

CLAIM # 11995

Province of Infection: Ontario
Province of Residence: Ontario

**IN THE MATTER OF AN ARBITRATION
TO REVIEW THE DECISION OF THE ADMINISTRATOR**

Before: Tanja Wacyk

Heard: July 9, 2007 at Kitchener, Ontario

Appearances: GK and MN for the Appellant
Belinda A. Bain and Carol Miller for the Administrator

DECISION

BACKGROUND:

1. The Appellant applied for compensation as a Primarily Infected Person under the Transfused HCV Plan (“the Plan”), as set out under the terms of the 1986 - 1990 Hepatitis C Settlement Agreement (“the Settlement Agreement”).
2. By letter dated November 9, 2006, the Administrator of the Fund (the “Administrator”) denied his application. The basis for the denial was that the Appellant had not provided sufficient evidence to demonstrate that he received blood during the Class Period i.e. January 1, 1986 - July 1, 1990.
3. The Appellant requested that an arbitrator review the decision of the Administrator in an in-person hearing.
4. An oral hearing in this matter was held in Kitchener on July 9, 2007.

APPLICABLE PROVISIONS:

5. Article 3.01 of the plan provides:

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 Héma-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. [emphasis added]

6. Article 3.04(1) of the Plan provides:

3.04 Traceback Procedure

Notwithstanding any other provision of this Agreement, if the results of a Traceback Procedure demonstrate that one of the donors or units of Blood received by a HCV-Infected Person or Opted-Out HCV Infected Person before 1 January 1986 is or was HCV antibody positive or that none of the donors or units of Blood received by a Primarily-Infected Person or Opted-Out Primarily Infected Person during the Class Period is or was HCV antibody positive, subject to the provisions of Section 3.04(2), the Administrator must reject the Claim of such HCV Infected Person and all Claims pertaining to such HCV Infected Person or Opted-Out HCV Infected Person including Claims of Secondarily-Infected Persons, HCV Personal Representatives, Dependents and Family Members.

EVIDENCE:

Appellant

7. The Appellant has experienced two hospitalizations. On April 28, 1981, he had surgery at St. Mary's General Hospital in Kitchener, in connection with a gunshot wound. On May 9, 1990 he had back surgery at Hotel Dieu Hospital in Kingston.
8. In his application, the Appellant indicated that he received Blood transfusion(s) during his 1981 surgery, but that he was unsure with regard to the 1990 surgery. However, at the hearing, he indicated that he recalled pulling an IV pole holding a bag of Blood when he had to use the washroom. He indicated the bag was hooked up to the IV for "a day or two". The Appellant denied that he may have confused the two surgeries, although his recollection of other details was vague.
9. Further, although there is a completed Treating Physician Form ("TRAN 2") on file (claim file, pages 29 - 32), which indicates the Appellant received a blood transfusion during the Class Period, there is no identifying information for the physician who completed the form, as is required. Consequently, it has not been possible to follow up with that physician to determine the basis for the indication that the Appellant received a blood transfusion within the Class Period.

Documents Relied upon by the Administrator

10. The hospital records indicated that in preparation for the Appellant's 1990 operation, blood was typed and crossmatched. This is a procedure by which compatible blood is requested and held in a hospital blood bank in the event it is required to be transfused.

11. However, Counsel for the Administrator pointed out that none of the hospital records indicate that the cross-matched units were sent anywhere to be administered. Counsel for the Administrator further pointed out that none of the documents on which a Blood transfusion would be recorded in the normal course indicate that he received a transfusion. These included: the Discharge Summary; the operating room notes; the nurse's notes; the anaesthetist's record, the recovery room record; the postoperative Doctor's orders; the cross-match documents; and, the Fluid Balance Sheets.
12. A trace-back was conducted in the course of considering the Appellant's application. The Traceback Coordinator for the Administrator was advised by Canadian Blood Services (CBS), by cover letter dated October 24, 2006, that the Appellant's records were available, and no record of a transfusion was found for his hospitalization at Hotel Dieu in Kingston in 1990.

ANALYSIS:

13. The Appellant bears the onus of demonstrating the Administrator erred in denying his application.
14. The Appellant's hospital records were available and contain no indication that he received a Blood transfusion during his hospitalization at Hotel Dieu in Kingston in 1990. This is also consistent with the Traceback information provided by CBS.
15. While the Appellant testified at the hearing that he recalled receiving a Blood transfusion following his surgery in 1990, this is inconsistent with his comments on his application form, dated June 4, 2005. At that time, he had indicated that he was unsure as to whether he had received a transfusion in 1990. I find that it is unlikely the Appellant's memory would have become clearer with the passage of an additional two years. Consequently, I find his evidence at the hearing that he recalled receiving a transfusion in 1990 unreliable.
16. In any event, section 3.01(1)(a) of the Transfused HCV Plan provides that a person claiming to be a Primarily-Infected Person must provide the Administrator with, amongst other things, "records demonstrating that the Claimant received a blood transfusion in Canada during the Class Period."
17. Section 3.01(2) of the Plan provides that 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. [emphasis added]

18. In this instance, the Appellant has provided no documentation indicating he received a Blood transfusion. Nor has he produced corroborating evidence which is independent of his recollection or that of his family.
19. Neither the Administrator, nor I, as an Arbitrator, have discretion to grant compensation to individuals infected with Hepatitis C who cannot show they received a transfusion within the Class Period, or whose traceback results are negative.

DISPOSITION:

20. The appeal is denied and the decision of the Administrator to deny the Appellant compensation pursuant to the Hepatitis C 1986-1990 Class Action Settlement is upheld.

DATED AT TORONTO, THIS 11TH DAY OF JULY, 2007.

Tanja Wacyk, Arbitrator