

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

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

FINDINGS OF FACT

1. On [redacted], 2005, the AHP Settlement Trust ("Trust") issued a Final Determination on the claim of [redacted], affirming the determination that [redacted] qualified for Matrix B-1/Level III Compensation Benefits in the total amount of \$ [redacted] but determining that she did not qualify for Matrix A-1 Compensation Benefits.

2. On [redacted], 2005, [redacted] filed an appeal from the denial of benefits by the Trust, requesting that the United States District Court ("Court") refer this matter to Arbitration.

3. On [redacted] 2005, the claim of [redacted] was referred by the Court to Arbitration pursuant to VI.C.4(h) & (i) or VI.D.1.(f) & (g) of the Nationwide Class Action Settlement Agreement with American Home Products Corporation.

4. On [redacted] 2006 [redacted], an Arbitration Hearing was held concerning the claim of [redacted]

5. submitted a Green Form dated . . .

6. According to Part II of 's Green Form, completed by Board Certified Cardiologist suffers from the following conditions: severe mitral regurgitation (Question C.3.a); mild aortic regurgitation (Question C.3.b); mitral valve prolapse (Question D.7); pulmonary hypertension secondary to moderate mitral regurgitation (Question F.3); ejection fraction of 50-60% (Question F.8); surgery to the mitral valve (Question F.9); and New York Association Functional Class I Symptoms (Question G.1).

7. The Trust determined that was entitled to Matrix B-1/Level III Compensation Benefits, but not Matrix A-1 Compensation Benefits. The Trust made this determination on the basis that the record established that ingested diet drugs for sixty (60) day or less, which qualifies her for Matrix B-1 Compensation Benefits only.

contends that the record established that she ingested diet drugs for at least sixty-one (61) days or more, and therefore, that she qualifies for Matrix A-1 Compensation Benefits. This is the sole issue presented in the appeal.

#### ANALYSIS

##### FUND A ISSUES NOT COVERED BY ARBITRATION PROCESS

1. The Settlement Agreement provides for two funds, Funds A and B, to be established to provide benefits to class members. (Settlement Agreement, Section III.A.1; Memorandum and Pretrial Order No. 1415 (August 28, 2000) at 62). Fund A provides funding only for non-Matrix specified benefits and expenses, e.g., drug and echocardiogram reimbursement. (Settlement Agreement, Section IV.A; Memorandum and Pretrial Order No. 1415 (August 28, 2000) at 62). Fund B provides funding for Matrix

Benefits. (Settlement Agreement, Section IV.B; Memorandum and Pretrial Order No. 1415 (August 28, 2000) at 62).

2. The arbitration appeals process only covers determinations made regarding Fund B, specifically, the eligibility of claimants to receive Matrix Compensation Benefits and/or the amount of Matrix Compensation Benefits they are entitled to receive.

3. In her statement of the case, [REDACTED] requests benefits based on alleged medical symptoms and conditions allegedly caused by the use of the Diet Drugs. On her Green Form, [REDACTED] indicates that she believes he is entitled to Benefits on the Fund A-1 Matrix. (Green Form, Part I, page 4, question 6).

#### MATRIX ELIGIBILITY AND QUALIFICATION

4. Under the Settlement Agreement, Matrix Compensation Benefits are paid according to two matrices. See Settlement Agreement § IV.B.2.d. The A Matrix, or the full compensation matrix, applies to claimants who: (1) have been diagnosed timely as FDA Positive; (2) ingested the diet drugs for sixty-one (61) or more days; and (3) have no conditions requiring a reduced payment under the terms of the Settlement Agreement. See id., § IV.B.2.d.(1). The B Matrix, or reduced compensation matrix, applies to claimants who: (1) have been diagnosed timely with Mild Mitral Regurgitation (regardless of the duration of ingestion of the diet drugs); or (2) were diagnosed timely as FDA Positive and ingested the diet drugs for sixty (60) days or less; or (3) were diagnosed timely as FDA Positive, ingested the diet drugs for sixty-one (61) or more days, and have certain conditions, identified in the Settlement Agreement, that may have caused or contributed to the claimant's heart problems. See id., § IV.B.2.d.(2).

5. In determining the length of diet drug usage, Section VI.C.2.d of the Settlement Agreement requires the claimant to submit documentary proof concerning the period of time the diet drugs were ingested. Specifically, the class member must submit pharmacy records and/or medical records documenting the claimant's name, prescribing physician information, diet drug name, date(s) prescribed, dosage and duration the drug was prescribed or dispensed. In the event pharmacy records or medical records are unobtainable, a class member may submit an affidavit under penalty of perjury from the prescribing physician or dispensing pharmacy identifying the claimant, the drug prescribed or dispensed, the date(s), quantity, frequency, dosage and number of prescriptions or refills of the diet drug(s) to document ingestion. See id. § VI.C.2.d.(3).

6. submitted pharmacy records showing two dispenses for Pondimin, January 23, 1996 and March 18, 1996. Each record states the quantity of pills dispensed as *ninety (90) pills, with an instruction for her to take 1 tablet 3 times per day. One Hundred and Eighty (180) pills taken three (3) times per day would constitute sixty (60) days of diet drug use.*

7. The only other evidence in the record submitted by in support of her position of diet drug use of greater than sixty (60) days is documentary evidence from her prescribing physician, Dr. . This documentary evidence consists of a notation on Dr. prescription pad, dated , 2005, stating: "was on Phentermine & Pondimin>61 days in 1996."

8. The notation on Dr ; prescription pad, dated ., 2005, does not constitute an affidavit under penalty of perjury. The notation also does not contain other

information required to rebut the pharmacy records, such as the date(s), quantity, frequency, dosage and number of prescriptions or refills of the diet drug(s) to document ingestion.

9. The Trust relied on the pharmacy records, and determined that there was an absence of any other credible proof to rebut the pharmacy records. The Trust therefore concluded that [redacted] had not established that she had ingested Pondimin for 61 days or more. I do not conclude that the Trust's analysis and determination were clearly erroneous.

10. During the Arbitration Hearing, [redacted] suggested that she was given sample pills prior to the actual prescriptions being provided. She also stated that she had samples in her possession after receiving the prescription, and that she may have utilized these samples from time to time, extending the total usage period of diet drugs beyond sixty-one (61) days [redacted] supplied no specific information with respect to how many samples she received, when took the samples, etc. Nevertheless, pursuant to Rule 9.a of the Rules Governing the Arbitration Process, new evidence is not permitted to be introduced during the arbitration process. The parties were so informed at the commencement of the hearing. Even if this evidence could be considered, it does not meet the standards set forth in the Settlement Agreement. See id. § VI.C.2.d.(3).

#### CONCLUSIONS

1. Based on the above, the findings of the Trust are not clearly erroneous as set forth in Rule 5 of the Rules Governing the Arbitration Process.

2. The final determination of the Trust assigning [redacted] claim for Matrix Compensation Benefits to Matrix B-1/Level III was not clearly erroneous as a matter of law.

3. The final determination of the Trust that is not entitled to any Matrix A-1 Compensation Benefits was not clearly erroneous as a matter of law.

September 10, 2006