

CLAIM #18542

Province of Infection: Ontario

Province of Residence: Ontario

**IN THE MATTER OF A REFERENCE
TO REVIEW THE DECISION OF THE ADMINISTRATOR**

Before: Tatiana (Tanja) Wacyk

Submissions: / for the Claimant
Belinda Bain and Carol Miller for the Administrator

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. On October 1, 2009, the Claimant's sister, completed a TRAN 1 form indicating the Claimant believes she received a blood transfusion during the Class Period (the period from January 1, 1986 - July 1, 1990), at the Hotel-Dieu Grace Hospital in Windsor.
3. The Hotel-Dieu Grace Hospital was created in 1994, as a result of the merger of the Hotel-Dieu of St. Joseph Hospital and the Salvation Army Grace Hospital.
4. By correspondence dated November 19, 2009, the Hotel-Dieu Grace Hospital provided the Claimant with a list of registered visits to the hospital, at both Hotel Dieu and Grace sites. Admission records from the Grace site are available for the relevant time period, and show no visits between 1986 and 1990. The Hotel-Dieu Grace Hospital advises that admission records from the Hotel-Dieu Grace site only begin in 1997, and that records of any visits from 1986 to 1990 would have been destroyed. The letter further advises that a separate inquiry will be made with respect to blood bank records from the relevant time.
5. On December 15, 2009, the Hotel-Dieu Grace Hospital again wrote to the Claimant and advised that a search of the transfusion records of Hotel-Dieu Grace Hospital was completed, and no records were found for her under any of the aliases she used. The letter states, "All Grace Site and Hotel Dieu Site transfusion records of Hotel-Dieu Grace Hospital have been searched and there is no record of a transfusion. The records for the Grace site include June 1987 to December 2003, and the Hotel Dieu site includes September 1981 to the present day. Records earlier than these dates have been destroyed and are no longer available".
6. Dr. Peer completed a Treating Physician Form (TRAN 2), dated June 29, 2010, diagnosing the Claimant at Disease Level 6. Dr. Peer further indicates the Claimant began Interferon therapy in 2004, and that she was first diagnosed with level 4 of the disease or higher on May 22, 2009.
7. Dr. Peer also indicates in the TRAN 2 that the Claimant received a blood transfusion during the Class Period. However, Fund Counsel points out Dr. Peer only began treating the Claimant in November, 2009. Fund Counsel suggests, and it is not contested, that Dr. Peer based his statements regarding the Claimant's receipt of blood and other risk factors on verbal information provided by the Claimant.
8. On January 11, 2011, the Claimant completed a Blood Transfusion History Form (TRAN 5), indicating she believes she received a transfusion at the Hotel Dieu Grace Hospital in Windsor in March, 1986, due to an admission in relation to an "accident domestic violence".
9. Further, in a handwritten note received from the Claimant's sister, she states she believes the Claimant received a blood transfusion in or around March 22, 1988, when her son was born.

10. On April 26, 2011, Canadian Blood Services ("CBS") provided its final traceback report to the Administrator. CBS indicated that all Grace and Hotel Dieu site transfusion records had been searched, and there is no record of a transfusion.

11. The Administrator of the Fund (the "Administrator") denied the Claimant's claim on June 1, 2011, on the basis she had failed to provide sufficient evidence to support her claim that she received blood during the Class Period.

12. The Claimant requested that a Referee review the decision of the Administrator in an in-person hearing. However, she was subsequently too ill to attend an in-person hearing. Instead, the parties agreed their e-mail exchanges constitute their submissions, and I was to decide the application on that basis.

13. The Administrator indicated that in the event the Claimant was able to establish she received a blood transfusion during the class period, there will be an issue with respect to other risk factors, including intravenous drug use, as a possible source of her infection with HCV. However, it was agreed that only the threshold issue of whether the Claimant received a blood transfusion in the Class Period is to be dealt with at this stage, leaving the issue of other risk factors to be dealt with in future if necessary.

SUBMISSIONS OF FUND COUNSEL:

The Settlement Agreement and Plan

14. Fund Counsel submitted the Settlement Agreement provides for compensation to be paid out of the Fund to individuals who were infected with HCV from the Canadian blood supply during the Class Period. Fund Counsel points out The Settlement Agreement was approved by Mr. Justice Winkler of the Ontario Superior Court of Justice on October 22, 1999, as being "fair, reasonable, adequate, and in the best interests of the Ontario Class Members in the Ontario Actions".

15. Fund Counsel relies on section 3.01 of the Settlement Agreement which provides as follows:

1.01 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-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.

16. Fund Counsel points out there is no mention in any of the medical records available of the Claimant receiving a blood transfusion within the Class Period.

17. However, Fund Counsel points out that if a claimant cannot comply with the provisions of section 3.01(1)(a), set out above, then section 3.01(2) provides an alternative means of proving a transfusion occurred.

18. Specifically, 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".

19. Fund Counsel submitted that as the Claimant has been unable to deliver sufficient proof to establish she was transfused with Blood during the Class Period, she is not entitled to compensation under the Plan.

20. Accordingly, Fund Counsel requested that the Administrator's decision denying the claim be upheld.

CLAIMANT'S SUBMISSION:

21. The Claimant's submissions were made by her brother. He indicated the Claimant received a transfusion as a result of a car caused by her boyfriend beating her while she was driving.

22. The Claimant's brother also expressed frustration with the lack of legal assistance for claimants, and what he perceived to be the complexity of the process. He also expressed frustration with the requirement that the Claimant prove she had a blood transfusion during the Class Period when "everybody knows that records have been destroyed or lost".

23. Finally, the Claimant's brother submitted that the record keeping for transfusions in Windsor hospitals is unreliable at best, and "some would see deliberately lost, at worse".

ANALYSIS:

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

25. 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.

26. As indicated above, section 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."

27. As pointed out by Counsel for the Fund, if a person claiming to be a Primarily-Infected Person cannot comply with section 3.01(1)(a), section 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.

28. 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.

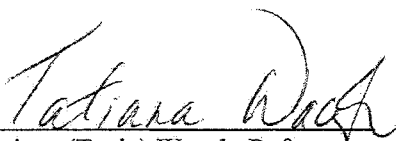
29. In this instance, the Claimant has provided no reliable documentation indicating she received a Blood transfusion during the Class Period. Nor has she produced corroborating evidence which is independent of her recollection or that of her family.

30. 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.

DETERMINATION:

31. 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 20TH DAY OF OCTOBER 2016.


Tatiana (Tanja) Wacyk, Referee