

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: 07-07727

REASONS FOR DECISION

INTRODUCTION

[1] The Claimant has appealed a decision of the Administrator dated February 27, 2009, in which her claim for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied. In particular, the Claimant, who had used non-prescription intravenous drugs, failed to satisfy the Administrator on the balance of probabilities that she was infected with HCV for the first time by a Blood transfusion during the Class Period.

FACTS

[2] On September 25, 2007, the Claimant delivered a claim for compensation under the *Settlement Agreement*. In the claim, she stated that she was a Primarily-Infected Person who was infected with the Hepatitis C virus through a Blood transfusion during the Class Period. In Section G of Form 1, she checked the boxes to indicate that she had two risk factors for the Hepatitis C virus: non-prescription intravenous drug use, involving the use of cocaine twice in July 1978, and one tattoo from July 1979. She did not check the box for “intra-nasal drug use” as a risk factor and made no entry in the space for “dates, type of drugs or shared paraphernalia” related to this type of drug use. The Treating Physician Form stated that she was at Disease Level 3. With respect to risk factors for the Hepatitis C virus, the Treating Physician indicated non-intravenous

prescription drug use from July 1978, as well as tattoos. He also noted on the Form a statement made by the Claimant that “[...] she used intravenous drugs on two occasions in July of 1978.” He did not check the box to indicate that intra-nasal drug use was a risk factor for Hepatitis C for the Claimant. In the Statutory Declaration Form, the Claimant declared that she had used non-prescription intravenous drugs. In the Blood Transfusion History Form, the Claimant indicated that she was transfused with six units of Blood following a miscarriage in July 1971.

[3] The Claimant was diagnosed with Hepatitis C in 1995.

[4] In support of her claim, the Claimant delivered various medical, clinical laboratory and hospital records. The hospital records from July and August 1971 confirmed that she was transfused with five units of blood due to very low hemoglobin caused by excessive bleeding prior to a D&C surgical procedure.

[5] One of the hospital records delivered by the Claimant made reference to her history of drug use. In a Consultation Report dated August 4, 2005, a specialist at the hepatology clinic in the hospital described the medical history of the Claimant and stated, in part, as follows:

[The Claimant] was seen at [her family physician’s] request on April 8, 2005 in evaluation of her chronic hepatitis C. She was transfused with 6 [sic] units of blood after a postpartum hemorrhage in 1972. She requested screening for hepatitis C in 1995 after publicity relating to blood transfusions and was found to be positive. She has no history of IV drug use. She does have a tattoo in her shoulder and a history of IN [intranasal] cocaine use between 1975 and 1994. She recalls specifically being jaundice [sic] around 1991. She has no significant body piercing. She has been monogamous for the past 9 years. Her partner is negative. [...] [Emphasis Added]

[6] By letter dated November 20, 2007, the Canadian Blood Services forwarded the final Traceback report to the Administrator. The Traceback stated that the hospital had

conducted a unit number and records search of its Blood Bank records. However, the search revealed that no Canadian Blood Services records were available for 1971. The Traceback also confirmed that the Claimant had received two blood transfusions in 2007; no investigation was conducted as the products were transfused after 1998.

PRELIMINARY DECISION OF THE ADMINISTRATOR

[7] In a decision dated June 30, 2008, the Administrator advised the Claimant that her claim for compensation would be rejected due to her use of non-prescription intravenous drugs, unless she provided further evidence to establish her eligibility on the balance of probabilities. In the decision, the Administrator stated as follows:

The Settlement provides that where there is evidence that the HCV Infected Class Member used non-prescription intravenous drugs, the person must establish on the balance of probabilities the following:

- 1) The HCV Infected Hemophiliac or person with Thalassemia Major was infected with HCV for the first time by the receipt of Blood;
OR
- 2) The HCV Infected Person was infected with HCV for the first time by a Blood transfusion for which an HCV antibody positive donor has been located or for which the status of the donor remains unknown;
OR
- 3) The Secondarily-Infected Person (Spouse or Parent) was infected with HCV for the first time by the alleged secondary infection.

Because the Statutory Declaration in the Form 3 you submitted, or the medical evidence is indicative of non-prescription intravenous drug use, your claim for compensation under the Pre-1986/Post-1990 Hepatitis C Settlement Agreement will be rejected unless **you provide further evidence to establish your eligibility based on the balance of probabilities.**

A Court Approved Protocol (referred to as the “CAP”) applies in your case. A copy of this CAP is enclosed for your convenience. We encourage you to take the time to read this document.

What You Need to Do

Return the enclosed “Further Evidence of First Infection Form” to the Administrator within 30 days of receipt.

[...]

FURTHER EVIDENCE OF FIRST INFECTION

[8] On July 14, 2008, the Claimant indicated on the Further Evidence of First Infection Form her intention to provide further evidence that she was infected with HCV for the first time by a blood transfusion.

[9] On September 26, 2008, the Claimant delivered her further evidence of first infection to the Administrator. The evidence included an affidavit from the Claimant and extensive medical, clinical, laboratory and hospital records from approximately 1996 to 2008. Two of the records contained statements relating to her drug use.

[10] In her affidavit dated August 13, 2008, the Claimant stated, in part, as follows:

[...]

3. I was diagnosed with HCV in 1995. I was of the age of nineteen years, in 1971, at the time I first received blood in the class period. I hadn't consulted any doctors prior to that period but was under the care of [a physician].
4. I used a non-prescription intravenous drug, twice on [sic] or about July of 1978.
5. I obtained the needles from [a pharmacy].
6. The needles were brand new and used right from the package that they were purchased in.
7. I have never shared needles with any other non-prescription intravenous drug users.
8. I have never donated blood in Canada.
9. I have never been convicted of a criminal offence.

[11] The first record in the further evidence of first infection that contained a reference to drug use by the Claimant was a handwritten entry dated December 12, 1997 made by the physician in her medical chart. The physician wrote that the Claimant was a cocaine user for 18 years and also noted "D/Ced x one yr [discontinued for one year]".

[12] The second record that made reference to the question of drug use was a reporting letter dated May 29, 2006, from a neurologist to the Claimant's family physician. In outlining the medical history given to her by the Claimant, the neurologist stated, in part, as follows:

[...] She is taking interferon for hepatitis C. This may have been acquired in the late 1970's when she had a blood transfusion. She also had a history of drug use, smoking cocaine in the 1980's. She recalls feeling sick at the time and her skin was yellow in the early 1990's. [...] [Emphasis Added]

OPINION FROM MEDICAL SPECIALIST OBTAINED BY ADMINISTRATOR

[13] On December 8, 2008, the Administrator requested an opinion from a medical specialist in infectious diseases.

[14] In a letter dated January 12, 2009, the medical specialist provided his opinion to the Administrator concerning the manner in which the Claimant likely contracted Hepatitis C. At the outset of his letter, the medical specialist described the circumstances surrounding the Claimant's blood transfusions in 1971, her blood tests in the 1990's, her liver biopsies in 2002 and 2005 and her significant response to her treatment with interferon. He continued by stating as follows:

Her history is complicated because the five units of blood that she received in 1971 cannot be traced. She does have one tattoo that she received in the 70s. She has a history of injection drug use with cocaine on two occasions by the patient. As well in history outlined by the hepatology clinic she has an 18 year history of use of cocaine but in most case this was by inhalation. Also of note is a history of what sounds like jaundice described as her skin turning yellow in or around 1991.

Other significant medical history includes two motor vehicle accidents, prior spinal surgery, hysterectomy, benign breast biopsies. She has chronic pain related to a neck fusion and spinal stenosis and has been managed with chronic narcotics. In the late 90s post-hysterectomy, she was on hormone replacement therapies. Her other blood work indicates that she was hepatitis B and surface and core antibody positive and surface antigen negative which would be indicative of a prior hepatitis B exposure.

The question put forward to me is on balance of probabilities where did this individual most likely acquire her hepatitis C. Clearly receiving 5 units of blood in the pre-test period would be a risk factor for acquiring hepatitis either hepatitis A or B however there does not appear to be any history either clinical or biochemical of hepatitis in the post-transfusion period. As she was 19 at the time, young women who were non heavy alcohol drinkers usually do have a history of hepatitis C disease that progresses at a very slow rate. The use of IV cocaine on two occasions if the needles definitively were clean needles and there was no sharing of products would be of low risk.

However what is often underappreciated is the risk of snorting cocaine because often the sharing of cocaine, spoon, diluting fluid and straws has been shown to be a clear risk factor of contact and spread of hepatitis C because of exposure to microscopic blood emanating from nasal mucosal ulcerations.

Certainly the history of what sounds like clinical jaundice in the early 90s would be very compatible with an exposure of hepatitis C at that time and looking at the liver biopsies that were done 12 to 15 years after that time point [sic] the minimal changes seen in the liver biopsy would be compatible with an exposure at that time. I do suspect that the elevated liver function tests seen in around 1999 and 2000 which has subsequently moderated could be compatible with the hormone replacement therapies that were being initiated at that time or perhaps a combination of that plus some of the other medications she was on for pain.

In summary, on the balance of probability it would seem most likely that this claimant was exposure [sic] to hepatitis C likely in the early 1990s related to inhaled cocaine exposure and explained with the likely period of jaundice that she had at that time. That time point would also be completely compatible with other elements of her disease as outlined above. [Emphasis Added]

REVIEW OF DECISION BY ADMINISTRATOR

[15] In a memorandum dated February 27, 2009, the Administrator summarized the facts that it considered in conducting a review of the claim for compensation and explained its conclusion. In the outline of the facts, the Administrator referred to the Traceback report, the Claimant's intravenous drug use in 1978, the contents of her affidavit, the summary in the hepatology Consultation Report dated August 4, 2005 referring to her intra-nasal drug use between 1975 and 1994 and her jaundice in 1991, as well as the physician's handwritten notes concerning her use of cocaine over a period of

18 years. The Administrator also referred to the opinion dated January 12, 2009 from the medical specialist, particularly his conclusion. The Administrator concluded as follows:

Conclusion of Administrator's review: The complete claim has been reviewed including the evidence of the medical expert and the claimant **has not satisfied** the criteria of the Court Approved protocol as she has not provided evidence that supports on a balance of probabilities that she was first infected with HCV by a Blood transfusion received in Canada during the class period. Based on this the Administrator must reject the claim. [Administrator's Emphasis]

FINAL DECISION OF ADMINISTRATOR

[16] On February 27, 2009, the Administrator denied the claim for compensation, stating as follows:

Criteria for Class Membership

The Settlement Agreement provides that if a Claimant cannot comply with the provisions of Sections 2.01(1)(c) and 2.01(3), 2.02(1)(a) and 2.02(2) or 3.01(4) because the Claimant used non-prescription intravenous drugs, the Administrator must be satisfied on the balance of probabilities that:

- 1) The HCV Infected Hemophiliac or person with Thalassemia Major was infected with HCV for the first time by the receipt of Blood;
OR
- 2) The HCV Infected Person was infected with HCV for the first time by a Blood transfusion for which an HCV antibody positive donor has been located or for which the status of the donor remains unknown;
OR
- 3) The Secondarily-Infected Person (Spouse or Parent) was infected with HCV for the first time by the alleged secondary infection.

Reasons for Decision

The Settlement Agreement requires the Administrator to determine a person's eligibility for class membership. The Court Approved Protocol ("CAP") for non-prescription intravenous drug use provides that the Administrator shall weigh the totality of evidence obtained from the additional investigations required by the provisions of the CAP and determine whether, on a balance of probabilities, the HCV Infected Class Member meets the eligibility criteria.

In your original application you and your treating physician advised that you had used Non-prescription intravenous drugs. You submitted an affidavit and medical records in compliance with the Court Approved Protocol. The Administrator has reviewed the entire claim including the opinion of the medical specialist as directed by the Courts. The medical evidence on file supports that on a balance of probabilities it is more likely that you were infected for the first time with

Hepatitis C in the early 90s and not in 1971, when you were the Administrator carefully reviewed all the material that you provided to support your claim. A Committee reviewed your claim and concluded that you do not meet the criteria for Class membership as noted above. [Emphasis Added]

REQUEST FOR REVIEW

[17] On March 12, 2009, the Claimant delivered a Request for Review and specified her reasons for appealing as follows:

You say that I must have been infected in the 1990's. I don't know how that could have happened. I never did drugs or had any blood transfusions then. And also my claim was accepted by the Red Cross. Why is your decision different than theirs? I submit the same stuff plus more.

SUPPLEMENTARY EVIDENCE AND SUBMISSIONS BY THE CLAIMANT

[18] In a letter dated April 30, 2009, the Claimant provided the following supplementary evidence and submissions:

My appeal is based on the fact that you cannot prove that I did not contact the Hep-c from the blood that I received in 1971. I think it is your responsibility to find out if the people that donated the blood were infected or not, but as you stated in your letter you cannot trace where the blood came from. I say that you should have to find out if the donors were infected with the Hep-c virus or not. So without knowing if the donors were infected or not how can you say for sure that I wasn't infected at the time of my transfusion. I know for a fact that I was jaundice [sic] couple of times in the 1970's shortly after my transfusion about 6 to 8 months later but all my medical records from my doctor have been destroyed so I am unable to send you prove [sic] of this.

As my use of cocaine [sic] I was what you would call a closet user I did not share with others. I was always very careful because I did not anyone to know [sic]. This is the only other information that I can give you at this time. [Emphasis Added]

ISSUE

[19] There are two issues to be determined on appeal: whether the decision of the Administrator denying the claim was reasonable on the basis of the evidence, and the effect, if any, of the supplementary evidence contained in the Claimant's letter delivered on appeal.

ANALYSIS

i) Section 2.01 of the Settlement Agreement and the Non-Prescription Intravenous Drug Use Protocol

[20] 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. Section 2.01 states 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-Québec 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;

(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.

(3) Notwithstanding the provisions of Section 2.01(1)(c), if a claimant cannot comply with the provisions of Section 2.01(1)(c) because the claimant used non-prescription intravenous drugs, then he or she must deliver to the Administrator other evidence establishing on a balance of probabilities that he or she was infected for the first time with HCV by Blood in Canada during the Class Period. [Emphasis Added]

[21] In circumstances where a claimant cannot comply with paragraph 2.01(1)(c) of the *Settlement Agreement* by making a declaration that non-prescription intravenous drugs were never used, the provisions of the *Non-Prescription Intravenous Drug Use Protocol* apply to the claim. Since the Claimant admitted in her declaration that she had used non-prescription intravenous drugs, the *Non-Prescription Intravenous Drug Use Protocol* therefore applies to the gathering of evidence and assessment of her claim. For the purposes of the present appeal, it is necessary to reproduce only the following parts of the *Non-Prescription Intravenous Drug Use Protocol*:

**NON-PRESCRIPTION INTRAVENOUS
DRUG USE PROTOCOL**

1. The Protocol applies where:
 - a. there is an admission that the HCV Infected Class Member used non-prescription intravenous drugs;
 - b. there is no statutory declaration as required under the Settlement Agreement, that the HCV Infected Class Member has never used non-prescription intravenous drugs; or
 - c. despite receipt of a statutory declaration, there is other evidence that the HCV Infected Class Member has used non-prescription intravenous drugs.
2. The Administrator shall conduct a Traceback under the Traceback Protocol. If the result of a Traceback investigation is such that the Traceback Protocol requires the Administrator to reject the claim, the Administrator shall reject the claim.
3. If a Traceback is not required to be conducted under the Traceback Protocol or the claim is not rejected under the Traceback Protocol, the Administrator shall:

- a. obtain such additional information and records pursuant to section 2.03 of the Settlement Agreement as the Administrator in its complete discretion considers necessary to inform its decision; and
 - b. obtain the opinion of a medical specialist experienced in treating and diagnosing HCV as to whether the HCV infection and the disease history of the HCV Infected Class Member is more consistent with infection at the time of the receipt of Blood or the secondary infection or with infection at the time of the non-prescription intravenous drug use as indicated by the totality of the medical evidence.
4. The Administrator shall weigh the totality of evidence obtained including the evidence obtained from the additional investigations required by the provisions of this Protocol and determine whether, on a balance of probabilities, the HCV Infected Class Member meets the eligibility criteria of the Settlement Agreement. The burden to prove eligibility is on the claimant. The Administrator shall assist the claimant by advising what types of evidence will be useful in meeting the burden of proof in accordance with this Protocol.
 5. In weighing the evidence in accordance with the provisions of this Protocol, the Administrator must be satisfied that the body of evidence is sufficiently complete in all of the circumstances of the particular case to permit it to make a decision. If the Administrator is not satisfied that the body of evidence is sufficiently complete in all of the circumstances of the particular case to permit it to make a decision, the Administrator shall reject the claim. [Emphasis Added]
[...]

ii) The reasonableness of the decision made by the Administrator

[22] The provisions of the *Non-Prescription Intravenous Drug Protocol* apply in the present claim by virtue of paragraph 1(a), in view of the admission by the Claimant in her Statutory Declaration Form that she had used non-prescription intravenous drugs. In circumstances such as the present, where a claim is not rejected under the provisions of the *Traceback Protocol*, paragraph 3(b) requires the Administrator, in mandatory terms, to obtain the opinion of a medical specialist. Following receipt of the opinion, section 4 directs the Administrator to weigh the totality of the evidence and to determine, on a balance of probabilities, whether a claimant has met the eligibility requirements in the

Settlement Agreement. Section 4 also clearly dictates that the burden of proving eligibility is on a claimant.

[23] I have carefully reviewed all of the evidence in the context of the eligibility requirements in section 2.01 of the *Settlement Agreement* and the applicable provisions of the *Non-Prescription Intravenous Drug Protocol*. In my opinion, it was reasonably open to the Administrator, in weighing the totality of the evidence, to conclude on a balance of probabilities that the Claimant was more likely “[...] infected for the first time with Hepatitis C in the early 90s and not in 1971” at the time of her blood transfusions. In particular, the opinion from the medical specialist dated January 12, 2009, when considered together with the other evidence in the file, amply supports the conclusion reached by the Administrator. Indeed, I would have reached the same conclusion as the Administrator in this matter on the basis of the totality of the evidence.

iii) Effect of the supplementary evidence and submissions made by the Claimant on appeal

[24] The Claimant delivered on appeal a letter dated April 30, 2009, reproduced in paragraph 18, containing supplementary evidence and submissions concerning, among other things, her use of cocaine. In her letter, she stated that she was a “closet user” and “did not share” cocaine with other persons; she provided no details concerning the manner in which she used cocaine. Her statement denying that she ever shared cocaine was clearly made in an attempt to address the statement in the opinion of the medical specialist, reproduced in paragraph 14, that “[...] the sharing of cocaine has been shown to be a clear risk factor of contact and spread of hepatitis C because of exposure to microscopic blood emanating from nasal mucosal ulcerations”.

[25] The statement made by the Claimant in her letter concerning her drug use must be considered in the context of the other evidence in the file in order to assess the weight, if any, to be given to it. At the outset, it is significant to note that the Claimant made no reference in her statement to the manner in which she used cocaine, other than to note that she did not share it with others. In particular, she did not deny that she used cocaine intra-nasally, as noted in the summary of her medical history in the Consultation Report dated August 4, 2005 and as stated by the medical specialist in opinion. Furthermore, in her affidavit dated August 13, 2008, reproduced in paragraph 10, she made no reference at all to her prolonged use of cocaine over an 18 year period. Indeed, although her use of cocaine over the course of many years was mentioned in a record delivered initially in support of the claim and in two other records delivered as part of the further evidence of first infection, she only admitted in her affidavit to using cocaine intravenously on two occasions in 1978.

[26] After careful reflection, I have concluded that the unsworn statement of the Claimant denying that she ever shared cocaine is lacking in credibility and should be given no weight in view of her failure to disclose in her affidavit her prolonged use of the drug and her failure to address in her statement the manner in which she used it. In the circumstances, I am not satisfied that the supplementary evidence, when considered in the context of the totality of the evidence, establishes on a balance of probabilities that the Claimant “[...] was infected for the first time with HCV by Blood in Canada during the Class Period”, as required by subsection 2.01(3) of the *Settlement Agreement*. The Claimant therefore has failed to meet the eligibility requirements under the *Settlement Agreement* and her claim must be dismissed.

iv) Compensation under another program or agreement

[27] In her supplementary submissions, the Claimant noted that she had applied for and received compensation under the terms of the *Red Cross Settlement*. 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.

[28] 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

[29] The appeal is dismissed.

"D. McGillis"

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

DATED July 2, 2009

TO: Claimant
Fund Counsel
Administrator