IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (PHENTERMINE/ FENFLURAMINE/DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 2:15MD1203
SHEILA BROWN, ET AL.	:	CIVIL ACTION NO.
v.	:	99-20593
AMERICAN HOME PRODUCTS CORPORATION	:	
Appellant: . .	:	REPORT AND AWARD
Arbitration I	:	OF ARBITRATOR
Claim No.: 183/00	:	

FINDINGS OF FACT

1. On , the AHP Settlement Trust ("Trust") issued a Final Determination denying the claim of for Matrix Compensation Benefits on the A Matrix.

2. On filed an appeal from the denial of benefits by the Trust, requesting that the United States District Court ("Court") refer this matter to Arbitration.

3. On , the claim of was referred by the Court to Arbitration pursuant to VI.C.4(h) & (i) or VI.D.1.(f) & (g) of the Nationwide Class Action Settlement Agreement with American Home Products Corporation.

4. On Wednesday, ., an Arbitration Hearing was held concerning the claim of

5. The Trust determined that was entitled to Compensation Benefits on the B Matrix, but that was not entitled to Compensation Benefits on the A Matrix on the basis that failed to supply the documentation required to establish Diet Drug ingestion for sixty-one (61) or more days.

6. In statement of the case, requests benefits based on alleged medical symptoms and conditions purportedly caused by the use of the diet drugs. In Green Form, indicates that believes is entitled to Matrix A-1 Benefits with severity level III. See Green Form, Part I, page 4, questions 5 and 6.

ANALYSIS

FUND A ISSUES NOT COVERED BY ARBITRATION PROCESS

1. The Settlement Agreement provides for two funds, Funds A and B, which were established to provide benefits to class members. See Settlement Agreement, Section III.A.1; Memorandum and Pretrial Order No. 1415 (August 28, 2000) at 62. Fund A provides funding only for non-Matrix specified benefits and expenses, e.g., drug refunds and echocardiogram reimbursement. See Settlement Agreement, Section IV.A; Memorandum and Pretrial Order No. 1415 (August 28, 2000) at 62. Fund B provides funding for Matrix Compensation Benefits. See Settlement Agreement, Section IV.B; Memorandum and Pretrial Order No. 1415 (August 28, 2000) at 62.

2. The arbitration process only covers determinations made regarding Fund B and the eligibility of claimants to receive Matrix Compensation Benefits and/or the amount of Matrix Compensation Benefits they are entitled to receive.

MATRIX ELIGIBILITY AND QUALIFICATION

1. Under the Settlement Agreement, Matrix Compensation Benefits are paid according to two matrices. See Settlement Agreement § IV.B.2.d. The A Matrix, or the full compensation matrix, applies to claimants who: (1) have been diagnosed timely as FDA Positive; (2) ingested the diet drugs for sixty-one (61) or more days; and (3) have no conditions requiring a reduced payment under the terms of the Settlement Agreement. See Id. § IV.B.2.d.(1). The B Matrix, or the reduced compensation matrix, applies to claimants who: (1) have been diagnosed timely with Mild Mitral Regurgitation (regardless of the duration of ingestion of the diet drugs); or (2) were diagnosed timely as FDA Positive and ingested the diet drugs for sixty (60) days or less; or (3) were diagnosed timely as FDA Positive, ingested the diet drugs for sixty-one (61) or more days, and have certain conditions, identified in the Settlement Agreement, that may have caused or contributed to the claimant's heart problems. See id. § IV.B.2.d.(2).

2. In determining the length of diet drug usage, Section VI.C.2.d of the Settlement Agreement requires the claimant to submit documentary proof concerning the period of time the diet drugs were ingested. Specifically, the claimant must submit pharmacy records documenting the claimant's name, prescribing physician information, diet drug name, date(s) prescribed, dosage and duration the drug was prescribed or dispensed. If a physician or weight loss clinic prescribed the diet drugs directly, or pharmacy records are unobtainable, a claimant must identify the prescribing physician, including the prescribing physician's name, address and telephone number, and submit a copy of the medical records prescribing or dispensing the drugs. If the pharmacy records and medical records are unobtainable, a claimant must submit an affidavit under penalty of perjury from the prescribing physician or

dispensing pharmacy identifying the claimant, the drug prescribed or dispensed, the date(s), quantity, frequency, dosage and number of prescriptions or refills of the diet drug(s) to document ingestion. See id. § VI.C.2.d.(3).

3. Under the Settlement Agreement, the burden of proving diet drug ingestion remains with the claimant. See PTO 7779 at 6.

4. submitted a Green Form dated [1]

5. In the Green Form, reference is made to an echocardiogram which was performed on (See Green Form, Part II, page 8, questions C.1 and C.2).

6. The Green Form submitted by reports moderate mitral valve regurgitation and no aortic valve regurgitation. (See Green Form, Part II, page 8, question C.3). The Green Form also reports surgery to repair or replace the mitral valve. (See Green Form, Part II, page 11, question 9).

7. The answers to the questions in Part II of Green Form were completed by physician, , a Board-Certified Cardiologist. (See Green Form, Part II, page 7, Section A).

8. submitted a Blue Form dated

9. According to questions 7, 8 and 9 of Blue Form, answered that took Pondimin for 61 days or more.

10. In support of claim that took Pondimin for 61 days or more, submitted a one page pharmacy record generated by entitled "Medical Expenses" for the period through This record documents that on

[1] also submitted Green Forms dated and

1996, the Pharmacy filled a prescription for [illegible] of 90 Pondimin pills and of 30 Lonamin pills prescribed by [illegible]. This record also documents that on April 12, 1996, the Pharmacy filled another prescription for [illegible] of 90 Pondimin pills and of 30 Lonamin pills prescribed by [illegible]. The record does not state the manner in which the drugs were to be taken.

11. [illegible] failed to submit copies of any medical records prescribing or dispensing diet drugs. [illegible] also failed to submit any affidavit under penalty of perjury from the prescribing physician identifying the claimant, the drug prescribed or dispensed, the date(s), quantity, frequency, dosage and number of prescriptions or refills of the diet drug(s) to document ingestion, alleging that [illegible] refused to submit an affidavit.

12. In addition to the pharmacy records, [illegible] submitted [illegible] own affidavit dated [illegible], in support of [illegible] claim that [illegible] took Pondimin for 61 days or more. In affidavit, [illegible] states that [illegible] took only two (2) Pondimin pills per day and Lonamin five (5) days per week, but not on weekends, as suggested by [illegible].

13. In its Statement of the Case, the Trust states that, even though the Pharmacy record does not state the manner in which Pondimin was to be taken, the record was accepted by the Trust as supporting sixty (60) days of Pondimin use based upon the 1997 Physician's Handbook which states with regard to Pondimin: "The usual dose is one 20-mg tablet three times daily before meals." Physicians Desk Reference, 2914 (51st ed. 1997). The Trust determined that [illegible] failed to meet [illegible] burden of proving that [illegible] took Pondimin for 61 days or more.

14. The Settlement Agreement requires the Trust, in determining the length of diet drug usage, to look first to the pharmacy records. See Settlement Agreement § VI.C.2.d.(1)

and (2). As noted above, the Trust did consider the Pharmacy records in reaching its determination. Yet, the Trust also considered the Affidavit of .

15. During the Arbitration Hearing, and in their Statements of the Case, both parties referred this Arbitrator to the internal Claims Processing Procedures which had been approved by the Trust and by Class Counsel, with regard to evaluating the Appellant's Affidavit as proof of the length of diet drug ingestion. See PTO 3261 at 4.

16. The Claims Processing Procedures provide that the prescription/pharmacy record creates a rebuttable presumption that the drug was ingested for the period reflected in the record. Claims Processing Procedures: Duration of Use ¶1. Based upon the Physicians Desk Reference, 2240 (51st ed. 1997), which states with regard to Pondimin that the usual dose is one 20-mg tablet three times daily, a rebuttable presumption is created that the drug was ingested for a period of sixty (60) days: 180 pills ingested 3 times daily equals 60.

17. The Claims Processing Procedures permit a claimant to rebut the presumption established by the pharmacy record by submitting "credible proof" that the claimant ingested diet drugs for more days than as indicated by the pharmacy record. Claims Processing Procedures: Duration of Use ¶¶ 2-3.

18. In addition to response to questions 7, 8 and 9 of Blue Form, submitted affidavit of , solely to support claim that took Pondimin for 61 days or more. The Claims Processing Procedures specifically state that such an affidavit, "if not corroborated by other credible evidence, such as a reliable affirmation of another person with knowledge of the subject matter, would not be sufficient to rebut the written prescription..." See id. at ¶3. has not submitted an affirmation of another person.

19. The Claims Processing Procedures also state "the Trust may consider a claimant's affidavit standing alone in the totality of circumstances presented by that claimant to access its weight in the rebuttal analysis." See id. Implicitly, there must be other "circumstances" which corroborate the Appellant's Affidavit in order to give the Affidavit any weight. Here, there are no other such circumstances.

20. I find that the Appellant's Affidavit is not corroborated by any other credible evidence and therefore, the Affidavit is not sufficient to rebut the presumption created by the prescription record. In addition, I find an affidavit of this nature from the Claimant, submitted solely to support of claim that took Pondimin for 61 days or more, to be self-serving and lacking in credibility, regardless of the presumption which applies. See PTO 3261 at 5.

21. Counsel for Appellant argued during the Arbitration Hearing that the dates when the prescriptions were filled, being 43 days apart, constitutes credible evidence corroborating the Affidavit of that took only two (2) Pondimin pills per day, making each filled prescription a forty (45) day supply for a total of ninety (90) days. However, the mere fact that the prescriptions were filled 43 days apart provides no evidence as to how many pills were taken by per day.

22. It was therefore reasonable for the Trust to conclude, on the basis of pharmacy records, that ingested Pondimin for sixty (60) days or less, and awarding Compensation Benefits on the B Matrix. I conclude that the Trust's analysis and determination were not clearly erroneous.

CONCLUSIONS

1. The Claimant has not met burden of providing documentary proof of diet drug ingestion of sixty-one (61) days or more to the Trust as required by the Settlement Agreement.

2. Based on the above, the findings of the Trust are not clearly erroneous as set forth in Rule 5 of the Rules Governing the Arbitration Process.

3. The final determination of the Trust is affirmed.

September 23, 2009

LUTHER E. WEAVER, III, ESQUIRE
ARBITRATOR