

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE: SULZER HIP PROSTHESIS)	Civil Action No.: 01-CV-9000
AND KNEE PROSTHESIS PRODUCT)	
LIABILITY LITIGATION)	ALL CASES
)	
<i>This document relates to:</i>)	(MDL No. 1401)
<i>Herbert Clifton Allen, Jr.</i>)	
)	Judge Kathleen M. O'Malley

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Herbert Clifton Allen, Jr., by and through his attorney James A. Hatch, Esq. (“Appellant”), appealed the decision of the Claims Administrator (“Appellee”) in rendering a Final Determination dated February 2, 2004 on Appellant’s claim for benefits from the Sulzer Settlement Trust.

Appellant appealed the decision of the Appellee, and contends that Appellee erred in his decision to deny Appellant’s claim for EIF Matrix Level III, IV, V and IX benefits.

The factual findings of this matter are as follows:

1. Appellant submitted claims for EIF benefits under multiple Matrix Levels.
2. Appellant has been deemed eligible for Matrix Level IV benefits for dislocations that occurred on July 15, 2002 and August 26, 2002.
3. Appellant also seeks Matrix Level III benefits for an alleged NAPRS on both his left and right hips on December 31, 2002, Matrix Level IV benefits for dislocations of October 16, 2002 and December 8, 2002, an alleged surgery of November 21, 2002, and for ventricular tachycardia, Matrix Level V benefits for an alleged permanent disability, and Matrix Level IX benefits for depression, suicidal tendencies, anxiety, narcotic pain addiction, pain, wage loss, loss of use of leg, fear of death from future surgery, dislocations of July 15, 2002, August 26, 2002, October 16, 2002 and December 8, 2002, his surgery of December 31, 2002, aggravated CHF, hip brace, cardiac problems, future surgeries, and medical care/bills.
4. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for Matrix Level III benefits, Matrix Level IV benefits for the dislocations of October 16, 2002 and December 8, 2002, his alleged surgery of November 21, 2002, and ventricular tachycardia, Matrix Level V benefits, and Matrix Level IX benefits for narcotic pain addiction, pain, wage loss, loss of use of leg, fear of death from future surgery, dislocations of July 15, 2002, August 26, 2002, October 16, 2002, December 8, 2002, surgery of December 31, 2002, aggravated CHF, hip brace, cardiac problems, future surgeries, and medical care/bills.

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In his response to Appellant's appeal, Appellee indicates that Appellant is eligible for Matrix Level IX benefits for the attempted surgery of November 21, 2002 and the subsequent surgery Appellant underwent on December 31, 2002. Therefore, this Determination will not address those claims under Matrix Level IX. The Special Master hereby directs the Claims Administrator, if he has not already done so, to immediately furnish Appellant with a revised benefit determination regarding those claims, and Appellant retains his right to appeal that benefit determination in accordance with CAP 30.

Appellant has not received a Final Determination regarding his claim for depression, suicidal tendencies and anxiety. That claim, therefore, cannot be appealed at this time and will not be addressed in this Determination.

After a thorough review of the appeal submitted by the Appellant and the response submitted by the Appellee, the Special Master finds as follows:

The Special Master shall review Final Determinations only for an abuse of discretion by the Appellee, Claims Administrator.

By Order of the United States District Court, the Claims Administrator shall evaluate claims for EIF benefits according to the policies and procedures set forth in Claims Administrator Procedure ("CAP") 27.

Matrix Level III – Surgery of December 31, 2002

CAP 27 § 7(a) defines a Non-Affected Product as a "product that is not an Affected Product but which performs the same function as an Affected Product and which was implanted with the intention of replacing an Affected Product for a term not shorter than one year...For example, to qualify as having a Non-Affected Product, a Class Member who was first implanted with a Sulzer Inter-Op Shell Affected Product must have that shell removed and replaced by a product which physically takes the place of an Inter-Op Shell and performs the function of a prosthetic acetabular component. To qualify as having a NAPRS, the same Class Member must undergo a surgical removal of the Non-Affected Product."

Appellant's surgery of December 31, 2002 involved the revision of the acetabular liners, which do not physically take the place of an Inter-Op Shell. Since that surgery does not qualify as a NAPRS pursuant to the terms of the Settlement Agreement and CAP 27, Appellee, Claims Administrator, did not abuse his discretion in denying Appellant's claim for Matrix Level III benefits.

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Matrix Level IV and IX – Dislocations

CAP 27 § 13(a)(3) provides that “injuries contemplated by the Settlement Agreement or a CAP, but which are not compensable under the Settlement Agreement or the CAP in question, shall not be compensable pursuant to Matrix Level IX.”

Annex IV-2 of the Settlement Agreement and CAP 27 anticipated and provided for dislocations. CAP 27 § 8(c) states, in pertinent part, “Dislocations that occur more than ninety days from a CRS...are not compensable from the EIF.”

Since dislocations are contemplated by Matrix Level IV, Appellee did not abuse his discretion in denying Matrix Level IX benefits for dislocations.

In addition, since the dislocations of October 16, 2002 and December 8, 2002 occurred more than 90 days after Appellant’s June 27, 2002 CRS, Appellee did not abuse his discretion in denying Matrix Level IV benefits for those dislocations.

Matrix Level IV – Alleged Surgery of November 21, 2002 and Ventricular Tachycardia

In order to be eligible for Matrix Level IV benefits, the Settlement Agreement and CAP 27 require that a Major Surgical Complication must be catastrophic and extraordinary, as defined by the Settlement Agreement.

There is no evidence that either the cancellation of Appellant’s surgery on November 21, 2002 “after induction of anesthesia, but before any incision was made,” or the episode of ventricular tachycardia, which required “further cardiac evaluation,” rise to the level of catastrophic or extraordinary as defined by the Settlement Agreement and CAP 27. Therefore, Appellee, Claims Administrator, did not abuse his discretion in denying these claims for Matrix Level IV benefits.

Matrix Level V – Permanent Partial Disability

CAP 30 § 3 states, in pertinent part, “No evidence, documentary or testimonial, real or illustrative, may be introduced during the course of the appeal if it was not first submitted to the Claims Administrator within 45 days of the issuance of the Preliminary Determination, the contest of which gave rise to the Appealed Final Determination.”

Appellant’s Preliminary Determination regarding his claim for EIF Benefits is dated September 16, 2003. In accordance with CAP 30 § 3, the last day Appellant could submit additional information or documentation supporting his claim was October 31, 2003. The November 4, 2003 report from Dr. Hoffman cannot be considered because it could not possibly have been submitted to the Claims Administrator within the time frame prescribed by the Settlement Agreement.

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Section 9(e) of CAP 27 states, in pertinent part, “To prove a Moderate injury, a Class Member must prove that he or she experienced pain, sensory loss or gait alteration that required narcotics and/or use of a cane or walker.” That definition is reiterated in Annex IV of the Settlement Agreement. The Settlement Agreement also requires that a permanent injury be the result of a surgical complication of a CRS in order to be eligible for Matrix Level V benefits.

There was no evidence submitted that proves Appellant experienced pain, sensory loss or gait alteration that required narcotics and/or use of a cane or walker at least 365 days after his CRS. Dr. Wilson’s letter of February 3, 2003 states that his pain is “dramatically improved” and that he will only be on a cane for “another month or so.” Dr. Wilson’s letter of October 20, 2003 addresses Appellant’s injuries in the past tense, certainly implying that they have resolved and, therefore, were not permanent. In addition, Dr. Wilson relates the “character of the injury and the debilitating effect of the injury” to the dislocations that occurred after his surgery, and not to the CRS as required by the Settlement Agreement.

Appellee did not abuse his discretion in denying Appellant’s claim for Matrix Level V benefits.

Matrix Level IX – Narcotic Pain Addiction, Pain, Wage Loss, Loss of Use of Leg, Fear of Death from Future Surgery, Aggravated CHF, Hip Brace, Cardiac Problems, Future Surgeries, Medical Care / Bills

CAP 30 §3 requires that a Class member who desires to note an appeal must submit a document that identifies the provision of the Settlement Agreement or CAP that supports his or her claim, attach a narrative explanation in support of his or her position, and submit copies of any documents previously supplied to the Claims Administrator as proof of his or her eligibility for benefits.

Appellant’s appeal does not include any documents proving his eligibility for any of these Matrix Level IX claims.

Because there was no evidence for the Special Master to consider, Appellant’s appeal - regarding his Matrix Level IX claim for Narcotic Pain Addiction, Pain, Wage Loss, Loss of Use of Leg, Fear of Death from Future Surgery, Aggravated CHF, Hip Brace, Cardiac Problems, Future Surgeries, or Medical Care / Bills is hereby DISMISSED, and Appellee’s Final Determination of ineligibility regarding these claims is final and may not be further contested or appealed.

By order of the Special Master, Appellee’s Final Determination of ineligibility for Appellant’s EIF Matrix Level III, IV, V and IX claims is hereby AFFIRMED.

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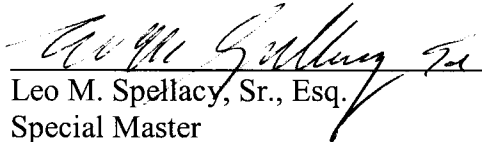
Appellant and Appellee have fifteen days from the date of this decision to submit a fact or principle they believe the Special Master did not consider in rendering a decision. **Such submissions may not be more than three pages in length. Exhibits are not to be attached to any such submission and will not be considered. Submissions are to be mailed to the following address:**

Leo M. Spellacy, Sr., Esq.
Special Master to the Sulzer Settlement Trust
c/o Liaison Counsel
1600 Midland Building
101 Prospect Avenue West
Cleveland, OH 44115

If no response is received (postmarked) by MAY 11 2004, then the Special Master's Decision is final and may not be further contested or appealed.

APR 26 2004

Date


Leo M. Spellacy, Sr., Esq.
Special Master