

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: 08-10899

REASONS FOR DECISION

INTRODUCTION

[1] The Claimant has appealed the amount of compensation awarded in a decision of the Administrator dated December 10, 2008, in which his claim under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was approved on the basis that he was a Family Member of a deceased HCV Infected Class Member.

FACTS

[2] On January 28, 2008, the Claimant delivered a claim for compensation under the *Settlement Agreement* as a Dependant and a Family Member, specifically as a child over 21 of a deceased HCV Infected Class Member.¹ He had never applied for or received benefits under any other settlements related to the Hepatitis C virus.

DECISION OF THE ADMINISTRATOR

[3] In a decision dated December 10, 2008, the Administrator approved the claim for compensation in the amount of \$4,352.00, together with \$88.00 for indexation. The total amount of compensation approved was \$4,440.00.

¹ In a letter dated March 19, 2009, the Fund Counsel advised the Claimant that the Administrator had not yet processed Dependant claim applications. The Claimant decided to proceed at this time with his appeal concerning the amount of compensation awarded to him as a Family Member.

REQUEST FOR REVIEW

[4] In an extremely touching letter delivered to the Administrator on February 9, 2009, the Claimant described the tragic progress of his late father's disease and expressed his love, affection and respect for his father. He also explained the extent to which the loss of his father has had a devastating effect, financially and otherwise, on him and his mother.

[5] On March 6, 2009, the Claimant delivered a Request for Review and stated, in his reasons for appealing, that he was a minor at the time that his father fell ill. He also enclosed a letter dated March 2, 2009, in which he stated, in part, as follows:

One area where your support could be of profound assistance to me is in relation to the student loan debt that I accrued during the period of my dad's illness, including his liver transplant and eventual passing. During this whole period of time, as well as being a full-time student, I also was going back and forth to specialist's appointments, and hospital visits. I drove him to the hospital at 4 AM the day he had the liver transplant, I also was with him in the hospital during his final months. Being an only child, I understood that my dad needed lots of help and my mom needed support during and after his passing. My student loan burden is \$90,000 between the federal, provincial, and Royal Bank pieces. If you could consider using this compensation to settle this directly with them, it will help me to honor these obligations and pay these loans out.

SUPPLEMENTARY EVIDENCE AND WRITTEN SUBMISSIONS ON APPEAL

[6] On April 30, 2009, the Claimant delivered a letter entitled "Events Timeline", together with documents confirming the amounts of his student loan debts. The "Events Timeline" described events beginning in "pre-1986" to the completion of his Master's degree in 2005.

ISSUE

[7] The issue to be determined is whether the Administrator erred in approving the amount of compensation.

ANALYSIS

[8] In the Reasons for Decision on the appeal in Claim File 07-10282, I analysed the provisions in Article Four of the *Settlement Agreement* concerning the compensation process for Family Members and stated as follows:

i) Compensation Provisions in Settlement Agreement for Family Members

[6] Article Four of the judicially approved *Settlement Agreement* contains the framework governing the compensation process for Dependents and Family Members of HCV Infected Class Members. With respect to Family Members, section 4.01 prescribes the eligibility requirements that must be met to make a successful claim, and section 4.02 contains the provisions for the payment of compensation.

[7] Under the terms of subsection 4.01(1) of the *Settlement Agreement*, a person who makes a claim for compensation as a Family Member must submit the required proof to the Administrator. In circumstances where the Administrator accepts the claim, the person becomes an “Approved Family Member”, as defined in section 1.01. The definition of “Approved Family Member” provides as follows:

“Approved Family Member” means a Family Member referred to in clause (a) of the definition of Family Member as defined herein, whose Claim made pursuant to Section 4.01 has been accepted by the Administrator.

Clause (a) of the definition of Family Member in section 1.01 states as follows:

“Family Member” means:

(a) the Spouse, Child, Grandchild, Parent, Grandparent or Sibling of an HCV Infected Class Member;

[...]

unless any person described above opts out of the Class Action in which he or she would otherwise be a Class Member. [Emphasis Added]

A [Child] is therefore included in the definition of Family Member for the purposes of compensation under section 4.02.

[8] Subsection 4.02(1) of the *Settlement Agreement* mandates the creation of a notional fund called the “Dynamic Non-Segregated Family Benefits Fund” within the Compensation Fund “...for the purpose of monitoring and accounting for compensation to Approved Family Members”. Following approval of a claim, subsection 4.02(2) provides for the notional transfer of the amounts set out in Schedule C3 to that fund.

[9] Under subsection 4.02(3) of the *Settlement Agreement*, an Approved Family Member is entitled to compensation in the amounts set out in Schedule C3A. Subsection 4.02(3) states as follows:

4.02 Compensation to Approved Family Members

(3) Subject to Section 5.02(2), each Approved Family Member will be paid compensation in the amounts set out in Schedule C3A in relation to the Disease Level of the HCV Infected Class Member, or in relation to an HCV Infected Class Member whose death was caused by HCV. On payment of such compensation, a corresponding deduction will be made to the notional balance of the Dynamic Non-Segregated Family Benefits Fund.

[10] The compensation payable to an Approved Family Member under subsection 4.02(3) of the *Settlement Agreement* is expressly made subject to subsection 5.02(2), which requires a deduction of 8/11ths of any amount previously paid to or on behalf of a Family Member under the *Red Cross Settlement*, as defined in section 1.01. Subsection 5.02(2) does not apply in the present case, as the Claimant did not receive compensation under the *Red Cross Settlement*.

[11] By virtue of the wording of subsection 4.02(3), as reproduced in paragraph 9 above, Schedule C3A is incorporated by reference into and forms part of the *Settlement Agreement*. Schedule C3A is entitled “Compensation to Family Members” and outlines a grid of lump sum compensation payments for Family Members. The amounts of compensation vary depending upon whether the HCV Infected Class Member is deceased or has attained a specific disease level, as the case may be.

[12] In addition to the compensation prescribed in Schedule C3A, subsection 4.02(4) provides for a pro-rata distribution of any positive balance remaining in the Dynamic Non-Segregated Family Benefits Fund on the Termination Date of the *Settlement Agreement*. In other words, additional compensation may be paid at a later date.

[13] A review of the compensation provisions for Family Members in the Settlement Agreement confirms that subsection 4.02(3) requires the payment of compensation to an Approved Family Member in the amount set out in Schedule C3A. Subsection 4.02(3) is mandatory in nature and gives the Administrator no discretion to use any other method, means or criteria to determine the amount of compensation to be paid to an Approved Family Member. In other words, the Administrator can only approve compensation for a Family Member in the amount specified in Schedule C3A, and only that amount of compensation can be paid under the terms of the Settlement Agreement. As indicated in the preceding paragraph, there is a possibility that an additional payment may be made on the termination of the Settlement Agreement. [Emphasis Added]

ii) Application of Compensation Provisions in Present Appeal

[9] In the present appeal, the Administrator accepted the claim on the basis that the Claimant was a Family Member, namely a child over 21, of an HCV Infected Class Member whose death was caused by his infection with HCV. As a result, by virtue of subsection 4.02(3) of the *Settlement Agreement*, the Administrator was required to pay compensation to the Claimant, an Approved Family Member, in the amount specified in Schedule C3A for a child over 21 of a deceased HCV Infected Class Member, namely \$4,352.00, together with indexation that amounted to \$88.00. The Administrator therefore committed no error in approving the total payment of \$4,440.00 for the Claimant. Indeed, the terms of the *Settlement Agreement* obliged the Administrator to pay compensation to the Claimant in exactly that amount.

[10] It is important to recognize that the terms of the *Settlement Agreement* are the result of an agreement reached between the parties and approved by the Courts; neither the Administrator nor the Appeals Officer has any power or discretion to alter those terms. Unfortunately, the appeal must therefore be dismissed. However, I should note that the document entitled "Events Timeline" will be relevant for the Administrator to consider when it determines whether the Claimant is entitled to compensation as a "Dependant" under the terms of the *Settlement Agreement*.

CONCLUSION

[11] The appeal is dismissed.

"D. McGillis"

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

DATED September 14, 2009

Received September 14, 2009

TO: Claimant
Fund Counsel
Administrator