

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

Claimant:	Claim 9600
File No.:	416611-21
Province of Infection:	Alberta
Province of Residence:	Alberta

DECISION

1. On December 8, 2004, the Administrator denied the claim for compensation as a Primarily-Infected Person pursuant to the Transfused HCV Plan on the basis that the Claimant had not provided sufficient evidence that he was infected for the first time with HCV by a blood transfusion received in Canada within the Class Period.
2. This case is anomalous for the fact that the Claimant had been provisionally approved in June 2003 after a traceback conducted by the Canadian Blood Services was initially inconclusive.
3. The Claimant requested an oral hearing by a Referee to review the decision of the Administrator.
4. The Claimant resides in Edmonton, Alberta, and received three units of transfused blood at the Royal Alexandra Hospital in Edmonton, Alberta, on May 4, 1986.
5. The hearing was held on June 20, 2005 at Edmonton, Alberta.
6. Neither party disputed the following facts:
 - (a) The clinical records from the Royal Alexandra Hospital related to an admission for a serious head injury resulting from a fall on the evening prior to admission.
 - (b) He was taken to the operating room where he had an emergency evacuation of his epidural hematoma.
 - (c) He was then transferred to the Glenrose Hospital for treatment in the brain injury rehabilitation program.
 - (d) The Claimant is infected with Hepatitis C and to the best of his knowledge was diagnosed in about September 2001.
 - (e) He submitted a claim for compensation in May 2002.
 - (f) A trace back was initiated in June 2002.
 - (g) By letter of June 19, 2003 the Claimant was told by the Claims Centre that his application for compensation under the 1986-1990 Hepatitis C Settlement Agreement was approved at Level 1 and he was paid the sum of \$10,904.06.
 - (h) This letter stated, *inter alia*, as follows:

“Not all of the pre-1986 donors of blood received by the HCV infected were tested within the Protocol 6 month period,”

and

...“ if the completed traceback shows that all of the donors of blood that a person received during the class period (1986-1990) were tested and that all were negative for HCV, claimant will no longer be eligible for compensation.”

(i) On July 7, 2003 he was requested by the Claims Centre to undertake a PCR test to determine his entitlement to be approved at Level 2.

(j) On June 17, 2004 he was advised by the Claims Centre that he was approved at Level 2 which would result in compensation of \$22,509.23 and he was again reminded about the procedure where traceback results were pending and which are mentioned in subparagraph (h) above.

(k) On September 27, 2004 he was advised by the Claims Centre that in his case the traceback results were inconclusive (all donors were not found or tested) and his claim was approved based on an inconclusive Traceback result and the fact that the Class Action Traceback Protocol directs the Administrator to make a decision on a claim once the six-month period expires regardless of the result.

(l) Specific portions of the letter of September 27, 2004 stated, (in bold and underlined print) as follows:

“The Class Action Traceback Protocol directs the Administrator to make a decision on a claim once the six-month period expires regardless of the result. In your case the results were inconclusive (all donors were not found or tested), and your claim was approved based on an inconclusive Traceback result and you were paid in July 2003.

On September 22, 2004, we received a letter from CBS stating that they had completed a Traceback search. Regrettably, the Health Canada Traceback results revealed that each donor of the three (3) units of blood you received tested negative for HCV.

Section 13 of the Class Action Settlement Traceback Protocol further provides as follows:

Where a Claim is accepted, it may be later rejected if information concerning the HCV antibody status of the donors or units of the Blood received by the person claimed to the [sic] a primarily infected person or other means of infection becomes known which would have resulted in rejection of the Claim had that information been considered at the time when the Administrator's decision was taken. The Claimant shall thereafter become disentitled to future payments under the Plan. Absent fraud on the part of the Claimant, the Claimant shall not be obligated to repay any monies under the plan prior to becoming disentitled under the Plan.

A donor search was completed and the results have been carefully reviewed. According to the results, the HCV antibody was not present in any of the blood or blood products you received between January 1, 1986 and July 1, 1990. CBS forwarded a copy of their Traceback results to you in August 2004.

If you wish to provide further evidence you must sign and return the “Further Evidence Form”... Upon receipt of your “Further Evidence Form” you will then have an additional six months to provide further evidence to the Administrator. If the Administrator receives no further evidence within that time, your claim will remain denied for further compensation.

Please note that the monies you received are yours to keep however you are not eligible for further payments.

Your Claim is Denied Unless You Submit Further Evidence

The Administrator has determined that your claim must be rejected **unless** you can prove that you were infected, for the first time, with HCV by a blood transfusion received in Canada during the Class Period notwithstanding the results of the above-mentioned Health Canada Traceback.”

7. Fund Counsel in its written submission indicated, *inter alia*, that
 - (a) On July 26, 2004 CBS wrote to the Administrator stating they had completed the traceback relating to the blood received by the Claimant during the Class Period and that the results showed that the donor of each unit of blood had tested negative for HCV.
 - (b) On December 8, 2004 the Claimant was advised in writing that his claim for compensation had been denied as he had failed to submit any further evidence that he was first infected within the Class Period.
8. At the hearing, I reviewed Royal Alexandra Hospital records, the Tran 2 form, the Other Risk Factor Inquiry Form and the CBS report of the negative traceback in the presence of the Claimant, Fund Counsel and Carol Miller, the Appeals Coordinator of the Hepatitis C January 1, 1986 – July 1990 Claims Centre.
9. During review of the Tran 2 filled out by a Dr. Beheils, it was noted that under Section E-Patient History, he indicated he had known the patient for 2 years but had left the remaining questions blank. Under questions 1-8 of Section F, Disease Verification, in the Tran 2, he checked only the box beside the word “None”.
10. I asked the Claimant to relate his prior medical history from birth, and noted:
 - He was born April 1, 1948,
 - He had a tattoo in 1960 from a tattoo parlor in Syracuse, New York,
 - He had overused alcohol on many occasions in his life and attended AADAC for counseling two years ago,
 - He could not recall who had been his family doctors in the years before Dr. Beheils,
 - He denied any other risk factors,

- He recalled one other hospitalization before 1986 for removal of his appendix but was uncertain when that occurred, and
- He was certain he had had no other transfusions in his lifetime.

12. I was satisfied that the Claimant had tried his best to answer all questions honestly and to the best of his recollection.

13. His position was that he could think of no other way in which he could have received the Hepatitis C virus other than the transfusion in question.

14. The provisions of the Plan as cited in the written submission of Fund Counsel are quite clear. These are set out below for ease of reference as follows:

Section 3.04 of the Plan provides as follows:

3.04 Traceback Procedure

1. Notwithstanding any other provision of this Agreement, if the results of the Traceback Procedure demonstrate that one of the donors or units of Blood received by a HCV-Infected Person or Opted-Out Primarily Infected Person before 1 January 1986 is or was HCV antibody positive, or that none of the donors or units of Blood received by a Primarily-Infected Person or Opted-Out Primarily Infected Person during the Class Period is or was HCV antibody positive, subject to the provisions of Section 3.04(2), the Administrator must reject the Claim of such HCV Infected Person and all Claims pertaining to such HCV Infected Person or Opted-Out HCV Infected Person including Claims of Secondarily-Infected Persons, HCV Personal Representatives, Dependents and Family Members.

2. A claimant may prove that the relevant Primarily-Infected Person or Opted-Out Primarily Infected Person was infected, for the first time, with HCV by a Blood transfusion received in Canada during the Class Period or that the relevant Secondarily-Infected Person who opted out of the Class Action in which he or she would otherwise be a Class Member was infected for the first time with HCV by his or her Spouse who is a Primarily-Infected Person or Opted-Out HCV Person, notwithstanding the results of the Traceback Procedure. For greater certainty, the costs of obtaining evidence to refute the results of a Traceback Procedure must be paid by the claimant unless otherwise ordered by a Referee, Arbitrator or Court.

15. The Claimant admitted that he did not have any evidence to submit in respect of 3.04 subparagraph 2 above.

16. Upon a review of all the documentation mentioned above, together with the Claimant's oral evidence at the hearing, I conclude the declaration by Dr. Beheils the Tran 2 was incomplete and in any event likely made without knowledge of all the relevant medical information, in particular the relevant risk factors present prior to his hospitalization including the fact that he had a tattoo, which could have put him in contact with the Hepatitis C virus. As well, his inability to remember details of his health history for many years before his attendance on Dr.

Beheils together with his admission to alcohol overuse for many periods in his life made me suspect that he could have contracted the disease through other high-risk activities without his recollection.

17. I found no evidence to show on a balance of probabilities or otherwise, that he was infected for the first time with HCV by a blood transfusion received in Canada during the Class Period.

18. Accordingly, I uphold the Administrator's denial of the Claimant's request for compensation.

Dated at Edmonton, Alberta, this 27th day of June 2005

Shelley L. Miller, Q.C.
Referee