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CLERK OF DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

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

**IN RE: SULZER HIP PROSTHESIS
AND KNEE PROSTHESIS PRODUCT
LIABILITY LITIGATION**

*This document relates to:
Lindsay Lowe*

) **Civil Action No.: 01-CV-9000**
)
) **ALL CASES**
)
) **(MDL No. 1401)**
)
) **Judge Kathleen M. O'Malley**

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Lindsay Lowe, by and through her attorney Steven J. Brewer, Esq. of the Law Firm Gwilliam, Ivary, Chiosso, Cavalli & Brewer ("Appellant"), appealed the decision of the Claims Administrator ("Appellee") in rendering a Final Determination dated November 5, 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 III and IV benefits in the amount of Zero Dollars (\$0.00) to Appellant.

The factual findings of this matter are as follows:

1. Appellant submitted claims for EIF Matrix Level III and IX benefits.
2. Appellant seeks EIF Matrix Level III benefits as a result of a Non-Affected Product Revision Surgery ("NAPRS") performed on April 13, 2002, and Matrix Level IX benefits for bone loss.
3. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF Matrix Level III and IV 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 III

Section 7(c) of CAP 27 and Annex IV of the Settlement Agreement state "Class Members who have undergone a Non-Affected Product Revision Surgery on or before the date that is one hundred and eighty (180) days after the date of an APRS" may be eligible for benefits under Matrix Level III, and "the Claims Administrator may, at his discretion, extend this compensable time period by 180 days where a Class Member's treating orthopedic surgeon causally relates (to a medical probability) the NAPRS to the APRS and/or to the original implantation of the Affected Product."

Appellant's last APRS was performed on January 26, 2001. In accordance with the terms of the Settlement Agreement and CAP 27, in order to be eligible for EIF Matrix Level III benefits, the latest possible date for Appellant to have undergone a NAPRS would have been 360 days after that APRS, or January 21, 2002. It is not disputed that Appellant's NAPRS was performed on April 13, 2002, almost two months past the deadline prescribed in the Settlement Agreement. There does not seem to be any extenuating circumstances that delayed Appellant's surgery. The September 4, 2003 letter from Dr. Oishi indicates that the decision for surgery was made in January 2002, but the actual surgery was deferred because of Appellant's schedule.

Appellee, Claims Administrator, does not have the authority to extend the EIF Matrix Level III deadline for undergoing an NAPRS past the 360 days prescribed by the Settlement Agreement and, therefore, did not abuse his discretion in denying Appellant's claim.

Matrix Level IX

Appellant also seeks to amend her Matrix Level IX claim for bone loss to a Matrix Level IV claim pursuant to CAP 27 § 13 (c), which permits the Claims Administrator to consider a Claim under the correct Matrix Level if it was inappropriately submitted under Matrix Level IX.

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Other than indicating that she is appealing this claim, Appellant does not address this claim in her appeal. Appellee does not address this claim in his response (Appellee addresses a Matrix Level IX claim for a subluxation that is not being appealed).

It is the Special Master's opinion that bone loss would more appropriately be considered under Matrix Level V, and Appellee has considered other Matrix Level IX claims for bone loss under Matrix Level V. In addition, the September 4, 2003 letter from Appellant's attorney states "We believe that the nature and extent of the bone loss is permanent, it required extensive reconstruction of the surgery of the pelvis and should otherwise be eligible under Matrix Level V, see CAP 27 § 9(f); or Matrix Level IV, see CAP 27 § 8(k). Therefore, the Special Master will consider Appellant's Matrix Level IX claim for bone loss under Matrix Level V.

CAP 27 § 9(e) states, 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. To prove a Severe injury a Class Member must prove that he or she required the use of a wheelchair or underwent an amputation." Those definitions are reiterated in Annex IV of the Settlement Agreement.

CAP 27 § 9(d) states, in pertinent part, "If it is clear, in the judgment of the Claims Administrator and from the totality of the circumstances that the Class Member is likely to recover from the injury, the injury shall not be compensable under Matrix Level V."

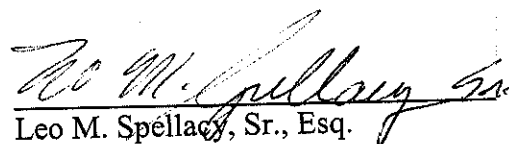
Appellant has provided a letter dated September 4, 2003 from Dr. Oishi, her orthopedic surgeon, in which he states "She [Appellant] no longer has pain. She is able to hike. She does not use any ambulatory aides." This statement clearly indicates that Appellant's bone loss does not rise to the level of Moderate or Severe pursuant to the terms of the Settlement Agreement and CAP 27. Therefore, Appellant is not eligible for EIF Matrix Level V benefits for bone loss.

By order of the Special Master, Appellee's Final Determination of ineligibility for Appellant's EIF Matrix Level III claim and Matrix Level IX claim (considered by the Special Master under Matrix Level V) 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 February 9, 2004, then the Special Master's Decision is final and may not be further contested or appealed.

January 23, 2004

Date


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