

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: 07-00291

**REASONS FOR DECISION**

**INTRODUCTION**

[1] The Claimant has appealed a reconsidered decision of the Administrator dated November 27, 2008, in which his claim for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was approved at Disease Level 1.

[2] In a decision dated July 14, 2008, the Administrator initially denied the claim for compensation on the basis that the Claimant had not provided sufficient evidence to demonstrate that he had received blood during the Class Period. On August 8, 2008, the Claimant delivered a Request for Review in which he stated that he had received 1000 cc of blood on July 21, 1976. The Administrator reconsidered its decision and, on November 27, 2008, approved the claim at Disease Level 1.

[3] The sole issue to be determined on the appeal is whether the Administrator erred in approving compensation at Disease Level 1. Although I have carefully reviewed the entire claim file, I will only summarize the evidence relevant to the question of the appropriate disease level.

**FACTS**

[4] On October 5, 2007, the Claimant delivered a claim for compensation under the *Settlement Agreement*. In the claim, he stated that he was a Primarily-Infected Person who was infected with the Hepatitis C virus through a blood transfusion received during the Class Period. In the Treating Physician Form dated September 7, 2007, the treating physician checked the box for Disease Level 1 to indicate that the Claimant had the Hepatitis C Antibody present in his blood, as demonstrated by the HCV Antibody Test. She noted that she had treated the Claimant for 20 years.

[5] A Public Health Laboratory Report was included with the Treating Physician Form and provided test results from a blood specimen of the Claimant received on May 15, 2006. The report stated that a test for the Hepatitis C Antibody was “reactive” and that the Hepatitis C Qualitative RNA was “not tested”. The report stated as follows:

Reason for Testing: Diagnostic  
 Outbreak #:  
 Specimen Comment: -HCV RNA REQUESTED

**Test Results**

<b>Specimen</b>	<b>Received</b>	<b>Collected</b>	<b>Test</b>	<b>Result</b>
s1244432	2006/05/15	2006/05/12	HepC-Antibody CMIA	Reactive
			HepC-Qualitative RNA	Not tested

**Previous Interpreted Results**

<b>Specimen</b>	<b>Reported</b>	<b>Received</b>	<b>Collected</b>	<b>Agent</b>	<b>Interpretation</b>
s0331159	2001/05/16	2001/05/09	2001/05/04	Hepatitis C	<<< Evidence of Antibody >>>
s0297526	2001/03/09	2001/03/02	2001/03/01	Hepatitis C	LFT values, clinical and treatment required for this molecular test stored pending information

**Final Interpretation**

s1244432	Hepatitis C	Treatment or clinical information is required for HCV RNA and HBV DNA PCR testing. Please complete and return the attached information form.
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[6] The Claimant has received compensation under both a provincial plan and the *Canadian Red Cross Settlement*, respectively in the amounts of \$25,000.00 and \$10,150.00.

#### **DECISION OF THE ADMINISTRATOR**

[7] In a decision dated November 27, 2008, the Administrator approved compensation for the Claimant at Disease Level 1 in the amount of \$8,453.00 and added \$170.92 for indexation. It also subtracted \$7,381.82 for the *Canadian Red Cross Settlement*, a pro-rated reduction required by the *Settlement Agreement*. The final amount of compensation approved for the Claimant was \$1,242.10.

#### **REQUEST FOR REVIEW**

[8] On January 16, 2009, the Claimant delivered a Request for Review in which he appealed on the basis that he did not agree with the decision and was waiting for evidence concerning his “blood level”.

#### **SUPPLEMENTARY EVIDENCE**

[9] On March 9, 2009, the Claimant delivered supplementary evidence consisting of two amended pages of the Treating Physician Form, a laboratory report concerning various blood tests, a Public Health Laboratory Report and a Surgical Pathology Report.

[10] The amended Treating Physician Form consisted of a new first and last page of the form. On the first page, the treating physician checked the box for Disease Level 2 to indicate that the Claimant had the Hepatitis C virus present in his blood “[...] as demonstrated by the PCR Test performed [...]”. On the last page of the amended form, the treating physician signed her name in the “Section H – Certification By Treating Physician” part of the form and wrote the date “March 2, 2009”.

[11] The laboratory report contained the results of various blood tests. There was no information in the report that was relevant to the question of the disease level of the Claimant.

[12] The Public Health Laboratory Report dated April 23, 2009 was addressed to the treating physician and reported that the test for the Hepatitis C Quantitative RNA (the PCR Test) revealed no detectable Hepatitis C RNA. The report was stamped “Received Apr 30 2009 [treating physician]”, confirming that it was received in the office of the treating physician on that date. The Public Health Laboratory Report stated as follows:

Reason for Testing: Diagnostic  
 Outbreak #:  
 Specimen Comment: -HCV RNA REQUESTED

**Test Results**

<b>Specimen</b>	<b>Received</b>	<b>Collected</b>	<b>Test</b>	<b>Result</b>	<b>Comment</b>
s1896910	2009/04/21	2009/04/20	HepC-Quantitative RNA HepC-Genotype	Not detected	

**Previous Interpreted Results**

<b>Specimen</b>	<b>Reported</b>	<b>Received</b>	<b>Collected</b>	<b>Agent</b>	<b>Interpretation</b>
s1877591	2009/03/17	2009/03/13	2009/03/12	Hepatitis C	No detectable Hepatitis C RNA (test detection limit is 15 IU/ml). Note: Results are accurate provided serum was separated and frozen within 4 hours of collection.
s1244869	2006/05/30	2006/05/17	2006/05/12	Hepatitis C	Patient previously tested. Please see comments.
s1877591	2009/03/17	2009/03/13	2009/03/12	Hepatitis C Genotype	Sample not tested. Refer to comment.

**Final Interpretation**

s1896910	Hepatitis C	No detectable Hepatitis C RNA (test detection limit is 15 IU/ml). Note: Results are accurate provided serum was separated and frozen within 4 hours of collection.	
	Hepatitis C Genotype	Sample not tested. Refer to comment.	Genotyping test requires detectable viral load.

[13] The Surgical Pathology Report detailed the findings concerning a biopsy of a specimen of the Claimant's liver received in July 2009. The interpretation given by the pathologist stated as follows:

Comment / Interpretation:

the most striking abnormality is steatosis which is predominantly microvesicular: the most common cause of microvesicular steatosis would likely be drugs, both prescription and non-prescription and including ethanol; usual characteristic features of hepatitis C are not really evident though some of the change here could be secondary to hepatitis C; malnourishment, for instance with severe IBD could cause steatosis; clinical correlation is required in determining the etiology of the changes in the biopsy

**RECONSIDERED DECISION DATED SEPTEMBER 9, 2009**

[14] By letter dated September 9, 2009, the Administrator sent the reconsidered decision to the Claimant in which it maintained the earlier decision awarding compensation at Disease Level 1. The reconsidered decision of the Administrator stated as follows:

Introduction

1. [The Claimant's] claim for compensation was approved at Disease Level 1 November 27, 2008. On January 19, 2009 he submitted a Request for Review indicating he did not agree with the decision on the claim and indicated he was waiting for a "blood level". As per the Rules of Appeal, Fund Counsel has forwarded the Claimant's supplementary evidence and submissions on August 20, 2009 to the Administrator for review and Reconsideration of the Disease level compensation on the claim.

Summary of Supplementary Evidence

2. Evidence submitted by the Claimant was the first and last page of a Treating Physician Form completed and signed by [the Treating Physician], [the Claimant's] Family Doctor. In this form [the Treating Physician] checked off the box to indicate that [the Claimant] was at Disease level 2. There were HCV RNA test results submitted with the form dated March 17, 2009 and April 21, 2009. The claimant also submitted a Liver biopsy result dates July 9, 2009.

### Administrator's Decision

The Administrator has an obligation to assess each claim and determine whether the required proof for compensation exists. The Pre1986/Post1990 Hepatitis C Settlement HCV Antibody and PCR test protocol states as follows:

*1.01 A person must have either an HCV Antibody Test or a PCR Test to qualify for compensation as an HCV Infected Class Member. An HCV Antibody Test qualifies a person at Level 1. A PCR Test qualifies a person at Level 2. Either test coupled with the medical evidence called for at Levels 3-6 qualifies the person at the appropriate level.*

The CAP further states

*3.01 The PCR Test reveals the **presence of HCV** in the blood which demonstrates ongoing infection.*

*3.02 The testing methodology is most commonly referred to as PCR testing (polymerase chain reaction) but it may also be called **RNA detection** (ribonucleic acid) or NAT (nucleic acid testing). (emphasis ours)*

The Administrator has reviewed the Supplementary evidence of the claimant. The Treating Physician checked off Disease level 2; however the HCV RNA test results submitted indicated that the HCV RNA was not detected. Based on these results the Administrator is unable to assess the claim at Disease level 2. The status of [the Claimant] claim remains at Disease level 1.

### **SUPPLEMENTARY SUBMISSIONS ON APPEAL**

[15] On October 26, 2009, the Claimant delivered to the Fund Counsel the following submissions on appeal:

Everything you have asked for, I have submitted to you concerning this blood transfusion that I received 33 years ago for an operation of Crohn's disease. As a result of this tainted blood transfusion, I have lost my job, my wife cannot have anymore [sic] children, and been forced to live with my widowed mother who is a senior as I cannot afford anything else.

Also I now have heart problems and a second heart attack from all the stress that I am now under, and all the medications that I am now forced to take.

It is getting to the point that I no longer know what to do, or where to turn as my finances are now nil. That \$1200.00 was not acceptable, as it does not cover all my expenses.

I have sent you all the information required, but do not know where it disappeared to.

Also I am now suffering from my third attack from Crohn's disease where there is NO cure, for "Hepatitis C".

Hoping you can help me further on these problems.

## ISSUE

[16] The issue to be determined is whether the Administrator erred in approving compensation for the Claimant at Disease Level 1.

## ANALYSIS

### *i) Compensation provisions in Section 2.04 of the Settlement Agreement*

[17] In the Reasons for Decision on the appeal in Claim File 07-05086, I analysed the provisions governing the compensation payable to an HCV Infected Class Member, such as the Claimant, and stated as follows:

[7] Article Two of the *Settlement Agreement* contains the framework governing the compensation process for HCV Infected Class Members, including the eligibility requirements in section 2.01 and the provisions for the payment of compensation in section 2.04. The expression "HCV Infected Class Member" is defined in section 1.01 as meaning "... collectively Primarily-Infected Class Members and Secondarily-Infected Persons".

[8] In the present case, the Claimant satisfied the eligibility requirements for a Primarily-Infected Class Member under section 2.01 of the *Settlement Agreement* by establishing, among other things, that she was infected with Hepatitis C by Blood received in Canada during the Class Period. As a result, she became an "HCV Infected Class Member", as defined in section 1.01. As soon as the Administrator made the decision to accept her claim, she became an "Approved HCV Class Member", as defined in section 1.01, entitled to compensation in accordance with the provisions in section 2.04. For the purposes of the present appeal, the relevant parts of section 2.04 state as follows:

### **2.04 Compensation to Approved HCV Infected Class Members**

- (1) Each Approved HCV Infected Class member who is alive will be paid compensation as set out in the compensation grid attached as Schedule C1 to this Agreement in accordance with the Approved HCV Member's year of birth and Disease Level, subject to the deductions provided in this Agreement. [Emphasis Added]
- (2) Disease Level for the purposes of this Agreement will be determined as follows: [...]

- (a) “Disease Level 1” means the HCV Infected Class Member has a positive HCV Antibody Test. [...]

Subsection 2.04(2) also specifies the requirements for Disease Levels 2 to 6.

[9] The deductions provided under the *Settlement Agreement* are specified in section 5.02. The deduction required for an Approved HCV Class Member who has received compensation under the *Red Cross Settlement* is outlined in subsection 5.02(1) in the following terms:

**5.02 Deductions**

(1) 8/11ths of the amount that has been paid to or on behalf of an Approved HCV Infected Class Member pursuant to the Red Cross Settlement as compensation for being infected with HCV will be deducted from the compensation paid to or on behalf of that Approved HCV Class Infected Member under Articles Two and Three of this Agreement.

[10] By virtue of the wording of subsection 2.04(1), Schedule C1 is incorporated by reference and forms part of the *Settlement Agreement*. Schedule C1 is entitled “Compensation to Alive HCV Infected Class Members” and outlines a grid of lump sum compensation payments for Disease Levels 1 to 6 for the years of birth from 2016 to and including 1900 or earlier. The compensation grid in Schedule C1 is also prefaced by the following words:

These lump sum present values are to be reduced by 8/11ths of the compensation received from the Red Cross. In addition to these amounts, compensation for Past Economic Losses may be payable.

[11] A review of subsection 2.04(1) confirms that an Approved HCV Infected Class Member must be “... paid compensation as set out in the compensation grid attached in Schedule C1 ... in accordance with the Approved HCV Infected Class Member’s year of birth and Disease Level, subject to the deductions provided in [the *Settlement Agreement*]”. Furthermore, where the Approved HCV Infected Class member has received compensation under the Red Cross Settlement, subsection 5.02(1) requires the imposition of a deduction of 8/11ths of that amount. The provisions in subsections 2.04(1) and 5.02(1) are mandatory in nature and give the Administrator no discretion to use any other method, means or criteria to decide the amount of compensation to be paid to an Approved HCV Infected Class Member. In other words, the Administrator can only approve compensation in the amount specified in Schedule C1, as determined by the year of birth and Disease Level of the Approved HCV Infected Class Member, and as reduced by 8/11ths of the amount of any monies paid under the *Red Cross Settlement*. [Emphasis Added]

[18] As indicated in the preceding quotation, paragraph 2.04(2)(a) of the *Settlement Agreement* states that “Disease Level 1 means that the HCV Infected Class Member has a positive HCV Antibody Test”. Disease Level 2 is defined in paragraph 2.04(2)(b) of the *Settlement Agreement* as follows:

**2.04**

[...]

(2) Disease Level for the purpose of this Agreement will be determined as follows: [...]

(b) “Disease Level 2” means the HCV Infected Class Member has a positive PCR Test”.

[19] The term “PCR Test” is defined in section 1.01 of the *Settlement Agreement* as follows:

“**PCR Test**” means a polymerase chain reaction test result from a commercially available assay acceptable to the Administrator demonstrating that HCV is present in a sample of blood of the person;

[20] The evidence concerning the disease level of the Claimant consists of the two Public Health Laboratory Reports and the Treating Physician Form, both in its original form and as amended. The first Public Health Laboratory Report, reproduced in paragraph 5, states that a specimen from the Claimant received on May 15, 2006 was reactive for the Hepatitis C Antibody; in other words, the Claimant tested positive for the Hepatitis C Antibody. However, the second Public Health Laboratory Report, dated April 23, 2009 and reproduced in paragraph 12, states that a specimen from the Claimant, received on April 21, 2009, did not reveal any detectable Hepatitis C RNA; in other words, the PCR Test was negative. Although the treating physician originally stated in the Treating Physician Form signed on September 7, 2007 that the Claimant was at Disease Level 1, she indicated in an amended form signed on March 2, 2009 that he was at Disease Level 2. In particular, she checked the box for Disease Level 2 to indicate that

the Claimant had the Hepatitis C virus present in his blood “as demonstrated by the PCR Test performed”. However, the Public Health Laboratory Report concerning the results of the PCR Test was dated April 23, 2009 and was stamped as having been received by the treating physician on April 30, 2009, almost two months after she signed the amended Treating Physician Form indicating that the Claimant was at Disease Level 2. The statement of the treating physician in the amended Treating Physician Form that the Claimant was at Disease Level 2 on the basis of the PCR Test is not supported by the evidence in the Public Health Laboratory Report dated April 23, 2009 and is entitled to no weight. The evidence, when considered in its totality, therefore establishes that the Administrator did not commit an error in determining that the Claimant was entitled to compensation at Disease Level 1.

[21] The Administrator also did not commit an error in awarding compensation in the amount of \$1,242.10. The compensation grid in Schedule C1 provides that the lump sum payment for an Approved HCV Infected Class Member at Disease Level 1 who was born in 1958, such as the Claimant, is in the amount of \$8,453.00, plus indexation. However, the Administrator was required by subsection 5.02(1) of the *Settlement Agreement* to reduce the lump sum “by 8/11ths of the compensation received” from the *Canadian Red Cross Settlement*. The Administrator therefore did not commit an error in approving a lump sum payment of \$8,453.00, together with indexation in the amount of \$170.92, and in reducing that amount by 8/11ths of the compensation received from the *Canadian Red Cross Settlement*, namely \$7,381.82, for a final total of \$1,242.10. Indeed, the Administrator was obliged by the terms of the *Settlement Agreement* to approve compensation for the Claimant in exactly that amount.

[22] Although I fully understand the frustration on the part of the Claimant concerning the amount of compensation to which he is entitled, it is 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. Unfortunately, the appeal must therefore be dismissed.

### CONCLUSION

[23] The appeal is dismissed.

"D. McGillis"

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

DATED January 7, 2010

TO: Claimant  
Fund Counsel  
Administrator