

IN THE MATTER OF an appeal filed  
pursuant to the *Rules for Appeals* under  
the *Pre-1986/Post-1990 Hepatitis C  
Settlement Agreement* and its *Protocols*

CLAIM FILE: 07-01574

**REASONS FOR DECISION**

**INTRODUCTION**

[1] The Claimant has appealed from the decision of the Administrator dated August 14, 2008, in which her claim for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied on the basis that she had not provided proof of infection with the Hepatitis C virus.

**FACTS**

[2] The Claimant filed a claim for compensation under the *Settlement Agreement* on or about January 25, 2008, and submitted further information on April 9, 2008 in order to complete the required forms. In her claim, the Claimant stated that she was a Primarily-Infected Person who was infected with the Hepatitis C virus through a blood transfusion received in 1969 during a Caesarean section operation. The Claimant is 75 years of age.

[3] On May 7, 1969, the Claimant delivered a child in the hospital by Caesarean section. Five days later, she was given a blood transfusion for anaemia.

[4] In 1976, the Claimant underwent cholecystectomy surgery. Although the Appeal File contains no medical records prepared at the time of that surgery, several subsequent hospital records indicate that the Claimant was diagnosed with “hepatitis” at that time.

For example, the Discharge Summary prepared on September 24, 1977, following her admission to the hospital for a liver biopsy, indicated as follows:

[The Claimant]...was admitted on September 23, 1977 for a liver biopsy for evaluation of her chronic active hepatitis. She was in good health until...1976 when she underwent a cholecystectomy... During the surgery, cirrhosis of the liver was diagnosed and a wedge resection biopsy was obtained which showed chronic active hepatitis and cirrhosis. She was Australian antigen positive. There is no history of previous hepatitis, jaundice; she has no history of contact with people who had [*sic*] had hepatitis. Her past liver function tests were normal.

[5] In or about April 2008, the Claimant had blood tests conducted, including an HCV Antibody Test. As indicated in section 2.01 of the *HCV Antibody and PCR Tests Protocol* that forms part of the *Settlement Agreement*, such a test "...identifies the presence of antibodies to HCV in the blood which reveals whether the person has ever been infected with HCV". On April 2, 2008, the Final Report from the chemistry laboratory indicated that her test for the HCV Antibody was negative. In other words, although the Claimant has some form of hepatitis, the test report confirmed that she did not have any HVC antibodies in her blood and therefore did not ever have a Hepatitis C infection.

## **DECISION OF THE ADMINISTRATOR**

[6] In the decision dated August 14, 2008, the Administrator dismissed the claim for compensation for the following reasons:

The Settlement Agreement requires the Administrator to determine a person's eligibility for class membership. As you may already know, section 2.01(1)(b) of the Settlement Agreement provides that you must deliver an HCV Antibody Test, PCR Test or similar test report to the Administrator. You have not provided proof of HCV (the Hepatitis C virus).

The Court Approved Protocol, "HCV Antibody and PCR Tests Protocol", defines which HCV test is acceptable. Note that in some cases, the Administrator must consult a microbiologist to obtain his or her expert opinion.

In the remaining paragraphs of the decision, the Administrator reproduced portions of the *HCV Antibody and PCR Tests Protocol* concerning what constitutes an acceptable test result, as well as other general information concerning evidence that may be presented if the Primarily-Infected Class Member is deceased. The decision made no reference to the HCV Antibody Test report.

[7] The Claimant filed her appeal within the prescribed time period and submitted a letter with her Request for Review Form indicating that she was infected with Hepatitis C during her Caesarean section. She also included a copy of one of the hospital reports from 1977 containing essentially the same information as reproduced in paragraph [4] above, namely that she was diagnosed with “hepatitis” the preceding year.

## **ISSUE**

[8] The issue to be determined is whether the decision of the Administrator was reasonable on the basis of the evidence.

## **ANALYSIS**

[9] Under the terms of the *Settlement Agreement*, a person claiming to be a Primarily-Infected Class Member, such as the Claimant, must satisfy the eligibility requirements in subsection 2.01(1) in order to make a successful claim for compensation.

Subsection 2.01(1) of the *Settlement Agreement* provides as follows:

### **2.01 Eligibility – Primarily-Infected Class Member**

(1) A person claiming to be a Primarily-Infected Class Member must deliver to the Administrator an application form prescribed by the Administrator together with:

- a) medical, clinical, laboratory, hospital, The Canadian Red Cross Society, Canadian Blood Services or Hema-Quebec records demonstrating that the claimant received Blood in Canada during the Class Period;
- b) an HCV Antibody Test report, PCR Test report or similar test report pertaining to the claimant;
- c) a statutory declaration of the claimant including a declaration
  - (i) that he or she has never used non-prescription intravenous drugs, and
  - (ii) as to where the claimant first received Blood in Canada during the Class Period, and
  - (iii) as to the place of residence of the claimant, both when he or she first received Blood in Canada during the Class Period and at the time of delivery of the application hereunder; and
  - (iv) where the claimant is a Primarily-Infected Person, that to the best of his or her knowledge, information and belief, he or she was infected with HCV during the Class period;

The blood test requirement in paragraph 2.01(1)(b) of the *Settlement Agreement* must be read in conjunction with the *HCV Antibody and PCR Tests Protocol*. Section 1.01 of that *Protocol* states as follows:

1.01 A person must have either an HCV Antibody Test or a PCR Test to qualify for compensation as an HCV Infected Class Member. An HCV Antibody Test qualifies a person at Level 1. A PCR Test qualifies a person at Level 2. Either test coupled with the medical evidence called for at Levels 3-6 qualifies the person at the appropriate level.

[10] The evidence in the record confirms that the Claimant satisfied the provisions of paragraphs 2.01(1)(a) and (c) of the *Settlement Agreement*, respectively, by establishing that she received Blood in Canada during the Class Period and by submitting the required statutory declaration. However, the Claimant was unable to meet the requirement in paragraph 2.01(b), as the Final Report on the HCV Antibody Test dated April 2, 2008 did not reveal the presence of HCV antibodies in the Claimant's blood, thereby confirming that she has never had the Hepatitis C virus. It is most unfortunate that, although the

Claimant clearly suffers from some form of hepatitis, the HCV Antibody Test report clearly establishes that she has never had a Hepatitis C infection. In the circumstances, the Claimant cannot meet the fundamental requirement in paragraph 2.01(b) of the *Settlement Agreement* and has therefore failed to establish her entitlement to compensation. The decision of the Administrator to deny the claim for compensation was therefore reasonable and the appeal must regrettably be dismissed.

[11] Before concluding, I feel compelled to comment on the decision rendered by the Administrator. In the portion of the decision dealing with the question of eligibility under the *Settlement Agreement*, the Administrator referred to the requirement in paragraph 2.01(1)(b) to deliver “...an HCV Antibody report, a PCR Test report or similar test report...” and thereafter simply stated that the Claimant “...had not provided proof of HCV (the Hepatitis C virus)”. Following that statement, the Administrator reproduced part of section 2.05 of the *HCV Antibody and PCR Test Protocol* indicating what specific HCV Antibody Test results were acceptable. In the context of this case, that information was utterly irrelevant in that the Claimant had already submitted an HCV Antibody Test report that complied with the requirements of the *Settlement Agreement* and the *HCV and PCR Test Protocol*. Given that there was definitive proof in the form of an HCV Antibody Test report that the Claimant has not ever had a Hepatitis C infection, the Administrator should have made specific reference in the decision to that crucial evidence which was determinative of the question of the eligibility of Claimant for compensation. The Claimant, who is 75 years of age, undoubtedly believed that she had submitted evidence to establish her entitlement to compensation under the *Settlement Agreement*. Indeed, in her Request for Review, she submitted, once again, a hospital

record confirming her 1976 diagnosis with “hepatitis”. A reference in the Administrator’s decision to the HCV Antibody Test report would have corrected that misconception and would also have clearly indicated the specific reason for the denial of the claim for compensation. In addition, when read as a whole, the decision could leave the erroneous impression that the Claimant had failed to comply with the requirement in paragraph 2.01(b) of the *Settlement Agreement* to submit an HCV Antibody Test or other acceptable test report. Finally, it was inappropriate to include in the body of the decision information concerning the situation for a deceased Primarily-Infected Class Member, as it had no relevance to the present case.

## CONCLUSION

[12] The appeal is dismissed.

"D. McGillis"

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The Honourable D. McGillis, Q.C.  
Appeals Officer

DATED November 13, 2008

TO: Claimant  
Fund Counsel  
Administrator