

REFEREE'S DECISION  
HEPATITIS C CLASS ACTION  
JANUARY 1, 1986 - JULY 1, 1990

|                        |                |
|------------------------|----------------|
| Claimant:              | Claimant #2898 |
| File No:               | 1052           |
| Province of Infection: | Manitoba       |
| Province of Residence: | Alberta        |
| Date:                  | July 6, 2024   |

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## **Decision**

1. By letter of October 26, 2020 to the deceased Claimant's Personal Representative (CPR), the Administrator denied the claim for compensation as a Primarily-Infected Person pursuant to the Transfused HVC Plan on the basis that the claim originally submitted contained deficiencies and, despite a number of extensions, including a final extension granted until November 17 2016, the deficiencies were not cured on or before that deadline.
2. The denial was based upon the D90 Deficiency Deadline protocol. A copy of Schedule "A" entitled Court Approved Protocol, Deficient Claims, Claims That Cannot Be Located and Duplicate Claims dated December 2012 (Schedule A) is attached to this decision.
3. The filed Appeal alleged that the Administrator may have denied procedural fairness to the CPR because the information required to cure the deficiencies was impossible to find.
4. The Appeal came before me in March of 2021 and proceeded until June, 2024 through a series of pre-hearing teleconferences which addressed ways by which the deficiencies remaining could be cured.
5. At the last teleconference, counsel for the CPR advised as a result of securing key evidence that disposed of the merits of the claim, she was instructed to discontinue the Appeal and withdraw the outstanding claim.
6. I was then asked for written reasons evidencing the resolution of the matter.
7. There are two purposes to be served in delivering reasons in this case. The first is to set out the circumstances giving rise to the protracted period of time between the first contact with the Administrator in May, 2000 and the final resolution of the matter in June, 2024. The second is to deal with the allegation that the Administrator may have deprived the CPR of procedural fairness in denying recognition of her claim.

## **Review of Facts**

8. The claim file documentation prior to October 2020 shows the following:

- (a) The Claimant received a blood transfusion on February 9, 1990 at the W Hospital due to a rupture of the aorta.
- (b) The Claimant died on November 12, 1991.
- (c) By letter of March 15, 1999 a medical officer from the Canadian Blood Services (CBS) Look Back/Traceback Program notified the deceased's physician that the deceased received blood products at the Health Science Centre in 1990 in a (City) hospital and the donor had been found to be anti-hepatitis C virus positive.
- (d) By letter of October 1, 1999 a Winnipeg law firm representing the CPR requested (City) a copy of the blood and hospital records pertaining to the deceased for the 1990 admission and any prior visits.  
  
By letter February 5, 2000, the Health Sciences  
(e) Centre provided certain medical records.
- (f) By letter of May 20, 2000, the CPR's law firm wrote to the Administrator advising the box of claims forms it provided did not include one for the deceased Claimant.
- (g) By a telephone contact on June 1, 2020 the Administrator asked the law firm for the Claimant's date of birth.
- (h) By letter of June 16, 2000 the CPR's law firm provided the Administrator the Claimant's date of birth.
- (i) A fax to the Administrator dated March 28, 2001 from the CPR at an address in Calgary indicated the (City) law firm no longer represented her.
- U) A new claim form submitted by the CPR was received by the Administrator on May 26, 2010. In response, the

Administrator communicated to the CPR the following deficiencies:

- (i) No provision of a completed treating physician form (Tran 2)
  - (ii) No provision of completed declaration (Tran 3)
  - (iii) No provision of authorization to initiate a trace back procedure or release information regarding a completed trace back (Tran 4)
  - (iv) No provision of a recent positive HCV antibody test and other specified medical evidence to indicate presence of the hepatitis C virus in absence of any other cause
  - (v) No provision of proof of status to act as Personal Representative.
- (k) The CPR submitted no additional information to the Administrator between May, 2010 and November, 2014.
- (l) The Administrator imposed or extended deadlines for submitting deficient information between November 2014, and August, 2015.
- (m) In about September 2015, a member of an (Province) non- profit legal organization (which provided legal guidance to persons without access to paid services) contacted the Administrator to obtain claim file documentation for the purposes of filing an Appeal.
- (n) The member reported that the CPR desired legal assistance but had struggled with the pursuit of the claim since the Claimant's death.
- (o) The Administrator allowed further extensions to the CPR between September 2015 and May, 2020 but no additional information was provided in that interval.
- (p) After the denial of the claim as described in paragraph 1 above, an Appeal was filed in or about December, 2020.

- (q) In or about February 16, 2021, the Administrator received a formal consent from the CPR for the (Provicne) lawyer (CPR lawyer) to represent the Appellant on the Appeal.
- (r) The CPR lawyer indicated she had had no access to communications or any of the claim documentation between the Administrator and the CPR in the four years prior.
- (s) Under Schedule "A", entitled Court Approved Protocol, Deficient Claims, Claims That Cannot Be Located and Duplicate Claims and dated December 2012, it is stipulated as follows:
  - A Deficient Claims
    - 1. The Administrator shall make all reasonable efforts to assist claimants in resolving deficiencies.
- 9. On March 3, 2021 Fund Counsel and I notified the CPR Lawyer of our appointments for the appeal process.
- 10. Due to the pandemic conditions prevailing at this time and the issue of determining the possible existence of records created in the three decades prior, the parties and I communicated through a series of pre-hearing telephone conferences between 2021 and 2024 as to how to address the deficiencies.
- 11. At the April 23, 2021 telephone conference, upon the joint request of the parties, I issued a Summons to the (City) Health Authority to produce medical records including blood bank records of the deceased Claimant and referencing the last known blood transfusion given at the (City) Hospital on February 9, 1990.
- 12. In response to the Summons, the requested medical records were sent to Fund Counsel who, on August 10, 2021, delivered copies of the same to the CPR lawyer.
- 13. At a December 16, 2021 telephone conference the following ensued:

- (a) Fund Counsel noted that in light of the information contained in the medical records, including medical proof of a transfusion of tainted blood, the Administrator was prepared to rescind the denial of the claim,
  - (b) Due to the challenge of marshalling the requisite documents to cure the remaining deficiencies, Fund Counsel proposed the matter remain under the Referee's jurisdiction with a view to ensuring progress in locating deficient information continued in a timely manner,
  - (c) The Administrator agreed to provide forms to the CPR lawyer required to complete the claim application, and to remain available to provide information and assist as appropriate. The Administrator also agreed to request the CBS to expedite the completion of the Traceback process,
  - (d) Counsel for the CPR agreed to seek to locate a death certificate and medical records to establish the cause of death of the Claimant.
14. On December 20, 2021, the Administrator advised it would not be able to send the file for Traceback until the Tran 4 and Tran 5 forms were completed correctly and a more recently completed Tran 1 form submitted.
15. The Administrator advised the CPR lawyer that it also required production of a Medical Death Certificate and the opinion of a Hepatitis C Specialist to complete the Tran 2 form with supporting evidence that HCV contributed to the Claimant's death. It was explained that the Specialist could complete the Tran 2 by reference to a review of the medical file documentation.
16. At a teleconference on February 24, 2002 Fund Counsel advised that completion of probate or estate administration would be required if a final decision determined the Claimant should be admitted to the Class and receive a payout.
17. Counsel for the parties agreed the CPR's lawyer should proceed to complete the submission of forms and seek to

secure the opinion of a medical specialist as to the cause of death.

18. The CPR's lawyer reported she was awaiting information from medical sources, including the Office of the Coroner.
19. The Administrator reported that a Traceback had been requested but no response had yet been received.
20. A further teleconference was scheduled for December 7, 2022 at which the CPR lawyer advised she would communicate when she had received further documentation.
21. A teleconference took place in September, 2023 at which the CPR lawyer reported on the obstacles to obtaining additional information to cure the deficiencies. It was agreed that further time would be required for those purposes.
22. On December 20, 2023 the CPR lawyer advised that she was awaiting receipt of a copy of the Medical Certificate of Death from (Province) and had located a specialist who agreed to complete the Tran 2, even if the specialist would be unable to complete every query in the form.
23. On February 29, 2024 the CPR lawyer advised that (Province) Department of Vital Statistics before the Medical Death Certificate could be released and information in it might assist the Specialist in completing the Tran 2.
24. On May 2, 2024 the CPR's lawyer reported that she had received a copy of the Long Form Death Certificate (Death Certificate) and transmitted it a local infectious diseases expert.
25. On May 31, 2024 the CPR's lawyer reported that she had obtained and transmitted a copy of a Tran 2 form to the local infectious diseases expert.
26. The Death Certificate stated that the Claimant's cause of death was lung cancer. The opinion provided in the Tran 2 by the infectious diseases expert was that the Hepatitis C virus did not contribute to the death of the Claimant.



27. In a telephone conference on June 3, 2024 the parties discussed the results presented and the CPR lawyer indicated she would seek instructions from the CPR.
28. On June 18, 2024 the CPR lawyer advised that the CPR and the Claimant's family understood that there was no basis to establish a claim that the Claimant's death was materially contributed to by the blood transfusion he received in 1990 at the (City) hospital and that the Appeal was to be discontinued.

### **Analysis and Conclusions**

29. I begin with a review of the Schedule A requirement imposed on the Administrator, set out again below for ease of reference:

#### **A. Deficient Claims**

1. The Administrator shall make all reasonable efforts to assist claimants in resolving deficiencies.

30. I now consider this requirement in light of the above facts. First, I observe that the CPR was apprised only in March 1999 by the CBS that the Claimant had received the transfusion of tainted blood, nearly 8 years after the Claimant's death.
31. There is no evidence that there was undue delay in transmitting that notification to the CPR, but in any case, the CBS acts independently from the Administrator, and as such is outside the Referee's jurisdiction under the HCV Transfused Plan.
32. Between October 1999 and March 2001, the CPR was represented by a (City) law firm which, in that interval, sought and obtained some relevant medical records and contacted the Administrator for production of claims forms to initiate a claim.
33. From a review of the correspondence between the (City) legal counsel and the Administrator, I am satisfied that the only assistance in that interval the former requested, namely provision of claims forms, was provided by the Administrator and in a timely manner.

34. The documentation shows only two steps taken in the next nine years. The first was taken by the CPR on March 28, 2001 to inform the Administrator that she had discharged the (City) law firm. The second was on or about May 26, 2010 when she filed a claim with the Administrator.
35. There is no evidence that between March 28, 2001 and May 26, 2010 the CPR communicated an intention to make a claim or requested assistance from the Administrator to complete the claim forms.
36. Although the Administrator communicated to the CPR in or about May 26, 2020 that the claim required production of additional documentation to cure deficiencies, I found no evidence to indicate that the CPR requested any assistance from the Administrator to resolve the deficiencies between that date and September, 2015 when communication was received from legal counsel in (City)
37. The Administrator was advised in September 2015 by a (City) legal organization that the CPR desired legal assistance but had struggled with the pursuit of the claim since the Claimant's death.
38. This communication was open to two possible interpretations: that the CPR desired assistance from the Administrator in resolving the deficiencies or it served as an explanation for the lack of action in resolving the deficiencies between 2001 and 2015.
39. Since the September 2015 communication was made through a corporation providing legal services and specified that the CPR desired "legal assistance", I conclude it was reasonable for the Administrator to assume the CPR was relying on legal counsel to both explain the delay to that date and to assist to cure the deficiencies.
40. The Administrator granted further extensions between September 2015 and May, 2020 but in that interval no further information was provided to resolve the deficiencies, nor had

CPR or her legal representative made any express request for assistance from the Administrator.

41. The appeal was filed in December, 2020 but the Administrator first received a formal consent from the CPR for the Alberta lawyer to represent the Appellant on the Appeal only on February 16, 2021.
42. After medical documentation received and reviewed in response to the April 2021 Summons I issued, Fund Counsel advised not only that the Administrator was prepared to rescind the denial of the claim, but would provide assistance as appropriate to the CPR's lawyer to locate the deficient information.
43. From December 2021 to June 2024 the combined and coordinated efforts of the Administrator, Fund Counsel and the CPR's lawyer resulted in the collection and presentation of expert and reliable documentary evidence which established that the HCV did not contribute the death of the Claimant.
44. Since the result of such combined efforts cured the deficiencies in the claim, and since the Appeal was formally withdrawn, the grounds for the appeal would appear to have been rendered moot. But for greater certainty I add the following findings.
45. Based on the foregoing facts and analysis, I conclude that the Administrator was never expressly asked for assistance by the CPR during the periods she was represented by legal counsel or otherwise, nor can I find any events that would by implication have triggered an obligation under Schedule A to have offered or provided assistance to the CPR in perfecting her claim.
46. In case the CPR harbors lingering doubts as to whether a different result would have been produced had the Administrator taken more active measures at earlier stages of the proceedings, I set out below further observations with a view to putting those doubts to rest.
47. First, I am mindful from a review of all the facts that from 2001 onward the CPR was probably adversely affected in obtaining the deficient documentation by:

- (a) restricted financial conditions
  - (b) seeking to locate relevant records from (Province) when she was residing in (Province)
  - (c) as the Claimant's widow, experiencing emotional toll in reliving the personal circumstances.
48. Second, I can well understand that the CPR and her family may have reasonably suspected since 1999 that the transfusion of tainted blood in hospital in 1990 materially contributed to the Claimant's death. The efforts of the CPR to retain counsel to advance a claim promptly in 1999 was prudent, and, but for intervening circumstances affecting her, information to support or rule out presentation of a valid claim may have been located earlier.
49. While it may appear to the CPR that the medical records produced to Fund Counsel were uncovered only in response to my issuing a Summons for production of the same, it is important to note two things: first, the Administrator is not granted authority to issue a Summons under the HCV Transfused Plan so could not have ordered production of those records from the medical institutions at any time. Second, in my view those records could have been located by the CPR between 2001 and December 2021 by writing in her capacity as the widow of the deceased to request such production.
50. I also observe that as with the Summons, the Administrator is not authorized under the HCV Transfused Plan to compel a medical expert opinion under the Tran 2. Such opinion normally cannot be secured by persons other than a Claimant, a CPR or their representatives. I accept that since 2001 the task of locating and retaining a medical expert to opine on the issue of causation of death or to obtain a medical death certificate would require much perseverance.
51. However, from all the foregoing facts and analysis, I see no basis for any suggestion that the Tran 2 expert's finding would have been different had the deficient documents and expert

opinion been secured by the CPR or any of her legal representatives at any earlier date.

52. I conclude that the Administrator at no material time failed assist the CPR to cure deficiencies or committed any acts or omissions constituting procedural unfairness, nor would any gratuitous assistance offered by the Administrator as contemplated by Schedule A have produced a different finding.
53. As a result of all the foregoing, had the CPR not withdrawn her claim in June, 2024, I would have upheld the Administrator's decision to deny the Claimant's request for compensation as a Primarily-Infected Person under the Plan.
54. As a final note, I commend the diligence of the CPR lawyer in ultimately locating and furnishing the requisite deficient documentation, and also Fund Counsel and the Administrator for their courtesy, helpful guidance to counsel for the CPR and professionalism displayed throughout the Appeal proceedings.

Dated July 6, 2024.



**{shelleyL.Miller, K.C. Referee**



Schedule "A"

COURT APPROVED PROTOCOL

Deficient Claims, Claimants that Cannot be Located and Duplicate Claims

December 2012

A. Deficient Claims

1. The Administrator shall make all reasonable efforts to assist claimants in resolving deficiencies.

2. In the circumstances where:

- (a) the Administrator concludes that it has taken all reasonable steps to assist the claimant in resolving deficiencies;
- (b) six months have passed since the last step was taken by the Administrator or the claimant without those deficiencies being cured;
- (c) the Administrator is not aware of further steps actively being pursued by the claimant which could reasonably cure the deficiencies; and
- (d) the Administrator has insufficient information or documentation to either approve or deny the claim,

the Administrator shall send the claimant a "Notice of Pending Deficiency Denial Letter" in substantially the form attached as Appendix "A". The Notice of Pending Deficiency Denial shall:

- (a) set out the deficiencies with the claim;
- (b) provide the claimant a deadline of 90 days from the date of the Notice of Pending Deficiency Denial Letter to cure all of the deficiencies (the "Deficiency Deadline"), unless 90 days from the date of the Notice of Pending Deficiency Denial Letter falls on a date that is not a Business Day (as defined in the Settlement Agreement), in which case the Deficiency Deadline will be stipulated as the next succeeding Business Day;

- (c) inform the claimant of his or her ability to request an extension of the Deficiency Deadline; and
- (d) inform the claimant that if the deficiencies are not cured or the claimant does not request an extension by the Deficiency Deadline, the claim will be denied.

3. Where a claimant wishes to request an extension of the Deficiency Deadline, he or she will be required to submit to the Administrator a "Request Form - Deficiency Deadline Extension", attached as Appendix "B", which will require the claimant to set out:

- (a) the steps already taken to cure the deficiencies;
- (b) the reasons why the deficiency have not been cured to date; and
- (c) the new steps the claimant proposes to take to cure the deficiencies and how long these steps will take.

4. The "Request Form - Deficiency Deadline Extension" will be provided by the Administrator to claimants upon request and will also be made available on the Administrator's website.

5. Upon receipt of a Request Form, the Administrator shall forthwith review it and determine if the Request Form sets out a plan that could reasonably cure the deficiencies. If so, the Administrator shall grant the extension, which shall not exceed 6 months from the date the Request Form is submitted. The Administrator shall communicate the length of the extension and the terms on which it is granted by sending the claimant a "Notice of Extension of Deficiency Deadline" substantially in the form attached as Appendix "C".

6. If, upon reviewing a Request Form, the Administrator determines that it does not set out a plan that could reasonably cure the deficiencies, the Administrator will deny the claim and shall send the claimant a "Rejection Letter" substantially in the form attached as Appendix "D".

7. If the claimant has not cured all of the deficiencies or submitted a Request Form on or before the Deficiency Deadline, the Administrator shall deny the claim and shall send the claimant a "Rejection Letter" substantially in the form attached as Appendix "E".



8. If a claimant has obtained an extension of the Deficiency Deadline but has failed to cure all of the deficiencies on or before the extended Deficiency Deadline, the Administrator shall deny the claim and shall send the claimant a "Rejection Letter" substantially in the form attached as Appendix "F".

**B. Claimants that Cannot be Located**

9. Where the Administrator is in receipt of a claim, but mail sent to the said claimant has been returned as "undeliverable" and the claimant has not provided the Administrator with updated contact information, then the Administrator will

- (a) make reasonable efforts to locate the claimant through Internet searches, and
- (b) where possible, contact the claimant's physician to locate the claimant.

10. Where the Administrator is unable to obtain updated contact information for the claimant after completing the steps in 8(a) and 8(b), the Administrator shall process the claim as having been denied.

**C. Duplicate Claims**

11. Where the Administrator is in receipt of a claim that it has determined is a duplicate of a claim that has already been finalized, the Administrator shall process the claim as having been denied and communicate this to the claimant in a letter substantially in the form attached as Appendix "G".