

**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>Timothy Farmer</i>)	
)	Judge Kathleen M. O'Malley

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Timothy Farmer, by and through his attorney Elizabeth Joy Fossell, Esq. of the Law Firm Varnum, Riddering, Schmidt & Howlett (“Appellant”), appealed the decision of the Claims Administrator (“Appellee”) in rendering a Final Determination dated November 24, 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 Level IV 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 a claim for EIF Matrix Level IV benefits and several claims for Matrix Level IX benefits.
2. Appellant seeks EIF Matrix Level IV benefits for the cumulative effects of his revision surgeries, and Matrix Level IX benefits for extraordinary losses, an alleged injury to his left knee, and economic losses.
3. A Final Determination has not yet been issued on Appellant’s Matrix Level IX claim for economic losses. That claim, therefore, cannot be appealed at this time and will not be addressed in this Determination.
4. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF Matrix Level IV and IX 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:

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 and IX – Cumulative Effects of Revision Surgeries

Appellant seeks EIF Matrix Level IV benefits for undergoing two revision surgeries on the same hip, resulting in a reduced life expectancy for the current prosthesis and the possibility that he will have to undergo one or more revision surgeries in the future.

There is no evidence that there was any surgical complication as a result of either of Appellant’s revision surgeries. In fact, the August 31, 2001 letter from Dr. Sheinkop states that “the patient had a reasonably good outcome, and the only *potential* [emphasis added] complication is the fact that the patient will more likely than not come to a second or perhaps even yet a third revision surgery in his lifetime.” Appellee, Claims Administrator, did not abuse his discretion in denying Appellant’s claim for Matrix Level IV benefits because there was no Major Surgical Complication relating to either of his revision surgeries.

Appellant’s contention that “if these injuries/damages do not fall properly under Matrix Level IV, the Court has the authority to render an award under Matrix IX as a Miscellaneous Complication” is erroneous. CAP 27 § 13(c) states “Where the Claims Administrator discovers that a Class Member has improperly asserted a Claim under Matrix Level IX, the Claims Administrator shall consider the Claim as if it has been properly made under the correct Matrix Level.” Neither the Settlement Agreement nor CAP 27 permits the Claims Administrator to consider a claim improperly asserted under Matrix Level I through VIII under Matrix Level IX.

However, it should be noted that this claim would be not be eligible under Matrix Level IX as CAP 27 § (a)(4) specifically bars claims of future injury. In addition, having to undergo two or more revision surgeries is not, unfortunately, extraordinary, as many Class Members had to undergo more than one revision surgery.

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Matrix Level IX – Injury to Left Knee

Appellant seeks Matrix Level IX benefits for acceleration in the arthritis of his left knee which, according to his appeal, “continually affects Mr. Farmer’s ability to walk, engage in sports, kneel, squat, and perform any work that requires bending at the knee.”

CAP 27 § 13(a)(1) requires that “injuries such as...loss of flexibility, ...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.” Since this claim is more appropriately considered under Matrix Level V, Appellee, Claims Administrator, did not abuse his discretion in denying this Matrix Level IX claim.

In order to be eligible for Matrix Level V benefits, Appellant must prove that his injury rises to the level of Moderate or Severe, as defined in Annex IV of the Settlement Agreement and CAP 27 § 9(e). Appellant has not proven that he experienced pain, sensory loss or gait alteration that required narcotics and/or use of a cane or walker; or that he required the use of a wheelchair or underwent an amputation. Dr. Sheinkop’s letter of May 4, 2001 states “the orthopedic surgeon of record should be congratulated since in spite of the need for three left hip operations within a nine month period this patient is quite functional and in effect at this time has a very satisfactory outcome” and “On the one hand, this patient is functional and working. On the other hand, he will come to a knee replacement sooner rather than later because of his experience with failed hip surgery.” Appellant is not eligible for Matrix Level V benefits because his injury does not rise to the level of Moderate or Severe as defined in the Settlement Agreement.

Compensation under Matrix Level IX for the possibility of needing a knee replacement “sooner rather than later” is specifically barred by 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 – Pain and Suffering

Appellee, Claims Administrator, did not abuse his discretion in denying Appellant’s Matrix Level IX benefits for extraordinary pain and suffering.

CAP 27 § 13(a)(2) states that “Claims requesting compensation for pain or mental anguish associated with injuries that form the basis of a Claim under another Matrix Level shall not be eligible for payment under Matrix Level IX. Likewise, Claims requesting compensation for pain or mental anguish associated with an APRS, CRS, or implantation surgery will not qualify for payment. Compensation for pain or mental anguish associated with these injuries is deemed to be included in the benefit award for

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those other Matrix Levels, and in the benefit award from the Affected Product Revision Surgery Fund or the Unrevised Affected Product Recipient Fund.”


Appellant has been compensated for the pain and suffering relating to the “repeated surgeries on the left hip” through his APRS awards, and additional compensation under Matrix Level IX is specifically barred by the terms of CAP 27.

The injury to his left knee, including pain and suffering, was considered under Matrix Level V and, therefore, cannot be considered under Matrix Level IX.

By order of the Special Master, Appellee’s Final Determination of ineligibility for Appellant’s EIF Matrix Level IV and IX claims 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 March 3, 2004, then the Special Master’s Decision is final and may not be further contested or appealed.

February 17, 2004
Date


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