

Appeal #19

Province of Infection: Ontario

Province of Residence: Ontario

IN THE MATTER OF AN ARBITRATION
TO REVIEW THE DECISION OF THE ADMINISTRATOR
UNDER THE HEPATITIS C (86-90) CLASS ACTIONS SETTLEMENT

ARBITRATOR: Lisa C. Munro

APPEARANCES: Claimant and his wife
Belinda A. Bain, on behalf of the Fund
Jennifer Langlotz, on behalf of the Administrator

DECISION

The Claim

1. On February 7, 2021, the Claimant, an Ontario resident at the time of HCV infection, submitted a claim for compensation as a Primarily Infected Person under the Transfused HCV Plan (the “Plan”) as set out in the 1986-1990 Hepatitis C Class Action Settlement Agreement. A fund was established as part of the Plan to provide compensation for those who were infected with HCV from the Canadian Blood Supply during the period January 1, 1986 to July 1, 1990 (the “Class Period”).
2. Section 5.02 of the Settlement Agreement requires the Settlement Administrator to determine a Claimant’s eligibility for membership in the class and for compensation under the Plan. By letter from the Administrator dated November 8, 2021, Claimant was advised that his request for compensation was denied pursuant to Article 3.01(1a) of the Plan, on the basis that he had not provided evidence that he had received a blood transfusion during the Class Period.
3. Claimant exercised his right to have the Administrator’s decision reviewed by an Arbitrator. He delivered a Request for Review by Arbitrator dated November 27, 2021.
4. I was appointed Arbitrator to conduct this review and this constitutes my Decision. I convened an oral hearing by Zoom on May 9, 2024, attended by Claimant, his wife, Fund counsel, and a representative of the Administrator. All participants received a copy of the Claimant’s file created by the Administrator and had an opportunity to give evidence and make submissions.

The Facts

5. Claimant was diagnosed with HCV in 1995.
6. In Claimant’s Late Claim Request Form dated September 1, 2021, he described the toll HCV has taken on him. He described HCV as having affected him, “psychologically, physically, mentally, spiritually.” It was life changing and he thought he was going to die. He became very sick and required treatment from a psychiatrist to help him with his depression. He underwent three treatments for HCV, the second of which made him very sick and depressed. During the hearing, Claimant testified that the third treatment was successful in 2015, but cost him about \$286,000.
7. Claimant submitted a Blood Transfusion History Form dated February 7, 2021, as part of his claim. In it he stated that as a result of a car accident he was transfused during the Class Period at (City) Heath Sciences Centre or at (City) General Hospital at either the General Site or the (City) Site. He did not provide a date.
8. Claimant also submitted a Treating Physician Form dated February 18, 2021, which was completed by a gastroenterologist at (City) Health Sciences Centre, who was treating Claimant at the time of his report and had been doing so for 5 years. He described Claimant as

suffering from significant fatigue, depression, and anxiety/stress secondary to his HCV infection. This treating physician selected “Disease Level 5” on the Form, because of a cirrhosis diagnosis. In the section, “HCV Disease Verification”, he checked the box that Claimant had received a blood transfusion in the Class Period and indicated that there was nothing in Claimant’s medical history that indicates that he may have been infected with HCV before January 1, 1986.

9. A second Treating Physician Form was completed by a former treating physician, also a gastroenterologist and formerly at (City) Health Sciences Centre, on May 27, 2021. This physician noted that Claimant was her patient in the period 2000 to 2015. She also selected “Disease Level 5” on the Form. In the “HCV Disease Verification” section of the form, she selected, “Blood transfusions prior to January 1, 1986”, before the Class Period, and also indicated that the Claimant had received a blood transfusion during the Class Period. She also checked, “Significant surgeries or trauma before January 1, 1986” with the additional note, “Not known to me. He was a patient at (City) Hospital then.” In the section “HCV Disease Verification”, she wrote “Pt [patient] reported diagnosis made in mid-1990s, before he was my patient.” She also recorded that Claimant had “marked fatigue, anemia while on trial therapy...”
10. The Administrator conducted a Traceback of Claimant’s records during the Class Period at (City) Health Sciences Centre and (City) General Hospital General and (City) Sites, through Canadian Blood Services. It reported on November 3, 2021, that the hospital records were available (either health or blood bank records or both) and show that the Claimant was not transfused during the Class Period. They also show that Claimant received a blood transfusion at (City) Health Sciences Centre in 2013 (outside the Class Period and post-HCV diagnosis).
11. After the Administrator notified Claimant that he was not eligible for compensation, Claimant delivered a Request for Review Form dated November 27, 2021, in which he wrote:

I had the blood transfusion sometime between 1978-1990 after a car accident. I had contacted (City) Hospital for info on my transfusion to only be informed that they had a flood in the 80’s and lost all records for both (City) & (City) General. Therefore I do not have the exact date of my blood transfusion.

...

Letter from Canadian blood services shows patient Health records Blank – Due to flood at Branson in the 80’s ...all lost...

...

I did have a blood transfusion January 2013 after my second treatment to get rid of my Hep C...I needed a blood transfusion which I got January 2013 at (City) The letter sent to me from the Canadian Blood Services which I have

enclosed shows patient Health records searched is blank. This could be due to records lost in the flood.

I know I had my blood transfusion done between 1978-1990. I waited till 2007 for my first treatment as I was told there was not enough info to suggest a cure. After my 1st treatment in 2007 I was told to wait till new treatments were available which was in 2012. This treatment made me very sick and did not cure my Hep C. I waited again till 2015 when Harvoni was introduced and this cured my Hep C.

I would really appreciate you taking another look at my case as I went through a lot of health issues due to Hep C at no fault of my own and I was not approved for life Insurance because of this which I wanted for my family.

12. On May 4, 2022, (City) Health Sciences Centre wrote to former Fund Counsel to advise there were no records from the period January 1, 1978 to July 1, 1990 for the Claimant.
13. On May 4, 2022, (City) General Hospital wrote to former Fund Counsel to advise that Medical Records/Blood Bank confirmed that there were no visits/records for the period 1978 to 1990 for the Claimant.
14. During the hearing, the Administrator's representative explained that that Claimant's (City) General Hospital patient health records for the General and (City) Sites were not available and identified as "blank" in the transfusion summary, but that the blood bank records were available.
15. Therefore, the health records for all three hospital locations identified by Claimant show that he was not transfused during the Class Period.
16. At the pre-hearing conference held on April 11, 2024, Claimant said that his current treating physician had told him that the only way to get HCV genotype 1b, with which he was diagnosed, was through a blood transfusion. On April 18, 2024, Claimant provided a letter from this physician dated April 11, 2024, which states:

[Claimant] acquired hepatitis C secondary to a blood transfusion in the 1980s (related to an MVA). He had no other risk factors for acquiring hepatitis C and thus the blood transfusion is the presumed mode of acquisition. He was previously followed by my colleague [previous treating physician] until July 2015. I took over [Claimant's] liver-related care in July 2015.

17. By way of response, on May 2, 2024, Fund Counsel delivered a letter dated May 1, 2024, from Dr. Curtis Cooper, Director of the Ottawa Hospital Viral Hepatitis Program. Dr. Cooper's letter referred to a 1994 *Journal Clinical Microbiology* publication, which reported (among other things) that in a Canadian-based population, 64% of blood transfusion recipients living with HCV were infected with genotype 1 (but did not discern between genotype 1a and 1b). The

letter also referred to the Canadian Network on Hepatitis C – Canadian Network Undertaking Against Hepatitis C database. This is a national cohort study of 4000 Canadian patients living with HCV or who have received HCV antiviral therapy. Dr. Cooper identified individuals with chronic HCV infection caused by blood product exposure. The data shows that 15.5% of those patients have genotype 1b.

18. Dr. Cooper’s letter concludes: “Based upon this collection of information I can confidently conclude that infection with genotype 1b cannot be used as a definitive indicator of past infection by blood transfusion exposure.”
19. During the hearing, Claimant testified that he knows that he received a blood transfusion during the Class Period, but is not sure exactly where. He has no other risk factors for HCV. Both Claimant and his wife testified that during this period Claimant had no family doctor and did not document his health history.

The Settlement Agreement and the Transfused HCV Plan

20. The Settlement Agreement in the 1986/1990 Hepatitis C Class Action was approved by Justice Winkler of the Ontario Superior Court of Justice on October 22, 1999, as being, “fair, reasonable, adequate, and in the best interests of the Ontario Class Members in the Ontario Actions”. The Plan established as part of the Settlement Agreement includes a Fund for compensation to be paid to individuals who were infected with HCV from the Canadian blood supply during the Class Period.
21. A claimant who claims to be a primarily infected person must meet the criteria set out in the Plan to be entitled to compensation.
22. Section 3.01 of the Plan states:
 - (1) A person claiming to be a Primarily-Infected Person...must deliver to the Administrator a[n]....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; and
 - (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.

23. This section 3.01(2) is relevant to this review.

Submissions

24. There is no dispute that the Claimant has been diagnosed with HCV. The issue is whether the Claimant was infected by a blood transfusion during the Class period.
25. The position of Fund Counsel is that the Claimant has been unable to provide corroborative evidence independent of his own recollection or the recollection of a family member that he was transfused during the Class Period. Therefore, Claimant is not entitled to compensation under the Plan and the Administrator's decision dismissing Claimant's claim for compensation should be upheld. Fund Counsel delivered written submissions summarizing this position, which she updated on April 11, 2024.
26. Claimant's position is that he is sure that he received a blood transfusion during the Class Period, but he is not sure where. He has no other risk factors for HCV, so he has been told that he must have been infected as a result of a blood transfusion. Claimant testified at the hearing that his current treating physician believes that Claimant acquired HCV through a blood transfusion because he has no other risk factors.
27. Claimant does not have any records to prove that he had a blood transfusion during the Class Period.
28. Before the hearing and upon receipt of the letter from Dr. Curtis Cooper, Claimant sent an email to Fund Counsel and to me dated May 13, 2024, in which he argued that:

It is only fair that you take into account the 64% chance that I acquired my Hep C from tainted blood as I had no other risk factors.

There should be some middle ground in this case.

I can't prove that I did receive tainted blood and no one can prove that I did not. I did and do not have any of the risk factors that would have exposed me to Hep C other than receiving a tainted blood transfusion.

This is my argument.

29. Fund counsel responded by email the same day, in which she wrote, "Your email below misinterprets the studies cited by Dr. Cooper" and recited Dr. Cooper's conclusions.
30. Fund counsel suggested that further argument be left for the hearing.
31. I take these submissions and those made at the hearing into account in this Decision.

Analysis and conclusion

32. It is clear that Claimant suffered significantly from his HCV infection until his third treatment, which was successful in curing him. Claimant had to pay for that treatment, which was extremely costly. HCV has affected both his physical and mental health and caused him to be bedridden for long periods of time. Of no less significance is his distress at not being able to obtain life insurance to protect his family. He points out that he has suffered this tragedy through no fault of his.
33. In all these circumstances, it is understandable that Claimant would hold out hope that he is entitled to compensation for all he has gone through.
34. However, I am required to apply the requirements of the Plan established as part of the court-approved 1986-1990 Hepatitis C Class Action Settlement Agreement.
35. The Plan provides for compensation for those who were infected by HCV as a result of a blood transfusion, only if they can prove that their HCV infection was caused by a blood transfusion during the Class Period. They must do so by health records or, if they are not available, by corroborative evidence that cannot be from the personal recollection of either the Claimant or a family member.
36. Unfortunately, none of the available health records show that Claimant was transfused during the Class Period and Claimant does not have corroborative evidence, other than his own recollection. The reports from his treating physicians do not assist. Neither of them treated Claimant during the Class Period or has first-hand knowledge of his medical history before 2000.

37. I accept Fund Counsel's interpretation of Dr. Curtis Cooper's letter that a diagnosis of HVC genotype 1b does not indicate that there is a 64% chance that Claimant contracted HVC through a blood transfusion. Dr. Cooper's letter clearly states that infection with HCV genotype 1b cannot be used as a definitive indicator of past infection by blood transfusion exposure.
38. Under the Plan, the burden of proof is on the Claimant to establish, on a balance of probabilities, that he received a blood transfusion in the Class Period. It is not for Fund Counsel or the Administrator to prove that he did not.
39. I cannot accept the Claimant's evidence that he received a blood transfusion during the Class Period and the Claimant delivered no other corroborating evidence as required under section 3.01(2) of the Plan. Therefore, I find that the evidence before me is not sufficient to establish on a balance of probabilities that the Claimant was infected with HCV as a result of a blood transfusion during the Class Period.

Disposition

40. I find that the Claimant is not eligible to receive compensation under the Plan and the Administrator's decision dismissing Claimant's claim for compensation is upheld.

Dated May 23, 2024



Lisa C. Munro, FCI Arb, Q. Arb, Arbitrator