

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

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

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Marcellyne M. Stein, by and through her attorneys Paul Jackson, Esq. of the Law Firm Roetzel Andress and Elizabeth Joy Fossel, Esq. of the Law Firm Varnum, Riddering, Schmidt & Howlett (“Appellant”), appealed the decision of the Claims Administrator (“Appellee”) in rendering a Final Determination dated January 21, 2004 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 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 has been deemed eligible for Matrix Level IV benefits
3. Appellant also seeks Matrix Level V benefits for altered gait, and Matrix Level IX benefits for fear of future illness, loss of income, reduced life expectancy of current implant, and depression.
4. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF Matrix Level IX benefits for loss of income.
5. Appellant’s claims for EIF Matrix Level V benefits for altered gait, and Matrix Level IX benefits for fear of future illness, reduced life expectancy of current implant, and depression are not subject of this appeal.

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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. When an act of discretion is under review, the reviewing party may not substitute its own notion of what is right for that of the Claims Administrator if his judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness.

Appellant argues that limiting the eligibility of a Class Member for reimbursement of income loss only if the loss exceeds \$20,000 is a denial of due process and fundamental fairness.

Annex IV of the Settlement Agreement outlines the compensation benefits payable from the EIF, and it vests the Claims Administrator with full discretion in awarding Matrix Level IX benefits. CAP 27, which was promulgated with the assistance of Class Counsel, clarifies how the Claims Administrator will exercise his discretion in awarding benefits from the EIF. In addition, the United States District Court ORDERED the Claims Administrator to evaluate claims for EIF benefits according to the policies and procedures set forth in Claims Administrator Procedure (“CAP”) 27. The Special Master does not have the authority to nullify that Order.

In her appeal, Appellant indicates she “provided the documents requested by the Claims Administrator, including Mrs. Stein’s W-2s for the years 1998, 1999 (the two years prior to injury) and for years 2000-2002 (*the years in which injury occurred and for which wage loss is claimed*).” [emphasis added]

Appellant’s W-2s prove that her income was greater in 2000, 2001 and 2002, the years for which she alleges a loss of income, than it was in 1999. She did not submit objective evidence proving a loss of income in 2003.

Appellant then argues that since she has been deemed permanently disabled by the Social Security Administration that she should be compensated for lost wages through age 65.

However, it appears that Appellant worked up until her May 13, 2003 surgery, and there is no evidence that Appellant’s permanent disability is the result of her CRS. The Work Status form dated May 23, 2003 signed by Dr. Kane indicates that Appellant cannot work from May 13, 2003 through August 11, 2003 due to her May 13, 2003 surgery. His office note of September 2, 2003, at which time he signed a Work Status form of indefinite disability, states “Her right knee remains achy but she does not feel as though

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this has worsened. In fact, it seems to have improved since I last saw her. Unfortunately, she has been troubled by significant amounts of radicular symptomatology and is now having significant low back and upper buttock discomfort. Unfortunately, because of this, she has been unable to work because she cannot even stand for any significant length of time and she is using support to get around” and “At this state, I think the patient’s right knee reconstruction is stable. We are dealing more with low back issues than anything else.”

Appellant did not prove that she suffered a loss of income greater than \$20,000 *as a result of* her CRS. Therefore, Appellee did not abuse his discretion in denying her claim for EIF Matrix Level IX benefits.

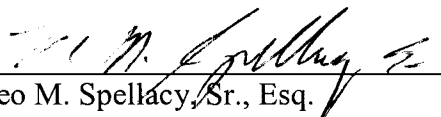
By order of the Special Master, Appellee’s Final Determination of ineligibility for Appellant’s EIF Matrix Level IX claim for wage loss is hereby AFFIRMED.

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 JUL 06 2004, then the Special Master’s Decision is final and may not be further contested or appealed.

JUN 18 2004
Date


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