



IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

*Pre-1986/Post-1990 Hepatitis C
Settlement Agreement and its Protocols
Re: Claim No. 09-15731,
2011 BCSC 58*

Date: 20110120
Docket: C965349
Registry: Vancouver

**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*
*Re: Claim No. 09-15731***

Before: The Honourable Chief Justice Bauman

Reasons for Judgment

Counsel for the Claimant:

Self-Represented

Place and Date of Judgment:

Vancouver, B.C.
20 January 2011

*Redaction accepted
1 Feb. 2011*

A Bauman CJSC BC

[1] The Claimant appeals from a determination that she is not entitled to benefits under the Pre-1986/Post-1990 Hepatitis C Settlement Agreement and its Protocols (the "Settlement Agreement").

[2] From _____, the Claimant was married to an HCV Infected Class Member. _____ the Claimant submitted a claim to the Administrator seeking compensation as a Family Member of a HCV Infected Class Member under the Settlement Agreement. The claim was denied by the Administrator on the basis that the Settlement Agreement does not provide compensation to former Spouses. The denial was upheld on appeal by the Appeals Officer.

Facts

[3] The Claimant has submitted various documents, mainly in the form of letters addressed to the Administrator, outlining the adversity she experienced as a result of her former husband's HCV infection and treatment. Her submissions are summarized below.

[4] The Claimant's former husband _____ he received tainted blood through a blood transfusion. He was eventually diagnosed with Hepatitis C in 1998.

[5] Following the diagnosis, the husband underwent drug treatment on Interferon. The drug treatment was expensive, and it was not covered under any medical plan. This created considerable financial hardship for the family. Further, the physiological effects of the drug treatment were significant: the husband was left physically exhausted, unable to work, and severely depressed.

[6]

[7] Throughout her husband's treatment for his HCV infection, the Claimant worked fulltime, looked after him ; the strain on their relationship eventually took its toll; In a letter to the Administrator, , the Claimant summarized her position:

Hep-C and the prescribed treatment were directly responsible for the deterioration and eventual termination of our marriage. I feel that I am being penalized; to deny me Compensation because I am no longer a spouse is extremely unjust. Everything that I have been through with [the HCV Infected Class Member], standing by him all these years, through all his illnesses, I have proven that I have been there through all and still am. I have his support and the support of his family

We are still very close. I will always be supportive of him.

[8] The Claimant has the support of her former husband and his family on her claim, as evidenced by a letter to the Administrator dated October, 2009. It states:

We [the family of the HCV Infected Class Member], feel it is unjust that you have denied [the Claimant], the Spousal Compensation. We were advised by Klein-Lyons that [the Claimant] could be compensated, as she was married to [the HCV Infected Class Member] throughout the every stage of his Hep-C infection, illness, and treatment.

We the undersigned feel that she should be entitled to compensation, as the marriage did not dissolve until after treatment was completed and [the HCV Infected Class Member] returned to work and normal activities.

Analysis

[9] Pursuant to section 18.03, the Settlement Agreement constitutes the entire agreement between the Parties with respect to the subject matter, and it cancels and supersedes any prior or other understandings and agreements between the Parties. Accordingly any claim for compensation, including the current claim under consideration, must fall within the terms of the Settlement Agreement.

[10] The Claimant seeks compensation pursuant to subsection 4.01(1) of the Settlement Agreement. It provides:

4.01 Eligibility – Family Member

(1) To be eligible for Family Member compensation, a person claiming to be the Spouse, Child, Grandchild, Parent, Grandparent or Sibling of an alive HCV Infected Class Member or an HCV Infected Class Member whose death was caused by the HCV infected Class Member's infection with HCV must deliver to the Administrator, within one year after the date of approval of an application for compensation under this Agreement by or on behalf of such HCV Infected Class Member or within one year of the claimant attaining his or her age of majority, whichever event is the last to occur, an application form prescribed by the Administrator together with:

(a) the applicable proof with respect to the HCV Infected Class Member as required by Sections 2.01 or 2.02, and 2.03 unless the required proof has been previously delivered to the Administrator; and

(b) proof that the claimant is or was the Spouse, Child, Grandchild, Parent, Grandparent or Sibling of the HCV Infected Class Member.

[11] By virtue of section 8.05 of the Settlement Agreement, Class Members are bound by the decisions made by Class Counsel on their behalf. In an Administrative Direction dated 24 February 2009, Class Counsel and the Court Appointed Monitor agreed that the date to be applied in determining whether a person has status as a Family Member is the date the primary claim for compensation was delivered.

[12] The Claimant and the HCV Infected Class Member were divorced
Over five years later, the HCV Infected Class Member delivered the primary application for compensation. The Claimant and the HCV Infected Class Member were divorced at the time of his application for compensation. In light of the noted Administrative Direction, the Claimant must be characterized as a former Spouse. Following this analysis, the appeal therefore turns on whether the Claimant, as a former Spouse, is eligible for compensation under section 4.01.

[13] The relevant portions of section 1.01 of the Settlement Agreement define "Family Member" so:

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

(c) a former Spouse of an HCV Infected Class Member.

However, subsection 4.01(1) does not refer to the extended definition of "Family Member". It rather restricts itself to those Family Members described in subsection (a) of the definition. "Former Spouse" is referred to in subsection (c) of the definition and such a person is not expressly included in section 4.01(1), nor are they included by definition, as "Spouse" does not, under section 1.01, include a "former Spouse".

[14] At first glance, subsection 4.01(1)(b) may suggest some ambiguity. It requires that the applicant deliver:

(b) proof that the claimant is or was the Spouse, Child, Grandchild, Parent, Grandparent or Sibling of the HCV Infected Class Member.

However, in the context of the whole of the section, it is clear that the words "was the Spouse" are meant to address situations where the HCV infected person is deceased rather than where the spousal relationship has been altered by a divorce. The Appeals Officer interpreted the provision to have application only in respect of claims where the infected person is deceased. At paragraph 20, in referencing an earlier decision, she states:

In order for a person to be eligible for compensation as a Spouse, paragraph 4.01(1)(b) of the *Settlement Agreement* requires the delivery of proof that she "[...] is or was the Spouse ... of the HCV Infected Class Member". The usage of the word "was" in that phrase must be read in the context of the whole of subsection 4.01(1) which permits a Spouse to apply for compensation in circumstances where the HCV Infected Class Member is alive or deceased. When read in context, the usage of the past tense "was" is clearly intended to permit a Spouse, as defined in section 1.01, to be eligible for compensation where the HCV Infected Class Member is deceased. Furthermore, the term "Spouse", as defined in section 1.01, does not include the words "former Spouse". Finally, the expression "former Spouse", which forms part of the definition of "Family Member", is not used in subsection 4.01(1), but rather is limited to circumstances where a claim is made under subsection 4.03(1) as a "Dependant", as defined in section 1.01.

In summary, under the terms of the *Settlement Agreement*, a former Spouse is not eligible to make a claim for compensation under subsection 4.01(1) as a Family Member. A former Spouse is only entitled to make a claim under subsection 4.03(1) as a Dependant, as defined in section 1.01, in circumstances where "[...] the HCV Infected Class Member was providing support or was under a legal obligation to provide support on the date of the HCV Infected Class Member's death.

[15] In my view, the Appeals Officer was correct in her interpretation. A “former Spouse” is not eligible for compensation under section 4.01(1) of the Settlement Agreement. This result is further supported by reference to section 4.02 which provides for the actual compensation to “Approved Family Members”, that is family members who have applied and been approved for compensation under section 4.01. “Approved Family Member” is a term defined under section 1.01:

...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;

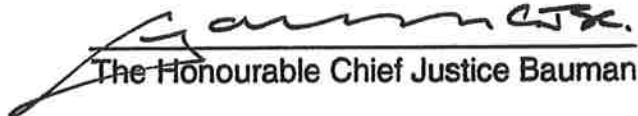
It is to be stressed that this definition is expressly restricted to those family members included in sub-paragraph (a) of the definition of “Family Member”. Again, “former Spouse” is only included in sub-paragraph (c) of the definition.

[16] The Claimant must be characterized as a former Spouse in accordance with the Administrative Direction dated February 24, 2009. Accordingly, the Claimant is not eligible for compensation as a Family Member under the Settlement Agreement.

[17] The Claimant also advanced an alternative argument regarding her eligibility. It was based on the fact that her former spouse made his initial application for class membership to class counsel at a time when he and she were still married. On this basis, she argues that the delay in arriving at a settlement in the class action proceeding should not serve to disentitle her to compensation. She points out that their divorce occurred approximately 4 years after the initial application but the action was not settled until approximately 5 years following their divorce.

[18] As outlined above, section 18.03 provides that the Settlement Agreement constitutes the entire agreement between the Parties, and any preceding agreements between the Parties are cancelled or superseded. There are no provisions in the Settlement Agreement that confer special status on those persons registering with class counsel prior to the settlement of the action. Accordingly, the date of the HCV Infected Class Member’s application to class counsel does not afford a basis on which to grant the Claimant’s appeal.

[19] The Claimant has obviously suffered considerably as a result of her ex-husband's HCV infection. However, as with any class action settlement with finite funding, difficult decisions must be made with respect to the allocation of compensation. Considering the Settlement Agreement as a whole, the outcome of this appeal is unfortunate but it is unavoidable; there is no reason to overturn the decision of the Appeals Officer. The appeal is denied.


The Honourable Chief Justice Bauman