

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: 07-01673

**REASONS FOR DECISION**

**INTRODUCTION**

[1] The Claimant has appealed a decision of the Administrator dated November 18, 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 was not infected with HCV for the first time by receiving blood in Canada during the Class Period.

**FACTS**

[2] On December 3, 2007, the Claimant delivered a claim for compensation under the *Settlement Agreement*. She delivered amended forms in February and May 2008 in order to provide further information. In the claim, she stated that she was a Primarily-Infected Person who was infected with the Hepatitis C virus through a blood transfusion received in November 1996 as a result of an operation. She had no risk factors for Hepatitis C and was at Disease Level 6. The Claimant has not received compensation under another plan or agreement.

[3] By letter dated October 9, 2008, the Canadian Blood Services forwarded the final report for the Traceback (“first Traceback”) to the Administrator, together with the following documents: a Request for Records Search dated March 22, 1999 from a

previous application for compensation made by the Claimant under a provincial plan, together with accompanying hospital records, and a Transfusion Summary.

[4] The Request for Records Search was sent by the provincial plan to the hospital where the Claimant had surgery in November 1996. The information provided by the provincial plan to the hospital stated, among other things, that the Claimant was diagnosed with HCV on October 16, 1996 (before the November 1996 surgery when she had a blood transfusion). The part of the form completed by the Canadian Blood Services on April 23, 1999 indicated that records were available, but that the Claimant was positive for Hepatitis C before the date of transfusion. In the circumstances, the Traceback was not continued.

[5] The Transfusion Summary dated October 9, 2008 (“first Transfusion Summary”), stated as follows:

As per the Pre1986/Post 1990 Court approved Protocol, a UNIT NUMBER SEARCH, and a RECORDS SEARCH was requested.  
A CBS Traceback has already been completed.  
Blood Bank records were reviewed to determine transfusions.

Below are the results of the findings.

Hospital: [...]

Comments: The following products were determined to be transfused, and matched against CBS records to determine if Donor status is known.

[The provincial plan] supplied documents indicate [sic] three units were transfused in November 1996.

Due to the fact that the claimant tested Positive for HCV prior to these transfusions, (Date of Diagnosis: 1996-10-16), a complete Traceback investigation will not be performed. [Emphasis Added]

## **DECISION OF THE ADMINISTRATOR**

[6] In a decision dated November 18, 2008, the Administrator denied the claim for compensation on the basis that the Claimant was not infected with HCV for the first time

by receiving blood in Canada during the Class Period. In the decision, the Administrator stated as follows:

We are writing to advise you that your claim has been denied for compensation under the Pre-1986/Post-1990 Hepatitis C Settlement Agreement. The reasons for denial are set out below.

**Criteria for Class Membership**

The Settlement Agreement provides compensation for Class Members first infected by Blood received in Canada prior to and including December 31, 1985, or between July 2, 1990, and September 28, 1998.

**Reasons for Decision**

The Settlement Agreement requires the Administrator to determine a person's eligibility for class membership. The Administrator carefully reviewed all the material that you provided to support your claim. Since you or the HCV Infected Person were/was not infected for the first time with HCV by receiving Blood in Canada during the Class Period, your claim must be rejected.

*The information on file confirms that you were transfused in November 1996. This information was submitted to Canadian Blood Services and they advised the Administrator in a letter received November 5, 2008 that a Traceback would not be conducted as you tested positive for HCV (hepatitis C virus) in October 1996, which is before you were transfused. Therefore, it is determined that you were infected with HCV before you received Blood and a [sic] your claim must be rejected.*

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 falls to meet one of several approval 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.

**REQUEST FOR REVIEW**

[7] On December 1, 2008, the Claimant delivered a Request for Review in which she stated, among other things, that she may also have received blood during gall bladder surgery in 1980.

[8] On January 17, 2009, the Claimant signed an amended Blood Transfusion History Form in which she added that she had received a blood transfusion in December 1980 due to blood loss during an operation. By letter dated January 20, 2009, the Fund Counsel

forwarded the Form to the Administrator, together with a request that a further Traceback be conducted in light of the new information.

### **UPDATED TRACEBACK**

[9] By letter dated January 21, 2009, the Canadian Blood Services forwarded an updated final Traceback report (“updated Traceback”) to the Administrator, including a Transfusion Summary (“updated Transfusion Summary”) which repeated the earlier findings and added as follows:

#### **Update 2009-01-21**

Claimant supplied new form 5 Transfusion History and stated possible transfusions took place in 1980 at [a] Hospital. CBS site 53 has no Donor records for 1980 so any units, if discovered, could not be investigated.

CBS will not contact the hospital for a unit number search.

[10] Given the information in the updated Traceback, the Administrator advised the Fund Counsel that the status of the claim was “unchanged”, as there was no evidence that the Claimant had received blood during the Class Period.

[11] The Claimant delivered no further evidence in support of the claim for compensation.

### **ISSUE**

[12] The issue to be determined is whether the Administrator committed any error in denying the claim for compensation.

### **ANALYSIS**

[13] At the outset, it is important to recognize that the purpose of the *Settlement Agreement*, as expressed in the recitals, is to settle all outstanding claims by eligible Class Members against Canada “[...] relating to or arising from the infection of persons with

Hepatitis C through the blood system during the Class Period [...]”, on the terms agreed to by the Parties. That phrase is repeated in various sections of the *Settlement Agreement*, as well as in the Release at Schedule “A” that must be signed by a successful claimant prior to the receipt of any compensation. The clear purpose and intent of the *Settlement Agreement* is therefore to compensate only eligible Class Members who were infected with Hepatitis C through the blood system in Canada during the Class Period.

[14] In order to be eligible for compensation under the *Settlement Agreement*, a person must be a “Class Member”, which is defined in section 1.01 as follows:

**“Class Member”** means all Primarily-Infected Class Members, all Secondarily-Infected Persons, all HCV Personal Representatives and all Family Members and Dependants, but excludes all persons who opt out, or are deemed to have opted-out of a Class Action; [Emphasis Added]

A “Primarily-Infected Class Member” is defined as follows:

**“Primarily-Infected Class Member”** means collectively “Primarily-Infected Person” and “Primarily-Infected Hemophiliac”. No person is a Primarily-Infected Class Member for the purposes of this Agreement if he or she is a Primarily-Infected Person or a Primarily-Infected Hemophiliac or Secondarily-Infected Person under the 1986-1990 Hepatitis C Settlement. [Emphasis Added]

A “Primarily-Infected Person” in turn is defined, in part, as follows:

**“Primarily-Infected Person”** means a person who received Blood in Canada during the Class Period, including a person who has or had Thalassaemia Major, and who is or was infected with HCV unless:

[...]

(b) it is established on the balance of probabilities by the Administrator that such person was not infected for the first time with HCV by receiving Blood in Canada during the Class Period; [Emphasis Added]

[...]

[15] Subsection 2.01(1) of the *Settlement Agreement* contains the eligibility requirements that must be met by a person claiming compensation as a Primarily-Infected Class Member. For the purposes of the present appeal, the relevant parts of

subsection 2.01(1) 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, within three years after the death of such HCV Infected Class Member or within two years after the Implementation Date, whichever event is the last to occur, an application form prescribed by the Administrator together with:

- (a) medical, clinical, laboratory, hospital, The Canadian Red Cross Society, Canadian Blood Services or Hema-Québec records demonstrating that the claimant received Blood in Canada during the Class Period;[Emphasis Added] [...]

[16] The Claimant made a claim for compensation under subsection 2.01(1) of the *Settlement Agreement* as a Primarily-Infected Class Member. She indicated in the forms delivered in support of the claim that she was a Primarily-Infected Person who had received blood in November 1996 during surgery. However, she was diagnosed with Hepatitis C on October 16, 1996, approximately one month before receiving blood. In particular, the first Transfusion Summary indicated that a complete Traceback was not conducted in view of the fact that she had tested positive for the Hepatitis C virus before she had received the blood transfusions in November 1996.

[17] The evidence establishes on a balance of probabilities that the Claimant was not infected with the Hepatitis C virus for the first time by receiving blood during the Class Period. As a result, she is excluded from the definition of a “Primarily-Infected Person” in section 1.01 of the *Settlement Agreement* by virtue of clause (b) of the definition, reproduced in paragraph 14. Since she is not a “Primarily-Infected Person”, she does not fall within the meaning of the term “Primarily-Infected Class Member”, as defined in section 1.01, and is not a “Class Member” for the purposes of compensation under the terms of the *Settlement Agreement*. She therefore does not meet the threshold class

membership eligibility requirement in subsection 2.01(1). In the circumstances, the Administrator did not commit an error in denying the claim for compensation in its decision dated November 18, 2008.

[18] During the course of her appeal, the Claimant delivered an amended Blood Transfusion History Form indicating that she had also received blood during surgery in December 1980. However, due to the fact that no donor records were available for 1980, the Canadian Blood Services stated in the updated Transfusion Summary that any units of blood transfused, if discovered, could not be investigated. In addition, the Claimant did not deliver any hospital or other records to demonstrate that she had received blood in December 1980. In the circumstances, there was no evidence to demonstrate that the Claimant had received blood in December 1980, as required by subsection 2.01(1) of the *Settlement Agreement*, and the Administrator did not commit an error in maintaining its previous decision to deny the claim for compensation.

[19] For these reasons, the Administrator did not err in denying the claim for compensation.

## **CONCLUSION**

[20] The appeal is dismissed.

"D. McGillis"

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

DATED October 6, 2009

TO: Claimant  
Fund Counsel  
Administrator

Received October 6.09