

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: 07-03699

REASONS FOR DECISION

INTRODUCTION

[1] The HCV Personal Representative has appealed a decision of the Administrator dated February 24, 2010 in which the application for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied. The HCV Personal Representative failed to satisfy the Administrator on a balance of probabilities that the HCV Infected Class Member, who had used non-prescription intravenous drugs, was infected with HCV for the first time by a blood transfusion in Canada during the Class Period.

FACTS

[2] The HCV Infected Class Member died on September 28, 1999. He was the son of the HCV Personal Representative.

[3] On April 4, 2008, the HCV Personal Representative delivered an application for compensation under the *Settlement Agreement*, together with various documents. None of the forms were completed. After receiving a deficiency letter from the Administrator, the HCV Personal Representative delivered completed forms on December 2, 2008.

[4] In the General Information Form, the HCV Personal Representative indicated that the HCV Infected Class Member was a Primarily-Infected Person who was infected with

the Hepatitis C virus through a blood transfusion during the Class Period. He was born on May 3, 1956. In “Section G – Other Risk Factors”, she checked the box to indicate prison incarceration as a risk factor and wrote “Too many to put on this sheet. Submitting separate sheet attached”. In the space beside “Non-prescription intravenous drug use”, she wrote “Don’t know”. She made the same notation beside “Intranasal drug use”. She noted that compensation has been paid under other plans or settlements in the amount of \$35,450.00.

[5] The Treating Physician Form was completed by a psychiatrist who had treated the HCV Infected Class Member. He indicated, among other things, that the HCV Infected Class Member was at Disease Level 1. In response to question 1 in the “Section F – HCV Disease Verification” part of the form, he checked the box to indicate prison incarceration as a risk factor for the Hepatitis C virus. In response to question 3 concerning whether there was anything in the HCV Infected Class Member’s medical history or clinical presentation to indicate that he had used non-prescription intravenous drugs at any time, the psychiatrist wrote “I had no history pertaining to that”. The psychiatrist indicated that he had treated the HCV Infected Class Member in 1998.

[6] In the Statutory Declaration Form, the HCV Personal Representative declared that the HCV Infected Class Member had never used non-prescription intravenous drugs.

[7] In support of the application, the HCV Personal Representative delivered documents from a provincial plan application. There were also laboratory tests dated July 3 and 27, 1998 respectively indicating that the HCV Infected Class Member had tested negative for the Hepatitis B Antigen and positive for the Hepatitis C Antibody.

[8] There were three “Request for Records Search” documents from the provincial plan application.

[9] The Hospital Response dated May 12, 1999 from Hospital “A” to the Request for Records Search confirmed that the HCV Infected Class Member was transfused with two units of blood on January 29, 1974; the donors could not be located. A hospital Blood Component Transfusion Record was included with the Hospital Response to confirm the transfusions.

[10] The Hospital Response dated August 20, 1999 from Hospital “B” included a list of six units that were transfused to the HCV Infected Class Member between July 18 and 21, 1991; the six units had tested negative for the Hepatitis C virus.

[11] The Hospital Response dated November 13, 1999 from Hospital “C” confirmed that the HCV Infected Class Member was transfused with two units on January 6, 1992; the two units had tested negative for the Hepatitis C virus. A hospital Blood Bank and Transfusion Record was included with the Hospital Response.

[12] In a final decision dated October 30, 2000, the provincial Review Committee granted an entitlement to benefit to the HCV Infected Class Member. The decision of the Review Committee stated, in part, as follows:

2. Transfusion

[...]

Establishing Transfusion

In this review, there is clear evidence, specifically a transfusion record, that the Applicant received two units of white blood cells at [Hospital “A”] when he was a patient there in 1974. There is no contradictory evidence to this fact on this file. The evidence is sufficient to establish that the Applicant received blood products in [the province] and the Review Committee finds, in the absence of any

contradictory evidence, that the Applicant was the recipient of blood products in [the province].

[...]

Did the Applicant contracted HCV through a transfusion?

In this review, there is evidence that tracebacks of the two units of white blood cells received by the Applicant was not possible. The form completed by Canadian Blood Services in May 1995 is clear on this issue. Accordingly, it cannot be conclusively determined if the blood products which the Applicant received came from a donor or donors with HCV.

[...]

I) the absence of other risk factors as a source of HCV

During his telephone interview, this Applicant said that he had used intravenous drugs at the age of 17 without sharing needles. There is no evidence on this file that contradicts the Applicant's statement that he did not share needles.

The expert medical opinion relied on by the Program Office leads to the statement from that office that the risk of contracting Hepatitis C through intravenous drug use is ten to fifty times greater than the risk of contracting the infection through a blood transfusion or the administration of blood products. It appears from the scientific evidence that this statement must be tempered by other factors including this time frame of the receipt of blood or blood products.

A document entitled Epidemiology of Transfusion-Associated Hepatitis C Virus Infection in Ontario, 1960-1985 by Dr. Robert Remis which is in the Reference List cites figures for the acquisition of HCV by transfusion in the period between 1960 and 1985. According to this source transfusions were the cause of infection in 27,700 cases as compared to 13,300 from other sources. Further there is an article entitled "Prevention and Control of Hepatitis C, Guidelines and Recommendations", Health Canada: Canada Communicable Disease Report: July 1995, Volume 21S2 which states that prior to blood screening, transfusion in Canada was the most likely source of infection, ahead of even needle sharing in intravenous drug use.

II) Is the stage of the HCV consistent with the chronology of the transfusion or administration of blood or blood products as the source of the Applicant's HCV infection?

There is evidence on this file that the Applicant died in October 1999. There is no evidence with respect to the cause of death. There is no evidence with respect to the chronology of the Applicant's disease. There is evidence that transfusion for which traceback was not possible occurred in 1974 and that the Applicant's reported drug use was when he was 17 or in 1973.

The Review Committee, on the basis of the foregoing evidence, finds that there is equal probability that the Applicant contracted Hepatitis C from the blood

products he received as there is that he received the infection as a result of intravenous drug use. The benefit of the doubt is thus applicable as directed by Policy and the Review Committee finds that the Applicant contracted HCV through transfusion in the entitlement period. [Emphasis Added]

PRELIMINARY DECISION OF THE ADMINISTRATOR

[13] In a decision dated March 24, 2009, the Administrator advised the HCV Personal Representative that the application for compensation would be rejected due to the use of non-prescription intravenous drugs by the HCV Infected Class Member, unless she provided further evidence to establish eligibility on a balance of probabilities. The Administrator included a Further Evidence of First Infection Form for the HCV Personal Representative to return within thirty days.

FURTHER EVIDENCE OF FIRST INFECTION

[14] On April 17, 2009, the HCV Personal Representative signed the Further Evidence of First Infection Form indicating her intention to provide further evidence that the HCV Infected Class Member was infected with HCV for the first time by a blood transfusion.

[15] By letter dated April 18, 2009, the HCV Personal Representative indicated, among other things, that she had exhausted her search for further information to prove that the HCV Infected Class Member had contracted Hepatitis C from a blood transfusion. With respect to the question of non-prescription intravenous drug use, she stated that she had never witnessed him using intravenous drugs and could not say if he did or did not use such drugs. She included with her letter the Applicant's Reasons for Requesting a Review dated July 14, 2000 from the provincial plan application, together with a letter dated June 8, 2000 that was submitted in support of that review. She delivered no other evidence.

DECISION OF ADMINISTRATOR

[16] On February 24, 2010, the Administrator denied the application 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 the original application the documentation from the [provincial] program advised the HCV infected person had a history of Non-prescription intravenous drug use. On April 17, 2009 you signed your Further Evidence Form indicating that you wanted the six months to provide further evidence to establish on the balance of probabilities that the HCV infected person was infected for the first time with HCV by a Blood transfusion received during the Class Period. You submitted a letter confirming you did not witness your son using IV drugs as well as documents you had previously prepared for the OHCAP program. No further medical evidence was submitted.

Paragraph 5 of the Non-Prescription Intravenous Drug Protocol reads as follows:

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.

Based on the above noted Article the Administrator must reject your claim because you have not submitted sufficient evidence and the time to do so has expired.

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 AND SUBMISSIONS

[17] On March 18, 2010, the HCV Personal Representative delivered a Request for Review and specified her reasons for appealing as including her belief that the HCV Infected Class Member had “just as likely” contracted Hepatitis C from a blood transfusion as from needles. She also stated that his many admissions to hospitals and correctional institutions made him vulnerable to Hepatitis C. Finally, the case “[...] has two sides that are equal (likely and not likely)”.

[18] In a letter dated April 30, 2010, the HCV Personal Representative delivered submissions on appeal. I have carefully read and considered her submissions

ISSUE

[19] The issue to be determined on appeal is whether the Administrator erred in denying the application for compensation.

ANALYSIS

[20] In the Reasons for Decision on the appeal in Claim File 07-07727, I analysed the provisions in section 2.01 of the *Settlement Agreement* and the applicable provisions of the *Non-Prescription Intravenous Drug Use Protocol* and stated as follows:

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.

[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. [...] [Emphasis Added]

ii) *Did the Administrator err in denying the application for compensation?*

[21] I have carefully reviewed all of the evidence in the context of the eligibility requirements in subsection 2.01(3) of the *Settlement Agreement*. The evidence confirms that the HCV Infected Class Member was transfused with two units of blood in 1974 that cannot be traced. However, the decision of the provincial Review Committee indicates that the HCV Infected Class Member had admitted to using non-prescription intravenous in 1973. In granting an entitlement to benefit, the provincial Review Committee concluded that it was an “equal probability” that the HCV Infected Class Member had contracted Hepatitis C from either the blood transfusion or his use of non-prescription intravenous drugs.

[22] By virtue of subsection 2.01(3) of the *Settlement Agreement*, the HCV Personal Representative must establish on a balance of probabilities that the HCV Infected Class Member was infected with Hepatitis C as a result of a blood transfusion. In other words, she must establish that it was “more likely than not” that the HCV Infected Class Member contracted Hepatitis C from the blood transfusion than from his use of non-prescription intravenous drugs. Unfortunately, the evidence establishes an equal probability that the HCV Infected Class Member contracted Hepatitis C from either the blood transfusion or the use of non-prescription intravenous drugs. The HCV Personal

Representative therefore has failed to establish on a balance of probabilities the infection of the HCV Infected Class Member for the first time with HCV by his blood transfusions in 1974, as required by subsection 2.01(3) of the *Settlement Agreement*, and the Administrator did not err in denying the application for compensation.

iii) Compensation under another program or agreement

[23] The Claimant has received compensation under the *Red Cross Settlement* and 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.

[24] 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.¹

¹ See two recent decisions on further appeals to the Court concerning the binding nature of the provisions of the *Settlement Agreement*: Claim Files 08-15662, 08-13831 and 07-10252 dated March 25, 2010 (Chief Justice Winkler) and Claim File 07-01482 dated April 7, 2010 (Mr. Justice Pitfield).

CONCLUSION

[25] The appeal is dismissed.

"D. McGillis"

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

DATED June 22, 2010

TO: HCV Personal Representative
Fund Counsel
Administrator