

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

Claimant:	Claimant #18706
File No.:	416611 – 37
Province of Infection:	Manitoba
Province of Residence:	Alberta
Date:	October 6, 2014

Decision

1. On January 10, 2014, the Administrator denied the claim for compensation pursuant to the transfused HCV Plan advanced by the Personal Representative of the Primarily-Infected Person on the basis that the Personal Representative had not provided sufficient evidence that the HCV Infected Person had received a transfusion of blood within the Class Period.
2. The Personal Representative requested an in person hearing by a Referee to review the decision of the Administrator.
3. The hearing took place in Calgary, Alberta on September 30, 2014.
4. Neither party disputed the following facts:
 - (a) The deceased Claimant was diagnosed with Hepatitis C;
 - (b) The deceased Claimant was admitted to Brandon General Hospital in Brandon, Manitoba on March 22, 1986 for treatment of a stab wound to the chest;
 - (c) The discharge summary noted that the stab wound was probed, did not penetrate in through the chest wall, the chest x-ray at the time was normal, the E.K.G. was normal, the blood gases were normal, and the hemoglobin was normal. Overnight the hemoglobin did not drop and when seen by the doctor, a drain was placed in the wound;
 - (d) The discharge summary further noted that sero sanguinous drainage was minimal and the patient was to be discharged with follow up for daily dressing changes;
 - (e) The Brandon General Hospital records contained a cross match report indicating that 2 units of blood were ordered, however there were no records to indicate any transfusions took place;
 - (f) The parties reviewed all of the hospital records produced by the aforesaid Hospital; and
 - (g) None revealed any blood transfusion either within the Class Period or otherwise.
5. The Personal Representative gave the following testimony:
 - (a) She and her mother visited the deceased Claimant the morning following the admission on March 22, 1986;
 - (b) The Personal Representative was told by the deceased Claimant that he had received a blood transfusion and the Personal Representative recalled

that there was a nurse present in the room at the time his statement was made.

- (c) The Personal Representative recalled the nurse was engaged in some nursing task at the time but made no comment or acknowledgment in respect of the statement of the Deceased Claimant.
 - (d) The Personal Representative did not know the name of the nurse in question who was present when the aforesaid statement was made or who may have witnessed the transfusion of units of blood on March 22, 1986.
6. The Personal Representative brings this appeal on the basis that even if the hospital records disclose no evidence of a transfusion on March 22, 1986 or any other date during the hospitalization in question, or within the Class Period, nevertheless the hospital records could be in error.
7. The Personal Representative testified that she could not be satisfied that the source of the infection did not come from a blood transfusion given to the deceased Claimant at the date of his hospitalization unless it could be proven to her that the two units of blood documented as being cross matched were transfused into another patient or patients or disposed of in some other fashion.
8. Despite my sympathies for the Personal Representative's loss and ongoing doubt about the accuracy of the hospital records, this appeal 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:

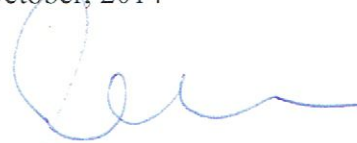
i. if the deceased was a Primarily-Infected Person, the proof required by Sections 3.01 and 3.03; or

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. Having regard to all the foregoing, the preponderance of evidence before me does not corroborate the occurrence of blood transfusions that could have been the source of the infection later diagnosed to be Hepatitis C in the deceased Claimant, and I found no evidence to suggest that there were errors committed by any medical or hospital staff.
13. Moreover, I note that the Claimant has not produced any medical or other evidence to contradict those records.
14. Further it must be noted that neither the Administrator nor I, as Referee, have any discretion, without any suggestion of error on the face of the hospital records to undertake an investigation as to the disposition of the units of blood cross matched during the hospitalization of the Deceased Claimant or to grant compensation where there is no evidence to show that the deceased Claimant received a transfusion within the Class Period.
15. I am of the view that unfortunately this is one of those cases where it will never be known how the deceased Claimant acquired the infection.
17. Because the Personal Representative delivered no corroborating evidence to the Administrator that the Deceased Claimant had received a blood transfusion during the Class Period as required by the Section 3.01(2) of the Plan, I have no alternative but to uphold the decision of the Administrator.

Dated at Edmonton, Alberta this 6th day of October, 2014



Shelley L. Miller, Q.C. Referee