

DECISION

The Claimant submitted a Request For Review, following refusal of her claim for compensation as a Primarily-Infected Person under the Transfused HCV Infected Plan.

The Claimant tested HCV positive after she underwent a test after receiving a letter from the Quebec Ministry of Health and Social Services inviting her to be screened during a HCV Traceback Campaign.

The Claimant alleges having been infected during the Class Action Period, either following a blood transfusion received on February 6, 1990 during her stay at the Hôpital Santa-Cabrini de Montréal. The fact that she is HCV positive and that she received a transfusion during the Class Action Period is not disputed.

After she submitted her claim under the Transfused HCV Plan, a lengthy investigation took place and confirmed that the Claimant had effectively received a transfusion on February 6, 1990, and that, even if three units had been set aside for the surgery, which she was to undergo.

The donor of that unit was identified and it was established that he had given blood about 50 times between 1990 and 1999.

In his letter of July 8, 2004 sent to HCV Claims Center, Héma-Québec's Vice-President of Medical Affairs confirmed that all test results related to the donor's traceback had turned out negative. This donor was tested every time and he always turned out negative.

The Claimant, now a 74-year-old lady, and her son both testified before me on July 5, 2005 and recognized at once that the Claimant had received only one blood transfusion during her stay at the Hôpital Santa-Cabrini in February 1990. The Claimant and her son also testified to the effect that she had always had a regular life, and that she had no spouse since her husband's death in 1982. It was established however that the Claimant had undergone a discectomy in 1974 at the Hôpital Notre-Dame and a hysterectomy in 1982 at Saint Mary's Hospital, over and above the lung surgery than she underwent in February 1990.

Paragraph 3.04 (1) of the HCV Transfused Plan provides that if the results of a Traceback Procedure show that none of the donors is or was anti-HCV positive, " the Administrator must reject that HCV Infected Person's claim ".

Paragraph 3.04 (2) of the same Plan provides however that the Claimant can prove having been infected for the first time as a result of a transfusion despite the results of the Traceback Procedure. In this case, this proof only lied on the fact that the Plaintiff had had a regular life, that she had not used intravenous drugs without prescription, nor had tattoos or other particular risk factors. The Claimant and especially her son suggested that there could have been a medical error and that perhaps, the medical or hospital records were not complete. The Plaintiff showed me, during the hearing, the Hôpital Santa-Cabrini's records (136 pages), which seemed complete to me. I carefully consulted the file and I found several references to the February 6, 1990 transfusion, but to no other. The Claimant did not ask her doctor to testify nor did she present medical evidence of any sort other than the Hôpital Santa-Cabrini's file.

In his decision of May 9, 2003, Mr. Justice I.H. Pitfield, of the Ontario Superior Court said the following:

" [14] While the primary basis for the determination of eligibility is the traceback process, a Claimant may adduce evidence on appeal in support of the claim that he or she was infected for the first time in the class period notwithstanding a negative traceback result.

In my opinion, Article 3.04(2) does not permit a Claimant to conduct his or her own traceback procedure. The Article contemplates that there might be evidence which would establish that the source of the infection, more likely than not or on the balance of probabilities, was a transfusion received in the period (...)

[15] The evidence the Claimant would be required to adduce on appeal would include, at the least, complete family and personal medical history and detailed evidence of all aspects of the Claimant's lifestyle including evidence of the absence of opportunity to be infected by needles or injections, however and for whatever purpose received. The kinds of evidence I have described are not intended to be exhaustive. Rather they are intended to point to the process that must be followed in the attempt to refute the traceback result.

[16] A simple denial by a Claimant of personal history or actions that have been identified as potential non-transfusion sources of HCV infection will not suffice. The reliability of the assertion which is subjective in nature would have to be tested by reference to all known objective evidence. One of the pieces of objective evidence is the negative traceback result following upon the application of, and adherence to, the approved traceback protocol. Contradictory objective evidence would have to be very persuasive if the traceback result is to be refuted."

I listened to the Claimant and her son with care and read the documents which were submitted to me. I consider that the Claimant has not succeeded to establish, on the balance of probabilities or by some other means, that she had probably been infected following the transfusion received in 1990. I consider that the proof provided is not sufficient to justify that we ignore the negative results of the traceback investigation. The 1974 and 1982 surgeries or the one in 1990 are important elements and risk factors against which the Claimant has submitted a very general testimony and without the support of testimonial evidence of a medical nature.

I do not doubt the good faith of the Claimant and her son and it is unfortunate to see that her health has been affected by this horrible disease. The Settlement Agreement cannot, regrettably, cover all cases and it represents an agreed compromise to compensate those who meet the terms and conditions of the Agreement. Regrettably, I arrive at the conclusion that the Claimant does not meet the terms and conditions of the

Agreement because she has not been able to establish on the balance of probabilities or otherwise that she had contracted the disease following a blood transfusion received in Canada, during the Class Action Period covered by the Agreement.

I consider that the Administrator's decision to reject this claim was correct and I confirm such a decision.

I thus reject the Request For Review.

Montreal, July 8, 2005

Jacques Nols
Referee