Before: Judge Bana Barazi

Registry: Amman

Registrar: Laurie McNabb

ANABTAWI

v.

COMMISSIONER GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Anna Segall
Introduction

1. This is an application by Marwan Anabtawi (the “Applicant”) against the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”), (i) not to approve his request for examination by a medical board, (ii) not to consider his injury as service-incurred, and (iii) to reduce his sick leave from two weeks to five days.

2. Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the Joint Appeals Board (the “JAB”) was abolished as of 1 July 2009. Effective 1 June 2010, as set out in Area Staff Regulation 11.1, the Agency established the UNRWA Dispute Tribunal (the “Tribunal”) and all appeals pending with the JAB on the date of its abolition, including this application, were transferred to the Tribunal.

3. As a transitional measure, Article 2, paragraph 5 of the Statute of the Tribunal provides that the Tribunal shall be competent to hear and pass judgment on cases filed prior to the establishment of the Tribunal and in respect of which no report of the JAB had been submitted to the Commissioner-General.

Facts

4. On 21 March 1981, the Applicant entered the service of the Agency as a Trades Instructor, grade 9, at the Damascus Vocational Trade Centre, on a temporary assistance basis, in Damascus, Syria. On 1 June 1981, the Applicant’s appointment was converted to a temporary indefinite appointment against the same post. At the time of the material facts, the Applicant was employed as a Senior Vocational Training Instructor Mechanics, grade 12.

5. On 22 February 1994 the Applicant had a surgical intervention on his lower back.

6. On 28 May 2001, the Applicant wrote the Field Personnel Officer requesting that a medical board be convened in order to consider his injury as service-incurred.
7. By letter dated 10 June 2001, the Field Personnel Officer & Deputy Field Administration Officer, Syria (“FPO & D/FAO”) denied the Applicant’s request to convene a medical board as advised by the Health Department.

8. On 28 July 2001, pursuant to Area Staff Personnel Directive No. A/6 Part III on Compensation for Death, Injury or Illness, the Applicant submitted a “Report of Accident or Other Incident Involving UNRWA Personnel” summarising the “chronicle of [his] disease”.

9. Following several exchanges between the Applicant and the Agency regarding the Applicant’s request to be examined by a medical board and claim for compensation in respect to the alleged service-incurred injury, the Applicant met with the Chief, Field Health Programme (“CFHP”) who examined him and reviewed his medical history.

10. On 18 August 2003, The CFHP advised the Field Personnel Officer FPO & D/FAO that there were no related forms submitted by the Applicant for a service-incurred injury and therefore the Applicant’s injury could not be considered as service-incurred. The CFHP concluded that based on the medical reports submitted by the Applicant there was no evidence of any impairment that resulted from his illness.

11. In a note dated 1 October 2003, a nerve surgery specialist diagnosed the Applicant as having “a nucleus left hernia in the pulp area in lumbar 4 and 5” and recommended absolute rest for two weeks after which it will be determined if he needs an MRI.

12. On 25 October 2003, the Applicant had a second surgical intervention on his back.

13. On 6 May 2004, the Applicant filed an appeal with the JAB. As summarised by the JAB in its report:

a- the Appellant asserts that he requested, for many times a medical board be convened in connection with his first service-related injury;
b- the Appellant further asserts that the decision of the CFHP/SAR, conveyed to him on 6 October 2003, to reduce his sick leave from two weeks to five days, forced him to return to work earlier than had been prescribed by his doctor; and as result his health condition deteriorated and resulted in his back surgery on 25 October 2003.

The Appellant therefore seeks:

i. To consider his surgery [of 25 October 2003] as a second service accident as he was forced to return to work before his full recovery.

ii. To be compensated against this service accident.

14. Four years later, on 21 July 2008, the Respondent submitted his reply to the JAB.

15. On 26 August 2008, the JAB convened and dismissed the appeal without prejudice and recommended:

33. In view of the foregoing, the Panel unanimously makes its recommendation to the Commissioner-General that the Appeal be dismissed. The Panel notes the Respondent’s acknowledgement that the Appellant could be accorded another opportunity to pursue his claim in the interest of justice. The Panel therefore further recommends that the dismissal of the Appeal is without prejudice to the Appellant being accorded an opportunity in the interest of justice, to re-submit his claims relating to his back surgery on 25 October 2003 to be considered an injury attributable to the performance of his official duties and for an award of compensation. As suggested by the Respondent, the Appellant may re-submit his claims to the Administration within 30 days from the date of the receipt of the final decision of his appeal.

16. On 12 September 2008, the Commissioner-General approved the JAB’s recommendation to allow the Applicant an opportunity to re-submit his claims.

17. By letter dated 4 November 2008 to the Director of UNRWA Affairs, Syria (“DUA/SAR”), the Applicant reiterated the claims submitted to the JAB on 6 May 2004 and stated:

1 The Tribunal notes that the Applicant was given 30 days from receipt of the JAB’s final decision. On 27 October 2008, the Applicant received the JAB report with the Commissioner-General’s decision.
I would like the Agency to consider my surgery as a second service accident as I was forced to return to work before my full recovery and consequently be compensated against this service accident according to the laws and regulations applied by the Agency and the hosting country.

18. On 14 December 2008, the DUA/SAR gave instructions to have a medical board convene to examine the Applicant and “assess his present health status”.

19. On 22 December 2008, the Applicant re-submitted an appeal to the JAB and requested that his “back surgery be considered as an injury attributed to the performance of my official duties and compensated for it”.

20. In its report dated 25 January 2009, the medical board set out the Applicant’s medical history, gave its opinion and concluded, inter alia:

The patient suffers from low back pain with two previous surgical interventions to remove herniated disc [sic] in 22/2/1994 and 25/10/2003. Physical examination was normal without function deficit.

Taking into consideration the present health status of the patients [sic], the diagnoses and the previous surgery and the nature of his work, he is ABLE to continue his work in the agency (emphasis in original).

21. The CFHP and the Chief, Medical Care Services agreed with the conclusion of the medical board and signed it on 4 and 8 February 2009 respectively.

22. By letter dated 19 February 2009, the Applicant informed the DUA/SAR that the medical board, in its above conclusion, had failed to take into consideration his “physical deficit resulting from [his] work casualty”, requesting his case to be reconsidered and the medical board to determine the percentage of physical deficit in order to be compensated for it accordingly.

23. By letter dated 25 February 2009, the Deputy FAO reminded the Applicant that the medical board had found him fit for duty and that he expected him to carry on with his duties.
24. On 9 August 2012, the Respondent submitted his reply. The Tribunal accepted his submission. Article 30 of the Rules gives the authority to the Tribunal to shorten or extend a time limit fixed by the Rules or waive any rule when the interests of justice so require. Pursuant to Article 14 of the Rules, the Tribunal may make any order or give any direction which appears to be appropriate for a fair and expeditious disposal of the case and do justice to the parties. It is the Tribunal’s belief that submissions from both parties will better equip the Tribunal to render a fair and comprehensive judgment. Therefore, the Tribunal finds that it is in the interests of justice and would be appropriate for a fair and expeditious disposal of the case and would do justice to the parties for the Tribunal to extend the time limit under Article 6 and accept the late filing of the Respondent’s reply.

Additional Procedure

25. On 7 August 2012, the Respondent submitted a Motion for Extension of Time to file his reply on the element of the application regarding the decision to reduce the Applicant’s sick leave.

26. By email dated 15 August 2012, the Registrar, on behalf of the Judge, requested that the Respondent provide a date on which he expected to submit his reply.

27. By email dated 16 August 2012, the Respondent informed the Tribunal that given the security situation in Syria, the information on the Applicant’s sick leave could not be obtained from the Syria Field Office. The Respondent proposed to file its reply to this element of the application by 17 September 2012.

28. By email dated 22 August 2012, the Judge granted the Respondent’s request for an extension of time.

29. By email dated 11 September 2012, the Respondent advised the Tribunal that the Applicant’s attendance records for sick leave had been destroyed in 2008. Accordingly, the Respondent stated:
Therefore, in light of the Agency’s inability to resolve the conflict between its documents, the Agency will concede and accept the Applicant’s dates regarding his sick leave...the Agency’s reply to the element of the Application regarding reduction of sick leave from 2 weeks to 5 days will be filed by 17 September 2012.

30. On 17 September 2012, the Respondent submitted a supplemental reply to the element of the application regarding reduction of sick leave.

Applicant’s contentions

31. The Applicant contends that:

(i) the Agency should have granted his request for examination by a medical board in order to consider his injury as service-incurred;

(ii) he should be compensated for the reduction of his sick leave from two weeks to five days.

Respondent’s contentions

32. The Respondent contends that:

(i) the element of the Application regarding the medical board is moot;

(ii) the refusal to compensate the Applicant for an alleged service-incurred injury was proper;

(iii) the reduction of sick leave days from twelve to five was correct and properly effected.

33. The Respondent requests the Tribunal to dismiss the application.

Considerations

Procedural Issues

Jurisdiction

34. The Tribunal recalls that per Article 2, paragraph 5 of its Statute, the Tribunal shall be competent to hear and pass judgment on cases filed prior to the
establishment of the Tribunal and in respect of which no report of the JAB had been submitted to the Commissioner-General.

35. The Tribunal notes that a JAB report was indeed submitted and approved by the Commissioner-General on 12 September 2008. However, given that the Commissioner-General approved the JAB’s recommendation to allow the Applicant to “re-submit his claims to the Administration within 30 days from the date of the receipt of the final decision of his appeal” and the Applicant having submitted his claim in a timely manner, the Tribunal finds the Application receivable. Moreover, Article 2, paragraph 4 of the Statute states that “In the event of a dispute as to whether the Tribunal has competence under the present statute, the Dispute Tribunal shall decide on the matter”.

Main Issues

The Applicant’s request for a medical board to examine his injury

36. Looking at the evidence in the record, the Tribunal notes that the DUA/SAR directed the CFHP to convene a medical board on 14 December 2008 to examine the Applicant and “assess his present health status”. Indeed, a medical board was convened, it examined the Applicant and it issued a report on 25 January 2009. Therefore, in the Tribunal’s opinion the issue becomes moot. Moreover, the Tribunal notes that under Area Staff Personnel Directive No A/6, Part VI, a staff member may request to convene a Medical Board, however this is not an absolute right and is at the discretion of the Agency.

Was the Respondent’s decision not to consider the Applicant’s injury as service-incurred properly made?

37. At the outset, the Tribunal would like to point to the fact that there is no evidence in the record that the Applicant’s first surgical intervention on 22 February 1994 to remove a herniated disc was a service-incurred injury. Therefore, the Tribunal will apply caution to any reference made by the Applicant to the surgical intervention on 25 October 2003 as a “second service accident”.

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38. This having been said, the Tribunal recalls that the Applicant re-submitted his claim by letter to the DUA/SAR on 4 November 2008, requesting:

... the Agency to consider my surgery as a second service accident as I was forced to return to work before my full recovery and consequently be compensated against this service accident according to the laws and regulations applied by the Agency and the hosting country.

39. Regarding the above claim, the CFHP had advised the Deputy Field Administration Officer on 7 December 2008 that:

Having reviewed the case of Mr. Anabtawi from medical point of view [sic], his illness can not be considered as service-incurred accident due to the nature of his job with the Agency as instructor in DTC\(^2\). Such illness could happen to any staff member even if his job is of clerical duties.

* * *

As for the present status of Mr. Anabtawi, it is suggested to refer him for examination by the medical board.

40. Further, the medical board concluded in its report dated 25 January 2009:

The patient suffers from low back pain with two previous surgical interventions to remove herniated disc [sic] in 22/2/1994 and 25/10/2003. Physical examination was normal without function deficit.

Taking into consideration the present health status of the patients [sic], the diagnoses and the previous surgery and the nature of his work, he is **ABLE** to continue his work in the agency (emphasis in original).

The CFHP and the Chief, Medical Care Services concurred with the medical board’s report and conclusion. On 25 February 2009, the D/FAO advised the Applicant that the medical board has found him “**Fit for Further Services with the Agency**” (emphasis in original).

41. The Tribunal takes note of an email dated 18 August 2003, sent by the CFHP, Dr. Refaat Daghestani, to the FPO & D/FAO. Dr. Daghestani indicated

\[^2\] The Tribunal notes that DTC refers to Damascus Training Centre.
that he had met on that same day with the Applicant and investigated his medical history and complaint. He wrote *inter alia*:

Having reviewed the available documents, there were no related forms for in service accident. Therefore, his illness cannot be considered as in service. Besides, there is no evidence of any impairment resulted from his illness as concluded from the medical reports he submitted.

42. Again, on 29 June 2004, Dr. Daghestani, in an UNRWA Action Slip addressed to the FPO & D/’FAO wrote:

I have reviewed this case several times. The illness that Mr. Anabtawi has suffered from (i.e. hereniated disk) is not related to his job. Such illness might occur to any staff member even for those who have clerical work only.

43. The Tribunal finds that the evidence above, i.e. medical opinions, supports the conclusion that the Respondent’s decision not to consider the Applicant’s surgery as service-incurred injury was properly made and, *ipso facto*, the Respondent’s decision not to compensate the Applicant for an alleged service-incurred injury was equally correct. The Tribunal notes that the Applicant has failed to submit any evidence - convincing or otherwise - which would challenge the Respondent’s decision not to consider his injury as service-incurred. The Applicant is reminded that simply stating that his surgery is a (second) service accident is not enough. In order for the Tribunal to consider any allegation made by either side, documentary evidence is required. The Tribunal will not take mere statements by the parties, i.e. unsubstantiated allegations, as they do not constitute probative evidence. The Tribunal also notes that according to the medical board’s report of 25 January 2009, the Applicant’s health had improved after the 25 October 2003 surgery.

44. The Tribunal would like to take a moment to clarify to the Applicant and all future applicants that reference to vague law of the host country has no application and is not relevant to his case because his conditions of employment are governed *solely and exclusively* by the Agency’s Area Staff Regulations and Rules and other relevant issuances, as amended by the Agency.
45.  As the Applicant has failed to discharge his onus of proof and as he has not alleged that the Respondent’s decision was arbitrary or capricious, motivated by prejudice or extraneous factors, or flawed by procedural irregularity or error of law, the Tribunal sees no reason to interfere with the Respondent’s decision not to consider the Applicant’s surgery as a service-incurred injury and, accordingly, not to compensate the Applicant for said injury.

Was the Respondent’s decision to reduce the Applicant’s sick leave from two weeks to five days properly made?

46.  The Tribunal recalls that the Applicant contends that his sick leave in October 2003 was reduced from two weeks to five days. In his 17 September 2012 reply, the Respondent stated:

Lacking definitive information regarding the days in October 2003 when the Applicant was on sick leave, the Respondent concedes that the Applicant’s sick leave was reduced from two weeks to five days.

While it would appear that the issue of sick leave is moot, the Respondent’s reply further submits that the Agency’s decision to reduce the Applicant’s amount of sick leave was correct and consistent with the Agency’s regulatory framework.

47.  Upon review of the file, the Tribunal found an Inter Office Memorandum of the Syria Field Office, Damascus Training Centre (“IOM”) dated 12 February 2004 on the subject of the Applicant’s assumption of duty. Noting that this document was found in the Applicant’s JAB file, the Tribunal immediately transmitted a copy to both parties on 18 September 2012.

48.  The aforementioned IOM is from the Principal, Damascus Training Centre to the Field Personnel Officer & D/FAO/SAR and states:

This is to inform you please that Mr. Marwan Anabtawi, who was on sick leave as form [sic] 2/10/2003 to 18/1/2004 assumed

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3 The Tribunal recalls that upon the creation of the Tribunal, the pending JAB case files were transferred to the Tribunal and as a transitional measure, the Tribunal is competent to hear and pass judgment on cases filed prior to its establishment.
his duties on 7.2.2004 after centre’s mid-year vacation (emphasis in original).

49. While the Tribunal notes that both parties submit that the Applicant’s sick leave of October 2003 was indeed reduced, neither can provide the actual dates which were allegedly reduced. In fact, the only documentary evidence in the file on the Applicant’s actual dates of sick leave are contained above in the IOM. Accordingly, the Tribunal finds that the record does not indicate any interruptions in sick leave days by the Applicant and therefore denies the request for compensation for the reduced sick leave.

Conclusion

50. The application is dismissed in its entirety.

(Signed) 
Judge Bana Barazi
Dated this 24th day of September 2012

Entered in the Register on this 24th day of September 2012

(Signed)
Laurie McNabb, Registrar, UNRWA DT, Amman