

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: 07-00826

REASONS FOR DECISION

INTRODUCTION

[1] The Claimant has appealed a decision of the Administrator dated November 2, 2008, in which her claim for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied on the basis that she had not received Blood during the Class Period.

FACTS

[2] On October 31, 2007, the Claimant filed a claim for compensation under the terms of the *Settlement Agreement*. In the claim, she stated that she was a Primarily-Infected Person who was infected with the Hepatitis C virus during the Class Period through a blood transfusion received in Canada. However, in Form 1, she did not fill out the Section E – Blood Transfusion Information. In Form 2, the Treating Physician indicated that the Claimant was at Disease Level 3 and that her only risk factor was “blood transfusion after hysterectomy”. In the Form 5 Blood Transfusion History, the Claimant noted that she had received a blood transfusion in April 1985 for cervical cancer. The number of units of blood transfused was not specified. The Claimant has received compensation in the amounts of \$25,000.00 and \$6,900.00 under two Hepatitis C programs.

[3] In support of her claim, the Claimant delivered four hospital records dating from 1997 to 2006.

[4] The first hospital record, a Clinic Note from the Liver Clinic dictated on December 1, 1997, was a three page reporting letter from a physician at the hospital to the Claimant's family physician containing a summary of the Claimant's medical history and the results of a physical examination on that date. On the first page of the letter, the physician noted, among other things, that the Claimant "[...] was found to be seropositive for hepatitis C in September 1995". With respect to risk factors, he stated as follows:

With respect to risk factors for viral hepatitis, the [Claimant] denies previous intravenous drug use, tattoos, or acupuncture. She also denies having any sexual contact with viral hepatitis or any sexually transmitted diseases. The [Claimant] did have her ears pierced for the first time at the age of 10 apparently with a sterile needle. She also snorted cocaine at the age of 17 but denies sharing any device with others.

On the second page, the physician noted that the Claimant was receiving vaccinations against Hepatitis B. Significantly, the physician stated as follows:

The past medical history is remarkable for the following: 1) Cervical cancer requiring hysterectomy in 1984 [sic]. To the [Claimant's] knowledge, she was not transfused of blood during or after the surgery. [Emphasis Added]

The third page of the letter provided information concerning the results of the examination, future tests to be conducted and the possibility of future treatment.

[5] Another hospital record was a letter dictated on August 12, 2005 by an Advanced Practice Nurse in the Liver Clinic to the family physician concerning recommended treatment for the Claimant. She summarized some background history in the opening paragraph and stated, in part, as follows:

As you know, she has chronic Hepatitis B likely infected from blood transfusions received back in the '80's. She has Hepatitis C genotype 1 [...].

[6] The remaining two hospital records, namely reporting letters dictated on June 21, 2000 and December 7, 2006 from hospital physicians to the Claimant's family physician, contained no information concerning any blood transfusion received during surgery or otherwise.

[7] In a Deficiency Letter dated November 30, 2007, the Administrator advised the Claimant that she had not submitted all of the required information in support of her claim.

[8] On December 28, 2007, the Claimant filed certain parts of the claim forms that she had not previously completed. In the Section E – Blood Transfusion Information part of Form 1, she checked the box “No” in response to question 2 “Has the HCV Infected Class Member ever had a Blood transfusion in Canada?” In the Form 5 Blood Transfusion History, she amended her previous form by adding, among other things, the notation “when I had operation” in the column entitled “Number of Units of Blood Transfused”.

[9] On February 19, 2008, the Administrator sent a further Deficiency Letter to the Claimant.

[10] On March 17, 2008, she filed an amended Section E – Blood Transfusion Information part of Form 1. In Section E, among other things, she checked the box “Yes” in response to the question “Has the HCV Infected Class Member ever received a Blood transfusion in Canada?” She also submitted copies of two documents: the letter dictated on August 12, 2005 that she had filed previously, summarized in paragraph 5, and the reporting letter to her family physician dictated on December 7, 2006, referred to in paragraph 6 as containing no information concerning any blood transfusion during

surgery or otherwise. The latter document contained additional handwritten notes concerning her medication that were not on the copy previously filed.

[11] On April 9, 2008, the Administrator sent a further Deficiency Letter.

[12] On July 14, 2008, the Claimant filed further documents, including a laboratory report dated June 11, 2008 confirming a positive HCV antibody test.

[13] By letter dated October 6, 2008, the Canadian Blood Services forwarded the final report for the Traceback to the Administrator, including a Traceback Notice dated October 3, 2008 and a Transfusion Summary dated October 6, 2008. The Traceback Notice contained the hospital response to the request for a search of the hospital transfusion records. The hospital response indicated that the Blood Bank records and the health records were searched from 1957 to 2008; the search confirmed that “patient record was available; not transfused”. The Transfusion Summary contained the following findings:

Comments:

Timeframe searched 1957-2008.

The [hospital] reported:

Patient record available; Not transfused. [Emphasis Added]

DECISION OF THE ADMINISTRATOR

[14] In a decision dated November 2, 2008, the Administrator denied the claim for compensation. In its Reasons for Decision, the Administrator stated as follows:

The Settlement Agreement requires the Administrator to determine a person’s eligibility for class membership.

All the material that you provided to support your claim was carefully reviewed by the Administrator. You have not provided sufficient evidence to support that you or the HCV Infected Class Member received **Blood** during the Class Period, as defined in the Settlement Agreement. [Administrator’s Emphasis]

After reproducing the full definition of “Blood” in the *Settlement Agreement*, the decision continued as follows:

As you may already know, every claim for compensation is reviewed and approved based on our review of documentation confirming a series of different but related proven facts. As soon as a claim submission fails to meet one of several approved criteria as set out in the settlement Agreement, the claim must be denied. It is important to note that in some cases, the subsequent claim evaluation steps were not completed after determining the need to deny the claim. Should you opt to appeal our decision to deny your claim and should you succeed on appeal, any and all pending evaluation steps will have to be completed.

In its decision, the Administrator made no reference to any facts pertaining to the claim.

REQUEST FOR REVIEW AND SUPPLEMENTARY EVIDENCE

[15] On November 10, 2008, the Claimant filed a Request for Review, together with a letter. She also included four hospital records and a document from a pharmacy concerning her medication. Two of the hospital records were filed previously: the first page of the Clinic Note summarized in paragraph 4 and the letter from the Liver Clinic summarized in paragraph 5. The remaining two documents were a letter dated January 29, 1998 from the Liver Clinic to the Claimant’s family physician detailing the results of an ultrasound and proposed treatment, as well as an Operative Note dictated on April 19, 2000 concerning a liver biopsy. Neither those documents nor the pharmacy list of medication contained any information concerning a blood transfusion received during surgery or otherwise.

[16] On February 17, 2009, the Claimant submitted a letter, together with copies of documents from her application for compensation under a provincial plan. In her letter, she described, among other things, the severe emotional trauma that she suffered after learning of her diagnosis with Hepatitis C.

[17] In the documents from the provincial plan, an eligibility assessment form dated February 3, 1999 had a check in the box “No” to indicate that there were no “[...] records, documents or other evidence that establishes that [the Claimant] was hospitalized and received a blood transfusion or administration of blood or blood products”. However, the person who completed the form wrote a note stating that “hosp. has record of her hospitalization – do have hosp. number”. That person also wrote on the form that the Claimant described her surgery by stating that “everything was stuck down – this requires extensive dissection to separate layers”, resulting in blood loss. A letter dated February 5, 1999 to the provincial plan from the hospital where the Claimant had her surgery indicated that no record could be found of the Claimant. On March 4, 1999, a provincial employee conducted a telephone interview with the Claimant. The interviewer wrote on the questionnaire that the Claimant had undergone a hysterectomy for cervical cancer in 1985 and was given a blood transfusion during surgery for blood loss. In a decision dated March 7, 1999, an adjudicator approved the Claimant’s application for compensation under the provincial plan and stated as follows:

Description of Relevant Facts & Information

Hospital searching: no records for '85; records for '85 and '99 but no transfusion.
NCM question determines likelihood of blood loss and transfusion due to extent of surgery; no other risk factors

Physician of long standing indicates no other risk factors

Balance of Probability/Benefit of the Doubt Assessment

B of Doubt that it is more likely than not that the applicant contracted HCV through the blood supply in [the province].

[18] On March 31, 2009, the Claimant filed a lengthy letter in which she stated, among other things, that she remembered losing so much blood and thought that she was bleeding to death. After she was sent home from the hospital, she went back to work and started bleeding again; she returned to the hospital “to be packed with ice”. The only two

persons who saw her in the hospital were her late mother and her late stepfather. In addition, a nurse employed by the provincial plan told her over the telephone that “[...] there was no way that blood was not given to me”. She also questioned how the records lost in 1999 were found, and expressed her frustration at trying to prove a blood transfusion after 32 years.

ISSUE

[19] The issue to be determined is whether the Claimant is entitled to compensation under the terms of the *Settlement Agreement*.

ANALYSIS

i) Generic Reasons

[20] A review of the Reasons for Decision denying the claim for compensation confirms that the Administrator has used “generic” reasons that did not make specific reference to the circumstances of the Claimant’s case. With respect to the use of generic reasons by the Administrator, I stated as follows on the appeal in Claim File 07-03416:

[17] A decision-maker, such as the Administrator, who has the obligation to conduct an evidentiary assessment and to make a decision that affects the right of a claimant to obtain compensation has a corresponding obligation imposed by the duty of fairness to provide some reasons to explain the decision reached in each particular case. In the context of the framework established in the *Settlement Agreement*, the reasons do not have to be elaborate and, indeed, may even be very minimal in some cases. Furthermore, there is nothing to preclude the Administrator from using certain generic or standard paragraphs in a decision to explain the applicable provisions or definitions that apply to the claim. However, the decision must also contain sufficient detail to demonstrate that the Administrator understood and considered the specific circumstances of the case, as revealed in the evidence. In the decision, *R. v. Sheppard*, [2002] 1 S.C.R. 869, Binnie J., writing for the Court, explained in paragraph 24 the practical function of reasons as follows:

“... reasons justify and explain the result. The losing party knows why he or she has lost. Informed consideration can be given to grounds for appeal. Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be”.

[18] Both a claimant and the public at large have a significant interest in seeing that redress is provided under the *Settlement Agreement* in appropriate circumstances and in understanding why it is not provided in others. In the absence of reasons that explain succinctly the result in the particular case, there is no justification for the decision and no transparency in the decision-making process. In other words, reasons constitute a form of accountability and also assist a claimant in deciding whether to exercise the right of appeal. Indeed, a claimant may decide not to appeal in circumstances where the decision is properly explained.

[19] The Appeal File contained abundant evidence to justify the decision made by the Administrator. In the circumstances, I have decided that it would be simpler and more expeditious for me to prepare reasons that support the decision, rather than remitting the matter to the Administrator [See, by way of analogy, the approach taken by Rothstein J. in *Apotex v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61 at paragraph 72]. I hasten to note that the Administrator could have satisfied the requirement to provide reasons by simply adding a few succinct sentences to its decision. [Emphasis Added]

[21] In applying the principles enunciated above, I have determined that there is sufficient evidence in the Appeal File to enable me to make the necessary factual findings and that it would be simpler and more expeditious for me to do so, rather than to remit the matter to the Administrator.

ii) Section 2.01 of the Settlement Agreement and the Receipt of Blood Protocol

[22] In the Reasons for Decision on the appeal in Claim File 07-00464, I analysed the provisions in section 2.01 of the *Settlement Agreement* concerning the requirements that must be met by a person claiming to be a Primarily-Infected Class Member in order to be eligible for compensation and stated, in part, as follows:

[32] Under the terms of the judicially approved *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. In the circumstances of the present claim, the relevant provisions are subsections 2.01(1) and (2) which state 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-Quebec records demonstrating that the claimant received Blood in Canada 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. [Emphasis Added]

Subsections 2.01(1) and (2) require that a claimant must have “received Blood in Canada” in order to be eligible for compensation under the *Settlement Agreement*.

[33] The term “Blood” is defined in section 1.01 of the *Settlement Agreement* [...].

iii) *Did Claimant’s records demonstrate receipt of Blood under paragraph 2.01(1)(a)?*

[34] Under paragraph 2.01(1)(a) of the *Settlement Agreement*, a person claiming to be a Primarily-Infected Class Member, such as the Claimant, must deliver records from at least one of the prescribed categories to demonstrate that she received Blood in Canada during the Class Period.

[..]

iv) *Did Claimant deliver independent corroborating evidence under subsection 2.01(2) in conformity with applicable provisions of Proof of Receipt of Blood Protocol?*

[37] In circumstances such as the present where a person claiming to be a Primarily-Infected Class Member cannot deliver records under paragraph 2.01(1)(a) of the *Settlement Agreement* to confirm the receipt of Blood, subsection 2.01(2) permits a claimant to deliver independent corroborating evidence to establish on a balance of probabilities the receipt of Blood. Subsection 2.01(2) must be read in conjunction with the *Proof of Receipt of Blood Protocol* which contains provisions governing the evidence that may be delivered by a claimant. Since the Claimant did not receive notification as part of a Blood Recipient Notification Program, the applicable provisions of the *Proof of Receipt of Blood Protocol* are sections 5 and 6 which state as follows:

No Hospital Records or Hospital Records Do Not Confirm Receipt of Blood and The Primarily-Infected Class Member Did Not Receive Notification As Part Of A Blood Recipient Notification Program

5. Subject to paragraphs 2 and 7 and the following constraints, the Administrator may accept any evidence it deems reliable as proof on the balance of probabilities of receipt of Blood in Canada during the Class Period in satisfaction of section 2.01(2) of the *Settlement Agreement*:

a. evidence of the Primarily-Infected Class Member or a Family Member of the Primarily-Infected Class Member may not be considered. The claimant must deliver to the Administrator

corroborating evidence independent of the personal recollection of the Primarily-Infected Class Member or any person who is the Family Member of the Primarily-Infected Class Member; and

b. any evidence which is in the nature of personal recollection must be in affidavit form and must provide the following particulars:

- i. the month and year of the hospitalization(s);
- ii. the reason for the hospitalization(s); and
- iii. the basis of the affiant's personal recollection that the Primarily-Infected Class Member received Blood during the hospitalization(s).

6. Subject to paragraph 5, the following are examples of the type of evidence which the Administrator may consider:

a. an affidavit of a medical practitioner or hospital employee involved in the care of the Primarily-Infected Class Member at the time of the receipt of Blood who recalls the receipt of Blood;

b. the opinion of a medical practitioner, who practices in the specialty to which the Primarily-Infected Class Member's underlying medical condition belongs or who specializes in blood banking, that at the time the receipt of Blood took place, and given the nature of the medical treatment the Primarily-Infected Class Member underwent and/or the circumstances of the Primarily-Infected Class Member at that time, it is more likely than not that the Primarily-Infected Class Member received Blood. If such an opinion is advanced by a person who does not have personal knowledge of the Primarily-Infected Class Member's underlying medical condition, the medical treatment the Primarily-Infected Class Member underwent and the circumstances of the Primarily-Infected Class Member at the time of the receipt of Blood, there should be independent evidence of the underlying medical condition, the medical treatment and the circumstances of the Primarily-Infected Class Member at the time of the receipt of Blood other than the recollection of the Primarily-Infected Class Member or any person who is a Family Member of the Primarily-Infected Class Member;

c. an affidavit of a person who witnessed the receipt of Blood;
or

d. hospital or other medical or clinical records which describe significant blood loss or refer to a receipt of Blood at the time of the alleged receipt of Blood.

[...]

iii) Did Claimant's records demonstrate receipt of Blood under paragraph 2.01(1)(a)

[23] Under paragraph 2.01(1)(a) of the *Settlement Agreement*, a person claiming to be a Primarily-Infected Class Member, such as the Claimant, must deliver records from at least one of the prescribed categories to demonstrate that she received Blood in Canada during the Class Period. Since the Claimant delivered some hospital records to the Administrator in compliance with the requirement in paragraph 2.01(1)(a), the first question to be determined in this matter is whether those records demonstrate that she received Blood during her hospitalization for her hysterectomy in 1985.

[24] I have carefully considered all of the records adduced by the Claimant and have concluded that the evidence, when considered in its totality, does not demonstrate that she received Blood during her surgery or at any other time.

[25] With respect to the hysterectomy in April 1985, there are no hospital records in evidence concerning her hospitalization for the surgery; the only hospital records filed by the Claimant date from 1997 to 2006 and relate to her examinations, tests and treatments at a hospital Liver Clinic for her Hepatitis C.

[26] In relation to the hospital records from 1997 to 2006, the first reference to a blood transfusion is found in the reporting letter dictated on December 1, 1997 from a physician at the Liver Clinic to the Claimant's family physician, summarized in paragraph 4. On the second page of the letter, the physician made reference to the hysterectomy and stated that "[t]o [the Claimant's] knowledge, she was not transfused of blood during or after the surgery". The physician dictated the letter on the same date that she examined the Claimant. The only reasonable inference to be drawn from the hospital record is that the physician recorded a statement made by the Claimant during her medical appointment on

that date, a little over a year before the application for compensation was made under the provincial plan. In that statement, the Claimant indicated that, to the best of her knowledge, she had not received a blood transfusion during or after her surgery.

[27] A second reference to a blood transfusion appears in the reporting letter dictated on August 12, 2005 by the nurse in the Liver Clinic to the family physician, summarized in paragraph 5. In the letter, the nurse stated in the opening paragraph that the Claimant was “[...] likely infected from blood transfusions received back in the 80’s”. The nurse did not indicate the source of the information. However, when the statement in the letter is considered in its proper context, the only reasonable inference to be drawn is that the nurse simply recorded information that was given to her either by the Claimant or a physician, since no hospital or other records demonstrate a blood transfusion. The statement made by the nurse in the letter therefore does not demonstrate that the Claimant received Blood in a transfusion.

[28] Finally, the most compelling evidence concerning the question of a blood transfusion is found in the final report for the Traceback, summarized in paragraph 13. In particular, the Traceback Notice confirmed that the hospital had searched its Blood Bank and health records for the period from 1957 to 2008; the search confirmed that the Claimant’s patient record was available, but that she had not received a blood transfusion.

[29] The records delivered to the Administrator, when considered in their totality, have therefore failed to demonstrate that the Claimant received Blood during the Class Period, as required by paragraph 2.01(1)(a) of the *Settlement Agreement*.

iv) Did Claimant deliver independent corroborating evidence under subsection 2.01(2) in conformity with applicable provisions of the Proof of Receipt of Blood Protocol?

[30] In circumstances where a claimant has not delivered the evidence required by paragraph 2.01(1)(a) of the *Settlement Agreement*, subsection 2.01(2) permits the delivery of independent corroborating evidence. Section 5(a) of the *Proof of Receipt of Blood Protocol* clearly excludes from consideration evidence from a claimant and requires the delivery of “[...] corroborating evidence independent of the personal recollection of the Primarily-Infected Class Member or any person who is the Family Member of the Primarily-Infected Class Member.” Section 6 of the *Receipt of Blood Protocol* gives examples of the types of evidence which the Administrator may consider.

[31] Unfortunately, the Claimant has failed to deliver any independent corroborating evidence to prove on the balance of probabilities that she received Blood in Canada during the Class Period. Her claim cannot therefore succeed and the appeal must be dismissed.

v) Compensation under another program

[32] As indicated previously, the Claimant has applied for and received compensation under the terms of two Hepatitis C compensation plans. 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 the terms of 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.

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.

CONCLUSION

[33] The appeal is dismissed.

"D. McGillis"

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

DATED May 7, 2009

TO: Claimant
Fund Counsel
Administrator