

## Decision

### BACKGROUND:

1. The Claimant submitted an application for compensation as a Primarily Infected Person under the Transfused HCV Plan ("the Plan"), as set out under the terms of the 1986-1990 Hepatitis C Settlement Agreement ("the Settlement Agreement").
2. By correspondence dated February 18, 2009, the Administrator denied his claim on the basis the Claimant failed to provide sufficient evidence to demonstrate he received blood during the period from January 1, 1986 - July 1, 1990 ("the Class Period").
3. The Claimant requested that a Referee review the decision of the Administrator. Unfortunately, the Claimant passed away before his appeal could be heard, and his estate, represented by his son, assumed carriage of the matter.
4. The appeal proceeded via written submissions.

### SUBMISSIONS:

#### *The Estate*

5. The Claimant's son indicated his father was a socially reclusive and deeply religious man who lived in a remote area, and had little contact with society outside of work and church. He indicated his father's contracting Hepatitis C caused his father a great amount of suffering and loss, including extreme illness, depression and eventual death.
6. The Claimant also indicated his father's illness caused significant loss to members of his family, including his wife, his children, and his grandchildren.
7. The Claimant's son indicated his father believed, to his death, that he contracted Hepatitis C in the hospital as no other possible source could be identified.
8. The Claimant's son asks whether a blood transfusion has ever gone undocumented, and indicates if it has, then it is more than possible that occurred in this instance.
9. The Claimant's son submits the lack of documentary evidence should not be conclusive. He points out his father was diagnosed with and died from a illness that was being contracted in the hospitals he attended, and the indication of a lack of documentary evidence comes from those facilities.
10. The Claimant's son points out there is irrefutable evidence of both his father's hospitalization, as well as his father having contracted Hepatitis C. However, he concedes that all he has to create a nexus between these facts is that his father began to feel ill after his treatment in the hospitals, and the documentary evidence of those treatments.

*The Fund*

11. Counsel for the Fund pointed out that in order to qualify for compensation under the Hepatitis C Settlement Agreement and Transfused HCV Plan, the Claimant's estate must demonstrate he was transfused with Blood during the Class period. Specifically, section 3.01 of the Transfused HCV Plan requires that claimants produce records of a transfusion, and lists the acceptable records to prove the transfusion. Counsel for the Fund pointed out the Claimant's application did not contain any proof that a transfusion occurred as required under the Transfused HCV Plan.

12. Counsel for the Fund also noted that in his application, the Claimant stated he had received blood transfusions from the Sunnybrook Hospital, the Temiskaming Hospital, and the Kirkland & District Hospital. Accordingly, as required, the Administrator of the Fund requested that the Canadian Blood Services ("CBS") conduct a traceback.

13. CBS was subsequently advised by the Sunnybrook Health Science Centre, the Temiskaming Hospital, and the Kirkland & District Hospital that the Claimant's medical records were available at all three hospitals. However, as documented in the Claimant's file, all three hospitals also reported that there were no records of any transfusions being administered to the Claimant.

14. Subsequently, summonses were issued to the Sunnybrook Health Sciences Centre, the Temiskaming Hospital, and the Kirkland & District Hospital requesting copies of any medical records in their possession between 1986 - 1990 (the Class Period) to determine if there was any mention of a transfusion in the medical records.

15. Counsel for the Fund pointed out that, consistent with the CBS report, the Sunnybrook Health Science Centre and the Kirkland District hospitals reported the Claimant did not receive any blood transfusions during the Class Period. With respect to the Temiskaming Hospital, all patients' records after a 10 year period were put onto microfiche and after checking same, no records could be located for the Claimant.

16. Counsel for the Fund further pointed out the Transfused HCV Plan permits a party to prove a transfusion, notwithstanding the lack of available records. However, pursuant to subsection 3.04(2) [sic], the evidence of such corroborating evidence must be independent of the personal recollection of a claimant or a family member. Counsel pointed out that in this instance, there is no corroborating evidence.

17. Counsel for the Fund submitted the Transfused HCV Plan is a part of the Settlement Agreement approved by the Court as a result of the Hepatitis C Class Action. The Settlement Agreement requires that a claimant demonstrate that he/she was transfused during the class period in order for him/her to receive compensation.

18. Counsel for the Fund submitted that in this instance, the necessary proof of a transfusion has not been provided, as all inquiries to both the CBS and the hospitals referenced by the Claimant resulted in no evidence of a transfusion. Nor has evidence which is admissible pursuant to subsection 3.01(2) been provided to establish, on the balance of probabilities, that a transfusion occurred.

19. Counsel for the Fund submitted that on that basis, the appeal ought to be dismissed.

**ANALYSIS:**

20. In order to qualify for compensation under the terms of the Transfused HCV Plan the Claimant's estate must satisfy the criteria set out in that Plan.

21. Subsection 3.01(1)(a) of the Plan provides that a person claiming to be a Primarily-Infected Person must provide the Administrator with, amongst other things, "...records demonstrating that the Claimant received a blood transfusion in Canada during the Class Period". As noted above, the Settlement Agreement establishes the "Class Period" to be "the period from and including 1 January 1986 to and including 1 July 1990".

22. If a person claiming to be a Primarily-Infected Person cannot comply with subsection 3.01(1)(a), subsection 3.01(2) provides that individual must deliver 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.

23. In this instance, the Claimant's estate bears the onus of demonstrating the Administrator erred in denying his application.

24. No hospital records demonstrating the Claimant received a blood transfusion in Canada during the Class Period, as required by Article 3.01(1)(a) of the Plan, were produced. The Claimant's son suggested the lack of any records documenting a transfusion may be the result of an omission on the part of hospital staff. However, the transfusion of blood is closely monitored, and in the absence of any evidence to suggest such an omission occurred, I am not persuaded it did.

25. Nor has the Claimant's estate been able to establish, through some other form of corroborating evidence other than that of the Claimant himself, that the Claimant received a blood transfusion in Canada during the Class Period.

26. Neither the Administrator, nor I as a Referee, have discretion to grant compensation to individuals infected with Hepatitis C who cannot show they received a transfusion within the Class Period.

27. Accordingly, I find the Administrator correctly determined the Claimant was not entitled to compensation pursuant to the Hepatitis C 1986-1990 Class Action Settlement as he, (and now his estate) failed to demonstrate he received a Blood transfusion during the Class Period.

28. The decision of the Administrator to deny the Claimant compensation pursuant to the Hepatitis C 1986-1990 Class Action Settlement is upheld.

DATED AT TORONTO, THIS 6TH DAY OF MAY 2012.

"Tanja Wacyk"  
Referee