

participating were _____ and _____, respectively, of _____.
The Trust was represented by _____.

ANALYSIS

1. The Claimant's PINK Form reports that _____ ingested Pondimin® (Fenfluramine) and Redux™ (Dexfenfluramine) for sixty-one days or more. See PINK Form, Questions 7, 8 and 9. This is confirmed by pharmacy records from _____, which reflect that _____ was dispensed Pondimin® on five dates ranging from _____ to _____.

2. The parties agree that _____ died on _____.

3. There is no dispute about _____ eligibility for Matrix compensation. In order to be eligible, a Diet Drug Recipient must fit within one of two categories: (1) Diet Drug Recipients diagnosed by a Qualified Physician as FDA Positive or as having mild mitral regurgitation by an echocardiogram performed on or before January 3, 2003, provided the Diet Drug Recipient registered for settlement benefits by May 3, 2003; or (2) Diet Drug Recipients who by September 30, 2005 have been diagnosed by a Qualified Physician as having Endocardial Fibrosis and who have registered for Fund B Benefits by January 31, 2006. See Settlement Agreement, § IV.B.1. In order to be diagnosed as FDA Positive, a Diet Drug Recipient must suffer mild or greater aortic valve regurgitation and/or moderate or greater mitral valve regurgitation. *Id.* at § I.22. Because _____ had mild mitral regurgitation and moderate aortic regurgitation, _____ met the definition of FDA Positive, thus making _____ eligible for Matrix Compensation. See Green Form, Questions C.3.a. and C.3.b.

4. Nor is there a dispute about _____ qualification for Matrix Level III

benefits. Matrix Level III includes surgery to repair or replace the aortic and/or mitral valve(s) after the use of Diet Drugs. *See* Settlement Agreement, § IV.B.2.c.(3). Because [redacted] had aortic valve surgery after ingestion of Pondimin®, [redacted] was qualified to receive Matrix Level III benefits. *See* GREEN Form, Question F.9. and Final Post-Audit Determination, dated [redacted].

5. The dispute in this matter centers on whether Level III benefits should be paid on Matrix A-1 or Matrix B-1. Claimant's position is that the claim should be paid on Matrix A-1 and that the Trust erred in placing the claim on Matrix B-1.

6. Claimant's award is based on a [redacted] GREEN Form, completed by [redacted], a Board-Certified Cardiologist. In that GREEN Form, [redacted] answered Question E.7. in the affirmative, attesting thereby that [redacted] had a history of daily use of methysergide or ergotamines for a continuous period of longer than 120 days. [redacted] signed the GREEN Form under penalty of perjury. Claimant has submitted nothing from [redacted] stating that [redacted] answered Question E.7. erroneously. In [redacted] letter, submitted with [redacted] contest materials, [redacted] stated that [redacted] would not admit to being in error, but [redacted] offers no explanation of why [redacted] was unwilling to do so or why the Trust should nonetheless conclude that the GREEN Form is erroneous and that some other fact is true. *See* Letter from [redacted] to [redacted], dated [redacted].

Claimant had previously submitted a GREEN Form in [redacted], signed by [redacted], but [redacted] is not a Board-Certified Cardiologist or a Board-Certified Cardiothoracic Surgeon. In [redacted], Claimant submitted an additional GREEN Form, signed by [redacted], a Board-Certified Cardiologist. In the [redacted] GREEN Form, [redacted] did not answer Question E.7., and added a handwritten notation "Don't Know." In [redacted], Claimant

submitted a Part II GREEN Form Update to [redacted] GREEN Form. The Update was signed by [redacted] on [redacted]. In the Update, [redacted] answered Question E.7. in the affirmative, stating that [redacted] had a history of daily use of methysergide or ergotamines for a continuous period of longer than 120 days. [redacted] GREEN Form was signed under penalty of perjury; the [redacted] GREEN Form Update was not.

During the arbitration, Claimant argued that it was placed in the impossible position of having to prove a negative, that is, that [redacted] did not have a history of daily use of methysergide or ergotamines. While this may be a difficult position, it was brought about by Claimant. Claimant submitted two GREEN Forms, both attesting in response to Question E.7. that Claimant had a history of daily use of methysergide or ergotamines.

GREEN FORM Update was not signed under penalty of perjury and was, thus, not the basis of Claimant's award. [redacted] GREEN Form was signed under penalty of perjury and was the basis of the Trust's award. While information pertaining to [redacted] would not have been binding on the Trust, it might have been informative. In neither instance, however, has Claimant given the Trust evidence from either doctor from which to conclude that either [redacted] or [redacted] completed the GREEN Form in error when both answered Question E.7. in the affirmative.

7. In support of [redacted] assertion that [redacted] was never on ergotamines, in contest Claimant submitted a document that appears to be written on a prescription pad bearing the name of [redacted].

[redacted]. The notation states "Pt above has never been on Ergotamine or any other migraine meds. Any Questions pleas (sic) call." The Trust concluded that this document did not possess the same indicia of credibility as the GREEN Form submissions signed by physicians chosen by the Claimant. Specifically, the prescription pad note is neither a verified statement nor

was it made under penalty of perjury. Moreover, it is not uncommon for an individual to be treated by more than one physician over the course of a lifetime. No evidence was submitted from which one might fairly conclude that _____ was _____ exclusive or life-long physician. In addition, the Trust noted that the handwriting on the note differed from that of the signature stamp. Irrespective of how I might judge these matters, I do not find the conclusion of the Trust to be clearly erroneous.

The Claimant also submitted copies of records from the _____ to support _____ claim that _____ was never treated for migraine headaches or other conditions that would have warranted the prescription of methysergide or ergotamines. These records, however, span the time between _____ and _____. They, therefore, provide no insight into what medications may have been prescribed prior to _____. They would, for example, be inadequate to prove ingestion of Pondimin, yet the parties agree that Pondimin was ingested by _____.

8. Daily use of methysergide or ergotamines for a continuous period of longer than 120 days is a “reduction factor,” rendering a claim eligible for Matrix Compensation payable on Matrix B-1, the reduced compensation Matrix. *See* Settlement Agreement, § IV.B.2.d.(2)(c)iii)f).

9. During the Arbitration Hearing, Claimant’s representative argued the difficulty of being forced to prove a negative and asked that the statements in the GREEN Forms be rebutted by Claimant’s submission, and asked that the affirmative answer to Question E.7. be disregarded.

10. The Settlement Agreement imposes on claimants the burden of providing the documentation necessary to justify an award of benefits. In this instance, the Claimant twice submitted documentation that supported a reduction of _____ claim from Matrix A-1 to Matrix B-1. Claimant would like the Trust to disregard that documentation, based on the subsequent

submission of contradictory evidence. Noticeably absent from that subsequent evidence is a request from either of the two physicians who attested to use of methysergide or ergotamines to amend or retract their assertions. And while five years' worth of medical records and a handwritten note on a prescription pad can be considered contradictory in content, they are not contradictory in substance. They do not trump two physicians' assertions, one under penalty of perjury. For these reasons, there is no basis to conclude that Claimant's two GREEN Forms should be disregarded.

CONCLUSIONS

1. The findings of the Trust are not clearly erroneous, as set forth in Rule 5 of the Rules Governing Arbitration Process.

2. Based upon the findings above, [redacted] not entitled to payment on Matrix A-1 because of the presence of a condition that mandates compensation on Matrix B-1. Settlement Agreement, §§ IV.B.2.d.(2)(c)iii)f).

Accordingly, based on all of the above, I find that [redacted] is entitled to Level III benefits payable on Matrix B-1.

DATE

Arbitrator