

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

IN RE: DIET DRUGS (PHENTERMINE/ : MDL DOCKET NO.
FENFLURAMINE/DEXFENFLURAMINE) : 2:15MD1203
PRODUCTS LIABILITY LITIGATION :
: :
-----: :
: :
SHEILA BROWN, ET AL. :
v. :
AMERICAN HOME PRODUCTS CORPORATION : CIVIL ACTION NO.
: :
-----: 99-20593
: :
Appellant: : REPORT AND AWARD
Arbitration No: : OF ARBITRATOR
Claim No.: 183.00 :

FINDINGS OF FACT

1. On _____, the AHP Settlement Trust (Trust) issued a Final Determination in the form of a Pre-Audit Final Determination Letter (Final PADL) on the claim of _____ (the Claimant) for Matrix Compensation Benefits.
2. On _____, the Claimant filed an appeal from the Final PADL to this Court requesting that the United States District Court (Court) refer this matter to Arbitration.
3. On _____, the Court referred the Claimant's claim to Arbitration pursuant to sections VI.C.4.(h) & (i) or VI.D.1.(f) & (g) of the Nationwide Class Action Settlement Agreement with American Home Products Corporation (Settlement Agreement).
4. On _____, an Arbitration Hearing was held on the Claimant's claim.
5. In her Green Form dated _____ (Green Form), the Claimant requests Matrix Benefits based on medical symptoms and

conditions allegedly caused by use of the Diet Drugs. The Green Form indicates that the Claimant believes that she is entitled to Matrix A-1, Level I Benefits. Green Form at 4, Questions 5-6.

6. The Green Form was based on an echocardiogram dated . Green Form at 8, Question C.1; at 13, Question L.4. The Attesting Physician indicated that the echocardiogram showed that the Claimant had moderate mitral valve regurgitation (Green Form at 8, Question C.3). The Attesting Physician also indicated that the Claimant developed an ejection fraction of 50%-60% after using the Diet Drugs (Green Form at 11, Question F.8).

7. The Final PADL stated that the Claimant's Green Form "facially demonstrates a Matrix-Level condition," but stated further that the Claimant "failed to supply the sufficient pharmacy records that prove [she] ingested Pondimin and/or Redux. Without adequate pharmacy records, the Trust cannot further process your Claim." Accordingly, the Trust stated in the Final PDL that the "Claimant is not eligible for purposes of seeking Matrix-Level compensation or otherwise," and that the "Claim will not be subject to audit pursuant to Pretrial Order 2662."

8. In lieu of pharmacy records, the Claimant submitted the following documents supporting her claim that she ingested the Diet Drugs for a period of time sufficient to meet the requirements of the Settlement Agreement:

(a) Affidavit of , stating that dispensed Pondimin to her from November 1997 through February 2000 without a prescription and "from his own office supply."

(b) Affidavit of , mother of the Claimant, stating that she "ate meals with" the Claimant, that from November 1999 through February 2000, the Claimant "was seeing a doctor for weight loss," and that she saw Claimant "take a pink tablet on numerous occasions."

(c) Affidavit of , who "works in the same department as" the Claimant, and states that from November 1999 through February 2000, she saw the Claimant "take a pink tablet

about two times per week."

(d) Affidavit of _____, which stated that he knew the Claimant "was being attended to for weight loss by _____," but which also included a handwritten correction to the effect that "I was not (handwritten correction) aware that _____ has dispensed Pondimin (Fenfluramine) to _____ during November 1999 to and including February 2000."

9. The Claimant also provided a Declaration of Prescribing Physician executed under penalty of perjury by _____, dated August 24, 2000 _____, stating that he prescribed or dispensed Pondimin and Redux in dosages of "250", beginning on "January 5." In the box designated for indicating the year of the Approximate Start Date, he included both 1998 and 1999. In the boxes designated for indicating the Approximate End Date, _____ inserted the word "same" and dashes (-). It is not clear what _____ intended to indicate by filling out the Declaration form in this manner. He may have intended to indicate that the Approximate Start Date was January 5, 1998 and the Approximate End Date was January 5, 1999, or that the Approximate Start Date was in either 1998 or 1999. In any event, his intent cannot be ascertained from the document itself. The Brown Declaration is ambiguous.

10. Attached to and submitted with the _____ Declaration was the Affidavit of _____, which stated that she was the assistant to _____ at _____, _____, from November 1999 through February 2002, that _____ office and clinic at that address is closed, and that his medical records, to _____ knowledge, are unobtainable. The Affidavit also stated that "_____ never wrote prescriptions, he always dispensed Pondimin (Fenfluramine) to _____ at the time of her visits from his own office supply."

ANALYSIS

1. In support of a Matrix claim, a Claimant must submit proof of Diet Drug use. In particular, under Section VI.C.2.d of the Settlement Agreement, each Claimant must submit *documentary* proof to the Trustees or the Claims Administrator of the *period of time* for which Diet Drugs Pondimin and/or Redux were prescribed to the Diet Drug Recipient who is the Claimant" (emphasis added).

2. Section VI.C.2.d.(1) provides that the documentary proof *must* include one of the following:

(1) If the Diet Drug was dispensed by a pharmacy, the identity of each pharmacy that dispensed Diet Drugs to the Diet Drug Recipient, including its name, address, and telephone number, and a copy of the prescription dispensing record(s) from each pharmacy, which should include the medication name, quantity, frequency, dosage and number of refills prescribed, prescribing physician's name, assigned prescription number, original fill date and each subsequent refill date; or,

(2) If the Diet Drug was dispensed directly by a physician or weight loss clinic, or the pharmacy records(s) is unobtainable, the identity of each prescribing physician, including the prescribing physician's name, address, and telephone number and a copy of the medical record(s) prescribing or dispensing the Diet Drug(s). The medical record(s) must include records which identify the Diet Drug Recipient, the Diet Drug name, the date(s) prescribed, the dosage, and the duration the drug was prescribed or dispensed;

(3) If the pharmacy records and medical records are unobtainable, an affidavit under penalty of perjury from the prescribing physician or dispensing pharmacy identifying the Diet Drug Recipient, the drug(s) prescribed or dispensed, the date(s), quantity, frequency, dosage and number of prescriptions or refills of the Diet Drug(s).

3. The Claimant did not submit as documentary proof any pharmacy records, as specified under subsection (1), or any medical records of a prescribing physician, as specified by

subsection (2). For purposes of this Report, it is accepted that there never were any pharmacy records, because any Diet Drugs that may have been dispensed would have been dispensed directly by . It is also assumed that Claimant's medical records with are unobtainable. Under those circumstances, the Claimant must establish documentary proof under subsection (3).

4. The affidavits of the Claimant, and attesting to her Diet Drug use are of no probative value under subsection (3), because none of those three affiants is the Claimant's prescribing physician. Such personal declarations of Diet Drug use are inadequate for establishing either the fact or duration of Diet Drug ingestion. Arbitration Decision No. 27, at 4, available at www.settlementdietdrugs.com.

5. The affidavit of is of no probative value under section 3 because he is not the Claimant's prescribing physician, and because the affidavit does not attest in any way to the Claimant's ingestion of Diet Drugs. Furthermore, states that he "was not aware" that had dispensed Pondimin to .

6. The Declaration, on its face, appears to be "an affidavit under penalty of perjury from the prescribing physician" (in this case, dispensing physician) providing the information required by subsection (3), including "the drug(s) prescribed or dispensed, the date(s), quantity, frequency, dosage." Nevertheless, it is insufficient as documentary proof of the Claimant's ingestion of Diet Drugs.

7. First, the Declaration is ambiguous in its indication of the duration of any ingestion. It does not make clear whether the "Approximate Start Date" was in 1998 or 1999. The use of the word "same" in two blocks, and the dashes in the others in the "Approximate End Date" make it unclear whether does not know the Approximate End Date, or whether he is indicating that the Approximate End Date was in 1999. The 1998 and 1999 dates

indicated by _____ are also inconsistent with the dates of ingestion stated in the _____ affidavits, all of which refer to the period November 1999 through February 2000.

8. Even if the ambiguity of the _____ Declaration is to be ignored, and the Declaration is interpreted in the manner most favorable to the Claimant (start date in January 1998, end date in January 1999), the _____ Declaration is insufficient as documentary proof. To take it seriously, it would have to be assumed that a licensed physician has voluntarily attested that he had illegally dispensed a medication that had been removed from the market in September 1997. In addition, the Declaration's assertion of a dosage of "250," seems implausible in light of the fact that Pondimin had been issued only in 30mg pills and Redux in 25mg pills. The mere submission of a declaration or affidavit by a dispensing physician does not in itself suffice to meet the requirements of subsection (3). Under these circumstances, I do not believe that the Trust erred.

9. It is concluded that the _____ Declaration does not provide the documentary proof required under subsection (3) to establish Matrix Level Claim.

CONCLUSION

1. The Claimant has not provided documentary proof of Diet Drug ingestion.
2. The Trust's Final Determination is not clearly erroneous. The Claimant is not entitled to Matrix Level Benefits.
3. The Trust's Final Determination is Affirmed.

DATE

ARBITRATOR