

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: 07-04977

REASONS FOR DECISION

[1] The Claimant has appealed a decision of the Administrator dated July 26, 2010 in which the application for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied. The Claimant, who had used non-prescription intravenous drugs, failed to satisfy the Administrator on a balance of probabilities that he was infected with Hepatitis C for the first time by a blood transfusion in Canada during the Class Period.

[2] The evidence in the medical records establishes that the Claimant developed chronic renal failure in 1983 probably due to his lengthy history of non-prescription intravenous drug use. There were several hospital records that made reference to non-prescription intravenous drug use by the Claimant. For example, the Summary Records for two hospitalizations from June 9 to 15 and June 29 to July 1, 1984 stated that the Claimant had chronic renal failure due to an interstitial nephritis, probably related to intravenous drug abuse.¹ The Summary Record for a hospitalization from July 22 to August 4, 1984 also stated that the renal failure of the Claimant “... was thought to be related to IV drug abuse” and further noted that he “... was a long time drug abuser of numerous drugs, especially Cocaine and Heroin” with a past history of hepatic dysfunction.² Approximately two years later, in 1986, the Summary Record for a

¹ See pages 419 and 421.

² See page 416.

hospitalization from March 19 to 22, 1986 stated in the “Past Medical History” that he had “[r]enal failure diagnosed in 1983 believed to be secondary to heroin and drug abuse”.³ The Summary Record for the period from April 4 to 11, 1986 noted that he had “a strong history of IV drug abuse”.⁴ Similarly, the Summary Record for a hospitalization from December 20 to 31, 1986, during which he had a renal transplant, stated that he had “... chronic renal failure on the basis of query drug abuse nephropathy” and tested negative for Hepatitis B.⁵ In a Request for Medical Consultation dated December 30, a physician outlined the past medical history of the Claimant noting that he had a liver biopsy in 1983, was an IV drug abuser and had “known hepatic dysfunction (? nonA nonB [illegible])”.⁶ Several years later, a hospital Outpatient Clinic Patient Record dated February 18, 1999 contained, among other things, the following note written by a physician during a medical examination of the Claimant:⁷

40 yr [male] Hep C + IVDU in 70’s – 80’s + Blood transfusions in 1980’s
Prev ETOH abuse – quit since '80’s [Emphasis Added]

[3] The Claimant received blood transfusions on ten occasions between July 18, 1984 and March 26, 1986.⁸ The HCV status of the donors for eight of the transfusions was negative; one donor was deceased and one could not be located.

[4] Although the Claimant admitted his non-prescription intravenous drug use in forms and other documents delivered in support of the application for compensation, he limited the period of time to the years 1980 to 1981 and indicated relatively minimal use.

³ See page 398.

⁴ See page 392.

⁵ See page 387.

⁶ See page 413.

⁷ See page 31.

⁸ See the Transfusion Summary in the Traceback at pages 28 to 29.

For example, in the General Information Form, he specified non-prescription intravenous drug use and intra-nasal drug use as two of his several risk factors for Hepatitis C and wrote “around 1980-81 or so I used cocaine intravenously about 5 times at the most”.⁹ He also admitted to using cocaine and MDA intra-nasally “a few times”. In his lengthy and unsworn affidavit, he stated that he used non-prescription intravenous drugs “for the first time around 1980 or 81”, always at home with new, sterile needles and paraphernalia.¹⁰ In a letter dated June 16, 2009, he stated, among other things, that “[a]fter high school I abused drugs and alcohol (1976 – 1982 or so) very hard”.¹¹

[5] I have considered the evidence in the file in its totality and have concluded that the hospital records constitute reliable and trustworthy evidence establishing a lengthy history of non-prescription intravenous drug use by the Claimant in the 1970’s and 1980’s. In the circumstances, the statements made by the Claimant in the affidavit and other documents limiting his non-prescription intravenous drug use to a relatively few occasions in 1980 and 1981 with new, sterile needles and paraphernalia are lacking in credibility and can be given no weight.

[6] In an opinion dated June 9, 2010, the medical specialist provided an overview of the evidence and concluded as follows:¹²

This all leads to the issue of where did he most likely acquire his hepatitis C infection. Clearly there is [sic] two units of blood in and around 1985-86 which cannot be traced and there is no question that this is a potential source of infection which cannot be proven one way or the other. The other potential source is what appears to be an extensive period of time of injection drug use. There are discrepancies in the history as the [Claimant] relates he used drugs in 1980-81 and only used needles about three times, however that has not been

⁹ See page 6.

¹⁰ See pages 49 to 51.

¹¹ See pages 73 to 77.

¹² See page 487 to 488.

reflected in the medical notes. As well, it is known that snorting cocaine, using diluents and other paraphernalia related to needle use can be associated with transmission of hepatitis C.

The claimant states that his blood work in the 80's should have been reflected if he was infected at that time but in fact that is not usually the case as many people can go 15 or more years before any damage is actually seen in the liver. Therefore on balance of probabilities it would be at least as likely that he could have acquired this infection through injection drug use or snorting drugs as through two units of blood that cannot be traced. [Emphasis Added]

[7] In denying the application for compensation, the Administrator relied upon the opinion of the medical specialist and concluded that the medical evidence did not support, on a balance of probabilities, the assertion of the Claimant that he was infected with Hepatitis C for the first time from his blood transfusions.¹³

[8] The Claimant did not deliver any supplementary evidence or submissions on appeal.

[9] Subsection 2.01(3) of the *Settlement Agreement* places the onus on the Claimant by requiring him to deliver evidence to establish on a balance of probabilities that he was infected for the first time with Hepatitis C by receiving blood. Section 4 of the *Non-Prescription Intravenous Drug Use Protocol* 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.

[10] 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, the Administrator has not erred in concluding that, on the totality of the evidence, the Claimant has failed to

¹³ See pages 490 to 491.

establish on a balance of probabilities his infection for the first time with Hepatitis C by his blood transfusions in 1984 to 1986, as required by subsection 2.01(3) of the *Settlement Agreement* and the provisions of the *Non-Prescription Intravenous Drug Protocol*. In particular, the evidence in the hospital records and the opinion of the medical specialist 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.

[11] The Claimant has made reference to the fact that he has received compensation under the *Red Cross Settlement*. 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.¹⁴

[12] The appeal is dismissed.

"D. McGillis"

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

DATED May 2, 2011

TO: Claimant
Fund Counsel
Administrator

¹⁴ 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).