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. 1203
SHEILA BROWN, et al. v. AMERICAN HOME PRODUCTS CORPORATION, et al.	:	
CLAIMANT: PRUDENCE NICOSIA	:	CIVIL ACTION NO. 99-20593

PRETRIAL ORDER NO. 3192

AND NOW, this 7th day of January, 2004, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the denial of Matrix Level III benefits for class member Prudence Nicosia is AFFIRMED.

BY THE COURT:

J.

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IN RE: DIET DRUGS (PHENTERMINE, FENFLURAMINE, DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 1203
SHEILA BROWN, et al.	:	
v.	:	
AMERICAN HOME PRODUCTS CORPORATION, et al.	:	
CLAIMANT: PRUDENCE NICOSIA	:	CIVIL ACTION NO. 99-20593

MEMORANDUM AND PRETRIAL ORDER NO. 3192

Bartle, J. January 7, 2004

Before the court is an appeal of Prudence Nicosia under § VI.C.4.i. and l. of the Nationwide Class Action Settlement Agreement ("Settlement Agreement") in this diet drug litigation from the report and award of an arbitrator denying her certain benefits from the AHP Settlement Trust (the "Trust").

Under the Settlement Agreement, any class member such as Ms. Nicosia may appeal the Trust's final determination of benefits to a single arbitrator appointed by the court. Any party may then appeal the arbitrator's report and award to the court whose decision shall be "final and binding." See Settlement Agreement § VI.C.4.h.-l.

The Settlement Agreement provides for various levels of so-called matrix benefits, depending on the seriousness of the injury from ingesting fen-phen and the age of the class member. Ms. Nicosia claims that the arbitrator erred in denying her benefits which she seeks under § IV.B.2.c.(3)(a) of the Settlement Agreement. It reads in relevant part:

> (3) **Matrix Level III** is left sided valvular heart disease requiring surgery or conditions of equal severity, and is defined as:
>
> > (a) Surgery to repair or replace the aortic and/or mitral valve(s) following the use of Pondimin® and/or Redux™.

The controversy here centers on the interpretation of the Settlement Agreement and its application to the facts, which are not in dispute. Our review is de novo.

While Ms. Nicosia had surgery following her use of Redux, she concedes that the surgery was performed because of aortic stenosis. There is no evidence that the surgery resulted from her use of Redux. Her aortic valve was replaced on July 8, 1997. Her medical records prior to that date do not disclose any valvular regurgitation. It was not until an echocardiogram on May 4, 2001, almost four years later, that she was diagnosed with mild mitral regurgitation and mild aortic regurgitation.

Ms. Nicosia argues that she has met the requirement of § IV.B.2.c.(3) because she had "valvular heart disease requiring surgery." She points to the replacement of her aortic valve. She then reasons that she has met the requirement of subsection (3)(a) because the surgery to replace her aortic valve followed

her use of Redux. While her logic is irrefutable as far as it goes, Ms. Nicosia overlooks the introductory paragraphs to § IV.B. of the Settlement Agreement entitled "Compensation Benefits Payable from Fund B." This section states:

> 1. **Eligible Class Members.** The following Class Members, and only such Class Members, shall be entitled to compensation benefits from Fund B ("Matrix Compensation Benefits"):
>
> a. Diet Drug Recipients who have been diagnosed by a Qualified Physician as FDA Positive or as having Mild Mitral Regurgitation by an Echocardiogram performed between the commencement of Diet Drug use and the end of the Screening Period and who have registered for further settlement benefits by Date 2.

Thus, qualifying all that follows, including the language in § IV.B.2.c.(3), is the limitation that only "Drug Recipients who have been diagnosed ... as FDA Positive or as having Mild Mitral Regurgitation by an Echocardiogram" are entitled to compensation. Experiencing left sided valvular heart disease is of no moment unless the claimant also passes muster under § IV.B.1.a.

The left sided valvular heart disease suffered by Ms. Nicosia and requiring surgery admittedly was not the result of mild mitral regurgitation or of being FDA Positive, that is, of having mild or greater aortic valve regurgitation and/or moderate or greater mitral valve regurgitation. See Settlement Agreement § I.22. Her mild aortic regurgitation and mild mitral

regurgitation were not diagnosed until almost four years after her surgery.

In sum, in order to qualify for Matrix Level III benefits, Ms. Nicosia would have to have had surgery because of mild mitral regurgitation or because of a condition described as FDA Positive. It is undisputed that she has not met either of these conditions. Consequently, she is not now entitled to Level III matrix benefits. We will deny her appeal and affirm the decision of the arbitrator.