

Patient, Dosage, Amount and Date as New Evidence to Claims Administrator for Re-Review of Claim; (3) If Claim is Denied by Claims Administrator, to Submit Additional Exhibits Prior to Arbitration Based Upon Good Cause” (hereinafter “First 2015 Petition to Submit New Evidence”). While this Petition was pending, the Trust agreed to consider the receipts as part of Claimant’s file, rendering moot the First 2015 Petition to Submit New Evidence.¹

5. On [redacted] Claimant filed “ [redacted] Petition (1) To Postpone Scheduling of Arbitration Date (2) To Submit New Evidence for Re-Review of Claim (i) A New Completed Green Form, to Which a Board Certified Cardiologist Has Attested (ii) Physician Verification (of Review of Medical History and Records) and DDR Recipient Attestation (iii) Echo Scan of [redacted] (3) If Claim is Denied By Claims Administrator, to Submit Additional Exhibits Prior to Arbitration Based Upon Good Cause” (hereinafter “Second 2015 Petition to Submit New Evidence”).

6. Before the Arbitration was scheduled and before a ruling was made in Claimant’s Second 2015 Petition to Submit New Evidence, Claimant filed a “Motion/Petition for Relief,” asking the United States District Court to determine whether [redacted] claim was timely.

7. On [redacted] the Honorable Harvey Bartle denied Claimant’s Motion/Petition for Relief, rejecting Claimant’s arguments that [redacted] claim was timely and thus should be considered. *See* PTO [redacted] and Memorandum in Support of Pretrial Order No. [redacted]

8. On [redacted] Claimant appealed PTO [redacted] to the United States Court of Appeals for the Third Circuit. On [redacted] the Third Circuit dismissed Claimant’s appeal of PTO [redacted] on jurisdictional grounds.

9. By letter dated [redacted] Claimant filed a third request to submit new

¹ The Trust no longer contests Claimant’s assertion regarding ingestion of Diet Drugs.

evidence (hereinafter “Third Petition for New Evidence”).

10. On _____ the Chair of the Arbitration Panel denied Claimant’s Second 2015 Petition to Submit New Evidence. *See* Chair Arbitration Decision No. 24.

11. On _____ the Chair of the Arbitration Panel denied Claimant’s Third Petition to Submit New Evidence. *See* Chair Arbitration Decision No. 25.

12. On _____, the undersigned held an Arbitration Hearing concerning _____ claim. At the Arbitration Hearing, _____ was assisted by 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. 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. *See* Seventh Amendment § III.A.1. _____ submitted a GREEN Form, signed by _____ on _____ (“the 2003 GREEN Form”), seeking level II Matrix Benefits.

_____ GREEN Form was submitted before May 3, 2003. _____ did not opt out of the Seventh Amendment. As such, _____ was and is a Seventh Amendment Category One Class Member. In

accordance with the terms of the Seventh Amendment, GREEN Form was subject to medical review. After review, the Seventh Amendment Fund Administrator concluded that was entitled to a payment of \$2,000.

3. In submitted to the Trust a copy of a report of aortic valve replacement surgery. No other documents accompanied the operative report.

4. In Claimant submitted a second GREEN Form (“2015 GREEN Form #1”). Part I of the GREEN Form sought matrix B, level III Benefits. Part II of the GREEN Form was blank. The Trust issued a Final Determination on 2015 GREEN Form #1 on Claimant filed an appeal from that determination on and on the Court referred the appeal to Arbitration.²

5. On November 5, 2010, Judge Bartle approved Court Approved Procedure (“CAP”) 16 in PTO 8559. Among other things, CAP 16 modified the deadlines applicable to Class Members seeking Matrix Benefits. 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. Four years from Claimant’s valve replacement surgery was Four years from the date CAP 16 was entered was November 8, 2014, a Saturday. In order for claim to be timely, Claimant had to submit a completed GREEN Form by November 10,

² In Claimant submitted a completed GREEN Form based on aortic valve replacement surgery (“2015 GREEN Form #2”). The 2015 GREEN Form #2 is not part

2014. *See id.* *See also* Memorandum in Support of PTO

6. Claimant makes several arguments as to why [redacted] should be excused from complying with the filing deadline. They are not persuasive.

7. Claimant argues that Cap 16 should not apply to qualifying medical events that preceded CAP 16. As stated above, Paragraph 5 of CAP 16 provides for alternative filing deadlines, one tied to a specific date (the date the CAP was signed) and one tied to varying dates (the date on which a Claimant is diagnosed as having experienced a qualifying event). If the deadline were intended to apply only to claimants experiencing qualifying events after the date CAP 16 was signed, there would have been no reason for an alternative date tied to the signing of CAP 16. The rule against superfluity counsels against concluding that terms or concepts are superfluous, and I decline to do so here. I conclude that inclusion of a filing deadline four years from the signing of CAP 16 is evidence that CAP 16 was intended to apply to qualifying medical events that preceded its establishment. Judge Bartle considered Claimant's argument and rejected it in the Memorandum in Support of PTO [redacted] *See* Memorandum in Support of PTO

8. Claimant says that CAP 16 should not apply to [redacted] because [redacted] was not aware of it or its filing deadlines. Claimant relies both on Federal Rule of Civil Procedure 23 and due process in support of [redacted] claim. Rule 23 only requires notice of a change to a class action settlement when the change would have a material adverse effect on the rights of class members. *See* Memorandum in Support of PTO [redacted] citing *In Re Diet Drugs Prods. Liab. Litig.*, No. 99-20593, 2010 WL 2735414, at *6 (E.D. Pa. July 2, 2010). CAP 16 in no manner reduced Claimant's eligibility for Matrix Benefits; it merely changed the time in which [redacted] was permitted

of this Arbitration.

to seek such Benefits. The deadline for the filing of contract claims, which a Settlement Agreement is considered to be, is four years. *See* 42 Pa.C.S.A. § 5525; *In Re Cendant Corp. Prides Litig.*, 233 F.3d 188, 193 (3d Cir. 2000). Claimant’s deadline afforded more than four years in which to file a claim, in that benefitted from the provision linked to the CAP 16 signing date, which imposed a filing deadline in November, 2014, more than four years after the date of surgery. In Memorandum in Support of PTO Judge Bartle concluded that the changed filing deadline was not a material adverse change, and I have no basis to disagree with him.

Nor is the imposition of the CAP 16 a violation of due process. Even if CAP 16 effectively amended the Settlement Agreement, which I do not conclude it did, the filing of CAP 16 on the docket and the posting of it on the Trust’s website constituted constructive notice. Judge Bartle found this constructive notice to be adequate, and I agree. He stated, “In multidistrict actions like this one, notice of a change to a settlement agreement is adequate when the ‘representative of all class members having active cases . . . [are] notified of the proposed amendment,’ which occurred here.” *Id.* (citation omitted).

9. Claimant also argues that should be excused from the deadline because suffered a stroke in . . . While sympathetic to Claimant’s health events, I cannot find in Claimant’s favor on this issue for three reasons. First, Claimant offers no explanation about how the stroke impeded ability to meet the filing deadline. Second, the imprecision of the request puts no bounds on the extension of time in which Claimant could file a claim and, as such, is impossibly vague and overbroad. Third, compliance with deadlines can be excused if based on excusable neglect. In rejecting Claimant’s argument that stroke should excuse from complying with the deadline, Judge Bartle cited the danger of prejudice to the non-movants. At

the Arbitration Hearing and in Reply to the Trust's Response, Claimant argues that belongs to a subclass of 130 unrepresented claimants, thus suggesting that prejudice to the Trust is minimal. Accepting for purposes of argument that 130 is the accurate number of unrepresented claimants, the potential compensation owed to Claimants is far from insubstantial. Accordingly, I believe that excusing from compliance with the deadline would expose the Trust to significantly costly claims. As such, I find the potential for prejudice to the Trust to outweigh Claimant's request to be excused from compliance with the filing deadline where no compelling reasons have been offered. The District Court considered this claim and similarly rejected Claimant's request that be excused from filing before the applicable deadline. *See* Memorandum in Support of PTO

10. Claimant also asserts that letters written to Class Counsel on and on constitute timely notice of claim. A letter to Class Counsel, however, is not a claim and does not toll CAP 16 deadlines. The Settlement Agreement expressly mandates that any person making a claim for high level Matrix Benefits must complete a GREEN Form and submit it to the Trust. *See* Settlement Agreement § VI.C.2.c. Similarly, the Seventh Amendment makes clear that a Seventh Amendment Class Member must submit a GREEN Form when seeking high level Matrix Benefits. *See* Seventh Amendment § IX.A.1.b; *see also* Memorandum in Support of PTO Claimant did not submit a completed GREEN Form until after the Trust's Final Determination that is the subject of this Arbitration.³

11. Additionally, Claimant places reliance on a letter from the Seventh Amendment Fund Administrator. The letter stated "You will also be entitled to claim Matrix Compensation Benefits at Levels III, IV or V, as modified by the 7th Amendment, if your

³ The same filing deadlines would apply to this Green Form as well.

condition worsens so as to qualify at those levels before December 31, 2011 or fifteen years after the last use of the diet drugs, whichever date is earlier.” There is nothing in this statement that is untrue. If a claim had been timely filed, Claimant retained eligibility to seek Matrix Benefits based on a worsening condition before December 31, 2011 or fifteen years after the last use of the diet drugs, whichever date was earlier. In Claimant’s own submission, Claimant says ingested Diet Drugs in 1995. *See* Statement of the Case. For purpose of this analysis, giving Claimant the benefit of the doubt that the last ingestion occurred on December 31, 1995, Claimant was eligible to seek Matrix Benefits for a condition that worsened on or before December 31, 2010. valvular surgery occurred in within this time frame. The letter from the Seventh Amendment Fund Administrator, therefore, neither helps nor hurts Claimant. At most, it can be considered, as the District Court stated, as a reminder to Claimant “of entitlement to file a claim for High-Level Matrix Benefits, while CAP 16 set forth the deadlines for doing so.” *See* Memorandum in Support of

12. At the Arbitration Hearing, Claimant suggested that should be entitled to Matrix Benefits by considering stroke as the last worsening event, perhaps elevating to level V claim. There are three flaws in this argument. First, this Arbitration is confined to the appropriateness of the Trust’s decision in denying Benefits based on the incomplete 2015 GREEN Form #1. Even if the 2015 GREEN Form #1 had cited Claimant’s stroke as a qualifying event, which it did not, the 2015 GREEN Form #1 was incomplete. Second, is beyond the Seventh Amendment deadline which permits Diet Drug Recipients to seek Matrix Benefits if a condition worsened so as to qualify at levels III, IV or V before December 31, 2011 or fifteen years after the

last use of the diet drugs, whichever date is earlier. *See* Seventh Amendment § IX.A.1.a. As stated above, by Claimant’s own words, fifteen years from the last use of Diet Drugs came and went in 2010. *See* Statement of the Case. More importantly, in 2014 Claimant was years old. Matrix compensation is available only to those who were 79 years of age or younger at the time of their qualifying event. *See* PTO 9350 and Memorandum in Support of PTO 9350 (Sept. 16, 2014). *See* Seventh Amendment § IX.A.1.b. Therefore, Claimant’s stroke, while obviously tragic, does not help assist in resolution of Arbitration claims.

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