

REFEREE'S DECISION
HEPATITIS C CLASS ACTION
JANUARY 1, 1986 – JULY 1, 1990

Claimant:	Claimant #1401846
File No.:	416611 – 20
Province of Infection:	Alberta
Province of Residence:	Alberta
Date:	September 8, 2006

Decision

1. On December 21, 2004, the Administrator denied the claim for compensation for Primarily Infected Person pursuant to the transfused HCV plan on the basis that the Claimant had not provided sufficient evidence that he was infected for the first time with HCV by a blood transfusion received in Canada within the Class Period.
2. The Claimant requested an oral hearing by a Referee to review the decision of the Administrator.
3. The Claimant resides in Calgary, Alberta and received 13 units of transfused blood at the Calgary General Hospital May 17, 1989.
4. An initial hearing was held in Calgary on May 25, 2005.
5. Neither party disputed the following facts:
 - (a) The Claimant suffers from Hepatitis C and has been diagnosed at disease level 4. The Tran 2 completed by his physician Dr. Mark Swain, indicated that the Claimant has a history of non-prescription intravenous drug use.
 - (b) On the Tran 3 the Claimant admitted that he had used non-prescription intravenous drugs including speed or MDA on more than one occasion in or about 1972.
 - (c) Canadian Blood Services conducted a traceback of the transfused blood and reported on September 18, 2002, that the donors of 11 of the units have been found to be non-reactive, but the results of the remaining two units were inconclusive.
 - (d) The Claimant testified at the hearing that he had used MDA in 1973 on two occasions that he could remember and it was possible that he injected MDA with a needle on more occasions.
 - (e) The Claimant was able to recall the family doctors who had treated him during his lifetime.
 - (f) The Claimant recalled that he had been treated in the early 1980s at the Foothills Emergency for stitches to his head and fingers and at the Peter Lougheed Centre.
 - (g) The Administrator advised the Claimant on March 4, 2004, that due to the acknowledgement of non-prescription intravenous drug use, he would have to provide evidence on a balance of probabilities that he was infected for the first time with HCV by a blood transfusion received in Canada during the Class Period.

- (h) The Claimant advised the Administrator on March 21, 2004 that he intended to provide further evidence of first infection within the Class Period.
- (i) The Claimant testified that he made his best efforts to locate additional medical records.
- (j) On September 2, 2004, he swore an Affidavit deposing that he submitted all the medical records that he could afford to obtain.
- (k) After the Claimant had identified the various doctors that he had seen and the various hospitals that he had attended, including Drs. McKay, Sawa, Swain and Lee, and hospitals including Foothills Hospital, Calgary General Hospital, Peter Lougheed Hospital and Rockyview Hospital, the Administrator agreed to assist in drafting a request to obtain any existing records from these various sources.
- (l) At the hearing, Fund Counsel explained to the Claimant the provisions of the Intravenous Drug Use Court Approved Protocol.
- (m) Subsequent to the hearing, the Claimant supplied two disks of information and all the documentation pertaining to his pre-transfusion health history that he could locate.
- (n) A review of this documentation disclosed, among other things, a report from Dr. Burak to Dr. McKay dated November 19, 1997 which stated that the Claimant had been exposed to Hepatitis B as a child and had admitted to heavy alcohol consumption between 1973 and 1983.
- (o) In this report, Dr. Burak expressed the opinion that the Hepatitis C was likely acquired during intravenous drug use in the 1970s, although the Claimant may have acquired it during the 1989 transfusion.
- (p) Dr. Lee provided a letter to the treating physician concerning treatment recommended in 2004.
- (q) The hearing was reconvened as telephone conference call on September 19, 2005, during which it was agreed that the Claimant would re-contact the clinics of Dr. Lee and Dr. Swain to ensure that entire chart was transmitted to me.
- (r) On February 2, 2006 Fund Counsel advised that they had transmitted all of the information to one Dr. Gary Garber, an expert retained on its behalf to provide an opinion on the causation issue.
- (s) Dr. Garber in an opinion dated December 20, 2005, stated that, it was more likely, on a balance of probabilities that the Claimant was exposed to

Hepatitis C prior to his blood transfusion in 1989 than as a result of the blood transfusion.

- (t) The hearing continued on April 20, 2006 by telephone conference at which time the Claimant stated that he desired to contact the government to determine if any further medical records could be archived and produced.
- (u) I inquired if he would be prepared to request his treating physician to refer him to an infectious diseases specialist.
- (v) The Claimant stated that he was scheduled to attend upon Dr. Lee who he understood had a specialty in infectious diseases.
- (w) The Claimant agreed to ask Dr. Lee for an independent opinion as to the likely cause of his infection that would include a review of Dr. Garber's opinion and the basis for it.
- (x) I spoke with the Claimant on the morning of August 16, 2006 who advised that he could not get through to Dr. Lee's office.
- (y) With the agreement of the parties, I wrote to Dr. Lee and asked that he review his file materials and the opinion of Dr. Garber as provide the Claimant with an opinion on the causation of his infection.
- (z) Dr. Lee was also provided with a copy the Court Approved Protocol.
- (aa) On September 6, 2006, I received written confirmation from Dr. Lee that he was a hepatologist rather than a specialist in infectious diseases. Nevertheless, he stated that he reviewed the Claimant's file in detail and came to the same conclusion as Dr. Garber on the causation issue.
- (bb) After reporting to the parties upon Dr. Lee's opinion, I was advised that neither had any further submissions to make.

The Plan and the Accompanying Court Approved Protocols

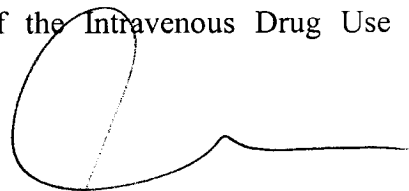
6. A fund has been established as part of a settlement agreement reached in the 1986-1990 Hepatitis C Class Action. The settlement agreement provides for compensation to be paid out of the fund to individuals who were infected with HCV through the Canadian blood supply during the period of January 1, 1986 to July 1, 1990. The settlement agreement incorporates a transfused HCV plan as well as a Court Approved Protocol which has been approved by the Court, and which guides the Administrator in the process and the payment of claims.
7. Section 3.01 of the Plan provides as follows:

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 Hema-Quebec Records demonstrating that the Claimant received a Blood transfusion in Canada during the Class Period;
 - (b) An HCV Antibody Test report, PCR Test report or similar test report pertaining to the Claimant; and
 - (c) A statutory declaration of the Claimant including a declaration;
 - (i) That he or she has never used non-prescription intravenous drugs;
 - (ii) To the best of his or her knowledge, information and belief, that he or she was not infected with Hepatitis Non-A, Non-B or HCV prior to January 1, 1986;
 - (iii) As to where the Claimant first received a blood transfusion in Canada during the Class Period; and
 - (iv) As to the place of residence of the Claimant, both when he or she first received a blood transfusion in Canada during the Class Period and at the time of delivery of the application hereunder.
- ...
3. **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.**
8. Section 10 of the Court Approved Protocol relating to intravenous drug use states:
 10. In weighing the evidence in accordance with the provisions of this CAP, the Administrator must be satisfied that the body of evidence is sufficiently complete in all the circumstances of the particular case to permit it make a decisions. If the Administrator is not satisfied that the body of evidence is sufficiently complete in all of the circumstances of the particular case to permit it to make a decisions, the Administrator shall reject the claim.
9. I am satisfied that Fund Counsel made all reasonable efforts to assist the Claimant in locating proof from his previous medical records that he may have been infected for the first time with HCV by a blood transfusion received in Canada within the Class Period.
10. I am satisfied that the Claimant made every effort to deliver proof that he was infected for the first time with HCV by a blood transfusion received in Canada within the Class Period.

11. However, based on the evidence presented to me at the hearings, the experts offered the same opinion that the infection on a balance of probabilities was more likely due to his previous intravenous drug use than due to the transfused blood within the Class Period.
12. In the result, I must find that this Claimant did not demonstrate that he was infected for the first time with HCV by a blood transfusion received in Canada during the Class Period and therefore, is unable to establish his entitlement for compensation in accordance with the provision of the Plan.
13. Accordingly, I must uphold the decision of the Administrator to reject the claim in accordance with Section 10 of the Intravenous Drug Use Court Approved Protocol.

Dated September 15, 2006.



Shelley L. Miller, Q.C. Referee