

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

Claimant:	Claimant #16190
File No.:	416611 – 29
Province of Infection:	Alberta
Province of Residence:	Alberta
Date:	January 21, 2008

Decision

1. On May 18, 2007 the Administrator denied the claim for compensation of the Primarily Infected Person pursuant to the transfused HCV Plan on the basis that the Claimant had not provided sufficient evidence that the Claimant had received a transfusion of blood within the Class Period.
2. The claim was brought by a Personal Representative of the deceased Claimant who requested an in person hearing by a Referee to review the decision of the Administrator.
3. The hearing took place in Calgary, Alberta on January 10, 2008.
4. Neither party disputed the following facts:
 - (a) The Claimant was diagnosed with Hepatitis C some time between 1990 and 2003.
 - (b) No medical records produced at the hearing established the precise date of that diagnosis.
 - (c) No hospital records revealed a blood transfusion within the Class Period.
5. The Personal Representative and members of the family of the deceased gave the following testimony:
 - (a) The deceased Claimant was born in Italy in 1926 and worked on the family farm with his nine brothers and sisters until approximately 1950.
 - (b) The deceased Claimant married on December 16, 1951 and supported his wife and his children in Italy until about 1991 when the family immigrated to Canada.
 - (c) Since his arrival in Canada the deceased Claimant was engaged in construction as a manual labourer for the remainder of his working life.
 - (d) The deceased Claimant had numerous work injuries and other health issues during his working life, including a number of hospital procedures for a deviated septum and a hernia.
 - (e) The deceased Claimant had frequent minor injuries at work including cuts and open wounds to his hands.
 - (f) The deceased Claimant died on February 17, 1994 at age 67.
 - (g) The family doctor of the deceased Claimant is also deceased.

- (h) No health care professionals have given an opinion to the Personal Representative or any family members to support the suggestion that the Hepatitis C was caused by a blood transfusion in the Class Period.
 - (i) The deceased Claimant's daughter was married in June of 1986. At that date the deceased Claimant appeared ill, gaunt, losing weight, and had a liver spot on his forehead which subsequently caused his family doctor to refer him for testing which was what led to the diagnosis of Hepatitis C.
 - (j) About this time they all observed the deceased Claimant to display fatigue, lack of energy, and an unwillingness to participate in activities he previously enjoyed.
 - (k) The family members remained very close to the deceased Claimant. In particular, the Personal Representative lived in the family home until the date of the deceased Claimant's death and the deceased daughter visited the family home on a very regular basis after she married and had children.
 - (l) The deceased Claimant engaged in no high risk activities and when not at work, he was typically at home participating in family activities.
 - (m) The deceased Claimant did not consume alcohol or non prescription drugs.
 - (n) Because of his various injuries and illnesses, the deceased Claimant was prescribed many medications over the course of his life and had at times inadvertently overmedicated himself.
6. The Personal Representative contends that even if the hospital records disclose no evidence of a transfusion within the Class Period, nevertheless the hospital records could be in error. The Personal Representative contends that the most probable cause of Hepatitis C was either during one of the hospital procedures within the Class Period from a surgical instrument, from a needle or from some improperly prescribed medication.
7. The Personal Representative and his family members gave their testimony about the many difficulties experienced by the deceased Claimant during the last 8 years of his life and the loss that his early demise has caused in a sincere and moving fashion and I have no doubt that they consider that the source of the infection could only have come from some flaw in the Canadian medical system.
8. Fund counsel submitted that the case must be determined on the basis of the relevant provisions of the Plan which are set out below.
9. Article 3.01 of the Plan requires that:
- 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;

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 1 January 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.

2. Notwithstanding the provisions of Section 3.01(a), if the Claimant cannot comply with the provisions of Section 3.01(1)(a) the Claimant must distribute to the Administrator corroborating evidence independent of the personal recollection of the Claimant or any person who is a family member of the Claimant establishing on a balance of probabilities that he or she received a blood transfusion in Canada during the Class Period.

3. 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.

10. Section 3.03 of the Plan provides as follows:

If requested by the Administrator, a person claiming to be a HCV Infected Person must also provide to the Administrator:

a. all medical, clinical hospital or other such records in his or her possession, control or power;

b. a consent authorizing the release to the Administrator of such medical, clinical, hospital records or other health information as the Administrator may request;

c. a consent to a Traceback Procedure;

d. a consent to an independent medical examination;

e. income tax returns and other records and accounts pertaining to loss of income; and

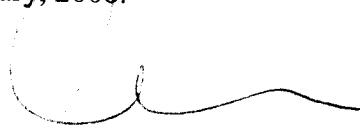
f. any other information, books, records, accounts or consents to examinations as may be requested by the Administrator to determine whether or not a claimant is HCV Infected Person or to process the Claim.

If any person refuses to provide any of the above information, documentation or other matters in his or her possession, control or power, the Administrator must not approve the Claim.

11. Section 3.05 of the Plan provides as follows:
 1. A person claiming to be the HCV Personal Representative of a HCV Infected Person who has died must deliver to the Administrator, within three years after the death of such HCV Infected Person or within two years after the Approval Date, whichever event is the last to occur, an application form prescribed by the Administrator together with:
 - a. proof that the death of the HCV Infected Person was caused by his or her infection with HCV.
 - b. unless the required proof has been previously delivered to the Administrator:
 - i. if the deceased was a Primarily-Infected Person, the proof required by Sections 3.01 and 3.03; or
 - ii. if the deceased was a Secondary-Infected Person, the proof required by Sections 3.02 and 3.02; and
 - c. the original certificate of appointment of estate trustee, grant of probate or of letters of administration or notarial will (or a copy thereof certified to be a true copy by a lawyer or notary) or such other proof of the right of the claimant to act for the estate of the deceased as may be required by the Administrator. ...
12. Fund Counsel further submitted that a significant percentage of persons infected with Hepatitis C have no history of intravenous drug use, risky behavior or having received a blood transfusion and for whom the cause of infection cannot be identified.
13. The Fund cited a medication information update from the Canadian Liver Foundation and an article titled "Enhanced Surveillance of Acute Hepatitis B and C in Four Health Regions in Canada, 1998 to 1999, which indicate that the source of the infection cannot be identified in 10% and 20% of cases, respectively.
14. Upon consideration of all the submissions, I find it evident from the testimony given by the Personal Representative and the family members that the deceased Claimant has had significantly challenging life circumstances, none of which, however, are indicative of a high risk life style.
15. On the other hand, the deceased Claimant had numerous physical injuries during his work history in the construction field occasionally involving open wounds which may have been acquired on the job site.

16. I am satisfied that the Personal Representative of the deceased and the family members' belief is sincerely and honestly held that the lack of hospital records in the 1987 or 1998 surgery in 1988 verifying such transfusions is most probably owing to error or omission by hospital staff.
17. However, the preponderance of evidence before me suggests that the deceased Claimant never had a blood transfusion within the Class Period and I found no evidence to suggest that there were errors committed by any medical or hospital staff.
18. I am of the view that unfortunately this is one of those cases where it will never be known how a claimant acquired the infection.
19. Further it must be noted that neither the Administrator nor I, as Referee, have any discretion to grant compensation where there is no evidence to show that the deceased Claimant received a transfusion within the Class Period.
20. Accordingly I uphold the decision of the Administrator.

Dated Edmonton, Alberta this 21st day of January, 2008.



Shelley L. Miller, Q.C. Referee