

DECISION

Claim No. 1300420

The Claimant has requested a review by a Referee of the decision of the Administrator of the Fund denying her compensation as a Primarily Infected Person. The Claimant was denied compensation on the basis that while she had two blood transfusions within the class period, the results of the tracebacks on those blood donors was negative for the HCV antibody.

An oral hearing was conducted in Vancouver on September 22, 2005.

The information available to the Administrator was as follows.

The Claimant was born in 1958. When she was 17, she was infected with Hepatitis B. There was no information available to the Administrator as to the cause of this infection, and the Claimant's evidence at the oral hearing was that the cause of that infection was unknown.

When the Claimant's first child was born in 1985, the Claimant was tested for Hepatitis B and it was determined that she no longer had hepatitis B.

In 1988, the Claimant was in hospital as a result of an ectopic pregnancy and received two blood transfusions.

She had another child in 1990. The Claimant was notified in 1997 that she should be tested as she may have received contaminated blood. She tested positive for HCV.

A letter from the Claimant's general practitioner dated January 20, 2001, indicates that the Claimant's past history was unremarkable apart from her previously diagnosed Hepatitis C "likely acquired during blood transfusions in 1988 with a ruptured ectopic pregnancy."

An ultrasound report of December 30, 2002 suggests the possibility of early cirrhosis.

The Claimant's general practitioner indicated on the TRAN 2 form that the Claimant had no other risk factors, and that there was no indication of infection with Hepatitis non-A, non-B or the Hepatitis C virus prior to 1986.

The traceback procedure was completed in March 2004, indicating that the donors of the units transfused in 1988 tested negative for the HCV antibody.

The Claimant submitted that the testing for hepatitis done in 1985 narrows the time frame for her to have contracted Hepatitis C from 1985 to 1997, when she was tested for Hepatitis C.

As the Claimant raised questions about the Traceback procedure, a traceback summary report dated November 1, 2004 was obtained and further information dated January 21, 2005 was obtained from Canadian Blood Services.

The required proof for compensation is set out in Article 3 of the Transfused HCV Plan (Schedule A to the 1986-1990 Hepatitis C Settlement Agreement). Section 7(a) of the Traceback Procedure Protocol provides that where all of the donors of the Blood received by the person who claimed to be a Primarily Infected Person during the Class Period are determined not to be HCV antibody positive, the Administrator shall reject the Claim as provided in Article 3.04(1) of the Plan.

However, as provided in Article 3.04(2) of the Plan, a claimant has the opportunity to prove that he or she was infected for the first time with HCV by a Blood Transfusion in the Class Period.

The issue on this review is whether the Claimant has established that she was infected by a Blood Transfusion in the Class Period despite the results of the Traceback Procedure.

The Claimant submitted that nowhere in the compensation package is it stated that the Traceback is the sole deciding factor in receiving benefits. Concerns were also raised about the timing of the Traceback and the procedure.

The Claimant also submits that if she had been infected with HCV prior to the Class Period, when she was tested for Hepatitis B in 1985, the results would have been positive for Hepatitis non-A, non-B.

The Administrator assessed the evidence in this case and could not reach a conclusion that there was sufficient evidence, on the balance of probabilities, that it was more likely than not that the Claimant was infected by a Transfusion in the Class Period.

The Claimant has provided a written medical opinion from her general practitioner, dated February 27, 2005, which concludes that it was likely her HCV infection was contracted as a result of the blood transfusions in 1988. The general practitioner in question has been the Claimant's doctor for almost 21 years and also has the records of the Claimant's previous two general practitioners, dating back to when she was 15 years of age.

At the oral hearing, the Claimant gave evidence as to her understanding of the testing which would have been done in 1985. She and her husband felt that as a result of the testing for Hepatitis in 1985, she would have tested positive for Hepatitis non-A, non-B had she already been infected with HCV at that point. However, as submitted by Fund Counsel, there was no testing for HCV until 1990. Prior to testing being available, diagnosis of non-A non-B hepatitis was made on the basis of clinical signs and symptoms. The testing of the Claimant in 1985 is therefore of no assistance in determining the date of her HCV infection.

It is, however, significant that she did not, according to the evidence, have any clinical signs or symptoms of infection with Hepatitis non-A, non-B as of or prior to 1985.

In terms of the evidence as to her personal history, the Claimant and her husband gave evidence that they had been together since 1981. The Claimant's husband and children have been tested for HCV and are negative.

The Claimant gave very detailed evidence about her education and work experience. Nothing in that history indicated any behaviour or events which put her at increased risk for contracting HCV. She said that while she was a normal teenager and experimented with alcohol, she did not do drugs. She is frightened of needles and does not have any tattoos or body piercing although she has pierced ears. She has never had acupuncture.

She has been in the hospital for day care surgical procedures at age 17 and age 20 or 21. The only other occasions she was in hospital were for the births of her two children in 1985 and 1990. Her second child was born by emergency C-section and a tubal ligation was performed at the time of that delivery. No blood transfusions were given during the C-section procedure.

She had a boyfriend for 7 years before she met her husband. The Claimant says that he was not a drug user and that he went to get tested for hepatitis at the time the Claimant had hepatitis B and was negative. He had no risk factors for HCV. The Claimant and her husband deny any history of drug abuse.

Fund Counsel does not challenge the evidence of the Claimant regarding her history. I should add that I found both the Claimant and her husband to be very forthcoming and credible.

The Claimant's general practitioner gave evidence, both in writing and orally, that he was not aware of any obvious risk behaviour for Hepatitis C on the part of the Claimant and that he had seen no suggestion of any high risk activities in the records of her previous physicians.

His evidence was that the Claimant had Hepatitis B when she was 18 and that the causes of Hepatitis B are the same as those of Hepatitis C – blood transfusion, direct contact with blood and body fluids, and uncommonly, sexual transmission.

He stated that he had seen no clinical evidence in the Claimant of non-A, non-B Hepatitis prior to the Class Period.

He was unable to say whether the suggestion of early cirrhosis on the ultrasound of December, 2002 shed any light on the timing of the HCV infection. He repeated in his oral evidence that his opinion is that the Claimant was infected as a result of her two blood transfusions in 1988.

His evidence was that the results of the Claimant's liver function tests and ultrasounds, while non-specific, are more in keeping with a more recent infection as opposed to the distant past.

At the hearing, the claimant advised that she had a letter from Dr. Steinbrecher, a gastroenterologist, which she believed supported her claim that the cause of her HCV infection was the blood transfusions in 1988. A copy of this letter was subsequently provided to me and to Fund Counsel. After this letter was produced, I asked both Fund Counsel and the Claimant if they wished to make any further submissions on Dr. Steinbrecher's letter and they did not.

Dr. Steinbrecher's letter, dated July 2, 1998, notes that the Complainant was tested for HCV in 1997 as a result of the provincial look-back program in relation to the blood transfusion she

received in 1988. Dr. Steinbrecher says in his letter that “this lady has had hepatitis for the past 10 years”. It appears that the focus of Dr. Steinbrecher in his letter was the course of the Claimant’s disease and the appropriate treatment and not the specific date of her infection. He does not appear to have been aware of the negative trace-back result in relation to her transfusion and he was not asked to testify.

The Claim File in this matter also contains at p. 61 a letter from Dr. Petrunia, an internist and gastroenterologist dated January 21, 2001, indicating that the Claimant’s history is “unremarkable apart from the previously diagnosed hepatitis C, likely acquired during a blood transfusion in 1988 with a ruptured ectopic pregnancy”.

The issue is whether the claimant has met the onus of proof necessary to rebut the negative traceback.

The leading decision on this point is the decision of the Honourable Mr. Justice Pitfield, dated May 9, 2003. In that case, the judge said as follows:

While the primary basis for the determination of eligibility is the traceback process, a Claimant may adduce evidence on appeal in support of the claim that he or she was infected for the first time in the class period notwithstanding a negative traceback result. In my opinion, Article 3.04(2) does not permit a Claimant to conduct his or her own traceback procedure. The Article contemplates that there might be evidence which would establish that the source of the infection, more likely than not or on the balance of probabilities, was a transfusion received in the period. It is not an answer to a Claimant’s attempt to provide such evidence to say that some small percentage of the population may be infected by HCV from unknown sources. Were such an assertion an answer, a Claimant could never refute the traceback result because the Claimant could never prove that he or she was not one of the small percentage of the population who might have been so infected.

The evidence the Claimant would be required to adduce on appeal would include, at the least, complete family and personal medical history and detailed evidence of all aspects of the Claimant’s lifestyle including evidence of the absence of opportunity to be infected by needles or injections, however and for whatever purpose received. The kinds of evidence I have described are not intended to be exhaustive. Rather, they are intended to point to the process that must be followed in the attempt to refute the traceback result.

A simple denial by a Claimant of personal history or actions that have been identified as potential non-transfusion sources of HCV infection will not suffice. The reliability of the assertion which is subjective in nature would have to be tested by reference to all known objective evidence. One of the pieces of objective evidence is the negative traceback result following upon the application of and adherence to, the approved traceback protocol. Contradictory objective evidence would have to be very persuasive if the traceback result is to be refuted.

In decision No. 93, the Referee held that the Claimant had established that the transfusion was the cause of the infection, as there was no other explanation for the timing of the hepatitis C other than the transfusion. In that case, the Claimant was diagnosed with acute Hepatitis non-A non-B about a month after receiving a blood transfusion at age 56. A traceback on the transfused unit was negative. Her treating physician was of the opinion that she had contracted Hepatitis C as a result of the transfusion, and there was evidence from 6 physicians to this effect.

In Decision 120, the Honourable Madam Justice Morneau allowed the Claimant's appeal from the referee's decision upholding the denial of compensation. In that case, the Claimant received a blood transfusion for the first time in the class period. He received an albumin transfusion after cardiac surgery in 1996. His cardiologist and treating physician confirmed that there were no other risk factors for hepatitis C except for the blood transfusion. The Claimant had developed advanced cirrhosis by 1999, which was unlikely to have developed in the period following his second transfusion. The judge referred to the Honourable Mr. Justice Pitfield's reasons as quoted above, and noted that the Claimant, who had been married for 40 years, had submitted everything he possibly could.

In Decision 122, Madame Justice Morneau referred to expert evidence that the history of the Claimant's father was compatible with HCV infection at the time of one of the transfusions in the class period. While the Claimant's father could have contracted Hepatitis C from other sources, the preponderance of evidence favored the transfusions as the source.

The referee in that case held that the Claimant had not established on the balance of probabilities, despite the medical evidence, that her father had been infected with HCV for the first time following one of the blood transfusions in 1989. The referee was only able to conclude that it was possible that the Claimant's father had been infected by the 1989 transfusions. He had had at least 5 surgical procedures as well as invasive procedures such as colonoscopy. There was evidence from a gastroenterologist called by the Claimant to the effect that the history of the Claimant's father was compatible with HCV contracted at the time of the 1989 transfusions, and he offered some hypotheses as to how a traceback on those donors could still have been negative. It was noted that the development of cirrhosis in that case was earlier than would normally have been expected, some 7 years after the transfusions. The Honourable Madam Justice Morneau upheld the decision of the referee.

In the present case, the Claimant's general practitioner has in his possession her records going back to age 15. While copies of those records were not provided, in his testimony, Dr. Urban advised that he has reviewed the records and there is no indication of high risk behaviour on the part of the claimant and he remained of the view, after review of those records, that the Claimant was likely infected with HCV as a result of her 1988 transfusions.

Dr. Steinbrecher's letter did not directly address the issue of whether the Claimant was infected by a transfusion in the class period. Nevertheless, the only medical evidence before me is that it is likely that the infection occurred as a result of the transfusions. There is no evidence before me as to how the traceback on those donors could still have been negative. The only other evidence before me is evidence adduced by fund counsel to the effect that in a certain percentage of cases of HC infections, the cause will never be known. It has been held by the Honourable

Mr. Justice Pitfield that such evidence is not an answer to a Claimant's attempt to refute a negative traceback result.

The issue is whether there is sufficient objective evidence before me to persuade me on a balance of probabilities that the Traceback result should not govern my decision.

Based on all of the evidence before me, including the medical evidence, the detailed evidence provided by the Claimant as to her history and lifestyle, and relying on Decision 120, I conclude that the Claimant has established on a balance of probabilities that the cause of her HCV was the transfusions in the class period, notwithstanding the negative traceback result. In my view, Decision 122 is distinguishable from the present case based on the complex and lengthy medical and surgical history of the claimant in that instance. In the present case, there is no evidence of high risk behaviour on the part of the Claimant, who has adduced all of the evidence she could reasonably obtain. The medical evidence is that her present condition is more consistent with a more recent infection than one in the distant past, which I take to mean more consistent with infection in 1988 than when the complainant was a teenager. I therefore allow this appeal.

DATED AT VANCOUVER, BRITISH COLUMBIA this 9 Day of March, 2006


Robin Harper
Referee