

REFEREE'S DECISION
HEPATITIS C CLASS ACTION
JANUARY 1, 1986 – JULY 1, 1990

Claimant:	Claimant #18195
File No.:	416611 – 34
Province of Infection:	Alberta
Province of Residence:	Alberta
Date:	May 26, 2011

Decision

1. On July 20, 2010 the Administrator advised the Personal Representative of the deceased Claimant that the claim for compensation of the Primarily Infected Person pursuant to the transfused HCV Plan would be rejected unless the Claimant provided further evidence that the Claimant had been infected for the first time with HCV by a transfusion of blood within the Class Period.
2. The Personal Representative of the deceased Claimant advised that she would produce no further evidence and the claim was denied on August 24, 2010.
3. The Personal Representative requested an in person hearing by an Arbitrator to review the decision of the Administrator. She specifically stated that she wished that I sit as an Arbitrator because she wanted finality.
4. The hearing took place in Red Deer, Alberta on May 17, 2011.
5. Neither party disputed the following facts:
 - (a) The deceased Claimant was diagnosed with Hepatitis C on or about April 4, 1999, according to a report from a Dr. Dale Lien at the Department of Pulmonary Medicine at the University of Alberta Hospital.
 - (b) The deceased Claimant was admitted to Foothills Hospital in Calgary, Alberta on August 9, 1988 for treatment of injuries resulting from a motorcycle accident on which she was riding as a passenger.
 - (c) The admission record noted the presiding physician had diagnosed leg injuries, requested blood tests but there was no record of any request for blood transfusion although the record indicates the deceased Claimant was to be taken to the operating room.
 - (d) The initial blood test taken on August 9, 1988 recorded a reading of 127 Hgb g/L and noted that the normal values for a female stood in the range of 120-180.
 - (e) Blood readings later on August 9, showed a lower value of 95 and on August 10 an even lower reading of 81 and then later on August 10 showed a reading of 83.
 - (f) The Foothills Hospital records contain a cross match report indicating that 6 units of blood were ordered, however also indicating only two units were signed out and transfused on August 10, 1988, the first at the recorded time of 17.30 p.m. and the other at 23.15 p.m.
 - (g) The Fund ordered tracebacks on the two units of blood that were transfused on August 10, 1988.

- (h) The Canadian Blood Services reported that both donors of the two units of blood transfused tested negative for the HCV antibody.
6. The Personal Representative gave the following testimony:
- (a) The deceased Claimant was born in 1969 to, and lived with, the Personal Representative until she married at approximately 16 years of age.
 - (b) Both the deceased Claimant and her sister suffered from cystic fibrosis.
 - (c) As a result, the deceased Claimant was hospitalized on many occasions during her lifetime.
 - (d) As far as the Personal Representative was aware, the deceased Claimant did not have a high risk lifestyle, although her husband had tattoos, was convicted of robbery, was jailed for 7 years, and after his release, he operated a tattoo shop.
 - (e) The Personal Representative agreed that the husband of the deceased Claimant may have been jailed on more than one occasion.
 - (f) The deceased Claimant divorced her husband some two years after the marriage.
 - (g) The Personal Representative indicated the deceased Claimant was subsequently in longer relationship with another person, whose last name she could not recall.
 - (h) The Personal Representative testified that she arrived at the Foothills Hospital, shortly after the motorcycle accident and witnessed bags of blood in the operating room beside the hospital bed of the deceased Claimant.
 - (i) The Personal Representative testified that the hospital personnel informed her that the deceased Claimant had lost a great deal of blood at the scene of the accident.
 - (j) The Personal Representative testified that she remained in the operating room for some twenty minutes while the surgeon operated on the deceased Claimant with and 6 or 7 additional hospital staff in attendance. After that interval of time, hospital staff informed her she must leave the operating room due to a risk of contamination.
 - (k) The deceased Claimant remained in Foothills Hospital from August 9 to August 25, 1988, however the Personal Representative does not know the names of the surgeon or any of the hospital staff in attendance who other than the Personal Representative may have witnessed the transfusion of some 4 units of blood on August 9, 1988.

- (1) No health care professionals have given an opinion to the Personal Representative or any family members to support the suggestion that the Hepatitis C was caused by a blood transfusion in the Class Period.
7. The Personal Representative contends that even if the hospital records disclose no evidence of additional transfusions on August 9 or 10, 1988 or any other date during the hospitalization in question, or within the Class Period, nevertheless the hospital records could be in error. The Personal Representative does not believe the medical records are true or accurate and based on her own personal observations contends that the most probable cause of Hepatitis C was during one such unrecorded transfusion of blood.
8. The Personal Representative gave testimony in a sincere and moving fashion about the later discovery of Hepatitis C and the difficulties experienced by both the deceased Claimant and the Personal Representative when it was finally determined that the deceased Claimant could not proceed with a lung transplant. and I have no doubt that the Personal Representative considers that the source of the infection could only have come from blood transfusions given to the deceased Claimant prior to the two units documented in the records of the Foothills Hospital.
9. I note that despite my sympathies for the tragic loss of the Personal Representative's youthful child, this appeal must be determined on the basis of the relevant provisions of the Plan which are set out below.
10. Article 3.01 of the Plan requires that:
 1. A person claiming to be a Primarily-Infected Person 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 a blood transfusion in Canada during the Class Period;
 - b. an HCV Antibody Test report, PCR Test report or similar test report pertaining to the claimant;
 - c. a statutory declaration of the claimant including a declaration
 - (i) that he or she has never used non-prescription intravenous drugs,
 - (ii) to the best of his or her knowledge, information and belief, that he or she was not infected with Hepatitis Non-A Non-B or HCV prior to 1 January 1986,
 - (iii) as to where the claimant first received a Blood transfusion in Canada during the Class Period, and
 - (iv) as to the place of residence of the claimant, both when he or she first received a Blood transfusion in Canada during the Class Period and at the time of delivery of the application hereunder.

2. Notwithstanding the provisions of Section 3.01(a), if the Claimant cannot comply with the provisions of Section 3.01(1)(a) the Claimant must distribute 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 a blood transfusion in Canada during the Class Period.

3. 3. Notwithstanding the provisions of Section 3.01(1)(c), if a claimant cannot comply with the provisions of Section 3.01(1)(c) because the claimant used non-prescription intravenous drugs, then he or she must deliver to the Administrator other evidence establishing on a balance of probabilities that he or she was infected for the first time with HCV by a Blood transfusion in Canada during the Class Period.

11. Section 3.03 of the Plan provides as follows:

If requested by the Administrator, a person claiming to be a HCV Infected Person must also provide to the Administrator:

- a. all medical, clinical hospital or other such records in his or her possession, control or power;
- b. a consent authorizing the release to the Administrator of such medical, clinical, hospital records or other health information as the Administrator may request;
- c. a consent to a Traceback Procedure;
- d. a consent to an independent medical examination;
- e. income tax returns and other records and accounts pertaining to loss of income; and
- f. any other information, books, records, accounts or consents to examinations as may be requested by the Administrator to determine whether or not a claimant is HCV Infected Person or to process the Claim.

If any person refuses to provide any of the above information, documentation or other matters in his or her possession, control or power, the Administrator must not approve the Claim.

12. Section 3.05 of the Plan provides as follows:

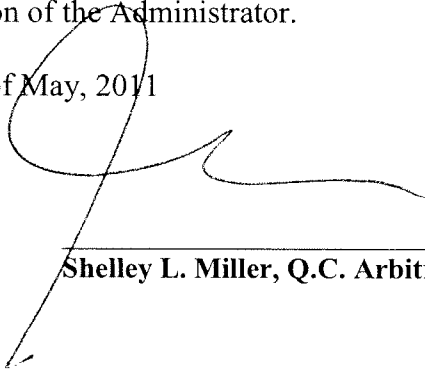
1. A person claiming to be the HCV Personal Representative of a HCV Infected Person who has died must deliver to the Administrator, within three years after the death of such HCV Infected Person or within two years after the Approval Date, whichever event is the last to occur, an application form prescribed by the Administrator together with:
 - a. proof that the death of the HCV Infected Person was caused by his or her infection with HCV.
 - b. unless the required proof has been previously delivered to the Administrator:
 - i. if the deceased was a Primarily-Infected Person, the proof required by Sections 3.01 and 3.03; or

ii. if the deceased was a Secondary-Infected Person, the proof required by Sections 3.02 and 3.02; and

c. the original certificate of appointment of estate trustee, grant of probate or of letters of administration or notarial will (or a copy thereof certified to be a true copy by a lawyer or notary) or such other proof of the right of the claimant to act for the estate of the deceased as may be required by the Administrator. ...

13. It has been noted in previous decisions of referees and administrators, including my own, that a significant percentage of persons infected with Hepatitis C have no history of intravenous drug use, risky behavior or having received a blood transfusion and for whom the cause of infection cannot be identified.
14. I find from the testimony given by the Personal Representative that the deceased Claimant has had significantly challenging life circumstances, and while the Personal Representative has stated that so far as she is aware, the deceased Claimant did not live a high risk life style, on the other hand, that same testimony revealed that the spouse of the deceased Claimant did have a history of high risk activities.
15. I am satisfied that the Personal Representative's belief is sincerely and honestly held that the lack of hospital records to verify the other transfusions she claimed to have witnessed in the operating room is most probably owing to error or omission by hospital staff.
16. However, the preponderance of evidence before me does not corroborate the occurrence of additional blood transfusions that could have been the source of the infection later diagnosed to be Hepatitis C in the deceased Claimant, beyond the two that were recorded and tested negative on the traceback and I found no evidence to suggest that there were errors committed by any medical or hospital staff.
17. Further it must be noted that neither the Administrator nor I, as Arbitrator, have any discretion to grant compensation where there is no evidence to show that the deceased Claimant received a transfusion within the Class Period.
18. I am of the view that unfortunately this is one of those cases where it will never be known how the deceased Claimant acquired the infection.
19. Accordingly I uphold the decision of the Administrator.

Dated Edmonton, Alberta this 26th day of May, 2011



Shelley L. Miller, Q.C. Arbitrator