UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NBI/2023/017
Judgment No.:	UNDT/2024/101
Date:	27 November 2024
Original:	English

Before: Judge Sean Wallace

Registry: Nairobi

Registrar: Wanda L. Carter

ASLAM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Manuel Calzada

Counsel for the Respondent:
Nicole Wynn, AS/ALD/OHR, UN Secretariat
Victoria Nakaddu Mujunga, AS/ALD/OHR, UN Secretariat

Introduction and Procedural History

1. The Applicant was the Chief Procurement Officer with the African Union/United Nations Hybrid Operation in Darfur ("UNAMID"). He held a continuing appointment at the P-5 level and was based in El-Fasher, Sudan. He challenges the Respondent's decision to deny his claim for Appendix D benefits.

Facts and Procedural History

2. This case is the latest round in the Applicant's five-year effort to obtain Appendix D compensation for injuries he alleges are service-related. The litigation has a rather tortuous procedural history, most of which is irrelevant to this judgment. The essential events are set forth below.

3. The Applicant previously deployed as a military staff officer of the Pakistani Army on duty with the United Nations Observer? Mission in Angola (1996). During that service his right leg was injured in a demining accident that required extensive treatment and rehabilitation. He was eventually discharged from treatment with a disability assessment of 2.2% according to South African Armed Forces Scales. His right leg was shortened by 2 cm and deformed. This gave the Applicant a slight limp, but he was able to walk without support.

4. In 2000, the Applicant joined the United Nations as a civilian Associate Procurement Officer (P2-B) at the Mission in the Democratic Republic of the Congo (MONUC, as it then was known). The UN was aware of the 1996 accident and treatment but issued him an A1 medical clearance to serve with MONUC. Between 2009 and 2018, the Applicant served as a procurement officer at UNAMID at various levels, again with medical clearance.

5. On 14 November 2019, the United Nations Staff Pension Committee granted the Applicant a disability benefit under Article 33 of the United Nations Joint Staff Pension Fund Regulations.

6. On 4 December 2019, the Applicant submitted the instant Appendix D claim, which was considered by the Advisory Board on Compensation Claims (ABCC). Ultimately, the Respondent issued the contested decision by letter dated 15 August 2022. The ABCC denied the Applicant's claim and found that an incident on 15 March 2017, in which an x-ray machine arm allegedly struck his knee was not proven to have caused a service-incurred injury because the x-ray machine did not, in fact, impact his knee. The ABCC further denied the claim that the living environment at UNAMID aggravated the condition of his previous knee condition, on the grounds that there was insufficient documentation for an assessment. Nonetheless, the Board concluded that the claim could be reopened when the required medical evidence was submitted.

7. The Applicant sought management evaluation of that decision and, when that was unsuccessful, filed for judicial review with the Dispute Tribunal.

8. By Order No.176 (NBI/2023), this Tribunal directed both parties to file "all medical documents in [their] custody, care or control that relate to treatments undertaken and/or [the Applicant's] physical condition from 1996 to present."

9. As a result of the medical documents having been provided in compliance with this order, the ABCC reopened the Applicant's claim. The Respondent then moved to dismiss this case as moot, but the Tribunal declined to do so by Order No. 31 (NBI/2024).

10. On 14 March 2024, the Respondent denied the reopened claim, finding that the contemporary medical reports were inconsistent with the alleged blow from an X-ray machine falling on Applicant's knee and that "given the extent and the severity of the initial injuries, the development of severe post-traumatic arthritis by 2017 could occur without any of the possible 'effects of the living/hardship environment in Darfur'."

11. The parties filed this decision on the reopened claim and various other submissions regarding related issues. Having reviewed the entirety of the parties'

submissions, the Tribunal considers itself fully briefed and ready to proceed to its judgment.

Considerations

12. In reviewing a decision to reject an Appendix D claim, the UNDT is obliged to determine if the Secretary-General's decision was legal, rational, procedurally correct and proportionate. However, it is not the Tribunal's role to consider the correctness of the choice made by the Secretary-General from amongst the various courses of action open to him, nor to substitute its own decision for that of the Secretary-General. *Likukela* 2017-UNAT-737, para. 28.

13. The Appeals Tribunal held in *Karseboom* 2015-UNAT-601 that when seized of an application challenging a decision under Appendix D, the Dispute Tribunal shall examine whether the proper procedure had been followed, but it cannot put itself in the place of the medical expert or the decisionmaker. The Appeals Tribunal stressed in *Karseboom* that the Dispute Tribunal is not competent to make medical findings (*see also*, *Baron* UNDT/2011/174; *Wamalala* UNDT/2014/133).

14. In this case, the Applicant challenges the 15 August 2022 decision by the Controller, relying on the ABCC, to deny his claim for compensation, particularly:

a. The conclusion that the X-ray camera did not impact his knee on 15 March 2017;

b. The decision of the ABCC to deny his claim that the living conditions in UNAMID adversely affected his knee because he failed to provide medical reports of his condition before starting at UNAMID and to not consider the independent witness statement of MR (anonymous for privacy reasons);

c. The presumption that he failed to provide comprehensive medical report(s) of his prior knee condition;

d. The presumption that the 1996 injuries, (irrespective of the extent of disability) means he is excluded from compensation;

e. Appendix D does not exclude service as expert on mission as a staff officer from its coverage;

f. Denying the post-traumatic stress disorder (PTSD) claim because, if physical injury was not compensable, then PTSD cannot be assessed;

g. ABCC relying on comment by *ex-officio* member that 1996 injury was very significant; and

h. The MEU denial of his medical negligence claim.[1]

15. The Respondent argues that these claims are not receivable and that the application lacks merit in any event.

Receivability

16. According to the Respondent, "to the extent the Applicant seeks for the Dispute Tribunal to find that he is entitled to compensation for injuries incurred in the 1996 incident, the Application is not receivable." In his rejoinder, the Applicant clarified that his claim did not relate to the 1996 injuries. This means that his arguments regarding whether Appendix D covers military officers on duty with UN missions (as summarized in para. 14(e) above) are moot.

17. Similarly, the Respondent argued that any claim that UN medical officers were negligent in 2017 is also not receivable. Again, the Applicant's rejoinder states that he "does not seek in this application to claim on account of the alleged negligence on the part of UNAMID medical officers." Thus, this issue is also moot.

[1] In his Rejoinder of 3 August 2023, the Applicant clarified that: "The Applicant is not seeking a determination from the Tribunal in this matter that it rules on the negligence or otherwise of UNAMID Medical Officers. Following the UNDT ruling on 28 April 2023, the Applicant filed de novo with the Secretary-General a claim for Negligence on 6 June 2023." That Application is pending before the Tribunal as UNDT/NBI/2024/017.

18. After the Respondent reopened the claim to consider additional medical records, and issued a revised decision on 14 May 2024, he argued that the revised decision was not receivable because the Applicant had failed to exhaust his internal administrative remedies, namely the remedies provided for in Article 5.1 of Appendix D and Section 2.1 of ST/AI/2019/1 relating to resolving medical determinations.

19. Article 5.1 of Appendix D stipulates that

> Claimants wishing to contest a decision taken on a claim under the present rules, when that decision is based upon a medical determination by the Medical Services Division or the United Nations medical Director, shall submit a request for reconsideration of the medical determination under conditions, and by a technical body, established by the Secretary-General.

20. Section 2.1 of ST/AI/2019/1 on the Resolution of Disputes Relating to Medical Determinations, in turn, says that

> Requests for review of medical determinations shall be submitted by staff members within 60 calendar days of the date on which they received notification, electronically or in hard copy, of the administrative decisions based on the contested medical determination.

21. The AI also provides details about the terms of reference and basis of the review, the composition of the medical board, the procedure to be followed, implementation of the medical board advice, and how the cost of the board is paid. Section 7 of the AI also states that a review of an administrative decision taken pursuant to advice from the medical board is exempt from the usual requirement for management evaluation and may proceed directly to the Dispute Tribunal.

22. The Applicant argues that whether the x-ray machine arm struck his knee in 2017 is not a medical determination. He is correct; that is a factual determination and thus not subject to the medical board reconsideration process. The Tribunal agrees that this portion of the 2022 decision is receivable and will be dealt with below on the merits.

23. This leaves the 2024 decision (on the reopened claim) as to whether the living conditions in UNAMID affected the Applicant's knee.

24. According to the Applicant

> It is only the interpretation and use of the medical reports and recommendations by the ABCC that is at issue in these proceedings, and this is in no way a matter for medical expertise.

25. The Tribunal finds that, to the contrary, interpreting medical reports to determine the cause and extent of medical disabilities is the essence of forensic medicine and the result is clearly a medical determination. It was a medical determination that the ABCC, in 2022, said it could not make without documentation of the Applicant's knee condition prior to starting work at UNAMID. It is the central part of the 2024 decision that Respondent now challenges as unreceivable.

26. The Applicant also argues that ST/AI/2019/1 does not apply to his case because the incidents giving rise to his claim took place "from 2000, when he joined the UN as a civilian officer, to 2017, when the X-Ray machine came down on his injured knee." Instead, he claims that the applicable rules to the Applicant's case should be those current on the date of the X-ray incident, March 2017; that is art.17 as amended by ST/SGB/Staff Rules/I/Rev. 7/Amend.3 of 1 January 1993.

27. Specifically, he points out that in 2017, the version of Appendix D in effect made reconsideration of medical determinations by a medical board optional and not mandatory. See, art. 17 of ST/SGB/Staff Rules, Appendix D/Rev.1. which provides that

> 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(?).

28. Nonetheless, the Applicant has requested the establishment of a Medical Board to review the medical determination, pursuant to ST/AI/2019/1; but maintains his argument that review by a medical board is *not mandatory per* the AI. The parties

recently submitted documentation indicating that the medical review board is being constituted.

29. The Tribunal finds that having availed himself of the reconsideration option (whether it is mandatory or optional), the Applicant must exhaust that remedy before he comes to the Tribunal. As recently noted by the Appeals Tribunal in *Bernard* 2024-UNAT-1422, paras. 50-51:

> The purpose of exhausting internal administrative mechanisms is to avert formal litigation. A staff member who did not exhaust available internal remedies, cannot file an application before the Dispute Tribunal. Furthermore, the UNAT has consistently held that the Tribunals "should not interfere with matters that fall within the Administration's prerogatives, including its lawful internal processes, and that the Administration must be left to conduct these processes in full and to finality."

30. It would be illogical and a waste of judicial resources to permit the Applicant to pursue both administrative reconsideration with a medical board and judicial review with the Tribunal simultaneously. If he were to prevail in the administrative reconsideration, the judicial review would be moot. On the other hand, if he were to prevail in the judicial review, then the administrative reconsideration may be moot. Either way, unnecessary and costly litigation would occur.

31. Accordingly, the Applicant's claim to have the 2024 decision (on his re-opened claim) reviewed as part of this case is not receivable.[2] However, the balance of this case is receivable.

Merits

32. In his first argument against the contested decision, the Applicant states his position thus:

> The Applicant strongly challenges the rationale relied upon by the Secretary-General that in essence denies that the X-ray camera fell on

[2] Of course, if the Applicant is dissatisfied with the decision arising from the medical review board, he may seek judicial review of that decision.

> the Applicant's knee on 15 March 2017 because the witness statements (from the attending and grossly negligent UNAMID doctors), and that the post facto investigation report, based on the circular testimony of the same attending medicos, did not corroborate that the machine was dropped on the Applicant's knee and denied the claim.

33. Essentially, this argument seeks to have the Tribunal second-guess the Administration's finding that the X-ray camera did not fall on the Applicant's knee in 2017. That is beyond the purview of this Tribunal. In conducting a judicial review of an administrative decision, the Tribunal must defer to the Administration's factual findings and may not substitute its own decision for that of the Administration. *Likulela*, *op. cit*.

34. Moreover, it is clear from the record that there was sufficient evidence upon which the Administration reasonably could have found that the X-ray camera did not impact the Applicant's knee. As such, that finding was neither arbitrary nor capricious. Weighing the evidence that it did impact his knee against the evidence that it did not is the purview of the Administration and not the Tribunal. Therefore, the decision was not unlawful on this point.

35. The Applicant next challenges, in respect of the living condition in UNAMID, the finding that he failed to "provide a comprehensive medical report on his knee condition prior to starting work with UNAMID" and the "presumption" that he had not done so.

36. The request for information was based on advice from a Senior Medical Officer at the Division of Healthcare Management and Occupational Safety and Health (DHMOSH) dated 14 July 2022. The doctor said

> It is impossible without further information to determine to what extent it is service incurred. Clearly his significant prior injury (direct mine blast with over 20 surgeries in order to save the limb) are relevant and provided a degree of pre-existing damage that affects other components…. This requires detailed medical reports from the time, particularly discharge summaries or end of rehab summaries…. Please advise the claimant that, as above, the completion of this process requires a reasonably detailed medical report(s) from the time

> summarizing the operations/prognosis/and functional capabilities at cessation of treatment. This should include an XRay and report, range of motion assessment, or other similar objective physical exam and investigation findings.

37. Whether or not the Applicant provided the requested medical reports is not a matter of presumption; it is a matter of fact. Either the Applicant provided the requested documentation, or he did not.

38. The Applicant submits that he complied by providing a medical report from his treating surgeon, his own summary of the effects of UNAMID's living conditions, and statement from a corroborating witness. The Tribunal notes that the latter two documents were not medical reports and thus insufficient.

39. The treating surgeon's report, dated 8 October 2018, opined that abnormal deterioration of his knee was "due to the repeated injuries as direct result of living environment in hardship area and walking on uneven surfaces including climbing stairs (in the absence of escalators)." However, this is not "from the time" and was neither a discharge summary, nor an end of rehab summary. It also does not include "an x-ray and report, range of motion assessment or other similar objective physical exam and investigation findings".

40. So, as a matter of fact, the Applicant failed to provide the requested documents deemed necessary to determine whether the current condition is service incurred and the extent of permanent lost function as a result. Indeed, when the Applicant submitted further records the Administration re-opened his claim to consider them before issuing a revised decision in 2024. Thus, these arguments by the Applicant are unfounded and/or moot as a result of the re-opening of his claim.

41. The Applicant's next argument is that the decision is based on "the presumption that the 1996 injuries, irrespective of what the extent of the disability arising from that incident were" exclude him from compensation.

42. Here again, there is no evidence in the record that the decision was based on any such presumption. The decision makes no mention of any presumption; instead, it references the DHMOSH advice that more information was needed to determine compensability. The request for more information is contrary to any presumed presumption. Thus, this argument is unavailing as well.

43. The Applicant next argues that it was "a sheer fallacy" to deny his claim of post-traumatic stress disorder (PTSD) "on the basis that if the physical injury was not the subject of compensation, the PTSD could also not be assessed." This argument seems to arise from the final paragraph in the contested decision which reads:

> Please note that your illness (PTSD allegedly caused by the fear of losing your leg, anxiety, insomnia, stress, and treatment from the United Nations), was not considered as the Board determined that it could not be established that the underlying injury is attributable to performance of official duties.

44. On its face, this does not seem to be a fallacy that if a physical injury cannot be assessed as compensable, neither can a psychological injury stemming from that physical injury.

45. The record in this case has only three references to post-traumatic stress disorder or PTSD in its entire 4282 pages. The first is an email from the Acting Secretary of the ABCC, dated 10 April 2022, wherein it is requested that if the Applicant is claiming post-traumatic stress disorder because of the 2017 incident, "please provide a comprehensive medical report from a Psychiatrist." The second is the contested decision, and the third is a psychiatrist's report following the contested decision letter. These references do not establish any claim of PTSD that is separate from the claimed physical leg injury. As such, the physical injury and the psychological injury are inextricably linked, and the Respondent was correct to defer ruling on the PTSD claim until the physical injury claim is decided.

46. The Applicant also argues that it was wrong to take into consideration a comment made by the DHMOSH *ex officio* member of the ABCC at its 10 June 2022 meeting

"that the injury sustained in 1996 is very significant." He claims this was improper because, after the meeting, DHMOSH advised that a comprehensive medical report of his knee condition prior to joining UNAMID was needed to determine the effects of the living conditions in the Mission on his pre-existing knee injury. The Applicant argues that the comment was uninformed and thus unreliable.

47. Substantively, it is difficult to understand how the Applicant can object to a statement that the 1996 injury was "very significant." The medical report following the accident, dated 9 July 1996, said the Applicant

> sustained a severe compound fracture of his right proximal tibia with contamination. He was resuscitated and taken to theatre for debridement. There was about 10 cm bone lost of the proximal tibia and only a posterior thin part of the tibia was left. The fracture was also into the knee joint, and the insertion of the patella tendon was also lost. The leg was still neurovascularly intact but very unstable with severe contamination, bone and soft tissue lost."

48. The records further show that "he underwent a massive bone graft on 12 August 1996." Altogether, the record indicates that the Applicant underwent more than 20 surgeries over several years to save his limb from amputation, including several bone grafts, free fibula graft, and fibular transposition.

49. It would seem that the Applicant's 1996 injury, which required all this treatment, could fairly be termed as "very significant," even from a lay point of view. Moreover, the Applicant has not explained how the Board's consideration of this comment affected the 2022 contested decision at all.

50. Having rejected the Applicant's arguments, the Tribunal concludes that the 2022 decision on the Applicant's Appendix D claim was legal, rational and procedurally correct.

Conclusion

51. For the reasons stated above, the Dispute Tribunal Determines that:

a. The Applicant's request to review the 2024 decision on his reopened Appendix D claim is not receivable; and

b. The Applicant's challenge to the 2022 decision on his Appendix D claim is denied.

(Signed)
Judge Sean Wallace
Dated this 27th day of November 2024

Entered in the Register on this 27th day of November 2024
(Signed)
Wanda L. Carter, Registrar, Nairobi