

CLAIM # 11152

Province of Infection: Ontario
Province of Residence: Ontario

IN THE MATTER OF AN APPEAL
TO REVIEW THE DECISION OF THE ADMINISTRATOR

Before: Tanja Wacyk

Heard:

Appearances:

[REDACTED] the Claimant
John Callaghan and Carol Miller for the Administrator

Decision

1. The Claimant submitted an application in 2010 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"). Her claim was denied by correspondence dated October 26, 2015 on the basis she failed to provide sufficient evidence to support her claim that she received blood during the period from January 1, 1986 - July 1, 1990 ("the Class Period").

2. This decision deals with the Claimant's request that the denial be reviewed by a Referee/Arbitrator (both were selected on her Request for Review).

Background:

3. The Claimant's blood transfusion history form, submitted with her application, stated she believed she was transfused once, for "Severe P.I.D". She indicated the transfusion occurred at the Ottawa General Hospital between May 1985 and December 1986, (the "Ottawa" Transfusion).

4. However, a Medical Treatment Form completed by Dr. Feinman, the Claimant's treating physician, was subsequently filed in 2015. Dr. Feinman indicated he had known the Claimant for only 6 months at the time he completed the Form. He further indicated that the Claimant was transfused sometime between May 1986 - October 1986. The Form also contained a hand-written notation indicating the Claimant's dentist in 1996, Dr. Stemcroff, had obtained a copy of the microchip of the Claimant's blood transfusion records.

5. On March 6, 2015 the Claimant submitted an "Other Risk Factor Inquiry Form". On that Form the Claimant reiterated that she had been transfused at the Ottawa General Hospital, but identified the time frame as April 1986 - November 1986, rather than the May 1985 to December 1986 or May 1986 - October 1986 referenced earlier.

6. The Claimant also indicated she had a hysterectomy in Kitchener, in December 1990, and was treated for a head injury at St. Michael's Hospital in Toronto in July of 2003. In addition, she disclosed she acquired a tattoo and had her ears pierced in 1994. While the Claimant used cocaine nasally between January 1994 and August 2003, she denied any non-prescription intravenous drug use. The Claimant also disclosed she was incarcerated between August 1999 and August 2000 at the Toronto West Detention Centre.

7. A further "Other Risk Factor Inquiry Form" was filed in May 2015. This second Form indicated the blood transfusion occurred between July 1986 and October 1986, and involved a ten-day hospital stay.

8. Despite numerous requests from the Claims Coordinator for documentary proof of a transfusion the Claimant was unable to provide such documentation. Alternatively, she provided no corroborating evidence that would establish a transfusion.

9. As part of the Traceback Process, intended to find any available documentation demonstrating a history of a blood transfusion, the Administrator requested a search of the various aliases provided by the Claimant, (i.e. Boucher, Cox, Brown, Playford, Haney). The Ottawa General Hospital searched its health records back to June 1986 and its blood bank records to January 1982. It reported the blood bank records were available, and there was no record of the Claimant's admission to the Hospital. There was also a note indicating the Claimant's health records were destroyed.

10. The Administrator denied the Claimant's application on the basis she failed to provide sufficient evidence to support her claim that she received blood during the period from January 1, 1986 - July 1, 1990 ("the Class Period").

11. The Claimant requested that an Arbitrator/Referee review the decision of the Administrator in an in-person hearing.

Review of the Administrator's Decision:

12. In the context of the Review of the Administrator's Decision, the Claimant, in correspondence dated December 7, 2015, indicated she believe the Ottawa transfusion occurred between January and December 1986.

13. As part of the Review process, summonses were issued to the Ottawa Hospitals in the various names provided by Ms. Boucher i.e. Boucher, Williams, Cox, Bouchier and Brown.

14. The Riverside Hospital and the Grace Hospital in Ottawa reported that records under the name "Bouchier" from Riverside Hospital, for dates of June 24, 1986 to June 27, 1986 had been destroyed, but no further information had been found.

Evidence at the Hearing:

15. At the hearing of her appeal, the Claimant indicated the Ottawa transfusion occurred during the summer of 1986. She indicated she was in Ottawa to see her daughter, and went out to buy cigarettes. She indicated that was the last thing she remembers. She then woke up in hospital and was told she collapsed on the street. She also indicated she was told she had "low blood and extreme PID" and that she been given a blood transfusion to save her life.

16. The Claimant attributed her inability to acquire any records of her transfusion to dark forces conspiring to thwart her efforts in this and many aspects of her life since she was a child. She indicated mercury had been added to her fillings at age 11 for that purpose. She further indicated she only became aware of these dark forces in her life in 2012, when a magnetic shift occurred on earth, resulting in her ascension to a higher plane of knowledge.

17. The Fund relied on its written submission provided prior to the hearing. The submission had been provided at my urging, in order to assist the Claimant to focus on the issues which needed to be addressed in order for her to succeed.

18. In its submission the Fund pointed out that in order to qualify as a Hepatitis claimant under the Transfused Plan, the onus is on the Claimant to file proof of transfusion. Pursuant to

section 3.01(1)(a) of the Transfused Plan, claimants may file medical, clinical, laboratory and hospital records demonstrating they received a blood transfusion in Canada during the class period.

19. Counsel for the Fund submitted that in this case there is no documented evidence of a blood transfusion having been provided to the Claimant in Canada during the class period.

20. Counsel for the Fund pointed out that despite the apparent destruction of the Claimant's health records for the Class Period, and the absence of evidence of a transfusion in the blood bank records, another means of proving she was transfused was available to the Claimant.

21. Specifically, the Transfused Plan, in section 3.01(2), provides that where a claimant cannot provide the document proof required by section 3.01(1)(a), the "claimant must deliver to the administrator corroborating evidence independent of the person's recollection of the claimant or any person who is a family member of that claimant establishing on a balance of probabilities that he or she received a blood transfusion in Canada during the Class Period".

22. Accordingly, while there is a second means by which a claimant may prove s/he was transfused, it requires independent corroborating evidence from a person who is not a family member. In this case, there is no evidence that meets this criterion.

23. Counsel for the Fund points out Referees and Courts have interpreted the requirements of these sections to place the onus on claimants to file either the record described in section 3.01(1)(a) or provide the alternative proof referenced in section 3.01(2).

24. Counsel for the Fund acknowledged the destruction of their records creates a significant challenge for claimants, but pointed out it does not alleviate their onus to provide the proof required by sections 3.01(1)(a) or 3.01(2).

25. In support of its submission, Counsel for the Fund referred to the decision of Honorable Justice Francois Rolland, Chief Justice of the Quebec Superior Court, in Claim No. 2629, dated September 17, 2012. In that instance, Chief Justice Francois Rolland analyzed a case of destroyed records as follows:

[20] Since no hospital records of a blood transfusion could be provided because The Reddy Memorial had destroyed them, the Referee relied on Article 3.01(2) of the Agreement to establish the possibility that the Claimant had received blood.

[21] The Referee, after hearing the Claimant's witnesses, concluded that they did not qualify with the conditions set out in Article 3.01(2) as they were not independent witnesses.

[22] Again, no one questions that the Claimant has Hepatitis e but to be entitled to compensation under the Agreement, the Claimant must comply with the Agreement's requirements.

[23] The Agreement, sanctioned by 3 different judges, provides that in the absence of records establishing blood transfusion, a Claimant must present two independent witnesses confirming the transfusion, in order to be entitled to compensation.

[24] The onus is on the Claimant and must be met by providing independent corroboration evidence.

[25] Unfortunately, the Claimant has failed to do so.

26. Counsel for the Fund submitted the above analysis is applicable in this case. Specifically, there is no documentary evidence of a transfusion. Further, the destruction of documents does not constitute proof of a transfusion. Nor is there any evidence that proves a transfusion occurred pursuant to section 3.01(2).

27. Finally, Counsel for the Fund pointed out that as harsh as it may seem, neither the Administrator, nor a Referee or a court has discretion to admit a claimant and provide benefits without the proof required under sections 3.01(1)(a) and 3.01(2).

28. Accordingly, Counsel for the Fund submitted the Administrator correctly denied the claim.

ANALYSIS:

29. As argued by the Fund, in order to qualify for compensation under the terms of the Transfused HCV Plan, the Claimant must satisfy the criteria set out in that Plan.

30. Article 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."

31. If a person claiming to be a Primarily-Infected Person cannot comply with Article 3.01(1)(a), Article 3.01(2) provides that 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.

32. The Claimant bears the onus of demonstrating the Administrator erred in denying her application.

33. In this instance, the Claimant has provided no reliable documentation indicating she received a Blood transfusion. Nor has she produced corroborating evidence which is independent of her recollection or that of her family.

34. Finally, as pointed out by Counsel for the Fund, regardless of the reason supporting evidence is not available, neither the Administrator, nor I as an Arbitrator or Referee, have discretion to grant compensation to individuals infected with Hepatitis C who cannot show they

received a transfusion within the Class Period.

35. Accordingly, I find the Administrator correctly determined the Claimant is not entitled to compensation pursuant to the Hepatitis C 1986 -1990 Class Action Settlement, as she has not demonstrated that she received a Blood transfusion during the Class Period.

36. 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 25TH DAY OF SEPTEMBER 2016.

“Tanja Wacyk”
Tanja Wacyk, Referee/Arbitrator