Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

B. B. (No. 4)

v.

UNIDO

135th Session **Judgment No. 4585**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr A. R. B. B. against the United Nations Industrial Development Organization (UNIDO) on 14 November 2019 and corrected on 18 December, UNIDO's reply of 13 May 2020, the complainant's rejoinder of 2 October 2020 and UNIDO's surrejoinder of 11 January 2021;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the decision made concerning the extent of his service-incurred disability, the date until which he should be paid compensation for disability, and the payment of the fees of the medical experts who examined his case.

Facts relevant to this case are to be found in Judgment 3160, delivered in public on 6 February 2013, concerning the complainant's first complaint, Judgment 3222, delivered in public on 4 July 2013, concerning his second complaint, and Judgment 3668, delivered in public on 6 July 2016, concerning his third complaint. Suffice it to recall that the complainant separated from service for health reasons on 19 September

2008. On 19 October 2010 the Director-General deemed his illness attributable to service.

In Judgment 3668 the Tribunal remitted the case to UNIDO for the Director-General to make the decision required by Appendix D to the Staff Rules, namely determine whether the complainant had been totally or partially disabled, and whether he had remained so and for what period of time. The Tribunal added that the benefits to which the complainant would then be entitled would result from the terms of Appendix D properly construed. Consequently, on 24 August 2016, the Director-General informed the complainant that, in accordance with that judgment, he had considered the facts of his case, the purpose and the scope of his compensation entitlements under Appendix D, and decided that the disability he was suffering since 2008 was both partial and only partially attributable to service. The Director-General explained that UNIDO paid compensation for total or partial disability only until retirement age, and that the rationale for compensation payments under Appendix D for work-related disability was to compensate for loss of earnings. He therefore awarded the complainant 6,844.78 United States dollars in compensation under Article 11.2(d) of Appendix D for the period from 20 September 2008 to 31 October 2010.

On 8 September 2016 the complainant requested the Director-General, under Article 17 of Appendix D, to reconsider the determination that his disability was only partial. He asserted that his disability was total, as confirmed by some medical experts, and indicated that he nominated Dr E. to represent him on the Medical Board. The complainant was also appealing, under Staff Rule 112.01(a), the decision to award him compensation for the period from 20 September 2008 to 31 October 2010, stressing that the compensation was calculated without including interest from due dates. He asked the Director-General to review that aspect of his appeal pursuant to Staff Rule 112.01(a), since Article 17 of Appendix D did not provide for the possibility to appeal a decision that did not involve medical issues. The complainant also requested the Director-General to "reverse" the decision not to pay him

any compensation under Article 11.3 of Appendix D despite the conclusion that he had suffered a "permanent loss of function".

In line with Article 17(d) of Appendix D, a Medical Board was convened to report to the Advisory Board on Compensation Claims (ABCC) on the medical aspects of the complainant's appeal. The Medical Board was responsible for determining whether his work-related illness resulted in total or partial disability in relation to his earning capacity in his normal occupation or in any equivalent occupation. The three members of the Medical Board did not agree and provided two reports in early 2018. Two members issued a report on 15 February 2018, for which they made clarifying statements in May 2018, January 2019 and March 2019. One member issued a minority opinion in April 2019.

The ABCC reconsidered the complainant's case on the basis of the medical reports produced by the Medical Board and the Medical Adviser, as well as of the complainant's "case history". As recorded in the minutes of its meeting of 12 March 2019, the ABCC held that the decision to compensate the complainant for 20 per cent disability from September 2008 to October 2010 was in his favour, and therefore rejected his request to increase the degree of disability under Article 11.2(d) of Appendix D. The ABCC also found that there was no basis to grant him compensation for permanent loss of a member or a function under Article 11.3 of Appendix D. With respect to the date of payment of the 20 per cent compensation for service-incurred disability beyond normal retirement age, the ABCC decided to seek the views of the Legal Office.

By a letter of 19 August 2019, the Secretariat of the ABCC informed the complainant that the Director-General had decided on 15 August to endorse the ABCC's recommendation. The Secretariat recalled Article 17(d) of Appendix D, which provided in particular that if after reviewing the report of the Medical Board and the recommendations of the ABCC, the Director-General sustained the original decision, "the claimant shall bear the medical fees and the incidental expenses of the medical practitioner whom he or she selected and half of the medical fees and expenses of the third medical practitioner on the medical

board". The balance of the fees and expenses should be borne by the Organization.

In accordance with this provision and since the original decision was sustained, the complainant was requested to settle the medical fees and expenses of Dr E., and half of the medical fees and expenses of Professor D., Dr Pf. and Dr N. Consequently, the Director-General asked the complainant to pay a total amount of 7,482 euros by 20 September 2019. The Secretariat added that the Director-General's final determination of 15 August 2019 on the Appendix D appeal could be appealed directly before the Tribunal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, and to order UNIDO to pay him compensation for disability as provided for under Appendix D, "with interest on any retroactive awards". He claims moral damages and costs.

UNIDO asks the Tribunal to reject the complaint as irreceivable for failure to exhaust internal means of redress insofar as the complainant contests the "ABCC Secretariat's decision" asking him to pay the fees and expenses of Dr Pf. and Dr N. It submits that the complaint is otherwise devoid of merit. UNIDO acknowledges that under Article 17(d) of Appendix D, the complainant should only bear the costs for the medical fees and expenses associated with his representative on the Medical Board, Dr E., and half of the medical fees and expenses of the Chair of the Medical Board, Dr D. Consequently, it asks the Tribunal to order the complainant to pay 1,980 euros, which represents half of the fees and expenses of Dr D.

In his rejoinder, the complainant states that the Tribunal is not competent to order him to pay the amount requested by UNIDO, arguing that UNIDO should pursue the matter in domestic courts if it considers that he owes any money to it.

CONSIDERATIONS

1. On 8 September 2016, the complainant filed an appeal under Appendix D to the Staff Rules against the Director-General's 24 August 2016 decision. At its 95th meeting, held on 12 March 2019, at which it considered the complainant's appeal, the ABCC unanimously changed its earlier recommendation to the Director-General that the complainant's disability was total and recommended that:

> "16. [...] the Director General's decision to grant the [complainant] compensation for 20% disability from September 2008 [the time of the complainant's separation] to October 2010 [the time of the complainant's retirement] was already in [his] favour [...] The ABCC therefore declined the [complainant's] request to increase the degree of disability under Article 11.2(d).
>
> [...] there was no basis to grant [him] compensation for permanent loss of a member or a function under Article 11.3.
>
> [...]"

2. By a letter dated 19 August 2019, the Secretariat of the ABCC informed the complainant that the Director-General approved the recommendations of the ABCC and dismissed his appeal in his 15 August 2019 decision. In the same letter, the Secretariat further informed the complainant that since the original decision had been sustained, he was liable to settle the medical fees and expenses of Dr E. directly (3,000 euros), and to pay half of the medical fees and expenses of Dr D., Dr Pf. and Dr N. (a total of 4,482 euros, that is 50 per cent of 8,964 euros).

3. On 14 November 2019 the complainant filed his fourth complaint with the Tribunal, impugning the decision of 19 August 2019. His first, second and third complaints have already been dealt with by the Tribunal in Judgments 3160, 3222 and 3668, respectively.

4. UNIDO asks the Tribunal to reject the complaint as irreceivable for failure to exhaust internal means of redress insofar as the complainant seeks to challenge the ABCC Secretariat's decision to demand payment of medical fees and expenses, which is a separate decision that has not

been the subject of any internal review. It submits that the remainder of the complaint is devoid of merit. It also asks the Tribunal to order the complainant to pay 1,980 euros, alleging that he must pay half of the medical fees and expenses of the Chair of the Medical Board, Dr D., in addition to those of his representative on the Medical Board pursuant to Article 17(d) of Appendix D to the Staff Rules. In his rejoinder, the complainant argues that the Tribunal is not competent to order him to pay the said medical fees and expenses, as this matter should be heard by domestic courts.

5. The receivability is a threshold issue that should be addressed at the outset. The Tribunal is of the opinion that both the claim from the complainant and the counterclaim from UNIDO concerning the payment of medical fees and expenses are irreceivable. Since the complainant's claim concerning the medical fees and expenses that he refuses to pay is not a medical issue, he should have followed the normal appeal process. In accordance with Article VII, paragraph 1, of the Statute of the Tribunal, "[a] complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations". Article 112.03(b) of the Staff Rules accordingly provides that "[a]n application to the Tribunal shall not be receivable unless the applicant has previously submitted the dispute to the Joint Appeals Board under rule 112.01 and the Board has communicated its opinion to the Director-General, except where the circumstances described in rule 112.02(b)(ii) obtain". This did not occur in the present case. Moreover, UNIDO's counterclaim in this respect, as it recognizes in its reply, concerns a decision separate from the impugned decision, thus falling outside the scope of the present case.

6. On the merits, the complainant first challenges the validity of the Medical Board's reports, questioning whether Dr Pf. signed any of the Medical Board's "reports at issue". In its reply, UNIDO provides to the Tribunal the signature page of the original German version of the Medical Board's report of 15 February 2018, which contains the

signatures and stamps from both Dr D. and Dr Pf. The complainant's allegation is therefore unfounded.

7. The complainant then makes a number of submissions regarding substantive and procedural errors, namely:

(a) the ABCC and the Director-General erred by rejecting the finding that he was 100 per cent disabled at the time of separation on 18 September 2008, which was not disputed by the Medical Board;

(b) the majority of the Medical Board's members incorrectly considered that once the pressure of returning to a stressful work environment had disappeared, the impairment of his disability was only 20 per cent, and relied on non-medical factors;

(c) the Medical Board's terms of reference were confusing: it was not asked whether he was totally disabled, but whether he was totally disabled in relation to his earning capacity in his normal occupation or any equivalent occupation;

(d) the majority of the Medical Board members erroneously distinguished "fitness for work" and "ability to work" without support from any medical literature or references;

(e) the majority of the Medical Board members relied on the report of Dr N., the only specialist who did "diagnostic testing", but these tests were not conducted to assess his degree of disability in 2008 or 2010;

(f) Dr N. was rehired by the Chair and UNIDO's representative on the Medical Board to conduct an assessment without seeking the views or agreement of Dr E., and his report was not communicated to Dr E. in breach of adversarial principle;

(g) the Medical Board's assessment was flawed as it did not apply the American Medical Association (AMA) Guide in assessing the complainant's situation; and

(h) the ABCC's recommendation was not reasoned and motivated, and misread the medical report of 15 February 2018.

8. It is unnecessary to consider all these arguments as the first and eighth arguments are well founded and are decisive.

9. The Tribunal notes that the complainant abandons his claim for compensation for permanent disfigurement or permanent loss of a member or function foreseen by Article 11.3(a) of Appendix D. Therefore, the central issue of the present case is whether the Director-General erred in deciding to grant the complainant the payment of compensation for 20 per cent disability from September 2008 to October 2010 (that is to say the complainant's normal age of retirement). Although UNIDO also raises the argument regarding the attributability to service, it is not within the scope of the present case. It should also be borne in mind that the Director-General has confirmed the complainant's illness as service-incurred in his decision of 19 October 2010.

10. The Tribunal has reviewed the ABCC's report and the Medical Board's reports. The Tribunal recalls its consistent precedent that it may not replace the medical findings of medical experts with its own assessment. However, it does have full competence to decide whether there was due process and to examine whether the medical reports on which administrative decisions are based show any material mistake or inconsistency, overlook some essential fact or plainly misread the evidence (see, for example, Judgment 4237, consideration 5, and the judgments cited therein).

11. Articles 11.1 and 11.2 of Appendix D respectively set out the compensation payable for injury or illness resulting in total disability and partial disability. Article 11.1 relevantly provides as follows:

> "In the case of injury or illness resulting in disability which is determined by the Director-General to be <u>total</u>, and whether or not the staff member is continued in the employment of the Organization or is separated:
>
> [...]
>
> (c) Immediately following the date on which salary and allowances cease to be payable under the Staff Regulations and Rules applicable, including paragraph (b) of this article, and for the duration of the staff member's total disability, he or she shall receive annual compensation payments equivalent to two thirds of his or her final pensionable remuneration plus one third of

> such annual rate in respect of each unmarried child of the staff member qualifying under article 2(c), subject always to the successive application of the three limitations set out below:
>
> [...]"

Article 11.2 relevantly provides as follows:

> "In the case of injury or illness resulting in disability which is determined by the Director-General to be partial:
>
> [...]
>
> (d) Where, upon the separation of a staff member from UNIDO, it is determined that he or she is partially disabled as a result of the injury or illness in a manner which adversely affects the staff member's earning capacity, he or she shall be entitled to receive such proportion of the annual compensation provided for under article 11.1(c) as corresponds with the degree of the staff member's disability, assessed on the basis of medical evidence and in relation to loss of earning capacity in his or her normal occupation or an equivalent occupation appropriate to his or her qualifications and experience." (Emphasis added.)

12. Although Article 11.1 does not provide a definition of total disability, it implies that the staff member cannot engage in any productive activity for remuneration for the duration of total disability, which leads to a total loss of her or his earning capacity. It is fairly easy to comprehend. In contrast, Article 11.2(d) requires that the degree of partial disability be "assessed on the basis of medical evidence and in relation to loss of earning capacity in his or her normal occupation or an equivalent occupation [...]", which assumes that partial disability leads to a decrease in earning capacity, compared with a total loss.

13. In his first and eighth arguments, the complainant contests the ABCC's findings, that the Medical Board did not dispute that he was 100 per cent disabled in September 2008, that the ABCC in January 2013 endorsed the assessment of an independent specialist (Dr S.) that he was 100 per cent disabled as of 2 November 2011, and that UNIDO accepted he was 100 per cent disabled for the purposes of granting him a disability pension in 2008.

14. UNIDO submits that the Medical Board's report of 15 February 2018 makes it clear that the complainant had recovered gradually to 80 per cent occupational capacity by 2010 at the latest. It argues that since the majority of the Medical Board's members did not understand that the disability pension that the complainant received was permanent and not temporary, it was thus open to the ABCC to conclude that the stress factors which led to the complainant's illness ceased to exist before his separation from UNIDO (i.e. at the latest in June 2008 when he was notified that he was entitled to a permanent disability pension), and well before his mandatory age of retirement. It further submits that, pursuant to Article 33(b) of the United Nations Joint Staff Pension Fund (UNJSPF) Regulations (January 2007 version), at the time of his separation, the complainant's disability was deemed permanent.

15. The Tribunal notes that the majority of the Medical Board has conducted a *de novo* review of the complainant's medical condition at the request of the ABCC as required by Article 17 of Appendix D. While reconsidering his appeal, the ABCC based its findings on the majority opinion of the Medical Board, and is not bound by the ABCC's earlier recommendations. A pension disability benefit under Article 33 of the UNJSPF Regulations is granted to "a participant who is [...] incapacitated for further service in a member organization reasonably compatible with his or her abilities [...]", which is different from the requirements of Article 11.1(c) and Article 11.2(d) of Appendix D. Dr S.'s report of 2 November 2011 merely concluded that the complainant had "100% disability [...] in his normal occupation" as of 2011 and did not mention his capacity for work, that is, the ability to perform tasks appropriate in a different workplace within or outside the organization. The majority of the Medical Board correctly rejected Dr S.'s report.

16. However, the Tribunal is satisfied that the ABCC has not correctly understood what was said by the Medical Board about the complainant's partial disability. In the report of 15 February 2018, the majority of the Medical Board confirmed that the complainant's occupational disability and inability to work (incapacity for work) were

both at 100 per cent in September 2008. In the 7 January 2019 correction, the majority of the Medical Board stated as follows:

> "2) In October 2010, the degree of occupational disability was 100%. After the pressure to return to his stressful working environment had ceased to exist, [the complainant's] ability to work was reduced at a rate of 20% only. [...]"

In its final clarifying statement of 7 March 2019, the majority of the Medical Board submitted that the complainant "only [...] regained his partial capacity for work after the acute episode of illness had subsided" and noted:

> "It should also be borne in mind that this is a process with a gradual recovery of capacity.
>
> d) It can be assumed that 80% of the employee's capacity for work is regained at the earliest one year after early retirement and at the latest in October 2010 [...]"

17. From the above paragraphs, the majority of the Medical Board did not clarify the exact end date when the complainant's inability to work had reduced from 100 per cent to 20 per cent. Having regard to the nature of recovery as a gradual process and the Medical Board's estimation that his 80 per cent ability to work was regained at the earliest one year after early retirement and at the latest in October 2010, the ABCC erred in determining that the complainant was only 20 per cent disabled in September 2008. It overlooked the essential information that it takes at least one year, at most two years, for the complainant to gradually reduce his inability to work to 20 per cent, after the stress factors which led to the complainant's illness cease to exist. It must be added that the ABCC also erred in recommending that the Director-General's original decision was already in favour of the complainant, by considering factors not stated in Article 11.2(d) of Appendix D, namely in considering whether it was the complainant's responsibility to seek appropriate psychiatric treatment and to what extent the complainant's condition was indeed work-related. In endorsing the ABCC's recommendations, the Director-General erred in making the impugned decision, which should be therefore set aside.

18. The Tribunal will remit the case to UNIDO to reconsider, based on the opinion of the majority of the Medical Board, the complainant's request for disability benefit and the period of time for which it is awarded. The Tribunal notes in particular the majority's conclusion that the complainant's "inability to work" was 100 per cent in September 2008 and that his illness supposed a "gradual recovery of capacity", as discussed by the majority of the Medical Board.

19. It is necessary to consider the complainant's arguments with regard to breach of due process including delay in the internal appeal process. The complainant alleges that Dr D.'s cancellation of the 21 March 2018 meeting was under the instruction of Dr A., the Medical Adviser, and her involvement in the matter was inappropriate and inconsistent with the adversarial principle. The argument is without merit. According to the correspondence, after considering Dr A.'s suggestion, Dr D. made his own decision to cancel the meeting, based on the factors that meeting at a café lacked privacy and that Dr Pf. was on vacation at that time. The complainant has not provided persuasive evidence to prove that Dr A.'s correspondence breached the adversarial principle.

20. Regarding the alleged delay in the internal appeal process, a brief summary of the relevant dates is useful. The complainant initiated the internal appeal process on 8 September 2016; the Medical Board began its work in October 2017, issued its majority report in February 2018, and submitted supplementary answers between May 2018 and March 2019; the ABCC met on 12 March 2019; and the impugned decision was notified to the complainant by a letter dated 19 August 2019. The Tribunal finds that the length of the internal appeal process was excessive, but the delay was due in part to the difficulties in constituting the Medical Board and in part to the divergent opinions and the submission of supplementary answers by the Medical Board. According to its case law, the Tribunal does not automatically grant moral damages for excessive delay. The complainant must produce evidence of the injury suffered and the causal link between the length of the procedure and the injury (see, for example, Judgment 4493, consideration 7, and the case law cited therein). In the present case, the complainant has not proven

that he was adversely affected by the delay. Accordingly, his request for moral damages is rejected.

21. As the complainant succeeds in part, he will be awarded costs in the amount of 8,000 euros.

DECISION

For the above reasons,

1. The impugned decision of 19 August 2019 is set aside.
2. The case is remitted to UNIDO in order for the Director-General to make a decision as referred to in consideration 18 above.
3. UNIDO shall pay the complainant costs in the amount of 8,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2022, Mr Michael F. Moore, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

JACQUES JAUMOTTE

HONGYU SHEN

DRAŽEN PETROVIĆ