, the Assignor's complaints, the clinical findings, and a review of the medical history, and in accordance with the generally accepted standards of care in the relevant medical community, that the DME provided on March 5, 2024 were medically necessary, within a reasonable degree of medical certainty. .

Dr. David-Park first noted that there are no specific guidelines delineating the absolute structured path for DME to be universally prescribed to all patients. Accordingly, she asserted that great deference should be given to the treating provider charged with the responsibility to examine, diagnose, and treat a patient who presents with symptoms and positive clinical findings.

Dr. David-Park asserted that the conditions noted in the peer review are not the only indications for the prescription of the Electrical Osteogenesis Stimulation and Waterproof Tape. She maintained that these clinical findings on examination and the diagnostic findings were indicative of severe musculoskeletal pain warranting the prescription of the electrical osteogenesis stimulation and waterproof tape. Dr. David-Park explained that the electrical osteogenesis stimulator "is a new modality in treating musculoskeletal pain," and "tends to accelerate the recovery and minimize the rehabilitation time." She indicated that the PEMF device "reduces the patient's pain and inflammation and aids in their recovery without prescription pain medication." She noted that the electrical osteogenesis stimulator:

... is a low-level, time-varying electromagnetic field that penetrates superficial soft tissue, helping to accelerate the body's natural anti-inflammatory and recovery responses.

PEMF therapy is being used in human medicine in a broad spectrum. Among other things, it is being used successfully for the treatment of acute as well as chronic conditions and for pain therapy. Clinical tests show that PEMF therapy can reduce the pain that is associated with trauma from accidents, sports injuries, surgery, and burns as well as from disease and degeneration. PEMF therapy improves these conditions in many different concurrent ways, including mechanical, chemical, electrical, and magnetic processes within the cells of the body.

Dr. David-Park asserted that the PEMF system provides: patented PEMF technology that reduces swelling and relieves pain; non-invasive, drug-free therapy with no side effects; works deep in the joint, at the source of injuries; clinically proven results; and reduced dependency on opioids for managing pain.

Dr. David-Park also asserted that for injury, recovery, and healing PEMF therapy, if performed regularly, allows muscles to work harder for a longer period of time and recover more rapidly. She maintained that PEMFs have proven to be a valid option for reducing pain, controlling inflammatory process, favoring functional recovery, and improving the quality of life of patients. Dr. David-Park asserted that electro-magnetic field therapy "relieves pain and improves function in patients with various pain musculoskeletal diseases," and "is well tolerated with no reported negative side effects in the analyzed studies." She cited an article that concluded that adding a pulsed electromagnetic field to conventional physical therapy protocol yields superior clinical improvement in pain, functional disability, and lumbar ROM in patients with nonspecific low back pain than conventional physical therapy alone.

Analysis - Medical Necessity - Osteogenesis stimulator - DOS 3/5/24

After reviewing all of the submissions and taking into account the oral arguments of the parties, I find that Applicant failed to establish, by a preponderance of credible evidence, that the osteogenesis stimulator with waterproof tape provided to the Assignor on March 5, 2024, was medically necessary. While I have some concerns with the peer review, overall, I find that the rebuttal and Applicant's supporting medical records fail to meaningfully and adequately address and rebut the arguments and opinions advanced in the peer review and to sufficiently demonstrate the medical necessity of the DME at issue. The osteogenesis stimulator was prescribed by Dr. Zakaria, following his follow-up examination of the Assignor on February 6, 2024, approximately one and a half months after the accident, and device was provided to the Assignor a month later on March 5, 2024. The follow-up examination report provided no specific explanation or rationale for the prescription of the prescribed DME. The peer reviewer asserted that electrical stimulation is a common adjunct used to promote bone healing in long bone fractures and post spinal fusion surgeries, and that the medical standard of care for using bone growth stimulators is as an adjunct to spinal fusion surgery for patients with any of the following risk factors for failed fusion: (1) One or more previous failed spinal fusion(s); (2) Grade III or worse spondylolisthesis; (3) Fusion to be performed at more than one level; (4) Current smoking habit (Note: Other tobacco use such as chewing

tobacco is not considered a risk factor); (5) Diabetes, Renal disease, Alcoholism; or (6) Significant osteoporosis which has been demonstrated on radiographs. Dr. Patel found that in reviewing the documentation provided, the Assignor was in a motor vehicle accident, with complaints of musculoskeletal injuries; however, he found no indication of a non-union fracture and/or failed spinal fusion to fulfill the required criteria to use such a device. He maintained that the device "is an FDA-approved treatment for non-union fractures," and "is used for cases with fracture healing or post fusion surgery." Dr. David-Park in the rebuttal asserted that the conditions noted in the peer review are not the only indications for the prescription of the prescribed device. She maintained that the electrical osteogenesis stimulator "is a new modality in treating musculoskeletal pain," and "tends to accelerate the recovery and minimize the rehabilitation time." She asserted that the PEMF device "reduces the patient's pain and inflammation and aids in their recovery without prescription pain medication." She maintained that PEMFs have proven to be a valid option for reducing pain, controlling inflammatory process, favoring functional recovery, and improving the quality of life of patients. After reviewing the medical records, I am not persuaded that the additional DME was medically necessary for the Assignor at the time prescribed. While the rebuttal discussed some of the benefits of the prescribed device, I found that the rebuttal failed to adequately explain, with reference to the Assignor's medical record, the medical necessity of the devices as applied to the Assignor and the Assignor's condition. Further, the one month delay in actually providing the device to the Assignor after prescription largely undermined any argument that disputed DME was actually needed at the time prescribed to supplement the other conservative treatment, to control the inflammatory process, to facilitate quicker healing, to aid in the performance of activities of daily living, or for any other reason asserted in the rebuttal. The long delay was not explained in the rebuttal nor the Assignor's medical records. Ultimately, I find the peer review to be more credible and persuasive than the rebuttal and Applicant's oral arguments and supporting medical records. Based on the totality of the evidence in the record, Applicant failed to rebut Respondent's defense and establish the medical necessity for the DME at issue. As Applicant has failed to meet its burden of persuasion, Applicant's claims for reimbursement for the osteogenesis stimulator with waterproof tape provided to the Assignor on March 5, 2024, 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.

02/24/2025
(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
Unique Modria Document ID:
5794a5c9a4bc177480ca857d5ff21be2

Electronically Signed

Your name: Kihyun Kim
Signed on: 02/24/2025