UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2021/038
Judgment No.:	UNDT/2022/055
Date:	10 June 2022
Original:	English

Before: Judge Joelle Adda

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Clémentine Foizel, ALD/OHR, UN Secretariat

Introduction

1. The Applicant contests the decision of the acting United Nations Medical Director to deny his "request to establish a medical board" of 6 April 2021.

2. The Respondent contends that the application is not receivable, and in any event, without merits.

3. For the reasons set out below, the application is granted in part.

Facts

4. On 29 June 2018, the Applicant filed a claim for compensation under Appendix D of the Staff Rules to the Advisory Board on Compensation Claim ("ABCC").

5. By letter dated 6 November 2020, a Senior Medical Officer from the Division of Healthcare Management and Occupational Safety and Health ("DHMOSH"), with the subject line, "Request for advice under Appendix D to the Staff Rules" stated as follows regarding the Applicant's claim:

> … I have reviewed the claim in detail, including recent medical reports and the statements provided by [the Applicant]. My determination is that his illness is not attributable the performance of official duties.
>
> … The claimant states his illness is secondary to regular workplace interactions, and acknowledges these interactions are not considered prohibited conduct.
>
> … Whilst there is no requirement to establish fault or negligence under Appendix D, there is a requirement to establish a link between the illness and the performance of duties. The claimant has not done so, emphasizing only routine normal work and common workplace interactions, and there remains a significant amount of uncertainty as to the cause:
>
> > a. His illness could equally be due to factors at home or outside the workplace; or

> b. More likely however, his illness is endogenous, and unrelated to any specific cause at all. This is supported by the nature of the illness, the nature and evolution of his symptoms, and by their failure to resolve once he was removed from the stressors of the workplace.
>
> … I note and have considered in detail his psychiatrist's statements that his illness is caused by work. She has done so based on the claimant's descriptions, and does not have any knowledge of the workplace except as described by the claimant. For such complex matters involving the evolution of psychiatric/psychological illness, this would normally preclude any assessment of causation by a health professional. My assessment is that normal interactions and difficulties at work did not cause his illness, but heightened his awareness and emphasis of them, leading them to be emphasized at the exclusion of other factors.
>
> … I am happy to provide the Board with further explanation if required on the nuances of the clinical findings, the interplay between ability to cope and the impact of normal work, the nature of secondary gain in psychological illness in the context of workers compensation, and the evidence around causation in psychological illness.
>
> … Based on the above the claimant has not met the burden of proof to establish his illness is attributable to the performance of his duties.

6. By letter dated 30 December 2020, the ABCC Secretary informed the Applicant that the Controller had denied his claim for compensation upon the recommendation of the ABCC, indicating, *inter alia*, that:

> The board noted the reports of your psychiatrist, outlining years of alleged abuse and attribution of the cause of your illness, but also noted the opinion of Medical [in response to Order No. 4 (NY/2022) dated 11 January 2022, the Respondent, in effect, submitted on 24 January 2022 that the ABCC Secretary thereby referred to the above quoted letter from DHMOSH of 6 November 2020] that there is uncertainty about the cause of your illness which could be due to matters outside the workplace and is most likely endogenous. This is supported by the nature of the illness, the nature and evolution of your symptoms, and by their failure to resolve once removed from the stressors of the workplace. Accordingly, although having considered the reports of your psychiatrist, Medical assessed that normal interactions and difficulties at work did not cause your illness, but heightened your awareness and emphasis of them, leading them to be emphasized at the exclusion of other factors.

> The board reviewed your psychiatrist's statements that your illness is caused by work, noting the statements were based on your descriptions, and that the psychiatrist does not have any knowledge of the workplace except as described by you. For such complex matters involving the evolution of psychiatric/psychological illness, Medical advised the board this would normally preclude any assessment of causation by a health professional.

7. On 20 January 2021, the Applicant requested the establishment of a medical board pursuant to art. 5.1 of Appendix D to challenge DHMOSH's findings in the 6 November 2020 letter.

8. By letter dated 6 April 2021, the acting Medical Director rejected the Applicant request for a medical board, stating as follows (emphasis in original):

> The ABCC has forwarded to me your request for a medical board in relation to your claim ABCC/2018-001811. Unfortunately, a medical board cannot be conducted.
>
> The primary reason for not establishing a medical board is the lack of a mechanism to do so. Medical boards are established for resolving disputes related to medical determinations. In this case however, no determination was made. The input from the Division of Healthcare Management and Occupational Safety and Health (DHMOSH) was not a *determination* given under Article 1.7 of Appendix D, but *advice* given under Article 2.2. Article 5.1 of Appendix D which covers 'Reconsideration, review and appeal' requires any medical board to be based upon a medical *determination* by DHMOSH. You also confirm this in your [Management Evaluation Unit, "MEU"] submission, referring to the Board making a 'non-medical factual determination'.
>
> I note however in paragraph 6 of your MEU submission that you state you have requested a medical board because in your view,
>
> > *"the issue of causation in cases involving psychological/psychiatric illness – as opposed to physical injury – requires expert medical opinion and referral to the medical board is the appropriate course."*
>
> There is no provision in Appendix D, nor is there a clinical need in this case for mental health issues to be treated differently from other medical issues. As such, I do not see any need to establish a medical board to determine causation because of the heath issue involved.

> I hope that responding to you directly confirms my intent of providing open and effective communication in order to help resolve disputes. However, I believe my role has ended and request that all further correspondence, including on medical matters, be directed to the ABCC or to the Management Evaluation Unit, Dispute Tribunal or other administrative body.

Consideration

Receivability

9. Following various case management steps, including several orders and further submissions by the parties, in Order No. 043 (NY/2022) dated 5 May 2022, the Tribunal held that the application was receivable in response to the Respondent's motion of 16 September 2021 to handle receivability as a preliminary matter. The Tribunal further ordered the Respondent to file his reply on 19 May 2022.

10. In the reply, the Respondent, nevertheless, submits that he "reiterates and maintains the receivability arguments raised in his motion dated 16 September 2021".

11. With reference to Order No. 043 (NY/2022), the Tribunal reaffirms the findings and holdings made therein.

The issue and the relevant legal framework

12. The present case essentially concerns whether the findings made in DHMOSH's 6 November 2020 letter constituted a "medical determination" under art. 1.7(a) of Appendix D or instead a "recommendation" as per its art. 2.2(c). This is so because in accordance with art. 5.1 of the Appendix D, a claimant, like the Applicant, who wishes "to contest a decision taken on a claim under" Appendix D, "shall submit a request for reconsideration of the *medical determination* under conditions, and by a technical body, established by the Secretary-General" when that "decision is based upon a *medical determination* by the Medical Services Division or the United Nations Medical Director" (emphasis added).

13. In this regard, the Tribunal notes that the functions of DHMOSH are listed in art. 1.7(a) on the "Role of the Medical Services Division" as the following, as relevant to the present case:

> (a) The Medical Services Division shall make a medical determination for consideration by the Advisory Board on Compensation Claims or the official with delegated authority to consider de minimis claims. Such a determination may include:
>
> (i) Whether a death, injury or illness is directly causatively related to an incident;
>
> (ii) Whether a death, injury or illness is directly causatively related to the performance of official duties;
>
> …

14. In art. 2.2(c), on "Eligibility for coverage, it is then stipulated that:

> (c) Such an assessment [on whether a claim is service-incurred as per art. 2.2(a)] will be based on the claimant's submissions, and, as appropriate, the recommendations of the Medical Services Division, technical advice from ex officio members of the Board and any other relevant documentary or other evidence.

Parties' submissions

15. The Applicant, in essence, submits that the 6 November 2020 letter was a "determination" under art. 1.7(a) of Appendix D.

16. The Respondent's submissions may be summarized as follows:

a. As "the medical notes submitted by the Applicant in support of his claim concerned the technical field of medicine", the ABCC "requested the technical advice of DHMOSH with respect to reviewing those notes". Under art. 2.2 of Appendix D, the ABCC "may rely on such technical advice to assess whether a claimant has met his obligation under Article 1.8(a) of Appendix D to fully support a claim that an illness is service-incurred";

b. DHMOSH responded on 6 November 2020 that it was "unable to make a determination because the Applicant had not met his burden of proof to establish that his illness is attributable to the performance of his duties". DHMOSH explained that "the Applicant's treating physician, his psychiatrist/health professional, developed her opinion 'based on the claimant's descriptions', without 'any knowledge of the workplace except as described by the claimant'. DHMOSH further "noted that '[f]or such complex matters involving the evolution of psychiatric/psychological illness, this would normally preclude any assessment of causation by a health professional'";

c. DHMOSH advised the ABCC that, "based on the notes of the Applicant's psychiatrist, there was 'a significant amount of uncertainty as to the cause' of the Applicant's illness, which could be attributed to matters extraneous to the workplace or was most likely endogenous, meaning that the illness occurred naturally and was not attributable to any specific event". In support of its advice, DHMOSH "pointed to the nature of the illness, the evolution of the symptoms, and the fact that the symptoms were not resolved or alleviated once the Applicant was removed from the alleged stressors at the workplace";

d. Under art. 2.2. of Appendix D, the ABCC took "DHMOSH's 6 November 2020 response under advisement as part of its factual assessment of causation". The ABCC "considered a number of factors, including the Applicant's leadership role in the Organization; the normal workplace interactions for a staff member in a leadership role; the Applicant's association with Lovis and his explanation of that role; the notes from the Applicant's psychiatrist; and the advice of DHMOSH that a clear cause of mental illness is not assessable by a patient's own healthcare provider in the circumstances described";

e. The Applicant's claim that the ABCC was "obligated to rely on another medical determination to reject his physician's determination about causation is baseless", because there is "no provision in Appendix D requiring the ABCC to rely on a medical determination". Further, in *Kisia* 2020-UNAT-1049, the Appeals Tribunal confirmed that "the factual determination on whether an illness is service-incurred is a non-medical assessment";

f. The Applicant's claim that "Article 1.7(a)(ii) of Appendix D is mandatory and requires DHMOSH to provide a medical determination is baseless". Article 1.7(a)(ii) of Appendix D "does not require DHMOSH to make a medical determination as to direct causation of an illness" as the provision "only states that a medical determination 'may include' a determination of whether an illness is directly causatively related to the performance of official duties". Accordingly, a "medical determination of causation is discretionary";

g. Article 2.2 of Appendix D "clearly states that the ABCC is responsible for determining causation in assessing whether an illness is self-incurred" and such an assessment does "not require the ABCC to rely on a medical determination". Instead, it "provides that, when appropriate, the ABCC can rely on recommendations or technical advice". Therefore, "interpretating Article 1.7(a)(ii) as a mandatory medical determination would breach Article 2.2", and it is "clear from the structure of Appendix D that Article 2.2 supersedes Article 1.7(a)(ii) under the *Specialia generalibus derogant* rule (the specific derogates from the general)". Article 1.7(a) is "a general introductory article about the 'role of the medical division' and is "part of Section I 'Scope and General Provisions' whereas "Article 2.2 is a specific article about the 'Eligibility for coverage' and is part of Section II 'requirements and conditions for coverage'". Therefore, "Article 1.7(a)(ii) is not mandatory and does not require DHMOSH to provide a medical determination";

h. The Applicant has "not met his burden of proof for DHMOSH to provide a medical determination" and his claim that, "by providing a medical note as requested by the Respondent, he met his burden of proof for DHMOSH to provide a medical determination is without merit". The medical note that "the Applicant submitted was insufficient for DHMOSH to provide a medical determination". The Secretary of the ABCC's "suggestion that the Applicant submit such a medical note did not absolve the claimant of his obligation to fully establish his claim". It was "not a commitment that the ABCC would find the medical note from the claimant's psychiatrist to be sufficient evidence of causation, i.e. that, under Article 1.8(a), the claimant's illness is attributable to service with the Organization";

i. The ABCC is "ultimately in charged with analyzing and determining a claim" and "reviewed and assessed the medical note from the claimant's psychiatrist". Relying on DHMOSH's advice that "in mental health cases, the treating physician is not in a position to assess causation, the ABCC concluded that the medical note from the claimant's psychiatrist did not evidence causation". The ABCC did "not limit the scope of the evidence the claimant could submit in support of his claim to satisfy his burden of proof". The Applicant had "the opportunity to provide independent evidence related to causation, but did not do so";

j. The Applicant's claim that "DHMOSH made a medical determination is baseless" because it "clearly indicated that it was unable to make such a determination because the assessment of causation cannot be made by the Applicant's treating physician, and 'there remains a significant amount of uncertainty as to the cause'". The Applicant did "not provide additional evidence in support of his claim regarding causation, and, contrary to the Applicant's claims, DHMOSH was not required to assist or otherwise prompt the Applicant to produce additional evidence";

k. The use of "the word 'determination' in paragraph 2 of DHMOSH's 6 November 2020 correspondence does not undermine the intent or content of the technical advice provided by DHMOSH". The nature of DHMOSH's advice "is evidenced by the title of the memo itself, 'Request for advice under Appendix D to the Staff Rules' and DHMOSH's conclusion that there was not enough evidence for a medical determination of causation";

l. The ABCC did "not treat DHMOSH's advice as a medical determination". The Applicant's "arguments that the use of the terms 'opinion' and 'assessed' by the ABCC mean the same as 'determination' have no merit". The "words 'opinion' and 'assessed' are not synonymous to 'determination'". According to the Oxford English Dictionary, "a determination is 'the process of establishing something exactly by calculation or research' whereas an opinion is 'a view or judgment formed about something, not necessarily based on fact or knowledge,' and to assess is to 'evaluate or estimate the nature, ability, or quality of'";

m. It is "clear that the ABCC treated DHMOSH's 6 November 2020 correspondence as an 'opinion'". Likewise, it is "undisputed that the assessment as to whether the Applicant's illness is service-incurred was made by the ABCC itself, in compliance with Article 2.2 of Appendix D".

Was DHMOSH's 6 November 2020 letter a "medical determination" or a "recommendation" under Appendix D?

17. The Respondent, in essence, argues that a differentiating distinction exists between the roles of DHMOSH in Appendix D as set out in in arts. 1.7(a) and 2.2(c), respectively. The Tribunal disagrees therewith.

18. From art. 1.7(a) follows that DHMOSH is to assess the causality between the alleged illness and an incident and/or the performance of official duties. In other words, it is to appraise if the relevant illness was "service-incurred" as stated in other places

of Appendix D. In art. 2.2(c), this review is specifically contextualized as part of the review of the claimant's eligibility for coverage. Nothing in arts. 1.7(a) and 2.2(c), elsewhere in Appendix D or in any other place in the applicable legal framework as much as implies that this responsibility under art. 2.2(c) is to be distinguished as being different from the general role of DHMOSH as stated in art. 1.7(a). In accordance with the legal principle of *non distinguit, nec nos distinguere debemus* as affirmed by the Appeals Tribunal in *Faust* 2016-UNAT-695, "where the law does not distinguish, neither should we distinguish" (para. 34).

19. Rather, it follows from art. 1.7(a) that DHMOSH "shall make a medical determination for consideration" by the ABCC. As a matter of definition, the ABCC only has to consider DHMOSH's findings, and it therefore does not necessarily need to follow them. The significance of the DHMOSH's medical determination is consequently solely that of a recommendation for the ABCC. This is also what is envisioned in art. 2.2(c). The Tribunal, however, understands the confusion as the role of DHMOSH could be much more clearly defined in Appendix D due to the incoherent use of terminology throughout its provisions.

20. The Respondent also argues that DHMOSH's 6 November 2020 letter was actually a "technical advice" under art. 2.2(c). This is a misconstrued appliance of the relevant provision to the present case, which explicitly distinguishes between "recommendations" from DHMOSH and "technical advice from *ex officio* members of the Board". The Respondent has made no submissions on the Senior Medical Office being such an *ex officio* member of the ABCC and nothing is the case file indicates that this should be the case.

21. The Tribunal's above legal findings are further supported by facts. In the 6 November 2020 letter from DHMOSH, the Senior Medical Officer explicitly states that his "*determination*" (emphasis added) was that the Applicant's illness was not attributable to the performance of official duties, which he then based on a number of medical, as well as factual, findings. In line herewith, in the ABCC's Secretary's 30

December 2020 letter, referred to DHMOSH's 6 November 2020 letter as "the opinion of Medical" by which "Medical assessed" and "Medical advised" on the situation.

22. The Respondent also refers to the Appeal Tribunal's judgment in *Kisia*, arguing that findings on causality are factual and non-medical assessments. The Tribunal, however, notes that the legal framework is this case was different as it concerned another and older version of Appendix D, and the case is therefore not relevant to the present case. Also, many of the findings of DHMOSH in the 6 November 2020 letter in the present case were indeed of a medical nature. The letter was further made under arts. 1.7(a) and art. 2.2(c) of Appendix D, which explicitly refers to "medical determination" and "recommendations of the Medical Services Division", respectively, and therefore also involves a medical assessment.

Remedies

23. The Applicant requests the following remedies:

a. "The decision of the ABCC and Controller denying Applicant's claim under Appendix D be rescinded and the claim be remanded to the ABCC for establishment of a Medical Board;

b. "The Medical Board shall solely be provided the reports of Applicant's psychiatrist which were submitted to the ABCC";

c. "The Board members shall not independently examine Applicant but shall rely solely on the reports of Applicant' s psychiatrist";

d. "Order that the relevant prescribed procedure be completed no later than 31 October 2021";

e. "Alternatively, the Tribunal is requested to find that Applicant suffered a service-incurred disability and to direct Respondent to calculate and pay the

benefit entitlement for total disability under Article 3.2 of Appendix D that corresponds, retroactively from the date of the claim with interest";

f. "That interest be paid for the extraordinary delays (calculating the interest from January 2019 or five months after the submittal of the claim to the ABCC)";

g. "Order that the information and documentation requested to the Secretary of the ABCC be provided to Applicant …";

h. "Order the payment of moral damages for the stress and moral damages for Respondent's unfair, unreasonable and illegal handling of Applicant's claim as well as for the significant delays and the serious and numerous procedural irregularities, at the highest end of the scale amounting to 2 years net base salary based on the supporting medical evidence …"

i. "Refer this matter to the Secretary-General for possible action against the ABCC Secretary, DHMOSH, [United Nations] Medical Director, [United Nations] Controller, [Under-Secretary-General for Department of Management Strategy, Policy and Compliance to enforce accountability under 10.8 of its Statute"; and

j. "Redact the public version of its judgment so as not to disclose details of the medical evidence which is confidential and sensitive … ".

24. In this regard, the Respondent's submissions may be summarized as follows:

a. The Applicant's request that "the decision of the Controller be rescinded and the claim be remanded cannot be granted because it is outside of the scope of this case as defined by the Dispute Tribunal in Order 043 (NY/2022)" because the present case does "not concern the decision of the controller";

b. The Applicant's "request for the establishment of a Medical Board and for that Medical Board's review to be limited to his physician's notes does not fall within the scope of relief that the Dispute Tribunal may grant under Article 10(5) of its Statute". It is "not the role of the Dispute Tribunal to define the scope of review by a medical board". Under art. 2.4 of ST/AI/2019/1, it is "the role of the Medical Director to draft the terms of reference for such a board and the review process is at the discretion of the medical professionals reviewing the case";

c. It is "not the role of the Dispute Tribunal to determine that the Applicant's illness is service-incurred and to direct the Organization to pay him a disability benefit". The Dispute Tribunal may "not substitute its own judgment for that of the Secretary-General on whether an illness is service incurred".

d. The Applicant's claim "for moral harm should be rejected" because art. 10.5(b) of the Dispute Tribunal's Statute provides that "compensation for harm may be awarded only where supported by evidence". The Applicant's "claim of moral harm is not corroborated by reliable independent evidence" and he "does not establish any causation between his illness and the alleged stress he claims to have suffered as a result of the denial of a medical board". The psychiatrist's note "provided by the Applicant as evidence was drafted 6 months before the contested decision and merely repeats the Applicant's statements, without any independent verification". The Dispute Tribunal "cannot award moral damages for pre-existing conditions that were not directly caused by the contested decision".

The legal framework for relief before the Dispute Tribunal

25. The Statute of the Dispute Tribunal provides in art. 10.5 an exhaustive list of remedies, which the Tribunal may award:

> 5. As part of its judgement, the Dispute Tribunal may only order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

Rescission under art. 10.5(a) of the Dispute Tribunal's Statute

26. The Tribunal notes that the contested administrative decision in the present case is the decision of the acting United Nations Medical Director of DHMOSH to deny the Applicant's "request to establish a medical board" of 6 April 2021. The decision of the Controller of 30 December 2020 is not under review and therefore cannot be rescinded.

27. Instead, the logical consequence of rescinding the contested administrative decision would be to remand the case to DHMOSH for a new consideration in light of the Tribunal's findings in the present case. As the basic legal premise for the contested administrative decision was flawed, the Tribunal find that this would be the most appropriate remedy in the present case (in line herewith, see the Appeals Tribunal in *Gueben* et al. 2016-UNAT-692, para. 48). In this regard, the Tribunal notes that it has no jurisdiction as to directing the work of a potential medical board or the ABCC.

28. As the present case does not concern appointment, promotion or termination, the Tribunal is not to set an amount for *in lieu* compensation.

Non-pecuniary damages

29. The Tribunal observes that under art. 10.5(b) of the Dispute Tribunal's Statute that compensation for harm is subject to evidence. In this regard, the Appeals Tribunal

has held that "compensation for harm shall be supported by three elements: the harm itself; an illegality; and a nexus between both" (see *Kebede* 2018-UNAT-874, para. 20).

30. In the present case, the only evidence produced by the Applicant for harm is a medical note dated 6 October 2020. Since this note predates the contested administrative decision, it is evidently not relevant. Accordingly, the Applicant's request for damages is rejected.

Redaction of the Judgment to cover medical details

31. Upon the Applicant's request, as the present Judgment sets out medical details regarding the Applicant, the Tribunal has redacted the Applicant's name from its title and excluded information that may identify him.

Referral for accountability

32. The Tribunal finds that considering that the Applicant has not established that the infringement his rights was, at minimum, negligent, there is no basis in the present case for referring anyone to the Secretary-General for accountability under art. 10.8 of the Statute of the Dispute Tribunal (in line herewith, see the Appeals Tribunal in *Chhikara* 2020-UNAT-1014, paras. 38 and 39).

Conclusion

33. In light of the foregoing, the Tribunal DECIDES that:

a. The application is granted in part;

b. The contested administrative decision is rescinded and remanded to DHMOSH for a new consideration in light of the Tribunal's findings in the present Judgment;

c. All other requests for remedies made by the Applicant are rejected.

(Signed)

Judge Joelle Adda

Dated this 10th day of June 2022

Entered in the Register on this 10th day of June 2022

(Signed)

Morten Albert Michelsen, Officer-in-Charge, New York Registry