

Referee's Decision,
The 1986-1990 Hepatitis C Class Actions,
Settlement Agreement
January 1, 1986-July 1, 1990.

Claim No. 18
Province: Manitoba,
Date: April 5, 2024.

Referee's Decision

A. Introduction

1. This is a review of the Administrator's denial of a claim for compensation pursuant to the Transfused HCV Plan. The Administrator denied the claim for compensation because the Claimant was unable to show that he had received a blood transfusion during the Class Period of January 1, 1986 to July 1, 1990. The Claimant submitted a Request for Review of the Administrator's decision, dated April 12, 2023. I was appointed to serve as the Manitoba arbitrator/referee for such appeals by order of the Ontario Superior Court of Justice on August 28, 2023.
2. On January 16, 2024, during a pre-hearing teleconference, the Claimant confirmed with Fund Counsel and myself that he had elected to my serving as a Referee. On January 31, 2024, he confirmed via email that he had chosen for the appeal to be conducted via paper review rather than an in-person hearing.

B. Background

3. The Claimant was born with congenital heart disease. In 1985, he was admitted to X Hospital for heart surgery. The Discharge Report noted that he had received plasma and platelet transfusions on March 13, 1985. In September 2019, the Claimant tested positive for Hepatitis C virus antibody.
4. In the Late Claim Request Form filed by the Claimant, he indicated that he had also received a blood transfusion at X Hospital in <City, Province> in October 1987 and that he first learned of having Hepatitis C as a teen.
5. On a Treating Physician Form (TRAN 2) which had been submitted as part of the Claimant's claim, Dr. A wrote that he had known the Claimant since September 2015, and had treated him for five years. At Section 24 of the Form, Dr. A wrote that the Claimant had a significant surgery on March 13, 1985. In response to the question at Section 25 as to "Based on the above definition of Blood, did the Primarily-Infected Person receive a Blood transfusion in the period January 1, 1986 to July 1, 1990", Dr. A answered "Unsure". In response to the question at Section 26 as to

“Is there anything in the HCV Infected Person’s medical history that indicates he or she was infected with Hepatitis Non-A, Non-B or the Hepatitis C virus prior to January 1, 1986”, Dr. A answered, “No”.

6. On a Blood Transfusion History Form (TRAN 5) which had been submitted, the Claimant disclosed that he had blood transfusions in February 1980 at the Hospital X as part of heart surgery, March 1985 at the Hospital X as part of heart surgery, September or October 1986 at X Hospital as part of tonsil removal surgery, and July 2014 at X General Hospital as part of heart surgery.
7. On September 24, 2021, the Administrator received traceback results from Canadian Blood Services, which were conducted regarding blood received by the Claimant during his blood transfusions. A traceback procedure searches existing donor information records of the Canadian Blood Services to determine if the donors of the blood the Claimant has received via blood transfusion have tested positive for the HCV antibody. The traceback results were as follows:

“Hospital: Hospital X <City, Province>

Claimant was transfused with 39 pre-class units from 1985-03-13 to 1985-03-15:

20 Donors = HCV Negative

16 Donors = HCV status unknown - refused testing or did not locate donor

3 Donors = Deceased

Hospital: X Hospital <City, Province>

Blood Bank Records Searched: Yes, 1987-05 to 1988-12

Comments: No Records for before 1987-05 were found.

Patient's Health Records Searched: No

Comments: Oldest Records recovered are from 2005.

Results of Search: No admission/Blood Bank records found between 1897[sic]-05 to 1988-12

Records destroyed/culled-unable to provide information on this patient
 Comments: Hospital Records older than 2005 destroyed.

Hospital: X General Hospital <City, Province>

Blood Bank Records Searched: Yes, 1993-11 to 2020-10

Patient's Health Records Searched: Yes, 1993-11 to 2020-10

Results of Search: Transfused

Note: Claimant was transfused with a unit of pooled platelets on 2014-07-17. This transfusion occurred after the claimant's known HCV diagnosis date: therefore, the donors of this product were not investigated."

8. The traceback results indicated that there were no records available with respect to the Class Period of January 1, 1986 to July 1, 1990.

3. Decision of Administrator

9. On September 30, 2021, the Administrator sent a letter to the Claimant, informing him that since no hospital records were available as to his hospital admissions during the Class Period, the Claimant was required to submit further information in accordance with the Records Destroyed Protocol pursuant to Section 3.01(2) of the Transfused HCV Plan, to continue processing the Claimant's claim. A second letter with the same notice was sent by the Administrator to the Claimant on April 12, 2022.
10. On October 2, 2022, Dr. B wrote the following letter which was received by the Administrator:

"This is to confirm that I cared for [the Claimant] when he was a young boy. Unfortunately, despite going back into archived hospital records, I have been unable to determine exact dates in those early years. As I arrived at this practice in 1988, I would have taken over his care somewhere around 1990. He transferred to Dr. A in about 2016.

I recall that he had two surgeries in , <City, Province>, in his early years related to Tetralogy of Fallot. According to what I could find in the records, his first

surgery occurred in February of 1980, a right Blalock Taussig shunt. In March of 1985, he underwent a repair of the Tetralogy of Fallow, with a transannular autologous pericardial patch and monocusp free hand valve.

From my recollection, both required blood product support, although I cannot find written evidence of that in the records to which I have access.

I saw the Claimant many times as a boy and a young man, as for a long time he required intravenous antivirals, antimicrobials and antifungal medications.

I sincerely hope this information is helpful.”

11. The letter from Dr. B did not provide any evidence that the Claimant received a Blood transfusion during the Class Period of January 1, 1986 to July 1, 1990.
12. On October 20, 2022, the Administrator sent a letter to the Claimant, informing him that his claim had been denied. The letter explained that X Hospital did not have records from before 1987 and therefore could not confirm a blood transfusion during 1986. The Claimant's claim was therefore deemed eligible for the Records Destroyed Protocol, and while a letter from the Claimant's family doctor was provided, it did not confirm a transfusion in 1986. Based on that information, the Claimant's claim had to be denied based on Article 3.01(1)(a) of the HCV Transfused Plan; as there was no evidence to support that the Claimant received a Blood transfusion between the Class Period of January 1, 1986 and July 1, 1990.
13. The Claimant submitted a Request for Review by Arbitrator/Referee Form, received by the Administrator on April 21, 2023.
14. On January 16, 2024, I met via teleconference with the Claimant and Fund Counsel to discuss the Claimant's appeal. During the teleconference, both Fund Counsel and I asked the Claimant whether there were any other hospitals, doctors, or other sources from which he could provide evidence of a transfusion during the Class Period. On January 23, 2024, the Claimant advised me via email that he had submitted a medical records request and was now waiting for a response.

15. On March 8, 2024, the Claimant advised me via email as follows: “I got a letter in the mail today, stating that they have no medical records regarding those 4 years. (I find it suspicious that they have all the records of the years before and after 1986-1990 but not during those 4 years) anyway, since there's nothing more I can give to you regarding new information, you can go ahead with this case.” In the Claimant’s Request for Review Form, he also wrote: “...I find it very suspicious how the doctors don’t have the records of my transfusion from 1986-1990...why don’t they have the records of the 4 years that I need? I know why, because they destroyed the evidence and proof of what they did to me. That’s why they conveniently don’t have the records I need. They don’t want to be accountable for their actions...”.
16. I also asked the Claimant via email on March 11, 2024, whether he had a response which he would like to submit regarding the written submission of Fund Counsel. The same day, the Claimant confirmed “No, I don't have anything to add.” I therefore confirmed with both the Claimant and Fund Counsel that I would begin my paper review of the Claimant’s appeal.

D. Analysis and Decision of Referee

17. The Claimant’s claim is that he received a blood transfusion in September or October 1986 at X Hospital in <City, Province>. However, hospital records are not available which could serve as evidence of a blood transfusion during the Class Period of January 1, 1986 to July 1, 1990.
18. Considering records not being available, the Claimant was notified by the Administrator on two occasions that he would need to produce other information in accordance with the Records Destroyed Protocol pursuant to Section 3.01(2) of the Transfused HCV Plan, to continue processing the Claimant’s claim. While a letter was provided by Dr. B, the letter did not confirm that the Claimant had a blood transfusion during the Class Period. Furthermore, the Claimant’s family doctor, Dr. Hunt, also could not confirm a blood transfusion in the Class Period on the Treating Physician Form. No other evidence was produced by the Claimant.
19. The Claimant recently made a request for other hospital records, but that request also produced no evidence of a blood transfusion in the Class Period.

20. While I have sympathy for the Claimant's frustrations as to not being able to obtain hospital records from X Hospital, this appeal must be determined based on the relevant provisions of the HCV Transfused Plan, which are set out below:

3.01 Claim by Primarily-Infected Person

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-Québec records demonstrating that the claimant received a Blood transfusion in Canada during the Class Period;

b. an HCV Antibody Test report, PCR Test report or similar test report pertaining to the claimant;

c. a statutory declaration of the claimant including a declaration

(i) that he or she has never used non-prescription intravenous drugs,

(ii) to the best of his or her knowledge, information and belief, that he or she was not infected with Hepatitis Non-A Non-B or HCV prior to 1 January 1986,

(iii) as to where the claimant first received a Blood transfusion in Canada during the Class Period, and

(iv) as to the place of residence of the claimant, both when he or she first received a Blood transfusion in Canada during the Class Period and at the time of delivery of the application hereunder.

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 the 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.

3. Notwithstanding the provisions of Section 3.01(1)(c), 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.

21. Having regard to the foregoing, I must conclude that there is no evidence before me which establishes on a balance of probabilities that the Claimant received a blood transfusion in Canada during the Class Period.

22. I should also note that neither the Administrator nor I have any discretion to undertake an investigation as to why hospital records at X Hospital were not available to either confirm or reject the Claimant's suspicions.

23. I therefore uphold the decision of the Administrator to deny the Claimant's claim. The Claimant does not qualify for compensation under the terms and conditions of the Settlement Agreement and Plan.

Dated at Winnipeg, Manitoba this 5th day of April, 2024



Jason Gisser, Q. Arb., Referee