

Introduction

1. The Claimant submitted a claim application as an Hepatitis C Primarily Infected Person (HCV), according to the terms and conditions of the HCV Transfused Plan (the Plan). He completed the General Claimant Information Form (TRAN 1) on March 10, 2002 in which he alleged having received a blood transfusion in Canada between January 1, 1986 and July 1, 1990, the possible Class Period.
2. In his letter to the Claimant dated May 17, 2004, the Class Action Settlement Administrator rejected the request on behalf of the Hepatitis C Claim Centre (1986-1990) on the basis that the Claimant had not "provided enough evidence confirming that he had received blood during the Class Period".
3. The Claimant completed a Request for Review dated May 31, 2004 asking that the Administrator's decision be referred to a Referee.
4. During the Hearing that took place before me, on May 18, 2005, there was agreement that the Claimant was HCV infected; the Administrator only challenged the Claimant's statement that he had received a blood transfusion in Canada during the Class Period. However, I must also examine another question raised by the Fund Counsel representing the Administrator in his written submission as to whether or not the Claimant had been HCV infected before January 1, 1986.

Was the Claimant HCV infected before January 1, 1986?

5. According to Section 1.01 of the Plan, a "Primarily-Infected Person" means a person who received a Blood transfusion in Canada during the Class Period and who is or was infected with HCV unless: (a) it is established on the balance of probabilities by the Administrator that such person was not infected for the first time with HCV by a Blood transfusion received in Canada during the Class Period;"
6. Although the question as to whether or not the Claimant was HCV infected before January 1, 1986 was not discussed during the Hearing, the following can be read in paragraph 3 of the observations provided by the Fund Counsel representing the Administrator.

Mr. [Claimant's name] Treating Physician noted that the patient [his name] had a history of risk factors with regard to Hepatitis C, apart from a blood transfusion received between January 1st and July 1st, 1990. In this particular case, the patient is a Genotype 4e and is a native of Africa (claim file, pages 47 and 48).

7. Pages 47 and 48 of the claim file contain photocopies of pages 4 and 5 of the Treating Physician's Form. In this Form, the Physician is asked a series of questions among which are the following questions in paragraph 24 of page 4 (page 47 of the file) and in paragraph 26 of page 5 (page 48 of the file):

24. Does the HCV Infected Person have a medical history with regard to the following risk factors related to Hepatitis C (check all relevant boxes): [one of the boxes is marked "other"]

26. Does the medical file of the HCV Infected Person say if the person was HCV infected before January 1st, 1986 ? If the answer is yes, what, in the medical file of the HCV Infected Person, indicates that *she could have been infected by the Hepatitis C virus* before January 1st, 1986? " (Emphasis added)

8. The Physician completed the Form in English. To answer the question in paragraph 24, the Physician only checked the box marked "other", and wrote the following words below: " Pt. has genotype 4e, i.e., the African genotype ". To answer the first question in paragraph 26, the Physician checked the box "yes" and to answer the second question, he then wrote these words: "Genotype 4e. Pt. is also from Africa.".

9. It was incumbent upon the Administrator to prove the legitimacy of a conclusion to the effect that the Claimant had effectively been HCV infected before January 1st, 1986. In my opinion, the Administrator did not discharge this burden of proof. It was not only a question that was not discussed during the Hearing, but more pertinently, a question to which the Physician gave only an ambiguous answer, that is to say that the Claimant "*could have been HCV infected before January 1st, 1986*" or, in English, "*may have been infected with ... the Hepatitis C virus prior to January 1, 1986*". This kind of statement does not meet the standard of pertinent proof, that of the balance of probabilities.

Did the Claimant receive a blood transfusion in Canada during the Class Period?

10. The Plan sets out only two ways by which a Primarily Infected Person can establish that he has received a blood transfusion in Canada during the Class Period. According to Section 3.01(1)(a), he can demonstrate the fact with the following documents: "medical, clinical, laboratory, hospital, The Canadian Red Cross Society, Canadian Blood Services or Hema-Québec records, "If the Claimant cannot provide such documents to the Administrator, Section 3.01(2) allows him to provide in lieu of : " 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".

11. In this case in point, the Claimant stated under oath that he had received a transfusion of the equivalent of a blood bag in July 1987 while at the Ottawa Hospital emergency room. However, he did not provide evidence of this fact, either through medical documents, or through corroborating and independent evidence of his own personal recollections.

12. As for medical documents, the claim file prepared by the Administrator contains two relevant documents.

13. The first one, on page 51, is a letter dated August 7, 2002 from the Ottawa Hospital. The Claimant's name appears as being the subject of the letter which reads as follows:

To Whom it may concern:

This patient was seen in the emergency department in July, 1987. He states a transfusion was administered to him there. I have reviewed the chart and there is no transfusion record available. Due to the fact that it was in emergency and in 1987, the transfusion record may not have been sent to medical records. I regret that I cannot obtain more information on this matter but I will be available if you have any questions. Thank you for your time in this matter.

Yours sincerely, signed J. L. Hutchingame, Health Records Technician, Medical Records Department,
Campus Général

14. The second relevant document, found on page 56 of the claim file is entitled "Hospital Record Confirmation Form". This document was prepared by the Ottawa Hospital at the request of the Canadian Blood Services and the Hepatitis C Claim Centre for the purpose defined as follows: "to determine if the following individual's infection may be transfusion related". The name of the Claimant, his date of birth and the month of the alleged claimed blood transfusion appear as being the subject of the Form. As completed, the Form indicates that the hospital files were accessible and verified for the period from 1980 to 2004 and that no report was found concerning a blood transfusion received there.

15. I raised two questions about these documents. First of all, given that the Form itself distinguishes between "health records" and "blood bank records", I wanted to know if the verifications made by the hospital contained both categories of documents. Secondly, given that the Ottawa Hospital consists of three campuses, Civic, General and Riverside and that Mrs. Hutchingame's letter comes from the General Campus, I wanted to know if the verifications made by the hospital included the three campuses.

16. With the consent of both parties, I received answers to these two questions after the Hearing of May 18, 2005. In a letter written on behalf of the Ottawa Hospital as a whole and dated January 30, 2006, labeled "Exhibit 3", one can read the following:

Further to your enquiry, this letter is to confirm that there has been verification with both the Medical Records and the Blood Bank regarding whether this patient [the Claimant's name appears in the subject of the letter] received a blood transfusion.

In the medical record, there was no evidence of [Claimant's name] having received a blood transfusion at the Ottawa Hospital. At the Blood Bank, we have also verified that there is no record of this patient having had a type and cross match, screen or transfusion. I trust that this information helps clarify our search.

Yours truly, signed Sary Buchmayer, R.N. BScN, Risk Management

17. A copy of this letter was sent to the Claimant's Counsel who answered the following way in a letter dated February 28, 2006:

My client is not surprised by the fact that a detailed search did not confirm the blood transfusion, which he alleges having received between 1986 and 1990 and quite probably during year 1987. According to him, Mrs. Janet Hutchingame's letter of August 7, 2002 which was the subject of lengthy discussions during the Hearing of May 18, will always cast a doubt as to the possibility of human error.

18. Yet, during the Hearing, the Claimant presented three emergency reports from the Ottawa Hospital indicating that he had been there on May 17, 1987, on July 31, 1987 and on September 17, 1987. These three reports were labeled "Exhibit 1". None of these reports mentions a blood transfusion. The Claimant also presented another letter from the Ottawa Hospital dated May 16, 2005. This letter, labeled "Exhibit 2", was sent to the Claimant's Counsel. It reads as follows :

In regards to patient [Claimant's name], we have reviewed the chart, and there is no transfusion record available. I regret that I cannot obtain any more information on this matter, but will be available if you have any questions.

Sincerely, signed Eilish Grégoire, Health Records Technician, Medical Records
Department, Campus Général

19. As indicated in his Legal Counsel's letter, the Claimant based his allegation mainly on Janet Hutchingame's letter and on "the possibility of human error". According to him, such an error can explain the absence of a documentary proof of a blood transfusion made in an emergency room at the Ottawa Hospital in July 1987. However, I note that this explanation serves only to raise the question of possibility as wished for by the Claimant. In no way does it exclude the other possibility, i.e., that no documentary proof exists because the Claimant has never had a blood transfusion in an emergency room at the Ottawa Hospital in July, 1987. In my opinion, this letter cannot establish "corroborating and independent evidence of the personal recollections of the Claimant...establishing on the balance of probabilities that he received a blood transfusion in Canada during the Class Period ". The Claimant did not present any other proof of this nature.

20. The Claimant also alleged that the Administrator's decision was ill-founded, because that decision mentions no valid basis to doubt the personal recollections and credibility of the Claimant. I do not agree.

21. In a signed affidavit dated May 16, 2005, the Claimant stated that he had gone to the Ottawa Hospital, that he had been "seen at Emergency by a Physician for a period of about thirty minutes", that the Physician had administered to him "a series of tests", before ordering a blood transfusion and that he "had spent several hours at the hospital on that July day, 1987".

22. Yet, according to the emergency report of July 31st, 1987, the Claimant was admitted at 23:15, complaining of headache. He saw the Physician at 00:25, one hour and ten minutes later. He was released from the hospital at 00:40, fifteen minutes after having seen the doctor, with a final diagnosis of headache and a prescription of 20 "292" tablets.

23. In my opinion, it is unlikely that the Claimant would have been examined by the Physician, would have undergone "a series of test", would have been connected to a transfusion device and transfused the equivalent of a bag of blood and would have been released from the hospital, within a fifteen minute period. According to Antonin Fortier's testimony, a medical assistant employed by the Hepatitis C Claim Centre, the normal duration of a blood transfusion is one hour and a half. Mr. Fortier also mentioned that he saw nothing in the emergency report of July 31, 1987 which would have justified a decision to give the Claimant a blood transfusion.

24. In any case, as drafted, the Plan did not allow the Administrator to base his decision only on the personal recollections and credibility of the Claimant. It was incumbent upon the latter to provide supplementary documentary or corroborating evidence.

Conclusion

25. In the absence of corroborating and independent evidence of the Claimant's personal recollections, the Administrator's decision should, in my opinion, be confirmed.

Signature on original
David Garth Leitch, Referee

March 27, 2006
Decision date