

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. 1203
	:	
<u>THIS DOCUMENT RELATES TO:</u>	:	
	:	
SHEILA BROWN, et al.	:	
	:	
v.	:	
	:	
WYETH, et al.	:	CIVIL ACTION NO. 99-20593
	:	

MEMORANDUM AND PRETRIAL ORDER NO.

Bartle, C.J.

July 10, 2007

Before this court is the motion of defendant Wyeth¹ to enforce the Diet Drug Nationwide Class Action Settlement Agreement ("Settlement Agreement") against the AHP Settlement Trust ("Trust") as to Vickley Raeford ("Raeford" or "claimant").² The Settlement Agreement was approved by this court as part of our continuing jurisdiction over Multi-District Litigation No. 1203 involving the diet drugs Pondimin and Redux. See Pretrial Order ("PTO") No. 1415 (Aug. 28, 2000).

Raeford, a class member under the Settlement Agreement with Wyeth, seeks Matrix Compensation Benefits from the Trust. Wyeth argues that the Trust must deny Raeford's Matrix Benefits

1. Effective March 11, 2002 American Home Products changed its name to Wyeth.

2. Claimant is pro se.

claim because she has failed to provide proper proof of diet drug ingestion, as required under the Settlement Agreement. See Settlement Agreement § VI.C.2.d.

Claimant underwent aortic valve replacement surgery on January 11, 2002. Approximately a year later, she had a second surgery to deal with complications from the first surgery. Subsequently, Raeford filed a completed Green Form with the Trust seeking High Level Matrix Compensation Benefits. The Trust selected Raeford's claim for audit, and it was reviewed by an auditing cardiologist. See Class Counsel's Mem. of Law in Opp'n to Wyeth's Mot. to Enforce, Ex. A. A Post-Audit Determination Letter was sent to Raeford informing her of the auditing cardiologist's findings that she was entitled to Matrix Level B-IV benefits, that is \$240,377.00.³ Raeford signed an "Acceptance of Post Audit Determination and Waiver Form" on December 26, 2006, in which she agreed that "the Post Audit Determination ... contained in the letter from the AHP Settlement Trust dated December 20, 2006, shall be considered as the Final Determination Claim." She waived her right to appeal.

On December 8, 2006, before the Trust issued its Post-Audit Determination Letter, an attorney for Wyeth sent a letter to Martin Rudolph, Trustee of the AHP Settlement Trust, expressing Wyeth's view that Raeford's claim was not payable because she failed to submit sufficient proof that she ingested

3. A derivative claim was also submitted to the Trust, and was deemed payable.

diet drugs. Wyeth and the Trust have reached an impasse regarding Raeford's claim. The present motion resulted.

With regard to proof of ingestion, the Settlement Agreement 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. The 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;
- (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.

Raeford submitted several documents to the Trust in order to establish proof of ingestion. First, on April 29, 2002, Raeford submitted a document titled, "Medical Records Prepared for Vickley Raeford" from Doctor's Choice, the weight loss clinic where Raeford claims she was dispensed Pondimin. On April 6, 2005, after being questioned about the medical records, Raeford resubmitted the Medical Records she first sent three years prior. This time the records were accompanied by a "Certification of Records" signed by Laura Restrepo, which stated that records were kept by the clinic "in the regular course of business." Finally, on December 13, 2005, Raeford submitted photographs of one of the pill bottles that she was dispensed.⁴

For reasons not relevant here, Wyeth had, and continues to have, serious doubts about the authenticity of the medical records prepared by Doctor's Choice. Furthermore, according to Wyeth, Raeford's pill bottle cannot prove diet drug ingestion under the terms of the Settlement Agreement.

The Trust, on the other hand, argues that Raeford's pill bottle was sufficient to establish proof of ingestion under § VI.C.2.d.(2) of the Settlement Agreement, because it is a

4. Raeford subsequently mailed the actual pill bottle to the Trust.

"written contemporaneous medical record that contains all of the information required by the Settlement Agreement to show diet drug ingestion." The Trust points out that the label on the pill bottle contains the following information: (1) the name and address of the dispensing weight loss clinic; (2) the dispensing physician's name; (3) the claimant's name; (4) the medication name; (5) the prescription (Rx) number; (6) the patient instructions, including the number and frequency of tablets to take; (7) the amount of pills; (8) the date prescribed; (9) the lot number; and (10) the packaging company.

Regarding the pill bottle's authenticity, the Trust neither detected evidence that the pill bottle had been tampered with nor noticed anything unusual about the dosage or frequency on the label. Moreover, the Trust attached an uncontested affidavit to its opposition to Wyeth's motion explaining that it was "not unusual for weight loss clinics such as Doctor's Choice to prescribe and dispense the diet drugs directly from their offices" and "physically handwrite the name of the patient on the bottle's label," as was done here. AHP Settlement Trust's Resp. to Wyeth's Mot. 3.

At the outset, we note that Raeford's claim was subject to the Parallel Processing Procedures ("PPP") approved in PTO No. 3882 (Aug. 26, 2004). Under PPP, Class Counsel must review claims to determine if they are "complete" under §§ VI.C.2. and VI.C.4. of the Settlement Agreement. Id. at ¶ 8. If Class Counsel concludes that a claim is incomplete, but Wyeth disagrees

with that conclusion, Wyeth can designate claims as incomplete, after which Class Counsel and Wyeth must confer on the issue. Id. at ¶ 9. In the event that Wyeth and Class Counsel cannot agree, the dispute is to be referred to Special Master Gregory Miller for a determination of whether it is complete. Id.

The PPP process, for reasons that are unknown to this court, was not followed with this claim. It is within our ongoing jurisdiction, however, to interpret and enforce the Settlement Agreement. See PTO No. 1415.

Wyeth argues that the Settlement Agreement provides for three options for claimants to prove ingestion and that a pill bottle is not one. This is not in fact what the Settlement Agreement says. The Settlement Agreement requires claimants to submit a "medical record." The term "medical record" is not defined in the Settlement Agreement. We therefore must consider the plain meaning of the term. Webster's II Dictionary defines "record" as: An account, as of information, set down especially in writing as a way of preserving knowledge. Webster's II New College Dictionary, (1995). Black's Law Dictionary defines "record" as: "A documentary account of past events, usually designed to memorialize those events; information that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form." Black's Law Dictionary, (7th Ed. 1999). The label affixed to the pill bottle is clearly a "record" under these definitions.

Not only does the label memorialize Raeford's prescription, the "medical record" required to prove ingestion, it also contains Raeford's prescribing physician's name, address, and telephone number, the identity of the Diet Drug Recipient, the Diet Drug name, the date prescribed, the dosage, and duration the drug was prescribed or dispensed—all of the information required under § VI.C.2.d(2). The Trust was correct in its determination that Raeford's claim was complete and that she has provided sufficient proof of ingestion.

Accordingly, the motion of Wyeth to enforce the settlement agreement will be denied.

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

<u>IN RE: DIET DRUGS (PHENTERMINE/ FENFLURAMINE/DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION</u>	:	MDL DOCKET NO. 1203
	:	
<u>THIS DOCUMENT RELATES TO:</u>	:	
	:	
SHEILA BROWN, et al.	:	
	:	
v.	:	
	:	
WYETH, et al.	:	CIVIL ACTION NO. 99-20593
	:	

PRETRIAL ORDER NO.

AND NOW, on this 10th day of July, 2007, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of Wyeth to enforce the Settlement Agreement against the AHP Settlement Trust as to Vickley Raeford is DENIED.

BY THE COURT:

/s/ Harvey Bartle III

C.J.