

DECISION

1. The Claimant, an Ontario resident, has submitted an application for compensation as a primarily infected person under the HCV Transfused Plan.
2. By letter dated February 27, 2003 the Administrator denied the claim on the basis that the Claimant had not provided sufficient evidence to establish that he received blood during the Class Period.
3. The Claimant submitted a Request for Review by a Referee, dated March 20, 2003. In the Request for Review, the Claimant indicated that he intended to call evidence at an oral hearing and that further documentary evidence might be required.
4. The Claimant requested a number of opportunities to submit further evidence in support of his claim¹. Eventually, as confirmed in correspondence from the Claimant and his physician², the Claimant clarified his request for review of the Administrator's decision and asked to be included as a Class Member on the basis of the receipt of a bone graft in the Class Period. The Claimant also confirmed that he had provided all of the information that he could and he requested a decision from the Referee.

Facts

5. In his initial Request for Review, the Claimant speculated that he might have received blood products during surgery to perform a bone/cartilage graft at Mount Sinai Hospital in Toronto on March 15, 1990. The Claimant's hospital records

¹ These requests were made during teleconference calls convened on November 18, 2003 and February 9, 2004 and repeated in various e-mail correspondence.

² Undated correspondence received from the Claimant received December 2005, further written submissions dated February 2, 2006 and a letter dated July 30, 2005 from Dr. Mc Naull, Mount Sinai Hospital, Hepatitis Centre, Liver Study Unit.

indicate that he was cross matched for four units of blood prior to his surgery; the subsequent surgical records do not indicate that the Claimant was actually transfused. A traceback was conducted to further investigate whether the Claimant received a transfusion during surgery. A search of the Claimant's medical notes and records at Mount Sinai from 1985 to present did not produce any evidence that the Claimant was transfused at that location.

6. By letter dated July 20, 2005, Dr. Mc Naull, the Claimant's physician, confirmed that the Claimant did not receive a blood transfusion. He further confirmed that the Claimant did receive a bone/cartilage graft (osteochondral allograft) on March 15, 1990 for a previous fracture of the right tibia. Dr. Mc Naull reported that the Claimant was first diagnosed with Hepatitis C in 1998. He reviewed the Claimant's risk factors for infection and concluded that the only epidemiological risk for the acquisition of Hepatitis C was the cartilage/bone graft the Claimant received in 1990. Furthermore, he noted that there are published literature reports to support Hepatitis C transmission to the recipients of bone and tendon allografts.

Submissions

7. In support of the Administrator's decision, Fund Counsel submits that compensable blood product are defined under the terms of the Plan and do not include bone or tissue transplants. Since the Claimant did not receive "Blood", as defined under the Settlement Agreement, he is not eligible for compensation. The Settlement Agreement is clear and does not provide for those who may have been infected as a result of a bone graft. In Fund Counsel's submission, neither the Administrator nor a Referee has any authority to deviate from the eligibility requirements set out in the Court approved Settlement Agreement.
8. The Claimant submits that the damage to his liver is consistent with having contracted Hepatitis C when he received a bone graft in 1990. Current medical literature confirms that the disease can be transmitted through the transplantation of tissue, organ and bone. In the Claimant's view, there are no other sources to

explain his illness and he believes that he contracted the virus from the “bad blood” that was allowed in the country and the hospital where his surgery was performed.

Analysis

9. The Claimant has applied for compensation under the terms of the Hepatitis C 1986-1990 Class Action Settlement, as approved by Court Order dated October 22, 1999. The terms of the settlement provide a detailed outline of who is eligible for compensation and how eligibility can be proven.

10. In order to qualify for compensation as a primarily infected person under the HCV Transfused Plan, the Claimant must demonstrate that he “received a Blood transfusion in Canada in the Class Period”³.

11. For the purposes of determining class membership, “Blood” is specifically defined under the terms of the Settlement Agreement as follows:

“Blood” means whole blood and the following blood products: packed red cells, platelets, plasma (fresh frozen and banked) and white blood cells.⁴

12. Membership in the class is a pre-condition of eligibility for compensation. In this case, there is no evidence that the Claimant received a “blood transfusion” or “blood” products, as defined under the Plan. A review of the Claimant’s medical records, the Traceback results from Mount Sinai hospital and the report provided by the Claimant’s physician all support my conclusion that the Claimant did not receive a transfusion in the Class Period. He was the recipient of a bone/cartilage graft, however, given the limited definition of “Blood” contained in the Settlement Agreement, I cannot conclude that a bone or cartilage graft qualifies as a blood product or is evidence of a blood transfusion.

³ Settlement Agreement, Schedule A, Transfused HCV Plan: Article 3.01 (1) of the Plan.


⁴Settlement Agreement, Schedule A, Transfused HCV Plan: 1.01 Definitions

13. I fully appreciate the Claimant's frustration with the current availability of compensation for his condition. Nonetheless, the Plan does not, and was never intended to apply to all persons infected with Hepatitis C. Compensation under the HCV Transfused Plan is limited to a defined class of individuals, and inevitably there will be some individuals, like the Claimant, who are infected with Hepatitis C but who are not entitled to receive compensation.
14. In determining eligibility for compensation, I am limited by the conditions set out in the Court approved Plan. Based on the evidence before me I conclude that the Claimant has not met the eligibility requirements for compensation under the HCV Transfused Plan contained in the Hepatitis C 1986-1990 Settlement Agreement. I therefore find that there is no basis to interfere with the decision of the Administrator.

Decision

15. The decision of the Administrator denying the Claimant's application for compensation under the HCV Transfused Plan is upheld.

Dated at Toronto, Ontario, May 15, 2006



Reva Devins, Referee

Claim no. 1401145
Province of infection - Ontario