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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. 2:15 MD 1203
SHEILA BROWN, et al.	:	CIVIL ACTION NO. 99-20593
v.	:	
AMERICAN HOME PRODUCTS CORPORATION	:	
THIS DOCUMENT RELATES TO:	:	
KATHLEEN ROW CLAIM NUMBER 183/00 646588 ARBITRATION NUMBER 599	:	

FILED

MAR 23 2007

MICHAEL E. KUNZ, Clerk
By_____Dep. Clerk

MEMORANDUM AND PRETRIAL ORDER NO. 7066

Bartle, C.J. March 23, 2007

Kathleen Row ("Ms. Row" or "claimant"), a class member under the Diet Drug Nationwide Class Action Settlement Agreement ("Settlement Agreement") with Wyeth, Inc.,[1] seeks benefits from the AHP Settlement Trust ("Trust"). The Trust denied Ms. Row's claim for Matrix Compensation Benefits ("Matrix Benefits"). Matrix Benefits compensate claimants for medical conditions caused by the diet drugs Pondimin or Redux.[2] See Settlement

1. Prior to March 11, 2002 Wyeth was known as American Home Products Corporation.

2. Matrix Benefits are paid according to two benefit matrices (Matrix "A" and Matrix "B"), which generally classify claimants for compensation purposes based upon the severity of their medical conditions, their ages when they are diagnosed, and the (continued...)

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Agreement § IV.B. Ms. Row appealed the Trust's adverse Final Determination, and the matter was referred to arbitration. See id. § IV.C.4.i. The Arbitrator issued a Report and Award affirming the Trust's determination.

Ms. Row has now appealed to this court as permitted under the Settlement Agreement. See id. She argues that she provided sufficient information to the Trust to satisfy her burden of proof. We apply a clearly erroneous standard of review to the Arbitrator's findings of fact, and conduct a plenary review of conclusions of law. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947-49 (1995). The decision of this court is final and binding. See Settlement Agreement at § IV.C.4.i.

Ms. Row submitted a signed "Pink Form"[3] to register with the Trust and claim Fund A Benefits on February 23, 2000. Fund A Benefits provide limited benefits to a claimant for

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2.(...continued)
presence of other medical conditions that also may have caused or contributed to a claimant's valvular heart disease ("VHD"). See Settlement Agreement §§ IV.B.2.b. and IV.B.2.d.(1)-(2). Matrix A-1 describes the compensation available to Diet Drug Recipients with serious VHD who took the drugs for 61 days or longer and who did not have any of the alternative causes of VHD that made the B matrices applicable. In contrast, Matrix B-1 outlines the compensation available to Diet Drug Recipients with serious VHD who were registered as having only mild mitral regurgitation by the close of the Screening Period or who took the drugs for 60 days or less or who had factors that would make it difficult for them to prove that their VHD was caused solely by the use of these diet drugs.

3. The various forms used in the course of implementing the Settlement Agreement are commonly identified by their color.

medical screening for diet drug related conditions as well as refunds for the cost incurred by a claimant in purchasing the Pondimin or Redux prescribed. See id. § IV.A. At the time Ms. Row was not represented by a lawyer. On the Pink Form, Ms. Row stated that she was prescribed and took Pondimin for approximately five months, from January 1995 until May 1995. Ms. Row also identified the names and addresses of the physician who prescribed her Pondimin and the pharmacy that dispensed the drug. She noted on the form that the pharmacy was no longer operating.

In December of 2000, the Trust sent Ms. Row two requests for copies of her prescription records in connection with her claim for Fund A benefits. The requests stated that "[w]e [the Trust] require certain copies of your medical records. We can obtain this information on your behalf or you may choose to obtain your own medical records from your provider of service and send them directly to us." R. 149, 173. Both times Ms. Row elected to have the Trust obtain her medical records on her behalf.

Ms. Row submitted a "Green Form" to the Trust on September 12, 2001, seeking A-1, Level II, Matrix Benefits to be paid out of Fund B as compensation for her medical condition. Claimants must submit a Green Form to claim Matrix Benefits. See Settlement Agreement § VI.C.2.c. On July 20, 2002, Ms. Row retained a lawyer, Richard C. Trahant, Esquire. Mr. Trahant wrote to Ms. Row's prescribing physician, Dr. B.G. Mills, on July 30, 2002 requesting that he execute a Declaration of

Prescribing Physician or Dispensing Pharmacy ("Declaration"). The Declaration form was provided to claimants on page eleven of the "Blue Form." The Blue Form, along with the Pink Form, was used by claimants to register with the Trust and claim Fund A benefits.

The Declaration can be used by claimants to prove that they ingested diet drugs when the prescribing physician's and pharmacy's records are unobtainable. Dr. Mills sent a letter to Mr. Trahant in which he wrote that, "the medical records you have requested are no longer in our custody. The medical records have been destroyed." R. at 21. A handwritten note on the bottom of the letter stated, "As per our letter we do not have the records. We cannot fill out the Blue Form. We have no records showing what Rx's she was on." R. at 21.

Mr. Trahant then asked Ms. Row's dispensing pharmacist, T. David Tichenor, to complete the Declaration. Mr. Tichenor did so on September 27, 2002. The Declaration requires that the physician or pharmacist specify the drug name, dosage, approximate start date, approximate end date, and the number of pills per day the claimant was prescribed. Mr. Tichenor affirmed that he dispensed "Pondimin/Redux" to Ms. Row from approximately January 2, 1995 to April 30, 1995. He also wrote that Ms. Row was given two pills per day. Mr. Tichenor did not further describe the prescription dosage.

On May 29, 2003, Ms. Row received a check from the Trust for Fund A Drug Refund benefits. A check was issued on

that date for $116. An attachment explained that Ms. Row was receiving a $116 refund for the cost of Pondimin and that if "you at any time file a GREEN Form seeking Matrix Level Benefits, the Trust will determine Diet Drug use, duration of use, whether the Diet Drug was diagnosed as FDA Positive, and any other aspect of Claim eligibility independently and without regard to any of the Trust determinations which qualified you to receive this Fund A Benefit." R. at 18.

On March 22, 2004 the Trust sent Ms. Row a Post-Audit Determination Letter stating that her claim for Matrix Benefits lacked proof of diet drug ingestion. The Trust issued a Tentative Determination Letter on November 29, 2004 stating Ms. Row had failed to provide information about the usage of each diet drug and the dosages prescribed for each diet drug. See Settlement Agreement § VI.C.4.e. The Trust's Final Determination was issued on January 11, 2005. See id. at § VI.C.4.g. It stated that Mr. Tichenor's Declaration was insufficient to prove diet drug ingestion. An Arbitrator affirmed the Trust's Final Determination and Ms. Row then appealed the decision to this court.

Ms. Row raises several issues on appeal. We first address whether she has satisfied her burden of proof that she ingested Pondimin or Redux. See Settlement Agreement § VI.C.2.d. Under the Settlement Agreement, claimants may provide proof of ingestion in three ways. It provides:

> In order to complete the submission of a Claim and to qualify for any benefits under the Settlement Agreement, 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 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...and a copy of the prescription dispensing record(s) from each pharmacy...
>
> (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...and a copy of the medical record(s) prescribing or dispensing the diet drug(s)....;
>
> (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.

Because Ms. Row's medical records from her prescribing physician and dispensing pharmacy were destroyed, she was forced to rely on the Declaration allowed in § VI.C.2.d.(3) of the Settlement Agreement. Ms. Row submitted Mr. Tichenor's Declaration, but the Trust argues that it was insufficient because it failed to specify which diet drug, Pondimin or Redux, Ms. Row was prescribed in 1995 and the dosage of that prescription.

Mr. Tichenor's Declaration states that she ingested "Pondimin/Redux" from January 1995 until the end of April 1995. The Trust does not dispute the time period that Ms. Row ingested diet drugs. Redux, however, was not available in the United States until 1996. See PTO No. 1415 at 7. It is true that Mr. Tichenor's Declaration, while mentioning both Pondimin and Redux, did not specify which of the two diet drugs Ms. Row was prescribed. However, the prescription had to have been for Pondimin, and not Redux since Redux was not being sold in this country at the time in question.

With regard to the dosage, the 1997 Physician's Handbook states that "Pondimin® is available in 20 mg orange, scored, compressed tablets ...." Physician's Desk Reference 2240 (51st ed. 1997). Although Mr. Tichenor's Declaration does not note the specific milligrams dispensed to Ms. Row, Pondimin was only available in 20 mg tablets. Mr. Tichenor was able to attest to Ms. Row's receiving two pills daily. Ms. Row has therefore provided proof that her prescribed dosage was 40 mg daily.

The arbitrator's award was clearly erroneous as to his findings of fact, and he erred as to his conclusions of law. Since Ms. Row has satisfied her burden of proving ingestion under the Settlement Agreement, we need not address Ms. Row's other contentions.

Accordingly, the Report and Award of the arbitrator is overturned. The claim of Kathleen Row for A-1, Level II, Matrix Benefits will be granted and remanded to the Trust for payment.

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PRETRIAL ORDER NO. 7066

AND NOW, this 13rd day of March, 2007, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the Report and Award of the Arbitrator is OVERTURNED; and

(2) the claim of Kathleen Row for A-1, Level II, Matrix Compensation Benefits is GRANTED and remanded to the Trust for payment.

BY THE COURT:

C.J.