IN THE MATTER OF A REFERENCE TO REVIEW

THE DECISION OF THE ADMINISTRATOR UNDER THE HCV 1986 - 1990

TRANSFUSED SETTLEMENT AGREEMENT

CLAIM No.: 1400016

Province of Infection: British Columbia

Province of Residence: Manitoba

Heard: October 24, 2006 at Winnipeg, Manitoba

Harvey Secter, Referee

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DECISION OF REFEREE

INTRODUCTION

1. On June 2, 2006, the Administrator the Administrator denied this claim for compensation under the 1966-1990 Hepatitis C Settlement Agreement ("Settlement Agreement").

2. The Claimant requested that the decision of the Administrator be reviewed. The original submission included a request for an in person hearing but did not specify whether the review would be by a Referee or an Arbitrator. I subsequently spoke with the Claimant and he agreed that he would prefer a review by a Referee.

3. A hearing was held in Winnipeg, Manitoba on October 24, 2006. The Claimant represented himself and the Administrator was represented by William A. Ferguson of MacKenzie Fujisawa LLP.

4. In person evidence was provided by the Claimant, a friend of the Claimant ("Ms D"), and Carole Miller. Dr. Gary Garber and Dr. Kelly Kaita testified by telephone.

THE ADMINISTRATOR'S DECISION

5. Article Three of the Transfused HCV Plan (the "Plan"), which appears as Schedule A to the Settlement Agreement, sets out the eligibility requirements for compensation. When a claimant admits to the use of non-prescription intravenous drugs, the Court Approved Protocol ("CAP") states that "the burden to prove eligibility is on the claimant." The CAP requires the Administrator to "weigh the totality of evidence ...and determine whether, on a balance of probabilities, the HCV Infected Person meets the eligibility requirements."

6. The letter of denial dated June 2, 2006 concludes that "the Administrator has considered all of the evidence submitted, including the opinion of a medical specialist experienced in treating and diagnosing HCV and has determined that, on a balance of probabilities, your claim does not meet the eligibility criteria. The Administrator cannot conclude that the HCV infected person was infected by HCV for the first time by a blood transfusion received in Canada in the Class Period; therefore, your claim is denied."

7. Central to this review is the Claimant's belief that the Administrator's denial was based on references to a history of non-prescription intravenous drug use contained in documents provided by physicians who had treated him. The Claimant, asserts that the information arose from both misunderstandings and mis-communication between the Claimant and the

physicians.

EVIDENCE

8. There is no dispute that the Claimant has been diagnosed with HCV. There is also no dispute that the Claimant received 18 blood transfusions in September 1987 while being treated at Royal Columbian Hospital in Vancouver following an assault during which he was stabbed. The traceback report showed that 17 of the donors tested negative for HCV and one could not be located. Accordingly, the results from the traceback are considered "inconclusive."

9. Section F of the Treating Physician Form (TRAN 2), completed by Dr. Kelly Kaita in June 2000, makes reference to the Claimant having both a history of non-prescription intravenous drug use and tattoos as risk factors for the Hepatitis C virus. In answer to question 6., Dr. Kaita wrote that the "patient admitted to using IVDA in the 1980's to ~ 8 y ago."

10. At the hearing, Dr. Kaita testified that this information was taken from notes he made while taking a history from the Clamant during his first appointment on February 18, 1998. That information is also contained in a letter Dr. Kaita sent to Dr. Dissanayake, the referring physician, on the same day. That letter states: "As you are aware, this gentleman was using intravenous drugs from the 1980's to approximately five years ago when he checked himself into St. Norbert Foundation and has been clean off all forms of substance abuse since then."

11. The Claimant insists that the information contained in Dr. Kaita's notes is incorrect. His Other Risk Factor Inquiry form dated February 23, 2001 states that he used cocaine only twice in 1986. In a letter to the Administrator dated May 26, 2005, the Claimant states that, when he first met with Dr. Kaita, he was very sick and may not have heard the questions clearly. When Dr. Kaita asking him about drug use, the Claimant thought the doctor was referring not just to the Claimant but rather to anyone in his family. The Claimant testified that his responses were about drug use by his brother and not himself.

12. The record indicates that the Claimant became aware of Dr. Kaita's statements about non-prescription intravenous drug use early in 2001. Following a lengthy conversation with the Claimant on May 16, 2001, Dr. Kaita wrote a memo that includes the following:

> "At this time because of compensation, [the Claimant] would like the record to show that in fact he had not used intravenous drugs on a regular basis but rather on a casual basis and in frequently. He feels that his compensation has been rejected because of my letter dated August 25, 1999 suggesting that he had a long-standing history of intravenous drug abuse. I am still in no position to determine whether or not his hepatitis C was a result of his needle use in the 80's up until the early 90's or from a

blood transfusion in 1987. Records are being obtained from St. Norbert Foundation to confirm the fact that this gentleman had a problem with intravenous cocaine use."

13. On May 16, 2001, Dr. Kaita also received a letter from Dr. Dissanayake regarding the Claimant that states:

> "I have only seen him on two occasions, on the 07 of Jan' 98 and the 28 of Jan' 98. My file notes indicate that he has told me he was an IV drug abuser. When I discussed the results with him on the 28 of Jan 98, he had not shown any protest about the results to indicate that he got them from any other source than the IV needle use."

14. The Claimant testified that he has no recollection of any discussion with Dr. Dissanayake about non-prescription intravenous drug use when he saw her for an examination and blood test. Dr. Dissanayake was not called to provide oral evidence. As a result, there is no explanation as to how Dr. Dissanayake would have made these notes other than from information she received from the Claimant. She did not receive this information from Dr. Kaita as the Claimant's visits with her predate his first contact with Dr. Kaita. In turn, Dr. Kaita testified that he did not receive any information about the Claimant's history from Dr. Dissanayake when she referred the Claimant to him in 1998. Dr. Kaita testified that he received this information from Dr. Dissanayake only in May 2001.

15. Dr. Kaita further testified that, as is his regular practice, he took notes during the examination of the Claimant on February 18, 1998 and dictated them immediately following their meeting. These notes contain references to past intravenous drug use as well as tattoos and multiple transfusions as risk factors for the hepatitis C infection. There is no reference to other members of the Claimant's family other than the notation that the family history is "unremarkable."

16. The third reference to the Claimant's use of non-prescription intravenous drugs is contained in a letter from Mike Calder of the Behavioural Health Foundation (formerly The St. Norbert Foundation), dated December 12, 2005. In that letter, Mr. Calder states that the Claimant was at the Foundation on two occasions for treatment for alcohol abuse. He also states that the Claimant "did on a few occasions use drugs but the main problems were alcohol abuse and lifestyle."

17. Mr. Calder did not appear at the hearing. The Claimant testified that he may have told Mr. Calder that he had used drugs on occasion as a way of getting into St. Norbert for help with his alcohol problem.

18. The Claimant insists that he only tried non-prescription intravenous drugs on the one occasion referred to in his affidavit dated March 11, 2005. During the night of March 25 and the early morning of March 26, 1986, the Claimant twice attempted to inject drugs with "brand new and sterile" needles. Both attempts were unsuccessful. He testified that his friend, Ms D, was present and observed his attempts to use intravenous drugs.

19. Ms D attended the hearing and confirmed the Claimant's account of the events on that night. She testified that she went to the Claimant's residence after he called to tell her that he was going to try drugs. While she observed him "poke at his arm" on the two attempts, she is certain that he did not get either needle into a vein. She testified that after these two attempts failed, the Claimant decided that he would not try using intravenous drugs again.

20. In her testimony, Ms D was clear in recounting the events that occurred on the night of March 25, 1986. She further testified that while she saw the Claimant "drunk lots of times"she never saw him use drugs on any other occasion or heard any reference to any other attempts by him to do so. However, she had difficulty recalling other details of her relationship with the Claimant or his activities at that time. I accept her explanation that her lack of memory is related to her health problems, a car accident and a susceptibility to panic attacks.

21. The Claimant also had difficulty with his memory of events. This is understandable given the many tragedies he faced during that period, including the loss of his wife and niece, an attack that left him critically wounded, and his difficulties with alcohol abuse.

22. Section 8.b. of the CAP requires the Administrator to "obtain the opinion of a medical specialist experienced in treating and diagnosing HCV as to whether the HCV infection and the disease history of the HCV Infected Person is more consistent with infection at the time of the receipt of blood, the Class Period Blood transfusion(s) or the secondary infection or with infection at the time of the non-prescription intravenous drug use as indicated by the totality of the medical evidence." Dr. Gary Garber, Professor and Head, Division of Infectious Diseases at the University of Ottawa was asked to review the medical evidence and provide that opinion.

23. Dr. Garber's opinion is contained in a letter dated May 4, 2006. A review of documents supplied by the Claimant, the physicians who treated him, and Mr. Calder, led Dr. Garber to conclude that "the history of the injection drug use is unclear." In addition to this risk factor, Dr. Garber also considered that one of the 18 units of blood received by the Claimant could not be traced and the fact that the Claimant had tattoos. Based on his review of the Claimant's file, Dr. Garber opined that "on the balance of probabilities it's more likely that he acquired hepatitis C through either injection drug use or tattoos than from a single unit of blood."

24. Dr. Garber testified by telephone. The Claimant challenged Dr. Garber's conclusion as being inconsistent with Dr. Kaita's memo of May 16, 2001 which states "I am still in no position to determine whether or not his hepatitis C was a result of his needle use in the 80's up to the early 90's or from a blood transfusion in 1987." Dr. Garber agreed with the Claimant that Dr. Kaita is also a recognized expert and that there is no certainty as to the cause of the infection. Dr. Garber explained that he was asked to weigh the available documentary evidence and provide an opinion based on probabilities. He did so and, in

the absence of any new evidence, was not prepared to change the opinion contained in his letter of March 4, 2006.

25. While the Claimant was appealing the decision to reject his claim and disagreed with the conclusions reached by Dr. Garber, he raised no objections with the procedures followed by the Administrator in conducting either the traceback or the review of his file under the terms of the CAP.

ANALYSIS

26. This claim presents significant challenges resulting from conflicting information regarding the use of non-prescription intravenous drugs by the Claimant. His testimony and affidavits both claim that he had only tried injecting drugs on a single occasion and used new sterilized needles in both of those two failed attempts. The Claimant's testimony was corroborated by his friend who testified that she was present on that occasion and has no knowledge of the Claimant using injection drugs at any other time. On the other hand, the file contains reports from Dr. Dissanayake, Dr. Kaita and Mike Calder which all refer to the Claimant having had more than a single experience with non-prescription intravenous drugs. The Claimant testified that he may have fabricated a history of drug use to increase his chances of getting into the program at St. Norbert for treatment of his alcohol problem. While that is plausible as it relates to Mr. Calder's letter, it does not explain the information contained in the reports from the two doctors the Claimant saw in 1998.

27. The notes taken by Dr. Dissanayake and Dr. Kaita both refer to the Claimant's use of non-prescription intravenous drugs over an extended period of time. Both doctors made their notes independently while taking a history from the Claimant at the time he was seeking treatment from them. I am satisfied that their notes accurately reflect information they received from the Claimant during their separate examinations of him. While the Claimant denies having given that information to Dr. Dissanayake, her notes are clear and the Claimant testified both that he was very unwell at that time and now has limited recall of many details about those events. There is no evidence to indicate how Dr. Dissanayake could have received the information contained in her notes other than from the Claimant himself. Nothing in either the record or Dr. Kaita's testimony supports the Claimant's contention that his responses to Dr. Kaita questions regarding drug referred to his brother rather than himself. I also accept Dr. Kaita's testimony that doctors try to be particularly careful when documenting a hepatitis C patient's history as it can directly affect the treatment plan.

28. After reviewing the evidence, Dr. Garber questioned whether or not "the drug use was more extensive than claimed." The IDU Committee considered the totality of the evidence and concluded that there was "reasonably reliable evidence that the non-prescription intravenous drug use took place on more than one occasion ..." Dr. Garber also questioned the reliability of the Claimant's statement that needles used for the tattoos he

received were always sterile, noting that the "standards within tattoo parlors were certainly rather suspect in the 1980's."

CONCLUSION

29. The requirements for a claimant being eligible to receive compensation are detailed in Article Three of the Transfused HCV Plan. Section 3.01(3) states that "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." The Court Approved Protocol addresses claims by those who are affected by 3.01(3) of the Plan. Section 3. of the CAP states that the "burden to prove eligibility is on the claimant."

30. The Plan and the CAP also set out specific requirements for conducting additional investigations and determining eligibility for a claimant with a record of IV drug use. Section 9. of the CAP requires the Administrator to "weigh the totality of evidence obtained from the additional investigations required by the provisions of this CAP and determine whether, on a balance of probabilities, the HCV Infected Person meets the eligibility criteria.

31. The Administrator must operate within the parameters of the Plan and the CAP. I am satisfied that, in this case, the Administrator met all of the requirements outlined in the CAP in determining that the Claimant did not meet the eligibility requirements specified in the Plan. That decision is supported by the report of the opinion provided by Dr. Garber and the review conducted by the IDU Committee. The Claimant was invited to present additional evidence to support his claim that his HCV infection was caused by a Class Period Blood transfusion. However, neither the documentary evidence contained in the file nor the testimony presented at the hearing were sufficient to meet the burden of proof that the CAP places on a claimant in these circumstances.

32. The Reasons for Decision contained in the letter sent to the Claimant on June 2, 2006 concludes with the following paragraph:

> In accordance with the Court Approved Protocol, the Administrator has considered all of the evidence submitted, including the opinion of a medical specialist experienced in treating and diagnosing HCV and has determined that, on a balance of probabilities, your claim does not meet the eligibility criteria. The Administrator cannot conclude that the HCV infected person was infected for the first time by a blood transfusion received in Canada in the Class Period; therefore, your claim is denied.

There is nothing to suggest that the conclusion reached by the Administrator was

incorrect. I therefore uphold the Administrator's decision to deny this claim.

Dated at Winnipeg, Manitoba, this 27th day of November, 2006.

Harvey L. Secter, Referee