

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. 2:15MD1203
-----	:	
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 [redacted] the AHP Settlement Trust (Trust) issued a Final Determination on the claim of [redacted] for Matrix Compensation Benefits (Matrix Benefits), denying [redacted] claim for Matrix Benefits.
2. [redacted] filed a timely appeal from the Final Determination to this Court requesting that the United States District Court (Court) refer this matter to Arbitration.
3. The Court then referred [redacted] 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 [redacted] an Arbitration Hearing was held on [redacted] claim.

5. initiated her claim by electing the Accelerated Implementation Option, submitting a signed Pink Form, in which she stated that she was prescribed and took Pondimin® for “about 5 months.” Pink Form at 4, Question Nos. 7-8. also hand-wrote on her Pink Form “Fen-Phen - 5 months.” Id. at 4, Question No. 9.

6. In November and December of the Trust sent two notices requesting copies of “all prescription records for Pondimin® and/or Redux™.” In response, Appellant provided an executed Medical Records Authorization and requested that the Trust obtain her medical records.

7. On submitted a Green Form requesting A-1, Level II, Matrix Benefits. Green Form at 4, Question Nos. 5-6. Attesting Physician, completed Part II of Appellant’s Green Form.

8. On retained counsel. Shortly thereafter, counsel wrote to prescribing physician, and asked him to execute page 11 of the Blue Form, the Declaration of Prescribing Physician or Dispensing Pharmacy (the Declaration). responded that he was unable to execute the Declaration because all of his records had been destroyed and that he had “no records showing what Rx’s was on.” Memorandum from

9. Counsel for then contacted dispensing pharmacist, who executed the Declaration. The information he provided in the Declaration “was as specific as it could be because he did not have access to the pharmacy records, which also had been destroyed.” could only confirm in the Declaration that the pharmacy dispensed “Pondimin/Redux” from to and that Appellant was prescribed two pills per day. The Declaration did not state which drugs actually were prescribed nor did it provide the dosage.

10. claim file, including medical documentation, was transmitted to an Auditing

Cardiologist on [redacted] Following completion of [redacted] Audit, the Trust issued a Medical Records CAP Notice letter (CAP Notice), which stated that, based on the information provided by [redacted] the findings at Audit and the duration of drug use, [redacted] claim was “potentially payable on Matrix A.” [redacted] CAP Notice. The CAP Notice further stated that the “duration of [Appellant’s] drug use is 61 days or more.” Id. The CAP Notice also informed Appellant, however, that to qualify to be paid on Matrix A, Appellant was required to provide the medical information required by CAP No. 4.

11. In response, [redacted] submitted a Verification Form completed by her Attesting Physician, [redacted]. In two subsequent letters, the Trust informed [redacted] that she had to provide the Attesting Physician’s written transcript of [redacted] medical history as it related to the answers in Part II.E of her Green Form. [redacted] Letter and [redacted] Letter. In the second letter, the Trust warned [redacted] that “failure to comply within 45 days will result in the issuance of a Post-Audit Determination Letter that your Claim will be paid on Matrix B.” [redacted] Letter. On [redacted] [redacted] submitted a report by [redacted] detailing Appellant’s medical history.

12. On [redacted] the Trust informed [redacted] that her claim for Matrix Benefits lacked proof of diet drug ingestion. [redacted] Post-Audit Determination Letter - Second Notice of Medical Status. The Trust stated that neither [redacted] medical records nor the Declaration were sufficient to establish diet drug ingestion. By letter dated [redacted] [redacted] asserted that the Trust previously had informed her that the Declaration from her pharmacist was acceptable proof of diet drug ingestion. [redacted] provided no details concerning when the Trust had made this statement. On [redacted] the Trust again informed [redacted] that she had not established diet drug ingestion.

13. The Trust issued a Tentative Determination Letter rescinding the CAP Notice of [redacted] and stating that [redacted] was not entitled to Matrix Benefits. [redacted] Tentative Determination. The Trust stated that the Declaration failed to provide separate information about [redacted]



claimant to qualify for Matrix Compensation Benefits of any kind, the Settlement Agreement requires the claimant to provide proof of ingestion of diet drugs, as follows:

[E]ach Class Member must submit documentary proof to the Trustees and/or Claims Administrator(s) of the period of time for which the Diet Drugs Pondimin® and/or Redux™ were prescribed and dispensed to the Diet Drug Recipient who is the subject of the Claim. This 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 fill date; or,
- (2) If the diet drug was dispensed directly by a physician or weight loss clinic, or the pharmacy record(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 duration the drug was prescribed or dispensed; [or],
- (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).

Settlement Agreement § VI. C.2.d.

2. Pursuant to Court Approved Procedure No. 4, the Medical Records CAP, (CAP No. 4), the Trust shall begin to process claims for Matrix Benefits prior to the claimant's submission of all required medical records and documents. CAP No. 4 ¶ 5. CAP No. 4 provides that if a claim proceeds through Audit and the Trust determines that the claim may be payable on Matrix A, it shall request the claimant to either submit all required medical records, to submit a completed

Physician Verification and Diet Drug Recipient Acknowledgment, or to agree in writing to be paid on Matrix B in full satisfaction of the claim. The Trust may not pay Matrix Benefits to the claimant unless and until the claimant complies with the Trust's request.

3. Despite numerous requests from the Trust, and her and her counsel's own diligence, has never been able to provide the "documentary proof" of diet drug ingestion required by the Settlement Agreement. Neither the Declaration provided by her prescribing pharmacist nor the "Detailed Statement" provided by indicate whether she took Pondimin® or Redux™ and in which dosage. Under the Settlement Agreement, the failure to provide such documentary proof means that cannot qualify for any Matrix Benefits.

4. argues, however, that "the Trust is well aware of what diet drug [she] took, how long she took it and the dosage." Arbitration of Plaintiff's/Appellant's Statement of the Case argues further that she "executed numerous medical release authorizations/powers of attorney for the Trust's benefit . . ." and that "the Trust obtained these records and determined everything it needed to know about diet drug ingestion." Id. In addition, claims that she "relied on representations from the Trust that it had obtained the records establishing proof of ingestion." thus concludes that "the Trust now should be legally estopped from arguing that it does not have proof of ingestion." estoppel argument asserts, in effect, that the Trust is precluded from denying her claim on the basis of non-proof of ingestion when the record establishes that it had such proof.

5. There is no evidence in the record, however, that the Trust "knew everything it needed to know about diet drug ingestion" or that the Trust represented to that it had obtained the necessary records of ingestion. To the contrary, the record is replete with examples of unambiguous communications to from the Trust indicating that her documentation was not complete, and that Matrix Benefits could not be paid until it was complete. There is thus no factual basis for estopping the Trust from claiming that has failed to provide the required documentary proof of diet drug ingestion.

6. also argued in the Arbitration Hearing and in her Post-Arbitration Brief that the Trust assumed the responsibility of obtaining all necessary documentation needed for her claim once she authorized the Trust to obtain her medical records, and that through detrimental reliance on that undertaking and subsequent (alleged) silence by the Trust, she was prevented from obtaining the records held by her physician before they were destroyed. Post-Arbitration Brief of dated

7. These arguments are unconvincing. First, the Settlement Agreement cannot be interpreted plausibly as shifting onto the Trust the burden of obtaining the documentary proof needed to establish a claim once the claimant authorizes the Trust to obtain her medical records. The Settlement Agreement consistently makes clear that the burden of providing such proof is upon the claimant. Furthermore, a holding that the Trust had assumed that burden in this case would mean that a similar undertaking would have to be found in every case in which a claimant authorized access to medical records. There is nothing distinctive about medical records authorizations that would distinguish them from other claimants' authorizations. A holding that medical records authorization shifted onto the Trust the burden of providing documentary proof would not only ignore the intent of the Settlement Agreement, but would impose upon the Trust the wholly unintended and insupportable burden of having to document itself the claims of thousands of claimants.

8. Second, the acceptance of medical records authorizations cannot be interpreted at a representation by the Trust that it had undertaken to obtain documentary proof of ingestion, relieving of that burden through some kind of detrimental reliance on that representation. In light of the clear intent of the Settlement Agreement with respect to the allocation of the burden of proof for claims, it would have been unreasonable for to interpret the Trust's mere acceptance of her medical records authorizations as constituting such a representation.

9. Third, equally fatal to her claim of detrimental reliance is failure to establish that she would have been able to obtain her physician's medical records after when she

signed her first medical records authorization, had she not relied on the Trust's alleged representation. By her own admission, [redacted] ceased treatments sometime in the [redacted] counsel claims that [redacted] under Texas law, would have been required to preserve her records for seven years, that making them accessible to [redacted] between [redacted] and [redacted] As [redacted] counsel for the Trust established in the Trust's Post Hearing Brief, however, Texas law did not begin to require preservation of medical records for seven years until late [redacted]

Her records then could have been destroyed legally before the new law came into effect.. There is no basis for assuming that [redacted] would have been able to obtain her records between [redacted] and [redacted] when her counsel learned the records had been destroyed.

10. In sum, neither [redacted] estoppel nor detrimental reliance arguments preclude the Trust from denying [redacted] claim for Matrix benefits at Level A.II on the ground of failure to provide documentary proof of diet drug usage and ingestion.

### CONCLUSION

1. The Trust's Final Determination denying [redacted] claim for Matrix Benefits is not clearly erroneous as a matter of law.
2. The Trust's Final Determination is hereby affirmed.

11.14.05

DATE

ARBITRATOR