Before: Judge Coral Shaw

Registry: Geneva

Registrar: René M. Vargas M.

KARSEBOOM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Alister Cumming, ALS/OHRM
Steven Dietrich, ALS/OHRM

Introduction

1. The Applicant, who suffered injuries in two separate incidents, contests the decision of the Secretary-General dated 2 February 2012 to deny his request for compensation on the grounds that he had not sustained any degree of permanent loss of function due to his leg and knee injuries, and that his spinal injury would not be recognised as service incurred. The Applicant filed an application before this Tribunal on 27 April 2012 and submitted an addendum to it on 30 July 2012.

Issues

2. The Tribunal is to consider the following:

   a. Was the contested decision unlawful due to procedural irregularities?

   b. Did the Respondent lawfully determine that the Applicant's spinal injuries were not attributable to the performance of official duties under art. 2 of Appendix D?

   c. Did the Respondent lawfully determine that the Applicant's leg and knee injuries did not result in permanent loss of function under art. 11.3 of Appendix D?

   d. Remedies (if applicable).

Facts

3. The following are the parties' agreed material facts supplemented by evidence given by the Applicant and three other witnesses at the oral hearing.

4. In November 2005, the Applicant was appointed as Regional Security Officer at the FS 4, step 10 level, in Kananga, Democratic Republic of Congo ("DRC"), at the United Nations Organization Mission in DRC ("MONUC").

5. While on leave in Spain, on 14 April 2006, the Applicant had a bicycle accident and suffered an injury to his lower back diagnosed as *lytic spondylolisthesis*. He received medical treatment in Spain in April 2006 from a traumatologist, Dr. Perez Francisco, and spent approximately three months recovering. Following medical clearance, he returned to full normal duty in Kananga at MONUC on 11 September 2006 with advice to wear a back brace. He did not have any further medical checks.

6. The Applicant told the Tribunal that his normal duties included oversight of the security at the airport, and of that of United Nations ("UN") staff members and properties.

7. In October 2006, he attended an MP5 shooting and yearly pistol requalification course in Kinshasa as part of his official duties. While attending this course, his car was attacked on 12 October 2006 and in the ensuing events he fell through a grille covering a gutter up to his left leg hip. He suffered severe injuries to his left leg and did not return to his duties again.

8. The Applicant told the Tribunal that after the accident, his knee was very swollen and his whole left leg went black. He was in considerable pain. He received first treatment from the local UN medical services in Kinshasa for injuries to his left leg and left knee. During this time he received daily painkiller injections.

9. The Applicant also said that although he started suffering from back pain a few days after that accident, he had reservations about the treatment he was receiving, and he was fearful to raise this with the treating physician at the UN.

10. A sonography of his damaged leg taken in Kinshasa revealed a massive hematoma with a rupture of the lateral ligament in the Applicant's left knee. It was decided that his condition required more extensive treatment than could be provided by the UN in Kinshasa. He was medically evacuated to Spain for treatment on 9 November 2006.

11. The Applicant immediately visited a private hospital in Tenerife, where he received some treatment for his knee; however, restrictions on his medical insurance meant that he could not afford immediate treatment for his back, including X-rays or Magnetic Resonance Imaging ("MRI") at that hospital. He was referred to the public health system where, on 13 November 2006, he was treated once again by Dr. Perez Francisco who prescribed X-rays of the Applicant's back.

12. The X-rays were taken on 18 December 2006. The results were inconclusive so the Applicant was referred urgently for an MRI. The MRI report dated 26 January 2007, stated as a diagnosis "Grade 1 *spondylolisthesis* at L5-S1 with *bilateral spondylolysis* at L5 and seriously compromised intervertebral foramen, primarily on the right side".[1]

13. Dr. Perez Francisco received the results of the MRI in March 2007 and diagnosed persisting low back pain secondary to the Applicant's established *lytic spondylolisthesis*. He informed the Applicant that his vertebrae required surgical repair and placed him on a waiting list for surgery. The Applicant's medical records at that time did not refer to the cause of the injury.

14. On 15 September 2007, the Applicant submitted a claim for compensation under Appendix D to the Staff Rules. Under "extent of the injury/illness" on the compensation claims form, the Applicant stated "loss of sensibility to leg (left), hematoma from hip to foot, ligaments, fractured vertebrae which was found out later".

15. The Applicant had surgery on his lower back on 4 March 2008 and again on 6 August 2008. On 11 September 2008, he was informed by Van Breda International, his healthcare insurance provider, that the UN had cancelled his coverage. On the same day, he was informed by MONUC that he had been separated from his post.

[1] Translation by the English Translation Section, United Nations Office at Geneva, from the original in Spanish that reads: "Espondilolistesis grado I L5-S1 condicionada por espondilólisis bilateral de vertebra L5, con marcada afectación de agujeros de conjunción de predominio derecho".

16. On 19 September 2008, the Applicant contacted MONUC to request information about his separation entitlements. HR, MONUC, sent the Applicant the forms to finalize his separation from MONUC on 6 October 2008; he submitted them on 28 October 2008.

17. On 12 January 2009, HR, MONUC, informed the Applicant that he had been separated from the Organization for "abandonment of post" effective 30 September 2007, and that his last working day was marked as 11 October 2006. The Applicant took issue with this description and engaged in a long series of emails in an attempt to resolve the situation. He was later retroactively reinstated from 1 October 2007 and his date of separation was revised to 20 April 2011.

18. On 13 January 2009, the OIC, HR, MONUC, sent the Applicant's compensation claim to an Officer at the Compensation Claims, Field Personnel Division ("FPD"). The Applicant had emphasized in several emails his desperate and urgent need for compensation and that due to his disability, it was very difficult for him to gather and transmit all necessary documents. On 9 February 2009, the Applicant's compensation claim was finally sent to the Secretary of the Advisory Board on Compensation Claims ("ABCC"), over a year after his initial claim.

19. Nine months later, on 14 September 2009, the ABCC Secretary requested the Director, MSD, to advise the ABCC, *inter alia*, whether the Applicant's injury could be considered to be directly related to the accident that occurred on 12 October 2006. In a handwritten note dated 28 September 2009, Dr. P., the representative of the Medical Director, MSD, stated, "[left] leg [and] [left] knee injury only. Spine injury precedes the accident of 12 Oct 06 (had a "sport accident" while at home in Tenerife, Canary Islands, Spain, in April 2006)".

20. Following its 447th meeting on 12 October 2009, the ABCC recommended on 23 November 2009, *inter alia*:

a. That the Applicant's injuries to his left leg and left knee were attributable to the performance of official duties on behalf of the United Nations, and that all reasonable medical expenses certified by the Medical Director as directly related to those injuries alone could be reimbursed under Appendix D to the Staff Rules;

b. That the Applicant should be granted special sick leave credit for the period from 12 October 2006 to 30 September 2007 (when he was separated from service), as being directly related to the service-incurred injuries, under the provisions of art. 18(a) of Appendix D, and that he should be credited for any days of annual leave that he was erroneously charged during that period in order to remain on full pay status; and

c. That the Applicant should receive compensation under art. 11.2(d) of Appendix D for the loss of earning capacity for the period from 1 October 2007 to 4 August 2008, using as basis for compensation the salary that he was receiving when he separated from service on 30 September 2007.

21. On behalf of the Secretary-General, the Controller approved the ABCC recommendation on 15 December 2009.

22. On 18 January 2010, the Applicant's legal representative wrote to the Department of Field Support ("DFS"), the ABCC, the United Nations Joint Staff Pension Fund ("UNJSPF") and MONUC, advising that the Applicant wished to "pursue and/or update all claims … available to him". This included a request for a disability benefit under art. 33 of the UNJSPF Regulations.

23. On 10 February 2010, pursuant to the ABCC recommendation of 23 November 2009, the Applicant was awarded USD43,064.13 as compensation for loss of earning (for injuries to his leg) and USD865,67 as reimbursement of medical expenses.

24. In a memorandum addressed to the Chief, Offices at Headquarters with Field Activities Section, Office of Human Resources Management ("OHRM") of 14 April 2010, the Deputy Director, MSD, recommended the Applicant for a disability benefit and requested OHRM to forward a request to the Secretary of the Pension Board.

25. On 22 September 2010, the Applicant submitted an addendum to his legal representative's 18 January 2010 communication asking that the injuries to his back, resulting from the events of 12 October 2006, be recognized as service incurred and consequently compensated.

26. To this addendum, the Applicant attached a report by Dr. Francisco Sosa, dated 5 August 2010, which described the Applicant's medical status and his severe incapacity as a result of the injury to his back. It included the Applicant's account of his injuries as follows:

> 21-6-2006 Persistent and incapacitating lower back pain that radiates to the lower extremities, treatment anti-inflammatory, lumbar orthotics full time, relative rest ... released with recommendation to return to work on 23-8-2006.
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> …
>
> 12-10-2006 Reference to work-related accident in Africa, which makes reappear his lumbar symptomatology with aggravation of his lesion (spondylolisthesis) and appearance of instability of the lumbar spine with bi-foraminal stenosis, his traumatologist recommends surgery.

Disability claim

27. In early March 2011, MSD requested Dr. Roberto Perez Pestana, an occupational medicine and work incapacity specialist in Spain, to conduct an independent evaluation of the Applicant in connection with his request for a disability benefit that was being considered by the United Nations Staff Pension Committee under the UNJSPF Regulations.

28. Dr. Pestana was asked to carry out a functional evaluation of the Applicant's left knee in connection with his claim for permanent loss of function under Appendix D and to answer the following questions:

> 1. If, on 4th of August 2008, [the Applicant] was incapacitated from [a] medical point of view and what was the exactly medical condition for that disability on that date.
>
> 2. Left knee functional evaluation and to determine if the maximum recovery has been reached as much as possible or if any functional improvement could be expected with some of the current or future treatments.
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> 3. Lumbar spine functional evaluation and to determine if the maximum recovery has been reached as much as possible or if any functional improvement could be expected with some of the current or future treatments.

29. Dr. Pestana's report (the Pestana Report), dated 26 March 2011, comprised summaries of the medical information he had been provided with, a report on his physical examination of the Applicant, and detailed answers to the questions asked of him by MSD. He referred to the Applicant's description of the October 2006 accident and his back pain.

30. Dr. Pestana described the Applicant's condition as at 4 August 2008, and evaluated his knee condition. He described his back condition as chronic and irreversible. He did not address the question of causation of the back injury.

31. On 21 April 2011, the UNJSPF advised the Applicant that, after consideration of the new medical evidence submitted and pursuant to art. 33(a) of the UNJSPF Regulations, he was to be awarded a disability benefit.

32. On 17 May 2011, Mr. Demetri Gounaris, Secretary, ABCC, advised the Applicant that on 4 March 2011, the ABCC had recommended that pursuant to art. 18(a) of Appendix D, he be granted special sick leave credit for half days in the period from 1 October 2007 to 4 August 2008, and that the sums awarded under art. 11.2(d) for the same period be recovered from the Applicant.

Compensation claim

33. By memorandum dated 1 June 2011, a Finance Officer of the ABCC Secretariat asked the Director, MSD, for information about the Applicant's 2010 request for reconsideration of his compensation claim, namely "(a) whether the claimant's back injury [could] be considered to be directly related to the accident that occurred on 12 October 2006 and (b) whether the claimant [had] sustained any degree of permanent loss of function of the whole person, under art. 11.3(c) of Appendix D".

34. In response, Dr. P., as the representative of the Medical Director, MSD, returned the memorandum to the ABCC Secretariat with the following handwritten note dated 28 June 2011:

> the back injury [was] related to a [Motor Vehicle Accident] that occurred while [the Applicant] was on vacation in his country of residence, Canary Islands, Spain in April 2006, prior to his accident under Appendix D which occurred in Oct 06. However[,] it is likely that the Oct 06 accident might have aggravated the back injury sustained in April 06. Please present this case again to the Board for decision.

35. On 7 July 2011, the Finance Officer, ABCC, referred Dr. P. to the memorandum of 1 June 2011 and her reply of 28 June 2011, and asked her to advise on the following:

> (a) [a]s the [Applicant] [had] not received any compensation for the left leg and knee injuries that had been considered to be service-incurred … [whether] the [Applicant] ha[d] sustained any permanent loss of function due to his service incurred injuries;
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> and
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> (b) [since from her] reply of 28 June 2011, it appeared that the service-incurred incident might have aggravated [the Applicant's] pre-existing back injury … [whether] any additional [permanent loss of function] [could] be awarded for this aggravation [and] if so, [to] specify the percentage.

36. Dr. P. responded to the ABCC Secretariat on 29 July 2011 in the following terms:

> Dr. [O.] and I have reviewed [the Applicant's] file, including the report of a March 2011 independent evaluation conducted in the context of a claim for disability benefits under the UNJSPF by Dr. Roberto PEREZ PESTANA (copy attached). Based on this review, we have the following reply to your questions:
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> a. The [Applicant] appears to have no permanent loss of function from the leg and knee injury sustained on 12 October 2006;
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> b. Dr. Perez's recent evaluation does not provide any evidence that the injury of 12 October 2006 had any impact on [the Applicant's] chronic back condition.

37. On 13 December 2011, the UNJSPF informed the Applicant of the estimated amount of his disability benefit.

38. On 8 February 2012, the Applicant was advised by the ABCC Secretariat that following its 458th meeting on 14 October 2011, the ABCC had recommended that:

> a. Based on the current medical information, as [he had] not sustained any degree of permanent loss of function due to his leg and knee injuries in accordance with the 6th Edition of the AMA guides to permanent impairment, [his] request for compensation under art. 11.3(c) of Appendix D be denied; and
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> b. [His] request that his spinal injury be recognized as service-incurred be denied.

39. The Controller, on behalf of the Secretary-General, approved the recommendation on 2 February 2012.

Additional oral evidence

40. Dr. Sosa was called by the Applicant to give evidence to the Tribunal. He is a specialist in physical medicine and rehabilitation and an associate professor at the department of Physical medicine and Pharmacology at the University of La Laguna. He wrote the report on the Applicant's medical condition that was submitted with the Applicant's request for reconsideration to the ABCC. He has

been treating the Applicant since 2009. The Tribunal accepts that he is an expert witness in relation to spinal conditions and therefore entitled to give his opinion.

41. Dr. Sosa testified that before his accidents, the Applicant was a 40-year-old man, with no medical history of spinal pathology. After the first accident in April 2006, he was diagnosed with grade 1 *spondylolisthesis* and *neuroforaminal stenosis*, which was probably pre-existing, and he had that condition when he returned to work in August 2006.

42. A grade 1 condition is stable with no displacement with the movement and flexion of the spine. The condition is benign in most cases with a good prognosis for more than 80% of people with that condition. It is treated by strengthening the muscles. The Applicant's prognosis in August 2006 was good. If he had followed his doctor's recommendations to strengthen his muscles, it is probable that there would either be no complications at least until his 60s or that there would be none at all.

43. In Dr. Sosa's opinion, as a result of the second accident, the Applicant's stable injury became unstable. The lesion became worse. Without the high-energy trauma suffered by the Applicant in that accident, it is unreasonable to think that the evolution of his spinal column would have been so serious as to require opiate analgesics and surgery. The change in the Applicant's back injury from stable to unstable was unlikely without the trauma of the second accident.

44. Dr. Sosa did not agree that the worsening of the Applicant's condition was a natural evolution of his pre-existing conditions. In his opinion, the Applicant may not have felt the instability in his spine directly after the second accident, as he was taking analgesics which would have affected his whole body and he would have been resting because of his injured leg. He regarded a period of one to two months after the trauma as a reasonable period for a patient to report the effects.

45. Dr. Michael Rowell gave evidence for the Respondent. He is a Senior Medical Officer in MSD, responsible for the ABCC operations. He did not provide medical advice to the ABCC in relation to the Applicant's claim or examine the Applicant, but for the purposes of the hearing had reviewed the medical advice to the ABBC, the available medical information concerning the Applicant's claim, and his request for reconsideration. He accepted that he is not an expert in spinal injuries.

46. Dr. Rowell testified that although the Pestana Report was primarily produced for consideration of the Applicant's case to UNJSPF for a disability benefit, it was a comprehensive clinical record that could be relied upon to reach conclusions on causation for the compensation claim under Appendix D. Having reviewed the report, Dr. Rowell supported the Secretary-General's decision that the Applicant's spinal injury should not be recognised as service incurred.

47. He was very influenced by the Applicant's pre-existing condition diagnosed in April 2006. He emphasised that although the Applicant was cleared to return to work following evidence of satisfactory improvement, including resolution of his back pain, his injuries from the April accident had resulted in a lengthy period of sick leave and that he returned to work with what Dr. Rowell viewed as significant restrictions. He accepted that the Applicant's second accident could have aggravated his condition, but insisted that if this had occurred, the symptoms would have shown closer to the time of the accident. If the Applicant's symptoms were caused by a mechanical dysfunction at the time of the October trauma, Dr. Rowell would have expected that the symptoms would have shown on the same or the next day.

48. Dr. Rowell further stated that there is no record that the Applicant's back was injured or that any back injury was noticeably exacerbated by the October 2006 accident. The evidence in the Pestana report referred only to the cause of the knee injury, and the Applicant's medical evacuation request did not refer to a back injury. The medical notes made after the Applicant returned to Tenerife indicated that treatment was directed at his knee. In March 2007, the Applicant's treating

physician described persisting lower back pain but made no reference to the October accident being part of the genesis of the condition.

49. In response to a question by the Tribunal, Dr. Rowell said that the evidence before the MSD and the ABCC was that the Applicant's back symptoms first showed up on 18 December 2006, nine weeks after the October accident.

50. Dr. Rowell supported the MSD conclusions that, by August 2008, the Applicant had recuperated from knee injuries sustained in the April accident, and could not find any loss of permanent function from those injuries because any deficiency in his knee was overwhelmed by his non-service incurred spinal condition. The assessment of permanent loss of function remained at 0%.

51. He agreed that Dr. Pestana had not been requested to and did not give his opinion on the cause of the Applicant's spinal injuries after the October accident, but said that it was possible to draw conclusions from the medical evidence referred to by Dr. Pestana. In Dr. Rowell's opinion, that evidence showed that the Applicant's significant spinal injuries were not caused or aggravated by the October accident. The return of his back symptoms was consistent with the natural history of his pre-existing conditions and therefore did not constitute service related injuries.

52. Mr. Gounaris was also called by the Respondent. He described the long-standing practices adopted by the ABCC to decide on appeals against a determination by the Secretary-General on a claim for compensation under art. 17 of Appendix D.

53. The ABCC interpreted art. 17 as providing for two separate procedures: under art. 17(a), it could reconsider a claim upon submission of new evidence by a claimant, without convening a medical board, whereas under art. 17(b), the ABCC could convene a medical board upon the request of the claimant, subject to the ABCC granting that request. As a third, separate avenue of appeal, the ABCC could request an independent medical evaluation ("IME"), at the cost of the Organization. Though this procedure was not referred to in art. 17 or codified in

any administrative issuance, the ABCC applied art. 14 of Appendix D to obtain an IME for the purpose of a reconsideration.

54. Mr. Gounaris told the Tribunal that the drafting of arts. 14 and 17 of Appendix D was "not ideal", but that the ABCC interpretation was reasonable and to the advantage of claimants as the Organization bears the cost of an IME. In contrast, if a medical board upholds the Secretary-General's decision, the claimant is obliged by art. 17(d) to assume certain medical fees and expenses, which may be considerable. For this reason, if a claimant does not request a medical board, the ABCC will not recommend one even if there are medical aspects to an appeal. Instead, it relies on the report of an IME to reconsider the claim and any new material submitted by the claimant. The IME is used in part to settle conflicting medical opinions.

55. He described the process as flexible as to time limits and the content of the claims. There is no specific form for a claimant to use when requesting reconsideration of a decision, but where there is an incomplete claim there is routinely a lot of "back and forth" between the ABCC office and the claimant.

56. Mr. Gounaris said that the Applicant had requested the reconsideration of his claim and submitted a medical report by Dr. Sosa, but had not expressly requested a medical board. The ABCC did not contact the Applicant to clarify his request. A decision was made to request an IME to settle differences between medical opinions about the causation of his serious back condition. Mr. Gounaris accepted that this was a medical question.

Parties' submissions

57. The Applicant's principal contentions are:

a. A delay of two years and five months from the submission of his request for reconsideration under Appendix D to its payment is unreasonable; it was further compounded by administrative errors relating to his separation from service and to his entitlements; the impact these delays had on the Applicant warrant compensation;

b. The evidence supports the conclusion that his spine injury was service-incurred and that MSD opinion with respect to causation was not beyond question;

c. Dr. Sosa's evidence should be preferred to that of Dr. Rowell; the former not only treated him but his evidence with respect to the issue of causation was also balanced and convincing. Dr. Rowell relied on a description of the Applicant's health status upon his return to duty which strongly differs from that of Dr. Sosa; since MSD had cleared his return to duty, the Administration cannot rely on this assertion;

d. Dr. Rowell further relies heavily on the time it took the Applicant to report back pain following his second accident. The evidence supports his statement that he reported the back pain immediately upon his return to Spain;

e. Both Dr. Rowell and Mr. Gounaris confirmed that the issue he requested the ABCC to review in his request for reconsideration—if his spinal injuries were service-incurred, hence the issue of causation—was mostly medical; his request was supported by a medical report by Dr. Sosa addressing these matters;

f. The ABCC failed to act upon the request for review: no independent evaluation of the question whether his spine injury was service-incurred was conducted. Dr. Pestana was not asked and did not review the issue of causation. The ABCC based its decision on the advice provided by Dr. P., who relied on the absence of evidence relating to causation in the Pestana report. The failure to request Dr. Pestana to address the issue of causation and the absence of evidence with respect to causation was manifestly unreasonable;

g. The ABCC did not refer to Dr. Sosa's report which addressed the issue of causation. In view of the medical issues involved, upon receipt of the request for reconsideration, the ABCC should have convened a medical board under art. 17(a); the other review processes applied by the ABCC are unlawful and not provided for under Appendix D; the ABCC did not seek his agreement to use an avenue not provided for in the rules; in any event, the IME did not address the relevant issue of causation.

58. The Respondent's principal contentions are:

a. The Secretary-General has accepted that at the time of the 12 October 2006 accident, the Applicant was performing official duties and, hence, was covered by Appendix D; however, the Applicant did not discharge his burden of proof that the "spinal injuries were attributable to, or a natural incident of, the 12 October 2006 accident" and that he suffered any permanent loss of function under the terms of art. 11.3(c) as required under Appendix D;

b. The ABCC based its recommendation on the advice from the Representative of the MSD, who based her conclusion on the IME contained in the medical report of Dr. Pestana of 26 March 2011; Dr. Pestana was a qualified medical practitioner under art. 13 of Appendix D. The medical evidence was well founded.

c. The Pestana report shows that the Applicant's symptoms of lower back pain appeared only some months after the October 2006 accident. Any exacerbation of this condition would have been manifest immediately after the accident; the MSD concluded that the injuries to the Applicant's spine were a natural progression of the two separate pre-existing conditions affecting his spine: *lytic spondylolisthesis* and *neuroforaminal stenosis.* MSD advised the ABCC that there was no medical evidence that the accident of 12 October 2006 had any impact on these pre-existing conditions;

d. The Tribunal is not competent to review the medical advice provided to the ABCC by the representative of the Medical Director under Appendix D and the judicial review is limited to examine if there were any procedural irregularities, mistakes of fact or of law, or if the decision was arbitrary or otherwise based on extraneous factors;

e. The Applicant relies on the opinion of Dr. Sosa to find that the ABCC decision was medically flawed; Dr. Sosa based his opinion on the history provided by the Applicant and his medical reports, possibly restricted to those from Spain;

f. The MSD/ABCC based their recommendation on all the medical evidence in front of them, and nothing suggests that they took into account extraneous medical information; staff members with a pre-existing medical condition may be declared fit for duty and this is in no contradiction with the determination that the Applicant's spinal injuries resulted from the natural progression of his pre-existing conditions; the principle of estoppel as contended by the Applicant is misconceived in this case;

g. Under art. 17(b) of Appendix D, the Administration is only required to convene a medical board to review a request for reconsideration if there are medical aspects to the appeal, and if the staff member requests the convening of such medical board; the Applicant did not request a medical board, nor did he nominate a practitioner to represent him, as required under art. 17(a);

h. The procedures under Appendix D were respected, both in the initial review of the Applicant's claim and after his request for reconsideration; therefore, the contested decision of 2 February 2012 was not vitiated by any procedural or substantive errors and was lawful;

i. Appendix D does not provide for compensation for risks of injuries; therefore, any "increased risk" of the Applicant's spinal injury as a result of the 12 October 2006 incident is not covered by Appendix D; in any event, the October accident did not increase any risk of spinal injury;

j. There is no separate legal basis for a claim of negligence with respect to a service-incurred injury. The Applicant did not file a request for management evaluation concerning his claim of negligence;

k. In cases of service-incurred injuries, entitlements are limited to those under Appendix D;

l. The Administration did not commit an error on or unduly delayed the review of the Applicant's case; any delay was justified by the fact that the ABCC was awaiting additional information and the advice from MSD on the basis of the Pestana Report. In any case, delay in itself does not give rise to compensation and the Applicant did not suffer any loss as a consequence of the time it took to determine his claim; he has been paid all his entitlements under the Staff Rules and his claim for a disability benefit;

m. The application should be dismissed in its entirety.

Considerations

59. In his application, the Applicant alleged that the Administration breached its duty of care to him and acted with gross negligence. In view of the jurisprudence of the Appeals Tribunal that a claim of gross negligence cannot be included in a claim under Appendix D (*Wamalala* 2013-UNAT-300), Counsel for the Applicant correctly did not pursue these claims at the hearing.

Was the contested decision unlawful due to procedural irregularities?

60. The Tribunal is limited to reviewing the procedures followed to reach a final decision. It is not for the Tribunal to interfere with an expert decision based on well-founded evidence or to substitute its own views for that of the medical service (*Gabaldon* UNDT/2011/132), although in *Frechon* 2011-UNAT-132, the Appeals Tribunal found that, in certain circumstances, the Dispute Tribunal can reconsider a determination of the Medical Director made on the basis of the report of a medical board. The Tribunal may come to a different conclusion on the information available at the time, without substituting its opinion for that of the Medical Director and without exceeding its jurisdiction.

61. The parties to this case disagreed on the interpretation of art. 17 of Appendix D, and the correct procedure to be followed in cases of reconsideration of compensation claims. The Respondent is of the view that in spite of the precise wording of art. 17, it was necessary and appropriate for the ABCC to pursue what was referred to in submissions as a less technical, more practical and flexible procedure to deal with requests for reconsideration. The Applicant relied on the wording of the relevant articles in Appendix D, and submitted that a procedure that does not conform with the article is unlawful unless followed with the agreement of the claimant.

62. Appendix D of the Staff Rules governs compensation for injury attributable to the performance of official duties. The principles and definitions governing the operation of the Rules are in Section II. The following provisions from art. 2 are relevant to this case:

> (a) Compensation shall be awarded in the event of … injury … of a staff member which is attributable to the performance of official duties on behalf of the United Nations …
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> …
>
> (b) Without restricting the generality of paragraph (a) … injury … of a staff member shall be deemed to be attributable to the performance of official duties on behalf of the United Nations … when:
>
> (i) The … injury … resulted as a natural incident of performing official duties on behalf of the United Nations
>
> …

63. Articles 11.1 and 11.2 of Appendix D distinguish between entitlements for total and partial disability. Article 11.3 provides the method for calculating the compensation for such injuries.

64. Section IV of Appendix D covers Administration and procedures for claimants to enter initial claims. Article 13 provides that "the determination of the injury ... and the type and degree of disability shall be made on the basis of reports obtained from a qualified medical practitioner or practitioners". Under art. 14, the Secretary-General can require the medical examination of any claimant, and the claimant is required to furnish such documentary evidence as may be required by the Secretary-General for the purpose of making a determination under the rules.

65. Article 16 establishes an ABCC consisting of representatives of the Administration and three staff representatives with necessary expertise to make recommendations to the Secretary-General concerning compensation claims. The Secretary-General makes the final decision.

66. Appeals against the decision of the Secretary-General are made by a request for reconsideration under art. 17. Article 17(a) states that "[t]he 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)".

67. Article 17(b) states that "[a] medical board shall be convened to consider and to report to the [ABCC] on the medical aspects of the appeal", and provides for the composition of the medical board. According to art. 17(c), "[t]he [ABCC] shall transmit its recommendations together with the report of the medical board to the Secretary-General who shall make the final determination". Costs associated with a successful reconsideration will be met by the Organization, while the claimant bears medical fees and incidental expenses of the medical practitioner he selected and half of the fees and expenses of the third medical practitioner on the medical board if the initial decision is upheld (art. 17(d)).

68. Where an appeal also involves an appeal against a decision of the Pension Board, the report of a medical board established under the Regulations and Rules of the Pension Board shall be utilised to the extent possible for the purposes of art. 17 (art. 17(e)).

69. The Tribunal finds that the wording of this article is quite clear. Article 17 provides for a specific process to determine a request for reconsideration of a claim for compensation. A claimant first requests reconsideration and provides the name of a practitioner to represent him on the medical board. In such a case, it is mandatory to convene a medical board if the appeal touches on medical aspects.

70. The report of the medical board on the medical aspects of the appeal and the ABCC recommendations are sent to the Secretary-General for final determination.

71. Unlike the process for the medical assessment of initial claims in art. 13 of Appendix D, art. 17 does not refer to an evaluation by a medical practitioner selected by the Administration in cases of requests for reconsideration.

72. Art. 17(e) authorises the use of a medical report concerning the appeal of a claimant against a decision of the Joint Staff Pension Board, prepared by a medical board under the Regulations and Rules of the UNJSPF. It does not say that such a report can be used as an alternative to the mandatory medical board. A reasonable interpretation of this article is that a medical board convened for an appeal under art. 17 could use a report prepared for the Joint Staff Pension Board but only to the extent possible.

73. This interpretation accords with the underlying policy of the appeal provisions in Appendix D which creates a distinctly different process for the reconsideration of a decision from that prescribed for the initial claim process. At the heart of this process is an expert medical tripartite board to reconsider the medical aspects of the appeal. This board includes the claimant's medical representative, no doubt to ensure that the claimant's interests are fully represented at that level of decision making.

74. The Tribunal rejects the Respondent's submission that a medical board under art. 17 is only to be convened if a claimant requests it. The article does not say so and that meaning cannot reasonably be inferred. The only requirement for a person appealing a decision under art. 17(a) is to give the name of a medical practitioner to sit on a medical board, the convening of which—in the event of medical aspects arising out of a request for reconsideration—is mandatory. It must be convened whether or not the claimant requests it.

75. The Respondent's witnesses accepted that there were medical aspects to the Applicant's request for reconsideration. In these circumstances, the ABCC had no lawful alternative other than to convene a medical board.

76. The ABCC could have utilised existing reports prepared for a medical board established in connection with an appeal against a decision of the Joint Staff Pension Board; but, in this case, the worksheet of the relevant ABCC meeting refers under "Medical report" to "[t]he medical report used for the review of [the Applicant's] pension disability application". This was the Pestana report, an IME established for the purpose of the Pension Board; it was not prepared for a medical board in the framework of an appeal under the Pension Fund Regulations.

77. When the Applicant submitted a request for reconsideration, he also submitted a medical report by a qualified medical practitioner. The Applicant was not contacted by the ABCC to clarify his request. He was not given the opportunity to provide any further medical information to support his case.

78. He was not advised that the alternative process of using an IME was being undertaken, and what that would entail; he was not asked for his consent to this alternative process that was different from the Appendix D procedure.

79. The Respondent may have been motivated to reach a practical solution of benefit to the Applicant by not placing him in jeopardy of incurring additional medical costs which may have arisen from the medical board, but the procedure followed was in breach of the fundamental rule of administrative law that the parties are bound by the rules of the Organization. Neither party can alter the processes prescribed by the rules unless there is clear agreement by both parties to do so.

80. The practice adopted by the ABCC is in clear contravention of art. 17. The Secretary-General is required by art. 17(c) to make a decision on the request for reconsideration on the basis of the ABCC recommendations together with the report of a medical board. In this case, a medical board was not convened and the decision was made without such a report.

81. The Applicant has demonstrated that the correct procedures required by art. 17 were not followed by the ABCC. Instead, the ABCC relied on a process that is not mandated by any regulation or rule of the Organization. As the decision of the Secretary-General on the request for reconsideration was made on the basis of an invalid process it is unlawful and therefore void.

Did the Respondent lawfully determine that the Applicant's spinal injuries were not attributable to the performance of official duties under art. 2 of Appendix D?

82. The Tribunal rejects the Respondent's submission that the Applicant bears the burden of proof to establish that the "spinal injuries were attributable to, or a natural incident of, the 12 October 2006 accident as required under Appendix D". In a challenge to a medical decision, the obligation of the Applicant is to demonstrate that the process in the relevant article was disregarded but not to provide negative proof of incapacity (*Frechon* 2010-UNAT-003).

83. It is for the Respondent to establish that the advice given to the Secretary-General by the ABCC was based on well-founded evidence.

84. During the hearing, it was common ground between the parties that a relevant factor in establishing whether the accident was the cause of the ongoing back pain was the length of time it took for the back pain to manifest itself after the second accident. Apart from a general reference to reliance on the Pestana report, there is no evidence that the ABCC considered this when making its recommendations on the appeal.

85. Dr. Rowell, who was not involved in the decision making process, sought to justify the ABCC decision, *ex post facto*, by referring to the time which he believed had elapsed between the October accident and the emergence of the Applicant's severe back pain as an indicator that the accident did not cause or contribute to his back injury.

86. Based on his review of the evidence considered by MSD and the ABCC, Dr. Rowell believed that the Applicant first complained of back pain on 18 December 2006, nine weeks after the accident. That is contrary to the evidence given by the Applicant to the Tribunal and is not a correct assessment of the evidence before the ABCC. That evidence was that the Applicant had been referred for a back X-ray by his traumatologist, and that after the inconclusive X-ray, taken on 18 December 2006, he was referred for an MRI conducted in January 2007. The Tribunal finds as a matter of fact that the Applicant first advised a doctor of his back pain on or about 13 November 2006 and that Dr. Rowell was mistaken on this point.

87. Having initially held the position before the ABCC that the October 2006 accident was likely to have aggravated the Applicant's back injury sustained in April 2006, Dr. P. changed her view, in her final advice to the ABCC, on the basis of the Pestana report.

88. This advice was supported by Dr. Rowell who made the point that the value of the Pestana report was not only in its conclusions but also in its content that would have been evaluated by the ABCC. The report was therefore a crucial factor in the recommendations of the ABCC.

89. However, as previously discussed, the Tribunal finds that the ABCC could not lawfully rely on that report as it was not prepared for the purposes of a medical board for the UNJSPF under the terms of art. 17(e) of Appendix D.

90. In addition, Dr. Pestana's terms of reference did not require him to investigate or give his opinion on the cause of the Applicant's back injuries, the very issue under consideration by the ABCC; therefore, his report could not provide any direct evidence or conclusions upon which the ABBC could properly reach a conclusion and make recommendations about the causation of the Applicant's back pain.

91. Dr. Pestana referred to Dr. Sosa's report dated 5 August 2010, submitted in support of the Applicant's request for reconsideration, but only to answer the question about the functional evaluation of the Applicant's spine. However, there was no reference to Dr. Sosa's report in the worksheets of the ABCC.

92. There is no evidence that, in relation to the issue of causation, the ABCC considered the Applicant's statement that he had a fractured vertebra as a result of the October 2006 accident, although this was repeated by Dr. Sosa in his report attached to the addendum to the Applicant's request for reconsideration. The Tribunal finds that these references to a fractured vertebra warranted further investigation by the ABCC.

93. Despite Dr. P.'s initial suggestion that the October 2006 accident might have aggravated the Applicant's spine injury, she and the ABCC relied not on direct evidence but on the absence of evidence in the Pestana report to support a conclusion that the second accident had no impact on the Applicant's back injury.

94. Dr. Sosa's expert evidence to the Tribunal demonstrated that there was another medical opinion about the causation of the Applicant's back injury which could have influenced the outcome of the Applicant's request for reconsideration had it been properly considered. If a medical board had been established, it could have evaluated his opinion alongside any conflicting medical opinions.

95. For these reasons, the Tribunal finds that the ABCC made its recommendations based on uncertain facts and inferences which were derived, improbably, from the absence of evidence. The ABCC recommendations and the consequent decision of the Secretary-General were not well founded.

96. In addition, there were significant delays in the processing of the Applicant's claim for compensation for his back injury made on 15 September 2007. It took one year and four months for it to be sent from MONUC to FPD. The ABCC acted promptly on the claim when it received it and made its first decision in September 2009. However, at that time it did not explicitly consider the Applicant's back injury and did not do so until the Applicant raised it again in his addendum to his appeal submitted in September 2010.

97. There are no mandatory deadlines for the processing of claims by the ABCC. As Dr. Rowell explained, in some cases there are reasons for delaying the assessment of claims to enable a proper assessment of a loss of functionality. However, the issue in this case was not the loss of functionality but the cause of it which should have been determined years earlier.

Did the Respondent lawfully determine that the Applicant's leg and knee injuries did not result in permanent loss of function under art. 11.3 of Appendix D?

98. The ABCC failure to convene a medical board, which undermined the lawfulness of the Secretary-General's decision on the cause of the Applicant's spinal injuries, also impugned the decision about loss of function related to the Applicant's leg and knee injuries. It also deprived the Applicant of the full medical evaluation of this matter to which he was entitled under art. 17.

Remedies

Submissions

99. The Applicant seeks rescission but not reconsideration of the Secretary-General's decision. In response to a request by the Tribunal for particulars on the remedies sought, the Applicant submitted that since the

Respondent's actions have precluded reasonable consideration of his claim, he should be fully compensated in accordance with the schedule of payments in art. 11.3(c) of Appendix D. This allows for a maximum payment of twice the amount of pensionable remuneration at grade P-4, step V.

100. In the alternative, he submitted that the Administration's failure to address causation in relation to his spinal injuries (and the refusal to provide the basis of the decision) is sufficient to give rise to an adverse inference as to their expressed opinion regarding causation. The remedy may be calculated on the basis of a percentage of loss of opportunity as in *Hastings* 2011-UNAT-109.

101. In considering this percentage, the Applicant submits that the adverse inference, combined with medical evidence supporting the conclusion that his spinal injuries were service incurred, means that the likelihood of him receiving compensation in the event of a proper consideration is extremely high.

102. The Respondent argues that there is no basis to award compensation even if the Tribunal finds that the decisions were flawed, as its powers are limited. He further submitted that the Tribunal could not award compensation under Appendix D as that requires a medical decision concerning causation. An assessment of a loss of opportunity also involves weighing up medical evidence. There is no evidence to justify an award of moral damages.

Considerations on Remedies

103. The Tribunal cannot make an award under Appendix D sought by the Applicant, as this would involve making findings on medical matters that are not within its competence. However, compensation may be awarded for material damages resulting from a violation of a staff member's rights and for moral damages for the impact of the breach on the Applicant.

Material damages

104. From the date of the October 2006 accident until now, the Applicant has been seriously disabled with a 100% permanent loss of function caused principally by his spinal injuries. Had the ABCC found that the Applicant's spine injury was service-incurred, he would have been entitled to the maximum amount under art. 11.3 of Appendix D, which is twice the annual amount of the pensionable remuneration at grade P-4, step V.

105. Because of procedural errors, the Respondent did not give proper and lawful consideration to the Applicant's appeal. If a lawful process had been followed, giving the Applicant the opportunity to have his own Doctor on a medical board, there is a chance that the outcome would have been different.

106. In *Hastings* 2011-UNAT-109, a case which concerned the unlawful denial of a position, the Appeals Tribunal held that while not subject to exact probabilities, assessments for loss of chance are sometimes necessary. It also stated that in many cases there will be an alternative means of calculating damages.

107. In this case, there are no alternative means of assessing damages and it is necessary to consider the likelihood that, but for the procedural errors, the ABCC would have reached a different conclusion about the cause of the permanent injuries to the Applicant's spine. This is not a medical assessment but an evaluation of the Applicant's loss of opportunity based on the following factors.

108. Before the second accident the Applicant was able to perform full duties at his work although still suffering from effects arising from his first accident. After the second accident, he was permanently disabled and unable to work again.

109. The Applicant reported his back condition immediately after he was medically evacuated to Spain one month after the second accident, and was urgently referred for diagnostic tests and eventual surgery.

110. Dr. Sosa's expert evidence was that before the second accident, the Applicant had a stable condition of the spine with an 80% chance of full recovery. After the accident, the spinal condition was unstable and required surgery on the basis of a fractured vertebra as suggested by the MRI. In his opinion, the accident aggravated the pre-existing injury.

111. The documentary evidence shows that the ABCC medical advisor had considered that there was a likelihood that the second accident had aggravated the pre-existing condition, and that she had submitted this recommendation before the ABCC for decision. She later changed her view based on an incorrect consideration of the Pestana report.

112. Given these factors, the Tribunal finds that there is a strong probability that the ABCC would have reached a different conclusion on the causation of the Applicant's permanent spinal injuries had it followed the correct procedures in assessing his claim.

113. As the medical evidence about causation is in dispute, the probability that the Applicant would have succeeded in his claim for compensation is estimated at a conservative 50%. As the maximum amount he could have obtained under art. 11.3 of Appendix D would have been USD300,208.[2] the potential loss to the Applicant is half of this maximum: USD150,104. This corresponds to approximately two years and eight months of the Applicant's net base salary at the FS 4, step 10 level at the time of his separation on 20 April 2011.

114. Article 10.5(b) of the Statute limits the total of all compensation, material and moral, ordered under subparagraphs (a), (b), or both, to the equivalent of two years' net base salary of an applicant unless it is an exceptional case warranting higher compensation.

[2] Based on the ICSC table for Pensionable Remuneration for staff in the Professional and Higher Categories effective 1 August 2008.

115. In *Mmata* 2010-UNAT-092 the Appeals Tribunal held that

> Article 10.5(b) of the UNDT Statute does not require a formulaic articulation of aggravating factors; rather it requires evidence of aggravating factors which warrant higher compensation … Blatant harassment and an accumulation of aggravating factors in administrative and investigative conduct in the course of wrongful dismissal cases are consistent with the principles of law applied in the former Administrative Tribunal to justify increased compensation.

116. It is necessary to consider if this is an exceptional case justifying an award greater than two years' net base salary. The findings relevant to this include the following:

a. The violations of the Staff Rules were serious and fundamental and caused the Applicant to lose what is, at least, a 50% chance to receive full compensation under Appendix D;

b. For unexplained reasons, the MSD and the ABCC took no steps to follow its usual practice of contacting the Applicant to clarify his claim or medical evidence with him before making final recommendations and took the short cut of relying inappropriately on the Pestana report. The MSD representative changed her mind about the aggravating effects of the accident on the Applicant's spinal injury on the basis of the Pestana report that did not address the issue of causation. She also showed lack of attentiveness when she referred to the Applicant's bicycle accident in April 2006 as a "motor vehicle accident". This, and the overall handling of the case, shows that the Administration was somewhat negligent in its approach to this serious case;

c. The Applicant, who claimed that his spine injury was service-incurred in his first claim for compensation in September 2007, suffered from delays throughout the processing of his claim, which was not concluded until February 2012;

d. The principles for exceptional circumstances in *Mmata* were formulated in relation to procedural defects in wrongful dismissal cases. The present case concerns the loss of important compensation rights of staff members who have suffered injury, by reason of their service to the UN. Appendix D of the Staff Rules quantifies the standard entitlements;

e. The Full Bench of the Appeals Tribunal in *Warren* UNAT-2010-059 stated that the purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations. The application of the normal two-year limit imposed by the Statute would deprive the Applicant of the appropriate level of compensation for loss of chance as measured against the compensation he may have received under Appendix D. It would also prevent any compensation for moral damages. This would be unjust bearing in mind the circumstances of this case.

117. For these cumulative reasons, the Tribunal finds that this is an exceptional case under art. 10.5(b) warranting an award of material damages in excess of two years' net base salary. This award is not compensation under Appendix D but is a measure of the opportunity that was lost by the Applicant to receive such compensation by reason of the procedural violations in this case.

118. The Applicant is entitled to an award of USD150,104 for material damages.

Moral damages

119. In *Asariotis* 2013-UNAT-309, the Appeals Tribunal held that the Dispute Tribunal must identify the moral injury sustained by the employee on the facts of each case. An award for moral damages may arise where the breach is of a fundamental nature "not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee".

120. In *Cieniewicz* 2012-UNAT-232, the Appeals Tribunal concurred with the general principle that unconscionable delays by the Administration in dealing with staff members' claims may give rise, in certain circumstances, to a compensatory award.

121. In *Meron* UNDT/2011/004, the Dispute Tribunal granted the Applicant USD25,000 for compensation of excessive and inordinate delays, including delay in convening a medical board. The Respondent did not appeal this award.

122. During the four-year delay in the overall processing of the Applicant's claim, he was dealing not only with his disabling medical issues and consequent serious personal issues, but also with a number of incorrect decisions by the Administration. These included his incorrect separation from service for alleged abandonment of post, and the withholding of his salary pending receipt of medical reports that had not been sent from MONUC to Headquarters.

123. The Applicant cannot and does not claim compensation for the administrative errors, as they are not part of this claim. However, the decision about his compensation claim came as a blow after these administrative errors which, although eventually identified and rectified by retroactive payments, took two years to be resolved. In his evidence, the Applicant expressed his disappointment. He stated that he feels he has been abandoned "[finding] it difficult to understand how the UN can treat their own people like this".

124. Having heard the evidence of the Applicant, the Tribunal is satisfied that, apart from the pain and suffering of his spinal injury, he holds a deep and legitimate sense of injustice given that his claim for compensation for his life changing injuries was not processed in a correct and timely manner. For this, he is awarded moral damages equivalent to three months of his net base salary at the time of his date of separation, 20 April 2011.

Conclusion

125. In view of the foregoing, the Tribunal DECIDES:

a. The decision of the Secretary-General dated 2 February 2012 to deny the Applicant compensation under Appendix D on the grounds that his spinal injury was not service-incurred and that he had not sustained any degree of permanent loss of function is unlawful and void;

b. The Applicant is to be compensated in the amount of USD150,104 for material damages and three months net base salary as at 20 April 2011 for moral damages;

c. The above amounts shall be paid within 60 days from the date this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the 60-day period, an additional 5% shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Coral Shaw

Dated this 30th day of October 2014

Entered in the Register on this 30th day of October 2014

(Signed)

René M. Vargas M., Registrar, Geneva