

**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>Tommie Whetstone. Sr.</i>)	
)	Judge Kathleen M. O'Malley

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Tommie Whetstone, Sr., by and through his attorneys Ken Suggs, Esq. and Gerald D. Jowers, Jr., Esq. of the Law Firm Suggs & Kelly Lawyers (“Appellant”), appealed the decision of the Claims Administrator (“Appellee”) in rendering a Final Determination dated February 18, 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 V benefits.

The factual findings of this matter are as follows:

1. Appellant submitted a claim for EIF Matrix Level V and IX benefits.
2. Appellant seeks Matrix Level V benefits for chronic pain, and Matrix Level IX benefits for income loss.
3. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF Matrix Level V benefits.
4. Appellee issued a Preliminary Determination regarding Appellant’s Matrix Level IX claim for income loss, and that claim is not being appealed at this time.

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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.

Appellant indicates that he “did not opt out of the settlement and expressly agreed to remain part of the settlement class based on the representations in the settlement agreement.” He argues that CAP 27 creates a standard for Matrix V discretionary claims that arbitrarily works to deny meritorious claims because the standard requires a permanent injury to be moderate or severe and CAP 27’s definition of moderate and severe is overly strict.

CAP 27 did not promulgate the definition of moderate and severe. Annex IV-1 of the Settlement Agreement reads as follows:

For purposes of determining the amount of EIF Benefits with respect to a given Matrix Level, the terms listed below shall have the following meanings:

1. “adjusted current annual income”...
2. “moderate” means the Class Member experienced pain, sensory loss or gait alteration that required narcotics and/or use of a cane or walker.
3. “severe” means the Class Member required the use of a wheelchair or underwent an amputation.

It is not disputed that Appellant’s permanent injury does not rise to the level of moderate or severe *as required by the Settlement Agreement*. Therefore, Appellee, Claims Administrator, did not abuse his discretion in denying Appellant’s claim for Matrix Level V benefits.

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

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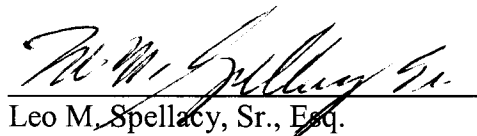
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Leo M. Spellacy, Sr., Esq.
Special Master to the Sulzer Settlement Trust
c/o Liaison Counsel
1600 Midland Building
101 Prospect Avenue West
Cleveland, OH 44115

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


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