

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: 07-01411

REASONS FOR DECISION

INTRODUCTION

[1] The Claimant has appealed a decision of the Administrator dated July 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 received Blood during the Class Period.

FACTS

[2] On November 20, 2008, the Claimant filed a claim for compensation under the *Settlement Agreement*. In her claim, she stated that she was a Primarily-Infected Person who was infected with the Hepatitis C virus during the Class Period. The Treating Physician Form indicated that she was at Disease Level 3, and she stated in the Blood Transfusion History Form that she had received a blood transfusion in 1974 due to post-operative complications. She had no other risk factors for Hepatitis C, and has received compensation under the *Red Cross Settlement* in the amount of \$10,450.00.

[3] By letter dated November 5, 2001, the Canadian Blood Services advised the Claimant that the hospital had “[...] several sources of records (i.e. – the patient hospital chart, computerized records and the Blood Bank Records)”, and that a search of the

records revealed as follows:

[The hospital] searched your patient hospital chart and found no record of transfusions. Please note your patient hospital chart only contains records back to 1980. The hospital also identified a hospital visits [sic] in July 1974 and September 1975. There are no records in your patient hospital chart of these visits. The Blood Bank Laboratory of the [hospital] searched their transfusion records for these timeframes and reported that they do not have any indications of transfusion on their Blood Bank records. The computerized records (1983-present) have no record of transfusions.

[4] By facsimile dated February 8, 2008, the Claimant's physician requested the Medical Records section of the hospital to forward the records in the Claimant's chart "related to hysterectomy and transfusion in the 1970's". On February 10, 2008, the hospital replied that the requested information had been destroyed.

[5] By letter dated June 3, 2008, the Canadian Blood Services forwarded two documents to the Administrator: the final report for the Traceback dated May 22, 2008, and a Canadian Blood Services "Request for Transfusion Information" form containing information recorded in 2001. The final Traceback report, entitled "Transfusion Summary", stated as follows: "Hospital reported that no transfusions were found for this patient".

[6] The Canadian Blood Services Request for Transfusion Information form contained two parts. The first section of the form, entitled "Product/Recipient Information (to be completed by Canadian Blood Services)", was dated August 9, 2001. It contained a reference to the Traceback number, together with a note that the "patient had hysterectomy and two motor vehicle accidents in 1979". The second section of the form, entitled "Transfusion Information (to be completed by Hospital)", was dated September 5, 2001 and contained the following handwritten note signed by a Technical

Specialist at the hospital:

No indication of transfusions for this patient.
No hospital visit in 1979.
Computer indicates visits in July 1974 and September 1975.
Computer search of records from 1983 – Sept. 5, 2001.
Manual search of records in 1974, 1975 and 1979.

DECISION OF THE ADMINISTRATOR

[7] 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 the decision, the Administrator made no reference to any facts pertaining to the Claimant.

REQUEST FOR REVIEW

[8] On August 5, 2008, the Claimant filed a Request for Review. In her reasons for

appealing the decision, she stated as follows:

I received a transfusion in 1975. As a result, I now have Hepatitis C. When trying to obtain my medical records, I have received the run around. The biopsy of my liver confirms the timeframe that I contracted this to be 1975.

SUPPLEMENTARY EVIDENCE ON APPEAL

[9] On August 28, 2008, the Claimant amended her Blood Transfusion History Form by adding a notation of another transfusion in 1975 at a different hospital during surgery for the removal of an ovary.

[10] By letter dated October 7, 2008, the Administrator sent copies of the following documents to the Fund Counsel who was providing assistance to the Claimant: a letter dated September 22, 2008 from the Canadian Blood Services, together with a second Traceback, described as the “revised final report for the Traceback”.

[11] The revised final report for the second Traceback, entitled “Transfusion Summary”, noted at the outset that the hospital providing the information “[...] has handled the blood distribution for transfusion to [the two hospitals named in the Claimant’s amended Blood Transfusion History Form] in the past”. The report stated as follows:

Hospital reported that “No indication of transfusions for this patient”. There was no record found for a hospital visit in 1979. Records did show hospital visits for July 1974 and Sept 1975, however patient was not transfused.

*Records searched were – manual records 1974, 1975, 1979 and computer records 1983 to 2001.

[12] The Claimant made a further request to the hospital for the disclosure of her medical records. On November 28, 2008, she filed an undated letter from the hospital

that responded to her request for information as follows:

Please be advised that the retention period for personal health information is twenty-five (25) years and prior to 2007, was twenty (20) years. Your request is for information that exceeds the retention period, and therefore, we are unable to process the request as this information has been destroyed according to the retention schedule.

[13] The Claimant filed no other evidence or supplementary submissions on appeal.

ISSUE

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

ANALYSIS

i) Generic Reasons

[15] A review of the Reasons for Decision denying the claim for compensation confirms that the Administrator has used “generic” reasons that did not make specific reference to the circumstances of the Claimant’s case. In the Reasons for Decision rendered on the appeal in Claim File 07-03416, I stated the following in a case where the Administrator had used the same 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]

[16] 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 factual 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) Section 2.01 and the Definition of Blood in the Settlement Agreement

[17] In the Reasons for Decision on the appeal in Claim File 07-00464, I analysed the provisions in section 2.01 of the *Settlement Agreement* concerning the requirements that must be met by a person claiming to be a Primarily-Infected Class Member in order to be eligible for compensation. Since those provisions also apply in the present appeal, I have reproduced my analysis from that decision in paragraphs 17 to 20 and 22 below for ease of reference.

[18] Under the terms of the judicially approved *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]

Subsections 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*.

[19] The term “Blood” is defined in section 1.01 of the *Settlement Agreement*, in part, as follows:

1.01 Definitions

In this Agreement, the following terms will have the following meanings:

[...]

“**Blood**” means:

(a) in the case of Primarily-Infected Persons, except those Primarily-Infected Persons who have or had Thalassemia Major, whole blood and the following blood products: packed red cells, platelets, plasma (fresh frozen and banked), white blood cells and cryoprecipitate. Blood does not include Albumin 5%, Albumin 25%, Factor VIII, Porcine Factor VIII, Factor IX, Factor VII, Cytomegalovirus Immune Globulin, Hepatitis B Immune Globulin, Rh Immune Globulin, Varicella Zoster Immune Globulin, Immune Serum Globulin, (FEIBA) FEVIII Inhibitor Bypassing Activity, Autoplex (Activate Prothrombin Complex), Tetanus Immune Globulin, Intravenous Immune Globulin (IVIG) and Antithrombin III (ATIII); [...]

iii) Did Claimant's records demonstrate receipt of Blood under paragraph 2.01(1)(a)?

[20] 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 she received Blood in Canada during the Class Period.

[21] Unfortunately, the Claimant was unable to deliver any hospital, medical or clinical records to the Administrator in compliance with the requirement in paragraph 2.01(1)(a). She has therefore not demonstrated that she received Blood in Canada during the Class Period, as required by paragraph 2.01(1)(a) of the *Settlement Agreement*.

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

[22] In circumstances such as the present where a person claiming to be a Primarily-Infected Class Member cannot deliver records under paragraph 2.01(1)(a) of the *Settlement Agreement* to confirm the receipt of Blood, 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. Since the Claimant did not receive notification as part of a Blood Recipient Notification Program, the applicable provisions of the *Proof of Receipt of Blood Protocol* are sections 5 and 6 which state as follows:

No Hospital Records or Hospital Records Do Not Confirm Receipt of Blood and The Primarily-Infected Class Member Did Not Receive Notification As Part Of A Blood Recipient Notification Program

5. Subject to paragraphs 2 and 7 and the following constraints, the Administrator may accept any evidence it deems reliable as proof on the balance of probabilities of receipt of Blood in Canada during the Class Period in

satisfaction of section 2.01(2) of the Settlement Agreement:

a. evidence of the Primarily-Infected Class Member or a Family Member of the Primarily-Infected Class Member may not be considered. The claimant must deliver to the Administrator corroborating evidence independent of the personal recollection of the Primarily-Infected Class Member or any person who is the Family Member of the Primarily-Infected Class Member; and

b. any evidence which is in the nature of personal recollection must be in affidavit form and must provide the following particulars:

i. the month and year of the hospitalization(s);

ii. the reason for the hospitalization(s); and

iii. the basis of the affiant's personal recollection that the Primarily-Infected Class Member received Blood during the hospitalization(s).

6. Subject to paragraph 5, the following are examples of the type of evidence which the Administrator may consider:

a. an affidavit of a medical practitioner or hospital employee involved in the care of the Primarily-Infected Class Member at the time of the receipt of Blood who recalls the receipt of Blood;

b. the opinion of a medical practitioner, who practices in the specialty to which the Primarily-Infected Class Member's underlying medical condition belongs or who specializes in blood banking, that at the time the receipt of Blood took place, and given the nature of the medical treatment the Primarily-Infected Class Member underwent and/or the circumstances of the Primarily-Infected Class Member at that time, it is more likely than not that the Primarily-Infected Class Member received Blood. If such an opinion is advanced by a person who does not have personal knowledge of the Primarily-Infected Class Member's underlying medical condition, the medical treatment the Primarily-Infected Class Member underwent and the circumstances of the Primarily-Infected Class Member at the time of the receipt of Blood, there should be independent evidence of the underlying medical condition, the medical treatment and the circumstances of the Primarily-Infected Class Member at the time of the receipt of Blood other than the recollection of the Primarily-Infected Class Member or any person who is a Family Member of the Primarily-Infected Class Member;

c. an affidavit of a person who witnessed the receipt of Blood; or

d. hospital or other medical or clinical records which describe significant blood loss or refer to a receipt of Blood at the time of the alleged receipt of Blood.

[23] Unfortunately, the Claimant did not deliver any independent corroborating evidence under subsection 2.01(2) to establish on a balance of probabilities that she received Blood in Canada during the Class Period.

v) Compensation under another program

[24] As indicated previously, the Claimant had applied for and received compensation under the terms of a provincial plan. 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

[25] The Claimant has not satisfied the fundamental eligibility requirement in either paragraph 2.01(1)(a) or subsection 2.01(2) of the *Settlement Agreement*, namely that she

received Blood in Canada during the Class Period. In the circumstances, the decision of the Administrator to deny the claim for compensation was reasonable on the basis of the evidence. Regrettably, the Claimant is not entitled to receive compensation under the terms of the *Settlement Agreement*.

[26] The appeal is dismissed.

"D. McGillis"

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

DATED April 2, 2009

TO: Claimant
Fund Counsel
Administrator