

**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>Lucille Bonness</i>)	
)	Judge Kathleen M. O'Malley

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Lucille Bonness, by and through her attorney Andres C. Pereira, Esq. of the Law Firm Fleming & Assoc. (“Appellant”), appealed the decision of the Claims Administrator (“Appellee”) in rendering a Final Determination dated June 30, 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 benefits.

The factual findings of this matter are as follows:

1. Appellant submitted a claim for EIF Matrix Level IV and V benefits.
2. Appellant seeks Matrix Level IV benefits for a dislocation, heterotopic ossification, leg length discrepancy, medical condition contraindicated revision, swelling, inability to walk, requires assistance with activities of daily living, and Matrix Level V benefits for a permanent nerve injury, and pain and gait alteration resulting in an inability to walk.
3. Appellant has been deemed eligible for EIF Matrix Level V benefits for pain and gait alteration resulting in an inability to walk.
4. Appellee issued a Preliminary Determination that Appellant was not eligible for a Matrix Level IV benefits for a dislocation. Appellant did not contest that Preliminary Determination; therefore, in accordance with Section 4.6(d) of the Settlement Agreement, that Preliminary Determination is deemed a Final Determination that cannot be further contested or appealed.
5. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF Matrix Level IV benefits for heterotopic ossification, leg length discrepancy, medical condition contraindicated revision, swelling, inability to walk and requires assistance with activities of daily living, and Matrix Level V benefits for a permanent nerve injury.

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

Appellant has not appealed the Final Determination regarding her claim for EIF Matrix Level IV benefits for medical condition contraindicated revision and inability to walk, or Matrix Level V benefits for a permanent nerve injury. Therefore, Appellee's Final Determination of ineligibility regarding those claims is final and it may not be further contested or appealed.

The Special Master shall review Final Determinations only for an abuse of discretion by the Appellee, Claims Administrator. When an act of discretion is under review the reviewing party may not substitute its own notion of what is right for that of the Claims Administrator if his judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness.

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 – Heterotopic Ossification

CAP 27 § 8(e) states, in pertinent part, "To receive compensation, Class Members must also show that either the heterotopic ossification required surgical repair or that the heterotopic ossification, as demonstrated by an x-ray, is properly classified as Grade IV as provided in the Settlement Agreement. Heterotopic ossification that is milder than Grade IV or which does not require surgical repair is not compensable under the EIF. Prophylaxis radiation treatment of a Grade I, II, or III heterotopic ossification is not surgical repair and is not compensable under the EIF."

A Physician Declaration Form, in and of itself, is not sufficient evidence that Appellant suffers from Grade IV heterotopic ossification, as demonstrated by x-ray or that required surgical repair.

Appellant alleges that Dr. Mackel's office records would support this claim, but those records were lost. There is no explanation as to why Appellant did not submit a letter from Dr. Mackel supporting this claim, or why a copy of the x-ray report demonstrating Grade IV heterotopic ossification was not submitted.

None of the medical records Appellant did submit indicate the existence or surgical repair of heterotopic ossification.

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Appellee did not abuse his discretion in denying this claim because there is not sufficient evidence that Appellant suffered from Grade IV heterotopic ossification, as demonstrated by x-ray or which required surgical repair.

Matrix Level IV – Swelling

The Special Master reviewed all of the records submitted with this appeal and did not find any evidence of swelling, let alone swelling that rises to the level of catastrophic and extraordinary, as required by the Settlement Agreement and CAP 27.

Appellee did not abuse his discretion in denying Appellant's Matrix Level IV claim that was not supported by her medical records.

Matrix Level IV – Leg Length Discrepancy and Requires Assistance with Activities of Daily Living

Appellant has been deemed eligible for Matrix Level V benefits for pain and gait alteration resulting in her inability to walk. It is certainly reasonable to conclude that her gait alteration is a result of her leg length discrepancy, and requiring assistance with activities of daily living is a result of her inability to walk

Appellee did not abuse his discretion in denying Appellant's Matrix Level IV claim for injuries that she will be compensated for under Matrix Level V.

By order of the Special Master, Appellee's Final Determination of ineligibility for Appellant's EIF Matrix Level IV claim for heterotopic ossification, leg length discrepancy and requiring assistance with activities of daily living is hereby AFFIRMED.

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

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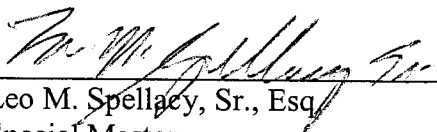
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If no response is received (postmarked) by _____, then the Special Master's Decision is final and may not be further contested or appealed.

SEP 14 2004

Date



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