

DECISION

BACKGROUND

1. On August 18, 2009, the Administrator denied the Claimant's request for compensation as a Primarily-Infected Person under the Transfused HCV Plan because the Claimant had not provided sufficient evidence that he was infected with HCV for the first time by a Blood transfusion received in Canada during the Class Period (January 1, 1986 to July 1, 1990).
2. On September 15, 2009, the Claimant requested that the Administrator's denial of his claim be reviewed by an arbitrator. Subsequently, he requested that his appeal be dealt with by way of a reference.
3. Despite repeated attempts over a 2-year period to schedule an in person hearing and to obtain further evidence from the Claimant, I was unsuccessful. Consequently, I decided to proceed by way of a written hearing with notice to the parties.
4. Fund Counsel filed written submissions on May 2, 2012. The written hearing concluded on July 6, 2012, when no submissions were received from the Claimant. In addition to Fund Counsel's submissions, I have reviewed all the material in the Claimant's file from the 1986-1990 Hepatitis C Claims Centre and all material forwarded by the Claimant.

Facts

5. The Claimant received 18 units of blood as a result of a motor vehicle accident in April 1986. A traceback was ordered and revealed that 14 units of blood tested negative for the Hepatitis C virus. Four units could not be traced.
6. In his initial application, the Claimant stated that he had been admitted to the London Health Sciences Centre, Victoria Campus, following his motor vehicle accident. Copies of medical records from the hospital were provided by the Claimant.
7. Subsequently, the Claimant advised that he was admitted to the Sarnia General Hospital for 48 hours before being transferred to the Victoria Hospital. I issued a summons to the Sarnia General Hospital in an attempt to obtain medical records in their possession. On March 22,

2010, the Sarnia General Hospital advised that its records had been destroyed.

8. A report dated April 2, 1996 from a physician at University Hospital, London states that the Claimant used “intravenous drugs six years ago and had a sexual partner who has recently been tested positive for the hepatitis C virus.” The Claimant was diagnosed as not having chronic hepatitis at the time.
9. In May 2005, a report from the same physician noted that the Claimant’s HCV-RNA was “undetectable” which “suggests that he has spontaneously cleared the virus.”
10. The Claimant stated in his declaration form signed on December 3, 2007, that he “has never at any time used non-prescription drugs.”
11. The Claimant’s treating physician in a form dated January 18, 2008 stated that the Claimant “admits to IV drug abuse 1990” and that he had a “hep c+ sexual partner 1996.”
12. On February 28, 2008, the Claimant confirmed in the “Other Risk Factor Inquiry Form” that he used cocaine but did not share needles. In a statutory declaration dated September 16, 2008 he stated that he used non-prescription intravenous drugs 4 times over the period of July and August, 1992. He also stated that he bought needles at the pharmacy in disposable packs and that the drug paraphernalia was sterile on all occasions and that he did not share needles.
13. The Claimant provided further information in his Request for Review form on September 15, 2009 where he referred to taking non-prescription intravenous drugs with his wife and roommate. He stated that each time they used their own fresh needles.
14. The Claimant’s file was forwarded by the Hepatitis C Claims Centre to Dr. Gary Garber at the Ottawa General Hospital in accordance with the Court Approved Protocol (CAP) for Non-Prescription intravenous drug use. Dr. Garber is a specialist experienced in treating and diagnosing HCV.
15. On July 22, 2009, Dr. Garber submitted his opinion that the Claimant may have been exposed to Hepatitis C through a number of avenues, including sex, injection drug use or blood products and it would be difficult to ascertain what was the most likely mode of exposure. He noted that the Claimant does not have any active infection, which means he is one of the 15 per cent of the population who clear the virus. As there was no active infection, there was no objective method for assessing the time of exposure.

16. The Claimant's application was forwarded to a committee to review in accordance with the CAP for non-prescription drug use. Its work was summarized in a report dated August 14, 2009. The Committee considered Dr. Garber's opinion together with several other factors. It was charged with weighing the totality of the evidence to determine whether the HCV infected person had established he was first infected by a Blood transfusion during the class period. On August 18, 2009, the Committee concluded that the Claimant had not satisfied the eligibility criteria.

ANALYSIS

17. The Claimant seeks compensation as a Primarily-Infected Person under the Transfused HCV Plan. The Transfused HCV Plan defines "Primarily-Infected Person", in part, as meaning "a person who received a Blood transfusion in Canada during the Class Period."
18. The 1986-1990 Hepatitis C Settlement Agreement defines "Class Period" as meaning "the period from and including 1 January 1986 to and including 1 July 1990." "Class Period" is defined identically in the Transfused HCV Plan.
19. Article 3.01 of the Transfused HCV Plan requires that a Primarily-Infected Person must deliver to the Administrator an application form together with, among other things, medical "records demonstrating that the Claimant received a Blood transfusion in Canada during the Class Period."
20. Article 3.01 (3) states the following:

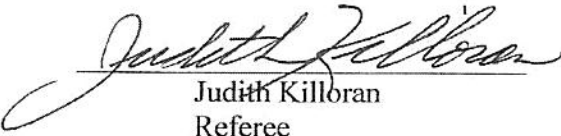
Notwithstanding the provisions of Section 3.01(1)(c), if a claimant cannot comply with the provisions of Section 3.01(1)(c) because the claimant used non-prescription intravenous drugs, then he or she must deliver to the administrator other evidence establishing on a balance of probabilities that he or she was infected for the first time with HCV by a Blood transfusion in Canada.
21. A number of written protocols have been approved by the Court to guide the Administrator in applying the terms and provisions of the Plan. Sections 2 and 3 of the CAP dealing with the issue of non-prescription drug use specifies that, in order for a claimant who has used non-

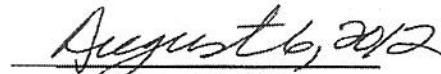
prescription intravenous drugs to be eligible to receive compensation under the Plan, the claimant must establish that it is more likely than not that he or she was infected with HCV for the first time by a Blood transfusion received in Canada during the Class Period.

22. Section 8 of the CAP requires the Administrator to obtain any necessary additional medical records and to obtain the opinion of a medical specialist as to whether the HCV infection and the disease history of the HCV Infected Person is more consistent with infection at the time of the Class Period Blood transfusion(s) or with infection at the time of the non-prescription intravenous drug use as indicated by the totality of the medical evidence.
23. Section 9 of the CAP requires the Administrator to weigh the evidence obtained to determine whether it is more likely than not that the claimant meets the eligibility criteria.
24. In the case before me, there is no evidence of an active infection and thus, no way to establish if the Claimant was first infected due to a Blood transfusion. There is no positive traceback and there is an inconsistency in the records as to drug use between 1990 and 1992 coupled with an initial denial of any drug use. Dr. Garber's opinion states that "this individual may have been exposed to hepatitis C through a multitude of routes, sexual, injection drug use or blood products and it could be difficult to ascertain what is the most likely mode of exposure." I find that the Administrator's decision was reasonable based on the evidence in this case. The Claimant has not demonstrated on a balance of probabilities that he was first infected with HCV as a result of a Blood transfusion in Canada during the Class Period.
25. I am bound by the terms of the 1986-1990 Hepatitis C Settlement Agreement. The terms of the Settlement Agreement are restricted to those claimants who were infected with Hepatitis C as a result of a Blood transfusion received in Canada between January 1, 1986 and July 1, 1990.
26. The Administrator under the Settlement Agreement is required to administer the Transfused HCV Plan in accordance with its terms. The Plan sets out the requirements for compensation which is limited to a defined class of individuals. The Claimant does not qualify for compensation under the Plan as he did not establish on a balance of probabilities that he was first infected with HCV as a result of a Blood transfusion received in Canada during the Class Period.

CONCLUSION

27. I uphold the Administrator's denial of the Claimant's request for compensation.


Judith Killoran
Referee


August 6, 2012