

DECISION

HEPATITIS C -1990 CLASS ACTION SETTLEMENT

Claim No. 1100880

Request for Review -- Referee

1. This appeal involving the 1986-1990 Hepatitis C Settlement Agreement Schedule "B" Hemophiliac HCV Plan (the "Plan") presents a question of interpretation of provisions in the Plan providing compensation for loss of support to an Approved Family Member of an HCV Infected Person. The question of interpretation is centered upon Article 4.02 of the Plan entitled Compensation for Loss of Income which is incorporated by reference into Article 6 of the Plan entitled Compensation to Approved Dependents and Approved Family Members.
2. The Claimant pursuing this appeal by way of a Request for a Review to a Referee is the widow of an HCV Infected Person who died in 1994 (the "Deceased").
3. At the heart of the question of interpretation is the Administrator's treatment of the Deceased's married person's tax credit under Section 118(1) of the *Income Tax Act*. In calculating loss of support payments the Administrator took into account the Claimant's income for the purpose of determining the married person's tax credit. The Claimant takes the position that the Administrator's position is harsh and unfair. She argues that her income should play no role in calculating loss of support payments under the Plan.
4. A hearing was held involving the Claimant and Fund Counsel on May 25, 2005.
5. The parties also agreed upon a Statement of Facts and Statement of Issue. The agreed Statement of Facts and Statement of Issue dated May 16, 2005 reads as follows:

Statement of Facts

- (1) [...] claimed for Loss of Support as a result of the death of [...] her husband, who died October 2, 1994.
- (2) The claim was accepted and the Administrator paid Loss of Support payments.
- (3) The claimant indicated she wished to appeal the calculation of the Loss of Support payments pursuant to section 4.02 of the Hemophiliac HCV Plan (claim file, p. 151). The claimant takes issue with the married person's tax credit being taken into account for income tax calculations.
- (4) The Administrator responded by letter dated September 9, 2004 (claim file, p. 163).
- (5) The claimant proceeded with a Request for Review before a Referee January 5, 2005 (claim file, pp. 6-10).

Statement of Issue

- (6) The issue is the interpretation of the Hemophiliac HCV Plan. The claimant's position is that nowhere in section 4.02(2)(g) does it state that in calculating her husband's projected income that her present income should be considered in the calculation. The claimant relies on section 4.02(c) and section 6.01(1). The Administrator's position is that by reason of section 118(1) of the *Income Tax Act*, a married person's tax credit is to be deducted from the tax payable by a taxpayer. "... who supports the individual's spouse...". The married person's or equivalent married tax credit is not payable unless the taxpayer supports the spouse.
6. By consent a brief was filed at the hearing which was marked Exhibit "1". It included the Statement of Facts and Statement of Issue, the Plan, pages 1 to 185 of the claim file and section 118 of the *Income Tax Act*, R.S.C. 1985 c. 1 (5th Supp).
7. I am informed that the parties have resolved all other issues concerning the calculations involved in loss of support payments which includes, for example, calculation of the Deceased's Pre-claim Net Income. Loss of support payments began in 1999. Therefore the only issue is the treatment of the married person's tax credit which is referred to in Article 4.02(g) of the Plan.
8. It is also common ground that the Claimant works as a teacher and started working in 1996. She was on maternity leave in 2002.
9. The Claimant did provide to the Administrator income tax information concerning her income for two years but because she thinks the Administrator's calculation involving the married person's tax credit is harsh and unfair she has refused to supply further information. She does not dispute the level of her assumed annual taxable income used by the Administrator in calculating loss of support payments.

The effect of that level of taxable income is to eliminate the married person's tax credit. It is agreed that \$15,000 or more of taxable income on her part is enough to "wipe out" the tax credit. The Claimant agrees that her taxable income is higher than \$15,000 per annum.

10. The Claimant provided information concerning her taxable income for the tax years 2001 and 2002. The Notices of Assessment are included in the claim file (pp. 91-92) for those two years. The Administrator used those figures in calculating loss of support for those years. Taxable income of the Claimant in 2001 was \$13,658 and in 2002 it was \$16,491. The Administrator assumed taxable income for 1999 and 2000 of \$15,000. Similarly for 2003 the assumed taxable income was \$15,000 in the absence of information from the Claimant. The claim file contains copies of the Claimant's T4 slips for 1999 through 2002 (claim file pp. 82-86). The point is that the Claimant does not dispute the Administrator's calculations: she disputes the fact that her income is taken into account at all by the Administrator in calculating loss of support payments.

11. I will set out the relevant provisions of the Plan:

4.02 Compensation for Loss of Income

...

(2) Each Approved HCV Infected Person who is entitled to receive compensation for past, present or future loss of income caused by his or her infection with HCV will be paid, subject to the provisions of Section 7.03, an amount each calendar year equal to 70% of his or her Annual Loss of Net Income for such year until he or she attains the age of 65 years determined in accordance with the following provisions:

(a) "Annual Loss of Net Income" for a year means the excess of the Approved HCV Person's Pre-claim Net Income for such year over his or her Post-claim Net Income for such year.

(b) "Pre-claim Net Income" of an Approved HCV Infected Person for a year means an amount determined as follows:

(i) an amount equal to the average of the person's three highest consecutive years of Earned Income preceding the HCV Infected Person's entitlement to compensation under Section 4.02 Pension Index for the middle year of the foregoing three consecutive years, or, if the Approved HCV Infected Person or the Administrator demonstrates on a balance of probabilities that his or her Earned Income for such year would have been higher or lower than such average but for the HCV Infected Person's Infection with HCV, such higher or lower amount, (the applicable amount being hereinafter referred to as the "Pre-claim Gross Income"), provided that the amount determined under this Section 4.02(2)(b)(i) will not exceed \$75,000 multiplied by the ratio that the Pension Index for the year bears to the Pension Index for 1999, **minus**

- (ii) **the Ordinary Deductions that would be payable by the Approved HCV Infected Person on the amount determined under Section 4.02(2)(b)(i) on the assumption that such amount was the Approved HCV Infected Person's only income for such year.**
- (c) "Post-claim Net Income" of an Approved HCV Infected Person for a year means an amount determined as follows:
- (i) the total of (A) the Approved HCV Infected Person's Earned Income for the year or, if the Administrator demonstrates on a balance of probabilities that the Approved HCV Infected Person's Earned Income for such year would have been higher than such amount but for the person claiming a level of impairment greater than the person's actual level of impairment, such Earned Income as determined by the Administrator (B) the amount paid or payable to the person in respect of the Canada Pension Plan or the Quebec Pension Plan on account of illness or disability for the year, (C) the amount paid or payable to the person in respect of Unemployment Insurance and/or Employment Insurance for the year, and (E) the amount paid or payable to the person pursuant to the EAP, MPTAP and/or the Nova Scotia Compensation Plan, (such total being hereinafter referred to as the "Post-claim Gross Income), provided that the amount determined under this Section 4.02(2)(c)(i) will not exceed the proportion of the amount determined under Section 4.02(2)(b)(i) for such year that the Approved HCV Infected Person's Post-claim Gross Income for such year is of such person's Pre-claim Gross Income for such year, minus
 - (ii) the Ordinary Deductions that would be payable by the Approved HCV Infected Person on the amount determined under Section 4.02(2)(c)(i) on the assumption that such amount were such person's only income for such year.
- ...
- (e) **"Ordinary Deductions" means income taxes, Unemployment Insurance and/or Employment Insurance and Canada Pension Plan and/or Quebec Pension Plan deductions applicable in the Province or Territory where the person is resident.**
- ...
- (g) **For the purpose of all income tax calculations required under this Section 4.02(2), the only deductions and tax credits that apply to the Approved HCV Infected Person which will be taken into account will be his or her alimony and maintenance payments deduction, basic personal tax credit, married person's or equivalent to married tax credit, disability tax credit, Unemployment or Employment Insurance premium tax credit and Canada Pension Plan or the Quebec Pension Plan contribution tax credit.**

[Emphasis added]

12. It would seem that the point of the married person's tax credit is to give a taxpayer a tax credit for supporting a spouse or common law partner. The less support, the smaller the credit. However,

where the taxpayer's spouse or common law partner has income over certain amounts, as determined by the formula in Section 118(1) of the *Income Tax Act*, the tax credit is eliminated.

13. As it has been stated in many previous decisions, the Administrator must administer the Plan in accordance with its terms and I as a Referee, do not have the authority to ignore or vary the provisions of the Plan. In Decision No. 41, May 29, 2002 Mr. Justice Pitfield succinctly made the point:

[7] Where, as in the present case, the Claimant has agreed to accept compensation for his injury under the Settlement Agreement, he has agreed to be bound by its terms. The Administrator must construe the Agreement as it was written and not as it could have been written had the parties to the Agreement decided to provide some other means to determine the amount of compensation to be paid in any particular circumstances.

[8] In the absence of ambiguity, the Administrator must not be concerned with factors that might have prompted the parties to the Agreement to settle upon the terms reflected in the Agreement. The issue for the Administrator is to construe the terms of the Agreement and make the computations required by its specific terms.

14. In this case the Claimant has agreed to accept compensation for loss of support. However, she had refused to provide complete information as required by the Administrator to perform necessary calculations. As she has fairly admitted, if she supplied that information it would not be helpful to her cause given the Administrator's approach.

15. It is not necessary for me to provide a minute dissection of the above-noted relevant provisions. It is clear that to calculate loss of support benefits under Article 6 and specifically Article 6.01, the Administrator must apply Article 4.02 of the Plan. Under Article 4.02, the calculation of the compensation for loss of income requires the determination of Annual Loss of Net Income which is the excess of Pre-claim Net Income over Post-claim Net Income. Pre-claim Net Income is determined by calculating Pre-claim Gross Income minus Ordinary Deductions.

16. Ordinary Deductions in Article 4.02(2)(e) means "income taxes ... applicable in the Province or Territory where the person is resident."

17. Article 4.02(g) spells out the deductions and tax credits that will be taken into account for the purposes of income tax calculations required under Article 4.02(2). Article 4.02(2)(g) clearly mandates an income tax calculation to include the "married person's or equivalent to married tax credit".

18. The Claimant argues that Article 4.02(c)(ii) dealing with Ordinary Deductions concerning "Post-claim Net Income" assists her argument. I fail to see how the section dealing with Post-claim Net

Income assists the Claimant's argument in any way where sub-Article (g) mandates a reference to the married person's or equivalent to married tax credit. The language of 4.02(2)(c)(ii) mirrors the language of 4.02(2)(b)(ii).

19. Under Section 118(1) of the *Income Tax Act, supra*, a married person's tax credit is to be deducted from the tax payable by a taxpayer "who supports the individual spouse...". The married person's or equivalent to married tax credit is not applicable unless the taxpayer supports the spouse. There is a limit on the level of support that will allow a tax credit. The Claimant would have the Administrator ignore the need for support in order to obtain the tax credit. The Claimant, in effect, is asking the Administrator to rewrite the Plan so that her loss of support payments will be higher. The Administrator cannot do that, nor can I as a Referee.

20. In conclusion I find that the Administrator correctly interpreted the Plan for the purposes of determining the Claimant's loss of support payments. For the foregoing reasons the decision of the Administrator is upheld. I thank the Claimant and Fund Counsel for their pointed and able submissions on an issue of first impression.

Dated at Vancouver, British Columbia this 22nd day of June 2005.

A handwritten signature in dark ink, appearing to read 'Vincent R.K. Orchard', written over a horizontal line.

Vincent R.K. Orchard, Q.C., Referee