

**IN THE MATTER OF A REFERENCE TO REVIEW
A DECISION UNDER THE HCV 1986 - 1990
TRANSFUSED SETTLEMENT AGREEMENT**

CLAIM NO. 17800

Province of Infection: Alberta

Province of Residence: Manitoba

Hearing: March 7, 2013 at Winnipeg Manitoba
Referee: Harvey L. Secter

CLAIM NO. 17800
DECISION OF REFEREE

1. In a letter dated February 23, 2012, the Administrator advised Claimant No. 17800 that his claim for compensation under the 1986 - 1990 Hepatitis C Settlement Agreement (the "Settlement Agreement") had been denied.
2. The letter states that "the Administrator has considered all of the evidence submitted including the opinion of a medical specialist experienced in treating and diagnosing HCV and has determined that, on the balance of probabilities, you do not meet the eligibility criteria. The Administrator cannot conclude that you were infected by HCV for the first time by a blood transfusion received in Canada in t e Class Period; therefore your claim is denied."
3. On March 7 2012, the Claimant requested that the decision of the Administrator be reviewe by a Referee based on the following reasons:
 - "1) that it was not established where I received the tainted blood
 - 2) my sister died of tainted blood and I received a settlement
 - 3) I a unable to work because of this."
4. A hearing as held in Winnipeg, Manitoba on March 7, 2013. The Claimant was self represented and the Administrator was represented by Carol Miller, Appeal Coordinator and Belinda A. Bain of Gowling Lafleur Henderson LLP.
5. The essential facts, upon which this claim is based, are not in dispute. They include:
 - a) the Claimant was admitted to the Calgary General Hospital in March, 1989 for treatment following a stab wound;
 - b) while in the hospital, the Claimant received 6 units of packed red blood cells;
 - c) in December 2008, the final report from Canadian Blood Services for the results of a traceback of the transfused blood showed that five of six units tested negative for Hepatitis C; the donor of the sixth unit was not available for testing.
 - d) the Claimant has acknowledged a history of intravenous drug use both prior to and subsequent to the 1989 transfusion.

6. Section 3.0 (3) of the Transfused HCV Plan which forms part of the Settlement Agreement states "...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."
7. The application of the terms of the Settlement Agreement have been clarified by a series of Court Approved Protocols. The protocol, "CAP- Non-Prescription Intravenous Drug Use," includes the following:

Applicability of CAP

1. This CAP applies where:
 - a. there is an admission that the HCV Infected Person used non-prescription intravenous drugs;...

Eligibility Criteria Where This CAP Applies

3. The burden to prove eligibility is on the claimant. The Administrator shall assist the claimant by advising what types of evidence will be useful in meeting the burden of proof in accordance with this CAP.

Additional Investigations

8. If the claim is not rejected under the Traceback CAP, the Administrator shall perform the following additional investigations:
 - b. obtain the opinion of a medical specialist experienced in treating and diagnosing HCV as to whether the HCV infection and the disease history of the HCV Infected Person is more consistent with infection at the time of the receipt of Blood, the Class Period Blood transfusion(s) or the secondary infection or with infection at the time of the non-prescription intravenous drug use as indicated by the totality of the medical evidence.

9. The Administrator shall weigh the totality of evidence obtained including the evidence obtained from the additional investigations required by the provisions of this CAP and determine whether, on a balance of probabilities, the HCV Infected Person meets the eligibility criteria.
 10. In weighing the evidence in accordance with the provisions of this CAP, the Administrator must be satisfied that the body of evidence is sufficiently complete in all of the circumstances of the particular case to permit it to make a decision. If the Administrator is not satisfied that the body of evidence is sufficiently complete in all of the circumstances of the particular case to permit it to make decision, the Administrator shall reject the claim.
8. As required by Section 8.b. of the CAP, the Administrator asked Dr. G, of the University/Hospital to review this file and opine on the most probable source of the Claimant's infection.
 9. In his review of the file, Dr. G relied on the information in the Claimant's Discharge Summary from The Calgary General Hospital in March 1989 and notes made by Dr. S, a psychiatric consultant, following an interview with the Claimant while he was in the hospital. Both reports refer to the Claimant's acknowledged history of intravenous drug use.
 10. Dr. S's report states that the Claimant "has a long-standing history of polydrug and alcohol abuse....He states that he mainlines Ritalin and Talwin about once per month. This represents a significant decline from the patient's daily use u to ten times/day two years ago."
 - 11 . The Claimant states that he has no recollection of talking with a psychiatrist while a patient at The Calgary General Hospital. Moreover, he asserts that the reports prepared in the hospital and relied upon by Dr. G contain numerous errors. While he acknowledges taking Talwin and Ritalin, he maintains that he only used them occasionally and not up to ten times per day. When asked what source other than information supplied by him would have informed Dr. S's report, the Claimant replied that, following the stabbing, he was scared and wanted to

come across as tough. While he says that "maybe, I made up a few stories," he was not able to produce any new evidence to contradict the information contained in the 1989 reports from doctors at The Calgary General Hospital.

12. In his letter, dated January 17, 2012, Dr. G notes that the "medical chart clearly indicates much more extensive drug use history than the patient has identified in his paperwork and affidavit." He then concludes, "On the balance of probabilities he [the Claimant] is far more likely to have become infected through his injection drug use with Talwin and Ritalin than through a single unit of blood that cannot be tested."
13. At the hearing, the Claimant showed that he was familiar with the terms of the Settlement Agreement, the information in his file, and the steps taken by the Administrator to process his claim. He asked the Referee to grant his appeal primarily on the basis that neither the Administrator nor Dr. G are "100% positive" that his infection did not result from the blood transfusion he received in 1989. However, neither is the claimant certain of the source of his infection. He admitted that it could have come from a number of sources ranging from toe nail clippers to drug use.
14. I found the Claimant to be forthright and credible. While I accept that he has no current recollection of providing some of the information contained in the medical reports, he admits that he "may have" made those statements at the time.
15. Section 30 of the CAP clearly states: "The burden to prove eligibility is on the claimant." To be successful, the Claimant would have to establish on a balance of probability that he was infected with HCV for the first time by the blood transfusion he received in Calgary in 1989. As a result of both the uncertainty of his memo and the absence of any other evidence, this Claimant is not able to meet the burden required by the CAP.
16. All of the evidence before me supports a conclusion that the Administrator complied with all of the requirements of the Settlement Agreement and the CAP both in processing this claim and concluding that it must be denied. The decision by the Administrator to deny Claim #17800 is upheld.

Dated at Winnipeg Manitoba, this 8th day of April, 2013.

A handwritten signature in black ink, appearing to read 'H. Sexter', with a long horizontal stroke extending to the right.

Harvey L. Sexter
Referee