

## **DECISION**

Claimant presented a claim as a HCV infected person in August 2000, indicating that he had received five (5) units of blood following a motor vehicle accident in December 1987.

It is indicated in the declaration form to be completed by a HCV infected person (TRAN 3) and signed under oath by claimant that "the HCV infected person has never at any time used non-prescription intravenous drugs" (section B, subsection 4 of page 1 of TRAN 3).

We know from the file material that a traceback was performed on the units transfused in 1987, but such traceback remains inconclusive as four (4) donors were tested negative, while one donor is deceased and could not be tested. Dr. Marc Deschênes, a well known Montreal area gastroenterologist, indicates in the treating physician form (TRAN 2) that he had known claimant since January 2000 and that he had identified a history of the following risk factors for the hepatitis C virus:

- non-prescription intravenous drug use;
- intra-nasal drug use;
- tattoos;
- prison incarceration;
- prior significant surgeries or trauma.

Dr. Deschênes wrote in the August 2000 form (TRAN 2) that claimant had used IV drugs after 1989, and he indicated at item 6 on page 5 : "patient says used drugs 1998 / 1999".

The Administrator denied the claim for reasons set out in a letter dated September 24, 2004, indicating that there was no evidence which establishes on the balance of probabilities that claimant was infected for the first time with HCV by a blood transfusion received in Canada between January 1, 1986 and July 1, 1990. One must understand from the denial of the claim that the Administrator considered that the claim did not meet the criteria established under Article 3.01 (3) of the plan which requires a primarily infected person who used non-prescription intravenous drugs to establish on a balance of probabilities that he was infected for the first time with HCV by a blood transfusion in Canada during the class period.

Claimant requested an in person hearing which was held in Montréal on April 28, 2006. Claimant was not represented by counsel but did appear before me and did give evidence. Attorney Christine Kark appeared on behalf of the Administrator.

Claimant who was born in 1950, admitted before me that he has used alcohol "all his life" and that he had trouble with the law and had been incarcerated. He added however that he never had sex while in prison and that while he had used drugs in the past (sniffing cocaine), his major problem had always been alcoholism and that he had "been clean" from the time of his December 1987 motor vehicle accident for the following seven (7) + years.

Claimant argued before me that he had used intravenous drugs only after being diagnosed with HCV and that he had provided the Administrator, and myself, with all the information which he reasonably could provide. The attorney representing the Fund Administrator argued that the information given by claimant or that contained in the hospital charts was inconclusive or contradictory and that the Administrator had not been able to obtain the opinion of a medical specialist as provided under section 8b) of the Court approved protocol as the Administrator had insufficient information to provide to such potential expert.

As claimant indicated before me that he expected to be able to obtain copy of blood test results which he "may have undergone" during a detoxication stay, at a date which he could not establish with precision, and since claimant provided me with a May 24, 1990 lab result which he claimed showed that he was not infected with HCV prior to 1986, I did agree to continue the hearing at a later date during which delay claimant was to provide me with additional information.

The hearing resumed on October 10, 2006, but claimant was unable to give me any additional documentation concerning his condition prior to 1986 or prior to July 1, 1990. I did however retain the services of Dr. Richard Clermont, gastroenterologist at Hotel-Dieu Hospital, in Montreal, to help me with the interpretation of the May 1990 blood tests. Copy of the brief report written by Dr. Clermont was sent to claimant and to the Fund counsel on June 22, 2006, such report having proven inconclusive.

During this second day of hearing, counsel for the Administrator gave me copy of claimant's record at St. Luc Hospital and at Maisonneuve-Rosemont Hospital, both large medical institutions in Montreal. Claimant testified that he had little or no recollection of what had happened in either one of these institutions, but he did say that he was ready to accept that what was written in the hospital records, both at St. Luc and at Maisonneuve-Rosemont Hospital, was accurate and that I could therefore rely on the information written in those charts.

Claimant repeated at this October 2006 hearing that he had not used intravenous drugs before 1999 and while he recognizes that he may have said to Dr. Deschênes (as is written in the Maisonneuve-Rosemont chart) that he had done IV drugs in the 60's, he does not remember either having said that or having used IV drugs prior to 1999.

Under schedule A, the transfused HCV plan, the required proof for compensation is detailed in section 3.01 (1). However, where the claimant used non-prescription intravenous drugs, section 3.01 (3) applies, and such section reads as follows:

"Notwithstanding the provisions of Section 3.01 (1) (c), if a claimant cannot comply with the provisions of Section 3.01 (1) (c) because the claimant used non-prescription intravenous drugs, then he or she must deliver to the Administrator other evidence establishing on a balance of probabilities that he or she was infected for the first time with HCV by a Blood transfusion in Canada during the Class Period."

I consider that the question before me therefore becomes whether the claimant has, on a balance of probabilities, established that he was infected for the first time with HCV with a blood transfusion, in Canada, during the class period.

I have considered all the evidence before me and the submissions made verbally by claimant and those made verbally and in writing by Fund counsel.

Claimant has a history of non-prescription intravenous drug use, the details of which were very difficult to determine with any degree of precision. For instance, I see at page 117 of the St. Luc Hospital chart, under the date of June 29, 2004:

*"poly toxicomanie de longue date  
cocaïne  
...  
sobre de 89 à 96"*

"long history of mixed drug use  
cocaine  
...  
sober from 89 to 96"  
(free translation)

In September 2003, still at St. Luc, one sees a reference to the use of cocaine from age 13 to 38 (therefore approximately 1963 to 1988), but also a note that there was no IV use except for a suicide attempt. Claimant testified before me that he had indeed attempted suicide in 1999 by using intra-venous drugs and that this was his only use of

IV drugs and his only suicide attempt. I did note however in a September 1988 report signed by Dr. Lionel Lemieux, neurologist (Maisonneuve-Rosemont chart), reference to a Summer 1988 suicide attempt and to wrist injuries.

At Maisonneuve-Rosemont Hospital, a May 1994 note at page 241 of the chart reads as follows:

*"ex-alcoolique. Cessé X 1988  
drogues : ex-cocaïnomanie cessé X 88  
sniffé  
drogues IV dans les années 60  
Ø IV dans les années 80"*

"ex-alcoholic. Stopped X 1988  
drugs: ex cocaine addict stopped X 88  
sniffed  
IV drugs in the 60's  
Ø IV in the 80's"

(free translation)

The Fund counsel submitted, at the October 2006 hearing , a report signed by Dr. Gary E. Garber, professor and head of the division of infectious diseases at the University of Ottawa/The Ottawa Hospital. Dr. Garber concludes in his October 4, 2006 report as follows:

"Based on extensive cocaine use over a very long period of time which appears to be intermittently over decades, this would make his street drug use far more likely to be the source of his hepatitis C infection than from a single unit of blood that cannot be traced."

I have read Dr. Garber's report with great attention and I do not find it compelling. The question as to whether claimant's drug use (as difficult to pinpoint as it may be) is more likely to be the source of his hepatitis C infection than the 1987 unit of blood that cannot be traced, is one to be answered by the Administrator, or at this stage by myself, and indeed I do not find much guidance in reaching such decision in Dr. Garber's report.

The Plan does not necessarily apply to everyone who has been affected by hepatitis C, but indeed it requires some basic conditions, i.e. that claimant establishes that he has contracted hepatitis C, that he has received a blood transfusion as defined in the plan during the applicable period, and that he first contracted the illness as a result of the

blood transfusion received during the 1986 – 1990 period. Section 3.01 (3) imposes a stricter burden of proof on IV drug users compared to the burden of proof required of claimants who are not IV drug users. The Court approved protocol gives further guidance to the Administrator in interpreting and applying the provisions of the plan.

I consider that the Court approved protocol in place for IV drug users, applies in this case, as claimant did admit that he was, at least at some point in time, an IV drug user. Section 3 of the Court approved protocol says that:

"The burden to prove eligibility is on the claimant."

I do not consider that claimant has proven his eligibility.

I find in the evidence given by claimant and in the evidence gathered from the hospital records presented before me, many inconsistencies which certainly do not assist claimant in satisfying his onus of proof.

Having heard claimant on two different occasions and having reviewed the evidence and the submissions, I am satisfied that claimant has not met the eligibility criteria.

I consider that the decision of the Administrator to refuse the claim was well founded and a proper application of the plan and of the Court approved protocol.

I uphold the Administrator's denial of the claim.

Montréal, January 15<sup>th</sup>, 2007

Jacques Nols  
Referee