

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

IN RE: DIET DRUGS (PHENTERMINE / FENFLURAMNE/DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 2:15 MD 1203
-----	:	
SHEILA BROWN, ET AL.	:	
v.	:	CIVIL ACTION
AMERICAN HOME PRODUCTS CORPORATION	:	99-20593
-----	:	
Appellant:	:	
Arbitration No.:	:	REPORT AND AWARD
Claim No.:	:	OF ARBITRATOR

FINDINGS OF FACT

1. Claimant

On the AHP Settlement

Trust ("Trust") issued a Final Determination, denying the claim of
for severity level II Matrix Compensation Benefits.

2. On

filed an appeal from the decision of the Trustees and/or Claims Administrator(s) and
requested that the United States District Court ("Court") refer this matter to Arbitration.

3. On

the Court referred claim to Arbitration pursuant

to §§ VI. C. 4. (h) & (i) of the Nationwide Class Action Settlement Agreement with American
Home Products Corporation.

4. On

the undersigned held an Arbitration Hearing concerning

claim. At the Arbitration Hearing,
In attendance were
represented the Trust.

Esquire, represented
Jules S. Henshell, Esquire,

ANALYSIS

1. In order to receive Matrix Benefits, a Claimant must be both eligible and qualified to receive Matrix Level Benefits and the claim cannot be barred. The issue in this Arbitration is whether the Appellant's claim is barred by, and even if not barred by may be untimely under the terms of, the Seventh Amendment to the Settlement Agreement. *See* Seventh Amendment to the Nationwide Class Action Settlement Agreement with American Home Products Corporation, PTO 4567.

2. The Seventh Amendment applies to two categories of Diet Drug Recipients or their Representative Claimants. Category One consists, *inter alia*, of Diet Drug Recipients or their Representative Claimants, on whose behalf a GREEN Form Part II was substantially completed, signed and submitted by an Attesting Physician on or before May 3, 2003.

Category Two consists of all Diet Drug Recipients (or their Representative Claimants) who:

- a. Have submitted a signed Pink Form, Blue Form, Green Form Part I, Green Form Part II, and/or Gray Form to the Trust on or before May 3, 2003, or who presently have a good faith belief that they timely registered for benefits under the Settlement Agreement and are determined by the Court to have been

- timely registered for benefits under the terms of the Settlement Agreement as it existed before the Seventh Amendment; and
- b. Have been diagnosed as having Mild Mitral Regurgitation or FDA Positive regurgitation after Diet Drug use and by the end of the Screening Period; and
 - c. Have not filed a Green Form Part II with the Trust on or before the end of the Seventh Amendment Opt-Out/Objection Period in which the unaudited answers provided by the Attesting Physician in the Green Form Part II contain sufficient information on medical conditions to support a claim for Matrix Compensation Benefits on Matrix Level III, Matrix Level IV, or Matrix Level V of the Settlement Agreement; and
 - d. Have not received payment of any Matrix Compensation Benefits from the Trust; and
 - e. Are not members of Category One; and
 - f. Have not exercised or attempted to exercise an Initial Opt-Out, Intermediate Opt-Out, or Back-End Opt-Out, unless that opt-out is a Revoked Opt-Out; and
 - g. Have not signed an individual release of claims arising from the use of Diet Drugs, and/or have not been the subject of a final order dismissing with prejudice an action relating to injuries arising from the use of Diet Drugs, unless such order

expressly preserves the Class Member's ability to seek benefits under the Settlement Agreement.

See Seventh Amendment § III.A.2.

3. seeks Matrix A, Level II benefits based on a GREEN Form signed by a Board-Certified Cardiologist, on (2013 GREEN Form).

4. Prior to submitting the 2013 GREEN Form, Claimant did not previously receive Matrix Level I benefits.

5. The Seventh Amendment was approved by the District Court on March 15, 2005. Approval followed notice, an opportunity to opt out, and a fairness hearing. *See* Pretrial Order No. 4567.

6. Section XI.B. of the Seventh Amendment states that, "Upon Final Judicial Approval of the Seventh Amendment, no Class Member may pursue or receive Matrix Compensation Benefits on Matrix Level I or Matrix Level II from the Trust unless such Class Member: (i) received Matrix Compensation Benefits on Matrix Level I before the Execution Date and is pursuing a Supplemental Claim for progression to Matrix Level II; or (ii) has timely and properly exercised a Seventh Amendment Opt-Out (that has not been revoked)."

7. In the 2013 GREEN Form, stated that Claimant had moderate mitral regurgitation, pulmonary hypertension secondary to moderate or greater mitral regurgitation, and an ejection fraction of 50-60%. *See* GREEN Form, Questions C.3.a., F.3., and F.8. stated that answers were based on review of an echocardiogram dated In support of the GREEN Form, submitted echocardiogram tapes/discs dated

and a echocardiogram report, and medical records. If confirmed at audit, this submission could substantiate benefits at Matrix Level II. *See* Settlement Agreement, Section IV.B.2.c.(2)(b).

8. The deadline for opting out of the Seventh Amendment was November 9, 2004. acknowledges did not opt out of the Seventh Amendment. *See* Appellant's Statement of the Case.

9. Claimant is a Category Two Class Member under the Seventh Amendment because (1) Claimant timely registered for benefits, (2) was diagnosed as having mild mitral regurgitation of FDA Positive regurgitation after Diet Drug use and prior to end of the Screening Period, (3) Claimant had not filed Part II of a GREEN Form by the end of the Seventh Amendment Opt-Out/Objection Period that stated a claim for Level III, IV or V benefits, (4) Claimant had not received Matrix compensation from the Trust, (5) Claimant was not a Category One Class Member, and (6) Claimant had not opted out of the Settlement Agreement or released claims arising from the use of Diet Drugs. *See* Seventh Amendment, Section III.A.2.

does not dispute the fact that Claimant was a Category Two Class Member.

10. Despite the fact that Claimant was a Category Two Class Member, is now seeking Level II Matrix Benefits. Because neither opted out of the Seventh Amendment, such a claim is now barred. *See* Seventh Amendment, Section XI.B.

11. argues that should be not be barred from relief based on several factors. First, argues that certain of Claimant's medical records were falsified by Claimant's physician(s) and/or attorney(s). Whether this assertion is true or not, it does not alter Claimant's status as a Category Two Class Member or the implications that flow from that

status, including compliance with Seventh Amendment deadlines.

12. [redacted] also argues that [redacted] submitted a change of address form to the Trust on [redacted] but that after receipt of such notice the Trust continued to send correspondence to Claimant's original address, which was unoccupied after Hurricane Katrina in September, 2005.

This claim is unavailing. First, if Claimant, [redacted] were entitled to personal notice of the approval of the Seventh Amendment and the implications it represented for certain Matrix Level I and II Claimants, Appellant might be in a different, and more availing, position. But as Judge Bartle stated in a related Diet Drug matter, in multidistrict litigation, notice of change to a Settlement Agreement is sufficient when the representatives of all class members with active cases are notified of the proposed amendment. *See* Pretrial Order No. 9457 at 9 (Jan. 27, 2016) (citing *In re Diet Drugs Prods. Liab. Litig.*, 93 F. App'x 338, 344 (3d Cir. 2004)). More importantly, however, the deadline to opt out of the Seventh Amendment was November 9, 2004. No correspondence sent after that date, whether properly or improperly addressed, can alter the fact that [redacted] did not opt out of the Seventh Amendment by that date.

13. [redacted] also voiced a complaint that a cardiac ultrasound in the Trust's file belonged not to Claimant, [redacted] but to a younger [redacted]. Because the Trust did not disqualify Claimant based on a medical review, the presence of this unrelated tape is irrelevant to the matters at hand.

14. [redacted] further stated that if Claimant had been notified by any of [redacted] attorneys would have opted out of the Seventh Amendment, that [redacted] would have insisted on [redacted] and that if [redacted] would have had counsel or had been in any way informed of [redacted] rights, [redacted] would have opted out of the Seventh Amendment. Besides

speculating about choices Claimant may or may not have made, [redacted] complaint, in essence, is that [redacted] was unrepresented, unaware that [redacted] was unrepresented and not informed of rights by the Trust. The weakness in this argument is that the circumstances in which [redacted] existed, regrettable though they may be, are not the fault of the Trust. More importantly, for purposes of this Arbitration, the circumstances are not the responsibility of the Trust. Indeed, no matter how emotionally appealing, the Trust lacks authority to deviate from the terms of the Settlement and its subsequent Amendments in order to excuse [redacted] from failing to comply with procedures agreed to by the parties and binding on all other Claimants.

15. [redacted] 2013 GREEN Form asserted no claim for Matrix Compensation at severity levels III, IV or V. In its appeal to the District Court, however, [redacted] made a broad claim that [redacted] should not be held to strict adherence to the rules of the Trust. *See* Appeal to District Court from AHP Settlement Trust's Termination of Benefits at 2. In response, the Trust argued that, even if sought, any claim for Matrix compensation at severity levels III, IV or V would be untimely under the Seventh Amendment and Court-Approved Procedure (CAP) No. 16, entered on November 8, 2010. *See* PTO 8559 (approving CAP 16 at ¶ 5). CAP 16 contemplated two categories of Claimants, those who would experience a qualifying health event before CAP 16 went into effect but would not seek benefits until after it went into effect and others who had not experienced a qualifying event. Under CAP 16, "the former must submit the required Green Form four years from 'the date on which the Diet Drug Recipient was first diagnosed as having the last occurring condition or event on which the claim . . . is based,' while the latter must submit the Green Form by November 8, 2014." *See* PTO 9457 at 8; *see also* PTO No. 8559 (Nov. 8, 2010) (approving CAP 16). Because [redacted] any claim for

benefits was required to have been submitted by November 8, 2014 (four years from the approval of CAP 16). While the Trust appears correct on this matter, I make no formal finding as did not assert, nor seek to justify, a Level III, IV or V claim.

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, the Appellant, _____ is not qualified to receive Matrix Level Benefits at severity Level II. *See* Settlement Agreement § IV.B.2.c.(2)(b) and Seventh Amendment § XI.B.

Accordingly, based on all of the above, I find that
is not currently entitled to Matrix Compensation Benefits.

DATE

Arbitrator