

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

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

MEMORANDUM AND PRETRIAL ORDER NO. 3194

Bartle, J.

January 7, 2004

Before the court is an appeal of Dawn Garner-Cottrell 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. Garner-Cottrell 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.-1.

The Settlement Agreement provides for various levels of so-called matrix benefits, depending on the age of the class member and seriousness of the injury from ingesting fen-phen. Ms. Garner-Cottrell 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.

Ms. Garner-Cottrell had aortic valve replacement surgery on November 11, 1999, several years after she stopped taking Pondimin. The valve replacement was a result of aortic stenosis. While prior to the surgery she experienced mild mitral valve regurgitation, it was not her mitral valve which was replaced. There is no record of aortic valve regurgitation before her operation.

Ms. Garner-Cottrell 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. Garner-Cottrell overlooks the introductory paragraphs to § IV.B. of the Settlement Agreement entitled "Compensation Benefits Payable from Fund B." It 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. Garner-Cottrell 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 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. Garner-Cottrell 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.