



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-tF/,2cq2k0-xFc/,0qy0- Ftc/,o/,22k0-xFc/yquv,22ckjmBpvcc,c-aFc/,qjq2-kvNq,kcj

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 *spoñu ð tsñ.s* at L5-S1 with *tt.r tsponñu ð ts s* 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 *tt ð spoñu ð tsñ.s*. 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.

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20. Following its 447th meeting on 12 October 2009, the ABCC recommended

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

28. Dr. Pestana was asked to carry out a functional evaluation of the Applicant's

Complaint on Df

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

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:

- a. The [Applicant] appears to have no permanent loss of function from the leg and knee injury sustained on 12 October 2006;
- 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 458

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.

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- 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

d. The Tribunal is not competent to review the medical advice provided to the ABCC by the representative of the Medical Director under

- 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

61. The parties to this case disagreed on the interpretation of art. 17 of

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

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

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

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

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 mbrknNt20k,pyjvtc7,p2v [

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 *H st n s* 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.

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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 noas