

S. (No. 16)

v.

IAEA

133rd Session

Judgment No. 4468

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixteenth complaint filed by Mrs H. S. against the International Atomic Energy Agency (IAEA) on 22 February 2019 and corrected on 30 March, the IAEA's reply of 8 July, the complainant's rejoinder of 11 October 2019 and the IAEA's surrejoinder of 20 January 2020;

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

Having examined the written submissions;

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

The complainant challenges the decision refusing to submit the alleged increase in her whole person impairment rating to the Medical Board and to reject her claim for compensation based on this alleged increase.

The complainant is a former staff member of the IAEA. She sustained injuries during her service at the IAEA which were recognized as service-incurred. A Medical Board was convened in 2011 to determine the medical aspects of the complainant's claims for compensation. In its report of 28 December 2011 to the Joint Advisory Board on Compensation Claims (JABCC), the Medical Board calculated the complainant's whole person impairment rating ("WPI", the percentage that estimates the impact of the impairment on the individual's overall ability to perform activities of daily living, excluding work) to be 19 per cent, of which 50 per cent was attributable to service-incurred injuries "to

adequately reflect the impact of the injuries in the context of progressive degenerative changes of the spine which are to be expected in the course of a person's life".

By a memorandum of 16 April 2012, the complainant was informed of the Director General's decision to grant her compensation for loss of function of a bodily member under Article 25 of Appendix D to the Staff Regulations and Staff Rules based on the recommendation of the JABCC and the report of the Medical Board. The loss of function was assessed as equal to 19 per cent of the WPI and 50 per cent of that loss of function was attributable to her service-incurred injuries. Therefore, the lump sum payable to the complainant was calculated to be 50 per cent of the lump sum payable for a loss of 19 per cent of the WPI.

By a letter of 10 May 2017 the complainant informed the IAEA that, according to an April 2017 medical report of her treating physician, she now had a WPI rating of 22 per cent. She requested to be paid compensation taking into account the increase in the WPI rating.

On 1 June 2018 the JABCC Chairperson informed the complainant that the Director General had decided to reject her request. As the Medical Board had determined in 2011 "after maximum medical improvement" of the complainant's health condition, that her WPI was 19 per cent, any further increases in functional impairment were deemed to be naturally occurring degenerative changes not attributable to any service-incurred injury.

On 29 June 2018 the complainant lodged an appeal against that decision pursuant to Article 40 of Appendix D to the Staff Regulations and Staff Rules.

By a letter of 23 November 2018 the Director General upheld his decision of 1 June 2018 explaining that increases in functional impairment occurring after the WPI determination of the Medical Board are deemed to be caused by natural degenerative factors, and therefore, not attributable to work-related circumstances. As there had been no additionally recognized service-incurred injuries since the Medical Board report of 28 December 2011, the Director General considered that any increase in WPI was not related to workplace accidents and, accordingly, would not convene another medical board for the purpose of revising the complainant's WPI rating. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to refer the matter back to the IAEA for further consideration of the Appendix D claim or to decide the claim on its own motion. She claims material and moral damages, as well as costs.

The IAEA asks the Tribunal to dismiss the complaint as entirely unfounded.

CONSIDERATIONS

1. The complainant requests oral proceedings. Pursuant to Article V of the Statute of the Tribunal, “[t]he Tribunal, at its discretion, may decide or decline to hold oral proceedings, including upon request of a party”. In the case at hand, the Tribunal finds the written submissions to be sufficient to reach a reasoned decision, thus there is no need for oral proceedings.

2. The complainant challenges the impugned decision by the following submissions: as the complainant suffered four service-incurred back injuries, the IAEA owes her a continuing duty of care; on 16 April 2012, she was awarded a lump sum compensation pursuant to Article 25 of Appendix D to the Staff Regulations and Staff Rules, based on a WPI rating of 19 per cent; even though the complainant did not suffer any additional service-incurred injuries since the Medical Board report of 28 December 2011, and even though the increase in the WPI rating may be owing to naturally occurring degenerative changes (which is not admitted), nonetheless the WPI rating is related to the service-incurred injuries; the deterioration of her condition was set in motion by the same service-incurred injuries; and, the impugned decision dismissed her request without convening a medical board.

3. The IAEA resists those pleas by submitting that the complainant was granted a lump sum amount equivalent to 50 per cent of a WPI rating of 19 per cent, by the 16 April 2012 decision, endorsing the 28 December 2011 Medical Board report; the 28 December 2011 Medical Board report assessed the WPI in the context of the American Medical Association “Guide to the evaluation of Permanent Impairment”, 6th edition (hereinafter the AMA Guide), and determined that the complainant had reached the MMI (maximum medical improvement); the MMI assesses that the injured staff member’s condition has stabilised

to the point where no further major medical change is to be expected; this assessment is also forward looking, as it considers whether and to what extent future degeneration may be attributable to the service-incurred injuries or to other factors; as the complainant's condition had stabilised in 2011, and in the absence of new work-related accidents, any decline in the complainant's condition could only be attributed to naturally degenerative factors; in order to get a change in the WPI rating, the complainant should have contested the 16 April 2012 decision and the Medical Board report endorsed thereby, within the applicable time limit.

4. It is convenient to quote the relevant rules and medical terms.

Article 25 of Appendix D to the Staff Regulations and Staff Rules stipulates that: "Irrespective of any other compensation payable under these rules, an official shall be entitled to lump sum compensation for permanent disfigurement or permanent loss of a member or function. Such compensation shall be payable whether or not the staff member remains in the employment of the Agency and whether or not the permanent disfigurement or loss of member or function affects the official's earning capacity." The lump sum amount provided for by Article 25 compensates the WPI, that is, according to the AMA Guide, "[p]ercentages that estimate the impact of the impairment on the individual's overall ability to perform Activities of Daily Living, excluding work".

The amount of compensation payable under Article 25 is determined on the basis of an assessment made in the light of the medical evidence (Article 26 of Appendix D). The decision by the Director General on the existence of an injury or illness attributable to the performance of official duties or on the type and degree of disability is taken on the basis of recommendations made by a Joint Advisory Board on Compensation Claims (JABCC) (Article 38 of Appendix D). This decision may be appealed, within thirty days of notice of the decision; in exceptional circumstances, the Director General may accept for consideration a request made at a later date (Article 40 of Appendix D). In case of appeal, a medical board is convened to consider and to report to the JABCC on the medical aspects of the appeal (Article 41 of Appendix D). Pursuant to Article 42 of Appendix D, in case of appeal the final decision must be taken following not only the JABCC recommendations but also a medical board report: "The Joint Advisory Board on Compensation Claims shall transmit its recommendations together with the report of

the medical board to the Director General, who shall make the final determination”.

5. The Tribunal emphasizes that where a decision regarding the lump sum amount provided for under Article 25 is appealed, for the decision on the appeal two procedural steps are needed: the recommendations of the JABCC and a medical board report on the medical aspects of the appeal. In the present case, the decision on the appeal is unlawful as it fails to meet one of these steps. The Director General rejected the appeal only on the basis of the JABCC recommendations, without convening a medical board.

6. The Tribunal does not accept the IAEA’s argument that, in order to contest the WPI rating established by the 28 December 2011 Medical Board report, the complainant should have impugned the decision that endorsed this report within the applicable thirty-day time limit. It is not relevant in the present case to establish whether Article 25 entitles an official only to a lump sum compensation as a one-off amount awarded once and forever, or, instead, also entitles them to seek further adjustments of an already awarded lump sum, on the basis of alleged deterioration of the health condition. If the first hypothesis were true, an appeal against the awarded lump sum could be lodged only within the established time limit. If the second hypothesis were true, the interested party:

- (i) might decide not to appeal the awarded lump sum, if satisfied with it unless and until the circumstances change (that is as the decision assesses the MMI at a specific material time and accordingly upon which a certain WPI rating is determined); and
- (ii) would maintain the possibility to make a further claim for a higher WPI rating in case of alleged further deterioration.

7. It is important at this point to emphasize that the approach of both the complainant and the IAEA proceeded on the footing that the letter of 10 May 2017 was a claim for compensation. Without deciding whether this is correct, the Tribunal will consider the claim on that basis.

In the present case, as a matter of fact, a first appeal was lodged pursuant to Article 40, and its outcome was the 16 April 2012 decision that endorsed the 28 December 2011 Medical Board report. By the 10 May 2017 letter, the complainant submitted a new claim pursuant to

Article 25, seeking compensation for the increase in her WPI rating. The Director General did not deal with this claim as an untimely appeal against the 16 April 2012 decision, pursuant to Article 40, but as a new claim pursuant to Article 25. By doing so, the Director General implicitly accepted that Article 25 not only entitles an official to a one-off amount once and forever, but also allows for new claims in case of alleged increase in the WPI rating related to the same events as the first WPI determination. Indeed, the Director General responded to the 10 May 2017 claim by means of the 1 June 2018 decision taken under Articles 35 and 38, following the relevant procedure, based only on the JABCC recommendations. Thus, this must be considered as a decision on a new claim, and not a decision on a late appeal against the 16 April 2012 decision.

The 1 June 2018 decision was appealed by the 29 June 2018 letter, which was decided in the 23 November 2018 decision. That decision clearly reveals its nature, as it affirms: “reference is made to your letter [...] of 29 June 2018, in which your client [...] appealed, pursuant to Article 40 of Appendix D [...]”; and “[t]his constitutes my final decision in this matter, pursuant to Article 42 of Appendix D”.

The impugned decision is unlawful, as it does not meet the requirements of Article 42 that the Director General ground his final decision on a report of a properly constituted medical board. For the reasons set out above, the impugned decision will be set aside and the case referred back to the IAEA for a new decision to be taken in compliance with the provisions of Article 42.

8. The complainant seeks the payment of moral damages. However, she fails to specify the relevant grounds and the amount. As the Tribunal’s case law requires that moral damages must be proven, this claim shall be dismissed (see, for example, Judgment 4156, consideration 5).

9. The complainant is entitled to costs, which the Tribunal assesses at 1,500 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The case is referred back to the IAEA in accordance with consideration 7 above.
3. The IAEA shall pay the complainant 1,500 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 18 October 2021, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ