

**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>Jeffrey Dougherty</i>)	
)	Judge Kathleen M. O'Malley

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Jeffrey Dougherty, by and through his attorney John T. Murray, Esq. of the Law Firm Murray & Murray Co. ("Appellant"), appealed the decision of the Claims Administrator ("Appellee") in rendering Final Determinations dated August 27, 2003 on Appellant's claim for Unrevised Affected Product Recipient benefits and February 18, 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 Unrevised APR and EIF Matrix Level I benefits.

The factual findings of this matter are as follows:

1. Appellant submitted a claim for Unrevised APR benefits on January 22, 2003.
2. Appellant also submitted a claim for EIF Matrix Level I benefits.
3. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for Unrevised APR benefits and EIF Matrix Level I benefits because his Blue Form was not submitted in a timely manner as required by the Settlement Agreement.

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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:

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.

Unrevised Affected Product Recipient (Blue Form) Claim

The Federal District Court has explained the importance of the deadlines prescribed in the Settlement Agreement [*In re Sulzer Hip Prosthesis and Knee Prosthesis Product Liability Litigation*, 01-CV-9000 at 17 through 20 (N.D.O. February 6, 2004) (Docket #1714)].

It is not disputed that Appellant submitted his claim for Unrevised APR benefits (Blue Form) more than four months after the deadline for submitting a Blue Form had passed.

Appellant has not proffered a reasonable explanation as to why his claim form was late. He contends that he did not believe a Blue Form needed to be filed in order to register him for EIF Matrix Level I benefits. However, the Green Form, which he completed, very clearly states "A timely *Blue* or *Orange Form* (whichever appropriate) must have been completed in addition to this EIF Benefits Form (*Green Form*)."

He also alleges that CAP 25 extends the deadline for filing a Blue Form and, therefore, pursuant to CAP 18 the deadline to apply for benefits under EIF Matrix Level I is December 1, 2003. CAP 25 very clearly relates only to APR's implanted with a Reprocessed Shell. The language in CAP 25 is unambiguous and cannot reasonably be construed to include APR's implanted with an Inter-Op Shell. Appellant was aware that his Affected Product was an Inter-Op Shell and not a Reprocessed Shell as evidenced by his checking the appropriate box on page one of the Green Form.

Appellant has not submitted any evidence of circumstances giving rise to a permissible extension of time in accordance with CAP 29. Therefore, Appellee, Claims Administrator, did not abuse his discretion in denying Appellant's claim for Unrevised APR benefits because his claim was not submitted timely as required by the Settlement Agreement.

Matrix Level I (Green Form) Claim

Appellant's argument that either a Blue Form or an Orange Form must be filed to qualify a claimant for Matrix Level I benefits, and since Appellant filed a timely Orange Form

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his Matrix Level I claim should not be deemed ineligible because his Blue Form was untimely is erroneous. The Green Form itself specifically states “A timely *Blue* or *Orange Form (whichever appropriate)* must have been completed in addition to this EIF Benefits Form (*Green Form*).” [emphasis added]

An Orange Form cannot possibly be an appropriate claim form to support a Matrix Level I claim since Matrix Level I benefits are only eligible if a revision surgery has not been performed on the Affected Product. Since the Blue Form is the appropriate claim form to complete a claim for EIF Matrix Level I benefits, the timeliness of Appellant’s Orange Form filing is immaterial.

Appellant did not file a timely Blue Form, as required by the Settlement Agreement. Therefore, Appellee did not abuse his discretion in denying his claim for EIF Matrix Level I benefits.

It should be noted that the merits of Appellant’s EIF claim were not reviewed because the untimeliness of his Blue Form rendered that claim invalid.

By order of the Special Master, Appellee’s Final Determination of ineligibility for Appellant’s Unrevised APR claim and EIF Matrix Level I claim 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:**

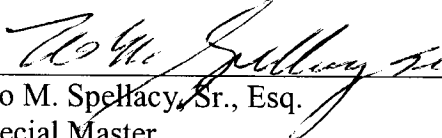
Leo M. Spellacy, Sr., Esq.
Special Master to the Sulzer Settlement Trust
c/o Liaison Counsel
1600 Midland Building
101 Prospect Avenue West
Cleveland, OH 44115

JUN 01 2004

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

MAY 14 2004

Date


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