

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.
2:15 MD 1203

SHEILA BROWN, ET AL.
v.
AMERICAN HOME PRODUCTS
CORPORATION

CIVIL ACTION NO.
99-20593

Appellant:
Arbitration No.:
Claim No.:

FINDINGS OF FACT

1. On _____ the AHP Settlement Trust (“Trust”) issued a Final Determination denying the claim of _____ (“Claimant,” “Appellant,” _____ and sometimes referred to as _____) for severity level III 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, _____ was represented by _____ Esquire. Jules Henshell, Esquire, represented the Trust.

ANALYSIS

1. In order to receive Matrix Benefits, a Claimant must be both eligible and qualified to receive Matrix Level Benefits and the claim must have been timely filed. The issue in this Arbitration is whether the Appellant submitted a timely claim for consideration 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 (hereinafter "Seventh Amendment").

2. On March 15, 2005, the Nationwide Class Action Settlement Agreement with American Home Products Corporation was amended a seventh time. See Seventh Amendment to the Nationwide Class Action Settlement Agreement with American Home Products Corporation, PTO 4567 (hereinafter "Seventh Amendment"). The Seventh Amendment applies to two categories of Diet Drug Recipients or their Representative Claimants. is a Category Two Class Member. timely registered for benefits under the Settlement Agreement. was diagnosed as having mild mitral regurgitation or FDA Positive regurgitation after ingesting Pondimin and prior to the end of the Screening Period. did not file a Green Form Part II with the Trust on or before the end of the Seventh Amendment Opt-Out or Objection Period. was not previously paid any Matrix Compensation benefits by the Trust. is not a Category One Class Member. did not exercise or attempt to exercise an Initial Opt-Out, Intermediate Opt-Out, or Back-End Opt-Out. did not enter into an individual release of claims arising from the use of Diet Drugs nor did preserve a right to seek Matrix Compensation benefits after being the subject of a final order dismissing with prejudice an action for injuries relating to the use of Diet Drugs. See Seventh Amendment, §§ III.A.2.a-g.

3. submitted a GREEN Form, signed by a Board-

Certified Cardiothoracic Surgeon, on [redacted] (“GREEN Form”), seeking level III Matrix Benefits. Part II of the GREEN Form stated that [redacted] underwent valvular repair or replacement surgery. *See* GREEN Form, Part II, Question F.9. Claimant also submitted hospital records that state that [redacted] had mitral and aortic valve replacement surgery on [redacted].

4. The Seventh Amendment provides that a Seventh Amendment class member may seek Matrix-level III, IV or V benefits for qualifying matrix-level conditions that were diagnosed and occurred by the earlier of the following: December 31, 2011 or fifteen years after the date of the last ingestion of Diet Drugs by the Diet Drug Recipient. *See* Seventh Amendment § IX.A.1.a. Claimant stated in [redacted] BLUE Form that [redacted] ingested Pondimin for 152 days. *See* BLUE Form, Q.9. In support of [redacted] claim, Claimant submitted pharmacy records that state [redacted] was prescribed Pondimin on four occasions in 1997. Fifteen years from 1997 is 2012. As such, with regard to the terms of the Seventh Amendment, Claimant is subject to the earlier deadline of December 31, 2011.

5. On November 5, 2010, Judge Bartle approved Court Approved Procedure (“CAP”) 16 in PTO 8559. Among other things, CAP 16 modified deadlines applicable to Class Members seeking Matrix Benefits. In paragraph 5, it stated:

5. Green Form Filing Deadline. Any Class Member who wishes to seek Matrix Compensation Benefits must submit a completed and executed Green Form Part I and Green Form Part II postmarked or delivered to the Trust no later than four years from the later of (a) the entry of an Order approving this Procedure or (b) the date on which the Diet Drug Recipient was first diagnosed as having the last occurring condition or event upon which the claim for Matrix Compensation Benefits is based.

CAP 16 at ¶ 5. The issue is whether CAP 16 is the current statement, both substantively and procedurally, of which Category Two Class members are entitled to seek high-level Matrix

compensation. Claimant's position is that CAP 16 amended the Seventh Amendment and is the most current substantive and procedural statement of cut-off deadlines. The Trust's position is that CAP 16 did not modify the Seventh Amendment's substantive provisions with respect to deadlines within which a Diet Drug Recipient must demonstrate qualification for high-level Matrix compensation, and that accordingly the Seventh Amendment is the most current substantive statement of cut-off deadlines. I conclude that CAP 16 is the current procedural statement, but not the current substantive statement of applicable cut-off deadlines. The most current substantive statement is the Seventh Amendment.

Claimant's position is that CAP 16 amended the Seventh Amendment's matrix qualification deadline. *See* Appellant's Statement of the Case. The Trust's position is that CAP 16 established Seventh Amendment filing deadlines. *See* Trust's Response to Appellant's Statement of the Case. If Claimant's analysis were correct, then CAP 16 would also have amended § IV.C.2 of the Settlement Agreement by extending, into the indefinite future, the deadline for a Diet Drug Recipient to experience a qualifying event or condition.

I do not find that CAP 16 amended the provisions of the Seventh Amendment or § IV.C.2 of the Settlement Agreement. If Claimant were correct, CAP 16 would have effectively eliminated any deadlines for experiencing a qualifying event or condition and would merely require submission of a GREEN Form within four years of the qualifying event or condition, whenever in the future such a qualifying event or condition were to occur. Such a conclusion is clearly inconsistent with CAP 16's title, "Approving CAP Regarding Payment and Claim Filing Deadlines." The District Court has recognized the difference between eligibility deadlines and filing deadlines for eligible claims. *See* Memorandum in Support of PTO 9485, at p 11 n.8. I therefore agree with the Trust that CAP 16 established filing deadlines for otherwise eligible

Seventh Amendment claims. By the same analysis, I conclude that CAP 16 did not amend the deadlines initially established in § IV.C.2 of the Settlement Agreement. Finally, I note that amendments to the Settlement Agreement are entitled “Amendments.” “CAP” in CAP 16 stands for “Court Approved *Procedure*” (emphasis supplied). I am not persuaded that the procedure for filing GREEN Forms, announced in CAP 16, amended the substantive qualification provisions in the Seventh Amendment or in § IV.C.2 of the original Settlement Agreement.

6. Claimant cites CAP 16 at paragraph 5(b) as proof that CAP 16 applies both to claims before and after the effective date of the Seventh Amendment because otherwise subparagraph (b) would be unnecessary. Stated concretely, Claimant’s argument is that if CAP 16 were not intended to apply to qualifying events or conditions after November 5, 2010, then subparagraph (a), which established a filing deadline of four years after the signing of CAP 16 would have been sufficient to establish an ultimate cut-off. According to Claimant, subparagraph (b) establishes separate – and later – cut-offs. With this much, I agree. Claimant, however, uses the fact that subparagraph (b) applies to qualifying events and conditions after the approval of CAP 16 as proof that CAP 16 applies to claims into an indefinite future, limited only by a requirement that the GREEN Form be submitted within four years of the qualifying event or condition. Claimant is correct that CAP 16 applies to claims arising after the effective date of the Seventh Amendment, but only until the end of the Seventh Amendment qualification period, which for was December 31, 2011.

7. Claimant also cites a principle of statutory analysis in support of argument that CAP 16 amended the Seventh Amendment. Claimant’s position is that unless CAP 16 amended the Seventh Amendment, subparagraph (b) of paragraph five would be superfluous and that there is a principle of statutory analysis (called the Rule Against Superfluity), which counsels against

concluding that statutory provisions are superfluous. I agree with the cited principle of statutory analysis, but do not find it applicable here. CAP 16 and the Seventh Amendment can be read together, giving meaning to the provisions of each. Insofar as I find that CAP 16 applies to Seventh Amendment claims filed after the effective date of the Seventh Amendment but only until its cut-off dates, I give meaning to all provisions and render none superfluous.

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, _____ has not established the conditions required for recovery of Matrix Level III Benefits, as described in the Settlement Agreement as modified by the Seventh Amendment because _____ did not file a timely claim. *See* Settlement Agreement § IV.B.2.c.(3)(a) as amended by Seventh Amendment to the Nationwide Class Action Settlement Agreement § I.B.30.c. *See also* PTO 8559, approving CAP 16.

DATE

Arbitrator