

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

REPORT AND AWARD  
OF ARBITRATOR

**FINDINGS OF FACT**

1. On \_\_\_\_\_, the AHP Settlement Trust (Trust) issued a Final Determination—Denial of Matrix Compensation Benefits (Final Determination) on the Claim of \_\_\_\_\_ (Claimant) for Matrix Compensation Benefits.
  
2. On \_\_\_\_\_, Claimant filed an appeal from the Final Determination to the United States District Court (Court) requesting that the Court refer this matter to Arbitration.
  
3. On \_\_\_\_\_ the Court referred the 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. An Arbitration Hearing on Claimant's claim was held on \_\_\_\_\_ Claimant was not represented by counsel.
  
5. In \_\_\_\_\_ Green Form dated \_\_\_\_\_ (Green Form), Claimant

requests Matrix Compensation Benefits based on medical symptoms and conditions allegedly caused by use of the Diet Drugs. The Green Form indicates that Claimant believes that is entitled to Matrix A-1, Level II Benefits. Green Form Part I, Questions 5-6.

6. Claimant based claim on an echocardiogram dated

The Attesting Physician stated that this echocardiogram showed that the Claimant had moderate mitral valve regurgitation and an ejection fraction of 50-60%. Green Form Part II, Questions C.3., F.8.

7. In a Blue Form signed by Claimant on (Blue Form), Claimant represented that ingested Pondimin for a total of sixty days, and Redux for a total of thirty days. Blue Form, Question 9. Claimant did not answer Question 10 regarding the prescribing physician or dispensing pharmacy.

8. In in response to a deficiency notice issued by the Trust on , Claimant submitted an update to the Blue Form identifying seven pharmacies purported to have dispensed Diet Drugs to

9. In response to the Trust's Tentative Denial of Matrix Claim Benefits, dated Claimant submitted on the following: a Blue Form Page 11 Declaration signed by Dr. relating to use of Diet Drugs (the Carfango Declaration); Blue Form Pages 4 and 5 identifying " as the dispensing pharmacy; and one Pondimin pill.

10. Claimant also submitted, as a medical record establishing ingestion of Diet Drugs, an echocardiogram report dated which includes a notation of Fen-Phen use.

11. The Final Determination stated that:

Your GREEN Form facially demonstrates a Matrix-Level

condition. However, you have failed to supply the sufficient pharmacy records that prove you ingested Pondimin and/or Redux. Without adequate pharmacy records the Trust cannot further process your Claim. Accordingly, this Claim will not be subject to audit pursuant to Pretrial Order 2662.

Final Determination at 1.

### **ANALYSIS**

1. Only persons who have ingested Diet Drugs are members of the Settlement Class eligible to submit a claim for Matrix Compensation Benefits. Settlement Agreement §II.B.

2. The Settlement Agreement provides that to sustain a claim for Matrix Compensation Benefits,

each Class Member must submit documentary proof to the Trustees and/or Claims Administrators of the period of time for which the Diet Drugs Pondimin<sup>®</sup> and/or Redux<sup>™</sup> were prescribed and dispensed to the Diet Drug Recipient.

Settlement Agreement §VI.C.2.d.

3. The Settlement Agreement contemplates that a Claimant will use pharmacy records or a physician's medical records as documentary proof of the period of ingestion of Diet Drugs, but recognizes that such records may be unobtainable. The Settlement Agreement thus provides that in those circumstances a Claimant may rely upon other documentation, as specified:

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 approved, the date(s), quantity, frequency, dosage and number of prescriptions or refills of the Diet Drug(s).

Settlement Agreement §VI.C.2.d(3).

4. Claimant has submitted no pharmacy records, nor has demonstrated that it was impossible to obtain them from the seven pharmacies identified.

5. Claimant argues that has established proof of ingestion by means of the Declaration, submission of the Pondimin pill, the notation on the echocardiogram, and submission of Green Form Part II. For the reasons set forth in the following paragraphs, the foregoing are not sufficient to establish proof of ingestion under the Settlement Agreement, either singly or collectively.

6. The Declaration is insufficient because a prescribing physician's affidavit must identify "the date(s), quantity, frequency, dosage and number of prescriptions or refills of the Diet Drug(s)." Settlement Agreement §VI.C.2.d. The Declaration does not provide the required information.

7. Similarly, the notation on the echocardiogram is insufficient because it does not provide the information required under Settlement Agreement §VI.C.2.d(3), and because it is not a medical record of the prescription of Diet Drugs for Claimant.

8. The Pondimin pill submitted by Claimant is of no probative value because it provides no basis for determining for whom it had been prescribed. It should be noted that Respondent did not submit a prescription bottle along with the pill that might have provided some information.

9. The mere submission of Green Form Part II does not establish ingestion of Diet Drugs. To hold that Green Form Part II itself constituted the requisite proof would render the proof of ingestion provisions of the Settlement Agreement nonsensical.

10. In sum, the Trust determined correctly that Claimant failed to

provide the necessary documentary proof of ingestion of Diet Drugs.

#### **CONCLUSION**

1. The Trust's Final Determination is not clearly erroneous. Claimant is not entitled to Matrix Level Benefits.
2. The Trust's Final Determination is Affirmed.