DECISION

Claim No. 15939

Province of Infection – Nova Scotia

1. The Claimant applied for compensation as a Primarily-Infected Person pursuant to the Transfused HCV Plan.

2. By letter dated November 16, 2010, the Administrator denied the claim on the basis that the Claimant had not provided sufficient evidence to establish that she had received blood during the Class Period.

3. The Claimant requested that the Administrator's denial of her claim be reviewed by a Referee or Arbitrator.

4. The Administrator's letter of November 16, 2010 gave the following reasons for denying the claim:

> "The Settlement Agreement requires the Administrator to determine a person's eligibility for class membership.
>
> All the material that you provided to support your claim was carefully reviewed by the Administrator. You have not provided sufficient evidence to support your claim

> that you or the HCV Infected Person received blood during the Class Period.
>
> In your original application you indicated you were transfused at Dartmouth General Hospital in 1989. Documents submitted with your claim confirm you were crossmatched for 2 units of blood. A crossmatch is a procedure in which blood is requested and saved in the hospital blood bank, however it is not proof of transfusion of that blood. It is the procedure of the Traceback Department to forward any transfusion information to Canadian Blood Services (CBS) to initiate a Traceback investigation if appropriate and obtain the results of that Traceback investigation. The results of your investigation were summarized in a letter from CBS received November 2, 2010. CBS confirmed that your hospital records were available and they searched from 1987 to 1989 and you were not transfused. Therefore, you do not qualify for compensation, based on Article 3.01 (1a) of the 1986-1990 Hepatitis C Settlement Agreement, Transfused Plan; because there is no evidence to support you received a blood transfusion between January 1, 1986 and July 1, 1990."

5. Following my appointment as Referee/Arbitrator, I advised the Claimant of her right to an oral hearing. Lengthy delays occurred while the Claimant first attempted to retain counsel and then, having been unable to do so, tried to obtain additional medical or other information which would corroborate her claim. On March 19, 2013, the Claimant phoned my office and left a message stating that she had not been able to obtain any additional information and was not going to make any further efforts to do so.

6. On March 26, 2013, I sent the following letter to Fund Counsel:

"March 26, 2013

VIA FAX (416-862-7661)
Mr. John E. Callaghan,
GOWLINGS,
1 First Canadian Place,
100 King Street West, Suite 1600,
Toronto, ON M5X 1G5

Dear Mr. Callaghan:

Re: 1986-1990 Hepatitis C Class Action Settlement – Claim No. 15939 (*Claimant*)

I received a voice message from the *Claimant* on March 19, 2013. In the message, the *Claimant* thanked me for my patience but indicated that she could not get a lawyer, could not get any further information and could not "fight this anymore".

Under the circumstances, I suggest that you provide me with a written submission on behalf of the Fund and send a copy to the *Claimant*. Following that, the *Claimant* will be given a reasonable time, say two weeks, to file any written response she wishes to make. Naturally, if the *Claimant* requires more than two weeks to respond to the Fund's submission, then she should let me know so that an extension can be arranged.

Yours truly,

S. Bruce Outhouse
SBO:sw
cc: The *Claimant* (via regular mail)"

7. On April 9, 2013, Fund Counsel filed a written submission and provided a copy to the Claimant.

8. On April 18, 2013, the Claimant requested and was granted an indefinite extension of time to obtain further medical information and respond to Fund Counsel's submission.

9. Ultimately, the Claimant was unsuccessful in producing any additional medical information. I spoke to her on June 11, 2014 and sent her the following letter the next day:

> "June 12, 2014
>
> **CONFIDENTIAL**
> *The* Claimant,
> ...
>
> Dear *The Claimant*:
>
> **Re: 1986-1990 Hepatitis C Class Action Settlement – Claim No. 15939**
>
> Thank you for speaking with me yesterday. As you know, we have had some difficulty contacting you because of your change of address.
>
> I gather from our conversation that you have not had any success in retaining a lawyer to assist you with this matter. Nevertheless, given that this review has been outstanding since December of 2010, the time has come to bring it to a conclusion.
>
> By copy of this letter to Fund Counsel, I would ask that he file a written submission on behalf of the Administrator by the end of this month. If you wish to respond to the submission, you can do so by sending me a letter, together with any other documents you may wish to submit, by not later than July 31, 2014. I will then issue a decision.

I trust this is satisfactory. If you have any questions or concerns, please do not hesitate to contact me.

Yours truly,

S. Bruce Outhouse
/sw
cc: Mr. John Callaghan, Fund Counsel (via email)"

10. Fund Counsel re-filed his earlier submission on June 27, 2014.

11. The Claimant did not file any response to Fund Counsel's submission.

12. The issue in this case is whether there is any evidence that the Claimant received a blood transfusion in the Class Period. Without evidence of a transfusion, there is no basis for interfering with the Administrator's decision to deny the claim.

13. The medical records show that the Claimant was admitted to the Dartmouth General Hospital on October 22, 1987 suffering from bleeding which was apparently related to an earlier medical procedure at another hospital. The Claimant was treated at the Dartmouth General and released the following afternoon.

14. The relevant medical records contain no indication that the Claimant received a blood transfusion during the aforementioned admission at the Dartmouth General. In fact, a subsequent Traceback investigation by the Canadian Blood Services states that the Claimant's hospital records were available and were searched from 1987 to 1989 and did not show that the Claimant had been transfused.

15. This case is governed by s. 3.01 of the HCV Transfused Plan which provides, in part, as follows:

> **"3.01 Claim by Primarily-Infected Person**
>
> (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-Québec records demonstrating that the claimant received a Blood transfusion in Canada during the Class Period;
>
> ....
>
> (2) Notwithstanding the provisions of Section 3.01(1)(a), if a claimant cannot comply with the provisions of Section 3.01(1)(a), the claimant 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."

16. Clearly, the Claimant has not been able to prove her claim pursuant to s. 3.01(1)(a). There is no medical record of any kind which demonstrates that she received a blood transfusion during the Class Period. Consequently, the only question is whether the Claimant has satisfied the requirements of s. 3.01(2) by providing "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...she received a Blood transfusion during the Class Period".

17. It has been decided in earlier cases that, under s. 3.01(2), a claimant bears the burden of proof on the balance of probabilities. It has also been authoritatively determined that the burden of proof must be satisfied by the independent evidence without regard to the recollections of a claimant or family members. In Court File No. 98-CV-141369, Winkler R.S.J., as he then was, stated:

> "Given the express wording of s. 3.01(2), the only interpretation it will be [sic] bear is that the evidence independent of the personal recollection of the Claimant or a Family Member is the determining factor. If that independent evidence establishes on a balance of probabilities that the Claimant received blood during the Class Period then the claimant has met the burden. If not, then the Claim must be rejected. The personal recollections of either the Claimant or Family Members are not to be considered."

18. In the present case, no independent evidence was proffered by the Claimant to establish that she had received a blood transfusion in Canada during the Class Period.

19. Under these circumstances, I have no alternative but to uphold the Administrator's denial of the Claimant's request for compensation.

DATED at Halifax, Nova Scotia, this 13th day of November, 2014.

S. BRUCE OUTHOUSE, Q.C.
Referee/Arbitrator