

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
:
THIS DOCUMENT RELATES TO: :
:
SHEILA BROWN, et al. :
:
v. :
:
AMERICAN HOME PRODUCTS, et al. : CIVIL ACTION NO. 99-20593

MEMORANDUM AND PRETRIAL ORDER NO. 3699

Bartle, J.

July 6, 2004

Before the court is an appeal by class member Jane H. Dugan and her derivative claimant husband from a Report and Recommendation of the Special Master. The Report recommended that the court grant Wyeth's motion to enforce Pretrial Order ("PTO") No. 1415 by enjoining plaintiffs from proceeding with their lawsuit against Wyeth in the Court of Common Pleas of Philadelphia County, Jane H. Dugan and Leonard J. Dugan, Jr., W/H v. American Home Products Corporation, et al., Philadelphia County Court of Common Pleas, November Term 2002, Case No. 002811. See April 26, 2004 Report and Recommendation No. 12 of Special Master As to Motion to Enforce Paragraph 7 of Pretrial Order No. 1415 against Jane H. Dugan and Leonard J. Dugan, Jr. Ms. Dugan alleges that she suffers from primary pulmonary hypertension ("PPH") as a result of ingesting Wyeth's diet drugs Pondimin and/or Redux.

In PTO 1415, this court approved the settlement of the nationwide class action involving Wyeth's diet drugs in Brown v. American Home Products Corporation, Civ. A. No. 99-20593 (E.D. Pa. Aug. 28, 2000). Under the Settlement Agreement, PPH was excluded from the definition of a settled claim, and anyone who suffered from PPH, as defined therein, could file a lawsuit against Wyeth for compensatory and punitive damages. See Settlement Agreement § I.46. Wyeth contends that the plaintiff does not have PPH and is therefore precluded from suing it on this basis.

Paragraph 7 of PTO No. 1415 provides:

The court hereby bars and enjoins all class members who have not, or do not, timely and properly exercise an Initial, Intermediate, Back-End or Financial Insecurity Opt-Out right form asserting, and/or continuing to prosecute against AHP or any other Released Party any and all Settled Claims which the class member had, has or may have in the future in any federal, state or territorial court.

In PTO No. 2383, the court set forth "Procedures for Resolving Motions to Enforce Paragraph 7 of Pretrial Order 1415 against Class Members who Assert Claims Allegedly Based on PPH." The Order provided for the court to refer such motions to the Special Master for consideration of relevant medical evidence and to issue a Report and Recommendation whether a separate action for PPH should be permitted to go forward.

Wyeth moved to enjoin plaintiffs here from proceeding with their state court action. The Special Master thereafter

reviewed the medical evidence and heard from counsel for the parties in accordance with PTO 2383. He agreed with Wyeth's position and recommended that plaintiffs be enjoined from proceeding with the PPH action. In his Report and Recommendation, he stated, "Based upon the foregoing facts, there is no medical evidence which shows, conclusively, that Ms. Dugan's wedge pressure was less than or equal to 15 mm Hg." The plaintiffs have timely appealed to this court, again as provided in PTO 2383.

The definition of PPH in the Settlement Agreement is quite detailed. Nonetheless, the dispute here concerns only one element of the definition. In order to be considered to suffer from PPH, a person's normal pulmonary artery wedge pressure must be equal to or less than 15 mm Hg. (millimeters of mercury). See Settlement Agreement § I.46.a.(1). Plaintiff contends that she meets this test while Wyeth maintains that she does not.

Plaintiff's treating physician, Steven Goldberg, M.D., a board-certified cardiologist, prepared a "Cardiac Catheterization Report" in February, 2002, which states, "mean pulmonary capillary wedge pressure 14-16 mHg." At his subsequent deposition, he testified that her wedge pressure was between 14 and 15 and "it was really 15." Dep. of Steven Paul Goldberg, M.D., December 1, 2003, at 22. He also answered "yes" to the question, "you could accurately say that the pressure is 16 just as you could accurately say the pressure is 14, is that right?" Id. at 145.

In addition, plaintiff presented to the Special Master a declaration of Lewis J. Rubin, M.D., a board-certified pulmonologist, who reviewed Dr. Goldberg's report as well as plaintiff's pressure tracings. He concluded that plaintiff's wedge pressure was 14 mm Hg. Decl. of Lewis J. Rubin, M.D., January 13, 2004.

On the other hand, Wyeth's expert Daniel Edmundowicz, M.D. is prepared to opine that plaintiff's wedge pressure was between 16 and 18 mm Hg.

We read PTO 1415 as requiring this court to decide if there is a genuine issue of material fact as to whether plaintiff suffers from PPH. If no such issue exists, this court will enjoin the plaintiff from going forward. Otherwise, it is a matter for the trial court. As we explained in PTO 2383:

A determination of whether a putative PPH plaintiff has been diagnosed with PPH, as defined by Section I.46 of the Settlement Agreement, is a threshold question that determines the eligibility of that Class Member to assert such a claim.

PTO 2383, ¶ D (emphasis added). Thus, our function is simply to serve as a gatekeeper to determine if Ms. Dugan, as a threshold matter, has come forward with sufficient evidence to proceed to trial with her PPH claim. Plaintiff's medical evidence either before us, or before the trial court for that matter, does not have to establish "conclusively" that her wedge pressure meets the definition under the Settlement Agreement.

We find that Ms. Dugan has come forth with sufficient evidence to go forward. While the testimony of Dr. Goldberg is ambiguous at best and some of it seems to contradict his Cardiac Catheterization Report, plaintiff's expert, Dr. Rubin, has filed a declaration that Ms. Dugan's wedge pressure is 14 mm Hg. This satisfies the wedge pressure requirements under the Settlement Agreement definition. Wyeth's expert, of course, has a contrary view of her wedge pressure, but it is not for this court to decide who is right and who is wrong. That question will ultimately be resolved in the state court action.

Accordingly, we will deny the motion of Wyeth to enforce PTO 1415 and will not enjoin plaintiff from proceeding with her PPH action pending in the Court of Common Pleas of Philadelphia County, Pennsylvania.

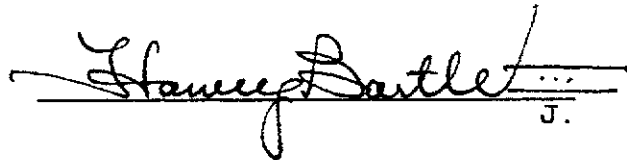
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AND NOW, this 6th day of July, 2004, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of Wyeth to enforce Pretrial Order No. 1415 by enjoining the plaintiffs from proceeding in Jane H. Dugan and Leonard J. Dugan, Jr., W/H v. American Home Products Corporation, et al., Philadelphia County Court of Common Pleas, November Term 2002, Case No. 002811 is DENIED.

BY THE COURT:


J.