

Hepatitis C Claim No. 1402088  
Review of the Decision of the Plan Administrator

1. The Plan Administrator denied this claim for compensation under the 1986-1990 Hepatitis C Settlement Agreement on March 1, 2002.
2. On February 17, 2003, the claimant requested a review of that decision by a Referee. In that application he stated that "appropriate weight was not given to the circumstantial evidence" suggesting that this claimant contracted Hepatitis C as a result of blood transfusions that he received at the St. Boniface General Hospital in 1988.
3. While the original Request for Review stated that the claimant did not intend to file any further documents, his counsel subsequently requested repeated extensions to gather additional information to support the claim.
4. On October 21, 2005, following several telephone conversations with the Referee, the claimant wrote to Fund Counsel that he was no longer being represented by counsel and wished to proceed with a hearing.
5. The hearing was held on Tuesday, January 31, 2006 in Winnipeg. The claimant represented himself and the Plan Administrator was represented by its Counsel.
6. The relevant facts can be summarized as follows:
  - a) The claimant tested positive for HCV in 1996.
  - b) He had received four units of blood during surgery at St. Boniface General Hospital in Winnipeg on March 25, 1988.
  - c) A 1989 pre-operative test at the Mayo Clinic in Minnesota showed that he was positive for anti-HBc. At the time, that test was used as a "surrogate test" for HCV.
  - d) The Traceback Report prepared by Canadian Blood Services, dated October 5, 2000, states that all four donors tested negative for HCV.
  - e) The claimant's Declaration Form and Other Risk Factor Inquiry Form both declare that he had not used intravenous drugs; the same assertion is included in his affidavit dated August 8, 2002. However,

medical records from FCI Ray Brook dated 1989 and submitted by the claimant's counsel on July 22, 2004, include a reference to a history of past intravenous drug use.

- f) A letter to the claimant's counsel dated September 30, 2004, Dr. K. Kaita states that the claimant "has other nonprofessional risks such as tattoos." The claimant's affidavit of August 8, 2002 states that he no tattoos.
7. Section 3.04(1) of the Transfused HCV Plan which forms part of the 1986-1990 Hepatitis C Settlement Agreement states that "notwithstanding any other provision of this Agreement, if the results of a traceback procedure demonstrate...that none of the donors of blood received by a primarily-infected person or opted-out primarily-infected person during the Class Period is or was HCV antibody positive, subject to the provisions of Section 3.04(2), the Administrator must reject the claim of such HCV infected person."
  8. The Plan Administrator followed the provisions of the Transfused HCV Plan in processing this claim and conducting the traceback. When the results of the traceback procedure showed that none of the four donors of the transfused blood received by this claimant tested positive for the HCV antibody, the Administrator followed the provisions of Section 3.04 which state that, in these circumstances, the "Administrator must reject the claim."
  9. Section 3.04(2) provides that "a claimant may prove that the relevant primarily-infected person or opted-out primarily-infected person was infected, for the first time, with HCV by a blood transfusion received in Canada during the Class Period...notwithstanding the results of the traceback procedure."
  10. The claimant was invited to submit additional information to show that there was evidence to support the claim that the first infection was caused by blood transfused in Canada during the Class Period.
  11. In both a letter dated February 6, 2002 and again in testimony at the hearing, the claimant states that there was no evidence that he was HCV positive at the time of his surgery on March 26, 1988. Since he subsequently tested

positive for anti Hbc in November 1989 at the Mayo Clinic, he asserts that he must have become infected while he was a patient at the St. Boniface General Hospital.

12. When asked to respond to the results of the Traceback that showed that none of the donors of blood that he received in March 1988 had tested positive, the Claimant argued that he must have contracted the virus from other sources while he was in the hospital at that time. He produced copies of newspaper articles that questioned procedures then in use by the Hospital in relation to the sterilization and re-use of surgical equipment. He asked the referee to conclude that even if the blood he received was not infected, some other aspect of the medical care he received during his stay at St. Boniface General Hospital in March 1988 must have been the cause of his infection.
13. In response to the discrepancies in the documentation regarding intravenous drug use, the claimant testified that he had fabricated the claim of drug use during a pre-sentence hearing following his arrest for possession of drugs in the United States in the fall of 1988. He testified that he had been told by other inmates that he would receive a more lenient sentence if the American authorities believed that he was a drug user himself. When talking with the doctor, he therefore claimed to be a heroin addict even though it was not true with the hope that the information would find its way back to the authorities.
14. The Claimant denies ever having had a tattoo and could not explain why Dr. Kaita made reference to tattoos in the letter of September 30, 2004.
15. The Claimant was a credible witness and I accept his testimony that he never had a tattoo or been an intravenous drug user.
16. While one can readily understand the frustration felt by this Claimant, the provisions of the Transfused HCV Plan are clear. Section 3.04(1) requires that the Plan Administrator reject a claim when the results of the traceback procedure show that the donors of the transfused blood tested negative for the HCV antibody. That is what occurred in this case.

17. The hearing on January 31, 2006 was intended to provide the claimant with an opportunity to prove that the infection occurred as a result of a blood transfusion notwithstanding the results of the traceback procedure as provided in Section 3.04(2). Neither the written submissions provided by the claimant in earlier correspondence nor the evidence adduced at the hearing met the standard of proof required by the Plan. Based on all of the available information, I cannot conclude on a balance of probabilities that the claimant was infected by the blood transfusions he received on March 26, 1988.
18. Under the terms of the Transfused HCV Plan, the Plan Administrator was correct in denying this claim and the decision to deny Claim #1402088 is upheld.
19. The terms of the 1986-1990 Hepatitis C Settlement Agreement are clear. They do not give either the Plan Administrator or the Referee jurisdiction to consider the claimant's contention that other factors at the St. Boniface General Hospital may have contributed to his infection.

Dated at Winnipeg, Manitoba, this 8<sup>th</sup> day of March, 2006.

Harvey Secter  
Referee