

DECISION

CLAIM ID: 70960

I. INTRODUCTION: BACKGROUND

1. On or about May 3, 2018 the Claimant submitted a Late Claim for compensation under the HCV Late Claims Benefit Plan as a Primarily-Infected Person. Entitlement to compensation is governed by the Transfused HCV Plan (the “Plan”). The Plan was established as part of the Settlement Agreement of the Hepatitis C 1986-1990 Class Action Settlement governing a Class Period from January 1, 1986 to July 1, 1990 (the “Settlement Agreement”). The Plan is contained in Schedule “A” to the Settlement Agreement. The Settlement Agreement was arrived at through negotiations between class action counsel and various defendants, including the Government of Canada. The Settlement Agreement was approved by the superior courts in which class actions were filed, including the Supreme Court of (Province).
2. Under Article 9 of the Plan, the Administrator appointed by the Courts is responsible for processing all Claims and for determining eligibility for compensation in accordance with the powers granted in Article 5 of the Settlement Agreement.
3. By letter dated August 20, 2019, the Administrator denied the Claimant’s late Claim for failing to meet the threshold requirement under Article 3.01 of the Plan of proof that the Claimant received a blood transfusion in the Class Period between January 1, 1986 and July 1, 1990.
4. On or about September 5, 2019 the Claimant appealed the Administrator’s decision seeking review by a Referee.
5. The Claimant, assisted by his spouse, made numerous attempts to locate and produce medical records relating to a particular date and admission to a local regional hospital on or about April 14, 199X at which time the Claimant was treated for a neck wound resulting in blood loss and surgical repair. Unfortunately, due to the effluxion of time it appears records have been destroyed with an exception which I will discuss.
6. Between October 25, 2019 and July 2, 2020, there were several telephone conference calls involving the Claimant, his spouse, Fund counsel, a representative of the Administrator and

myself as Referee. Much of the discussion involved the attempts made on behalf of the Claimant to discover documents or witnesses that might assist in proving that a transfusion occurred during the Class Period and specifically on or about April 14, 199X.

7. The Claimant elected to have an oral hearing which was held on July 21, 2020. On July 3, 2020, as requested by the Claimant, I approved a Summons directed to the local hospital for all medical records including blood bank and laboratory records related to the Claimant. By July 21, 2020 the hospital had not responded to the Summons. Prior to the hearing, and again at the hearing, I asked the parties if they wished to proceed with the hearing or request an adjournment in light of the outstanding Summons. The parties elected to proceed with the hearing, to call evidence and make submissions notwithstanding the lack of response to the Summons. I confirmed that I would make my decision on the appeal based on the documentary record available to the date of the oral hearing, the evidence presented at the hearing and the submissions of the parties. I explained that before I rendered my decision the parties could apply to reopen the hearing if further relevant evidence became available. However, after I rendered my decision, my role in the matter was at an end. The parties wished to proceed with the hearing which began and concluded on July 21, 2020.

II. THE ISSUE

8. The issue in this appeal turns on whether the Claimant has met the evidentiary requirement under Article 3.01(1)(a) of the Plan or failing that the alternative evidentiary requirement under Article 3.01(2) of the Plan.
9. The relevant Articles read as follows:

3.01(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; ...

3.01(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 personal recollection of the claimant or any person who is a Family Member of the claimant establishing on a balance of probabilities that he or she received a Blood transfusion in Canada during the Class Period. [emphasis added]*

III. FACTS

10. The Claims file was entered into evidence. There is no dispute that the Claimant has Hepatitis C. The diagnosis was confirmed in 200X.
11. In his Late Claim documentation, his Request for Review and in his testimony at the hearing, the Claimant identifies an incident which occurred at a pub in his hometown on (Month) 14, 199X when he was 25 years of age in which he suffered a serious laceration to his neck which resulted in significant blood loss, emergency first aid, ambulance attendance and admission to hospital where he was treated, sutured and discharged the following day. The Claimant states that his blood loss was so severe he required 7 pints of blood by way of transfusion. However, no medical record in compliance with Article 3.01(1)(a) has been produced. The only record of a transfusion from the hospital is a transfusion which occurred on (Month) 25, 201X.
12. The Claimant testified as did his spouse. I allowed the Claimant's spouse to assist the Claimant in presenting his appeal. No objection was made by Fund Counsel. Her evidence was directed primarily to the considerable efforts she has made to uncover pertinent contemporaneous documents and witnesses such as attending nurses and physicians. She also confirmed the misery and suffering her husband has endured because of Hep C.
13. Three individuals who were present in the pub on (Month)14, 199X when the Claimant was injured testified at the hearing including the friend responsible for inflicting the injury, an experienced firefighter who administered emergency first aid and staunched the bleeding and a woman who comforted the Claimant as he lay on the floor awaiting the ambulance attendants.
14. In addition to the Claimant's evidence about quantity of blood loss, the firefighter who staunched the blood flow and the woman who comforted the Claimant gave some evidence about the blood loss and the Claimant's injury. The female witness who was quite young at the time was not experienced in assessing and treating injuries. She described the event as "traumatic". At the hearing she became emotional about seeing a person bleeding from the neck. She said she was not a doctor; however, she said she saw a significant amount of blood at the site of the wound, but it was not pooling on the floor.
15. The retired firefighter who testified had considerable experience dealing with the acutely injured. Before he retired, he spent 37 years as a firefighter and he also had experience as

an ambulance attendant. He thought the Claimant suffered a laceration to a vein not an artery and not to the jugular vein. He thought that if the bleeding was not dealt with the Claimant would have been at considerable risk. He said the ambulance attendants were satisfied with the pressure bandaging he performed which they left in place. I should add that the friend who caused the injury testified but he was unaware of the injury he caused.

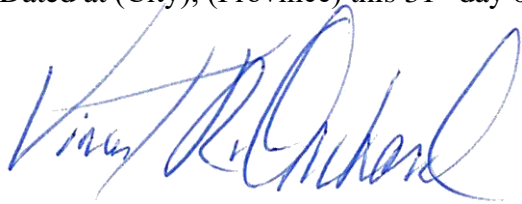
16. Unfortunately, none of the Claimant's witnesses could corroborate the Claimant's assertion he received a transfusion later that evening at the hospital. Because of that, none of their testimony about blood loss observed before the Claimant was taken to the hospital by ambulance is relevant to the issue of the Claimant's burden under Article 3.01(1)(a) or Article 3.01(2).
17. The Claimant's evidence that he was transfused with 7 pints of blood derives from his recollection of conversations at the hospital with nurses who he says administered via IV several bags or units of blood and also his recollection of a conversation with the attending ER physician who was described as having a reddish beard, thinning hair and a Scottish or English accent. Unfortunately for the Claimant, the drafters of the Settlement Agreement required evidence on a balance of probabilities independent of the Claimant or family member as admissible proof under Article 3.01(2). The Claimant's hearsay evidence of conversations with medical personnel does not meet the test of independent corroborating evidence.
18. I would add that it seems unlikely that the Claimant's injury, serious as it was, resulted in a loss of 7 pints of blood. The average adult has about 10 pints of blood normally. Given the evidence of the firefighter that he thought the jugular vein was not involved and he was able to stop the blood flow and the evidence of the attending woman who said that blood didn't pool on the floor of the bar, I have doubts as to the Claimant's recollection of a transfusion with 7 pints of blood. In any event, the main point is that a transfusion during the Class Period, and specifically on April 14, 1990 at the hospital in question, is not proven under either Article 3.01(1)(a) or Article 3.01(2).
19. There is one additional factual matter that does not support the Claimant's belief that he had a blood transfusion on (Month) 14, 199X at a local regional hospital in (Province). A "Traceback Procedure" by Canadian Blood Services ("CBS") was performed. The final Traceback report from CBS received on or about December 27, 2018 confirmed that the

Claimant received 3 units of blood in this regional hospital in question on (Month) 25, 201X. The Claimant confirmed this transfusion. However, CBS confirmed no transfusions occurred during the Class Period. In response to an erroneous suggestion from a treating doctor that the Claimant may have been transfused in 198X, the claims file confirms that the hospital reported no blood bank records confirming a blood transfusion in the Class Period (see pp. 72, 81-82 of the Claim File).

IV CONCLUSION

20. Under both Article 3.01(1)(a) and Article 3.01(2) the onus is on the Claimant to prove, in accordance with the wording of those Articles as quoted above, that he received a blood transfusion in Canada during the Class Period. The Claimant has failed to meet the onus established under the Plan as the threshold for entitlement to compensation.
21. The Administrator has an obligation under the Plan to review a claim to determine whether the required proof for compensation exists. The Administrator has no discretion to allow a claim where the required proof is absent. Nor has the Administrator the authority to alter, amend or ignore the terms of the Plan. A Referee or Arbitrator called upon to review decisions of the Administrator, has no power to alter or amend the Plan, nor to act contrary to its terms.
22. For the reasons given, I conclude that the Administrator properly determined that the Claimant is not entitled to compensation under the Plan. The Administrator was correct in finding that there was insufficient evidence that the Claimant received a blood transfusion in Canada during the Class Period. I have concluded, as well, on the evidence before me as a Referee, that there is insufficient evidence as required under Article 3.01(1)(a) and 3.01(2) of the Plan, to prove the Claimant received a blood transfusion in Canada during the Class Period. Accordingly, I uphold the Administrator's denial of the Claimant's request for compensation under the Plan.

Dated at (City), (Province) this 31st day of July 2020.



Vincent Orchard QC, Referee