

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: 07-05429

REASONS FOR DECISION

INTRODUCTION

[1] The Claimant has appealed a decision of the Administrator dated September 30, 2010, in which the application for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was approved at Disease Level 1.

FACTS

[2] On May 20, 2010, the Claimant delivered an application for compensation under the *Settlement Agreement*. Certain forms were not fully completed, and the Administrator sent a deficiency letter. On August 6, 2008, the Claimant corrected the deficiencies in the forms.

[3] In the General Information Form, the Claimant stated that he was a Primarily-Infected Person who was infected with the Hepatitis C virus through a blood transfusion received in Canada during the Class Period. He had no other risk factors for Hepatitis C and has received compensation under the *Red Cross Settlement* and a provincial plan. He was born in 1955.

[4] In the Treating Physician Form, the treating physician indicated that the Claimant was at Disease Level 1; he had treated the Claimant for four years. In “Section F – HCV

Disease Verification”, he indicated that the Claimant had no risk factors and had received blood during the Class Period.

[5] In the Blood Transfusion History, the Claimant stated that he had received a blood transfusion in the fall of 1980 for a compound fracture of the left femur.

[6] In support of the application, the Claimant delivered laboratory reports dated November 9, 2007 and April 8, 2008 indicating positive Hepatitis C antibody tests. A laboratory report dated April 9, 2008 indicated that the Hepatitis C Quantitative RNA (“PCR test”) was not detected. In other words, the Claimant did not have the Hepatitis C virus present in his blood as demonstrated by a PCR test.

[7] By letter dated August 12, 2008, the Canadian Blood services forwarded the final report for the Traceback to the Administrator. The Transfusion Summary stated, among other things, that the Claimant had received five units of blood in September and November 1980.

DECISION OF THE ADMINISTRATOR

[8] In a decision dated September 30, 2008, the Administrator approved compensation for the Claimant at Disease Level 1 in the amount of \$8,453.00 and added \$170.92 for indexation. It also subtracted \$7,600.00 for the *Red Cross Settlement*, a pro-rated reduction required by the *Settlement Agreement*. The final amount of compensation approved for the Claimant was \$1,023.92.

REQUEST FOR REVIEW

[9] On January 6, 2009, the Claimant delivered a Request for Review. In a lengthy letter that accompanied the Request for Review, he explained in detail the devastating

effects of his illness and its daily consequences. He noted that he was infected through no fault of his own. He also stated, among other things, that the difference in compensation between Disease Level 1 and 2 was “grossly unfair”.

SUPPLEMENTARY EVIDENCE AND SUBMISSIONS

[10] The Fund Counsel gave several extensions of time to the Claimant for the delivery of supplementary evidence and submissions.

[11] In February 2010, the Claimant delivered a letter in which he explained, among other things, that he contracted Hepatitis A, B and C as a result of blood transfusions received for treatment following a motor vehicle accident. He stated that his illness has led to a very lonely life. He also delivered a laboratory report dated December 17, 2009 confirming positive tests for Hepatitis A, B and C. However, it did not indicate that the Claimant had a positive Hepatitis C PCR test.

[12] The Fund Counsel provided further extensions of time to the Claimant.

[13] On October 18, 2010, the appeal file was received by the Appeals Officer.

ISSUE

[14] The issue to be determined is whether the Administrator erred in approving compensation for the Claimant as a fixed payment for Disease Level 1.

ANALYSIS

i) Compensation provisions in Section 2.04 of the Settlement Agreement

[15] In the Reasons for Decision on the appeal in Claim File 07-05086, I analysed the provisions governing the compensation payable to an HCV Infected Class Member, such as the Claimant, and stated as follows:

[7] Article Two of the *Settlement Agreement* contains the framework governing the compensation process for HCV Infected Class Members, including the eligibility requirements in section 2.01 and the provisions for the payment of compensation in section 2.04. The expression “HCV Infected Class Member” is defined in section 1.01 as meaning “... collectively Primarily-Infected Class Members and Secondarily-Infected Persons”.

[8] In the present case, the Claimant satisfied the eligibility requirements for a Primarily-Infected Class Member under section 2.01 of the *Settlement Agreement* by establishing, among other things, that she was infected with Hepatitis C by Blood received in Canada during the Class Period. As a result, she became an “HCV Infected Class Member”, as defined in section 1.01. As soon as the Administrator made the decision to accept her claim, she became an “Approved HCV Class Member”, as defined in section 1.01, entitled to compensation in accordance with the provisions in section 2.04. For the purposes of the present appeal, the relevant parts of section 2.04 state as follows:

2.04 Compensation to Approved HCV Infected Class Members

- (1) Each Approved HCV Infected Class member who is alive will be paid compensation as set out in the compensation grid attached as Schedule C1 to this Agreement in accordance with the Approved HCV Member’s year of birth and Disease Level, subject to the deductions provided in this Agreement. [Emphasis Added]
- (2) Disease Level for the purposes of this Agreement will be determined as follows: [...]
 - (a) “Disease Level 1” means the HCV Infected Class Member has a positive HCV Antibody Test. [...]

Subsection 2.04(2) also specifies the requirements for Disease Levels 2 to 6.

[9] The deductions provided under the *Settlement Agreement* are specified in section 5.02. The deduction required for an Approved HCV Class Member who has received compensation under the *Red Cross Settlement* is outlined in subsection 5.02(1) in the following terms:

5.02 Deductions

- (1) 8/11ths of the amount that has been paid to or on behalf of an Approved HCV Infected Class Member pursuant to the Red Cross Settlement as compensation for being infected with HCV will be deducted from the compensation paid to or on behalf of that Approved HCV Class Infected Member under Articles Two and Three of this Agreement.

[10] By virtue of the wording of subsection 2.04(1), Schedule C1 is incorporated by reference and forms part of the *Settlement Agreement*. Schedule C1 is entitled “Compensation to Alive HCV Infected Class Members” and outlines a grid of lump sum compensation payments for Disease Levels 1 to 6 for the years of birth from 2016 to and including 1900 or earlier. The compensation grid in Schedule C1 is also prefaced by the following words:

These lump sum present values are to be reduced by 8/11ths of the compensation received from the Red Cross. In addition to these amounts, compensation for Past Economic Losses may be payable.

[11] A review of subsection 2.04(1) confirms that an Approved HCV Infected Class Member must be "... paid compensation as set out in the compensation grid attached in Schedule C1 ... in accordance with the Approved HCV Infected Class Member's year of birth and Disease Level, subject to the deductions provided in [the *Settlement Agreement*]". Furthermore, where the Approved HCV Infected Class member has received compensation under the Red Cross Settlement, subsection 5.02(1) requires the imposition of a deduction of 8/11ths of that amount. The provisions in subsections 2.04(1) and 5.02(1) are mandatory in nature and give the Administrator no discretion to use any other method, means or criteria to decide the amount of compensation to be paid to an Approved HCV Infected Class Member. In other words, the Administrator can only approve compensation in the amount specified in Schedule C1, as determined by the year of birth and Disease Level of the Approved HCV Infected Class Member, and as reduced by 8/11ths of the amount of any monies paid under the *Red Cross Settlement*. [Emphasis Added]

ii) Did the Administrator err in approving compensation at Disease Level 1?

[16] The evidence establishes that the Claimant had a positive Hepatitis C Antibody test. As a result, by virtue of paragraph 2.04(2)(a) of the *Settlement Agreement*, he must be categorized at Disease Level 1 for the purposes of the payment of compensation. The compensation grid in Schedule C1 provides that the lump sum payment for an Approved HCV Infected Class Member at Disease Level 1 who was born in 1955, such as the Claimant, is in the amount of \$8,453.00, plus indexation. However, the Administrator was required by subsection 5.02(1) to reduce the lump sum "by 8/11ths of the compensation received" from the *Red Cross Settlement*. The Administrator therefore did not commit an error in approving a lump sum payment of \$8,453.00, together with indexation in the amount of \$170.92, and in reducing that amount by 8/11ths of the compensation received from the *Red Cross Settlement*, namely \$7,600.00, for a final total of \$1,023.92. Indeed, the Administrator was obliged by the terms of the *Settlement Agreement* to approve compensation for the Claimant in exactly that amount.

[17] Although I fully understand the frustration on the part of the Claimant concerning the amount of compensation to which he is entitled, it is 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. Two recent decisions delivered on further appeals to the Court have underscored the binding nature of the provisions of the *Settlement Agreement*. In the decision on further appeal to the Court in Claim Files 08-14662, 08-13831 and 07-10252 dated March 25, 2010, Chief Justice Winkler dismissed the appeals and concluded that the estates of deceased Family Members were not entitled to compensation. He stated, in part, as follows:

A global settlement fund has been negotiated by the representative plaintiffs. The manner in which that fund is apportioned amongst the class members is a product of compromise. This is an approach consistent with the established principle that the settlement doesn't have to afford perfect or complete compensation to each and every class member but rather, must be "fair, reasonable and in the best interests of the class" as a whole. Within that context, it is considered acceptable to draw reasonable distinctions between those within the class in regard to the entitlement to, or quantum of, compensation.

In the decision on further appeal to the Court in Claim File 07-01482 dated April 7, 2010, Mr. Justice Pitfield dismissed an appeal concerning the amount of compensation awarded and stated, in part as follows:

[6] In substance, the Claimant disagrees with the formula by which compensation is to be quantified in accord with the [*Settlement Agreement*]. The Claimant does not dispute the manner in which the Administrator applied the formula to his circumstances.

[7] The [*Settlement Agreement*] was the result of negotiation between plaintiffs who were representative of all Class members, and the defendant, which was the Government of Canada. The [*Settlement Agreement*] was submitted to the Courts of British Columbia, Ontario and Quebec for approval.

[8] In British Columbia, the court was afforded the benefit of submissions of counsel for both the Class and the defendant with respect to the fairness of the settlement. The court was also provided with submissions of various members of

the class, some of whom opposed the settlement and some of whom supported it. At the conclusion of the hearing the court concluded that the settlement was fair and reasonable in all of the circumstances and ordered that it be approved.

[9] A settlement of this kind in question cannot be expected, nor is it intended, to produce a perfect result. It is intended to produce a result that is fair and reasonable having regard to the interests of the Class generally, the interests of the defendant, and all of the circumstances surrounding the issues in the litigation.

[10] It is not now open to the Administrator, the Appeals Officer or this Court to depart from the terms of the [*Settlement Agreement*] which, as they pertain to this Claimant, have been accurately interpreted and applied by the Administrator.

CONCLUSION

[18] The appeal is dismissed.

"D. McGillis"

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

DATED November 1, 2010

TO: Claimant
Fund Counsel
Administrator