

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
2004 JAN 23 PM 1:03
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

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

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Florence Masterson, by and through her attorneys James L. Cole, Esq. and Elizabeth Joy Fossel, Esq. of the Law Firms Roetzel & Andress and Varnum, Riddering, Schmidt & Howlett ("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 V 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 various claims for EIF benefits.
2. Appellant seeks EIF benefits for an alleged contralateral injury, alleged depression and anxiety, and contest of offset.
3. Appellee reviewed Appellant's claim for a contralateral injury pursuant to Matrix Level V and IX.
4. Appellee issued Preliminary and Final Determinations that Appellant was 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 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.

Appellant seeks EIF Matrix Level V or IX benefits for a contralateral injury.

CAP 27 §9(d) states "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 obtained relief after her left total hip arthroplasty on August 29, 2001 and, therefore, the injury cannot be considered permanent and is not compensable under Matrix Level V. Appellee, Claims Administrator, did not abuse his discretion in denying this claim.

The New Patient Evaluation dated August 23, 2000 from Dr. Kevin Kane, Appellant's orthopedic surgeon, states that Appellant has been referred for evaluation of her hips and "she reports that she has had hip problems for quite some time now, at least several years" and "her right hip is more painful than the left and the symptoms are worsening." The x-ray review "demonstrates evidence of advanced hip degenerative changes bilaterally...the patient's left hip shows some preservation of cartilage space, but significant osteophyte formation and degenerative lateral subluxation as well." In order to be eligible for EIF Matrix Level IX benefits for a contralateral injury, CAP 27 §13(b)(2) requires a Class Member to show that as a result of an APRS the Class Member suffered injury to the opposite joint that required either the surgical implant of a prosthesis or the revision of an existing prosthetic implant to the contralateral joint. Appellant's medical records and her Physician Declaration Form indicate that the injury to her left hip was not caused by her APRS, as required by CAP 27, but rather by degenerative arthritis that existed prior to her APRS and prior to implantation of the Affected Product. It is reasonable to assume from her medical records that the condition of her left hip would have deteriorated to the point of needing a total hip arthroplasty (as did her right hip) regardless of the Affected Product that had been implanted in her right hip. Therefore, her left total hip arthroplasty was not an extraordinary or catastrophic injury and Appellee, Claims Administrator, did not abuse his discretion in denying Appellant's claim for EIF Matrix Level IX benefits for a contralateral injury.

Appellee also did not abuse his discretion in denying Appellant's claim for EIF Matrix Level IX benefits for depression and anxiety related to her contralateral injury because it relates to an injury that is not compensable under the terms of the Settlement Agreement.

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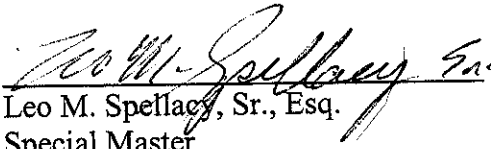
Lastly, Appellant's claim for EIF Matrix Level IX benefits for offsets deducted from her APRS initial payment is barred by the terms of the Settlement Agreement and CAP 27, which require that the value of a non-medical offset withheld from a Class Member's benefit award may not be recovered from the EIF. [S.A. § 3.6(d) and CAP 27 § 13(a)(6)]

Appellee, Claims Administrator, did not abuse his discretion in denying Appellant's claims for Matrix Level IX benefits for a non-medical offset.

By order of the Special Master, Appellee's Final Determination of ineligibility for Appellant'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