

**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.
-----:	:	2:15MD1203
	:	
SHEILA BROWN, ET AL.	:	
5.	:	
AMERICAN HOME PRODUCTS CORPORATION	:	CIVIL ACTION NO.
-----:	:	
	:	99-20593
	:	
Appellant: REDACTED	:	REPORT AND AWARD
Arbitration No.: REDACTED	:	OF ARBITRATOR
Claim No.: REDACTED	:	

FINDINGS OF FACT

1. On [DATE] the AHP Settlement Trust (“Trust”) issued a Post Audit Determination Letter approving the claim of [APPELLANT] for **Matrix Compensation Benefits at Matrix A/Level II, but denying [APPELLANT’S] claim for Matrix A/Level V Benefits.**

2. By a letter of [TRUST PERSONNEL] to [REDACTED], Esquire, counsel for [APPELLANT], dated [DATE], the Trust offered [APPELLANT], subject to specified conditions, payment of Matrix A/Level II Benefits without prejudicing his/her right to contest the Trust's denial of Matrix A/Level V Benefits.

3. On [DATE] [APPELLANT] filed an appeal from the denial of Matrix A/Level V Benefits by the Trust to this Court requesting that the United States District Court (“Court”) refer this matter to Arbitration.

4. On [DATE] the claim of [APPELLANT] was referred by the Court to Arbitration pursuant to Sections VI.c.4.(h) & (i) or VI.b.1.(f) & (g) of the Nationwide Class Action Settlement Agreement with American Home Products Corporation (“Agreement”).

5. On [DATE] an Arbitration Hearing was held on the claim of [APPELLANT]. With the consent of [APPELLANT], [REDACTED], Esquire, counsel for American Home Products

Corporation, participated in the Hearing.

6. [APPELLANT'S] PINK FORM, dated [DATE], indicated that [APPELLANT] ingested Pondimin[®] for 434 days (page 4, question 9). [APPELLANT'S] medical records confirmed usage of Pondimin[®] for 61 or more days.

7. [APPELLANT'S] GREEN FORM, dated [DATE], indicated that, based on an echocardiogram performed on [DATE], he/she had moderate mitral valve regurgitation and mild aortic valve regurgitation (page 8, question 3). The GREEN FORM indicated a left ventricular ejection fraction of 50-60% (page 11, question 8). The GREEN FORM also indicated that [APPELLANT] experienced ventricular fibrillation or sustained ventricular tachycardia (page 14, question 5). [DOCTOR], M.D., a Board-Certified Cardiologist, completed and signed Part II of [APPELLANT'S] GREEN FORM on [DATE].

8. [APPELLANT'S] medical records indicate that on [DATE] he/she experienced an acute inferior wall myocardial infarction and ventricular fibrillation. A cardiac catheterization performed on [DATE] showed no mitral valve regurgitation. There is no other indication in the record that [APPELLANT] suffered from mitral valve regurgitation at or before the time of the infarction.

9. [APPELLANT] submitted an echocardiogram report dated [DATE] with his/her claim. That echocardiogram reflected moderate mitral valve regurgitation and an ejection fraction of 52%. [APPELLANT] also submitted a GRAY FORM, completed and signed by [DOCTOR] on [DATE], which indicated, on the basis of an interpretation of the [DATE] echocardiogram, moderate mitral valve regurgitation and mild aortic valve regurgitation.

10. Pursuant to Section VI.E of the Agreement, [APPELLANT'S] GREEN FORM and [DATE] echocardiogram tape were selected for audit. The auditing cardiologist determined that [APPELLANT'S] echocardiogram demonstrated mild to moderate mitral valve regurgitation, mild aortic regurgitation and an ejection fraction of 40-49%.

11. On the basis of this audit determination, and pursuant to Section IV.B.2.c(2)(b)(iv) of the Agreement, the Trust awarded Matrix Compensation benefits at Matrix A/Level II on the basis of [APPELLANT'S] moderate mitral valve regurgitation and left ventricular ejection fraction of less than or equal to 60%.

12. There is no indication in the record that [APPELLANT] exhibited ventricular

fibrillation or sustained ventricular tachycardia which resulted in hemodynamic compromise at the time of or after the [DATE] echocardiogram that demonstrated moderate mitral valve regurgitation.

ANALYSIS

1. [APPELLANT] argues that he/she is entitled to benefits under Matrix A, Level V, which provides that:

The individual otherwise qualifies for payment at Matrix Level II, III, or IV and suffers from ventricular fibrillation or sustained ventricular tachycardia which results in hemodynamic compromise.

(Agreement, Section IV.B.2.c(5)(d)). [APPELLANT] argues further that because he/she was qualified for payment at Matrix Level II (as acknowledged by the Trust through its payment), and suffered from ventricular fibrillation or sustained ventricular fibrillation that resulted in hemodynamic compromise at the time of his/her infarction on [DATE], he/she qualifies for Matrix Level V Benefits under Section IV.B.2.c.(5)(d).

2. It is undisputed that at the time of his/her infarction, [DATE], [APPELLANT] was not FDA Positive by virtue of the presence of moderate mitral valve regurgitation or on any other basis. Thus, at the time he/she experienced ventricular fibrillation or sustained ventricular tachycardia that resulted in hemodynamic compromise he/she was not qualified for payment of benefits under any Matrix Level as required by subsection (d).

3. It is also undisputed that he/she was FDA Positive and eligible for Matrix Level II Benefits as of [DATE], because his/her echocardiogram of that date showed moderate mitral valve regurgitation and the requisite ejection fraction. There was no evidence of ventricular fibrillation or tachycardia at or after that date.

4. The question in this appeal is whether [APPELLANT], who suffered the type of fibrillation or sustained ventricular tachycardia specified by subsection (d) *before, but not after* exhibiting the moderate mitral valve regurgitation that qualified him/her for Matrix Level II Benefits, qualifies for Matrix Level V Benefits.

5. [APPELLANT] argues that the plain meaning of subsection (d) requires that question to be answered in the affirmative. He/she argues, in effect, that the linkage of the two

requirements of subsection (d) by the word “and” means that if a claimant has both qualified for a Matrix Level Benefit and at some point suffered the requisite fibrillation or tachycardia, then he or she is eligible for benefits under subsection (d) and no “subjective interpretation” altering that conclusion with a temporal requirement is permitted. He/she argues further that in the event subsection (d) is deemed to be ambiguous, then its language must be strictly construed in favor of the claimant.

6. Both arguments are unconvincing. First, it is by no means clear that the plain meaning of subsection (d) dictates the conclusion asserted by [APPELLANT]. It is at least equally persuasive, if not more plausible, that the use of the word “suffers” in the present tense in subsection (d) indicates an intent on the part of the drafters to award higher Matrix Level Benefits only to those who are already qualified for payments *and* currently suffering from an aggravating condition at or after the time the qualification for payments is established. In effect, there is a temporal requirement implicit in the use of the present tense verb form, “suffers.” Thus, [APPELLANT] cannot rely on the plain meaning canon of interpretation to compel the result he/she seeks. In fact, the plain meaning of subsection (d) is the opposite of what [APPELLANT] asserts, and hence dictates the opposite result: the claimant must suffer from the requisite fibrillation or tachycardia at or after the time he or she becomes FDA Positive and eligible for the specified Matrix Level Benefits. Second, the use of the phrase “and suffers” is not ambiguous, so there is no ambiguity to be strictly construed in favor of [APPELLANT] as a claimant.

7. It should be noted that the foregoing conclusions are not based on an assumption that a claimant must show that a qualifying condition such as moderate mitral valve regurgitation caused the aggravated condition such as fibrillation or tachycardia. They are derived instead from a recognition that Matrix Level V (and indeed the whole Matrix structure itself) provides higher benefits for such aggravated conditions only if they are shown to exist or arise at or after the time that the claimant has become FDA Positive and eligible for payments.

CONCLUSIONS

1. Because this appeal involved only an interpretation of a question of law, and not a factual determination, it was reviewed *de novo*, and not on a clearly erroneous standard.
2. The Trust appropriately applied the terms of the agreement to [APPELLANT’S] claim. Thus, [APPELLANT] is not entitled to Matrix A, Level V Benefits.

3. It is noted that if [APPELLANT] develops a condition that qualifies him/her for higher Matrix Level Benefits in the future, he/she may apply for such benefits at that time.

October 9, 2002
DATE

**REDACTED
ARBITRATOR**