

DECISION

BACKGROUND

1. The Claimant had a previous hearing before me which resulted in a decision denying him compensation. My decision was appealed resulting in the return of this matter for further consideration. Justice Winkler expressed his concern about my reliance on the statements of the relevant hospitals and of Canadian Blood Services that the Claimant did not receive a blood transfusion. Justice Winkler stated that it was not clear how the hospitals could have determined whether the Claimant received blood transfusions when they either had no records relating to the Claimant or their records had been destroyed. Justice Winkler ruled that it was an error in principle to draw inferences that were detrimental to the Claimant when hospital records were missing or destroyed.
2. The parties have agreed that this proceeding is restricted to considering the issue of whether the Claimant received a blood transfusion in Canada during the Class Period.
3. Further documentary evidence has been filed by the parties, including medical records from Toronto East General Hospital (“TEGH”) and the family physician. Also, further testimony has been heard from the Claimant, the Claimant’s former spouse and members of the staff at TEGH.
4. Final written submissions were filed by the claimant on July 27, 2012. Fund Counsel filed submissions on August 31, 2012. Reply submissions were received from the Claimant on October 2, 2012.

5. The Claimant is relying on section 3.01 of the Transfused HCV Plan, which states the following:

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- Quebec records demonstrating that the claimant received a Blood transfusion in Canada during the Class Period;
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 established on a balance of probabilities that he or she received a Blood transfusion in Canada during the Class Period.

EVIDENCE

6. The evidence of the Claimant at the first hearing and on November 11, 2011 is consistent with respect to his recollection of a blood transfusion. He confirmed that he recalled seeing bags of blood for transfusion in his room during his admission on November 14, 1987.
7. Medical records from TEGH and the Claimant's family physician have been requested on a number of occasions. Both parties acknowledged that there have been discrepancies in the various sets of records.

8. Three sets of records have been produced by TEGH as follows:
 - (a) A set of clinical notes and records were received by the Claimant's counsel from TEGH in 2007. This set of records was sent to counsel for the Fund and collated/paginated (the "first set").
 - (b) Another set of records was received from TEGH in response to the summons on January 20, 2011 (the "second set").
 - (c) Following a hearing with attendance by representatives of TEGH in January 2011, another set of records were received from TEGH in March 2011 (the "third set").
9. A review of the records received from TEGH discloses that each set of records varies from the other in content resulting in inconsistencies. For examples, documents in one "complete set" are not included in the other "complete set". Records in each set vary in the number of pages and the order of documents included. It has been confirmed by TEGH that the original chart, notes and records relating to the Claimant's care at TEGH have been destroyed.
10. It is the sworn evidence of the Claimant and his former spouse, both of whom testified at the original hearing and on November 11, 2011, that they each had separate conversations with the records clerk (a woman called "Daisy") at TEGH in May 2000 when they were seeking documents to support this claim.
11. The Claimant and his former spouse testified that Daisy advised them that she had located a transfusion report and would send a copy to the family physician when she received an authorization signed by the Claimant. The required authorization was faxed by Daisy to the Claimant's former spouse. It was signed by the Claimant and faxed back to Daisy.
12. A letter dated May 4, 2000 from the Claimant to Daisy, enclosing his signed authorization, corroborated his account that a conversation occurred between Daisy and each of the Claimant and the Claimant's former spouse.

13. On May 11, 2012, Daisy testified at a continuation of the hearing that her handwriting was on the authorization sent to the Claimant. She also confirmed that it was common for her to communicate with patients on the phone. However, she testified that she would not have said that the records would contain “good news” or that there was a record of a blood transfusion, as testified to by the Claimant and his former spouse, as it was not her practice to comment on the content of medical records or to send records to a family physician.
14. Daisy also testified about the method by which she would search for records. Records are destroyed after approximately 5 years and then copies are kept on microfiches. The microfiche copies are not kept in a continuous roll and there is no directory specifying which rolls contain records from which year or for which patients. All records from each visit are not necessarily on the same roll, records may be placed on incorrect rolls and rolls can be misplaced. She also testified that it is impossible to tell from a record which roll it came from or if there were accompanying records.
15. In a letter dated January 6, 2011, the director of laboratory services at TEGH, stated that “blood transfusion records indicate that there were no blood transfusions on [the claimant].” This mirrors the statement which Justice Winkler expressed concern about and was, in part, the reason he sent this matter back for a rehearing. I place no weight on the letter and opinion dated January 6, 2011 and do not accept it as evidence.
16. Carol Miller, the Appeals Coordinator for the Fund, testified that the administration of the Plan began in April 2000 and a higher than usual number of patients would have been requesting hospital records. This increased demand was confirmed by Daisy and may explain the failure to send records to the Claimant’s family physician.

CONCLUSION

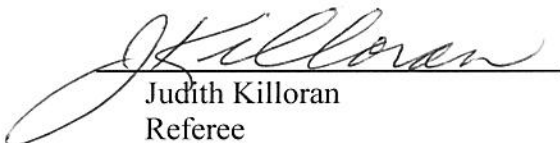
17. I find that the difference in the records produced by TEGH, while explainable by the record keeping process, casts doubt on their accuracy. The testimony of Daisy was that a third party was hired to destroy the records. The procedure was to copy them onto microfiche prior to destruction of the records and this procedure was engaged in with the assistance of students and volunteers. Another employee of the hospital, the Coordinator of Health Records, testified about the process of transferring documents to microfiche and could not confirm that all documents were microfilmed. No evidence was given about a process for overseeing or confirming the records so that they would be properly transferred to microfiche.
18. As the process of record retention at TEGH was unreliable, the best evidence available to me was the Claimant's testimony of his recollection of the transfusion together with his and his former spouse's testimony that they were told individually by Daisy that the Claimant had received a blood transfusion. Their evidence is corroborated by the fax sent to Daisy, enclosing the authorization which Daisy confirmed was partially completed by her immediately following their conversation. A follow up letter was sent to Daisy by the Claimant on August 30, 2000 and a further request was forwarded by the Claimant's family physician on January 2, 2002 when the records had still not been received.
19. No records were produced from TEGH until 2007, followed by more productions in 2011 and 2012, after repeated requests and the issuance of summonses. Three different sets of records were eventually produced. The records clerk named "Daisy" referred to by the Claimant and his former spouse in the original hearing could not be located originally. The Claimant's former spouse testified she was informed by a TEGH employee that "Daisy" was no longer employed at the hospital. However, when Daisy was finally located in 2012, she was still a TEGH employee, which in itself reinforces the testimony of the Claimant and his former spouse. I also find that the actions of the Claimant are consistent with the testimony of him and his former spouse. His actions, which involved persistent attempts from 2000 to date to secure a record of his blood transfusion lend

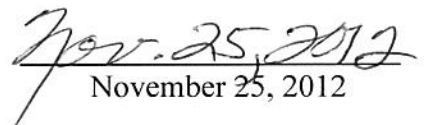
weight to his testimony and that of his former spouse that they were informed of the existence of the blood transfusion record in 2000.

20. I find that a constellation of factors including the record keeping retrieval process, the high volume of record requests in the relevant time period and the many years which have elapsed since the Claimant's transfusion explains the missing records. It is only the evidence of the Claimant and his former spouse which has been consistent and reliable.
21. On April 19, 1993, the Claimant was diagnosed with HCV. The Claimant requested his medical records from TEGH by letter in 2000. When they were not received he and his former spouse spoke with Daisy by telephone. Their testimony is that Daisy confirmed the existence of the blood transfusion records. Although Daisy was unable to recall her conversations with the Claimant and his former common law spouse, I find that does not detract from the veracity of their evidence. It is understandable that Daisy would not recall conversations in 2012 that occurred twelve years previously, particularly considering the multitude of calls fielded by her. However, she did identify her handwriting on the fax and on the consent documents filed in evidence.
22. I prefer the evidence of the Claimant and his former spouse to that of Daisy who testified that it was not her practice to inform people of such information over the telephone. It is believable that she may have varied her usual practice in this case. I find that the evidence of the Claimant and his former spouse about Daisy's statement was credible and reliable. This is the best evidence of the existence of a blood transfusion record that the Claimant recalls he received in November 1987.
23. The Standard Operating Procedure does not limit or detail the types or form of corroborating evidence that should be accepted. It is defined as "any evidence it deems reliable." Corroborating evidence offers additional or supplementary evidence which supports, strengthens or confirms principal evidence. In this claim, the principal evidence is that of the Claimant who provided a recollection of having received a blood transfusion at TEGH in November 1987. The evidence of the Claimant and his former spouse is that

Daisy stated that she had a record of the Claimant having received a blood transfusion at TEGH during the Class Period. The supporting evidence of a statement renders probable the principal evidence of the Claimant about his blood transfusion.

24. The Standard Operating Procedure and the Best Evidence Rule support the conclusion that the communication of the record of the blood transfusion may be accepted in an “oral” form. The evidence is reliable as the best evidence in the circumstances. I find that the record of the Claimant’s blood transfusion at TEGH during the Class Period existed in 2000 when the Claimant and his former spouse were told by Daisy that she had the record of the blood transfusion. Regrettably, a copy of the record has not been located again.
25. Rule 20(c) of the Rules for Arbitration/Reference (Court Approved Protocol) provides that at an oral hearing “subject to issues of privilege, an Arbitrator/Referee may accept all oral or written evidence as the Arbitrator/Referee, in his or her discretion considers proper, whether admissible in a Court of law or not.” Consequently, my discretion to accept evidence at a hearing has a broader ambit than what might be accepted in court. As I have found that the testimony of the Claimant and of his former spouse about Daisy’s statement is reliable, I find that it constitutes corroborating evidence of the Claimant’s independent recollection of a blood transfusion during the Class Period.
26. I find that the Claimant has satisfied the requirements of section 3.01(2) of the Plan. Consequently, I find that the Claimant has provided proof, on a balance of probabilities, that he received a blood transfusion in Canada during the Class Period.


Judith Killoran
Referee


November 25, 2012