

Decision

Background:

1. The Claimant applied for compensation pursuant to section 3.05 of the Transfused HCV Plan, under the 1986-1990 Hepatitis C Settlement Agreement (the “Agreement”), in her capacity as the personal representative of a Primarily Infected Person, (the Claimant’s father), who died prior to January 1, 1999.
2. By letter dated August 13, 2003, the Administrator of the Fund denied the claim on the basis there was insufficient evidence that the death of the Claimant’s father was caused by his infection with Hepatitis C (“HCV”).
3. The Claimant requested that an Arbitrator review the decision of the Administrator of the Fund and requested an oral hearing.

Evidence:

4. The following facts are not in dispute:
 - the Claimant’s father suffered from rectal cancer and received a blood transfusion in November 1986, during surgery;
 - at least one of the units of blood he received was contaminated with HCV;
 - During his surgery in 1986, it was determined that his cancer had metastasized and entered his liver;
 - The Claimant’s father was readmitted to Sunnybrook Hospital in January 1987, and diagnosed with non-A, non-B Hepatitis, now referred to as Hepatitis C;
 - In February 1987, the Claimant’s father underwent surgery as a result of cancer of the prostate;
 - The Claimant’s father was readmitted to hospital and again underwent surgery in January 1988 because of the reoccurrence of cancer in his rectum;

- Throughout the early part of January and February 1988, the condition of the Claimant's father deteriorated until his death on February 16, 1988;
- Dr. Sherif Hanna, the Claimant's father's treating physician, indicated on the TRAN 2 form, dated March 1, 2003, that his HCV infection did not materially contribute to his death;
- Dr. Hanna also provided the following opinion, dated March 3, 2003:

There is no doubt that this patient acquired hepatitis C as a result of blood transfusions. He died approximately 14 months after his surgery and after acquiring the hepatitis C. As best as we could determine, this patient's cause of death was recurrence of his rectal cancer with liver and lung metastases at the time of his death. Although it is possible that the hepatitis C hastened his demise, somehow I do not think that it materially contributed to his death.

Evidence at the Hearing:

5. At the hearing, Counsel for the Administrator of the Fund explained the decision of the Administrator, and referred to the provisions of the Agreement relied upon in concluding the Estate had not satisfied the eligibility criteria.

6. The Claimant did not dispute the interpretation of the Agreement, but testified that her father had been doing well, and that his condition began to deteriorate following his blood transfusion. She maintained that in her view, her father's HCV materially contributed to his death.

7. The Claimant also testified about her lack of confidence in Dr. Hanna's opinion, and described what appeared to be a somewhat hostile relationship which developed with him in the context of his completion of the TRAN 2 form.

8. The Claimant further testified regarding the family's distress about first hearing of her father's HCV from the funeral director, who would not even touch the body as a result.

9. The hearing in this matter was adjourned to give the Claimant and her sisters an

opportunity to pursue another medical opinion. However, none was forthcoming.

Submissions:

10. In her final submissions, the Claimant conceded that her father's death was primarily a result of his cancer, but pointed out that his HCV resulted in additional expenses to his family for burial preparation. She argued that the Administrator's failure to reimburse at least these expenses resulted in her family having to pay for the hospital's negligence. She points out that the family will never be compensated for the additional pain her father experienced, but asks why the family is not owed, at the very least, the additional burial expenses resulting from his HCV.

11. Counsel for the Administrator of the Fund maintained that in the face of Dr. Hanna's opinion that he did not believe that his HCV did not materially contribute to the Claimant's father's death, the Administrator of the Fund was correct in denying the claim.

Analysis:

12. Article 3.05(1)(a) of the Agreement requires, as a threshold test for a claim, proof that the HCV infected person's death was caused by his or her infection with HCV.

13. The Claimant, therefore, must establish that her father's death was caused by his infection with HCV.

14. The Estate has not brought forward any proof that the death of the Claimant's father was caused by his infection with HCV, and the claim must be denied on that basis.

15. However, the Claimant raises a good question regarding why, at the very least, the additional funeral expenses resulting from her father's HCV do not attract compensation.

16. Unfortunately for the Claimant and her family, the Plan does not provide for such compensation in the event the threshold test pursuant to Article 3.05(1)(a) is not met.

17. Neither the Administrator of the Fund, nor I, as an Arbitrator, have any discretion to grant compensation to individuals who were infected with HCV but whose deaths cannot be attributed to that infection.

18. Accordingly, I find that the Administrator correctly determined that the Estate of Claimant's father is not entitled to compensation pursuant to the Agreement, as there is insufficient evidence to demonstrate that his death resulted from his having been infected with HCV.

Determination:

19. The decision of the Administrator of the Fund to deny the Estate of the Claimant's father compensation pursuant to the Hepatitis C 1986-1990 Class Action Settlement Agreement is upheld.

DATED AT TORONTO, THIS 23rd DAY OF JANUARY, 2006.

Tanja Wacyk, Arbitrator