

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 :
: _____
: _____
SHEILA BROWN, et al. :
: v. :
: AMERICAN HOME PRODUCTS :
CORPORATION, et al. :
: CLAIMANTS: JACQUELINE CARTER :
STEPHEN CARTER II : CIVIL ACTION NO. 99-20593

MEMORANDUM AND PRETRIAL ORDER NO.

Bartle, J. February , 2004

Before the court is the appeal of Jacqueline Carter and her adult son Stephen Carter II under §§ VI.C.4.i. and l. of the Nationwide Class Action Settlement Agreement ("Settlement Agreement") in this diet drug litigation from a report and award of an arbitrator denying them certain benefits from the AHP Settlement Trust (the "Trust").

Under the Settlement Agreement, any class member 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 Pondimin and/or Redux and on the age of the class member. Benefits are significantly higher for class members who ingested either of these drugs for 61 days or more than for those class members who ingested them for 60 days or less. See Settlement Agreement § IV.B.2.d.1.; Pretrial Order ("PTO") No. 1415 at 49 (E.D. Pa. Aug. 28, 2000).

Ms. Carter asserts that the arbitrator erred in affirming the Trust's finding that she used Redux for less than 61 days. As a result, she was awarded benefits under Matrix B-1/Level II in the amount of \$85,383. Had she been found to have ingested Redux for more than 60 days, she would have been paid \$426,912 under Matrix A. We will review the findings of the arbitrator under a clearly erroneous standard. See PTO 2153, Rule 5 of the Rules Governing Arbitration Process.

Ms. Carter submitted to the Trust what is known as a Pink Form, in which she claimed diet drug usage in excess of 60 days. Section VI.C.2.d. of the Settlement Agreement delineates what proof she needed to provide to the Trust to substantiate her claim:

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, including its name, address, and telephone number, and a copy of the prescription dispensing record(s) from each pharmacy, which should include the medication name, quantity, frequency, dosage and number of refills prescribed, prescribing physician's name, assigned prescription number, original fill date and each subsequent refill date; or,
- (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, including the prescribing physician's name, address, and telephone number and a copy of the medical record(s) prescribing or dispensing the diet drug(s). The medical record(s) must include records which identify the Diet Drug Recipient, the Diet Drug name, the date(s) prescribed, the dosage, and duration the drug was prescribed or dispensed.

Settlement Agreement § VI.C.2.d.(1)-(2).

The Settlement Agreement further provides for the situation where a class member is unable to obtain the required documentation. In § VI.C.4.b, it states:

If the Class Member seeking a Matrix payment is unable to obtain the documentation described above through the exercise of reasonable efforts, the Trustees and/or Claims Administrator(s) shall have the right to consider other supporting documentation including but not limited to declarations of other Qualified Physician(s) under penalty of perjury setting forth opinion(s) to a reasonable degree of medical certainty to support the claim that the Class Member's condition entitles him or her to a Matrix payment, subject to review by the Court as set forth in Section VIII.D. If this evidence establishes the Class Member's

condition to the satisfaction of the Trustees and/or Claims Administrator(s), the Class Member shall be entitled to receive the appropriate Matrix Compensation Benefits.

Settlement Agreement § VI.C.4.b.

The record is undisputed that Ms. Carter had two 30 day prescriptions for Redux for a total of 120 pills. The prescriptions directed her to take one pill twice a day. Ms. Carter, however, submitted an affidavit stating that while her prescriptions admittedly covered a period of only 60 days, she actually took these 120 pills over a span of more than 60 days. In her affidavit, she declares that "There were some days that instead of taking 2 Redux pills, I only took one (1) Redux pill I am certain that I took the Redux pills for 61 days or more."

The arbitrator considered her affidavit along with the prescriptions themselves. In his analysis, he referred to the internal Claims Processing Procedures which had been approved by the Trust and class counsel. They provide in relevant part:

1. The prescription/pharmacy record creates a rebuttable presumption that the drug was ingested for the period reflected in the record. A record indicating a prescription for 60 days or less creates the rebuttable presumption that the claimant is in that category. A record showing a prescription for longer than 60 days creates the presumption that the claimant is in the 61 days or more category.
2. A claimant may rebut the presumption that the claimant ingested the diet drugs for 60 days or less with credible proof that the drug was ingested on more days than shown in the prescription.

This proof must demonstrate by credible proof the number of days the claimant took the drug, if it differs from the duration of the prescription. The standard would not turn on the total time span in which the claimant says the drug was used, but instead on the actual number of days on which the drug was taken.

3. The Trust should develop procedures for what constitutes credible proof, who makes that decision, and a process for an appeal from that decision. The parties agree that a medical record contemporaneous with use indicating longer-term use would be sufficient to rebut the presumption. An affidavit under oath from the claimant prepared solely to submit with the claim, if not corroborated by other credible evidence, such as a reliable affirmation of another person with knowledge of the subject matter, would not be sufficient to rebut the written prescription, but the Trust may consider a claimant's affidavit standing alone in the totality of the circumstances presented by that claimant to assess its weight in the rebuttal analysis.

Ms. Carter challenges the arbitrator's and Trust's use of these internal procedures on the ground that she did not have proper notice of them. We need not reach that issue here. It is clear that the arbitrator ultimately rejected the affidavit as "inherently self-interested" and lacking credibility, regardless of any presumptions.

Ms. Carter concedes that her prescriptions instructed her to use Redux twice a day for 60 days only. Her bare bones affidavit states that she did not follow her prescriptions and instead took these 120 pills over a period in excess of 60 days. The arbitrator acted properly in refusing to credit her affidavit

without any further substantiation. Her self-interest is overwhelming. Based on the prescriptions and without the affidavit, she is entitled to an award of \$85,383. If her uncorroborated affidavit is accepted, she would receive \$426,912, a five-fold increase. Regardless of any internal procedures, neither the Settlement Agreement nor the court requires an arbitrator to forego his or her common sense when evaluating evidence or credibility. The arbitrator's finding against Ms. Carter was not clearly erroneous.

Finally, Stephen Carter II, the adult son of Ms. Carter, appeals the denial of his status as a derivative claimant. However, he does not point to anything in the record or the Settlement Agreement in support of his position. He was born in 1964 and lives at a separate address with a separate zip code from his mother. There is nothing in the record to suggest he was dependent on his mother for services or support. Again, the arbitrator's finding was not clearly erroneous.

Ms. Carter is not entitled to Matrix A benefits because the arbitrator properly found that she ingested Redux for less than 61 days. Her son, Stephen Carter II, is not entitled to any benefits for lack of proof. Consequently, we will deny their appeals and affirm the decision of the arbitrator.

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PRETRIAL ORDER NO.

AND NOW, this day of February, 2004, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the denial of Matrix A benefits for class member Jacqueline Carter is AFFIRMED; and

(2) the denial of benefits for Stephen Carter II, son of class member Jacqueline Carter, for lack of proof is AFFIRMED.

BY THE COURT:

J.