

DECISION

Claim No. 3949

Province of Infection – unknown

1. The Claimant applied for compensation as a Primarily-Infected Person pursuant to the Transfused HCV Plan.
2. By letter dated August 12, 2004, the Administrator denied the claim on the basis that the Claimant had not provided sufficient evidence to establish that he had received blood during the Class Period.
3. The Claimant requested that the Administrator's denial of his claim be reviewed, but did not specify whether the review was to be conducted by a referee or an arbitrator.
4. The Administrator's letter of August 12, 2004, denying the claim stated, in part:

“In your original application you indicated you did not know if you were transfused between January 1, 1986 and July 1, 1990. Several letters were sent to you

requesting you provide this information. In a telephone conversation with a claims processor on July 13, 2004 you indicated you did not think you ever received a transfusion and that you had applied to our program because you had Hepatitis C. Therefore, you do not meet the Criteria for compensation and your claim is denied, based on Article 3.01 (1a) of the 1986-1990 Hepatitis C Settlement Agreement; because there is no evidence to support you received a transfusion of blood between January 1, 1986 and July 1, 1990.”

5. In the Request for Review filed by the Claimant, he stated the following reasons for wanting to have the Administrator’s decision reviewed:

“I had Hepititic C confirm twice and I Believe I probly got Hep C from using Razor Blade at Millhaven Pen in Beth Ont. 1980s I believe we all used the Same Razor Blade in the Hole at Millhave Pen and we did get nicked, lots of time, Bad Blood on the Razor Blade in a locked Handle on the Razor Blade the Blade was not changed every time need a shave etc. I was in the Hole quite awhile about 25 to 30 months locked up.” [sic]

6. The Claimant’s request for review was originally referred to Gregory North, Q.C., for determination. The Claimant and Fund Counsel agreed to proceed by way of written submissions. Fund Counsel’s submission is dated September 12, 2005 and the Claimant’s submission is dated January 13, 2006.

7. The Claimant's Request for Review was reassigned to me following the unfortunate death of Mr. North.

8. I have reviewed the submissions of the Claimant and Fund Counsel, as well as the entire Appeal File. I find that the material facts are accurately summarized in the submission of Fund Counsel as follows:

"It is not disputed that [the Claimant] suffers from HCV. However, there is no evidence to suggest that [the Claimant] received a blood transfusion during the Class Period, entitling him to compensation under the Settlement Agreement.

On his request for review form, [the Claimant] has written:

I believe I probably got Hep C from using a razor blade at Millhaven Pen in Beth, Ontario [in the] 1980's. I believe we all used the same razor blade in the Hole at Millhaven Pen and we did get nicked, lots of times. Bad blood on the razor blade in a locked handle on the razor blade. The blade was not changed every time need a shave, etc. I was in the hole quite awhile about 25 to 30 months locked up. (Appeal File, page 6).

In a telephone conversation with a Claims Processor on July 13, 2004, [the Claimant] indicated that he did not think that he ever received a blood transfusion, but rather had simply applied for compensation on the basis that he was infected with Hepatitis C.

On the General Claimant Information Form (TRAN 1), [the Claimant] does not indicate that he received a blood transfusion during the Class Period. Rather, he has handwritten in on the table, 'I have HCV' (Appeal File, page 29).

On the Treating Physician Form (TRAN 2), it is indicated that it appears from [the Claimant's] medical history that he

was infected with Hepatitis Non A, Non B or Hepatitis C virus prior to January 1, 1986 (Appeal File, page 37).

On his Declaration Form by HCV Infection Person (TRAN 3), [the Claimant] has indicated under Question 4 dealing with the use of non-prescription intravenous drugs, 'I did use drugs, but never shared needles.' (Appeal File, page 38).

On the Blood Transfusion History Form (TRANS 5), when asked to identify his blood transfusion history, [the Claimant] has indicated that he does not know when he was transfused, or how many units of blood he was transfused (Appeal File, page 41).

In a handwritten letter prepared by the Claimant dated September 8, 2000, he indicates that he does not know how he got HCV, and lists a number of theories (Appeal File, page 57).

A medical note contained within the file makes reference to [the Claimant's] use of street drugs in 1982 (Appeal File, page 84).

A medical note from [the Claimant's] file indicates that [the Claimant] has a long history of drug abuse, and criminal behaviour, and has been in penitentiary on 11 occasions (Appeal File, page 88).

Another note from [the Claimant's] medical file dated June 21, 1998 notes that [the Claimant] described a long history of polydrug abuse and alcoholism and states that he has spent a lot of his time in prison in solitary or psychiatric centres (Appeal File, page 91).

On his other Risk Factor Inquiry Form, [the Claimant] has indicated that he has 13 tattoos, received in 1964 and 1980, has used intranasal drugs, and non-prescription intravenous drugs including speed and heroin, on the streets and in prison, more than 30 times. In addition, [the Claimant] indicates that he has been incarcerated on quite a few different times, in Kingston Penitentiary, Dorchester Penitentiary, Springhill Penitentiary, Millhaven Penitentiary and New Westminister Penitentiary (Appeal File, pages 122 and 133).

There is no evidence in any of the forms or medical documentation submitted by [the Claimant] of a blood transfusion received within the Class Period."

9. In addition to the above, there is a medical note prepared by Dr. A. Robertson summarizing a meeting with the Claimant on March 7, 1990. Dr. Robertson's note states:

“He told me that he was very heavily into drugs at one time. I asked to see his forearms and the right arm in particular is heavily marked with scars. He said he was heavily into heroin and speed and was mainlining.” (Appeal File, page 112)

10. Finally, in the Claimant's written submission to Mr. North dated January 13, 2006, the Claimant makes no reference to receiving a blood transfusion in a hospital or other medical facility. Instead, he reiterates his earlier speculation that he was infected with Hepatitis C as a result of sharing a razor blade while in prison. In the Claimant's view, this was “a form of blood transfusion” because another person's blood had been mixed with his.

11. Section 3.01 of the Transfused HCV Plan provides:

“3.01 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-Québec 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 or 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.
- (2) Notwithstanding the provisions of Section 3.01(1)(a), if a claimant cannot comply with the provisions of Section 3.01(1)(a), the claimant 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.
- (3) Notwithstanding the provisions of Section 3.01(1)(c), if a claimant cannot comply with the provisions of Section 3.01(1)(c) because the claimant used non-prescription intravenous drugs, then he or she must deliver to the Administrator other evidence establishing on a balance of probabilities that he or she was infected for the first time with HCV by a Blood transfusion in Canada during the Class Period.”

12. It is abundantly clear from the record that the Claimant has been unable to deliver any form or proof that he was transfused during the Class Period. As a result, the Claimant has not met the requirements of either Section 3.01(1)(a) or 3.01(2) of the Transfused HCV Plan.

13. Justice Winkler, in a recent judgment on a motion by Claimant No. 1000015 to oppose confirmation of the decision of a referee appointed pursuant to the terms of the Hepatitis C 1986-1990 Class Action Settlement Agreement, made the following observations about the burden of proof in a case such as the present one:

“11. The Settlement Agreement is clear on the issue of eligibility. A claimant must establish that he or she has both infection with the Hepatitis C virus and receipt of Blood during the class period. Generally, the method by which receipt of Blood is established is through the submission of the medical, clinical, hospital or laboratory records of the claimant. (See s. 3.01(1) (a) of the Transfused Agreement)

12. Where the claimant’s medical records do not indicate the receipt of blood during the class period, the claimant may still be able to establish that he or she received Blood during that time pursuant to s. 3.01(2) which provides:

3.01(2) ...if a claimant cannot comply with the provisions of Section 3.01(1)(a), the claimant 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.

13. In this case, the claimant did not have the supporting medical records demonstrating that he received a Blood transfusion and therefore was attempting to establish a transfusion on alternate evidence under s. 3.01(2). However, the important thing to note about s. 3.01(2) is that the claimant bears the onus of proof on the balance of probabilities. The referee determined that the claimant did not satisfy the onus and therefore upheld the decision of the administrator.”

[emphasis added]

14. As Justice Winkler explained, the onus is on a claimant to establish that he or she received a blood transfusion in Canada during the Class Period. Unfortunately for the present Claimant, he has not produced any evidence whatever to show that he received a blood transfusion during the Class Period and the requirements of Section 3.01(1)(a) and 3.01(2) have not been met in any respect.

15. The Claimant suggests that he received a “blood transfusion” via a cut from a shared razor blade while he was in prison. I cannot accept this submission for obvious reasons. The January 1, 1986 – July 1, 1990 Hepatitis C Settlement Agreement arose out of class action litigation against the Canadian Red Cross Society and other defendants. It was not intended to cover and does not cover primary Hepatitis C infections which may have been caused by direct blood-to-

blood contact between persons completely outside the context of the blood supply system.

16. Under the circumstances, therefore, I have no alternative but to uphold the Administrator's denial of the Claimant's request for compensation.

DATED at Halifax, Nova Scotia, this 12th day of May, 2006.

BRUCE OUTHOUSE, Q.C.
Referee/Arbitrator