

THE 1986-1990 HEPATITIS C CLASS ACTION SETTLEMENT

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE ADMINISTRATOR
DATED SEPTEMBER 29, 2010

DATE OF HEARING: April 18, 2013

CLAIM #1000577

IN ATTENDANCE: Claimant
Claimant's Sisters

FOR THE ADMINISTRATOR: Belinda Bain
Carol Miller

REFEREE: C. Michael Mitchell

DECISION

1. This is an Ontario-based claimant, claim #1000577.
2. I am sitting as a Referee in this matter.
3. There is, in effect, a motion before me from the Administrator to refer this matter to a medical expert for an opinion under section 8 of the IVDU CAP with respect to whether the disease history of the HCV infected person is more consistent with infection at the time of the receipt of blood or with infection at the time of the non-prescription intravenous drug use as indicated by the totality of the medical evidence.
4. I am dismissing the motion to refer the matter to a medical expert and upholding the claim on the merits for reasons set out below.
5. A hearing in this matter was held on April 18, 2013, followed by a conference call on May 10 in which Dr. Mc gave evidence.
6. The parties have had a full opportunity to make oral and written representations on the merits and on the motion. I extended that opportunity in my decision of May 30, 2013. No further submissions have been received.
7. In August 1986, the claimant suffered an aneurism which left her, in the words of the Administrator's counsel, "with memory loss and other difficulties with cognitive functioning." The claimant received a blood transfusion in the class period during her stay in hospital treating the aneurism (two units of blood). Due to the fact that there was some reference in the treating physician form and in the medical records to non-prescription drug use, the Administrator denied the claim.
8. The Administrator was evidently reluctant to refer the matter to the medical expert because of the scarcity of evidence concerning IV drug use in the medical records and in the file. Also, the claimant denied IV drug use in an affidavit signed in 2009.
9. After the initial hearing, a decision was made to hold a conference call with Dr. Mc, whose medical records contained the references to IV drug use. After that call, I requested the parties make submissions as to how to proceed and the Administrator indicated an intent to refer the medical records and a summary of Dr. Mc's evidence to the medical expert for an opinion under section 8 as outlined above. I indicated in my decision of May 30, 2013 that I was treating that intent by the Administrator as, in effect, a motion to refer the matter to the medical expert. I indicated that I proposed to rule on that motion and, if it was denied, to rule on the merits. I invited further submissions, if any, on the motion or the merits. As indicated above, none were received.

10. The claimant was previously represented by her daughter who passed away. At the hearing and on the conference call, she was represented by her sisters who also gave evidence respecting the claimant at the hearing.
11. There is some evidence of IV drug use in the medical records. Importantly, however, it is all subsequent to the occurrence of the aneurism and was communicated by the claimant to the physician when her cognitive faculties were already impaired.
12. There is a terse note in Dr. Mc's file dated October 17, 1996 regarding IV drug use which states: "previously used IV drugs – also had a blood transfusion – Hep C positive given pamphlet – unsure D understood, not taking Dilantin".
13. There was no record of which IV drugs were taken, nor in what circumstances, when, how often, or for what duration. Although Dr. Mc said it was his impression that the claimant was referring to drug use in the remote past, based on his evidence, I am satisfied that Dr. Mc has no independent recollection of anything he was told 18 years ago, beyond what appears in the notes, and accordingly his "impression" is not helpful. He may or may not have asked anything further of the claimant at that time about the IV drug use.
14. Dr. Mc's notes on March 28, 2004, are again terse and read: "again admits to using IV drugs once (speed) with worker concern that the IV reference her not getting compensation for her Hep C". The reference to the "worker" was a reference to a worker the claimant brought with her to the appointment.
15. Dr. Mc could not recollect when the IV drug use was said to have occurred, or whether that was explored, and I conclude from his lack of independent recollection regarding anything beyond what is in the records that the question may never have been asked or pursued with the claimant.
16. Dr. Mc testified that, as a patient, the claimant was difficult to communicate with and to understand. She would often say things "right off the top of her head", and "that may not have made sense". He wondered whether she fully understood his questions. She clearly had cognitive difficulties as a result of the brain injury she sustained as a result of the aneurism. Importantly, in his first interaction with her in 1996, he noted almost immediately in his notes that she was "aphasic", which I understand to mean a loss of ability to speak or to understand, in this case, due to an injury of the brain.
17. At various times the claimant was accompanied to appointments by family members, but this was not always noted in the files. He recalls a man attending, whom he assumed was her husband. There is no indication of the name of the "worker" who accompanied the claimant in 2004.

18. In March of 1998, a general surgeon, Dr. I. Soutter, reported to Dr. Mc that the claimant's past history was significant with a ruptured cerebral aneurysm which left her with right sided hemiparesis:

"She was told she would be unable to speak suggesting injury to her left middle lobe however she communicates quite well considering the motor deficit that she has. She is somewhat uninhibited and slightly inappropriate at times suggesting to me that she may have has [sic] a left frontal lobe destruction or dysfunction."

19. At the time of the aneurism, the claimant was married with two children. It was clear to her family who testified that she had suffered brain damage, as they put it, and as a result she was physically and mentally handicapped affecting her speech, memory and cognition. Her entire life changed as a result of the aneurism, as her husband and children all left her.
20. Her sisters testified that they knew the claimant well, as their families lived close together in a small town and were very close. They describe her as the older child who helped her mother raise the other children, a person who was anti-drugs and not a person who befriended "druggies and drinkers".
21. I do not put any weight on this evidence of good character or no drug use, not because I do not believe it but because her younger sisters could not have been in a position to really know what their older sister may have done since she lived for four years in Toronto away from the family. Also, their evidence is inherently too amorphous and broad to contradict the clearer indication of IV drug use in the medical records. If those medical records were reliable, I would have to take them into account and refer the matter to the medical expert, but I cannot give them any reliability in the circumstances of this case.
22. The difficulty that I have in finding any reliable evidence of IV drug use in the medical records is that its source, even as an admission against interest, comes from someone who was brain damaged, had difficulty with comprehension and speaking, who may well not have understood the question according to the physician himself, and who "answered off the top of her head", and "did not make sense". Thus, the so-called evidence of IV drug use is inherently unreliable.
23. I observed the claimant in person on the day of the hearing and asked her several questions. As well, I observed her interactions on the telephone in several conference calls before the hearing and on the conference call after the hearing. I found her to be significantly handicapped and I had no confidence that she understood or comprehended anything that was occurring or the questions that were being asked and answered in the proceeding. I found her, in short, to be significantly impaired. Given the doctor's evidence that he found her difficult to comprehend, that he had difficulty making sense of what she was saying, and that he was uncertain she understood the questions she was answering, together

with his initial observation that she was aphasic, and her sisters' evidence that following the aneurism she was mentally as well as physically handicapped, I find as a fact that there was no reliable or probative evidence of IV drug use that can be sent to a medical expert for the purposes of a report under section 8.

24. In these circumstances, I can see no purpose in sending Dr. Mc's medical files or a summary of his evidence to a medical expert to assess whether IV drug use or infected blood was more likely to have caused the claimant's illness. The medical expert cannot assess the claimant's medical state, hear Dr. Mc's or the sisters' evidence or observe the claimant's mental state now. In short, the medical expert would have no basis on which to make an assessment of whether IV drug use had ever occurred, much less when and for what duration, and would be left to merely speculate on these matters. His opinion in such circumstances on the relative probabilities of which source of infection more likely caused the disease would be of no use whatsoever, since there is no reliable evidence of IV drug use.
25. Having found that there is no reliable evidence of IV drug use to send to the medical expert, the result is also that there is no evidence that the Administrator is required now to take into account regarding IV drug use. In the proceedings all relevant and possible inquiries were made, including hearing and probing the evidence of Dr. Mc regarding the alleged IV drug use. By engaging in this process before a Referee, the Administrator has engaged in appropriate due diligence on the IV drug issue in this case. My conclusion that the evidence coming from a significantly impaired individual was unreliable means the Administrator must now not take the alleged IV drug use into account in processing this claim.
26. The Administrator is directed to deal with the file on the basis of the evidence of infection from the blood transfusion in 1986 only. My understanding is that, on that basis, the claimant is entitled to be compensated and I direct the Administrator to pay compensation to the claimant as per the Settlement Agreement. I remain seized to deal with any issues arising out of the implementation or interpretation of this decision.
27. I thank the parties, and in particular the Administrator and counsel, for their co-operation and assistance throughout.

DATED at Toronto this 11th Day of November, 2013



C. Michael Mitchell
Referee