

**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>Ida Gross</i> |) | |
| |) | Judge Kathleen M. O'Malley |

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Ida Gross, by and through her attorney Sean M. Cleary, Esq. of the Law Firm Colson Hicks Eidson (“Appellant”), appealed the decision of the Claims Administrator (“Appellee”) in rendering a Final Determination dated February 20, 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 IX benefits.

The factual findings of this matter are as follows:

1. Appellant submitted a claim for EIF Matrix Level II, IV, V and IX benefits.
2. Appellant has been deemed eligible for Matrix Level V benefits for a permanent injury.
3. Appellant also seeks Matrix Level II and IX benefits for her surgery of November 29, 2000, Matrix Level IV benefits for a wound infection, and Matrix Level IX benefits for medical and other expenses, depression, pain and discomfort, leg length inequality and exacerbation of lower back condition, including spinal stenosis, and a permanent nerve injury.
4. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF Matrix Level II, IV and IX benefits.

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Appellant has not appealed the Final Determination regarding her EIF Matrix Level II and IX claim for her surgery of November 29, 2000, her Matrix Level IV claim for a wound infection, or her Matrix Level IX claims for depression, pain and discomfort, leg length discrepancy exacerbating spinal stenosis (permanent nerve injury) resulting in altered gait. Therefore, Appellee's Final Determination of ineligibility regarding those claims is final and may not be further contested or appealed.

Appellee has not received a Final Determination regarding her Matrix Level V claim. Therefore, that claim cannot be appealed at this time and will not be addressed in this Determination.

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. 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.

Lost Medical Benefits

CAP 27 § 13(a)(3) provides that "injuries contemplated by the Settlement Agreement or a CAP, but which are not compensable under the Settlement Agreement or the CAP in question, shall not be compensable pursuant to Matrix Level IX."

Section 3.9(c) of the Settlement Agreement anticipated and provided for medical expenses of an APR necessitated by an Affected Product.

Since the Settlement Agreement contemplates medical expenses, they are not compensable under Matrix Level IX in accordance with CAP 27. Therefore, Appellee, Claims Administrator, did not abuse his discretion in denying this Matrix Level IX claim.

Appellant included with her appeal letters from her insurance company that indicate they are aware they have a subrogation claim on behalf of Appellant. Bankers Life can contact the Claims Administrator at (800) 683-1861 to inquire as to how to file a subrogation claim on behalf of Appellant.

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Other Expenses

Appellant seeks \$12,300 in lost golf benefits and \$526.20 for expenses incurred to modify and purchase shoes due to her leg length discrepancy.

CAP 27 § 13(b)(1) states "...a loss of income is "catastrophic" if...it results in direct economic loss, provable by objective evidence, of \$20,000 or more." CAP 27 was promulgated with the concurrence of Class Counsel and the Court.

Appellant's economic loss, which does not include medical expenses that are eligible for compensation under the subrogation provisions of the Settlement Agreement, is substantially less than \$20,000. Therefore, Appellee did not abuse his discretion in denying Appellant's Matrix Level IX claim for an economic loss under \$20,000.

By order of the Special Master, Appellee's Final Determination of ineligibility for Appellant's EIF Matrix Level IX claim for medical and other expenses 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

If no response is received (postmarked) by JUL 01 2004, then the Special Master's Decision is final and may not be further contested or appealed.

JUN 16 2004

Date


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