

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

<b>IN RE: SULZER HIP PROSTHESIS</b>	)	<b>Civil Action No.: 01-CV-9000</b>
<b>AND KNEE PROSTHESIS PRODUCT</b>	)	
<b>LIABILITY LITIGATION</b>	)	<b>ALL CASES</b>
	)	
<i>This document relates to:</i>	)	<b>(MDL No. 1401)</b>
<i>Ermalinda Navarro</i>	)	
	)	<b>Judge Kathleen M. O'Malley</b>

**NOTICE OF SPECIAL MASTER DETERMINATION**

Class Member Ermalinda Navarro, by and through her attorney Andres C. Pereira, Esq. of the Law Firm Fleming & Assoc. ("Appellant"), appealed the decision of the Claims Administrator ("Appellee") in rendering a Final Determination dated December 23, 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 deny Appellant's claim for EIF Matrix Level IV, V and IX benefits.

The factual findings of this matter are as follows:

1. Appellant submitted a claim for EIF Matrix Level IV, V and IX benefits.
2. Appellant seeks Matrix Level IV benefits for femoral nerve palsy, Matrix Level V benefits for a permanent nerve injury, and Matrix Level IX benefits for bone loss and multiple surgeries.
3. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF Matrix Level IV, V and 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:

Appellant has not appealed the Final Determination regarding her EIF Matrix Level IX claim for multiple surgeries. Therefore, Appellee's Final Determination of ineligibility regarding that claims is final and it may not be further contested or appealed.

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 IV - Femoral Nerve Palsy

CAP 27 Section 8(k) requires that a major surgical complication be catastrophic and extraordinary in order to be eligible for Matrix Level IV benefits. Catastrophic shall mean that the complication suffered prevented the Class Member from engaging in an activity of daily living. Extraordinary shall mean that the complication suffered by the Class Member was unique compared to other Class Members similarly situated.

Appellant's APRS was performed on October 16, 2000. Her Physician Declaration Form indicates that the Major Surgical Complication was not even recognized until November 7, 2000 and the first mention of femoral nerve palsy in her medical records is not until September 7, 2001.

There is no evidence that this alleged femoral nerve palsy rises to the level of catastrophic or extraordinary major surgical complication, as required by the Settlement Agreement and CAP 27. Therefore, Appellee, Claims Administrator did not abuse his discretion in denying this claim.

Matrix Level V - Permanent Nerve Injury

Section 9(e) of CAP 27 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. Appellant's medical records and the Physician Declaration Form indicate that the treatment for her nerve injury is extensive physical therapy to regain motor strength.

There is no evidence that she experienced pain, sensory loss or gait alteration that

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required narcotics and/or use of a cane or walker; or that she required the use of a wheelchair or underwent an amputation, as required by CAP 27. Therefore, Appellee, Claims Administrator, did not abuse his discretion in denying this claim.

Bone Loss

CAP 27 § 13(a)(1) states that “Injuries such as bone, tissue or muscle loss...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.”

Appellee, Claims Administrator, did not abuse his discretion in denying Appellant’s claim for Matrix Level IX benefits for bone loss that must be claimed under, and meet the criteria of, Matrix Level IV or V in accordance with the terms of CAP 27.

CAP 27 § 8(k) provides that “The Claims Administrator shall award [Matrix Level IV] Benefits in every case provided that he finds, in his discretion, and in the totality of the circumstances, that a Class Member suffered a Major Surgical Complication that was catastrophic and extraordinary. Catastrophic shall mean that the complication suffered prevented the Class Member from engaging in an activity of daily living. Extraordinary shall mean that the complication suffered by the Class Member was unique compared to other Class Members similarly situated.”

Appellant has not proven that her bone loss prevented her from engaging in an activity of daily living and, therefore, it does not rise to the level of catastrophic as required by the Settlement Agreement and CAP 27. In addition, bone loss is a common occurrence during hip replacement surgery; it is not unique compared to other Class Members similarly situated. Because Appellant’s bone loss does not rise to the level of catastrophic and extraordinary as defined by the Settlement Agreement and CAP 27, she is not eligible for Matrix Level IV benefits.

In order to be eligible for Matrix Level V benefits, a Permanent Injury must be either Moderate or Severe, as defined by the Settlement Agreement and CAP 27 § 9(e), which state “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.”

Appellant has not submitted any evidence that her bone loss caused pain, sensory loss or gait alteration that required narcotics and/or use of a cane or walker; or that it required her to use a wheelchair or undergo an amputation. Therefore, Appellant is not eligible for Matrix Level V benefits for an injury that is not Moderate or Severe, as required by CAP 27 and the Settlement Agreement.

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By order of the Special Master, Appellee's Final Determination of ineligibility for Appellant's EIF Matrix Level IV, V and IX claim is hereby **AFFIRMED**.

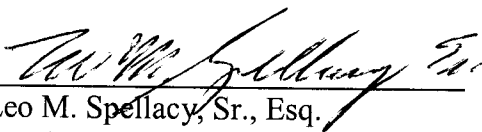
Appellant and Appellee have fifteen days from the date of this decision to submit a fact or principle they believe the Special Master did not consider in rendering a decision. **Such submissions may not be more than three pages in length. Exhibits are not to be attached to any such submission and will 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 01 2004, then the Special Master's Decision is final and may not be further contested or appealed.

**MAY 17 2004**

\_\_\_\_\_  
Date

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