

the Notice of Appeal submitted by Jane Livingston (“Appellant”) on September 5, 2003. The Final Determination in this matter should be affirmed because Appellant has not demonstrated that she was implanted with an Affected Product according to the requirements of the Settlement Agreement and because Appellant failed to timely contest the Claims Administrator’s Preliminary Determination denying Settlement benefits.

1. The Date of the Final Determination that is the Subject of this Appeal.

Appellant has noted an appeal from the Claims Administrator’s August 8, 2003 Final Determination in this matter.

2. The Provisions of the Settlement Agreement and/or CAPs that are the Subject of this Appeal.

- a. Settlement Agreement § 1.1(d) states that “Affected Products shall mean (i) Inter-Op Acetabular shells (“Inter-Op Shells”) identified in SOUS’s Safety Alert dated December 5, 2000 as identified by lot numbers on Annex I attached hereto...(iii) Inter-Op Shells and Tibial Baseplates that are otherwise identified by lot numbers on Annex I attached hereto and (iv) reprocessed Inter-Op Shells (“Reprocessed Inter-Op Shells”) identified by lot numbers on Annex II attached hereto.”
- b. Settlement Agreement § 1.1(e) provides that “Affected Product Recipients shall mean person who are citizens or residents of the United States, in whose bodies one or more Affected Products have been or are now implanted in an operation or other surgical procedures, whether or not any such Affected Product has been or may in the future be removed.”
- c. Settlement Agreement § 1.1(p) provides that the Claims Administrator shall “administer claims for benefits and make determinations under the Settlement Agreement and the Trust Documents.”

- d. Settlement Agreement § 3.4(a) provides that Class Members who timely undergo an APRS are eligible for APRS Fund benefits of \$160,000.
- e. Settlement Agreement § 4.6(d) provides that Class Members may contest a Preliminary Determination within 45 days of its issuance, and failure to do so renders the Preliminary Determination Final and not subject to further contest.
- f. Settlement Agreement § 4.6(f) provides that Class Members may note an appeal from a Final Determination within 30 days of its issuance.
- g. Claims Administrator Procedure 30 prescribes the process for appealing the Claims Administrator's Final Determinations, as well as the standard of review on appeal.

3. The Factual Findings of the Claims Administrator Regarding this Appeal

The Claims Administrator made the following factual findings in this matter. Those findings are based on the Exhibits noted below and attached to this Claims Administrator's Response to Notice of Appeal.

- a. Appellant submitted an Orange Form on September 5, 2002 seeking APRS benefits. *See* Exhibit A ("Livingston Orange Form"). In her original submission Appellant failed to provide the lot number of the prosthetic device implanted in her hip as required by the Orange Form.
- b. On November 4, 2002, the Office of the Claims Administrator sent Appellant a letter entitled "Sulzer Settlement Claim Status Notification" which informed the Appellant that she was required to provide "Proof that [she] was implanted with an Affected Product as required in Question 7 of the Orange Form." *See* Exhibit B ("November 4, 2002 Deficiency Notice").

- c. On March 3, 2003 the Claims Administrator issued a Preliminary Determination denying Appellant Settlement benefits as she had still not proffered sufficient evidence that she was implanted with an Affected Product. *See* Exhibit C (“Livingston Preliminary Determination”).
- d. On June 12, 2003, more than one hundred days after the Claims Administrator issued his Preliminary Determination, Appellant submitted a letter from counsel which indicated that the lot number of the prosthetic implant she received was #1420238. *See* Exhibit D (“Letter of June 12, 2003”). Because the lot number was not provided as part of the Appellant’s hospital or medical records, the June 12, 2003 letter did not satisfy the requirements of Question 7 of the Orange Form.
- e. Since the Appellant failed to timely contest her Preliminary Determination and failed to prove the implantation of an Affected Product as required by the Settlement Agreement, on August 8, 2003 the Claims Administrator issued a Final Determination denying Settlement benefits. *See* Exhibit E (“Livingston Final Determination”)

4. Narrative Explanation of Why the Claims Administrator’s Final Determination Must be Affirmed.

Settlement Agreement § 4.6(d) provides Claimants 45 days to contest a Preliminary Determination from the Claims Administrator. If a Class Member does not contest a Preliminary Determination within 45 days from the date of the Preliminary Determination, “such Preliminary Determination shall be deemed to be a Final Determination in accordance with Section 4.6(e) and such Class Member and/or Plaintiffs’ Counsel shall have no further right to contest such Final Determination.” Settlement Agreement § 4.6(d). Because the Claims Administrator issued Appellant’s Preliminary Determination on March 3, 2003, Appellant had until April 17, 2003 to

note a contest. The Claims Administrator first learned of the Appellant's desire to contest her Preliminary Determination from her letter dated June 12, 2003, more than one hundred days after the date of the Preliminary Determination. Since Appellant did not timely contest her Preliminary Determination, the decision of the Claims Administrator was rendered final by operation of Settlement Agreement § 4.6(d). Her appeal to the Special Master is improper and not permitted by the Settlement Agreement. *See* Special Master Opinion *Sampson* (September 9, 2003)(denying a Claim for Settlement benefits where the Appellant failed to contest the Preliminary Determination until 125 days after its issue)("The Preliminary Determination was final and not subject to appeal unless contested within 45 days")

Even if the Claims Administrator was permitted to consider the content of Appellant's June 12, 2003 letter challenging the Preliminary Determination, the Appellant has not advanced a compensable APRS Claim. Appellant's June 12, 2003 letter to the Claims Administrator contains the only reference to the lot number of the prosthetic device implanted in the Appellant's hip. This number is found in the text of a letter from counsel, not as part of Appellant's medical records or in a statement from her physician as required by Question 7 of the Orange Form. Appellant has not satisfactorily proven that she was implanted with an Affected Product. The Claims Administrator's Final Determination correctly denied her Claim. *See* Special Master Opinion *Stockman* (September 11, 2003)(holding that the Claims Administrator properly denied APRS benefits where Claimants did not adhere to the requirements of Question 7 of the Orange Form.)

The Claims Administrator is required to make benefit determinations in accordance with the terms of the Settlement Agreement. Settlement Agreement § 1.1(p). Because Appellant did not submit the proof required by the Settlement Agreement, the Claims Administrator did not

abuse his discretion in denying Appellant's Claim for Settlement benefits. Additionally, since the Appellant failed to timely contest the Claims Administrator's Preliminary Determination, she may not appeal that determination to the Special Master. The Claims Administrator's Final Determination should therefore be affirmed.

5. Certificate Required by CAP 30

This Claims Administrator's Response to Notice of Appeal is true and accurate to the best of the Claims Administrator's information and belief.

CERTIFICATE OF SERVICE

I certify that on October 6, 2003 I did cause to be electronically filed a copy of the foregoing Claims Administrator's Response to Notice of Appeal. Notice of this filing will be sent to all Parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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