

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: 09-15100

REASONS FOR DECISION

[1] The Claimant has appealed a reconsidered decision of the Administrator dated April 14, 2011, in which the application for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied on the basis that he did not provide further evidence of first infection with Hepatitis C by a blood transfusion in Canada during the Class Period.

[2] The Claimant was transfused with three units of blood on September 23, 1991, and the three donors subsequently tested negative for the Hepatitis C virus.¹ The transfusions took place when the Claimant had surgery for a fracture to the right tibia and fibula.²

[3] The Claimant indicated that self-administered tattoos from 1980 were his sole risk factor for the Hepatitis C virus.³

[3] On January 19, 2011, the Administrator denied the application for compensation on the basis that the Claimant had not delivered further evidence that he was first infected with the Hepatitis C virus by a blood transfusion received in Canada during the Class Period.⁴

¹ See the Canadian Blood Services Transfusion Summary dated May 26, 2010 at page 41.

² See the Blood Transfusion History at page 17.

³ See page 36.

⁴ See page 46.

[4] On February 4, 2011, the Claimant appealed the decision of the Administrator and stated in his reasons for appealing that the medical equipment used during his surgery could have been contaminated with the Hepatitis C virus.⁵

[5] In support of the appeal, the Claimant delivered supplementary evidence, including a letter dated March 14, 2011 from his accountant that stated as follows:⁶

This is to confirm my acquaintance with [the Claimant] and my knowledge of his past affairs. I have been [the Claimant's] accountant since the summer of 1990 whom [sic] we first met while he was working on a project at the theatre in [name of city and province deleted].

At the time my office was also located in [name of city and province deleted], and I had occasion to meet [the Claimant] several times during 1990 and through to 1993 and occasionally (at least once a year) up to the present time.

I was aware of the accident that happened to [the Claimant] in the autumn of 1991, (September, I believe), and his subsequent operation and rehabilitation.

When I met him at the end of 1991, near the beginning of December 1991 when he was recovering at his home, he was using a wheelchair and trying to get around on crutches, I believe he had some assistance with in home nursing for a while. I did notice a significant change in his overall appearance and condition from the previous summer. His complexion appeared pale with a yellowish tone that made him look quite sickly.

As a result of this condition, it seemed to leave him with a lot less energy and vigour. These are the facts as best as I can recall them from that period now over 20 years ago. If I can be of any further assistance in this matter, please do not hesitate to contact me. [Emphasis Added]

[6] In a decision dated April 14, 2011, the Administrator considered the supplementary evidence delivered on appeal and concluded that there was no evidence to establish on a balance of probabilities that the Claimant was first infected with the Hepatitis C virus by a blood transfusion. In the decision, the Administrator stated as follows:

⁵ See page 49.

⁶ The materials on appeal were not paginated.

Introduction

1. [The Claimant]'s claim was rejected because there was no evidence to support that he was First Infected with Hepatitis C from a Blood transfusion received in the Class Period. The decision was made based on the results of his Traceback Investigation. Canadian Blood Services (CBS) Final Traceback final report on file confirm that the claimant received three units of Red Cells in September 1991 and all of the donors have tested negative for HCV. There is no indication that the claimant was transfused at any other time. And the claim was rejected. As per the Rules of Appeal, Fund Counsel has forwarded the Claimant's supplementary evidence and submissions on April 4, 2011 to the Administrator for our review and response.

Summary of Supplementary Evidence

2. [The Claimant] has submitted a letter from his Accountant who has known him since 1990. In this letter it is noted that after his accident in 1991 he noticed [the Claimant] had "a lot less energy and vigour."
3. [The Claimant] also submitted documents and notes from Visiting Nursing program to support he required assistance at home following his discharge from Hospital in 1991.

Relevant Section of the Settlement Agreement

Paragraph 5.04 of the Settlement Agreement states [section deleted]

Decision of the Administrator

4. The Administrator has an obligation to assess each claim and determine whether the required proof for compensation exists. Paragraph 5.04 (1) b clearly states if no donors of class period transfusions are positive the Administrator **must reject** the claim. The supplementary evidence has been carefully reviewed and there is no evidence to support on a Balance of Probabilities the claimant was first infected with HCV by a Blood transfusion received in the class period notwithstanding the results of the Traceback. The decision to reject this claim for compensation remains unchanged.

[7] On May 2, 2011, the Claimant elected to continue with the appeal.

[8] In a letter dated May 24, 2011, the Fund Counsel summarized the supplementary submissions of the Claimant. In particular, the Claimant emphasized the absence of any reference by the Administrator in the reconsidered decision to the statement of the accountant that the Claimant had a complexion that "appeared pale with a yellowish tone that made him look quite sickly". Furthermore, the Claimant believed that he should not

be penalized due to his inability to obtain medical evidence of an episode of jaundice. Finally, he had no history of risk factors other than tattoos. In the circumstances, he “strongly believed” that the inclusiveness principle should be applied.

[9] On March 25, 2010, Chief Justice Winkler dismissed a further appeal to the Court in Claim File 07-07291, a case also involving a negative traceback. In that case, there was affidavit evidence from a former employer of the claimant concerning her jaundiced appearance after her hospitalization for childbirth. In dismissing the further appeal, Chief Justice Winkler stated as follows:

Analysis

15. Since all of the donors of the blood received by a Claimant were found to have tested negative for HCV antibodies pursuant to a traceback procedure, the Claimant can only succeed if she can prove that, notwithstanding the results of the traceback procedure, she was “infected, for the first time, with HCV by receiving Blood in Canada during the Class Period...”: section 5.04 of the Settlement Agreement. Such proof must be established on a balance of probabilities.

16. The Claimant has suggested that one of the four blood donors may have been previously infected by hepatitis C, but then recovered prior to being tested. In support of this argument, the Claimant provided the Administrator with an excerpt from a booklet of 20% of people with acute hepatitis C will spontaneously recover.”

17. The Claimant speculates that hospital records could have been mixed up or that the blood donors identified by Canadian Blood Services may not have been the actual donors. However, there is no evidence to support the Claimant’s position on this point.

18. Neither the general statement about the progress of Hepatitis C nor the Claimant’s speculation regarding the hospital records is sufficient to rebut the cogent evidence that the units of blood she received were from donors who have tested negative for Hepatitis C infection. The affidavit from the Claimant’s former employer regarding an observation about an episode of jaundice in June 1984 suffers from the same defect. It is a general statement that does not lead to the conclusion, either in itself or in consideration of the other evidence adduced by the Claimant, that she was infected with Hepatitis C through a blood transfusion in 1984.

19. Accordingly, the Claimant has been unable to establish, on the balance of probabilities, that she was infected with hepatitis C as a result of the receipt of blood during the Class Period. [Emphasis Added]

[10] For the reasons given by Chief Justice Winkler in dismissing the further appeal to the Court in Claim File 07-07291, the appeal must be dismissed. In particular, the evidence of the accountant concerning the “yellowish tone” of the Claimant’s complexion following his hospitalization is “... a general statement that that does not lead to the conclusion, either in itself or in consideration of the other evidence adduced ...” that he was infected with Hepatitis C through a blood transfusion in 1991 or at any other time. As a result, when the evidence in the file is considered in its totality, the Claimant has not established on a balance of probabilities that he was infected with Hepatitis C for the first time by the receipt of blood during the Class Period. In the circumstances, the inclusiveness principle cannot apply to assist the Claimant.

[11] The appeal is dismissed.

"D. McGillis"

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

DATED May 26, 2011

TO: Claimant
Fund Counsel
Administrator