

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED

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U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

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

*This document relates to:
Jeff Boswell*

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

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Jeff Boswell, by and through his attorney Kelley O'Neill-Boswell, Esq. of the Law Firm Watson, Spence, Lowe and Chambless ("Appellant"), appealed the decision of the Claims Administrator ("Appellee") in rendering a Final Determination dated November 5, 2003 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 award EIF Matrix Levels IV, V and IX benefits in the amount of Zero Dollars (\$0.00) to Appellant.

The factual findings of this matter are as follows:

1. Appellant submitted claims for EIF Matrix Level IV, V and IX benefits.
2. Appellant seeks Matrix Level IV benefits for an alleged wound infection and an alleged dislocation; Matrix Level V benefits for alleged permanent nerve and vascular injuries; and Matrix Level IX benefits for gait alteration.
3. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF Matrix Level IV, V or IX benefits.

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

Jeff Boswell

Page 2 of 3

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 out in Claims Administrator Procedure ("CAP") 27.

Matrix Level IV – Wound Infection

Appellant seeks EIF Matrix Level IV benefits for a wound infection that occurred after his APRS. Appellant's last APRS was performed on March 19, 2002. Section 8(b) of CAP 27 states, in pertinent part, "Wound infections which occur...more than one hundred eighty (180) days after a CRS, are not compensable from the EIF." In accordance with the terms of CAP 27 and the Settlement Agreement, in order to be eligible for EIF Matrix Level IV benefits, a wound infection must have occurred within 180 days after his CRS, or September 15, 2002. Dr. Rosenbaum's office note of September 25, 2002 states "No evidence of loosening or infection." His office note of October 30, 2002 states "there is serious discharge that is tannish yellow with a deep granulation pus-y type tissue extruded with extreme pain" and "this is a new onset discharge, this has been present for 3 weeks." Dr. Rosenbaum's records indicate that the onset of the infection was approximately October 9, 2002, which is more than 180 days after his CRS. Therefore, Appellee, Claims Administrator, did not abuse his discretion in denying Appellant's claims for Matrix Level IV benefits relating to his wound infection.

Matrix Level IV - Dislocation

Appellant also seeks EIF Matrix Level IV benefits for a dislocation that occurred on December 19, 2000. CAP 27 § 8(c) provides that "Class Members who have undergone a CRS and later suffered a dislocation or subluxation of the prosthetic femoral head may seek compensation under the EIF." Appellant's first CRS was on March 2, 2001, which means the dislocation occurred prior to the CRS and is barred by the terms of the Settlement Agreement. Therefore, Appellee, Claims Administrator, did not abuse his discretion in denying Appellant's claim for EIF Matrix Level IV benefits relating to a dislocation that occurred prior to his CRS.

Matrix Level V

In regards to Appellant's claim for EIF Matrix Level V benefits, Appellant concedes that at this point Dr. Rosenbaum is unable to give an opinion as to the extent of any permanent nerve or vascular injury. CAP 27 requires that in order to be eligible for Matrix Level V benefits Class Members must show that the injury did not exist prior to the associated CRS and demonstrate that the injury was caused by the CRS. [CAP 27 § 9

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

Jeff Boswell

Page 3 of 3

(a)(b)] In addition, the severity of the Permanent Injury must rise to the level of Moderate or Severe as defined by the Settlement Agreement and CAP 27. At the present time, there is no evidence that Appellant suffers from a Permanent Injury that satisfies the requirements of the Settlement Agreement for compensation under Matrix Level V. Therefore, Appellee, Claims Administrator, did not abuse his discretion in denying Appellant's claims for Matrix Level V benefits for a permanent nerve injury or a permanent vascular injury.

In response to the Appellant's statement that "the purpose of this appeal is to make certain that the Class Member's claim for his yet ill-defined permanent injury remains in place", the Special Master directs Appellant to CAP 27 § 13(a)(4) which provides that injuries or damages that have not occurred within the time periods allotted by the Settlement Agreement shall not be eligible for compensation.

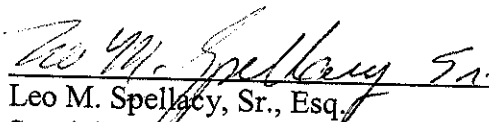
Matrix Level IX

Appellant seeks EIF Matrix Level IX benefits for his permanent gait alteration. CAP 27 § 13(a)(1) reads "Injuries such as... *altered gait* and decreased mobility are properly classified as Permanent Injuries and/or Major Complications which must be Claimed under Matrix Level IV or V, and to be compensable must meet the criteria of Matrix Levels IV or V to qualify for EIF benefits." Therefore, Appellant is not eligible for Matrix Level IX benefits for a gait alteration. Appellant's appeal indicates that "the Class Member currently has an antibiotic spacer which has resulted in a severe gait alteration, as he has not been able to participate in or complete a physical therapy regimen while the antibiotic spacer is in place." This statement in and of itself would render Appellant ineligible for Matrix Level V benefits because it attributes his gait alteration to the antibiotic spacer and CAP 27 requires that Permanent Injuries must be caused by the CRS to be eligible for compensation. Therefore, Appellee did not abuse his discretion in denying Appellant's claim for benefits for his permanent gait alteration.

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

Appellant and Appellee have fifteen days from the date of this decision to file with the Court, for the Special Master's review, a fact or principle they believe the Special Master did not consider in rendering a decision. If no response is received by February 9, 2004, then the Special Master's Decision is final and may not be further contested or appealed.

January 23, 2004
Date


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