

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
2004 JAN 23 PM 1:08
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

IN RE: SULZER HIP PROSTHESIS)
AND KNEE PROSTHESIS PRODUCT)
LIABILITY LITIGATION)
)
This document relates to:)
Richard Mahan)
Judy Mahan)
Civil Action No.: 01-CV-9000
ALL CASES
(MDL No. 1401)
Judge Kathleen M. O'Malley

NOTICE OF SPECIAL MASTER DETERMINATION

Class Members Richard Mahan ("Appellant") and his spouse Judy Mahan, by and through their attorney LeDawn Marsters, Esq. of the Law Firm Cosho, Humphrey, Greener & Welsh, appealed the decision of the Claims Administrator ("Appellee") in rendering a Final Determination dated November 5, 2003 on Appellant's claims and Appellant's spouse's claim for Extraordinary Injury Fund ("EIF") benefits from the Sulzer Settlement Trust.

Appellant and his spouse appealed the decision of the Appellee, and contend that Appellee erred in his decision to award EIF Matrix Level V and IX benefits in the amount of Zero Dollars (\$0.00) to Appellant and his spouse.

The factual findings of this matter are as follows:

1. Appellant and his spouse submitted claims for EIF Matrix Level IX benefits.
2. Appellant seeks EIF benefits for soft tissue pain and lost wages, and Appellant's spouse seeks EIF benefits for loss of consortium.
3. Appellee reviewed Appellant's claim for soft tissue pain under Matrix Level V and IX.
4. Appellee issued Preliminary and Final Determinations that Appellant and his spouse were not eligible for EIF Matrix Level V or IX benefits.

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After a thorough review of the appeal submitted by the Appellant and his spouse 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 out in Claims Administrator Procedure ("CAP") 27.

Matrix Level IX – Soft Tissue Pain

Section 13(a)(1) of CAP 27 requires that "Injuries such as bone, *tissue or muscle loss* damage...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 a tissue injury is not eligible for Matrix Level IX benefits pursuant to CAP 27, Appellee, Claims Administrator, did not abuse his discretion in denying this claim under EIF Matrix Level IX.

Matrix Level V

Appellant's qualifying CRS was performed on February 13, 2001. Pursuant to CAP 27 § 9(d), in order to be eligible for EIF Matrix Level V benefits, Appellant must provide evidence demonstrating the existence of the alleged soft tissue injury through physical examination and quantitative measures performed on or after February 13, 2002 (365 days after his qualifying CRS). In addition, he must prove that his injury qualifies as either Moderate or Severe as defined in CAP 27 § 9(e) and Annex IV of the Settlement Agreement. None of the medical records that Appellant submitted mention a soft tissue injury. The Nursing Notes Log dated April 15, 2002 indicates that Appellant's medications were Vioxx and Tylenol, neither of which are narcotics. The report of Pierre J.J.B. Blais, B.Sc., Ph.D., C.Chem, F.C.I.C. is not acceptable evidence. Dr. Blais is not Appellant's treating physician, and he did not perform a physical examination of Appellant. Appellant has not submitted any evidence supporting his claim for a soft tissue injury and, therefore, Appellee, Claims Administrator did not abuse his discretion in denying this claim.

Matrix Level IX – Loss of Consortium

CAP 27 § 13(a)(5) states "The EIF benefit for Derivative Claimants is described in Section 3.5(c) of the Settlement Agreement and shall be limited to 1% of the EIF award

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made to a Derivative Claimant's associated APR..." Therefore, the claim of Appellant's spouse for loss of consortium benefits is barred by the terms of CAP 27, and Appellee, Claims Administrator, did not abuse his discretion in denying this claim.

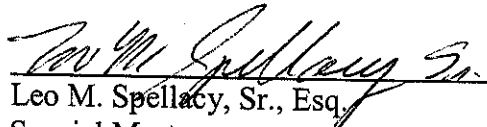
Matrix Level IX – Economic Loss

Appellant also seeks EIF Matrix Level IX benefits for lost income. CAP 27 §13(b)(1) provides that "a loss of income is "catastrophic" if it results in direct economic loss, provable by objective evidence, of \$20,000 or more." The only objective evidence Appellant submitted with his appeal were his W-2 forms for 1998, 1999 and 2000. While it is true that Appellant's income was less in both 2000 and 1999 than in 1998, the amount of that decrease is well below the \$20,000 threshold required by CAP 27. Therefore, Appellee, Claims Administrator, did not abuse his discretion in denying Appellant's claim for lost income.

By order of the Special Master, Appellee's Final Determination of ineligibility for Appellant's and Appellant's spouse's EIF Matrix Level V 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 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. Spellacy, Sr., Esq.
Special Master