

Judgement No. 218

(Original: English)

Case No. 211:
Trenczak

Against: The Secretary-General
of the United Nations

Request for the reopening of a case by the Advisory Board on Compensation Claims.

Analysis of the reasons for the unusual lapse of time between the onset of the Applicant's illness and his application.—Reluctance of the Applicant to appeal against decisions taken by the Respondent.—Receptivity of the Applicant to the advice of the Respondent.—Comments on the quality of that advice.

Question whether the Applicant was partially or totally disabled.—The Applicant's claim that he was totally disabled has not been established.—The plea is time-barred.

Question of the assessment of the Applicant's incapacity at 25 per cent.—The plea is time-barred.—The Tribunal cannot question the decision of the Advisory Board because it does not have the necessary medical knowledge or evidence.

Question whether the subsequent heart attacks suffered by the Applicant could be regarded as attributable to his service-incurred heart condition.—Observation by the Tribunal that the answer to that question was never clearly established.

Question whether, in considering the Applicant's appeals in 1972 and 1976, the Respondent took proper account of the medical and other information then available to him in refusing to reopen the case.—Unreasonable and arbitrary character of the refusal of the Advisory Board in 1972 to accept evidence which might have led it to revise its earlier decision.—In 1976 the Advisory Board relied mainly on its 1972 decision not to reopen the case.—Conclusion of the Tribunal that the decision of the Secretary-General taken in 1976 based on the Advisory Board's recommendation of 1976 suffered from the same infirmity as the decision of 1972.

Rejection of the Applicant's plea that he is totally disabled.—Plea of the Applicant seeking to establish that his disease resulted in a disability of a percentage higher than 25 per cent and that this disability has since increased to a point where it has become total.—Rescission of the decisions of the Secretary-General of 1972 and 1976.—As a consequence, the case should be remanded to the Advisory Board.—Such remand not opportune.—Award to the Applicant of lump-sum compensation in the amount of \$10,000.—The plea of the Applicant for payment of interest on the sums awarded is rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Madame Paul Bastid, Vice-President; Sir Roger Stevens;

Whereas at the request of Ladislaus Franz Trenczak, a former technical assistance expert of the United Nations, the Tribunal extended the time-limit for the filing of an application to 15 December 1976;

Whereas, on 15 December 1976, the Applicant filed an application which did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the Applicant, after making the necessary corrections, again filed the application on 20 December 1976;

Whereas the pleas of the application read:

"1. The Tribunal is requested to establish that the heart disease which the Applicant has contracted in March 1959 during his service as a UN expert in Pakistan and which was attributable to the performance of his official duties on behalf of the United Nations, resulted in the Applicant's total disability and that he is therefore entitled to receive retroactively compensation payments in accordance with art. 11.1 of Appendix D to the Staff Rules.

"2. In case the above-mentioned plea is not granted, the Tribunal is requested to establish that the heart disease which the Applicant has contracted in March 1959 during his service as a UN expert in Pakistan and which was attributable to the performance of his official duties on behalf of the United Nations, resulted in the Applicant's disability of a percentage higher than 25% and that this disability has increased since as a direct cause of the first illness resulting in the Applicant's total disability as from a date to be determined by a medical board, and that he is therefore entitled to receive retroactively increased compensation payments in accordance with art. 11.1 and 11.2 of Appendix D to the Staff Rules.

"3. The Applicant requests that 6% interest be paid on all amounts from the date they were, according to the Tribunal's judgement, due till their actual payment."

Whereas the Respondent filed his answer on 22 February 1977;

Whereas the Applicant filed written observations on 29 March 1977;

Whereas the facts in the case are as follows:

The Applicant, who was born on 9 March 1888, entered the service of the United Nations on 8 April 1957 under a fixed-term appointment for one year at level 5 as a Coal Mining Expert to be assigned to Quetta, Pakistan. This appointment was subsequently extended by one year and then again through 10 July 1959. Prior to his appointment the Applicant passed a medical examination on the basis of which he received a class A medical clearance. The work in the project area, situated in a region of high altitudes, proved to be particularly difficult and hazardous; the Applicant was required to crawl on his hands and knees through mining shafts poorly ventilated, and he was subjected to unusual physical and mental stress. During the night from 23 to 24 March 1959 the Applicant suffered a heart attack which his attending physician attributed to "the height and excessive work and worry which Mr. Trenczak has had to undergo in his work". He was given two months' sick leave although his examining doctor had recommended three months. On 20 June 1959 the Applicant submitted under Appendix D to the Staff Rules a claim for compensation for illness attributable to the performance of official duties on behalf of the United Nations. On 15 July 1959 he departed from Pakistan for repatriation after the United Nations, on the advice of its Medical Director, rejected consideration of an extension of his contract. After the Applicant's return to Graz, Austria, his heart trouble continued and he underwent on 29 August 1959 a medical examination by Dr. Uranitsch, including an electrocardiogram which showed "a tachycardiac fibrillar arrhythmia and a rudimentary right bundle-branch block, together with signs of myocardial damage". During this and the following year the Applicant suffered several other heart attacks described as severe and on 14 November 1960 he was admitted to the University Medical Clinic of Graz for in-patient treatment. In a medical report dated 17 November 1960, his physician, Dr. Gotsch, summarized his findings in a report of which the following is a translation:

"At the present time, the patient is suffering from abnormal excitability of the myocardium and extrasystoles, with overburdening of the right heart as a result

of pulmonary emphysema. Last year's attacks of auricular fibrillation may also be regarded as an indication of a momentary overextension of the right auricle. The examination also indicated, on the basis of laboratory findings, that there is damage to the parenchyma of the liver.

"In view of the patient's advanced age, the abnormal excitability of the myocardium can be attributed primarily to coronary sclerosis and a greater degree of stress than is advisable for a man of his age. At present, there is no indication of a thrombosis.

"The patient has been advised to avoid physical and mental strain and to undergo hospital treatment if possible.

"In reply to his question, the patient was informed that he would not be able to resume his previous work, that is to say, he must be regarded as totally incapacitated for his most recent occupation (that of mining consultant) under the conditions described at the beginning of this report. Judging from the report of the medical findings at that time, copies of which are in my possession, this incapacity probably dates from his heart attack of 24 March 1959. At the present time, no answer can be given to the patient's question as to whether his working capacity could be restored through hospitalization or hydrotherapy."

In the meantime the Applicant had sent several reminders of his claim for compensation to the United Nations, had been advised by the Secretary of the Advisory Board on Compensation Claims (ABCC) on 29 September 1960 that his claim would be considered early in October, and had submitted on 10 November 1960 additional information requested by the Secretary on 31 October 1960. The ABCC considered the Applicant's claim on 2 February 1961 and on 9 February 1961 submitted its report, which read in part as follows:

"Consideration by the Board

"7. The evaluation of this claim was based on criteria applied to three heart cases at the Board's 87th meeting: in those cases where new symptoms of coronary heart disease appear in conjunction with unusual exertion or other special or extraordinary circumstances, it would be reasonable to consider the possibility of a causal relationship between such circumstances and the heart attack.

"8. The Board heard Mr. Savornin, Bureau of Technical Assistance Operations mining expert, on the circumstances prevailing in the Pakistan mines, as well as Mr. Donald B. Kennedy of the Technical Assistance Recruitment Services on the recruitment aspect of this case. It took further cognizance of a letter dated 2 July 1959 from Mr. John A. Reinemund, Head of the United States Geological Survey, who worked closely with claimant, acknowledging claimant's 'assistance in measuring and sampling the coal beds in many of the deepest mines in the coal field under conditions of very great physical difficulty'.

"9. While it is generally recognized that the present heart condition now limits the activities of claimant in that he should not engage in strenuous activities, some limitation was considered not unusual for a man of 72 years of age. The assessment of the physical impairment at twenty-five per cent was finally agreed upon after noting methods recommended by the American Medical Association—Guide to the Evaluation of Permanent Impairment of the Cardiovascular System.

"Recommendation

"The Advisory Board on Compensation Claims,

"Having considered the claim submitted by Mr. Ladislaus Trenzack in respect of a heart condition;

"Recognizing claimant's activities in Pakistan, performed as a natural incident of official duties, occasioned unusual exertion under special and extraordinary circumstances;

"Further recognizing on the basis of a medical assessment, a permanent physical impairment evaluated at twenty-five per cent in application of the standards established by the American Medical Association in the 'Guides to the Evaluation of Permanent Impairment—the Cardiovascular System'.

"In consideration of the Secretary-General's decision in previous heart cases, making allowance for the possibility of a causal relationship between unusual exertion and other special and extraordinary circumstances and a heart attack;

"Recommends to the Secretary-General

"(a) to determine:

"(i) the present heart condition attributable to the performance of official duties on behalf of the United Nations;

"(ii) twenty-five per cent permanent partial incapacity;

"(b) to award under Appendix D

"(i) compensation in the amount of US \$2,437.50 during the first year following separation from the employment of the United Nations (25% of staff member's net salary and allowances amounting to \$9,750), and \$1,405.75 annually thereafter, to be reduced when the entitlements for dependent children cease (25% of 66-2/3 per cent of staff member's net base pay of \$9,250 plus five per cent of such net base pay for dependent child). These entitlements are arrived at in consideration of the provisions under Article 11.1 and Article 11.2 (c).

"(ii) Payment of reasonable medical, hospital and directly related costs already incurred in the amount of \$100, as well as such future expenses as may be approved by the Medical Director of the United Nations under the provisions of Article 11.2 (a) (i)."

On 10 February 1961 the Secretary-General approved the ABCC's recommendation and on 13 February 1961 the Applicant was advised accordingly. On 1 March 1961 the Applicant wrote to the Secretary of the ABCC complaining that the determination of twenty-five per cent permanent partial incapacity seemed inadequate in view of the finding of total incapacity contained in Dr. Gotsch's medical report dated 17 November 1960 and inquiring whether reconsideration was possible. On 17 March 1961 the Secretary replied in part:

"Your incapacity was evaluated at 25% in the full understanding of Professor Dr. Gotsch's statement. A careful reading of this report reveals that he certifies total incapacity 'for his most recent occupation (that of mining consultant) under the conditions described at the beginning of this report'. I trust this is an accurate reflection of your doctor's report . . .

"It is difficult for me to advise you on whether to appeal the decision of the Secretary-General. You are fully entitled to do so under the provisions of Appendix D. Personally, I am of the opinion that your case has received the most sympathetic consideration of the ABCC and the Secretary-General . . ."

After an interval in which further correspondence took place, the Applicant, in a letter addressed to the Secretary-General on 24 May 1969, requested reconsideration of his case under article 17 of Appendix D to the Staff Rules and designated a medical practitioner to represent him on the medical board provided for under paragraph (b) of that article. On 24 June 1969 the Deputy Controller replied that there was no possibility to arrange for an increase in the payments made to the Applicant by the

United Nations. The Applicant suffered a further heart attack in 1972 and on 15 June 1972 he reiterated his request for reconsideration of his case with supporting documents. On 21 June 1972 the Secretary of the ABCC advised him as follows:

“ . . .

“2. *The degree of your disability*

“This is a rather complex matter, and involves more than medical opinion. It must be recognized that Dr. Gotsch's report of 1960 was fully considered by the Advisory Board on Compensation Claims when it made its recommendation. In this connection, I must point out to you that the United Nations compensation rules do not define ‘total disability’ as being inability to engage in the previous occupation. It was fully recognized that you could not resume work in the same capacity as before your illness. Dr. Gotsch, in pointing this out, did not in any way suggest that you could not be gainfully employed in some less strenuous occupation.

“It must also be realized that an illness of this type is a slowly progressive, degenerative one, thus while it did become noticeable at the time of your assignment at Quetta, it can be assumed that the condition had been developing for some time.

“Your age was also a factor to which consideration had to be given.

“It was on the basis of at least all the above factors that the Advisory Board assessed your disability at 25%.

“3. *Future action*

“In your letter [of 15 June 1972], you ask that an appeal be entered under article 17 of Appendix D. I regret that it would not be possible to take this course of action at this time, after more than eleven years have elapsed since Mr. Hammarskjöld's decision. You will note that such an appeal should have been entered within 30 days of the decision being made known to you.

“Alternatively, however, it might be possible, and I must stress that it is only a possibility, that you could re-open your case under article 9. To do so, the first requisite would be a detailed medical report showing that your present condition had changed significantly from what it was when Dr. Gotsch reported in 1960. This could be considered by the Advisory Board, and it might make a recommendation to adjust the assessment of disability. You should realize, however, that your present age would have a significantly adverse bearing on the consideration given. The Advisory Board would also wish to know if you have had *any* employment since your separation from the United Nations.

“I must caution you that these remarks (about re-opening your case) are purely general and should not be construed in any way to mean that there is any likelihood of your benefit being increased. I suggest that before you take any action along these lines that you discuss the matter fully with your doctor, keeping in mind that our rules for total disability have no connection with mining practice.”

In a reply dated 10 July 1972 the Applicant stated that his first appeal had been made in his letter of 1 March 1961 to the ABCC and repeated four times in the following years; he also drew the Secretary's attention to the clause in article 17 (a) of Appendix D to the Staff Rules authorizing the Secretary-General, “in exceptional circumstances”, to “accept for consideration a request made at a later date”, and concluded that while he was still of the opinion that he was entitled to a reconsideration of his case under article 17 of Appendix D to the Staff Rules, he did welcome the possibility of a reopening of the case under article 9. On 18 August 1972 the Applicant asked the Secretary-General to reopen his case under article 9 of Appendix D to the

Staff Rules; in support of his request he transmitted a medical report dated 9 August 1972 from Dr. Reisenhofer, Chief Physician of the Austrian Mining Insurance Institute; in an annex dated 17 July 1972 to that report, Dr. Stenzel, the Applicant's attending physician, summarized his findings as follows:

"In March 1959, after years of overexertion, the patient suffered a heart attack; on the basis of the medical history and the findings made at that time, it is highly probable that he suffered a coronary occlusion caused by overwork. Since the patient had a sound heart before his employment by the United Nations, as indicated by the examination conducted at the time he was engaged, it is highly probable that this coronary heart disease should be considered a consequence of the working conditions in the Pakistan mines.

"At the time he left United Nations employment, on the basis of findings made at that time, Mr. Trenzak was judged to be totally disabled. According to the usual regulations of mining law, which apply to all mines in Austria (the matter is governed by the General Mining Police Regulation of 2 April 1959 (BGB1. Nr. 11/1159)), after the heart attack in question the patient was no longer fitted for any underground occupation. This judgement applies to all mines.

"Light work above ground might perhaps have been possible one year after the attack, but no comprehensive expert appraisal of the patient's health was made at that time. However, since the patient reached the age of 72 years one year after the heart attack suffered at Quetta, it is to be assumed, in conformity with the results of today's examination, that the total disability was permanent."

On 27 September 1972 the Medical Director of the United Nations, who had met the Applicant during a visit to Vienna, asked Dr. Stenzel for his views in the following terms:

"During a recent visit to Vienna, I had the great pleasure of meeting Mr. Trenzak.

"I have seen your report of 17 July 1972 on Mr. Trenzak. We would like to know how frequently he has seen you in the past year and also, we would be interested in having details of his present treatment.

"As there are many different factors involved in the development of coronary artery disease, it is somewhat difficult to determine how much the stress of Mr. Trenzak's working activities, in Pakistan, between May 1957 and March 1959, influenced the progress of his cardio-vascular lesion. In 1961, the UN Advisory Board on Compensation Claims agreed that the occupational factors alone had been responsible for a 25% permanent partial impairment.

"As a matter of interest, I would like to have your views on what influence you think Mr. Trenzak's work in Pakistan, so long ago, had on his cardiovascular disease, bearing in mind that other factors must be involved, in a man of his age, in the development of this condition. As Dr. Reisenhofer has also been to see Mr. Trenzak recently, perhaps you can ask him for his opinion as well?

"I look forward to receiving your reply, at your earliest convenience, as Mr. Trenzak's case is being re-examined."

In his reply, dated 20 October 1972, Dr. Stenzel stated that it was not correct to regard an incapacity for work as mining consultant in Pakistan mines as automatically equal to a 75 per cent capacity for work in Europe, thereby arriving at an impairment figure of only 25 per cent, and he concluded:

"To sum up, I can state that from the point of view of the attending physician, in the light of the unquestionable causal relationship, it seems necessary to review the patient's loss of earning capacity. In simple justice, the estimate of the patient's disability should be increased to at least 70 per cent, by reason of the special

circumstances and factors affecting his health, since influences, rather than constitutional factors, clearly contributed most to his disability.”

The ABCC considered the Applicant's claim again on 15 November 1972 and submitted on 6 December 1972 the following recommendation to the Secretary-General:

“The Advisory Board on Compensation Claims,

“Having considered, at its 207th meeting on 15 November 1972, the request submitted by Mr. Ladislaus F. Trenczak, a former technical assistance expert, who is in receipt of continuing compensation benefits awarded in 1961 under article 11.2 (d), for an increase in the assessed degree of disability and the amount of compensation, with retroactive effect;

“Noting the medical history of the claimant recently prepared by his attending physician;

“Noting further that the additional medical reports did not disclose any new relevant information that was not before the Advisory Board on Compensation Claims when it first considered the claim in 1961;

“Considers that there are no sufficient grounds on which it could base a recommendation to the Secretary-General that the compensation claim on Mr. Ladislaus F. Trenczak, as decided in 1961, should be re-opened under article 9 of Appendix D to the Staff Rules.”

The Secretary-General approved that recommendation and on 8 December 1972 the Applicant was informed accordingly. The Applicant continued to inquire about a possible appeal. On 19 January 1973 the Secretary of the ABCC advised him that he could not encourage him to pursue the matter. On 1 July 1975 the Applicant submitted through the Austrian Mission to the United Nations a new request for a reconsideration of his case. On 26 September 1975 the Secretary of the ABCC advised him that, as his request included no new relevant information, no useful purpose would be served by presenting it to the ABCC. On 26 October 1975 the Applicant wrote to the Secretary-General under Staff Rule 111.3 requesting a review of that decision. The ABCC considered again the Applicant's claim on 22 December 1975 and 9 June 1976, and submitted on 29 June 1976 the following recommendation to the Secretary-General:

“The Advisory Board on Compensation Claims,

“Having considered, at its 236th and 239th meetings on 22 December 1975 and 9 June 1976 respectively, the request submitted by Mr. Ladislaus Trenczak, a former technical assistance expert who is in receipt of continuing compensation benefits awarded in 1961 under article 11.2 (d), for an increase in the assessed degree of disability and the amount of compensation, with retroactive effect;

“Noting that following the 207th meeting on 15 November 1972 at which it was determined that there were insufficient grounds for re-opening the case under article 9 of Appendix D to the Staff Rules, the Secretary-General approved the recommendation to deny the claimant's appeal;

“Further noting that the additional evidence now submitted did not materially affect the criteria and reasoning which had resulted in the recommendation to deny the re-opening of the case under article 9; therefore

“Recommends to the Secretary-General that the previous decision to deny the re-opening of the case under article 9 be maintained.”

That recommendation was approved on behalf of the Secretary-General and on 30 June 1976 the Applicant was informed accordingly. On 17 July 1976 the Applicant requested the Secretary-General to agree that the case be submitted directly to the Tribunal. His request was granted on 6 August 1976 and on 20 December 1976 he filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The ABCC has correctly established the causal relationship between the performance of the Applicant's official duties on behalf of the United Nations and his heart attack of 23/24 March 1959.

2. The ABCC, however, has erroneously established the degree of disability as being only 25% permanent partial incapacity. The question of disability cannot be considered separately from the profession the person in question occupies. It is therefore not enough to base a decision on the Guide to the Evaluation of Permanent Impairment of the American Medical Association as the ABCC has done. The symptoms associated with a 20–45% impairment under that Guide are general symptoms which the ABCC has applied without medical advice and are unrelated to the Applicant's profession as a mining expert. Against the ABCC's opinion, it is established that total disability has to be accepted where the person involved is incapacitated from performing any substantial part of his ordinary duties, though still able to perform a few minor duties and be present at his place of business. In the present case, the Applicant is a mining expert who cannot exercise his profession without going underground into the mines. The Applicant was not only physically unable, as a direct consequence of his heart disease, to continue his profession; he was forbidden to do so by the relevant mining laws of practically all countries. All these facts have been submitted by the Applicant to the ABCC on several occasions but have been regarded as "not relevant". That position is erroneous and the Applicant's total permanent disability should have been established by the ABCC from the outset.

3. The ABCC has cited the Applicant's age as a factor not to decide on total disability. That position is erroneous as the age of the person has generally been of little importance in the decisional process concerning the causality of work and heart disease. The United Nations has employed the Applicant in full knowledge of his age and it would be a flagrant contradiction to morality to penalize him now after he has lost his health during the performance of official duties on behalf of the United Nations.

4. The Applicant submitted his claim for compensation at an early date, namely on 20 June 1959, only shortly after his heart attack took place. The negligence of the United Nations in dealing with his case was causal in the constant deterioration of his health after his return to Austria. It took the Administration over a year only to react to his claim. None of his countless appeals was dealt with in accordance with Appendix D to the Staff Rules. At no time during the past 17 years was a medical board convened as prescribed in article 17 of Appendix D.

5. The Applicant is also suffering from other deficiencies which are at least partly attributable to his heart disease.

6. Therefore, even if one would deny the total permanent disability of the Applicant as of his heart attack in March 1959, there was no justification for only a 25% permanent incapacity and in the meantime his incapacity has reached 100% partly because of his service-incurred illness and partly because of the negligence of the Administration in dealing with the case.

Whereas the Respondent's principal contentions are:

1. As to procedure:

When making its recommendations of December 1972 and June 1976 the ABCC was considering whether to recommend the reopening of the case under article 9 of Appendix D to the Staff Rules. In order to have workable claims appeal procedures it is essential that decisions become final after a period of time; therefore, only exceptionally and not as of right in the employee, may compensation cases be reopened and amended with future effect. However, even where the possibility of reopening a case is being considered under article 9, it may be reasonable and proper in some circum-

stances to convene a medical board or to follow a procedure analogous to that prescribed for an appeal under article 17 (b), e.g. if there is a conflict of medical opinion to be resolved by an impartial medical authority. But in the case at hand there was and is no substantial dispute as to the medical condition of the Applicant. Since, therefore, a medical board was not required on practical or legal grounds, the Secretary-General's decision based on the recommendation of the ABCC was not vitiated by defective procedure.

2. As to the Applicant's first plea:

(a) As the decision of 1961 was not appealed, the only issues raised by this plea are whether the case should have been reopened in 1972 and, if so, whether the Applicant could then have been found to be totally incapacitated. But, in any event, on the evidence that was before the ABCC in 1961, particularly the report of Dr. Gotsch dated 17 November 1960, it was reasonable for the ABCC to assume that it was only with respect to the abnormally difficult working conditions in the Pakistani mines that the Applicant could be considered to be totally incapacitated;

(b) In order for there to be total disability under Appendix D to the Staff Rules there must be an inability to perform any gainful employment. Since the Applicant has not produced any evidence to show that he has been incapable of performing any gainful employment there is no basis for reopening the case *to consider whether he is totally disabled*.

3. As to the Applicant's second plea:

The questions in issue in determining *partial* disability are whether the Applicant, during the years of his life when he could normally have expected to have been gainfully employed after March 1959, did or could have done any work as a mining consultant or mining expert with his heart condition, and, if so, what percentage would that amount of work be of the work that he would have done if he had not suffered the heart attack in 1959. There was no new relevant information placed before the ABCC after 1972. Therefore, the decision to be made by the Tribunal is whether the rejection by the ABCC in 1972 of the information placed before it amounted to an unreasonable and arbitrary decision so as to invalidate its recommendations to the Secretary-General and his decision in 1972 not to reopen the case.

The Tribunal, having deliberated from 4 to 19 April 1977, now pronounces the following judgement:

I. The Tribunal is called upon to determine whether the Secretary-General's decisions not to reopen the case when in 1972 and again in 1976 the Applicant appealed under article 9 of Appendix D to the Staff Rules are open to challenge in the circumstances of the case.

II. The Tribunal notes that it is common ground between the Applicant and the Respondent that the heart condition of the Applicant which developed in 1959 was attributable to the performance of official duties on behalf of the United Nations in the mines of Pakistan. The questions at issue are:

- (i) Whether the Applicant was, as a result of his service-incurred heart condition, totally or partially incapacitated;
- (ii) if partially incapacitated, whether the ABCC correctly assessed the Applicant's incapacity at 25% in 1961;
- (iii) whether the further heart attacks suffered at a later date by the Applicant, notably in 1970 and 1974, could be regarded as attributable to his service-incurred heart condition; and,
- (iv) whether, when considering the Applicant's further appeals in 1972 and 1976,

the Respondent took proper account of the medical and other information then available to him in refusing to reopen the case.

III. Before addressing itself to these questions, the Tribunal thinks it desirable to comment on, and analyse, the unusual lapse of time between the onset of the Applicant's service-incurred heart condition in 1959 and his present application of December 1976. This lapse of time has been due in large measure to the Applicant's reluctance to appeal promptly against decisions taken by the Respondent, a reluctance which appears to the Tribunal to stem in part from advice received from the Respondent.

Thus on 1 March 1961, following the determination of the ABCC of 9 February 1961, the Applicant expressed misgivings about the adequacy of the decision that he was 25% incapacitated, pointed out that the medical report before the ABCC had referred to total incapacity (for his last assignment), and asked if his case could not be reconsidered on the basis that the medical report in question had been misunderstood. He added:

"Of course I don't wish to ask for reconsideration if by the question for [reconsidering] the decision of the Secretary-General of February 13, 1961 . . . the payments based on that decision should be endangered."

The Applicant was informed in a reply of 17 March 1961 from the Secretary of the ABCC that he was entitled to appeal under the provisions of Appendix D of the Staff Rules but that, in the Secretary's personal view, his case had received the most sympathetic consideration, on every issue he had been given the benefit of the doubt, and had he been present he would have been in a better position to appreciate fully the generous spirit in which the award had been made. He was not reminded that under the terms of article 17 (a) of Appendix D to the Staff Rules only 30 days were normally allowed for requests for reconsideration. In the event the Applicant took no further action and in a letter of 26 March 1961 to the Secretary of the ABCC said:

"I wish to express explicitly my full appreciation for the generous spirit in which the award was made."

For some time thereafter the Applicant apparently continued to accept the 25% award. Thus on 21 March 1964 he suggested in a letter to the Secretary of the ABCC that the remaining 75% of his ability (physical ability) for adequate work could be utilized by the United Nations; and again on 26 January 1968, in applying for a post with UNIDO in Vienna, he wrote:

"I guess that my present health would be good enough for such control work, though I have lost 25% of my health in Pakistan. . . ."

Nevertheless, in a letter of 6 February 1966 he argued that at least 50% incapacity should have been determined by the ABCC and said that he had not lost hope that the ABCC's decision would be reconsidered. He was told in a reply of 9 February 1966:

". . . in the absence of any medical evidence to support your point of view, I am afraid it is not possible for me to ask for a review of your case. I must, however, point out that, at your age, on which you are to be congratulated, it would probably be difficult to revise the assessment previously made."

Once again, the Applicant would appear to have taken no further action, such as to secure medical evidence. Indeed, on the basis of later information it would seem that his heart condition had stabilized at this time. It was not until 24 May 1969 that the Applicant formally requested reconsideration of the ABCC's decision under article 17 of Appendix D to the Staff Rules, accompanying his request, addressed direct to the Secretary-General, with the name and address of a medical practitioner to represent him on the medical board provided under paragraph (b) of that article. He was told, in a brief letter from the Deputy Controller dated 24 June 1969, that:

"There is no possibility to arrange for an increase in the payments made to you by the United Nations."

The Tribunal notes that he was *not* told in this reply either that any possibility of action under article 17 had expired through time, nor that it was open to him to make a request for a reopening of his case under article 9.

The Applicant, having experienced a new deterioration in his heart condition in 1970, took no further action until 1 March 1972, when he prepared a letter, not dispatched until 15 June 1972, renewing his appeal under article 17 and enclosing statements by Dr. Alexander Reisenhofer, Chief Doctor of the Insurance Institution of Austrian Mining in Graz (dated 12 June 1969), Dr. Straub, Medical Director of the Bundesknappschaft in Bochum (dated 17 February 1970) and Dr. Denk of the Professional Association of the Mining and Iron Producing Industry of Austria (dated 16 June 1972), all bearing on the interpretation of Dr. Gotsch's report of 1960 and on the degree of the Applicant's incapacity at that time. As a result of this action, the Applicant was given, in a letter from the Secretary of the ABCC dated 21 June 1972 and quoted in the first part of this judgement, fuller information than had hitherto been provided to him concerning the factors which had determined the ABCC's decision in 1961, and regarding possible future action under article 9 of Appendix D. The letter stated *inter alia* that the first requisite for such action would be a detailed medical report showing that his present condition had changed significantly from what it was when Dr. Gotsch reported in 1960. As a result the Applicant formally requested, in a letter of 18 August 1972, that his case should be reopened under article 9. Accompanying his appeal was a report by Dr. Reisenhofer dated 9 August 1972 enclosing a clinical record by Dr. Stenzel dated 17 July 1972. These documents, together with those provided earlier, and a later medical report submitted by Dr. Stenzel (of 20 October 1972) as the result of a request made by Dr. Irwin on 27 September 1972, were considered by the ABCC before it recommended, on 15 November 1972, that there were not sufficient grounds for reopening the case under article 9 of Appendix D since the additional medical reports did not disclose any new relevant information that was not before the ABCC in 1961. The Applicant was informed in a letter of 8 December 1972 of the Secretary-General's acceptance of this recommendation. He inquired about a possible appeal, but received a discouraging reply from the Secretary of the ABCC dated 19 January 1973, reading in part as follows:

"... I am afraid I cannot encourage you to pursue the matter. You should understand that the amount of the payment being made to you each month is based solely on the United Nations compensation rules and that the opinion of, to quote from your letter, prominent doctors and international institutions would not change these ... if it were possible, within our rules, to find a way to help you further, this would have been done."

The Applicant took no further action at the time but in 1975, as a result of correspondence with the Austrian Mission to the United Nations, he requested the Secretary-General under Staff Rule 111.3 to review the ABCC's decision of 1972. It was only on 29 June 1976 that the ABCC recommended that its previous decision should be maintained and thereafter the Applicant requested, and was granted, leave to submit his case directly to the Tribunal.

IV. In the Tribunal's view, the protracted consideration of his case has been due largely to the Applicant being singularly receptive to the advice given to him by the Respondent. As to the quality of that advice the Tribunal has the following comments:

- (i) the Secretary of the ABCC went beyond his functions in expressing a personal view in his letter of 17 March 1961. He also failed to warn the Applicant about the time limitation;
- (ii) the letter of 24 June 1969 quoted above failed to explain to the Applicant the

courses open to him though these were subsequently explained to him on 21 June 1972 in response to his further appeal;

- (iii) the statement of the Secretary of the ABCC in his letter of 19 January 1973 to the effect that the amount of the payment made each month was based solely on the United Nations compensation rules failed to take account of the fact that, if new information had been provided and accepted as relevant, increased compensation based on a higher estimate of incapacity would have been possible within those rules.

V. The Tribunal now addresses itself to the questions raised in paragraph II above. On the issue of total incapacity the Respondent argues that there is no basis for reopening the question raised in the Applicant's first plea, since the 1961 decision was not appealed and the Applicant has not produced evidence to show that he has been incapable of engaging himself in any gainful employment. While observing that the medical report before the ABCC in 1961 was later subject to various interpretations, the Tribunal nevertheless accepts that, on the facts before it, the Applicant's claim that he was totally disabled has not been established. In any case the plea is barred by his failure to appeal within the prescribed time-limits.

VI. As to the ABCC's assessment in 1961 of 25% incapacity, on which all compensation to the Applicant has been subsequently based, the same considerations arise as in paragraph V above in so far as the Applicant did not formally appeal against the assessment within the prescribed time-limits. In any case the Tribunal does not consider that it has the necessary medical knowledge or evidence to question the decision of the ABCC in 1961 that, in the light of the medical report, the condition of the Applicant fell within the 20-45% impairment category set out in the American Medical Association Guide to the Evaluation of Permanent Impairment. The Tribunal notes, however, that these categories provide for a range of impairment and that it would have been open to the ABCC, had it considered that the evidence justified it, to have assessed a higher percentage of incapacity and hence awarded a higher percentage of compensation while still regarding the Applicant as falling within the same category, viz. 20%-45%.

VII. The Tribunal notes from the later medical reports and especially from those of Dr. Stenzel dated 17 July 1972 and 20 October 1972 that the Applicant's heart condition became consolidated during 1961-1962 and that it was not until about 1970 that he again showed clear signs of disability. In 1974, according to a report of Professor S. Sailer dated 6 June 1974, the Applicant suffered from marked cardiac decompensation. It is not clear from these reports how far these symptoms were regarded as the direct result of the service-incurred heart condition, though an ophthalmological report of 10 January 1974 from Dr. Volckmar attributed macular degeneration to poor circulation resulting from sclerosis and reduced heart function. Having regard to the statement in the letter from the Secretary of the ABCC dated 21 June 1972 referred to above that "the first requisite (for the consideration of the Applicant's case by the ABCC) would be a detailed medical report showing that your present condition had changed significantly from what it was when Dr. Gotsch reported in 1960", it might have been expected that the ABCC would have sought evidence on this specific point and particularly (in 1972) on the relationship between the deterioration after 1970 and the service-incurred condition. The letter of the Medical Director of the United Nations, Dr. Irwin, addressed to Dr. Stenzel on 27 September 1972 and referred to earlier did not specifically seek information on this point nor did it refer to the deterioration which had apparently occurred in the Applicant's condition as evidenced by Dr. Stenzel's clinical record dated 17 July 1972, copy of which had been transmitted to the Respondent on 18 August 1972. Dr. Irwin's letter did on the other hand refer to the ABCC's agreement in 1961 that "the occupational factors alone had been responsible

for a 25% permanent partial impairment." Possibly as a result of the terms of Dr. Irwin's letter, Dr. Stenzel's reply of 20 October 1972, while emphasizing the causal relationship between the Applicant's work in Pakistan and his heart condition in general terms, did not address itself specifically to the connexion between the Applicant's service-incurred condition and his recent deterioration. Equally, Professor Sailer's report of 6 June 1974 expressed no view on this subject. The Tribunal notes accordingly that the answer to the question posed in paragraph II (iii) above, namely whether the further heart attacks suffered by the Applicant in 1970 and 1974 could be regarded as attributable to his service-incurred heart condition, was never clearly established.

VIII. As to the question in paragraph II (iv) above, the Tribunal observes that the medical and other information before the Board in 1972, while indicating that the Applicant's condition had deteriorated in 1970, dealt more particularly with other matters. In his letter dated 12 June 1969 (before the Applicant experienced further heart attacks) Dr. Reisenhofer had written:

"According to the findings of the examination conducted in March 1959, you were suffering from coronary damage with suspected coronary occlusion. Under Austrian regulations (Allgemeine Bergpolizei-Verordnung of 2 April 1959, *Bundesgesetzblatt* No. 114, 327/I), such a condition renders the patient unfit to continue working in the mining industry.

"Since regulations in respect of health are similar in most of the mining countries of the world, it is my opinion that Mr. Trenczak should have been declared entirely incapacitated as regards further mining activity directly after the examination carried out at the hospital in Quetta, Pakistan, and later repeated by Dr. Gotsch in Austria.

"I am prepared to carry out a further examination of Mr. Trenczak if required to do so by the United Nations."

Dr. Straub's report of 17 February 1970 said the Applicant had to be considered as generally incapable for work in the mining industry. Dr. Denk's letter of 16 June 1972 said that the Applicant's "present state of health is very poor. His heart, which was severely strained in the course of his professional activity in the Pakistan coal mines, is failing." A certificate from the Professional Association of the Mining and Iron Producing Industry of Austria dated 18 July 1972 declared that the Applicant "since his convalescence was compelled to discontinue all mining activity on the orders of his doctors" adding that he "is therefore no longer able to carry on his activity as an expert." Dr. Stenzel observed that "according to the usual regulations of mining law, . . . after the heart attack in question the patient was no longer fitted for any underground occupation." He concluded his clinical record by saying "it is to be assumed, in conformity with the results of today's examination [17 July 1972], that the total disability was permanent." In his reply of 20 October 1972 to Dr. Irwin's letter, Dr. Stenzel said that "in simple justice" the Applicant's loss of earning capacity should be reviewed and the estimate of his disability should be increased to at least 70%. The Tribunal notes that those reports contained evidence relating to the Applicant's employability which was not available to the ABCC in 1961. They also expressed views about the degree of the Applicant's disability which were at variance with the ABCC's interpretation of Dr. Gotsch's report of 17 November 1960 on which its recommendations for compensation in 1961 had been based. The medical reports came moreover from sources particularly well qualified to judge of the Applicant's capabilities for work in the mining industry.

IX. The position when the ABCC reconsidered the Applicant's case in 1972 was therefore as follows. The ABCC was aware that the Applicant had suffered a deterioration in his heart condition in 1970 but failed to ascertain how far this deterioration was

the result of the service-incurred heart condition of 1961. The ABCC was also aware that the Applicant as a result of his health condition had failed to obtain any employment in the mining industry, and it was known that the Applicant had attempted, and failed, to obtain employment with the United Nations. It is true that he had not responded to the Secretary's inquiry of 21 June 1972 to the effect that the ABCC would "wish to know if you have had *any* employment since your separation from the United Nations", but no further attempt had been made to elicit such information. In these circumstances the Tribunal finds that the ABCC's refusal in 1972 to accept evidence which, had the case been reopened could have led to a reconsideration of its earlier decision that the Applicant's disability should be assessed at 25%, was unreasonable and arbitrary.

X. As regards the ABCC's review of the case in 1976, the Tribunal notes that, whereas in 1972 the ABCC had said that "the additional medical reports did not disclose any new relevant information", the 1976 recommendation stated that "the additional evidence now submitted did not materially affect the criteria and reasoning" which had resulted in the 1972 decision. This difference of wording presumably was the result of recognizing that Dr. Volckmar's report referred to in paragraph VII above did contain some new evidence of deterioration in the Applicant's eye condition as a result of heart trouble. Nevertheless the ABCC in 1976 mainly relied on the 1972 decision not to reopen the case. Therefore, in the Tribunal's view, the Secretary-General's decision of 30 June 1976 based on the ABCC's recommendation of 29 June 1976 suffered from the same infirmity as the decision of 1972.

XI. For the reasons stated in paragraph V above, the Applicant's first plea that the heart disease which he contracted in Pakistan in 1959 resulted in his total disability is rejected.

As to the Applicant's second plea, the Respondent has submitted in his answer that "the decision to be made by the Tribunal with respect to the second plea of the Applicant is whether the rejection by the ABCC in 1972 . . . of the information [placed before it] amounted to an unreasonable and arbitrary decision so as to invalidate its recommendations to the Secretary-General and his decision in 1972 not to reopen the case." In view of the finding in paragraph IX above that the ABCC's refusal in 1972 to accept the medical evidence was unreasonable and arbitrary, the Tribunal decides that the approval of the ABCC's recommendation by the Secretary-General on 8 December 1972 should be, and is hereby, rescinded and that the Secretary-General's decision of 30 June 1976, based on the ABCC's recommendation of 29 June 1976 which relies on the ABCC's recommendation of 1972, should also be, and is hereby, rescinded.

XII. As a consequence, the case should be remanded for fresh consideration by the ABCC. But considering that the Applicant's claim has been pending for a long period of time, the difficulty of resurrecting evidence about his health condition prior to 1972 and the Respondent's own suggestion in his answer that if the Tribunal "should order rescission of the Secretary-General's decision then any compensation ordered in lieu of further action should be stated as a lump sum", the Tribunal considers that award of a lump sum compensation would constitute an adequate and appropriate remedy. The Tribunal proceeds accordingly to fix the amount of compensation to be paid to the Applicant.

Article 9 of the Statute of the Tribunal requires that the Tribunal shall fix the amount of compensation to be paid to the Applicant "for the injury sustained". The Applicant has suffered a service-incurred illness for nearly 20 years and his contention that his condition has worsened with advancing years has not received due attention. Obviously his earning capacity has been reduced throughout this period. Considering all these factors and taking note of the Applicant's annual net base salary of 9,250

dollars, the Tribunal orders the Respondent to pay the Applicant indemnity in the amount of 10,000 dollars without prejudice to the Applicant's entitlement to the compensation payments which he is receiving under the Secretary-General's decision of 10 February 1961.

XIII. In view of the Tribunal's decision in paragraph XII above, the Applicant's third plea is denied.

(Signatures)

R. VENKATARAMAN
President

Suzanne BASTID
Vice-President
Geneva, 19 April 1977

Roger STEVENS
Member

Jean HARDY
Executive Secretary

Judgement No. 219

(Original: French)

Case No. 212:
Pochonet

Against: The Secretary-General
of the United Nations

Termination of the employment of a staff member holding a permanent appointment on the ground of unsatisfactory service.

Request for rescission of the decision to terminate the Applicant's appointment.—Circumstances in which that decision was taken.—Prior judgements of the Tribunal relating to the termination of permanent contracts on the occasion of the five-year review.—Contention of the Applicant that the contested decision was based on a tardy appraisal of the value of his services.—Examination of the Applicant's periodic reports.—Conclusion of the Tribunal that the complaints about the Applicant cannot be linked to the presence of a new Chief of Section.—Decisive importance of the latest periodic reports for the purposes of the five-year review.—The fact that the Applicant was awarded his salary increments does not show that the Respondent recognized that the performance and conduct of the Applicant were satisfactory until that time.—Allegation of prejudice based on the fact that the appointments of six other members of the Section were terminated at the same time as that of the Applicant.—Legal status of those staff members.—Allegation of prejudice rejected.—Complaints concerning the circumstances in which the Appointment and Promotion Committee submitted its recommendation concerning the Applicant.—Inapplicability of Administrative Instruction ST/AI/222 and Staff Rule 104.14 (f) (ii) (C).—Fact that the proposal for termination was submitted at a time when the last periodic report prepared in connexion with the five-year review had not yet been brought to the attention of the Applicant.—General character of the rebuttal of that periodic report by the Applicant.—Specific and relevant character of the rebuttal of the previous periodic report, which was included in the Applicant's file.—Circumstances in which the investigations to which those rebuttals gave rise were carried out.—The procedure followed was not irregular.—The failure to draw up a special report in connexion with the withholding of the salary increment cannot be held to have affected the value of the information submitted to the Appointment and Promotion Committee.—Conclusion of the Tribunal that it has not been shown that the Committee's consideration of the unfavourable appraisals of the Applicant took place in circumstances likely to affect the validity of the conclusion reached by the Committee.—Rejection of the request for rescission of the decision terminating the Applicant's employment.

Application rejected.
