

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 FILES: 10-20951 and 10-20959

REASONS FOR DECISION

INTRODUCTION

[1] The Claimants have each appealed a decision of the Administrator dated October 4, 2010, in which the application for compensation as a Family Member under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied on the basis that it was not made within the time period prescribed in subsection 4.01(1). The same evidence was delivered in support of both appeals.

FACTS

[2] On August 21, 2009, the primary application made by the HCV Infected Class Member was approved.

[3] On September 8, 2010, counsel delivered an application for compensation for each of the Claimants under the *Settlement Agreement* as a sibling of an HCV Infected Class Member. The Claimants live in the United States of America.

DECISION OF THE ADMINISTRATOR

[4] In decisions dated October 4, 2010, the Administrator denied the applications for compensation on the basis that each Claimant had not delivered the application for compensation within the one year time period prescribed in subsection 4.01(1) of the *Settlement Agreement*. In the decisions, the Administrator stated, in part, as follows:

You applied for Family Member compensation as the Sibling of an HCV Infected-Class Member. As noted previously, in order to be eligible for compensation you must deliver your application within one year after the date of approval of the HCV Infected Class Member's Application or within one year of the claimant attaining the age of majority, whichever is the last event to occur. The HCV Infected Class Member's claim was approved on August 21, 2009 and your application was delivered to the Administrator on September 8, 2010, which is more than one year after the Approval of the Primary Claim. Based on this the Administrator has no choice but to reject your claim as the eligibility deadline has passed. [Emphasis Added]

REQUEST FOR REVIEW

[5] On November 2, 2010, counsel for the Claimants wrote, signed and delivered a Request for Review for each Claimant. Counsel specified the reasons for appealing as follows:

I was not made aware of when the Application for my late sister was accepted by the Plan. I filed my forms promptly when I was made aware and given that I live so far away they took longer to arrive.

I am informed that the Plan was told that the siblings would be filing claims and hope that this will be sufficient to allow my claim.

SUPPLEMENTARY EVIDENCE AND SUBMISSIONS

[6] By letter dated December 30, 2010, counsel for the Claimants delivered written submissions, together with various documents. For the purposes of the appeal, it is unnecessary to make reference to any of the documents. The written submissions of counsel stated as follows:

FACTS:

1. The late [name deleted – HCV Infected Class Member], died as a result of contracting Hep C from a blood transfusion during surgery. She learned about her condition in the late 1990s when she received notice from the hospital to be tested. After the testing her results were positive. She was in the pre-1986 group. She underwent treatment in [name of city and province deleted], however it was determined that she was not a good candidate for a liver transplant. Her condition worsened and she ultimately died before this settlement was put in place.
2. Her claim to the Fund was accepted by letter dated August 21, 2009.

3. Her spouse, [name deleted], who is in his 80s, is not in good health (he has a pacemaker) and he does not speak English. He and his son, [name deleted], were informed of the decision on Thursday, September 3, 2009, and provided with a copy of the notification letter. [The HCV Infected Class Member] had fairly good command of the English language but her husband speaks Portuguese. The spouse is the Executor and beneficiary under the Will.

4. Prior to this time, in addition to submitting documentation pertaining to the main claim, at least one letter had been sent to notify the Fund of the potential claimants and mentioned specifically that there would be siblings presenting claims. See letter attached dated January 16, 2009, at Tab 1.

5. As more documentation was submitted other letters noted the dependent claims that were to be filed and mentioned the siblings. See letters dated September 9 and 22, 2009 and letter dated November 6, 2009, at Tabs 2, 3 and 4.

6. On November 6, 2009, a letter was sent to the family of the [the HCV Infected Class Member] requesting the names of the siblings and their addresses.

7. The siblings do not live in [City "A"] and in fact, the majority of them live in [name of state deleted], U.S.A. The contact was with [the HCV Infected Class Member] and in point of fact, she was the person who had handled the family business.

8. The siblings are elderly and did not keep in touch with the spouse or with the children of [the HCV Infected Class Member]. That is not to say that there is hostility, but there is not regular contact.

9. The names of the surviving siblings were provided in or about January 2010 and a contact was given to obtain the current addresses. This was [name deleted] who was a sister-in-law of [the HCV Infected Class Member]. She, in turn, spent 3-4 months in Portugal in the spring of 2010 and so it was not possible to reach her immediately.

10. I did not, for reasons explained later get in touch with her until July and it was not until August when finally I received the addresses, on August 6, 2010.

11. On August 11, 2010, a letter was sent to the siblings of [the HCV Infected Class Member]. As can be noted from the letter attached at Tab 5 all but one of the surviving siblings reside in [name of state deleted].

12. This letter represents the first notice to the siblings of their right to make a claim. And, while it asks for them to react quickly, it contains some inaccuracies and does not advise that the claim will be denied if it is not filed in that time line.

13. It should also be noted that [the Claimant] is over 80 years of age.

14. From records that I have, I can make the following observations with respect to the siblings' claims:

[Details deleted]

15. Obviously, these siblings received very short notice and given the distance involved and work required, they dealt with the Applications in a timely fashion.

16. Second, it appears that the letter was not clearly understood. Some of them sent the letter directly to the Fund as requested and others sent it to the law firm.

17. Clearly had the letters been sent directly to the Fund, they would have met the time requirements.

Explanation for Delay

18. It is true that the addresses for the siblings were not received until August and that [name deleted – the sister-in-law referred to in paragraph 9] was away for 3-4 months in the spring of 2010, however, the true reason for the delay is more of a personal and unfortunate circumstance. It is not something that I wish to have as a part of any appeal process, but in fact, it plays a part and so I feel a need to explain.

19. Briefly, we are a small firm and this file came to me because I knew [the HCV Infected Class Member] over the years and she entrusted her family business to me and this firm for many years.

20. I did not have an articling student or a junior lawyer to assist. I share my one assistant.

21. In the fall of 2009, my mother, then 82, fell and broke her hip. As the daughter, I began many journeys to and from [City "A"] to [City "B"] to take care of my parents. My dad was then 83.

22. By January, the decision was made for them to sell their house and relocate to [City "A"]. On or about January 27th, my father suffered a cardiac arrest.

23. Once out of the hospital in February, we moved them here to [City "A"] into a temporary residence. We found permanent accommodation in May. Meantime, there were many visits to doctors, clinics, hospital, etc. Needless to say, my time was greatly compromised not to mention the emotion of it all.

24. Through May and June, things began to look like the worse had past. However, in July, my father took ill again and ended up in Intensive Care in the [City "A"] Hospital and remained there from about July 25 to September 2, 2010, when he died. This meant daily and sometimes more frequent visits to the hospital and again it was time consuming and distracting.

25. All of this can be substantiated with other evidence and of course a death certificate.

Equitable Treatment

26. All of the siblings are members of the same class. It does not seem fair or equitable for them to be treated differently.

27. There is a technical breach of the time period in that the Fund did not receive the Applications within the one year however, there is only a one day delay given when the representative of the estate had knowledge of the claim being Thursday, September 3, 2009. Therefore, one year later excluding the first day would mean that the deadline was Saturday, September 4th, 2010, and with the 6th being a holiday, this would extend the deadline to the 7th, Tuesday. Or, it is less than two weeks from when the application was received in the office, a very short period.

28. In addition, while the Fund did not have the actual forms or names, it did have notice that such claims were to be expected from early on.

29. Respectfully, had [the Claimant] submitted his claim directly to the Fund, there would not have been any reason for this appeal, but we are dealing with a person whose first language is not English and who is elderly. These are other considerations to take into account in why some of the letters were sent to the Fund and others to this firm.

30. The letter for [the Claimant] as well ought to have been transmitted by courier. Regrettably, given the date it was received, it was an exceptionally difficult time to get anything done.

31. Therefore, I submit that it would be equitable and fair for the claim of [the Claimant] to be accepted.

ISSUE

[7] Is it in the interests of justice to allow the appeal?

ANALYSIS

[8] In the written submissions, counsel gave some reasons in paragraphs 3 to 17 in an effort to excuse the delay in delivering the applications for compensation. However, she disclosed in paragraph 18 and subsequent paragraphs what she aptly described as the “true reason for the delay”. In essence, counsel was preoccupied with personal family obligations for several months. As a result, she did not advise the Claimants in a timely manner of their rights under the *Settlement Agreement* and the prescribed time period in subsection 4.01(1) for delivering an application for compensation.

[9] In Claim File 09-17723 and nine related files, I allowed the appeals in circumstances where a paralegal clerk had erroneously neglected to provide the Family Member claim forms to the claimants in a timely manner or to provide advice concerning the time limit in subsection 4.01(1) of the *Settlement Agreement*. The evidence indicated that the lawyer who employed the law clerk had handled all aspects of the claim for the HCV Infected Class Member and the family. In the decision in Claim File 09-17723, I stated, in part, as follows:

i) Interpretation of section 4.01 of the Settlement Agreement

[10] In the Reasons for Decision on the appeal in Claim File 07-10239, I analysed the provisions in Article Four of the *Settlement Agreement* governing the payment of compensation for Dependents and Family Members and stated, in part, as follows:

iii) Eligibility Requirements in section 4.01 for Compensation as a Family Member

[10] Under the terms of the judicially approved *Settlement Agreement*, a person claiming to be a Family Member must satisfy the eligibility requirements in section 4.01 in order to make a successful claim for compensation. Section 4.01 provides as follows:

4.01 Eligibility – Family Member

(1) To be eligible for Family Member compensation, a person claiming to be the Spouse, Child, Grandchild, Parent, Grandparent or Sibling of an alive HCV Infected Class Member or an HCV Infected Class Member whose death was caused by the HCV Infected Class Member's infection with HCV must deliver to the Administrator, within one year after the date of approval of an application for compensation under this Agreement by or on behalf of such HCV Infected Class Member or within one year of the claimant attaining his or her age of majority, whichever event is the last to occur, an application form prescribed by the Administrator together with:

(a) the applicable proof with respect to the HCV Infected Class Member as required by Sections 2.01 or 2.02, and 2.03, unless the required proof has been previously delivered to the Administrator; and

(b) proof that the claimant is or was the Spouse, Child, Grandchild, Parent, Grandparent or Sibling of the HCV Infected Class Member. [Emphasis Added]

[11] Subsection 4.01(1) of the *Settlement Agreement* requires, in mandatory terms, the application for compensation of a Family Member to be delivered within one year after the date of approval of an application made by or on behalf of the HCV Infected Class Member.

ii) Is it in the interests of justice to allow the appeal?

[12] The evidence in the claim file establishes that the HCV Infected Class Member was represented by a highly experienced lawyer for the purposes of the primary application for compensation under the *Settlement Agreement*. The primary application for compensation of the HCV Infected Class Member was approved on February 12, 2008. By letter dated September 15, 2009, a paralegal clerk in the office of the lawyer sent the Family Member claim forms to the HCV Infected Class Member. In the letter, she stated that the forms should be sent to the Administrator by the Family Member claimants as soon as possible with the requisite proof of relationship. Unfortunately, it appears that the paralegal clerk in the law firm made an error in calculating the date by which the Family Member claims had to be delivered in order to comply with the time period prescribed in subsection 4.01(1) of the *Settlement Agreement*. Rather than sending the letter to the HCV Infected Class Member in sufficient time to have the Family Member claims delivered by the required dates in either February or July 2009, depending upon the application that was to be made, she sent the letter in September 2009 for a deadline that she had apparently erroneously calculated as a date early in the year 2010. The HCV Infected Class Members and the Family Members had relied on the law firm for the provision of advice concerning their applications for compensation.

[13] Subsection 4.01(1) of the *Settlement Agreement* requires, in mandatory terms, a Family Member application for compensation to be delivered within one year after the date of approval of the HCV Infected Class Member's application. The Family Member application therefore had to be delivered before February 12, 2009. There is no provision in the *Settlement Agreement* to permit the Appeals Officer to extend the time for the delivery of an application for Family Member compensation.

[14] Despite the absence of a provision permitting the extension of the time period in subsection 4.01(1) of the *Settlement Agreement*, the factual circumstances of the present appeal require intervention in order to prevent a manifest injustice from occurring. Otherwise, an isolated administrative error made in the office of a highly experienced lawyer would result in severe and irreparable prejudice to the Family Members of an approved HCV Infected Class Member by preventing them from delivering their applications. The evidence in the claim file demonstrates that the Family Members had a continuing intention to pursue their applications and relied on advice given by the law firm concerning the deadline for the delivery of the applications. Furthermore, given the approval of the HCV Infected Class Member's claim, the Family Member applications are clearly meritorious and would be approved by the Administrator upon delivery of

the proof of relationship required in subsection 4.01(1) of the *Settlement Agreement*. In the circumstances, there is no prejudice to anyone other than the Family Members arising from the delay. Finally, in the absence of an intervention, the Family Members would have no other effective recourse to remedy the prejudice caused to them. Given the unusual facts, my intervention is required in the interests of justice in order to remedy an otherwise irreparable prejudice. I should add that this is a highly unusual situation and my decision in this matter is strictly limited to the facts of this case. [Emphasis Added]

[10] Although I sympathize with the personal difficulties encountered by counsel during the relevant time period, the evidence establishes that she did not advise the Claimants in a timely manner of their rights under the *Settlement Agreement* or the prescribed time period for the delivery of their applications for compensation. For the reasons delivered in Claim File 09-17723, the appeal is allowed.

[11] Before closing, I feel compelled to note that the reasons for appealing that counsel wrote and signed in the Request for Review delivered on behalf of each of the Claimants are, at a very minimum, less than completely candid when considered in light of the “true reason for the delay” given in the written submissions.

CONCLUSION

[12] The appeal is allowed. The applications for compensation as a Family Member delivered by the Claimants on September 8, 2010 shall be deemed to have been delivered within the time period prescribed in subsection 4.01(1) of the *Settlement Agreement*, and the Administrator shall consider each application on its merits.

"D. McGillis"

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

DATED February 4, 2011

TO: Counsel for the Claimants
Fund Counsel
Administrator