

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: 07-00688

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 three occasions, in March 1983, June 1991 and September 1991, the Claimant received injections of Rhogam at a hospital. In November 1995, she received a letter from the hospital stating, among other things, that it was advising all patients who had received a blood transfusion or a blood product to be tested for the Hepatitis C virus. Shortly thereafter, the Claimant was tested, and a laboratory report dated December 14, 1995 confirmed the presence of HCV antibodies in her blood.

[3] On February 8, 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 through the injections of Rhogam received in 1983 and 1991. The Claimant noted in her claim that she had received compensation under a provincial agreement in the amount of \$25,000.00

and under the *Canadian Red Cross Settlement Agreement in the Pre-1986/Post-1990 Hepatitis C Claims ("Red Cross Settlement")* in the amount of approximately \$10,450.00.

DECISION OF THE ADMINISTRATOR

[4] 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.

CLAIMANT'S APPEAL

[5] The Claimant filed a Request for Review on July 31, 2008 and appealed the denial of her claim on the basis that she was approved for compensation under both a provincial agreement and the *Red Cross Settlement Agreement*. In support of her appeal, she filed a copy of a decision rendered by the provincial review committee granting her entitlement to a benefit payable to a primarily-infected person. It was noted at page 3 of that decision that the Claimant had received injections of Rh Immune Globulin in 1983 and 1991.

ISSUE

[6] The issue to be determined is whether the Administrator committed any error in denying the claim.

ANALYSIS

[7] 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]

[8] 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.

[9] 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*.

[10] 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); [Emphasis Added] [...]

The definition of the term “Blood”, for the purposes of the *Settlement Agreement*, therefore specifically excludes Rh Immune Globulin from its meaning.

[11] The evidence in the Appeal File confirms that the Claimant developed a Hepatitis C infection as a result of injections of Rh Immune Globulin, a blood product that is specifically excluded from the definition of “Blood” in the *Settlement Agreement*. The Claimant therefore did not receive Blood, within the meaning of that term as defined in section 1.01 of the *Settlement Agreement*. As a result, she cannot satisfy one of the fundamental eligibility requirements in section 2.01, namely that she received Blood. Regrettably, the Claimant is not entitled to receive compensation under the terms of the *Settlement Agreement*.

CONCLUSION

[12] The appeal is dismissed.

"D. McGillis"

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

DATED December 17, 2008

TO: Claimant
Fund Counsel
Administrator