

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: 07-01303

REASONS FOR DECISION

INTRODUCTION

[1] The Claimant has appealed a decision of the Administrator dated July 14, 2008, in which his claim for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied on the basis that he had not received Blood during the Class Period.

FACTS

[2] The Claimant filed a claim for compensation under the *Settlement Agreement* on October 15, 2007, on the basis that he was a Primarily-Infected Person who was infected with the Hepatitis C virus through blood transfusions received in the United States in August 1990 during open heart surgery. The Treating Physician Form indicated that he was at Disease Level 2. The Claimant filed, together with his Blood Transfusion History Form, the transfusion records from the clinic in the United States which confirmed that he received transfusions of eight units of blood on August 26 and 27, 1990. He did not complete the Section E – Blood Transfusion Information in his claim form.

[3] On November 20, 2007, the Claimant filed a completed Section E – Blood Transfusion Information part of the claim form, in which he referred to his blood transfusions in the United States. He noted that the [provincial health plan] had paid for his emergency surgery in the United States. He also checked the box to indicate that he

had received a blood transfusion in Canada between the period of July 2, 1990 and September 28, 1998, and filed a letter dated November 12, 2007.

[4] The Claimant was awarded compensation under the *Red Cross Settlement* in the amount of approximately \$10,000.00 and under a provincial program in the amount of \$25,000.00.

[5] In a decision dated August 23, 2000, the Claimant was found to be eligible for compensation under the provincial program for the following reasons:

Description of Relevant Facts & Information:

Record search conducted at [the hospital]. Applicant has produced strong evidence/verification that he was referred to the [clinic in the United States] by [a physician in the Province] and was transfused at least 8 units during cardiac surgery. The Canadian Blood Services has no records for these units and therefore a trace back is not possible. Physician and applicant note no confounding risk factors. Applicant has history of drug abuse but physician and applicant clearly indicated that drugs were not used intravenously.

Balance of Probabilities/Benefit of the Doubt Assessment and Decision:

Given record of transfusion and no confounding risk factors, it is more likely than not that the applicant was infected with Hepatitis C through the blood supply.

DECISION OF THE ADMINISTRATOR

[6] In a decision dated July 14, 2008, the Administrator denied the claim for compensation. In its Reasons for Decision, the Administrator stated as follows:

The Settlement Agreement requires the Administrator to determine a person's eligibility for class membership.

All the material that you provided to support your claim was carefully reviewed by the Administrator. You have not provided sufficient evidence to support that you or the HCV Infected Class Member received **Blood** during the Class Period, as defined in the Settlement Agreement. [Administrator's Emphasis]

After reproducing the full definition of "Blood" in the *Settlement Agreement*, the decision continued as follows:

As you may already know, every claim for compensation is reviewed and approved based on our review of documentation confirming a series of different

but related proven facts. As soon as a claim submission fails to meet one of several approved criteria as set out in the settlement Agreement, the claim must be denied. It is important to note that in some cases, the subsequent claim evaluation steps were not completed after determining the need to deny the claim. Should you opt to appeal our decision to deny your claim and should you succeed on appeal, any and all pending evaluation steps will have to be completed.

In its decision, the Administrator made no reference to any facts pertaining to the Claimant.

REQUEST FOR REVIEW

[7] On August 1, 2008, the Claimant filed a Request for Review and specified his reasons for appealing the decision, in part, as follows:

I am appealing this decision based on the fact that I was in need of emergency heart surgery that could not be performed in Canada because of a backlog in our country. Therefore [the provincial plan] paid for my heart surgery and therefore became liable for me obtaining Hep C through transfusion in [the United States]. If Canada had given me the surgery I would not have contracted Hep C. Responsibility is and was our system's fault!

The Claimant also indicated in his reasons for appealing, among other things, that he was given intravenous blood and blood products in September 2000 in two hospitals in Canada.

[8] In support of his appeal, the Claimant wrote letters dated August 16 and September 30, 2008.

ISSUE

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

ANALYSIS

i) Generic Reasons

[10] A review of the Reasons for Decision denying the claim for compensation confirms that the Administrator has used “generic” reasons that do not address the central issue raised by the facts, namely whether the Claimant had received Blood in Canada. In the Reasons for Decision rendered on the appeal in Claim File 07-03416, I stated as follows in a case where the Administrator had used generic reasons:

[17] A decision-maker, such as the Administrator, who has the obligation to conduct an evidentiary assessment and to make a decision that affects the right of a claimant to obtain compensation has a corresponding obligation imposed by the duty of fairness to provide some reasons to explain the decision reached in each particular case. In the context of the framework established in the *Settlement Agreement*, the reasons do not have to be elaborate and, indeed, may even be very minimal in some cases. Furthermore, there is nothing to preclude the Administrator from using certain generic or standard paragraphs in a decision to explain the applicable provisions or definitions that apply to the claim. However, the decision must also contain sufficient detail to demonstrate that the Administrator understood and considered the specific circumstances of the case, as revealed in the evidence. In the decision, *R. v. Sheppard*, [2002] 1 S.C.R. 869, Binnie J., writing for the Court, explained in paragraph 24 the practical function of reasons as follows:

“... reasons justify and explain the result. The losing party knows why he or she has lost. Informed consideration can be given to grounds for appeal. Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be”.

[18] Both a claimant and the public at large have a significant interest in seeing that redress is provided under the *Settlement Agreement* in appropriate circumstances and in understanding why it is not provided in others. In the absence of reasons that explain succinctly the result in the particular case, there is no justification for the decision and no transparency in the decision-making process. In other words, reasons constitute a form of accountability and also assist a claimant in deciding whether to exercise the right of appeal. Indeed, a claimant may decide not to appeal in circumstances where the decision is properly explained.

[19] The Appeal File contained abundant evidence to justify the decision made by the Administrator. In the circumstances, I have decided that it would be simpler and more expeditious for me to prepare reasons that support the decision, rather than remitting the matter to the Administrator [See, by way of analogy, the approach taken by Rothstein J. in *Apotex v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61 at paragraph 72]. I hasten to note that the Administrator could have

satisfied the requirement to provide reasons by simply adding a few succinct sentences to its decision. [Emphasis Added]

[11] In applying the principles enunciated above, I have determined that there is sufficient evidence in the Appeal File to enable me to make the necessary findings and that it would be simpler and more expeditious for me to do so rather than to remit the matter to the Administrator.

ii) Interpretation of Settlement Agreement

[12] In the Reasons for Decision delivered on the appeal in Claim File 08-14662, I explained the principles that must be followed in interpreting the *Settlement Agreement* and stated as follows:

The interpretation must be conducted “... in a textual, contextual and purposive way” [See *Pelletier v. Canada*, [2008] 3 F.C.R. 40 (F.C.A.) at paragraph 47]. In performing the interpretative exercise, two underlying principles of the *Settlement Agreement* must also be considered. Those two principles are expressly articulated in the concluding paragraph of the recitals, at page 7 of the *Settlement Agreement*, and in section 18.03. The concluding paragraph of the recitals establishes that the fundamental purpose of the *Settlement Agreement* is to settle “... the actions, liabilities, claims and demands whatsoever of the Class Members...”. The full text states as follows:

THEREFORE, in consideration of the premises and the covenants and agreements herein contained, the Parties agree that, subject to the approval of this Agreement by the Courts, all actions, causes of actions, liabilities, claims and demands whatsoever of the Class Members, including Charter Claims, relating to or arising from the infection of persons with hepatitis C through the blood system during the Class Period, are to be settled on the terms set out in this Agreement.

In addition, section 18.03 confirms unequivocally that the *Settlement Agreement* constitutes the entire agreement between the Parties. Section 18.03 states as follows:

18.03 Entire Agreement

This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and cancels and supersedes any prior or other understandings and agreements between the parties with respect thereto. There are no representations, warranties, terms, conditions, undertakings, covenants or collateral agreements, express, implied or

statutory between the Parties with respect to the subject matter hereof other than as expressly set forth or referred to in this Agreement.

The underlying principles of the *Settlement Agreement* therefore dictate that any claim for compensation must be made by a Class Member and must fall within the terms of the *Settlement Agreement*. [Emphasis Added]

In other words, a claim for compensation cannot succeed unless it meets the requirements set out in the terms of the *Settlement Agreement*.

iii) Section 2.01 of the Settlement Agreement

[13] 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 section 2.01 in order to make a successful claim for compensation. In the circumstances of the present claim, the relevant provisions are subsections 2.01(1) and (2) which state 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; [...]

(2) Notwithstanding the provisions of Section 2.01(1)(a), if a claimant cannot comply with the provisions of Section 2.01(1)(a), the claimant must deliver to the Administrator corroborating evidence independent of the personal recollection of the claimant or any person who is a Family Member of the claimant establishing on a balance of probabilities that he or she received Blood in Canada during the Class Period. [Emphasis Added]

Subsection 2.01(1) and (2) require that a claimant must have “received Blood in Canada” in order to be eligible for compensation under the *Settlement Agreement*.

[14] In the Reasons for Decision issued in Appeal File 07-03416, I interpreted the meaning to be accorded to the phrase “received Blood in Canada”, as it appears in the eligibility requirements in subsections 2.01(1) and (2) of the *Settlement Agreement*, and stated, in part, as follows:

[23] As indicated previously, the expression “received Blood in Canada”, as used in the eligibility requirements in paragraph 2.01(1)(a), subsection 2.01(2) and elsewhere, must be interpreted in a manner consistent with the fundamental purpose of the *Settlement Agreement*, having also regard to its context and usage in the text. When considered in that manner, the phrase “received Blood in Canada” can only be interpreted as meaning that a claimant must have received Blood that came from the blood system in Canada in order to satisfy the eligibility requirements under the *Settlement Agreement*. [Emphasis Added]

I should also note that the Certification Orders and Judgments issued by the supervising Courts confirm that the settlement of the class action on the terms agreed to in the *Settlement Agreement* relates solely to Hepatitis C infections caused by Blood provided through the blood system in Canada during the Class Period.

iv) Did Claimant’s records demonstrate receipt of Blood in Canada under paragraph 2.01(1)(a)?

[15] Under paragraph 2.01(1)(a) of the *Settlement Agreement*, a person claiming to be a Primarily-Infected Class Member, such as the Claimant, must deliver records from at least one of the prescribed categories to demonstrate that he received Blood in Canada during the Class Period. Since the Claimant delivered hospital, medical or clinical records to the Administrator in compliance with the requirement in paragraph 2.01(1)(a), the first question to be determined in this matter is whether those records demonstrate that he received Blood in Canada at any time.

[16] The evidence in the Appeal File establishes that the Claimant was sent to the United States in 1990 for emergency heart surgery at the request of his Canadian physician. He received blood transfusions in United States during that surgery and

subsequently developed a Hepatitis C infection. Although he made reference in his Claim Form and in some of his letters to transfusions in Canada, none of the records demonstrate that he ever received Blood in Canada.

[17] The records delivered to the Administrator therefore fail to demonstrate that the Claimant received Blood in Canada during the Class Period, as required by paragraph 2.01(1)(a) of the *Settlement Agreement*.

v) *Did Claimant deliver independent corroborating evidence under subsection 2.01(2) in conformity with applicable provisions of Proof of Receipt of Blood Protocol?*

[18] In circumstances such as the present where the available records tendered under paragraph 2.01(1)(a) of the *Settlement Agreement* do not confirm the receipt of Blood by the Primarily-Infected Class Member, subsection 2.01(2) permits a claimant to deliver independent corroborating evidence to establish on a balance of probabilities the receipt of Blood. Subsection 2.01(2) must be read in conjunction with the *Proof of Receipt of Blood Protocol* which contains provisions governing the evidence that may be delivered by a claimant. Unfortunately, the Claimant did not deliver any independent corroborating evidence under subsection 2.01(2) to establish on a balance of probabilities that he received Blood in Canada during the Class Period.

vi) *Compensation under Other Programs*

[19] As indicated previously, the Claimant has applied for and received compensation under the terms of the *Red Cross Settlement* and a provincial program. In the Reasons for Decision rendered in Claim File 07-00464, I commented on the perception of inequity that may arise when compensation is awarded under one plan or agreement and denied

under another. In particular, I stated as follows in paragraph 41 of that decision:

[41] I can appreciate the frustration and distress that this decision will cause to the Claimant, particularly given that the member of the provincial review committee found him to be eligible for a benefit under that program. It must be recognized that the framework governing eligibility for compensation under the terms of the *Settlement Agreement* is completely different from the one applied by the member of the review committee in the context of the provincial agreement.

Although I fully understand that it must be confusing and upsetting when compensation is granted under the auspices of one program or agreement and yet denied under another one, the terms of the *Settlement Agreement* govern the present claim and must be applied. It is also important to recognize that the terms of the *Settlement Agreement* are the result of an agreement between the Parties which was approved by the Courts; neither the Administrator nor the Appeals Officer has any power or discretion to alter those terms.

CONCLUSION

[20] Unfortunately, the evidence in the Appeal File does not satisfy the fundamental eligibility requirement in either paragraph 2.01(1)(a) or subsection 2.01(2) of the *Settlement Agreement* that Blood was received in Canada. The decision of the Administrator to deny the claim was therefore reasonable on the basis of the evidence. Regrettably, the appeal must be dismissed.

[21] The appeal is dismissed.

"D. McGillis"

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

DATED March 30, 2009

TO: Claimant
Fund Counsel
Administrator

