

**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>Robert W. Hibbard</i>)	
)	Judge Kathleen M. O'Malley

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Robert W. Hibbard, by and through his attorney Robert D. Bjork, Jr., Esq. of the Law Firm Bjork Lawrence (“Appellant”), appealed the decision of the Claims Administrator (“Appellee”) in rendering a Final Determination dated March 15, 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 III, IV, V and IX benefits.

The factual findings of this matter are as follows:

1. Appellant submitted a claim for EIF Matrix Level III, IV, V and IX benefits.
2. Appellant has been deemed eligible for Matrix Level IV benefits for renal failure, Matrix Level V benefits for a permanent nerve injury, and Matrix Level IX benefits for a reimplantation procedure that occurred on July 5, 2001.
3. Appellant also seeks Matrix Level III benefits for surgeries of July 5, 2001 and July 16, 2003, Matrix Level IV benefits for various wound infections, Matrix Level V benefits for kidney failure and exacerbation of diabetes, and Matrix Level IX benefits for wage loss and future medical expenses.
4. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for Matrix Level III benefits for surgeries of July 5, 2001 and July 16, 2003, Matrix Level IV benefits for various wound infections, Matrix Level V benefits for kidney failure and exacerbation of diabetes, and Matrix Level IX benefits for wage loss and future medical expenses.

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Appellee has indicated that the Final Determination regarding Appellant's Matrix Level III claim for his surgery of July 16, 2003 shall be considered a Preliminary, not a Final, Determination. Therefore, that claim is not subject to this appeal and will not be addressed in this Determination. In addition, Appellant has not appealed the Final Determination regarding his EIF Matrix Level IX claim for future medical expenses. Therefore, Appellee's Final Determination of ineligibility regarding that claim is final and it may not be further contested or appealed

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.

Matrix Level III - Surgery of July 5, 2001

On February 21, 2001 Appellant underwent a procedure in which an Affected Product was removed and a temporary antibiotic spacer was inserted. That antibiotic spacer was removed on July 5, 2001 and Appellant has been deemed eligible for EIF Matrix Level IX benefits for that surgery.

CAP 27 § 7(b) states "Surgeries that are not NAPRS for the purposes of Matrix Level III include, but are not limited to, surgical revisions of femoral components, plastic liners, *antibiotic spacers*, screws, cement or circleage wires."

Neither the Special Master nor the Claims Administrator has the authority to nullify the Order of the United States District Court that requires the Claims Administrator to evaluate claims for EIF benefits according to the policies and procedures set forth in CAP 27.

Appellee did not abuse his discretion in denying this Matrix Level III claim for a surgery that is specifically barred by CAP 27 and for which Appellant will be compensated under Matrix Level IX.

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Matrix Level IV or IX - Wound Infections

Section 8(b) of CAP 27 states, in pertinent part, “Wound infections which occur before a CRS [Covered Revision Surgery] ... are not compensable from the EIF.”

Appellee did not abuse his discretion in denying Appellant’s Matrix Level IV claim for wound infections that occurred prior to his CRS.

In addition, 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.” Therefore, Appellant is not eligible for Matrix Level IX benefits for wound infections that must meet the criteria of Matrix Level IV in order to be compensable from the EIF.

Matrix Level V – Kidney Failure and Exacerbation of Diabetes

Appellant seeks EIF Matrix Level V benefits for kidney failure and exacerbation of his diabetes.

The Settlement Agreement requires that in order to be eligible for Matrix Level V benefits a Class Member must have suffered a permanent injury *as a result of a CRS*.

There is no evidence that Appellant’s kidney failure and/or exacerbation of diabetes were the result of his CRS. Dr. Reynolds’ letter of December 10, 2003 states “I believe that all of his present problems somehow relate to either the defective implant itself or the complications of the removal and subsequent procedures that the removal surgery required.” However, supposition is not sufficient evidence. The Special Master could find no causal link between Appellant’s CRS and his kidney failure and/or exacerbation of diabetes in the medical records submitted with his appeal. Dr. Reynolds’ office note of July 11, 2000 reads “He has been on insulin in the past.” The Operative Report from Appellant’s February 21, 2001 CRS indicates that Appellant “has an underlying significant diabetes mellitus.” Dr. Reynolds’ office note of January 3, 2002 indicates that he has “a history of some marginal kidney failure.” Dr. Schwartz’s impression, from his May 20, 2002 evaluation of Appellant is that he has “chronic renal failure of undetermined etiology. ?Secondary to diabetes mellitus” and the April 22, 2003 Discharge Summary reads “Patient [Appellant] is a 72-year old male with a history of chronic renal failure from diabetic nephropathy.”

The Special Master could find no evidence that his kidney failure or the exacerbation were the result of his CRS, or that they rise to the level of Moderate (pain, sensory loss or gait alteration that required narcotics and/or use of a cane or walker) or Severe (required the use of a wheelchair or underwent an amputation) as required by CAP 27. Therefore, Appellee did not abuse his discretion in denying these Matrix Level V claims.

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Matrix Level IX -- Wage Loss

CAP 27 § 13(b)(1) states that "...a loss of income is "catastrophic" if...it results in direct economic loss, provable by *objective* evidence, of \$20,000 or more." [emphasis added]

Appellant retired in 1998, prior to being implanted with an Affected Product. He seeks Matrix Level IX benefits for "lost profits" from a business that never operated. Speculation as to the projected success of his business is not objective evidence.

Appellee did not abuse his discretion in denying this claim for lost profits that was not supported by objective evidence.

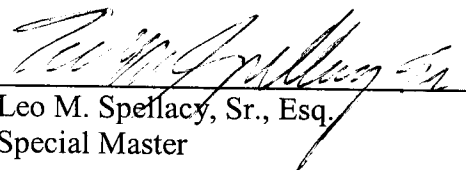
By order of the Special Master, Appellee's Final Determination of ineligibility for Appellant's EIF Matrix Level III claim for his surgery of July 5, 2001, Matrix Level IV claim for various wound infections, Matrix Level V claim for kidney failure and exacerbation of diabetes, and Matrix Level IX claim for wage loss 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 JUN 25 2004, then the Special Master's Decision is final and may not be further contested or appealed.

JUN 10 2004
Date


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