

**IN THE MATTER OF AN APPEAL TO REVIEW THE DECISION OF THE
ADMINISTRATOR CONCERNING CLAIM NO. 71062
UNDER THE HCV LATE CLAIMS BENEFIT PLAN
AND UNDER THE HCV 1986 – 1990 SETTLEMENT AGREEMENT
AND THE TRANSFUSED HCV PLAN**

Vincent R. K. Orchard, K.C., C. Arb. / Arbitrator and Referee for the Province of (Province)

DECISION

CLAIM ID: 71062

I. INTRODUCTION: BACKGROUND

1. On or about July 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 October 22, 2021, 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. The letter stated in part:

You submitted a Transfusion History Form indicating you were transfused in (Month) 196X at the X Hospital, January 197X at the (City) General Hospital and August 198X at XX Hospital. All hospitals were in (City), (Province) Unfortunately, the dates for these transfusions are outside the claim period from and including 1 January 1986 and including 1 July 1990.

Based on this information your claim must be denied based on Article 3.01(1a) of the 1986-1990 Hepatitis C Settlement Agreement, Transfused Plan; because there is no evidence to support that the HCV infected person received a Blood transfusion between January 1, 1986 and July 1, 1990.

4. On or about November 9, 2021, the Claimant appealed the Administrator's decision seeking review by a Referee. His Request for Review was received December 2, 2021.
5. In his Request for Review the Claimant requested an in-person oral hearing for the following reason: *"Due to the gap in documentation access to support claim I am requesting a hearing in order to be able to present oral testimony regarding my medical history and physical impacts."* The Claimant listed the names and addresses of three potential witnesses. Ultimately the oral hearing took place on October 25, 2022, in (City), (Province). The Claimant gave evidence concerning his medical history and other matters to which I will refer later in this decision. None of the witnesses mentioned in the Request for Review was called nor were any other witnesses called with personal knowledge of the Claimant's past medical history including various hospital admissions. One other witness gave oral evidence but the evidence given by the witness did not involve evidence from personal knowledge of past blood transfusions or specific past medical history of the Claimant.
6. Prior to the hearing in October 25, 2022, I was in contact with the parties starting with telephone conferences on January 11 and March 10, 2022, and by way of email and correspondence. The witness who testified for the Claimant at the hearing also assisted the Claimant with his Appeal and attended telephone conferences with the Claimant and essentially acted as the Claimant's contact person. She is referred to in the Claim file as a personal representative and a Health Navigator.
7. In order to assist the Claimant with his search for relevant hospital records I issued two Summonses to two hospitals: R Hospital in (City), (Province). and S Hospital in (City), (Province). Fund Counsel assisted with the service of those Summonses. R Hospital did provide its entire records relating to the Claimant numbering 398 pages. However, delay in getting the records did result in a delay of the original hearing date set for August 3-5, 2022 in (City), (Province). The hearing date was moved by consent to October 24-26, 2022. S Hospital had no additional records.
8. In a telephone conference with the parties on October 7, 2022, there were further discussions concerning the likelihood of witnesses who might testify and the need for three hearing days. I later heard from the parties that one day would be sufficient to conduct the hearing.

Accordingly, on October 17, 2022, I issued a direction that the hearing take place on Monday, October 24, 2022.

9. I attended in (City), at the arranged conference site on Monday, October 24, 2022 for the hearing to commence at 9:00 a.m. Fund Counsel was also in attendance. In addition, an Appeal Coordinator for the 1986-1990 Hepatitis C Class Action Settlement, who had been involved in the appeal process throughout, was in attendance by Zoom from Ottawa. Regrettably, the Claimant and the person assisting him apparently misunderstood my direction and were intending on attending in (City) on Wednesday, October 26, 2022. After further communication involving myself as Referee and the parties, I directed the hearing to proceed on Tuesday, October 25, 2022, in (City) with my attendance by Zoom. In accordance with my Direction, the hearing proceeded in (City) on Tuesday, October 25, 2022. As indicated, I heard evidence from the Claimant and his personal representative. The Claim file in its entirety was entered into evidence as Exhibit 1. Included in the Claim file were the hospital records from R Hospital and some records of S Hospital dating back to 1972 and 1980. Fund Counsel did not call any witnesses to give oral testimony. He relied on the records in the Claim file and provided written submissions and brief oral argument. The Claimant and his witness also made oral submissions.

II. THE ISSUE

10. 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.
11. 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.*

III. FACTS and EVIDENCE

12. The Claim file constitutes the entire documentary record for this Appeal. Portions of the Claim file consist of hospital records of R Hospital, consisting of 398 pages including a two page record of an emergency visit to B Hospital, in (City), on November 5, 198X, during the Class Period. That particular admission record notes a diagnosis of influenza (p. 398) and other complaints including aching joints and headaches. As expected, there is no evidence of a blood transfusion in that hospital record. The R Hospital records, with the exception of the B Hospital 2-page record of November 5, 198X, are later than the Class Period and cover the time from (Month) 22, 199X to (Month) 7, 202X. The Claim file also includes records of S Hospital, but those records predate the Class Period and include hospitalization in 197X and 198X.
13. As noted, the Claimant gave evidence at the hearing. He has been a long-time resident of (City), (Province). He is now 77 years old. He currently resides in (City), (Province), having been displaced by fire which destroyed much of (City). There is no dispute that the Claimant has Hepatitis C. The Claim file contains a lab report of (Month) 26, 201X, confirming detection of Hepatitis C virus (p. 32). The Claimant received confirmation of the diagnosis in (Month) 201X. Oral testimony was also given at the Appeal hearing by the witness described in the Claim file as the Claimant's personal representative and Health Navigator. She assisted the Claimant in making his Late Claim and in pursuing his Appeal.
14. Another person, a friend of the Claimant, who attended residential school with the Claimant many years ago, also attended the appeal hearing in (City), (Province) but did not testify.
15. The Claimant's personal representative testified that medical records that the Claimant would have produced didn't exist any longer; records of B Hospital and a

medical clinic in (City), (Province) were destroyed by fire in (Month) 202X. The Claimant also referred to his efforts to get records of B Hospital to pursue what he described as “Hep C litigation”. He said he was trying to get medical records from when he was 18 or 19 years of age. He said that records had been removed from the (City) Hospital to a building in (City) , but the building was destroyed. The Claimant recounted that he had “received blood many times”. He referred to having a hemorrhage from a bleeding ulcer when he was in (City) to obtain his Grade 12 at age of 19. He said he attended a V hospital at X Ave and X Street in (City) and was there for four months and received blood. The Claimant gave evidence about other hospital admissions in the 1980’s involving another hemorrhage.

16. The Claimant stated that he had been in hospitals and “received so much blood” yet no records can be found. He went on to recount a number of encounters with the medical profession since the “80’s” including stomach surgery related to a bleeding ulcer and hand surgery involving amputation of the tips of two fingers of his right hand. He recounted a motor vehicle accident in (City) , (Province) when he was 27 years old in which he suffered a skull fracture and a neck fracture. He was transferred to the (City) General Hospital and remained there for one- and one-half years. He said he could not walk.
17. The Claimant gave evidence of some unfortunate incidents and encounters with the medical profession over the years although he did speak highly of one surgeon in particular. Both the Claimant and his personal representative gave sincere evidence about the history of X people and their treatment within the health care system which speaks to discrimination and racism. The personal representative testified that there was systemic racism. Both witnesses suggested that the medical system did not keep proper records for X people or the records that were kept were not accurate. As the Claimant stated medical records “don’t exist for X people”.
18. While I accept the testimony about systemic racism in the medical system was both sincere and heartfelt, as a Referee my sole task is to consider the evidence that either shows the Administration erred in not allowing the Claim or correctly determined that the Claim lacked the necessary proof as required by the Plan confirmed by the Settlement Agreement and court order.

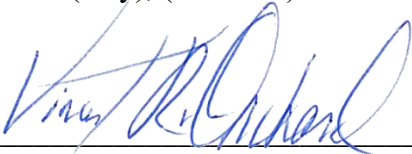
19. In this case quite voluminous hospital records concerning the Claimant form part of the record including: (i) from 1972 and 1980 (S Hospital); (ii) from November 5, 1989 and November 18, 1993 (B Hospital); and (iii) November 5, 1989 to July 7, 2022 (R Hospital). However, despite suggestions by the Claimant in the Claim file of possible transfusions in 198x in S Hospital and during right hand surgery in 198X-198X, none of the hospital records forming part of the Claim file refer to any Blood transfusions during the Class Period. There are no records from S Hospital for a 198X attendance; the records relating to hand surgery relate to an accident that occurred in 199X and; all references to hospital admissions for stomach/abdominal surgery are not within the Class Period.

IV. CONCLUSION

20. No proof by way of hospital records or other medical records as identified in Article 3.01(1)(a) of a Blood transfusion during the Class Period was presented in support of the Claim nor was such proof presented as part of the Appeal. No corroborative evidence of anyone was put forward under Article 3.01(2). Even though personal recollection of the Claimant or of any person who is a family member of the Claimant is not considered corroborative evidence of a Blood transfusion during the Class Period under Article 3.01(2) of the Plan, no oral evidence at all was given of any personal recollection on the part of anyone of a Blood transfusion in the Class Period.
21. 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.
22. 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.

23. 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 no 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 an absence of 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 15th day of November 2022.

A handwritten signature in blue ink, appearing to read "Vincent R.K. Orchard", written over a horizontal line.

Vincent R.K. Orchard, K.C., Referee