

**IN THE MATTER OF AN APPEAL TO REVIEW THE DECISION
OF THE ADMINISTRATOR CONCERNING CLAIM NO. XXXX UNDER THE HCV 1986 - 1990
SETTLEMENT AGREEMENT AND THE TRANSFUSED HCV PLAN**

Vincent R. K. Orchard, Q.C., Arbitrator / Referee for the Province of British Columbia

Decision

Claim ID No: XXXX

I. INTRODUCTION: THE CLAIM AND THE APPEAL

1. This is an Appeal for review of a decision dated November 7, 2018 of the Administrator denying the Claim brought by the Personal Representative of her deceased spouse (the “Deceased”) who was diagnosed with Hepatitis C (“HCV”) prior to his death in 2017.
2. The Claim and the Appeal were brought pursuant to the HCV Transfused Plan (the “Plan”) adopted under the HCV 1986-1990 Settlement Agreement (the “Agreement”) confirmed by court orders following settlement of class action litigation.
3. This Appeal comes before me as a court appointed Referee further to the Agreement and relevant court orders.
4. The Claim was denied based on failure to meet a fundamental threshold evidentiary requirement under Article 3.01 of the Plan requiring proof, as therein defined, that the Deceased, the Primary-Infected Person, received a Blood transfusion, as further defined, during the Class Period January 1, 1986 to July 1, 1990.
5. Article 3.01(1) requires proof by way of certain specified medical records as set out in Article 3.01(1)(a) of a Blood transfusion in Canada during the Class Period. No such records were presented to the Administrator in the Claim. The onus is upon the Claimant to do so. Nor was any alternative proof adduced by way of witness testimony, as permitted by Article 3.01(2), of a Blood transfusion in Canada. Moreover, no proof of a Blood transfusion was adduced in this Appeal despite the passage of more than two and one-half years since the filing of this Appeal on January 30, 2019, and despite efforts by the Claimant, aided by the issuance in the Appeal of a Summons to (*Province*) Health Services (“PHS”), the province where it is asserted that the Deceased was transfused in 1986 at the Calgary General Hospital. PHS responded by affidavit and emails indicating a thorough search of available records disclosed no proof of a Class Period transfusion. Furthermore, during the Administrator’s review of the Claim, Canadian Blood Services (“CBS”) also conducted a search of blood bank records. The CBS search covered the years 1983 – 2018 with negative results.

6. The records searched and disclosed by AHS revealed an outpatient attendance at the *(City)* General Hospital in October, 1987, by the Deceased. The Deceased attended the Hospital complaining of fever, chills, chest pain and shortness of breath. As would be expected, there was no proof of a transfusion during that visit. The Deceased was discharged the same day.
7. The only other medical record of interest is a consultation report of a gastroenterologist provided by the Claimant in July 2021. The consultation report is dated February 9, 2007. It refers to a history given by the Deceased of “some sort of blood transfusion” in 1983 after sustaining a knife wound after an attempted mugging. Perhaps the Deceased had a Blood transfusion before the Class Period and the Claimant thought it happened in 1986. However, CBS searched blood bank records from November 1983 to October 2018 at the hospital in question and no transfusion took place during that time frame. I agree with Fund Counsel that if a transfusion took place in 1983 or on an earlier date, the transfusion is prior to the Class Period and the Deceased would not have been a Primarily-Infected Person nor a Class Member.
8. As a procedural matter, the Claimant was given ample time during this Appeal to search for records to support the Claim. The efforts of the Claimant to obtain records were considerable. Searches by CBS and AHS were very helpful. It was ultimately concluded by the Parties that no purpose would be served by conducting an in-person hearing. Accordingly, during a conference call, on June 23, 2021, I gave the parties deadlines in July and August, 2021 for any further submissions or production of records. Fund Counsel provided submissions and the Claimant provided further medical records.

II. CONCLUSION

9. Under Article 3.01 the onus is on the Claimant to prove that the Deceased received a Blood transfusion in Canada during the Class Period. Despite a thorough search for records, as described above, there is no evidence in any of the records of a Blood transfusion during the Class Period. The Claimant has failed to meet the onus established under the Plan as the threshold for entitlement to compensation. There is no proof that the Deceased met the definition of a Primarily-Injected Person. Therefore, the Deceased has not been proven to be a Class Member.

10. Under the Agreement and the Plan, the Administrator has an obligation to determine whether the required proof for compensation exists. The Administrator had no choice but to deny the Claim in the absence of proof of a Blood transfusion during the Class Period. The Administrator has no discretion to allow a claim where the necessary proof is absent. Neither the Administrator nor an Arbitrator or Referee called upon to decide an appeal of the Administrator's decision has any authority to alter, amend or ignore the terms of the Agreement and Plan.
11. For the reasons given, I conclude that the Administrator correctly denied the Claim. The Administrator's decision is upheld. The Appeal is denied.

Dated at Burnaby, British Columbia, this 14th day of September, 2021.



Vincent R.K. Orchard, Q.C., Arbitrator / Referee