



ADMINISTRATIVE TRIBUNAL

Judgement No. 1393

Case No. 1459

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Dayendra Sena Wijewardane, Vice-President, presiding; Ms. Brigitte Stern;
Mr. Goh Joon Seng;

Whereas, on 26 July 2005, a former staff member of the United Nations, filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 27 January 2006, after making the necessary corrections, the Applicant filed an Application containing pleas which read, in part, as follows:

“II: **PLEAS**

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

...

(c) *to decide* to hold oral proceedings ...

On the merits, the Applicant respectfully requests the Tribunal:

(a) *to rescind* the decision of the Secretary-General denying compensation under article 11.1 (c) of Appendix D to the Staff Rules;

(b) *to find* that the Advisory Board on Compensation Claims [(ABCC)] erred in its decision to deny a claim for total disability by basing its decision on incomplete medical information and an inappropriate interpretation of the report of the prior Medical Board;

- (c) *to find* that the ... Medical Service unreasonably impeded the constitution of a Medical Board under article 17 of Appendix D to consider and report on the medical aspects of the Applicant's appeal;
- (d) *to order* that the Applicant be awarded compensation for total permanent disability based upon the medical evidence or alternatively, that consistent with the provisions of article 17 of Appendix D, a Medical Board be constituted within 30 days of the issuance of the Tribunal's decision to consider and report to the ABCC on the medical aspects of [her] appeal;
- (e) *to award* the Applicant appropriate and adequate compensation ...;
- (f) *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; [and]
- (g) *to award* the Applicant as cost, the sum of US\$ 10,000.00 in legal fees and US\$ 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 until 1 July 2006, and once thereafter until 1 August;

Whereas the Respondent filed his Answer on 1 August 2006;

Whereas on 10 January 2007, the Applicant filed Written Observations and an additional communication;

Whereas on 24 June 2008, the Respondent commented on the Applicant's Observations; and the Applicant's commented thereon on 25 June.

Whereas, on 26 June 2008, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts of the case are as follows:

The Applicant entered the service of the United Nations on 28 January 1970, on a three-month fixed-term appointment as an Associate Librarian at the P-2 level. Her contract was extended and, on 1 April 1974, she was granted a permanent appointment. The Applicant served in a number of positions and was promoted to the P-4 level. On 15 November 1999, her service with the Organization was terminated for reasons of health.

On 22 December 1985, the Applicant suffered injuries to her neck and back in an automobile accident while commuting to work. Her case was considered by the ABCC at its 301st meeting on 12 March 1986 and, in its report dated 27 March, her injuries were recognized as attributable to the performance of her duties and, therefore, compensable under Appendix D. The ABCC deferred consideration of an award under article 11.3 of Appendix D, however, pending further medical evaluation of her condition. This recommendation was approved by the Secretary-General on 3 April. In subsequent years, the Applicant spent several extended periods on sick leave and the ABCC considered various claims in connection with her injuries. On 8 November 1999, she applied to the ABCC for compensation for total

disability under article 11.1 of Appendix D and requested that a medical board be convened to consider the medical aspects of her case.

On 14 January 2000, the Assistant Secretary-General for Human Resources Management informed the Applicant that, upon a recommendation of the Medical Director, the United Nations Joint Staff Pension Committee had agreed to award her a disability benefit under article 33 of the Regulations of the Joint Staff Pension Fund. The Pension Committee had concurred that the Applicant's medical conditions - namely chronic neck pain due to a whiplash accident, chronic lower back pain, hypertension, depression and anxiety, and chronic right wrist pain - rendered her incapable of further service. Accordingly, the Applicant was advised that the Organization had terminated her permanent appointment with effect from 15 November 1999.

At its 400th meeting on 13 October 2000, the ABCC considered the Applicant's claim for compensation for total disability. On 26 October, the Board recommended that the Medical Director's determination that the Applicant had suffered partial, not total, disability be approved and that a medical board be convened under article of 17 of Appendix D to determine the degree of her partial disability. The Secretary-General accepted this recommendation on 31 October and a Medical Board was subsequently convened. In its report dated 8 June 2001, the Medical Board concluded:

“[The Applicant's] disabilities cannot be determined to be total at this time ... More aggressive treatment interventions need to be undertaken. Specifically, the patient should consult a quality chronic pain center ... to be considered for a multi-modal course of treatment. At such time in the future, following a suitable series of treatment interventions, this Medical Board should reconvene having received the clinical progress reports of such treatments and then make a more informed final determination.”

Thereafter, on 22 October, the ABCC recommended that “in accordance with the determination of the Medical Board ..., the claimant should consult a quality chronic pain center to be considered for a multi-modal course of treatment”. The Secretary-General endorsed this recommendation on 24 October.

It proved impossible for the Medical Board to reconvene to consider the Applicant's case, however, as, following the resignation of one of the members, no agreement could be reached as to his replacement on the Board. The ABCC, finding it “extremely unlikely that the Medical Board could be reconvened”, discussed the Applicant's case at its 422nd meeting on 4 March 2005. In its report dated 23 March, which was approved on behalf of the Secretary-General on 9 May, the ABCC recommended

“that, as the claimant had not been able to continue with the medical treatment that had been recommended by the Medical Board and that, despite the good-faith efforts of the Organization to reconvene the Medical Board, no agreement had been reached with the claimant's representative on the Medical Board; therefore, on the basis of the available medical documentation ..., as the claimant has sustained a partial, not total, disability ..., the request for compensation under article 11.1 (c) of Appendix D should be denied”.

On 27 January 2006, the Applicant appealed the 9 May 2005 decision to the Tribunal.

Whereas the Applicant's principal contentions are:

1. The ABCC erred in its decision to deny a claim for total disability.
2. The Medical Service unreasonably impeded the constitution of a Medical Board.
3. The Applicant suffered consequential and moral damages as a result of the Respondent's actions or lack thereof.
4. The Applicant's rights of due process were violated.

Whereas the Respondent's principal contentions are:

1. The Medical Director or an officer designated by the Medical Director may propose a candidate to serve as Chairperson of the Medical Board.
2. The Respondent made good faith efforts to convene a Medical Board but was frustrated by lack of cooperation from the Applicant's nominee.
3. There was no undue delay by the Administration in handling the case.
4. The allegations of bias in the Administration's handling of the Applicant's case are groundless.

The Tribunal, having deliberated from 26 June to 25 July 2008, now pronounces the following Judgement:

I. The Applicant entered the service of the Organization on 28 January 1970, on an initial fixed-term appointment of three months as an Associate Librarian at the P-2 level. She was subsequently granted a permanent appointment. After a series of promotions and reassignments, on 15 November 1999, the Applicant's service with the Organization was terminated due to health issues.

On 22 December 1985, the Applicant suffered injuries to her neck and back in an automobile accident. The ABCC considered her case in 1986 and recognized the Applicant's injuries as service-incurred and, consequently, compensable under Appendix D. Nonetheless, the ABCC deferred consideration of an award under article 11.3 of Appendix D until further medical evaluation of the Applicant's condition could be made. In subsequent years, the Applicant was on sick leave for several extended periods and the ABCC considered her various claims.

On 8 November 1999, the Applicant submitted a claim for compensation for total disability. The ABCC considered her claim on 26 October 2000, recommending that she be considered partially disabled and that a medical board be convened in order to assess the degree of disability. On 8 June 2001, the Medical Board reported that the Applicant was not totally disabled and recommended further treatment before a final determination on her condition could be made.

Thereafter, the chairperson of the Medical Board declared himself unable to continue his membership. This left the remaining members - the Applicant's representative and the representative appointed by the Medical Director - the task of selecting the Medical Board's third member.

Unfortunately, the Medical Board was unable to be reconvened due to disagreement between the remaining Board members and the Medical Service Division (MSD) regarding the proposal and selection of the third member. After almost four years without a reconvened Medical Board, the ABCC decided to proceed with its final evaluation of the Applicant's claim for total disability. On 23 March 2005, the ABCC issued a recommendation wherein it concluded that the Applicant had sustained a partial disability and that her request for compensation under article 11.1 (c) of Appendix D for total disability should be denied. On 9 May, the Secretary-General accepted this recommendation.

II. On 27 January 2006, the Applicant submitted an Application to the Tribunal, challenging the 9 May 2005 decision to deny her claim for compensation under article 11.1 (c) of Appendix D. The Applicant contends that she should have been awarded compensation for total disability. She also claims that the MSD unreasonably impeded the constitution of the Medical Board and usurped authority over its composition in violation of article 17 (b) of Appendix D.

III. The Tribunal notes that there are three central issues involved in the present Application: (1) the interpretation of article 17 (b) of Appendix D in relation to the selection of the third member of the Medical Board; (2) the authority of the ABCC to proceed with a recommendation on the Applicant's claim without the reconstituted Medical Board's report; and, (3) the Applicant's claim of bias on the part of the MSD.

IV. With respect to the first issue, it turns on the construction of article 17 (b) of Appendix D. Article 17 reads as follows:

“(a) Reconsideration of the determination by the Secretary-General of the existence of an injury or illness attributable to the performance of official duties, or of the type and degree of disability may be requested within thirty days of notice of the decision; provided, however, that in exceptional circumstances the Secretary-General may accept for consideration a request made at a later date.

The request for reconsideration shall be accompanied by the name of the medical practitioner chosen by the staff member to represent him on the medical board provided for under paragraph (b).

(b) A medical board shall be convened to consider and to report to the [ABCC] on the medical aspects of the appeal. The medical board shall consist of: (i) a qualified medical practitioner selected by the [Applicant]; (ii) the Medical Director of the United Nations or a medical practitioner selected by him; (iii) a third qualified medical practitioner who shall be selected by the first two, and who shall not be a medical officer of the United Nations.”

The Tribunal is mindful that the Applicant's representative and the Medical Director's representative were willing and able to continue their service on the Medical Board when they initially made their recommendation on 8 June 2001, to reconvene the Medical Board in order to further consider the Applicant's claim for total disability. However, around 30 April 2003, the third member - the chairperson - of the Medical Board informed the Senior Medical Officer that he was no longer able to serve

on the Board. Accordingly, the third member of the Medical Board had to be replaced. Therein lay the impasse. The Senior Medical Officer insisted that as the original third member had been proposed by the Applicant's representative, the MSD had the right to put forward the replacement member. She proposed two doctors, one of whom proved unavailable to serve. The representatives of both the Applicant and the Medical Director on the Medical Board agreed on another doctor, who was willing to serve, but the Senior Medical Officer refused their selection without any explanation. The Tribunal notes that the impasse could not be breached even with the intervention of the Chairperson of the ABCC.

On the issue of competence or standing of the Senior Medical Officer to restrict the selection of the third member of the Medical Board, the Tribunal disagrees with the Respondent. The text of article 17 (b) of Appendix D is quite clear that the Applicant's representative and the Medical Director's representative are to select the Medical Board's third member. The Tribunal notes that the MSD appointee acts in its stead and that any limitation by the MSD on the selection of the third member of the Medical Board is to be made exclusively through its appointee on the Medical Board. Accordingly, the Tribunal finds that the MSD was incorrect in its interpretation of article 17 (b).

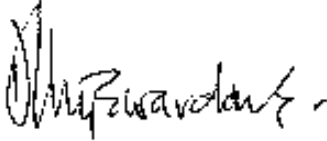
V. The second issue concerns the actions of the ABCC, in proceeding to make a recommendation in the absence of an updated Medical Board opinion. The Tribunal notes that article 16 (c) of Appendix D provides that "[t]he advisory board may decide on such procedures as it may consider necessary for the purpose of discharging its responsibilities under the provision of this article".

While the Tribunal recognizes that it would have been preferable for a Medical Board to have been convened, it is clear from paragraph IV above that a complete impasse had developed. As a result, the ABCC's options were limited to proceeding in the absence of an updated Medical Board opinion or not proceeding at all. Under the circumstances, and in view of the fact that there had been previous Medical Board opinions and that the ABCC had considered the Applicant's claim during some 16 meetings, the Tribunal cannot fault the ABCC for proceeding in this manner. In this regard, the Tribunal notes that the ABCC proceeded on the basis of all available medical documentation, including the most recent report submitted by the Applicant, and is satisfied that the requirements of transparency and due process were thus met. Accordingly, the Tribunal concludes that, given the facts, the lack of a reconstituted Medical Board did not vitiate the ABCC's recommendation, or the Secretary-General's decision thereon, in this case.

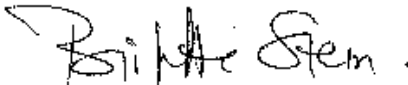
VI. Insofar as the third issue is concerned, the Applicant's claim of bias or improper motive, the Tribunal has consistently held that the *onus probandi* is on the Applicant. (See Judgements No. 639, *Leung-Ki* (1994); No. 784, *Knowles* (1996); No. 870, *Choudhury et al* (1998); No. 1069, *Madarshahi* (2002); and, No. 1180, *Kazeze* (2004).) It considers that the Applicant has not discharged the burden of proving her allegations of prejudice and/or unwarranted skepticism on the part of the MSD in her case. Indeed, on the contrary, in reviewing the history of this case, as set out above, the Tribunal finds the allegations groundless.

VII. In view of the foregoing, the Application is rejected in its entirety.

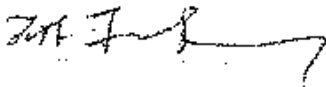
(Signatures)



Dayendra Sena Wijewardane
Vice-President

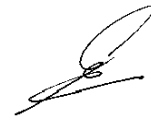


Brigitte Stern
Member



Goh Joon Seng
Member

Geneva, 25 July 2008



Maritza Struyvenberg
Executive Secretary