

**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>Theresa M. VanBuren</i>	)	
	)	<b>Judge Kathleen M. O'Malley</b>

**NOTICE OF SPECIAL MASTER DETERMINATION**

Class Member Theresa VanBuren, by and through her attorney Janie L. Jordan, Esq. of the Law Firm Mithoff & Jacks (“Appellant”), appealed the decision of the Claims Administrator (“Appellee”) in rendering a Final Determination dated June 4, 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 IX benefits.
2. Appellant seeks Matrix Level IX benefits for loosening of her acetabular component, cardiac ischemia, and pain.
3. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF Matrix 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. 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.

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.

In order to be eligible for Matrix Level IX benefits, CAP 27 Section 13(b)(3) requires that an injury be catastrophic and extraordinary. Catastrophic is defined as an injury that prevented the Class Member from engaging in an activity of daily living; and extraordinary shall mean that the complication suffered by the Class Member was unique compared to other Class Members similarly situated.

Cardiac Ischemia

There is no medical evidence supporting Appellant’s allegation that “during her revision surgery, Mrs. VanBuren developed cardiac ischemia which required her to have an extended hospitalization” and “she did suffer from prolonged ischemia and cardiac muscle damage.”

Appellant underwent a CRS on April 24, 2001 and was discharged to home on May 1, 2001. The Discharge Summary from that admission states “Postoperatively, she [Appellant] did experience some ST-segment depressions and was sent to the ICU...On the second postoperative day, the patient’s cardiac complications had stabilized...on the fourth postoperative day, the patient’s telemetry was discontinued...It was felt on the sixth postoperative day that the patient was stable and had rehab sufficiently to be able to be discharged home.” Dr. Gabriel’s consult of April 24, 2001 states “After surgery a 12 lead EKG was obtained and the ST segment depressions were still present though less. She is awake and denies any chest pain, any shortness of breath or neck pain or nausea. She is complaining only of pain in her hip.” Dr. Gabriel recommended a nitroglycerine drip “until we know whether or not she has had a myocardial infarction” and “consult Dr. Meyer, who is her cardiologist.” Dr. Meyer’s consultation of April 25, 2001 states “Her cardiac markers are negative. At this point, would allow her to continue to recover from her hip surgery. She could be weaned off the IV nitroglycerin at this time and transferred to 3 West.”

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There is no evidence that the cardiac ischemia extended her hospitalization, or that it caused any type of cardiac muscle damage. In fact, medical records following her CRS indicate a history of bypass surgery in 1995, cardiac catheterization in 1999, hip replacement in November 2000 and revision in 2001, but there is no mention of the occurrence of cardiac ischemia during her revision surgery.

Appellee did not abuse his discretion in denying Appellant's claim for EIF Matrix Level IX benefits for an episode of cardiac ischemia that was not extraordinary, as that term is defined by the Settlement Agreement.

Pain

Again, there is no medical evidence support Appellant's allegation that her "pain has been ongoing since the time of her initial implant surgery and continues" or that "Her pain prevents her from walking unaided, and doing her household chores."

Pain due to the loosening of an acetabular component prior to a CRS was extremely common among Class Members and compensation for that pain is included in the APRS benefit award.

Appellant underwent an APRS on April 24, 2001. Dr. Peare's office notes following that surgery indicate the following:

- May 10, 2001: "She is doing well with minimal pain"
- June 7, 2001: "The patient states she is doing well and denies any pain."
- August 9, 2001: "She is not having any pain."
- November 8, 2001: She states she is doing excellent and has no complaints and no pain. No problems whatsoever."
- February 18, 2002: "Doing well, no pain"
- April 2, 2002: "The patient has been doing very well, however, the last 2-3 days she has been having some burning and pain in her left buttocks area. The patient has been doing a lot more activity recently, with more driving and walking. There have been some family illnesses and patient and her husband have been traveling a lot. She has also stopped doing her stretching and strengthening exercises"

The April 2, 2002 office note also indicates "We will see the patient back in approximately six months for a recheck, unless these symptoms persist and have not improved over the next 7-10 days." Because there were no subsequent records from Dr. Peare it is certainly reasonable to conclude that the burning and pain in her left buttocks area did improve.

Appellee did not abuse his discretion in denying this claim for Matrix Level IX benefits for pain that is not supported by her medical records.

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Loosening of her Component

Appellant argues that the loosening of her acetabular component was unique because she had partial fibrous ingrowth into the shell and that "because of this, Ms. VanBuren will always have a weak acetabular region that is unstable at best."

The Claims Administrator, based upon his review of thousands of claims, indicates that fibrous ingrowth was not unusual among Affected Product implants and, indeed, was common.

There is no indication in her medical records indicating that fibrous ingrowth caused a weak acetabular region that is unstable at best.

Appellee did not abuse his discretion in denying Appellant's claim for Matrix Level IX benefits for loosening of her acetabular component, which is not unique, and that term is defined by the Settlement Agreement, and for which she has been awarded APRS benefits.

By order of the Special Master, Appellee's Final Determination of ineligibility for Appellant's EIF Matrix Level 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:**

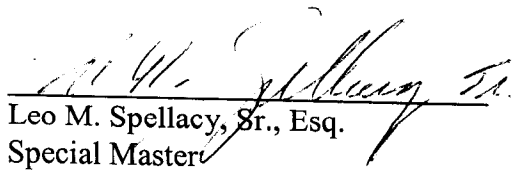
Leo M. Spellacy, Sr., Esq.  
Special Master to the Sulzer Settlement Trust  
c/o Liaison Counsel  
1600 Midland Building  
101 Prospect Avenue West  
Cleveland, OH 44115

**SEP 16 2004**

If no response is received (postmarked) by \_\_\_\_\_, then the Special Master's Decision is final and may not be further contested or appealed.

**SEP 01 2004**

\_\_\_\_\_  
Date

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