

CLAIM # 711384

Province of Infection: Manitoba

Province of Residence: Ontario

IN THE MATTER OF A REFERENCE

TO REVIEW THE DECISION OF THE ADMINISTRATOR

UNDER THE HEPATITIS C (86-90) CLASS ACTION SETTLEMENT

REFEREE: Wesley Marsden

APPEARANCES: Claimant

Belinda A. Bain, on behalf of the Fund.

## Decision

### Background:

1. The Claimant submitted an application for compensation as a Primarily Infected Person under the 1986-1990 Hepatitis C Settlement Agreement (the "Settlement Agreement").
2. The Settlement Agreement provides compensation for individuals infected with Hepatitis C Virus ("HCV" from the Canadian blood supply during the period from January 1, 1986 to July 1, 1990 ("the Class Period").
3. On April 26, 2017, a Referee granted the Claimant's request to file an application pursuant to the Late Claims Benefit Plan. The Referee was satisfied that the Claimant was unaware of the application deadline until she read about it on social media in 2017.
4. On September 12, 2022, the Administrator denied the claim on the basis that the Claimant did not establish on a balance of probabilities that she was infected for the first time with HCV by a blood transfusion received in Canada between January 1, 1986 and July 1, 1990.
5. The Claimant subsequently requested that a Referee review the Administrator's decision and an oral hearing was conducted at the request of the Claimant on September 23, 2024.
6. The Claimant declined the opportunity to provide additional evidence prior to the Administrator rendering the decision and again during a case conference conducted by this Referee before the hearing was scheduled. Rather, it is evident that the Claimant wanted to attend a hearing in order to describe the circumstances surrounding her intravenous drug use and to base her submissions on the existing file information.

7. The relevant provision of the Transfused HCV Plan provides as follows:

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; 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.

...

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.

8. In addition to the plan, several Court Approved Protocols (“CAPs”) have been approved by the Court to guide the Administrator in applying the terms and provisions of the Plan. One of the CAPs provides that where a Claimant has used intravenous drugs, the Claimant must establish on a balance of probabilities that it is more likely than not that he or she was infected with HCV for the first time by a blood transfusion received in Canada during the class period.

**Facts:**

9. There is no dispute that the Claimant received two blood transfusions during the Class Period. Specifically, records obtained from the H Centre in (City) (Province) confirm that the Claimant received two blood transfusions on November 9, 1986. According to the Transfusion Summary, the first unit (A X-XXXXX) was HCV negative based on the status of the donor. However, for the second unit (A Y-YYYYY), the donor could not be located.
10. A request was also made to the Canadian Blood Services (“CBS”) to conduct a search for records of any transfusions which may have been recorded under another surname that was previously used by the Claimant. On May 10, 2024, the CBS wrote to the Traceback Coordinator and advised that records had been searched again from January 1984 to January 1992 for both surnames and no additional records were located. In a letter to the Administrator dated November 6, 2019, the Claimant reported that she received at least three transfusions between 1983 and 1989 due to childbirth complications, however, the traceback summaries could only confirm that the Claimant received two transfusions.
11. There is also no dispute that the Claimant contracted the HCV as she tested positive in April 2004.
12. There is ample file information which indicates that the Claimant used non-prescribed intravenous drugs prior to the Class Period.
13. Pursuant to section 8 of the applicable CAP, the Administrator referred the Claimant’s file to an Independent Medical Expert as the results of the traceback did not automatically lead to the rejection of the claim. In a report dated August 16, 2022, Dr. C concluded that it was more likely than not that the Claimant was most likely infected with HCV as a consequence of intravenous drug use occurring during the mid-1980s, however, he added that it was “plausible” that transfusion A Y-YYYYY was a source of HCV.

14. The Claimant admitted that she had used intravenous drugs but only for a very brief period in her life. There is conflicting evidence in the medical records as to the extent and frequency that the Claimant used intravenous drugs. In an affidavit sworn on December 1, 2020, the Claimant admitted to using cocaine five times in 1985 through injections. In the Treating Physician Form, Dr. K noted that the Claimant admitted to using intravenous drugs in 1983-1984. In an "Other Risk Factors Form" dated October 23, 2009, the Claimant stated that she also used "T's and R's" (Talwin and Ritalin) in 1984. In addition, a medical summary prepared by Dr. W dated January 26, 2005 indicates that the Claimant disclosed a history of alcohol abuse and intravenous drug use from the 1980's until 1991.
  
15. At the hearing, the Claimant stated that she only engaged in intravenous drug use on five occasions and that the drugs consisted of cocaine on some occasions and Ts and R's on other occasions. The Claimant did not testify or submit that her intravenous drug use occurred after she received the transfusions on November 9, 1986.
  
16. The Claimant also agreed that her memory was not good in the mid-1980's as she was struggling with an alcohol addiction. She maintains that her drug of choice was alcohol. She did not like needles as she had seen other people overdose and get sick. She used the drugs in the company of her sister and a friend during times when alcohol was not readily available.

**Submissions:**

17. At the hearing, the Claimant did not call any witnesses nor did she produce any documentary evidence. The Claimant submitted that she only used intravenous drugs on five occasions and at a time when she was struggling with an alcohol addiction. The Claimant implied that she used intravenous drugs more out of desperation as opposed to habit.

18. The Claimant submitted that based on the Independent Medical Expert's report, it is "plausible" that the one of the transfusions was the source of HCV exposure.
19. Despite the results of the traceback reports, the Claimant believes she was transfused on more than two occasions.
20. Fund Counsel submitted that the Administrator properly rejected the claim, having obtained and weighed the relevant evidence in accordance with the CAP. Fund Counsel submitted that the Claimant has been unable to demonstrate that she was infected for the first time with HCV by a blood transfusion received in Canada during the Class period, and therefore unable to establish her eligibility for compensation in accordance with the provisions of the Plan.
21. In her written submissions, Fund Counsel provided a detailed review of the file information surrounding the Claimant's intravenous drug use including the report of the Independent Medical Expert, the Claimant's affidavit evidence, the report of her treating physician and the Claimant's medical records. In addition, Fund Counsel provided a fulsome review of the applicable provisions contained in the Settlement Agreement.

**Decision:**

22. I find that the Administrator conducted a thorough review and investigation before denying the claim on September 12, 2022. The Administrator had relevant medical records of the Claimant, affidavit evidence from the Claimant and the expert opinion of Dr. C.
23. There is ample file information which indicates that the Claimant used intravenous drugs before she received the transfusions in 1986. At the hearing, the Claimant testified that she only used non-prescription intravenous drugs on five occasions, however, she did not submit or testify that this drug use occurred after she received the transfusions.

24. Upon reviewing the Claimant's voluminous medical records, the Independent Medical Expert was satisfied that the Claimant was most likely initially infected with HCV as a consequence of the intravenous drug use occurring in the mid-1980's.
25. It is clear that the drafters of the Settlement Agreement, the Plan and the CAP intended that Claimants who used intravenous drug would be presented with the more difficult burden of proving that a blood transfusion during the Class Period is a source of the HCV infection.
26. The onus is on the Claimant to establish on a balance of probabilities that she was infected with HCV for the first time with HCV by the 1986 blood transfusion which had an unknown donor. There is no indication that this donor was positive for HCV, rather, the donor could not be located and was therefore unknown.
27. At most, it is plausible that unit A Y-YYYYY was the source of the infection, however, that is not enough under the Plan to tip the scales in the Claimant's favour. The Claimant did not adduce any additional evidence to establish that she was infected for the first time by the blood transfusions.
28. I also note that the Claimant admitted to having a "sketchy" memory in the mid-1980's and I find that it is more likely than not that she used intravenous drugs on more than five occasions. However, I do accept that her intravenous drug use was confined to a brief period of time and that her drug of choice was alcohol.
29. In addition, pursuant to section 3.01 3 of the Plan, a Claimant "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. In this case, the Claimant did not deliver sufficient evidence to the Administrator, nor did she adduce any witnesses or documentary evidence at the hearing to discharge her burden of proof.

30. At the hearing, the Claimant relied upon Dr. C's independent expert report wherein he opined that it is "plausible" that the transfusion from the unknown donor could have led to the infection. A plausible explanation is one that sounds as if it could be true. In other words, it could be a credible or believable explanation. However, I also note that the donor of this transfusion was unknown and the Traceback was therefore inconclusive in terms of whether the donor of the blood had tested positive for HCV. I accept Dr. C's opinion and agree with him that the Claimant was most likely initially infected with HCV as a consequence of intravenous drug use occurring in the early to mid-1980's.

31. Based on all of the above, I uphold the Administrator's denial of the claim. However, I do wish to congratulate the Claimant for making a positive turn in her life. I am hopeful that this decision will help bring some measure of closure and healing.

Dated October 1, 2024



Wesley Marsden, Referee