

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

**IN RE: SULZER HIP PROSTHESIS
AND KNEE PROSTHESIS PRODUCT
LIABILITY LITIGATION**

*This document relates to:
Marjorie Bolten*

) **Civil Action No.: 01-CV-9000**
)
) **ALL CASES**
)
) **(MDL No. 1401)**
)
) **Judge Kathleen M. O'Malley**

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Marjorie Bolten, by and through her attorneys Steven E. Fineman, Esq. and Wendy R. Fleishman, Esq. of the Law Firm Lieff Cabraser Heimann & Bernstein (“Appellant”), appealed the decision of the Claims Administrator (“Appellee”) in rendering a Final Determination dated January 21, 2004 on Appellant’s claim for Extraordinary Injury Fund (“EIF”) 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 IV and IX benefits.

The factual findings of this matter are as follows:

1. Appellant submitted a claim for EIF Matrix Level IV, V and IX benefits.
2. Appellant has been deemed eligible for Matrix Level V benefits for a permanent nerve injury.
3. Appellant also seeks Matrix Level IV benefits for a wound infection and Matrix Level IX benefits for a back injury.
4. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF Matrix Level IV and IX benefits.

**IN RE: SULZER HIP PROSTHESIS
AND KNEE PROSTHESIS PRODUCT
LIABILITY LITIGATION**

Notice of Special Master Determination

Marjorie Bolten

Page 2 of 4

“Appellant’s Reply in Further Support of Notice of Appeal of Final Determination” filed on May 10, 2004 is not a permissible filing and will not be considered.

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 IV – Wound Infection

Appellant argues that her wound infection meets the criteria for “catastrophic” and “extraordinary” under CAP 27 § 8(k). However, the Settlement Agreement, as cited in CAP 27 § 8(k), provides benefits *only* for a major surgical complication not already contemplated by Matrix Level IV.

Wound infections are specifically contemplated by Matrix Level IV. Therefore, Appellant’s claim cannot be considered as a “Major Complication not specifically provided for under Matrix Level IV” pursuant to CAP 27 § 8(k).

In order to qualify for Matrix Level IV benefits, CAP 27 § 8(b) provides that a wound infection must require surgical debridement with prosthesis retention, resection arthroplasty, hip arthrodesis, or reimplantation. Appellant’s infection was treated with intravenous antibiotics.

Appellant is not eligible for Matrix Level IV benefits for a wound infection that did not require surgical debridement with prosthesis retention, resection arthroplasty, hip arthrodesis, or reimplantation, pursuant to the terms of CAP 27 and the Settlement Agreement.

Matrix Level IX – Back Injury

Appellee alleges that Appellant’s Matrix Level IX claim is “for pain associated with her Affected Product Revision Surgery.” However, Appellant’s Green Form identifies her Matrix Level IX claim as “2 degree herniated disk of L4-L5 and a spinal fracture as a result of Ms. Bolton’s inability to perform weight bearing activity and ambulate in a normal manner,” which is not a claim for pain associated with her APRS. Appellee also seems to indicate that this claim is a duplication of Appellant’s Matrix Level V claim for a permanent nerve injury. Since Appellant has been deemed eligible for Matrix Level V benefits for a permanent nerve injury, and that

**IN RE: SULZER HIP PROSTHESIS
AND KNEE PROSTHESIS PRODUCT
LIABILITY LITIGATION**

Notice of Special Master Determination

Marjorie Bolten

Page 3 of 4

claim is not part of her appeal, it is likely that all of the medical records relating to that injury were not submitted to the Special Master. It is, therefore, difficult for the Special Master to ascertain if these injuries are, indeed, the same. Although, the clinical

reason for Appellant's June 18, 2001 MRI is reported as "back pain with bilateral leg pain and numbness" and Dr. Castellvi's office note of June 15, 2001 states "She [Appellant] noticed lower back pain two days ago and left leg pain. She had severe pain, numbness, and tingling and saw Dr. Gustke this morning who stated that her hip was okay. The patient has been diagnosed with a disc problem..." in addition to Dr. Castellvi's July 3, 2001 office note, which reads "She [Appellant] has severe low back pain with severe left leg pain"

The Special Master has, however, reviewed all of the records submitted with Appellant's appeal. There is no evidence that the 2 degree herniated disk of L4-L5 and/or the spinal fracture were a result of Appellant's CRS. Appellant's medical records indicate that her back problems were a result of osteoporosis that was present as early as 1993 [see Dr. Gustke's office note of June 21, 1993 which states "She [Appellant] has been diagnosed as having osteoporosis for which she takes Didronel..."], and which resulted in her need for a right hip replacement in 1996 and a left hip replacement in 2000. Her Physician Declaration Form indicates that the herniated disc directly altered her gait, thus worsening her osteoporosis, resulting in a fracture to the spine, but there is no evidence that the herniated disc was a result of her CRS.

Appellee did not abuse his discretion in denying Appellant's claim for EIF Matrix Level IX benefits for an injury that she did not prove was a result of her CRS.

By order of the Special Master, Appellee's Final Determination of ineligibility for Appellant's EIF Matrix Level IX claim is hereby AFFIRMED.

Pursuant to the request of Appellant, this Determination is not to be posted on the official Sulzer Settlement website.

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:**

**IN RE: SULZER HIP PROSTHESIS
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Notice of Special Master Determination

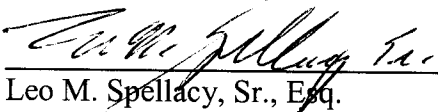
Marjorie Bolten

Page 4 of 4

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 JUN 11 2004, then the Special Master's Decision is final and may not be further contested or appealed.

MAY 27 2004
Date



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