

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

IN RE: DIET DRUGS (PHENTERMINE/
FENFLURAMINE/DEXFENFLURAMINE) : MDL DOCKET NO. 1203
PRODUCTS LIABILITY LITIGATION :

THIS DOCUMENT RELATES TO:

SHEILA BROWN, et al.

v.

AMERICAN HOME PRODUCTS
CORPORATION

NO. 99-20593

THIS DOCUMENT RELATES TO:

Claimant: Gail Corlew
Claim No.: 183/00 9892157

PRETRIAL ORDER NO. 8134

AND NOW, this 6th day of April 2009, it is hereby
ORDERED that the November 29, 2007 Report and Award of the
Arbitrator related to the claims of Gail Corlew for Matrix
Benefits under the Nationwide Class Action Settlement Agreement
is AFFIRMED for the reasons set forth in said Report and Award.

BY THE COURT:

Thomas Bartle
C.J.

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 MD1203
SHEILA BROWN, ET AL. v. AMERICAN HOME PRODUCTS CORPORATION -----	:	CIVIL ACTION NO. 99-20593
Appellant: Gail Corlew Arbitration No.: 895 Claim No.: 183/00 9892157	:	REPORT AND AWARD OF ARBITRATOR

FINDINGS OF FACT

1. On May 30, 2006, the AHP Settlement Trust ("Trust") issued a Final Determination, denying the claim of Gail Corlew ("Claimant") for Matrix Compensation Benefits.
2. On June 14, 2006, Claimant filed an appeal from the denial of benefits by the Trust, and requested that the United States District Court ("Court") refer this matter to Arbitration.
3. On April 27, 2007, the claim of Gail Corlew was referred by the Court to Arbitration pursuant to Sections VI. C. 4 (h) & (i) of the Nationwide Class Action Settlement Agreement with American Home Products Corporation.
4. On November 13, 2007, an Arbitration Hearing was held concerning the claim of Gail Corlew. Ms. Corlew was represented by Lawrence Hart, Esquire.

ANALYSIS

1. Claimant seeks benefits at Level V on Matrix A-1. In support of her claim, Claimant submitted a GREEN Form, completed by David E. Chambers, M.D., a Board-Certified Cardiologist. In order to be compensated at Level V on Matrix A-1, a claimant who ingested Pondimin (“Fenfluramine”) and/or Redux (“Dexfenfluramine”) (both hereinafter “Diet Drugs”) must demonstrate eligibility for compensation and that she is qualified to receive benefits at Level V.

2. The Settlement Class consists of persons who ingested Pondimin and/or Redux (hereinafter “Diet Drug Recipients”) and their Representative or Derivative Claimants. Settlement Agreement, Section II.B. To qualify for any benefits under the Settlement Agreement, including Matrix Compensation Benefits, a claimant must submit “documentary proof” regarding the ingestion of Diet Drugs. Settlement Agreement, Section VI.C.2.d.¹ Claimants can prove that they were prescribed Diet Drugs in any of three ways. Settlement Agreement, Section VI.C.2.d. If the Diet Drugs were dispensed by a pharmacy, the claimant must provide the identity of the prescribing pharmacy and the records corroborating the dispensing of Diet Drugs. *Id.*, at VI.C.2.d.(1). If the Diet Drugs were dispensed directly by a physician or weight loss clinic, or the pharmacy record is unobtainable, the claimant must

¹ Eligibility also requires that a Diet Drug Recipient fit within one of two categories: (1) Diet Drug Recipients diagnosed by a Qualified Physician as FDA Positive or as having mild mitral regurgitation by an echocardiogram performed on or before January 3, 2003, provided the Diet Drug Recipient registered for settlement benefits by May 3, 2003; or (2) Diet Drug Recipients who by September 30, 2005 have been diagnosed by a Qualified Physician as having Endocardial Fibrosis and who have registered for Fund B Benefits by January 31, 2006. *See* Settlement Agreement, Section IV.B.1. In order to be diagnosed as FDA Positive, a Diet Drug Recipient must suffer mild or greater aortic valve regurgitation and/or moderate or greater mitral valve regurgitation. *Id.*, at Section I.22.

provide the identity of the prescribing physician and a copy of the medical record prescribing or dispensing the Diet Drugs. Those medical records must identify the Diet Drug Recipient, the name of the Diet Drugs, the date(s) prescribed, the dosage, and the duration that the Diet Drugs were prescribed or dispensed. *Id.*, at VI.C.2.d.(2). If the pharmacy and medical records are unavailable, the Settlement Agreement allows for the submission of an affidavit under penalty of perjury from the prescribing physician or dispensing pharmacy, identifying the Diet Drug Recipient, the Diet Drugs prescribed or dispensed, the date(s), quantity, frequency, dosage and number of prescriptions or refills of Diet Drugs. *Id.*, at VI.C.2.d.(3). Alternative forms of proof are not allowed under the terms of the Settlement Agreement.

4. In her BLUE Form, Claimant stated that she ingested Redux (Dexfenfluramine) in excess of 60 days. In that same form and again during the Arbitration Hearing, Claimant stated that she received Redux directly from Dr. J. M. Moore, Jr., D.O., through Dr. Moore's Diet Clinic (called "The Moore Clinic"). In such a circumstance, Ms. Corlew may prove that she ingested Diet Drugs by providing the identity of the prescribing physician and a copy of the medical record prescribing or dispensing the Diet Drugs. Pursuant to the terms of the Settlement Agreement, those medical records must identify the Diet Drug Recipient, the name of the Diet Drugs, the date(s) prescribed, the dosage, and the duration that the Diet Drugs were prescribed or dispensed. *See id.*, at VI.C.2.d.(2). Ms. Corlew did identify Dr. Moore as the prescribing physician, but according to Ms. Corlew, she was prevented from submitting any qualifying medical records from Dr. Moore's files because when she sought such records she discovered that Dr. Moore had died and his records had been destroyed.

As alternative support for her claim, Ms. Corlew submitted canceled checks documenting several visits to "The Moore Clinic." These canceled checks indeed confirm Ms. Corlew's visits to the Moore Clinic, but they do not document the purpose or the results of such visits. Ms.

Corlew also submitted a copy of various pieces of Redux literature which she said accompanied her receipt of Redux. Possession of Redux literature, however, is not one of the Settlement Agreement's prescribed means of proving ingestion. Moreover, possession of Redux literature does not prove possession of Redux, nor that Redux was ingested.

In addition to the canceled checks and the Redux literature, Ms. Corlew submitted a notarized statement from her son, Harold Corlew. In his statement, son Harold attested to the fact that his mother received diet medication from Dr. Moore, but he never identified what type of diet medication his mother received. Ms. Corlew also submitted a letter from Arthur W. Walker, M.D. (dated February 3, 2004) and an Affidavit from Jessie M. Smothers (dated December 15, 2005), but both of those documents focus upon Ms. Corlew's medical condition, not her ingestion of Diet Drugs.

On the issue of ingestion of Diet Drugs, Ms. Corlew has not established that she ingested Diet Drugs. More specifically, Ms. Corlew submitted no pharmacy records, no medical records, and no affidavit from a prescribing physician or dispensing pharmacy. Though her failure to do so might be understandable given Dr. Moore's death, in settling the Diet Drug litigation the parties limited Matrix Compensation Benefits to those claimants who proved, in one of the three agreed-upon manners, that claimants ingested Pondimin or Redux. *See Settlement Agreement, Section IV.C.2.d.* Absent such proof, Matrix Compensation Benefits are not warranted or permitted.

5. Ms. Corlew also claims that the Trust is estopped from denying her claim because on January 31, 2003 it reimbursed her \$365 for the claimed cost of Redux. That reimbursement, however, was accompanied by the following language:

The Trust has determined your eligibility for this Fund A benefit based upon the information currently in your Claim File. All facts relating to other types of benefits **will be determined independently**. Therefore, if you qualify for the

Cash/Medical Services benefit or 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 Recipient 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. (Emphasis supplied).

6. During the Arbitration Hearing, Mr. Hart stated that Ms. Corlew's submissions constituted substantial compliance in that she provided everything that she could be expected to provide in light of Dr. Moore's death and, as a matter of fairness, her submissions should be considered adequate proof of Diet Drug use. If this matter turned solely on notions of fairness, I might agree and quite possibly so might the Trust. But the Trust is obligated to apply the terms of the Settlement Agreement and I am limited to determining whether it did so accurately. Lamentable though it may be, Ms. Corlew did not comply with the requirements for proving Diet Drug use. The Trust had no authority to excuse this failure and, therefore, had no basis on which to justify an award of Matrix Compensation Benefits. I, in turn, have no basis on which to fault the Trust's decision.

CONCLUSIONS

1. Having endured valvular replacement surgery, the Green Form submitted by Gail Corlew reflects that she has a Matrix-level condition.² She did not, however, provide the Trust with a basis to find that she is an eligible Diet Drug Recipient and, as such, she failed to establish that she was entitled to Matrix Compensation Benefits. Accordingly, the findings of the Trust are not clearly erroneous.

2. Based upon the findings above, Claimant is not entitled to any Matrix

² Based on its conclusion that Ms. Corlew did not establish that she was a Diet Drug Recipient, the Trust did not address Ms. Corlew's qualification for Matrix-Level V benefits, nor do I make a determination of that issue.

Compensation Benefits because she has failed to submit documentary proof, as defined by the Settlement Agreement, establishing that she ingested Diet Drugs. I base these conclusions on the Settlement Agreement, Sections VI.C.2.d.

November 29, 2007

DATE

JoAnne A. Epps

JoAnne A. Epps
Arbitrator

