

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—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 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 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. Green Form Part II, Question C.3. The Attesting Physician stated further that the echocardiogram also showed evidence of mild aortic regurgitation (Green Form Part II, Question C.3.b), an ejection fraction of 50-60% (Green Form Part II, Question F.8), and New York Heart Association Functional Class I Symptoms (Green Form Part II, Question G.1).

7. 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 process your claim.

Final Determination at 1.

8. The Pink Form was signed by Claimant on . Claimant also completed a Medical Records Authorization, but it was not signed by Claimant or counsel. Claimant subsequently provided a signed Medical Records Authorization dated

9. On through Counsel, Claimant submitted the affidavit of , Claimant's , and , Claimant's attesting to their personal knowledge of Claimant's ingestion of Diet Drugs (the Affidavits).

10. Claimant submitted the Affidavits because had access to neither pharmacy records nor medical records indicating that

had been prescribed Diet Drugs or that Diet Drugs had been dispensed to According to Claimant, prescription had been written at a weight loss clinic in which had closed and was untraceable, and had obtained the Diet Drugs by mail order, not from a pharmacy.

ANALYSIS

1. Only persons who have ingested Pondimin and/or Redux are members of the Settlement Class and, if eligible, may 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 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.

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 only the following documentation:

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.(3).

4. Because pharmacy and medical records were unobtainable, Claimant submitted the Affidavits of and .

as proof of the period of time in which ingested Diet Drugs.

5. Under the language of the Settlement Agreement, the Affidavits are not acceptable as proof of Diet Drug use because neither or are associated with a prescribing physician or dispensing pharmacy, and neither of the affidavits identify the "date(s), quantity, frequency, dosage and number of prescriptions or refills of the Diet Drug(s)." Id.

6. The Trust thus determined correctly that Claimant failed to provide the necessary documentary proof of ingestion of Diet Drugs.

7. In Statement of the Case, Claimant asserts several related arguments for why the plain language of the Settlement Agreement should be ignored and the Trust ordered to continue processing the Claim.

8. First, Claimant argues that an express provision of the Pink Form signed by Claimant defines everything that was required to prove ingestion of Diet Drugs for purposes of a claim for Matrix Compensation Benefits, and that the Trust is contractually bound by that provision. That provision states:

You must supply the Claims Administrators with written proof of the amount of Pondimin® and/or Redux™ which was dispensed for your use by your drugstore(s), doctor(s) or healthcare facility(s). If you supply the names, addresses, and telephone numbers for your drugstore(s), doctors(s) or healthcare facility(s) as described in question Number 10, and complete the Medical Records Authorization, you fulfill this requirement.

Pink Form, page 10, paragraph 1. By providing the address of weight loss clinic and signing the Medical Records Authorization, Claimant concludes, has provided all of the proof of ingestion required for a Matrix Compensation Benefits claim as described by contract with the Trust.

9. This argument is without merit. It ignores the function and contractual effect of the Pink Form. The Pink Form does not

establish contractually any entitlement to Matrix Compensation Benefits. Signing the Pink Form and providing the required information simply indicated Claimant's acceptance of the Accelerated Implementation Option and registered an eligible Claimant for specified medical services, reimbursement of specified medical expenses, or fixed cash distributions.

10. Moreover, the heading for the provision that Claimant relies upon states: "Remember, in order to complete the submission of your Registration, you must supply the following to the Claims Administrators." Pink Form at 10. Thus, Claimant provided what was necessary to establish proof of ingestion for those limited purposes, but NOT for Matrix Compensation Benefits.

11. The same page of the Pink Form cited by Claimant provides that:

If you claim Matrix compensation benefits, you and your doctor must complete the Matrix Compensation Benefits Claim Form - the GREEN FORM - and return it to the Claims Administrators.

Pink Form at 10, paragraph 4 (emphasis in original). To obtain Matrix Compensation Benefits Claimant would have to provide the documentary proof as required by Settlement Agreement Section VI.C.2.d. Claimant's argument that the obligation to provide the documentary proof of ingestion required by the Green Form is somehow obviated by complying with the requirements of the Pink Form is based on a misreading of the Pink Form. The language cited by Claimant from the Pink Form can in no way be read as imposing some kind of contractual obligation on the part of the Trust to accept the information and authorization as sufficient to satisfy the proof requirements under the Green Form, which are defined precisely by the plain language of the Settlement Agreement.

12. Second, Claimant argues through Counsel at the Arbitration hearing, and in Statement of the Case, that some sort of "estoppel" should apply against the Trust's enforcement of the proof of ingestion requirement. Claimant's argument seems to be that

relied on the Trust's representation in the Pink Form that had fulfilled the proof of ingestion requirement for Matrix Compensation Benefits by providing the weight loss clinic's address and signing the Medical Records Authorization, and that the Trust had assumed the responsibility of securing medical and pharmacy records. relied on that representation, so the Trust should not now be permitted to require additional proof of ingestion for claim for Matrix Compensation Benefits. This argument also is without merit. Paragraph 1 on page 10 of the Pink Form, when read in conjunction with paragraph 4 relating to eligibility for Matrix Compensation Benefits, and in light of the limited purpose and effect of the Pink Form, cannot be characterized as a representation that could give rise to estoppel as Claimant asserts. That Pink Form language relates only to registration for benefits under the Accelerated Implementation Option. Even if it could be considered such a representation, Claimant's reliance upon it could hardly be reasonable, given that was repeatedly notified of obligation to provide the necessary documentation. See Denial of Matrix Claims Benefits for Lack of Supporting Documentation, , at 1. Those notifications should have dispelled any impression Claimant may have had that the Trust had agreed to secure pharmacy or medical records. Furthermore, nothing in the record indicates what Claimant would or could have done differently to provide proof of ingestion, had not erroneously assumed that the Trust was responsible for obtaining that proof. In sum, the Trust is not estopped from requiring Claimant to provide proof of ingestion as required by the Settlement Agreement.

13. Third, at the Arbitration hearing, Claimant argued that as a "fiduciary" of Claimant, the Trust had an obligation to use data allegedly in its possession about other claims to "cross-check" Claimant's information about the weight loss clinic that prescribed Diet Drugs, and that such a search would have enabled the Trust to find Claimant's medical records. This argument is without merit. Claimant provided no basis to demonstrate that even if such "cross-checking" were possible, that there would have been any records to

be found. Furthermore, leaving aside the question of whether the Trust has any kind of obligation to Claimant outside of those defined by the Settlement Agreement, the Trust certainly has no obligation, fiduciary or otherwise, to do anything in contradiction to the Settlement Agreement. The Settlement Agreement places the burden of providing documentary proof on the Claimant. The Trust has no authority, let alone "fiduciary obligation," to assume that burden.

14. Appellant's Statement asserts that "the Trust has constantly changed its positions on [the proof of ingestion] issue," that "the Court has seen fit to expand the 'strict' terms of the Settlement Agreement," and that the Trust "has paid out matrix level benefits to claimants without the proof they are now seeking from

." Appellant's Statement at 2. Nothing in the record or in the Appellant's Statement supports these assertions, and they were accorded no weight in this analysis.

CONCLUSION

1. The Trust's Final Determination is not clearly erroneous. Claimant is not entitled to further consideration of Claim or Audit.

2. The Trust's Final Determination is Affirmed.

DATE

ARBITRATOR

ESQUIRE