

DECISION

Claim No. 14418

Province of Infection – Nova Scotia

1. The Claimant applied for compensation as a Primarily-Infected Person pursuant to the Transfused HCV Plan.

2. By letter dated June 1, 2011, the Administrator denied the claim on the basis that the Claimant had not provided sufficient evidence to establish that he had received blood during the Class Period.

3. The Claimant requested that the Administrator's denial of his claim be reviewed by an Arbitrator.

4. The Administrator's letter of June 1, 2011 gave the following reasons for denying the claim:

“The Settlement Agreement requires the Administrator to determine a person's eligibility for class membership.

All the material that you provided to support your claim was carefully reviewed by the Administrator. You have not provided sufficient evidence to support your claim that you or the HCV Infected Person received blood during the Class Period.

In your original application you indicated you received transfusions in 1987 at the Halifax Infirmary. You submitted medical records that included a Crossmatch requisition for 2 units of blood. Please note a crossmatch is a procedure in which blood is requested and saved in the hospital blood bank however it is not proof of transfusion of that blood. In cases where the claimant is having difficulty obtaining documents to support the HCV infected person received a transfusion; the Traceback department contacts Canadian Blood Services (CBS) to request their assistance in obtaining transfusion information directly from the hospital. In your case CBS contacted the Hospital and the response was received in May 2011. The hospital advised CBS that your records were available and you were typed, screened and crossmatched only, you were not transfused. Therefore based on Article 3.01 (1a) of the 1986-1990 Hepatitis C Settlement Agreement; your claim must be denied because there is no evidence to support you received a transfusion of Blood between January 1, 1986 and July 1, 1990.”

5. Following my appointment as Arbitrator, I advised the Claimant of his right to an oral hearing. A lengthy delay occurred while the Claimant attempted to obtain additional medical or other information which would corroborate his claim. On January 21, 2013, the Claimant contacted my office and advised that he had not been able to obtain any additional information and had no further recourse.

6. On March 26, 2013, I sent the following letter to Fund Counsel:

“March 26, 2013

VIA FAX (416-862-7661)

Mr. John E. Callaghan,
GOWLINGS,
1 First Canadian Place,
100 King Street West, Suite 1600,
Toronto, ON M5X 1G5

Dear Mr. Callaghan:

Re: Claim No. 14418 (*Claimant*)

As you are aware, the *Claimant* called me on January 21, 2013, in response to my letter of January 8, 2013. He advised that Dr. Peltekian was not able to assist him in establishing that he had been transfused during the Class Period. He also said that he was unable to obtain any further medical information and had no further recourse, adding that “you will have to do what you have to do”.

Your office subsequently confirmed to me that in November of 2011, you had sent the *Claimant* copies of his medical records obtained from the Queen Elizabeth II Health Sciences Centre covering the period February 2, 1987 to February 11, 1987.

Under the circumstances, I suggest that you provide me with a written submission on behalf of the Fund and send a copy to the *Claimant*. Following that, the *Claimant* will be given a reasonable time, say two weeks, to file any written response he wishes to make. Naturally, if the *Claimant* requires more than two weeks to respond to the Fund’s submission, then he should let me know so that an extension can be arranged.

Yours truly,

S. Bruce Outhouse
SBO:sw
cc: The *Claimant* (via regular mail)”

7. On April 8, 2013, Fund Counsel filed a written submission and provided a copy to the Claimant.

8. The Claimant did not file any response to Fund Counsel's submission.

9. The issue in this case is whether there is any evidence that the Claimant received a blood transfusion in the Class Period. Without evidence of a transfusion, there is no basis for interfering with the Administrator's decision to deny the claim.

10. The medical records show that the Claimant was admitted to the Halifax Infirmary on February 2, 1987 where he underwent a tonsillectomy. He was discharged from hospital on February 5, 1987. He was subsequently readmitted on February 10, 1987 with a diagnosis of delayed post-tonsillar bleed. He was treated and discharged the following day.

11. The relevant medical records contain no indication that the Claimant received a blood transfusion during the aforementioned admission at the Halifax Infirmary. In fact, a subsequent Traceback investigation by the Canadian Blood Services indicates that both a computer and manual search of the hospital records

was made for the relevant period and that, although the records were available for review, no record of a transfusion was found.

12. This case is governed by s. 3.01 of the HCV Transfused Plan which provides, in part, as follows:

“3.01 Claim by Primarily-Infected Person

(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-Québec records demonstrating that the claimant received a Blood transfusion in Canada during the Class Period;

(2) Notwithstanding the provisions of Section 3.01(1)(a), if a claimant cannot comply with the provisions of Section 3.01(1)(a), the claimant must deliver 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.”

13. Clearly, the Claimant has not been able to prove his claim pursuant to s. 3.01(1)(a). There is no medical record of any kind which demonstrates that he received a blood transfusion during the Class Period. Consequently, the only

question is whether the Claimant has satisfied the requirements of s. 3.01(2) by providing “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 received a Blood transfusion during the Class Period”.

14. It has been decided in earlier cases that, under s. 3.01(2), a claimant bears the burden of proof on the balance of probabilities. It has also been authoritatively determined that the burden of proof must be satisfied by the independent evidence without regard to the recollections of a claimant or family members. In Court File No. 98-CV-141369, Winkler R.S.J., as he then was, stated:

“Given the express wording of s. 3.01(2), the only interpretation it will be [sic] bear is that the evidence independent of the personal recollection of the Claimant or a Family Member is the determining factor. If that independent evidence establishes on a balance of probabilities that the Claimant received blood during the Class Period then the claimant has met the burden. If not, then the Claim must be rejected. The personal recollections of either the Claimant or Family Members are not to be considered.”

15. In the present case, no independent evidence was proffered by the Claimant to establish that he had received a blood transfusion in Canada during the Class Period.

16. Under these circumstances, I have no alternative but to uphold the Administrator's denial of the Claimant's request for compensation.

DATED at Halifax, Nova Scotia, this 11th day of June, 2014.



S. BRUCE OUTHOUSE, Q.C.
Arbitrator