

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

2004 JAN 21 AM 11:20

CLERK OF COURT
CLEVELAND

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

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Civil Action No.: 01-CV-9000

ALL CASES

*This document relates to:
James Pennington*

(MDL No. 1401)

Judge Kathleen M. O'Malley

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Linda Pennington, on behalf of herself and her deceased husband James Pennington, by and through her attorney Tyler Meade, Esq. of the Law Firm Anthony & Carlson ("Appellant"), appealed the decision of the Claims Administrator ("Appellee") in rendering a Final Determination dated October 20, 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 IX benefits in the amount of Zero Dollars (\$0.00) to Appellant.

The factual findings of this matter are as follows:

1. Appellant submitted three claims for EIF Matrix Level IX benefits.
2. Appellant seeks EIF Matrix Level IX benefits for a dislocation on October 17, 2000, an October 2, 2002 surgery, and lost wages.
3. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF Matrix Level 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.

On October 17, 2000 Appellant underwent a reduction of his right total hip dislocation. He also underwent Affected Product Revision Surgeries (APRS's) on October 18, 2000 and March 23, 2001, and his Non-Affected Product was removed on October 2, 2002.

Appellant seeks EIF Matrix Level IX benefits for the October 2002 procedure, which occurred nearly 19 months after his last APRS.

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.

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."

Annex IV of the Settlement Agreement and CAP 27 anticipated and provided for Non-Affected Product Revision Surgeries (NAPRS's). 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...".

Since Appellant's surgery of October 2002 was an NAPRS, it was contemplated by Matrix Level III. Therefore, Appellee did not abuse his discretion in denying this Matrix Level IX claim. 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 undergo an NAPRS would have been 360 days after his APRS. It is not disputed that Appellant's NAPRS was performed on October 2, 2002, almost seven months after that deadline. Appellee 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. Therefore, Appellant is not eligible for Matrix Level III benefits.

Appellant also seeks EIF Matrix Level IX benefits for the hip dislocation he suffered on October 17, 2000, prior to his first APRS.

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Appellant's contention that CAP 27 redefines the terms of the Settlement Agreement and is, therefore, invalid is erroneous. The Special Master does not have 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 Claims Administrator Procedure ("CAP") 27.

CAP 27 § 13(a)(3) states "...a Class Member who suffers a dislocation of the prosthetic femoral head **before** [emphasis added] ...the date of a CRS is ineligible for benefits under both Matrix Level IV and Matrix Level IX." Therefore, Appellee, Claims Administrator, did not abuse his discretion in following the Order of the United States District Court and denying Appellant's EIF Matrix Level IX claim for a pre-revision dislocation.

Appellant additionally seeks EIF Matrix Level IX benefits for wage losses of less than \$20,000.

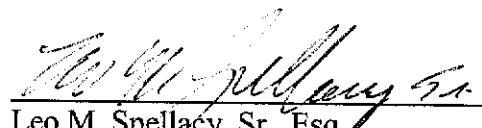
CAP 27 § 13(b)(1) states that "...a loss of income is "catastrophic" if...it results in direct economic loss, provable by objective evidence, of \$20,000 or more." Since Appellant's alleged economic loss is less than \$20,000, Appellee, Claims Administrator, did not abuse his discretion in denying Appellant's Matrix Level IX claim for lost wages.

By order of the Special Master, Appellee's Final Determination of ineligibility for Appellant's EIF Matrix Level IX claims is hereby AFFIRMED.

Appellant's request for an oral hearing is not permitted under CAP 30 and is, therefore, denied.

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 5, 2004, then the Special Master's Decision is final and may not be further contested or appealed.

January 21, 2004
Date


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