United Nations AT/DEC/1197

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1197

Case No. 1125 : MERON
No. 1253 : MERON

Against : The Secretary General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Ms. Brigitte Stern, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Jacqueline R. Scott;

Whereas, on 23 January 1998, Raya Meron, a former staff member of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), filed an Application requesting the Tribunal, inter alia, to order production of her complete medical file; the convening of a Medical Board; expedition of her claims before the Advisory Board on Compensation Claims (ABCC); and, to award her compensation. In respect of this Application, the Tribunal rendered Judgement No. 918, dated 23 July 1999, rejecting the Application in its entirety.

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing another application with the Tribunal until 30 June 1999 and periodically thereafter until 31 March 2000;

Whereas, on 29 February 2000, the Applicant filed an Application in the "first case" containing pleas which read, in part, as follows:

"Section II: PLEAS

7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

…

(c) *to decide* to hold oral proceedings …;

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *to rescind* the decision of the Secretary-General rejecting the Applicant's claims before the [ABCC] which were based upon the unanimous recommendation of a duly constituted Medical Board;

(b) *to find and rule* that the [ABCC] erred as a matter of law and equity in finding that the [Applicant] suffers from a forty-two (42) percent permanent loss of function of the whole person and recommending that she be awarded compensation in the amount of $26,202.86;

(c) *to find and rule* that the [ABCC] erred as a matter of law and equity in finding that the [Applicant] did not qualify for disability compensation for loss of earning capacity under article 11 of Appendix D;

(d) *to find and rule* that the [ABCC] erred as a matter of law and equity in rejecting the [Applicant's] request for reimbursement of insurance premiums and interest;

(e) *to find and rule* that the [ABCC] erred as a matter of law and equity in failing to consider paragraph 4 of the Medical Board Report dated 15 August 1998, in which the three Medical Board members unanimously recommended 100% coverage of Applicant's future medical and dental care;

(f) *to award* the Applicant appropriate compensation for 50% permanent loss of function, representing the annual amount of pensionable remuneration at grade P-4/V as of 1998, based on Geneva salary scales;

(g) *to award* the Applicant annual compensation for total disability in the amount equal to two thirds of her final pensionable remuneration for the duration of her disability;

(h) *to award* the Applicant the sum of CHF 61,467.00 to cover the cost of past and future insurance premiums in order to ensure her continued medical and dental care;

(i) *to award* additional and appropriate compensation for the violation of the Applicant's rights and the stress caused by the unreasonable delays of the Respondent in processing the Applicant's claims for reimbursement of medical expenses;

(j) *to award* interest on all those payments …;

(k) *to fix* pursuant to Article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;

(l) *to award* the Applicant as cost, the sum of $10,000.00 in legal fees and $10,000.00 in expenses and disbursements."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer in the "first case" until 31 August 2000 and periodically thereafter until 31 July 2001;

Whereas, on 18 September 2001, at the request of the Respondent, the President of the Tribunal suspended the time-limit for the filing of a Respondent's answer in the "first case";

Whereas, on 19 December 2001, the Applicant amended her pleas in the "first case" by deleting pleas 8 (b) and (f);

Whereas the Respondent filed his Answer in the "first case" on 27 February 2002;

Whereas, on 16 March 2002, the Applicant filed an Application in the "second case" containing pleas which read, in part, as follows:

> "II: PLEAS
>
> 7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:
>
> …
>
> (d) *to decide* to hold oral proceedings ...
>
> 8. On the merits, the Applicant respectfully requests the Tribunal:
>
> (a) *to rescind* the decisions of the Respondent refusing the reimbursement of the Applicant's medical bills;
>
> (b) *to order* that the Applicant's disputed medical bills be reimbursed and that bills for future medical treatments be covered under Appendix D and reimbursed promptly;
>
> (c) *to order* that in the event the Respondent refuses to certify the Applicant's outstanding medical and dental bills from 1998 to date consequential to Applicant's original injury, a Medical Board be constituted immediately to make decision on Applicant's present and future long-term care;
>
> (d) *to award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;
>
> (e) *to fix* … the amount of compensation to be paid in lieu of specific performance at three year's net base pay in view of the special circumstances of the case;
>
> (f) *to award* the Applicant as cost, the sum of $500.00 in expenses and disbursements."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer in the "second case" until 31 August 2002 and periodically thereafter until 15 January 2003;

Whereas the Respondent filed his Answer in the "second case" on 15 January 2003;

Whereas the Applicant filed Written Observations in the "first case" on 31 March 2003;

Whereas the Applicant filed Written Observations in the "second case" on 1 September 2003;

Whereas, on 29 September 2003, the Tribunal, at the request of the Applicant, decided to postpone both cases until its summer 2004 session;

Whereas, on 24 June 2004, the Tribunal decided not to hold oral proceedings in either case;

Whereas, on 14 July 2004, the Tribunal posed a question to the Respondent, who responded on 19 July 2004;

Whereas, on 23 July 2004, the Tribunal posed another question to the Respondent, who responded the same day;

Whereas the facts of both cases, additional to the facts outlined in Judgement No. 918, are as follows:

On 16 June 1997, a Medical Board was convened to consider the Applicant's case. Thereafter, on 21 November, the ABCC recommended, inter alia, that the Applicant's outstanding medical and dental expenses be reimbursed but that the question of whether she had sustained any permanent loss of function be remanded to the Medical Board and the issue of whether she was eligible for compensation under article 11.1 (c) or 11.2 (d) of Appendix D to the Staff Rules be deferred until after the Medical Board had submitted its report on permanent loss of function. The Secretary-General subsequently agreed with these recommendations.

Accordingly, on 16 June 1998, another Medical Board was convened. In its report of 15 August, the Board reported, inter alia, that the Applicant was permanently disabled from working as of 16 September 1998 and that the Organization would be responsible for treatment related to the whiplash injury she had sustained. It specified:

> "4. All future treatments required by the patient's current condition must be covered, that is:
>
> (a) Various consultations (generalists, rheumatologists, orthopaedists, ORL) and the treatments prescribed by them;
>
> (b) Physiotherapy/osteopathy treatments;
>
> (c) Laboratory tests and X-rays;
>
> (d) Dental treatment and dental surgery;

(e) Other treatments, such as, e.g., special pain management programmes."

The percentage of permanent disability suffered by the Applicant was to be calculated by Professor Hoffmeyer, one of the members of the Medical Board, in accordance with the text "Guides to the evaluation of permanent impairment, 4th Edition, 1994". On 3 July, Professor Hoffmeyer reported that the Applicant suffered permanent partial disability of 50%.

On 29 October 1998, the ABCC recommended that the Applicant be awarded "compensation in the amount of US$ 26,202.86, equivalent to a forty-two (42) per cent permanent loss of function of the whole person, under article 11.3 of Appendix D to the Staff Rules", and that she be reimbursed for train fares and for hotel accommodation during spa treatment she had undertaken. It found that she did "not qualify for compensation for loss of earning capacity under article 11.2(d) of Appendix D for partial disability", having

> "tak[en] into consideration the fact that compensation for partial disability for loss of earning capacity under article 11.2 (d) is granted up to the date on which a claimant reaches the normal age of retirement in the United Nations; that the claimant retired from the United Nations at age 62; that she was aware when she joined the United Nations that she would have to retire at age 62; and that the United Nations does not have an obligation to compensate beyond that point".

In addition, the ABCC denied the Applicant's request for reimbursement of insurance premiums and interest "as there is no provision for such compensation under Appendix D to the Staff Rules". On 3 November, the Secretary-General accepted these recommendations of the ABCC.

On 30 November 1999, the Medical Services Division, New York (MSD), which had previously asked the Applicant to submit medical reports in support of her requests for reimbursement of certain treatments that it did not consider standard medical treatment for whiplash, wrote to the ABCC recommending as follows:

> "a) Visits to [the Applicant's personal physician's] office can be reimbursed at the frequency of one visit per month.
>
> b) Visits to the [Ear, Nose and Throat] specialist … can be reimbursed at the frequency of one visit per year.
>
> c) The conditions for which [the Applicant's personal physician] states he is treating [the Applicant] 'stress related liver and pancreas disorders' are not described in any medical literature. Therefore, not surprisingly, the prescriptions for 'trace elements, special fortifying vitamins and homeopathic

> remedy', are not described as standard in the medical literature. Hence, we cannot recommend any of these prescriptions as being related to the whiplash injury she suffered years ago while serving in Cambodia.
>
> d) With regard to the bills from the dentist … kindly request a report of the care given to the patient."

On 22 December 1999, the Secretary of the ABCC wrote to the Compensation Claims Unit, Geneva, outlining which of the expenses submitted by the Applicant had been certified by the MSD, and authorizing reimbursement thereof. She further instructed the Compensation Claims Unit to reimburse remaining expenses in accordance with the guidelines established by the MSD in its memorandum of 30 November.

On 2 February 2000, the Applicant informed the Medical Director, MSD, that the expenses approved for reimbursement had been submitted eighteen months earlier. She stated, inter alia, that the criteria outlined in the 22 December 1999 memorandum "overturn[ed] the decisions and recommendations" of the Medical Boards and the ABCC, and requested that "the Medical Service agree to an annual treatment programme, including prescriptions, as recommended in the Medical Board report of 15 August 1998", under the supervision of the Joint Medical Service, Geneva (JMS).

On 29 February 2000, the Applicant filed the above-referenced Application in the "first case" with the Tribunal.

In May 2000, the Medical Director delegated the review and approval of the Applicant's medical and dental expenses to the JMS. This decision was subsequently supported by the ABCC, which noted that the guidelines recommended by the MSD on 30 November 1999 should be followed, and that the MSD and the JMS should "work together to establish any other guidelines that may be required".

On 6 November 2000, the Applicant was advised that medical and dental bills submitted without proof of payment would not be considered for reimbursement.

On 8 February 2001, the Applicant's counsel and her personal physician met with a Medical Officer, JMS. According to a letter to the Officer-in-Charge of the Compensation Claims Unit, dated 10 April and signed by all three parties, the doctors agreed that the Medical Board report of 15 August 1998 provided the basis for an annual treatment plan and that any modification the Applicant's personal physician considered necessary would be brought to the attention of the Medical Officer. They also agreed that the Medical Officer would clear bills for treatment arising from the Applicant's service-incurred injuries that fell within the framework of that report.

On 31 May 2001, the Compensation Claims Unit advised the Applicant that invoices certified by the JMS would be reimbursed once she had provided proof of payment. The Applicant was also informed that, pursuant to the recommendation of the JMS, all invoices that had been previously rejected by the ABCC remained rejected. On 12 July, the Applicant requested that another Medical Board be convened to review the decisions to deny reimbursement of certain medical expenses and to limit her ongoing treatment.

On 4 September 2001, the Office of Legal Affairs advised the ABCC that the compensation payable to the Applicant for loss of function had been erroneously calculated, as it was premised upon the Cambodia salary scale, where the Applicant was on mission, rather than the salary scale applicable in Geneva, her duty station. The Applicant had received substantially less compensation than that to which she was entitled. Thereafter, the ABCC issued a revised recommendation awarding the Applicant additional compensation for loss of function of US$ 73,988.42, which amount was paid with four per cent interest.

On 13 September 2001, the Medical Officer advised the Compensation Claims Unit that he had reviewed a report of a Neurology specialist, which declared that the Applicant required three physiotherapy sessions per week. He stated that he could not accept this report, as it did not appear to be based on a physical examination of the Applicant. In February 2002, the Applicant was informed that only one physiotherapy session per week would be reimbursed for the period 2 July to 15 November 2001. The JMS subsequently approved an additional weekly physiotherapy session under the long-term functional rehabilitation treatment program of the Staff Mutual Insurance Society Against Sickness and Accident, which provides for reimbursement of 80% of approved expenses.

On 15 February 2002, the Applicant sent the JMS a list of claims dating back to 1998, categorized by medical expenses which had been denied as well as those yet to be submitted for certification.

On 16 March 2002, the Applicant filed the above-referenced Application in the "second case" with the Tribunal.

On 20 May 2002, the ABCC recommended that the Applicant's request for the convening of another Medical Board be denied, "as the report of the Medical Board of 15 August 1998 remain[ed] valid". It recommended that that report be

> "interpreted as covering the reimbursement of those medical expenses which have been determined by [the JMS] as meeting the following criteria: (a) they

> are directly related to the [Applicant]'s service-incurred injury (whiplash) of 17 May 1992; and (b) they are standard medical treatment for that condition".

It further recommended that reimbursement for medical expenses certified by the JMS should be made only upon receipt of "standard documentation, e.g. properly prepared invoices and proof of payment". On 30 May 2002, the Controller approved these recommendations on behalf of the Secretary-General, and the Applicant was advised accordingly.

Whereas the Applicant's principal contentions in the "first case" are:

1. The Applicant is entitled to an appropriate award for loss of function and permanent total disability in keeping with the provisions of Appendix D to the Staff Rules. The Applicant should be compensated for loss of earning capacity after retirement.

2. The Applicant is entitled to compensation to cover the cost of her medical and dental insurance premiums.

3. The Applicant should be paid interest on medical and dental bills for which the Respondent delayed reimbursement.

4. The Applicant should be compensated for denial of due process and delays on the part of the Respondent.

Whereas the Applicant's principal contentions in the "second case" are:

1. The Applicant is entitled to the reconvening of her Medical Board to consider outstanding medical expenses and to determine her long-term care.

2. The Applicant is entitled to reimbursement of all outstanding and future medical expenses which relate to her service-incurred injury.

3. The Applicant is entitled to compensation for the undue delay in reimbursing her expenses and for the stress she has suffered.

4. The Applicant's rights of due process were violated by the Respondent, and she was subjected to discrimination and harassment.

Whereas the Respondent's principal contentions in the "first case" are:

1. The Organization has no obligation to compensate a staff member for loss of earning capacity beyond the normal age of retirement.

2. The Applicant has suffered no financial loss, and any compensation for loss of earning capacity would be offset, by up to 90 per cent, against a corresponding award under the Pension Fund regulations.

3. The Respondent's decisions with respect to the Applicant's disability and medical expenses are in accordance with the rules of the Organization.

4. The matter of delay is *res judicata*, having been addressed by the Tribunal in Judgement No. 918, and no unreasonable delay occurred thereafter.

Whereas the Respondent's principal contentions in the "second case" are:

1. The Applicant's rights have not been violated by the decision of the Respondent not to reimburse part of her medical expenses.

2. The Applicant's rights have not been violated by the decision of the Respondent not to reconvene another Medical Board.

3. The Applicant's rights of due process have not been violated.

The Tribunal, having deliberated from 24 June to 23 July 2004, in Geneva, now pronounces the following Judgement:

I. The Tribunal is once again seized of the Applicant's disputes with the Administration concerning the financial consequences resulting from a car accident which she suffered on 17 May 1992 during a mission to Cambodia. The Tribunal, having considered the two Applications submitted by the Applicant, decided that it was preferable to consider them together since they both involve the same sequence of events. The Tribunal is convinced that, in so doing, it will have a better overview of the issues and that this cannot adversely affect the Applicant's rights and interests.

II. A first judgement (No. 918) was already rendered in this case on 23 July 1999. There were two questions before the Tribunal. The first was whether the Applicant had been improperly denied access to her medical file. The second was whether the Respondent had unduly delayed in convening a Medical Board. On the first question the Tribunal, while noting that the delay attributable to the Respondent had undoubtedly been a cause of disappointment and dissatisfaction to the Applicant, was not convinced that the delay had been serious enough, or that its consequences had been prejudicial enough, to justify awarding compensation to the Applicant, since she had finally obtained full access to her medical file. On the second question, the Tribunal was convinced that the Applicant herself had contributed to the delay in

submitting her requests to the Medical Board because she had not produced certain medical reports predating the accident that the Director of the Medical Service had asked her to produce, and because compensation would be justified only if the delay was so serious as to be tantamount to denial of due process rights, which was not the case. The Application was therefore rejected in its entirety.

III. On 29 February 2000 the Applicant filed a new Application (No. 1125) asking that she be awarded a total disability pension in accordance with Appendix D and compensation for the cost of her insurance premiums, and "to award additional and appropriate compensation for the violation of the Applicant's rights and the stress caused by the unreasonable delays of the Respondent in processing the Applicant's claims for reimbursement of medical expenses", in addition to interest on the sums awarded and reimbursement of legal costs. The Tribunal notes that Appendix D is a rather complex document which contains provisions on the payment of compensation in case of sickness, accident or death attributable to the performance of official duties in the service of the United Nations. The articles relevant to this case are mainly articles 11.1, 11.2 and 11.3. Article 11.1 governs the consequences of total disability and article 11.2 those of partial disability, while article 11.3 concerns the methods of calculating the lump sum granted to a staff member who suffers an accident in the service of the United Nations, if such accident causes permanent disfiguration or permanent loss of a limb or function. On 16 March 2002, the Applicant submitted another Application (No. 1253), in which she complains of the refusal to reimburse a number of medical and dental invoices resulting from her accident, and requests the Tribunal to order the convening of a Medical Board to review her pleas for reimbursement. The Application also contains a plea for damages and interest for moral injury, for, according to the Applicant, "medical care delayed is medical care denied", and for reimbursement of expenses, along with a plea for "compensation to be paid in lieu of specific performance at three years net base pay in view of the special circumstances of the case".

IV. The Tribunal will begin by reviewing very briefly the various stages of the proceeding. A first Advisory Board on Compensation Claims (hereinafter referred to as the ABCC) meeting on 25 May 1994, recognized that the accident had been suffered in the service of the Organization, "and that therefore all medical expenses, including those dental expenses, certified by the Medical Director as reasonable and directly related to the injury may be reimbursed". At the same time, under article 18 of

Appendix D, the Applicant was credited with sick leave days equal to the number of days between 1 March 1993 and 31 July 1993. The ABCC report makes it clear that the authority for determining which medical expenses are reasonable and directly related to the accident is the Director of the Medical Service. The latter, accordingly, made a selection from among the requests submitted by the Applicant, agreeing to reimburse certain invoices and refusing to reimburse others. The Applicant made numerous requests to the Organization for the convening of a Medical Board to review the question of the unpaid invoices. The Administration ultimately acceded to her request and a Medical Board was convened to consider all the rejected invoices from 1992 to 1996, as well as the question of the Applicant's sick leave from October 1995 to 31 July 1997, the date on which she retired. This Medical Board (hereinafter referred to as the 1997 MB) met on 16 June 1997 and its report was submitted to the ABCC, which made the following recommendations on 21 November 1997:

> "... (ii) reimbursement be made for the outstanding medical and dental expenses as recommended by the Chairman of the Medical Board; (iii) sick leave be approved for the period from October 1995 to July 1997; … (v) the issues of whether the claimant is eligible for any compensation under article 11.1 (c) or 11.2 (d) of Appendix D to the Staff Rules be deferred until after the Medical Board has submitted its report regarding permanent loss of function".

It was therefore necessary to convene a new Medical Board to give its opinion on any loss of function and disability that the Applicant might have suffered. On 16 June 1998 a new Medical Board (hereinafter referred to as the 1998 MB) issued its report, which states as follows:

> "1. The patient suffers from a whiplash injury resulting from the accident she had while on mission for UNHCR in Cambodia (17 May 1992).
>
> 2. All forms of care, various treatments (physiotherapy, regimen), laboratory tests and X-rays, as well as dental treatments, that have been administered to the patient up to now result from this condition.
>
> 3. The patient was placed on total (100 per cent) work stoppage on 16 September 1996 because of the symptoms resulting from the whiplash injury and has been totally disabled from working since that date.
>
> 4. All future treatments required by the patient's current condition must be covered, that is:
>
> (a) Various consultations (generalists, rheumatologists, orthopaedists, ORL) and the treatments prescribed by them;
>
> (b) Physiotherapy/osteopathy treatments;

(c) Laboratory tests and X-rays;

(d) Dental treatment and dental surgery;

(e) Other treatments, such as, e.g., special pain management programmes.

5. Since 16 September 1998 the patient has been totally and permanently disabled from working (for life).

6. The question of calculation of the percentage of permanent partial disability will be handled by Professor Hoffmeyer, who will follow the guidelines laid down in the 'Guides to the evaluation of permanent impairment, 4th edition, 1994'. The members of the Medical Board defer to the expert in respect of calculation of the percentage and can only share the specialist's opinion."

Less than one month later, on 3 July 1998, Prof. Hoffmeyer issued an expert opinion in the Applicant's case, concluding that she suffered from a 50 per cent partial permanent disability. The 1998 MB report was also submitted to the ABCC, which adopted an opinion on 29 October 1998 that is the starting-point for the Applicant's various pleas in this case. In its opinion the ABCC recommended:

– That the Applicant should receive lump-sum compensation corresponding to 42 per cent loss of function, in accordance with article 11.3;

– That the Applicant should not be regarded as entitled to compensation for loss of salary owing to recognized partial disability, in accordance with article 11.2;

– That the Applicant should be reimbursed for certain travel and accommodation expenses relating to a regimen which she had followed;

– That the insurance premiums for which the Applicant claimed reimbursement should not be reimbursed, as that was not provided for in Appendix D.

The Secretary-General followed these recommendations and it is therefore his decision of 3 November 1998 that the Applicant now contests. In particular, she requests the Tribunal "to award the Applicant annual compensation for total disability in the amount equal to two thirds of her final pensionable remuneration for the duration of her disability", in other words, the application of article 11.1 of Appendix D.

V. The Tribunal will briefly review the question of the lump-sum compensation for loss of function that should be awarded to the Applicant. Article 11.3 of Appendix D states that

> "In the case of injury or illness resulting in permanent disfigurement or permanent loss of a member or function, there shall be paid to the staff member a lump sum, the amount of which shall be determined by the Secretary-General on the basis of the schedule ... The payment of lump-sum compensation ... shall be made in addition to any other compensation payable under article 11 ..."

In her Application the Applicant requested the Tribunal to state that the ABCC had erred in awarding her only a 42 per cent loss of function and asked that she be recognized as having a 50 per cent loss of function. On 3 October 2001, the ABCC recommended that the amount of compensation due to the Applicant under article 11.3 (c) of Appendix D should be corrected and that, instead of being calculated on the basis of the Cambodian salary, it should be calculated on the basis of the Geneva salary. The Secretary-General approved this recommendation. After the initial compensation paid to her had been recalculated accordingly on the basis of the Geneva salary scale and not the Cambodian one, as had been done initially, and 4 per cent interest on the difference had been awarded to her, the Applicant withdrew these pleas and the Tribunal therefore no longer needs to take them into account. While the Applicant withdrew some of her pleas, she maintained the plea for compensation in accordance with article 11.1 of Appendix D, and claimed compensation to cover the cost of her insurance premiums.

VI. Accordingly, the Tribunal must first rule on whether the Applicant is entitled to a disability pension in accordance with Appendix D and, if so, whether what is at stake is a partial or a total disability pension. It may be recalled that the Applicant requested a total disability pension in July 1996. As indicated, the Applicant subsequently filed the present Application following the decision of the ABCC dated 29 October 1998. In that decision the ABCC considered that the Applicant was not entitled to compensation for partial disability in accordance with article 11.2 of Appendix D as such compensation was, in its view, awarded only until the Applicant reached retirement age, the United Nations having no obligation to compensate her beyond that age.

VII. Accordingly, the various questions before the Tribunal are as follows: first, was the ABCC correct in recognizing only partial disability and not total disability, in view of the reports of the physicians and the Medical Boards; second, was the ABCC correct in refusing compensation for partial disability solely on the ground of the Applicant's retirement?

VIII. On the question of whether the Applicant should be entitled to compensation for partial or for total disability, the Tribunal first points out the scope of its powers, as spelled out recently in the *Dillett* case:

> "The Tribunal is well aware that the Medical Board issues a report, which may include recommendations, and the ABCC takes that report into account along with other advice and recommendations. Thereafter the ABCC makes its own recommendations to the Secretary-General, for final decision.
>
> The Tribunal, having no medical competence, will not seek to substitute its subjective judgement for the judgement of the administrative bodies charged with making medical decisions. The Tribunal, however, can determine whether sufficient evidence exists to support the conclusions reached by those administrative bodies. If sufficient evidence does not exist, the Tribunal is obligated to set aside any decision made by such decision makers." (Judgement No 1162 (2004).)

In other words, the Tribunal considers that in view of all the reports of the Medical Boards and of the ABCC, it falls within its competence, even though it has no medical competence, to determine whether the correct legal conclusions were drawn from the medical assessments, which it is not for the Tribunal to question.

IX. In order to proceed with this analysis, the Tribunal wishes to note a number of elements in the file that are relevant to a solution of the dispute. First, in the medical report drawn up by UNHCR to determine whether the accident was indeed an accident suffered in the service of the Organization — drafted on 21 April 1993, or about a year after the accident — the physician answers "yes" to the question "Do you foresee any invalidity?". Subsequently, the report of the Medical Board of 16 June 1998 states clearly that "the patient is *totally* and permanently disabled from working (for life)". It seems at first glance that here is a clear and unambiguous recognition of a total disability by a Medical Board qualified to assess this question and competent to do so. It is true, however, that a certain ambiguity is created by the following paragraph of the report of the Medical Board, stating that the Board defers to Prof. Hoffmeyer in respect of "the question of calculation of the percentage of permanent *partial* impairment". Another point needs to be clarified: the Medical Board states that this total permanent disability to work dates from 16 September 1998, yet the opinion was issued on 16 June 1998, hence prior to that date. In view of the context, the Tribunal considers that this should read "16 September 1996", inasmuch as it is stressed in the same report that "the patient was placed on total (100 per cent) work stoppage on 16 September 1996". In the view of the Tribunal, therefore, the 1998 MB report is partially

contradictory, in that references are made to both a total and a partial disability as from 16 September 1996. It may be recalled that on 3 July 1998, Prof. Hoffmeyer concluded that the Applicant suffered from a 50 per cent permanent partial disability. The Director of the Medical Service also stated, in a letter dated 3 September 1998 addressed to the ABCC, that "(t)his case would quality for partial disability under Appendix D". The ABCC also agreed, on 29 October 1998, that a partial disability existed, as did the Secretary-General, who endorsed that decision on 3 November 1998. The Tribunal wishes to recall here that both the Medical Board and the Advisory Board on Compensation Claims only make recommendations which are not binding on the Secretary-General. The scope of the powers of the various bodies participating in medical decisions when it comes to determining the existence of a partial or a total disability was fully clarified by the International Labour Organization Administrative Tribunal as regards the respective powers of the Director-General of the United Nations Industrial Development Organization, the Medical Board and the Advisory Board on Compensation Claims in Judgement No. 1637 (*In re* Fahmy (No. 3) (1997), para. 11):

> "The Director-General decided on 2 April 1996 to endorse the Board's recommendation and reject the appeal, thereby confirming the position he had held to from the outset. The material issue is whether that decision is lawful. He was bound neither by the medical board's conclusions nor by the position of the Advisory Board — which had made no recommendation at all — and had broad discretion in the matter. Not but what he was of course bound to bear all the material evidence in mind and not to draw clearly wrong conclusions from it."

The Tribunal considers that in the light of the contradictory drafting of the report of the 1998 Medical Board, the decision of Prof. Hoffmeyer, which the Medical Board endorsed in advance, and the acceptance by the ABCC and the Secretary-General of the existence of a 50 per cent partial disability, there are sufficient elements in the record for the Tribunal not to censure this decision.

X. The Tribunal will next seek to determine whether the ABCC was entitled to invoke the Applicant's retirement in refusing compensation for partial disability, as provided by article 11.2, which stipulates that:

> "(d) Where, upon the separation of a staff member from United Nations service, it is determined that he is partially disabled as a result of the injury or illness in a manner which adversely affects his earning capacity, he shall be entitled to receive such proportion of the annual compensation provided for under

> article 11.1 (c) as corresponds with the degree of the staff member's disability, assessed on the basis of medical evidence and in relation to loss of earning capacity in his normal occupation or an equivalent occupation appropriate to his qualifications and experience."

It should be noted that the compensation provided by article 11.1 (c) is an annual pension equal to two thirds of the staff member's final pensionable remuneration.

The grounds for refusal given by the ABCC were not the absence of a partial disability, which, on the contrary, is recognized in the recommendation of the ABCC, since it states that its decision is "based on the reports of the Medical Board and on the report of the Medical Director that the claimant has sustained a partial disability under Appendix D"; the refusal of compensation is explained by

> "the fact that compensation for partial disability for loss of earning capacity under article 11.2 (d) is granted up to the date on which a claimant reaches the normal age of retirement in the United Nations, that the claimant retired from the United Nations at the age of 62, and that the United Nations does not have an obligation to compensate beyond that age".

The Tribunal notes that what is at issue here is a stated policy of the Organization, but it is necessary to verify whether that policy is in conformity with the texts governing the rights of employees of the Organization.

This policy was spelled out by the ABCC in a letter dated 19 July 2004, pursuant to a request for explanation submitted by the Tribunal, as follows:

> "Compensation awarded under article 11.2 (d) for loss of earning capacity is sometimes awarded for a short period of time, if the claimant is expected to recover sufficiently to resume working. In cases where the claimant cannot return to work, the Board awards compensation up to the normal age of retirement, i.e. either up to age 60 or 62, depending on the claimant's entry on duty date. *In the past, such compensation awards were paid up to the claimant's death, or for as long as the disability existed, as in the case of compensation awarded under article 11.1 (c)*. In recent years, however, the Board has decided that the Organization does not have an obligation to award compensation for the loss of earnings beyond the normal age of retirement and it has applied this interpretation of article 11.2 (d) uniformly. The claimant is advised as to when the benefit will terminate, and this date is included in the Secretary-General's decision" (Tribunal's emphasis).

XI. It is therefore necessary to inquire, first, whether this new policy is in conformity with the rules laid down in article 11.2, but secondly, even if the Tribunal arrives at an affirmative answer, it is still necessary to consider whether this change adversely affected an acquired right of the Applicant as provided for in the relevant texts. In

order to answer these questions, it is appropriate to begin by analysing the relevant paragraph of article 11.2. In interpreting this text, the Tribunal will be guided by the rules of interpretation set forth in the Vienna Convention on the Law of Treaties, which are considered to reflect the general principles of interpretation and which it has already used a number of times. Accordingly, article 31 provides as follows:

> "Article 31. General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose ...
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended."

Accordingly, in Judgement No. 942, *Merani* (1999), the Tribunal stated:

> "In interpreting the text we will give words their 'natural and ordinary meaning'. (Cf. Judgement No. 852, *Balogun*, (1977).) This follows general international practice, which refers to interpretation according to the 'ordinary meaning' of the terms 'in their context and in the light of [their] object and purpose' unless the parties intended to give the word a special meaning. *(Vienna Convention on the Law of Treaties*, Articles 31.1 & 31.4)."

XII. If it starts from a textual analysis based on the ordinary meaning of the words, the Tribunal cannot help noting that nothing in the text of article 11.2 (d) explicitly rules out compensation beyond the age of retirement. What the text says is that compensation is granted "where, upon the separation of a staff member from United Nations service, it is determined that he is partially disabled as a result of the injury or illness in a manner which adversely affects his earning capacity". Accordingly, the term "separation from service" must be interpreted to determine whether it excludes retirement. The Tribunal notes that, in examining the Staff Regulations, chapter IX is entitled "Separation from service". This chapter sets forth the various types of separation from service, e.g., dismissal (art. 9.1), resignation (art. 9.2) and retirement (art. 9.5). Similarly, in the Human Resources Handbook, the rules governing retirement are set forth under the title "Separation from service on retirement", which confirms that retirement is one of the modalities of separation from service. A textual analysis tends, therefore, to interpret article 11.2 (d) as applying also in the case of retirement. The Tribunal notes, too, that there is a certain contradiction in awarding compensation in the form of an annual pension equal to two thirds of final pensionable remuneration in case of total disability, for life, and not awarding compensation in the form of an annual pension equal to a percentage (itself equal to the recognized percentage of

disability) of two thirds of the final pensionable remuneration in case of partial disability, also for life. Indeed, the Administration does not dispute that in case of compensation for total disability, such compensation is paid up to the death of the person concerned; in fact, at the Tribunal's request, the ABCC, in the aforementioned letter of 19 July 2004, spelled out the manner in which articles 11.1 and 11.2 were interpreted:

> "Article 11.1 (c) of Appendix D provides for compensation in cases of injury or illness that have resulted in a disability which has been determined by the Secretary-General to be total. Compensation awarded in such cases *is payable for as long as the total disability exists*. While compensation is *usually payable for the life of the claimant* as he/she is most likely also receiving a disability benefit under the United Nations Joint Staff Pension Fund, the Medical Service may periodically request him/her to undergo a medical examination in order to confirm that he/she is still totally disabled" (Tribunal's emphasis).

Another very important element in the debate is, of course, the fact that in the past the Organization itself interpreted this text as giving rise to an entitlement to compensation for life. In the letter referred to above, the ABCC stated what its current interpretation of article 11.2 is and what the past interpretation was, as noted in paragraph X of this Judgement.

XIII. The Tribunal wishes, however, to extend the analysis by considering also the object and purpose of the provisions of article 11.2. Upon reading the article, it appears that the pension is intended to compensate for the loss of earning capacity resulting from partial disability. It is undeniable, however, that even if some persons work beyond the retirement age established by the Organization, such earning capacity often ends well before they reach the end of their lives. It is rare, but not impossible, for a 90-year-old, for example, to continue working and earning a living. It may therefore appear that the new policy stated by the Organization also falls within a reasonable interpretation of article 11.2. The Tribunal also wishes to refer here to the jurisprudence of the International Labour Organization Administrative Tribunal, which dealt with a similar problem in *In re* Grasshoff (Nos. 1 and 2), Judgement No. 402 (1980). In that case, the Applicant had had a service-incurred accident while working for the World Health Organization (WHO), and had been awarded compensation for a 30 per cent permanent partial disability. This compensation ceased to be paid to him upon his retirement, with WHO declaring, just as in the present case, that it had no obligation for loss of earning capacity towards an official who had retired. The

Applicant then requested the organization to continue to pay him such compensation for his loss of earning capacity for five years following his retirement, which had occurred when he was 60 years of age. The Tribunal ordered that sum to be paid to him until the age of 65, based on the following reasoning:

> "It is quite usual for persons of pensionable age to seek further employment and there is no reason why a loss of earning capacity should not apply to that. The complainant has produced detailed calculations which as such have not been criticised" (para. 12).

The situation may of course be slightly different from a factual standpoint, for at WHO, an extension to age 65 is possible even if it is at the discretion of the Director-General, but the Tribunal was less interested in the solution adopted than in the reasoning underlying it.

Taking all these considerations into account, the Tribunal concludes that Appendix D, which dates from 1966, is unclear and that the competent authorities should delineate the rights of staff members of the Organization in case of total or partial disability suffered as a result of an accident attributable to their service with the Organization. It further notes that, in view of the different interpretations made over time by the Administration, it does not seem that any one of them is manifestly erroneous, and it therefore agrees that both the old and the new policy may be regarded as reasonable interpretations of article 11.2 of Appendix D.

XIV. It is still necessary to inquire, however, whether this change in policy, which the Tribunal does not censure in and of itself, adversely affected an acquired right of the Applicant. In order to answer this question, it is necessary to determine at what point the Applicant's right to compensation for partial disability arose and at what point the Organization's policy was changed. As to the first point, there seems to be no difficulty in stating that the Applicant was recognized as having suffered a 50 per cent partial disability on 16 September 1996, hence prior to the date on which she retired. It remains to be determined, therefore, what the Organization's interpretation of article 11.2 (d) was at that point, for a change after that date cannot adversely affect what in September 1996 was a right of the Applicant, as the Tribunal has had occasion to note:

> "No amendment of the regulations may affect the benefits and advantages accruing to the staff member for services rendered before the entry into force of the amendment. Hence, no amendment may have an adverse retroactive effect in relation to a staff member" (Judgement No. 82, *Puvrez* (1961)).

The information gathered by the Tribunal from the ABCC indicates that the policy changed in 1997 and that as from that date, those who had a pension as a result of a partial disability kept it until their death, pursuant to a kind of "grandfather clause", whereas staff members who requested such a pension as a result of an accident suffered in the service of the Organization were granted it with the proviso that it would be paid only until they retired. The policy having changed after the recognition of a staff member's partial disability, the Tribunal considers that the Applicant had an acquired right to the application of the old policy in force at the time that her permanent partial disability was determined and that, accordingly, she could not, in 1998, be refused the compensation provided without it being limited by her retirement.

XV. Having reached the conclusion that the Applicant is entitled to the annual pension provided for her partial disability, it is still necessary to determine how various provisions should be combined. Some of these provisions relate to the retirement pension paid under the Regulations of the United Nations Joint Staff Pension Fund, while others relate to an accident or illness suffered in the service of the Organization, under Appendix D. According to the Respondent, the Applicant should not be entitled to combine different pensions in an abusive manner, as stated in the Respondent's Answer:

> "The Respondent submits ... that a staff member who has reached the mandatory age of separation and is in receipt of a retirement benefit is not entitled to an additional payment of compensation for loss of earning capacity under Appendix D. If the Tribunal were to hold otherwise, this would result in an anomaly whereby benefits to such a staff member would be duplicated through the payment of both the Appendix D award and the retirement benefit under the UNJSPF Regulations. In fact, when staff members are separated from service on grounds of incapacity for further service and become entitled to a disability benefit under article 33 of the UNJSPF Regulations, such a benefit is off-set against any award of compensation for loss of earning capacity under Article 11.2 (d)."

Article 4 of Appendix D entitled "Relation to benefits under the United Nations Joint Staff Pension Board" provides that compensation awarded under Appendix D is intended to *supplement* benefits awarded under the Regulations of the Joint Staff Pension Fund.

Article 4.1 requires that the amount of all benefits paid under the Regulations of the Joint Staff Pension Fund that have become "payable as a result of the same death,

injury or illness which gave rise to the entitlement to compensation under these rules" shall be deducted from any compensation payable under articles 10.2, 11.1 (c) and 11.2 (d) of Appendix D, provided that the deductions made shall not have the effect of reducing the compensation to less than 10 per cent thereof. This article refers clearly to benefits payable under article 33 of the Regulations of the Joint Staff Pension Fund, which permits a staff member to be awarded a *disability pension* when the Joint Staff Pension Board finds him to be "incapacitated for further service in a member organization reasonably compatible with his or her abilities, due to injury or illness constituting an impairment to health which is likely to be permanent or of long duration". This is not, of course, limited to injuries occurring while on mission for the Organization. But as the article in question makes it clear that the deduction refers only to cases in which the disability pension is paid for the same accident as the one giving rise to a benefit under article 11.2, the *regular pension* which the Applicant receives should not, in the Tribunal's view, be affected. Of course, such a situation is fairly unusual; the Applicant was kept on sick leave until retirement age and did not have her contract terminated on the basis of her inability to work. Accordingly, she receives a regular pension and not a disability pension under article 33 of the Regulations of the Joint Staff Pension Fund, which should have been the case under the applicable texts. In view of the extremely clear language used in article 4.1 of Appendix D, which does not cover this particular case, the Tribunal therefore has no other choice, under the circumstances of the case, than to reject the Respondent's interpretation whereby the pension paid under article 11.2 (d) must be deducted from the regular pension received by the Applicant. Accordingly, there is no need to make the deduction claimed by the Respondent.

XVI. The claim for reimbursement of the insurance premiums for which the Applicant states that she has contracted can be rejected quickly, as no provision of Appendix D provides for such reimbursement.

XVII. With regard to the question of medical and dental invoices, it should be recalled first of all that article 11.2 of Appendix D stipulates that:

> "In the case of injury or illness resulting in disability which is determined by the Secretary-General to be partial: (a) The United Nations shall pay all reasonable medical, hospital and directly related costs, whether or not the staff member remains in the employment of the United Nations".

The Tribunal takes note, first of all, of the fact that all of the invoices up to April 1998 were paid, shortly before the Tribunal considered the Applicant's Case No. 998. The issue before the Tribunal, therefore, relates to the invoices outstanding since 1998. On 12 July 2001 the Applicant requested the ABCC to reconvene a Medical Board to consider the question of the refusal by the Director of the United Nations Medical Service to reimburse a large number of medical and dental invoices, as well as the question of the limitation by the ABCC of future reimbursable treatments. Instead of convening a new Medical Board, the Administration informed the Applicant on 28 February 2002 that the Medical Service had agreed to reimburse only 20 treatments out of a total of 48. Following a new and fruitless request for the convening of a Medical Board, the Applicant appealed to the Tribunal to order such a meeting. According to the Applicant,

> "the Applicant's rights under Appendix D to the Staff Rules have been violated in two respects. In the first instance, the decisions of the ABCC which authorized the reimbursement of medical and dental expenses, based on the clear recommendation of the two Medical Boards, have not been carried out in good faith, thereby jeopardizing the Applicant's continued treatment and causing her unnecessary anxiety and stress. In the second instance, the Medical Director refuses to reconvene the Medical Board which the Applicant requested on 12 July 2001 in order to reconsider her future long-term care and the outstanding medical and dental expenses from 1998 to date."

The Tribunal also notes that on 2 July 1999, the Applicant's physician sent a number of reports requested by the Medical Service, adding that he hoped that

> "with the aid of this highly interesting literature, the Medical Service will finally be able to reimburse my patient for the medical expenses that she has borne on her own up to now, that in the future the procedure will be less cumbersome and more worthy of an institution wishing to save the time and energy of the staff it is supposed to help!"

In its meeting held on 23 February 2001, the ABCC "endorsed the delegation of authority to the Joint Medical Services vis-à-vis the review and the reimbursement of the claimant's medical and dental expenses". Furthermore, on 8 February 2001, a JMS physician (Dr. B.) and the patient's physician (Dr. D.), as well as her counsel, met to try to settle the question of the invoices and appropriate treatment for the future and recorded the results of their meeting in a memorandum dated 10 April 2001, in which they stated their agreement on the following points:

> "1. The Medical Board Report of 15 August 1998 is the basis for the annual treatment plan. Any modification thought necessary by [the Applicant's personal physician] will be brought to the attention of [the Medical Officer, JMS].
>
> 2. [The Medical Officer, JMS] will clear all bills for treatments arising from [the Applicant's] service-incurred injuries, which are within the framework of the Medical Board Report, which constitutes the basis or the annual treatment plan.
>
> 3. In exceptional circumstances additional information will be requested of and submitted by the treating medical personnel/officials, as in the case of the number of required physiotherapy sessions, to provide [the Medical Officer, JMS,] with the necessary information to assist him in arriving at his decision."

The Tribunal recalls that the basis for the Applicant's compensation is the report of the 1998 Medical Board, which is extremely inclusive and provides for very broad reimbursement of all invoices relating to the treatments that the patient requires:

> "All future treatments required by the patient's current condition must be covered, that is:
>
> (a) Various consultations (generalists, rheumatologists, orthopaedists, ORL) and the treatments prescribed by them;
>
> (b) Physiotherapy/osteopathy treatments;
>
> (c) Laboratory tests and X-rays;
>
> (d) Dental treatment and dental surgery;
>
> (e) Other treatments, such as, e.g., special pain management programmes."

In the Tribunal's view, the margin of discretion left to the Organization's physician is very limited. It is not for the Tribunal to settle such questions as whether the patient's condition requires one or three physiotherapy sessions per week, but the Tribunal wishes to state that it is inclined to share the Applicant's analysis whereby the decisions to deny reimbursement do not constitute implementation in good faith of the Medical Board's recommendations. It seems, therefore, that there is a certain impasse in this case, since despite a decision of the 1998 Medical Board granting a right to reimbursement of a wide range of treatments, despite the memorandum of agreement of April 2002, the JMS physician continues to deny the treatments prescribed by the Applicant's physician. The patient's counsel wrote to the Medical Director on 15 February 2002, highlighting this disagreement between physicians:

> "I visited [the Organization's physician] on November 2001 to discuss the delays in payments for Ms. Meron's medical treatment. He has a fundamental

> disagreement with the treating physician's course of treatment. We agreed that this impasse is best solved by a new Medical Board."

It appears, moreover, from other documents and in particular from the recording of the meeting held on 8 February 2001 that what is at issue is not so much a disagreement between physicians, but a difference between the physicians — who seem to agree that the treatments should be reimbursed, even if they seem to recognize that the Applicant may be engaging in overconsumption of medical treatments — and the Administration, which finds the outstanding payments disproportionate.

The Tribunal therefore considers that in order to overcome this impasse, a Medical Board should be convened to establish even clearer guidelines, taking into account both the patient's real needs and her tendency, noted by the physicians, to have excessive recourse to treatment. Thus, the JMS Medical Officer stated during the meeting on 8 February that

> "there are circumstances in which people overconsume, overconsume, overconsume because they are so panicky that they need to reassure themselves with lots of things, which don't reassure them, you know that as well as I do, but they have to consume medicine".

In addition to establishing guidelines for the reimbursement of outstanding past invoices, the Medical Board should also see to it that a relatively clear treatment protocol is prescribed for the future, making sure, once again, that it is reasonable. On this basis, the Tribunal requests the Director of the Medical Service to examine the disputed invoices one by one, in good faith.

XVIII. Lastly, there is the question of the delays with which this case was, if not settled, then at least considered. In the view of the Tribunal, it is unacceptable that the consequences of an accident which occurred in 1992 should not have been resolved 12 years later. The Tribunal notes, too, that the first Medical Board, which dealt with the question of the invoices, did not meet until five years after the accident, and that the Medical Board which dealt with compensation under article 11 of Appendix D did not meet until six years after the accident. In the view of the Tribunal, such delays warrant compensation.

In the light of the foregoing, the Tribunal:

1. Orders that the Applicant be awarded an annual pension equal to 50 per cent of two thirds of her final pensionable remuneration;

2. Orders that a Medical Board be convened within three months from the date on which the Administration is notified of this Judgement to review the question of the outstanding invoices;

3. Awards a sum of $10,000 as compensation for the anxiety caused by the unreasonable delays in the handling of the Applicant's case;

4. Rejects all other pleas.

(*Signatures*)

Brigitte **Stern**
Vice-President, presiding

Spyridon **Flogaitis**
Member

Jacqueline R. **Scott**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Secretary