

THE 1986-1990 HEPATITIS C CLASS ACTION SETTLEMENT

DECISION

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE ADMINISTRATOR
DATED SEPTEMBER 25, 2002

CLAIMANT REPRESENTATIVE: No. 8775

FOR THE ADMINISTRATOR: Belinda Bain

REFEREE: C. Michael Mitchell

BACKGROUND

1. This is an Ontario-based Claimant, claim # 8775.
2. It has been 15 years since the first hearing in this claim, and it has been postponed and adjourned to provide the applicant an opportunity to present materials, evidence and argument to support his claim. He has not responded to any recent communications where he was advised that if he failed to participate, the matter would be determined on the materials and evidence already submitted. No substantive response was received from the claimant.
3. A hearing took place in Joyceville Ontario on December 13, 2002 in which the claimant participated.
4. The claimant made a claim to the Plan based on two separate transfusions he claims to have received in Sunnybrook Hospital in the summer of 1986 or 1987. He had indicated in his application that he had other risk factors for Hepatitis C including blood transfusions prior to the class period, tattoos, and incarceration. The administrator denied the claim because neither the blood bank records nor the hospital records demonstrates that a transfusion had taken place.
5. At the hearing, it was established that the claimant suffered a work related injury and had serious complications with his back. He stated he underwent two surgeries to his back within a period of approximately nine months although the records ultimately showed they took place after the claimant indicated and were somewhat further apart. The surgeon was Dr. Gertzbein. A number of screws and 10" rods were inserted. The claimant's recollection is that he was told by Dr. Gertzbein that he would receive a transfusion (which he did not wish to have) but the claimant's understanding was that he did receive a transfusion. There was no evidence that anyone including family members who picked him up at the hospital saw a transfusion.
6. Following the hearing, medical records were obtained from Sunnybrook Hospital. The records recorded that there were indeed two separate surgeries on February 7, 1989 and September 11, 1990. There is no reference in the medical records to the transfusion of any blood products in connection with either surgery.
7. The post-operative report for the Sept 11, 1990 surgery recorded that there was an estimated blood loss of 900 cc's and that the patient received three litres of crystalloid solution. The administrator stated that crystalloid solution is an isotonic solution used largely for fluid replacement, and is not a blood product within the definition of "blood" under the Settlement Agreement. Under that agreement, blood is defined as:

"Blood means whole blood and the following products: packed red cells, platelets, plasma (fresh frozen and banked) and white blood cells. Blood does not include Albumin 5%, Albumin 25%, Factor VIII, Porcine Factor VIII, Factor IX, Factor VII, Cytomegalovirus Immune Globulin, Hepatitis B Immune Globulin, Rh Immune Globulin, Varicella Zoster Immune Globulin, Immune Serum Globulin, (FEIBA) FEVIII Inhibitor Bypassing Activity, AutoPlex (Activate Prothrombin Complex), Tetanus Immune Globulin, Intravenous Immune Globulin (IVIG) and Antithrombin III(ATIII).

8. On July 30, 2003, counsel for the administrator wrote to the claimant indicating his understanding that crystalloid solution was not a blood product. He advised the claimant to seek out any further information as he determined appropriate with respect to the issue of the crystalloid solution. The claimant did not respond, and was reported to have moved to England. After numerous attempts at contact with the claimant directly and through his sister, the matter was adjourned at the suggestion of counsel for the administrator by a decision by me dated January 24th, 2006.
9. I was advised that in July 2016, as part of an effort by the administrator to clean up dormant files, the claimant was contacted and he then advised that he wished to proceed with his appeal. Efforts by counsel for the administrator to arrange a conference call with counsel, the claimant, and myself were unsuccessful, although the claimant did respond to one further email from counsel to the administrator in which he indicated a desire to participate in a conference call but further emails went unanswered.
10. I sent the following communication to the claimant by email on January 21, 2017:

"As you may recall I am the adjudicator in your claim for compensation. I am being asked by the Administrator in this file to issue a decision in your case. Do you have any submissions that you wish to make? Do you wish to have a phone call with the legal counsel for the Administrator and with me?

You did respond to one communication from counsel for the Fund so I am reluctant to issue a decision without hearing from you further, but I will have to if you do not respond.

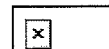
I will wait until the end of February to issues a decision in your case. However, I would appreciate hearing from you as to your intentions. If you have any questions or concerns or wish to arrange a phone conversation to conclude the hearing in this matter, please contact Belinda Bain at the email address above.

11. No response was received and this decision has therefore been rendered based on the materials and submissions received.

Decision

12. The medical records received from Sunnybrook Hospital where the surgeries took place contain no evidence of a transfusion having been administered to the claimant although there are detailed surgical notes of the procedure. There is a record of blood loss and the administration of crystalloid solution which may be why the claimant believed he had a transfusion of blood. Under section 3.04(2) of the Settlement Agreement, in order to be entitled to compensation in these circumstances, the claimant would have to show evidence independent of his personal recollection or the recollection of any family member that he did receive a transfusion of blood. There is no evidence to support his claim of a blood transfusion other than the claimant's own recollection and the administration of the crystalloid solution which is not "blood" as defined.
13. There are two issues with respect to the crystalloid solution. First it does not meet the definition of blood as defined in the settlement agreement, and second, even if it did, it occurred in respect of the surgery which took place on September 11, 1990. That falls outside the class period which expired July 1, 1990. That surgery is therefore not eligible for compensation under this Plan in any event.
14. In short, there is no evidence to support the claim that there was a blood transfusion in the required period. The claim is dismissed.

DATED at Toronto this 18th day of June, 2017



C. Michael Mitchell
Arbitrator