DECISION

During the period covered by the Transfused HCV Plan 1986-1990, the Claimant said that she had received three anti-Rh immune globulin (also called WinRho) transfusions, and had contracted hepatitis C. The Claimant's records at St Mary's Hospital, a large hospital in Montreal, as well as the research work completed by Héma-Québec do confirm that the Claimant received three immune globulin injections from 1987 to 1990. However, I notice that one of the injections received was on July 20, 1990, just days after the end of the Transfused HCV Plan period (i.e., January 1, 1986 to July 1, 1990). This was not a determinant factor in my decision, given the conclusions that I have reached on other issues.

Also, the medical records submitted to me confirm that the Claimant suffers from hepatitis C, and that the disease was diagnosed in 2003. These facts are also not disputed by the Counsel appointed to represent the Fund Administrator.

The Claimant's request for compensation was denied by the Fund Administrator on July 20, 2010. The Administrator based his decision on the fact that the anti-Rh immune globulin is "a blood product coming from multiple donors, but does not meet the definition of the word "blood" as set out in the Settlement Agreement."

The Claimant is requesting a review about this decision and I had to consider such a request as Referee. The Claimant and her daughter appeared before me on November 24, 2010, and testified, and then presented a carefully developed and well articulated argument. The Fund Administrator's appointed Counsel has meanwhile filed written observations before the hearing of the request for review, and also presented a verbal argument at the hearing.

The definition of the word "blood" in Article 1 of the text of the Transfused HCV Plan 1986-1990 is as follows:

> "Blood" means whole blood and the following blood products: packed red cells, platelets, plasma (fresh frozen and banked) and white blood cells. Blood does not include Albumin 5%, Albumin 25%, Factor VIII, Porcine Factor VIII, Factor IX, Factor VII, Cytomegalovirus Immune Globulin, Hepatitis B Immune Globulin, Rh Immune Globulin, Varicella Zoster Immune Globulin, Immune Serum Globulin, (FEIBA) FEVIII Inhibitor Bypassing Activity, Autoplex (Activate Prothrombin Complex), Tetanus Immune Globulin, Intravenous Immune Globulin (IVIG) and Antithrombin III (ATIII)."

The Claimant and her daughter agree that the definition of blood in the above mentioned text comes from the Settlement Agreement and does not apply to WinRho, but this definition, as they say, is incorrect. The Claimant acknowledges that:

> "As now written, it is true that WinRho contamination is not covered in the Agreement but the agreement is poorly drafted, and neither the Administrator nor the Referee should rely on an error in order to deny compensation to the Claimant."

The statement which I believe I have reproduced verbatim were pronounced by the Claimant's daughter, but the latter agreed with the statement and said that I could consider the words of her daughter as if she had said them herself.

According to the Claimant, plasma is an important part of the total volume of blood plasma containing red blood cells, white cells and platelets, therefore, if the red blood cells are part of the definition, it is inappropriate to exclude from the definition the WinRho product which is made from soft plasma.

Why, said the Claimant and her daughter, would the Claimant not be a part of the program for the simple fact that she received WinRho when in fact, she contracted hepatitis C through a transfusion.

During the hearing, the Claimant submitted documents from various sources. The Claimant argued that such documents prove she contracted hepatitis C through one or the other of the WinRho transfusions. Certainly, it is possible that the Claimant had contracted hepatitis C from one of these WinRho injections, especially since it was impossible to test one of the products transfused in July 1987 and it is impossible to confirm that it was not contaminated.

The Claimant also exhibited some photographs confirming the seriousness of her condition.

The Claimant adds that the program's purpose is to compensate people infected with Hepatitis C. Therefore, why would this Claimant be discriminated against? The definition of blood is not incorrectly written according to the Claimant and her daughter, and they add that two people equally infected should receive the same treatment by law and under the agreement.

They suggested to me, they even implored me to ensure that an amendment be made to the definition to include WinRho.

Unfortunately for the Claimant and her daughter, I do not have that power. While the purpose of the 1986-1990 Transfused HCV Plan is to effectively compensate people infected with HCV through a blood transfusion, it is not a universal program, but rather the result of long and probably difficult negotiations. I have not, as Referee, the discretion to approve a claim or a request for review if the evidence required by the Agreement was not provided. As Referee, I cannot modify, ignore or overrule the terms and conditions of the Agreement. The Claimant received a product specifically excluded from the definition of blood, and she does not meet the criteria allowing her to be

compensated under the Settlement Agreement. Maybe one day, this Agreement will be amended and extended to cover a product such as anti-Rh immune globulin, but this is not the criterion that should guide me now.

To this end, let me reproduce here paragraphs 8 and 9 of Judge Winkler's decision in the request for review reported under Decision # 3 (February 11, 2003)

> 8. In her appeal to the referee, the Claimant took the position that she was being unfairly treated by the exclusion of RH Immune Globulin from the definition of Blood in the Settlement Agreement. Accordingly, the Claimant argued that she should be compensated. However, the Referee found that the terms of the Agreement were binding upon her, including the provision stipulating that certain blood products are excluded as a basis for compensation, and rejected the Claimant's appeal.
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> 9. When viewed in this light, it is clear that the Claimant is really seeking an amendment to the Settlement Agreement itself. It is not disputed that she has contracted Hepatitis C, and it is probable that she contracted it from the RH Immune Globulin. However, given that this product is expressly excluded by the express terms of the Agreement as a basis for a compensation claim, absent an amendment to the Agreement, the Claimant cannot succeed. In short, the court simply does not have the jurisdiction to amend the Agreement in the manner sought by the Claimant.

Like Mr. Justice Winkler, I cannot, as Referee, go beyond the text of the Agreement and compensate a person who does not meet the criteria of the Settlement Agreement. The Agreement does not apply to this claim and I must therefore uphold the decision of the Administrator to refuse to compensate the Claimant under the 1986-1990 Transfused HCV Plan.

Montreal, January 27, 2011

Original signed by

Jacques Nols

Referee