

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

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

**NOTICE OF SPECIAL MASTER DETERMINATION**

Class Member Esther Conklin, by and through her attorney Robert T. Joyce, Esq. of the Joyce and Reyes Law Firm (“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 V 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 EIF Matrix Level IV benefits for a dislocation that occurred prior to her CRS and Matrix Level V benefits for being “unable to walk” and “chronic hip pain.”
3. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF Matrix Level IV or V benefits.

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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 EIF Matrix Level IV claim for a dislocation. Therefore, Appellee's Final Determination of ineligibility regarding that claim 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.

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.

CAP 27 § 9(e) and Annex IV of the Settlement Agreement state, 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."

Appellant argues that Dr. Gomez's completion of the Physician Declaration Form is sufficient evidence that Appellant's injury rises to the level of Moderate as required by CAP 27 §9(e). That is incorrect, especially since Appellant's Physician Declaration Form describes the medical treatment for her alleged Moderate Permanent Injury as CT scans, anti-inflammatory (Celebrex), x-rays and epidural injections for her back, none of which satisfy the Settlement Agreement's definition of Moderate.

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." Therefore, the August 23, 2003 report of Dr. Gomez cannot be considered. Even if it were to be considered, however, it certainly does not support her claim for a Permanent Injury because it attributes her treatments and complications to her back injury, for which she has already undergone four back operations and for which she has a morphine pump for pain control.

There was no evidence submitted to prove that Appellant's injuries rise to the level of Moderate as defined by the Settlement Agreement, or that they are the result of her CRS. Therefore, Appellee, Claims Administrator, did not abuse his discretion in denying Appellant's claim for EIF Matrix Level V benefits.

By order of the Special Master, Appellee's Final Determination of ineligibility for Appellant's EIF Matrix Level V claim 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:**

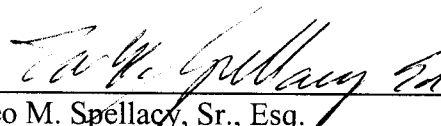
Leo M. Spellacy, Sr., Esq.  
Special Master to the Sulzer Settlement Trust  
c/o Liaison Counsel  
1600 Midland Building  
101 Prospect Avenue West  
Cleveland, OH 44115

**APR 20 2004**

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

**APR 05 2004**

Date

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