

**UNITED NATIONS
ADMINISTRATIVE TRIBUNAL**

Judgement No. 114

(Original: English)

Case No. 117:
Khederian

**Against: The Secretary-General
of the United Nations**

Request for rescission of a decision taken by the Secretary-General on the recommendation of the Advisory Board on Compensation Claims, on the grounds that the procedure did not meet the requirements of due process.

Request for the production of supplementary documents.—Request rejected, as the production of such documents was not necessary.

Principal request.—Question of the reopening of the case under article 9 of Appendix D to the Staff Rules.—No legal justification for the institution of yet another Medical Board.—Procedure followed by the Advisory Board on Compensation Claims.—Membership and functions of the Medical Board.—Crucial importance of the report.—Disregard of the report of the Medical Board.—The Tribunal finds that the recommendations of the Advisory Board were made under misapprehension of the functioning of the Medical Board and of the purport of providing for the appointment of a third medical practitioner.—Irregularity of the procedure followed.—Case remanded for correction of the procedure.—Award to the Applicant of compensation equivalent to three months' net base salary for all loss caused to her by procedural delay.

Request for costs.—Request rejected, as it is on matters extraneous to the present proceedings.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; the Lord Crook, Vice-President; Mr. Zenon Rossides; Mr. Héctor Gros Espiell, alternate member;

Whereas, on 5 June 1967, Adrienne Khederian, a former staff member of the United Nations, requested the President of the Tribunal to designate a counsel to assist her in drawing up and submitting an application to the Tribunal;

Whereas, on 16 June 1967, the President, in pursuance of Administrative Instruction ST/AI/163/Rev.1, designated as counsel Miss Norma Roth, a staff member of the United Nations, who, on 15 March 1968, was relieved of her duties as counsel at her own request and was replaced by counsel chosen by the Applicant;

Whereas, at the Applicant's request and with the Respondent's agreement, the President extended to 22 September 1967 the time-limit for the filing of the application;

Whereas, on 22 September 1967, the Applicant filed an application the pleas of which read:

*"Pleas Addressed to the President under Article 10
of the Rules of the Tribunal*

"The Applicant requests the President to call upon the Respondent:

- "A. To produce the file opened on her case by the Advisory Board on Compensation Claims (hereinafter called the Advisory Board);
- "B. To produce all the correspondence between the Medical Director and Dr. Pisani relating to her case, and in particular the Medical Director's letter requesting the submission of Dr. Pisani's supplementary report of 1 June 1966;
- "C. To produce all memoranda passing between the Medical Director and the Advisory Board relating to her case.

*"Pleas Addressed to the Tribunal under Article 9.2
of the Statute of the Tribunal*

"The Applicant requests the Tribunal:

- "A. To order the case remanded to the Advisory Board for correction of the procedure by which it arrived at its recommendation concerning the report of the Medical Board established under Article 17 (b) of Appendix D to the Staff Rules;
- "B. To order the payment of compensation equivalent to three months' net base salary to the Applicant for such loss as may have been caused by the procedural delay;
- "C. To order the Respondent to pay a sum of \$5,000 to the Applicant for the prejudice suffered by her as a consequence of the abnormal delays imputable to the Respondent.

*"Pleas Addressed to the Tribunal under Article 9.1
of the Statute of the Tribunal*

"The Applicant requests the Tribunal:

- "A. To order the rescinding of the Respondent's decision of 14 February 1967 approving the Advisory Board's recommendation of 31 January 1967;
- "B.
 1. To rule that the Advisory Board exceeded its competence when it recommended that the findings of a majority of the Medical Board established under Article 17 (b) of Appendix D to the Staff Rules on the medical aspects of the appeal brought by the Applicant under Article 17 (a) of Appendix D should be disregarded;
 2. To remand the case to the Advisory Board with instructions to respect and apply the findings of the majority of the Medical Board on the medical aspects of the appeal;
or, in the alternative,

3. To rule that the reasons which the Advisory Board gave in support of its recommendation of 31 January 1967 were completely unfounded;
 4. To remand the case to the Advisory Board with instructions to draw valid conclusions from the Medical Board's report of 1 December 1966;
or, in the alternative,
 5. To rule that the Respondent's original decision of 22 June 1966 approving the Advisory Board's recommendation of 13 June 1966 was invalid because that recommendation was arrived at by an unauthorized delegation of power in violation of the provisions of Appendix D to the Staff Rules;
 6. To remand the case to the Advisory Board with instructions to make a fresh recommendation based on all the relevant evidence;
or, in the alternative,
 7. To rule that the Advisory Board failed to draw the proper legal conclusions from the report which it adopted as the only valid medical opinion and the views subsequently expressed by the author of that report;
 8. To remand the case to the Advisory Board with instructions to draw the appropriate conclusions from the views expressed by Dr. Pisani;
- "C. To order the Respondent to pay a sum of \$5,000 to the Applicant for the prejudice suffered by her as a consequence of the abnormal delays imputable to the Respondent;
- "D. To order the Respondent to pay \$1,231.18 as costs to the Applicant;
- "E. In the event that the Respondent exercises his option under article 9.1 of the Statute of the Tribunal, to fix compensation at an amount equivalent to the benefits which the Applicant would have received under articles 11.2 and 11.3 of Appendix D to the Staff Rules if the findings of the Medical Board's report of 1 December 1966 had been applied.";

Whereas the Respondent filed his answer on 27 November 1967;

Whereas, on 15 February 1968, the Applicant filed written observations in which she requested that oral proceedings be held;

Whereas, on 26 February 1968, the President decided that the Tribunal would consider the case at its next session, that no oral proceedings under article 15 of the Rules of the Tribunal would be held at that session and that, in order to complete the documentation of the case, the parties would be heard under the procedure laid down in article 10, paragraph 3, of the Rules;

Whereas, on 29 February 1968, the Executive Secretary of the Tribunal informed the parties that, in the opinion of the President, an examination of the Advisory Board's entire file on the case would assist the Tribunal in its deliberations;

Whereas, on 12 and 26 March 1968, the Respondent offered the Advisory Board's entire file to the Tribunal for inspection on the understanding that the

Tribunal in confidence would examine the file and then indicate to the Respondent which papers the Tribunal considers to be relevant to the claim, the Respondent being prepared to consider whether any or all of them might be provided to the Tribunal for the Applicant's use;

Whereas, on 18 March 1968, the Respondent filed a reply to the Applicant's written observations;

Whereas the procedure under article 10, paragraph 3, of the Rules was conducted by Mr. Rossides on 22 March 1968;

Whereas, on 1 April 1968, the Applicant consented to the procedure suggested by the Respondent for the submission of the Advisory Board's entire file to the Tribunal and requested the right to examine all of the doctors comprising the Medical Board or at least the opportunity to examine Dr. Pisani;

Whereas the Respondent submitted on 5 April 1968 a written statement concerning the Applicant's request for a cross-examination of members of the Medical Board;

Whereas, on 9 April 1968, the Tribunal informed the parties, pursuant to article 18 of the Rules, that it was considering the possibility of remanding the case in accordance with article 9, paragraph 2, of the Statute of the Tribunal, in order that the required procedure should be instituted or corrected;

Whereas, on 11 April 1968, the Respondent requested that the case be remanded in accordance with article 9, paragraph 2, of the Statute of the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 13 May 1962 under a fixed-term appointment of one year as a secretary for the United Nations Operation in the Congo (ONUC). On 25 March 1963 she was informed of the sudden death of her mother in Cairo and, in view of her reaction to this news, she was given a sedative injection in her right arm at the ONUC Hospital in Kinshasa; thereafter an inflammation developed at the site of the injection. On the following day she left for Cairo, where she was treated by a doctor who found that she was suffering from a phlegmon of the right arm due to a faulty injection. On 13 May 1963 the Applicant's appointment was extended for one year. Towards the end of May 1963 she returned to Kinshasa where in the course of the following months she was examined and treated by several ONUC doctors and by private practitioners. On 13 May 1964 she was granted an extension of her appointment to 30 June 1964. On 1 July 1964, her appointment was extended to 30 June 1965. On 10 July 1964 the Applicant requested that in view of the unsuccessful efforts to effect a cure in the Congo she be sent to Europe at ONUC expense for treatment. This request was denied, the Medical Director of the United Nations being of the opinion that medical evacuation to Europe was not justified. On 29 August 1964, the Applicant left the Congo on home leave, but first went to Heidelberg, Federal Republic of Germany, for medical consultation and treatment. On 16 November 1964, while she was still in Germany, her salary payments were stopped until further notice. Having returned to duty in the Congo on 9 January 1965, she requested on 12 January payment of back salary, medical expenses and fees, travel to Germany and additional fare for return trip to Kinshasa, and compensation for moral damage. On 3 February 1965, the Medical Director ruled that sick leave during annual leave for the period 1 September-30 November 1964 was not approved, as only ambulatory treatment was required and treatment was available in the area of assignment, and that reimbursement of medical expenses

by the United Nations was disallowed as treatment was available in the area of assignment. On 23 February 1965 the Applicant contested these rulings and suggested that the matter of sick leave entitlement should be referred to an independent practitioner in accordance with Staff Rule 106.2 (a) (viii). On 17 March 1965 she was placed on leave without pay until the expiration of her contract on 30 June 1965; part of that period was subsequently recognized as sick leave. On 29 May 1965 the Chief Personnel Officer, ONUC, informed the Applicant that Headquarters had agreed to refer the matter to an independent practitioner, and proposed the names of two practitioners. On 1 June 1965 the Applicant agreed to the appointment of one of them. On 24 July 1965 the Acting Chief Personnel Officer, ONUC, informed her that the medical practitioner chosen by both parties could not review the case because of his heavy duties, and proposed alternative names of practitioners. On 29 July 1965 the Applicant replied that these practitioners were not acceptable to her and that the medical examination should take place in New York. In the meantime, on 25 May and 21 June 1965 respectively, a claim for damages as well as an appeal contesting the decision not to review her contract and claiming compensation for the injury alleged to have been caused by the faulty injection had been submitted to the Secretary-General on behalf of the Applicant. On 15 September 1965 the Secretary of the Advisory Board on Compensation Claims wrote to the attorney who was handling the Applicant's affairs in New York, *inter alia*, that the Applicant had two points at issue—namely, the refusal of sick leave for the period during which she underwent treatment in Heidelberg and the larger question of compensation for the alleged injury—that to deal with both of those questions the United Nations would require an impartial medical appraisal of the whole sequence of events, that the Applicant had to submit to such a medical review before any consideration could be given to her claim, and that she should advise the Board of the name of a physician acceptable both to herself and to the United Nations to whom she was prepared to submit for a full medical review of her case. On 14 October 1965 the Medical Director of the United Nations wrote to the Applicant's attorney that the Organization would be prepared to have the Applicant's case reviewed by a single independent physician if she and he (the Medical Director) could agree on such a physician. An orthopaedist, Dr. Pisani, was nominated on behalf of the Applicant as the single independent physician and the Medical Director agreed to the nomination. On 1 December 1965 the Medical Director sent to Dr. Pisani an abstract from the medical file of the Applicant and asked him, in making his report, to include his opinion on the following questions: "(a) The nature and degree of the injury or illness; (b) The degree of incapacitation in August 1964, March 1965 and at the present time; (c) Whether there was justification on medical grounds for treatment in Europe." Dr. Pisani examined the Applicant—who had come to New York in October 1965—on 6 January 1966 and issued his report on 10 January. After her examination by the independent practitioner the Applicant consulted other physicians. One of them, Dr. Waltier, issued a report on 30 March 1966.

The Applicant's claim was placed on the agenda of the Advisory Board on Compensation Claims at its 138th meeting on 25 May 1966. In addition to Dr. Pisani's report of 10 January 1966, the Advisory Board had before it Dr. Waltier's report of 30 March 1966, which had been submitted to it two days before its meeting. The Advisory Board did not consider the case at its 138th meeting. However, after the formal closure of the meeting, members of the Board made an informal review of the papers submitted. The Medical Director pointed out that Dr. Pisani's report "should be considered as the only pertinent medical

report for review by the Board". One member having requested clarification of Dr. Pisani's report on two points, the Advisory Board had also before it a supplementary report by Dr. Pisani dated 1 June 1966 when it considered the claim at its 139th meeting on 13 June 1966. At this meeting the Advisory Board adopted the following recommendation:

"The Advisory Board on Compensation Claims,

"Having considered, at its 139th meeting on 13 June 1966, the claim submitted by Miss Adrienne Khederian for compensation for the effects of an injection administered on 25 March 1963 in the Congo;

"Noting that an independent practitioner, acceptable both to the Secretary-General and the claimant, had been appointed to review the medical history of the case;

"Recognizing the report of this practitioner as being the only valid medical opinion;

"Further noting the opinion of the practitioner that a temporary disability had resulted from the injection, but that this disability had completely subsided by 28 August 1964, and that the claimant's other symptoms and complaints were traceable to a cervical nerve root syndrome of congenital origin;

"Recommends to the Secretary-General that

"(a) the temporary disability experienced by Miss Adrienne Khederian during the period between 25 March 1963 and 28 August 1964 be recognized as attributable to service;

"(b) reasonable medical expenses incurred between 25 March 1963 and 28 August 1964 in connexion with the temporary disability, as certified by the Medical Director, be paid; and

"(c) claims for the alleged thirty per cent permanent partial impairment, loss of earning capacity, and reimbursement of medical expenses subsequent to 28 August 1964, be denied."

On 23 June 1966 the Applicant was notified that the Secretary-General had accepted the above recommendation.

On 22 July 1966 the Applicant filed an appeal under article 17 (a) of Appendix D to the Staff Rules against the Secretary-General's decision and named Dr. Waltier as the medical practitioner to represent her on the Medical Board provided for under article 17 (b). The Medical Director selected Dr. Pisani to represent the United Nations and, on 26 August 1966, he invited him to contact Dr. Waltier in order to arrange for the selection of the third physician and for a meeting of the Medical Board to examine the evidence and submit a joint report on the following questions: (1) The degree, if any, of permanent partial disability; (2) Cause of arm symptoms and "other symptoms" referred to in a memorandum of 10 August 1966 addressed on behalf of the Applicant to the Secretary of the Advisory Board; (3) Is she disabled for carrying out normal duties at the present time, and if so the prognosis for resumption of duties; (4) On the basis of the submitted evidence, was she incapacitated from duty at the date of separation from service. Dr. Pisani and Dr. Waltier selected Dr. Pyrros as the third member of the Medical Board. On 29 September 1966 the Applicant's adviser requested from the Secretary of the Advisory Board permission to examine the Advisory Board's file in the case so as to submit the Applicant's comments in writing. The Secretary replied on the following day that he was referring this request to

the Office of the Legal Counsel for comment, but no further reply seems to have been given to the request. Prior to the issue of the report of the Medical Board, individual reports were submitted by Dr. Waltier on 7 November 1966 and by Dr. Pyrros on 9 and 21 November. On 22 November, the Secretary of the Advisory Board wrote to Dr. Pyrros, with copies to Dr. Waltier and Dr. Pisani, stating that the individual reports would not appear to be relevant in the case. The Medical Board convened on 23 November 1966 and submitted its report on 1 December 1966 in a letter addressed to the Medical Director. The Medical Board's findings read as follows:

"1. The degree of permanent partial disability: Dr. Waltier approved the disability as 84 per cent of the right upper extremity, permanent partial. There is a one hundred per cent disability as a typist, permanent. Dr. Pyrros agreed with the above percentages. I disagree, and am of the opinion that any disability at the present time will be materially affected by additional treatment, specifically directed toward surgical treatment of the rudimentary rib, plus treatment of the dermatitis. This dermatitis has been diagnosed by the dermatologist, Dr. Milton Reisch, as a dermatitis factitia. My estimate of any permanent partial disability is withheld, pending the result of the above treatment.

"2. The cause of arm symptoms and other symptoms: Dr. Waltier is of the opinion that the present symptomatology and disability is due to the hypodermic injection, followed by secondary lymphangitis and subsequent osteitis. Following this chain of events, the patient developed additional causally related disability of dermatitis factitia. The congenital rudimentary rib formation was aggravated by all of the above factors. Dr. Pyrros agrees with the above. I am of the opinion that this is a true dermatitis factitia, caused by the patient's nervous state, probably secondary to the chain of events beginning in March of 1963. The cervical rib syndrome was aggravated by this chain of events. The congenital rudimentary ribs were previously asymptomatic.

"3. Dr. Waltier feels that Miss Khederian is disabled from carrying out her normal duties at the present time. The prognosis, he feels, is poor for the future. Please note the permanent disability as stated above. Dr. Pyrros agrees with this. I disagree. It is my opinion that a partial disability probably does exist at the present time. The percentage of permanent disability, partial, is to be determined pending the outcome of the treatment mentioned above.

"4. On the basis of the submitted evidence, Dr. Waltier is of the opinion that Miss Khederian was incapacitated from duty at the date of separation from services, June 30, 1965. Dr. Pyrros agrees. I disagree. As stated in the third paragraph of my report of June 1, 1966, '... plus the fact that she had been working up until August 1964, it is my opinion that Miss Khederian was not disabled for her secretarial work. This opinion is meant to cover the period from the end of August, 1964 until she returned to work in December of 1964.' "

On 12 December 1966 the Medical Director submitted the following comments on that report:

"1. Although Dr. Pisani's opinion is a minority opinion, I believe his opinion is important. First, his opinion is objective because, for the earlier appeal against the denial of sick leave, he had been selected by *the appellant* to be the independent medical practitioner to review her case. Secondly, his

opinion is based on sound technical experience, since of the three members of the medical board he is the only one who is a specialist in orthopaedics and in compensation medicine.

"2. I feel that an important difference between the majority and minority opinions is the estimation of the emotional factor. I share the opinion that any incapability existed more in the appellant's mind than could be explained by physical findings, starting from the moment when she was upset by the sudden news of the death of her mother and when she was given an injection of a sedative.

"3. Mention is made for the first time of a condition of dermatitis factitia. By definition, dermatitis factitia is a skin inflammation which has been artificially produced."

At its 142nd meeting on 15 December 1966, the Advisory Board considered the Applicant's appeal and noted that "the opinions expressed [in the report of the Medical Board] were not unanimous, and that there was considerable divergence of opinion as to the extent of the disability, if any; the causes of the conditions described; and the possibility of treatment reducing or eliminating the disabling conditions". Under the circumstances, the Advisory Board "asked the Medical Director to provide it with a written statement clarifying the report before giving it further consideration". Having been advised that the Applicant was in a difficult financial situation, the Advisory Board agreed "that the attention of the Secretary-General be drawn to this situation, in the event that he might wish to consider making an *ex gratia* arrangement, without prejudice to the ultimate decision", to enable the Applicant "to enter a hospital for observation and diagnosis of her condition, if she so desired, pending the completion of the Board's consideration of the appeal". Further discussion was deferred. The above suggestion for an *ex gratia* award was dealt with in a memorandum of 21 December 1966 addressed to the members of the Advisory Board by its Secretary; this memorandum stated *inter alia*:

"...

"2. The Secretary-General approved this suggestion and has authorized such an *ex gratia* award.

"3. The appellant, however, refused to attend a meeting, arranged for the purpose of informing her of the proposal, with the Medical Director, the Staff Counsellor, the Secretary of the Advisory Board on Compensation Claims, and her adviser from the panel of legal counsel. When she was subsequently advised of the nature of the Secretary-General's offer by her legal adviser, she categorically refused to consider it.

"4. Under such circumstances, it is assumed that the offer of an *ex gratia* award for the purposes stated will be withdrawn, and that the matter is in abeyance pending receipt of the Medical Director's report on the medical issues of the case."

A copy of that memorandum was addressed to the Applicant's adviser, who on 22 December 1966 replied as follows to the Secretary of the Advisory Board:

"...

"1. When you told me over the telephone, on 20 December, that the Administration was offering to pay for Miss Khederian's stay in hospital for the purpose of observation, I asked you to give me a written text of the offer specifying the conditions under which this would be done, so that I could show it to Miss Khederian and discuss the matter with her with a full

knowledge of all the facts. You said that you were unable to do so, since the offer was purely verbal.

"2. Miss Khederian was put in the position of having to take in a very short time a decision in a matter vital for her, without knowing who would choose the hospital, whether her own doctor would be authorized to supervise the treatment she would receive there and, above all, whether the diagnosis which would be arrived at by the hospital would replace the findings of the medical board appointed under Article 17 of Appendix D to the Staff Rules. She chose the prudent course, and I cannot blame her.

"3. I had to give her advice without having been shown the report of the medical board appointed under Article 17. I had not even been informed that the board had submitted its report. May I recall in this connexion that, by a memorandum of 29 September, I asked to be allowed to examine Miss Khederian's file and all the documents in her case. The only answer I received so far to that memorandum was that the Office of Legal Affairs was considering the matter. In the circumstances I felt that I had no right to bring any pressure to bear upon Miss Khederian and I fully understand her decision.

"4. The reasons for that decision are very simple. Miss Khederian believes that she has scrupulously followed the procedure prescribed by Appendix D, that she took all the medical examinations requested by the medical board appointed under Article 17, and that it is now for the Respondent to take a decision on the basis of the findings of the board.

"..."

At its 143rd meeting on 11 January 1967, the Advisory Board again considered the report of the Medical Board, together with the statement of the Medical Director containing an analysis of that report, but was "unable to make a determination of the degree of disability or of the attributability to service". At its 144th meeting on 25 January 1967, the Advisory Board agreed that "on the basis of the report of the Medical Board, it was unable to recommend that the Secretary-General should revise his previous decision" in the case. The Advisory Board's recommendation was submitted by its Acting Chairman to the Secretary-General in a memorandum of 31 January 1967 reading in part:

"..."

"3. In the course of three meetings, on 14 December 1966, 11 and 25 January 1967, the Advisory Board studied the report of the medical board and in particular the findings contained therein on the extent and nature of any disability of the appellant and the causes of her various symptoms. The Advisory Board found the report of the medical board, whose votes were divided on each issue, inconclusive and ambiguous as to that element which is basic to the competence of the Advisory Board and essential in the determination of entitlement to compensation under Appendix D, namely, whether or not the injury or illness of the claimant is attributable to the performance of official duties on behalf of the United Nations.

"4. Accordingly, the Advisory Board, in the light of all the evidence and medical opinions received in the case, could find no basis for proposing to the Secretary-General a revision of the decision appealed against. It therefore *recommends* that he maintain his previous decision but suggests that, at the option of the appellant, a new medical board, to be composed of eminent physicians, could be convened, whose findings on the issues involved would

enable the Secretary-General to reopen the case under Article 9 of Appendix D. The expenses in connexion with such a new medical board should be borne entirely by the United Nations."

The Advisory Board's recommendation and suggestion were accepted by the Secretary-General and, on 17 February 1967, the Applicant was notified accordingly. On 3 March 1967 the Applicant appealed against the decision communicated to her and requested the Secretary-General's agreement to the direct submission of an application to the Administrative Tribunal. That agreement was given on 22 March 1967, and, on 22 September 1967, the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Concerning the pleas addressed to the President under article 10 of the Rules of the Tribunal: The procedure followed in the Azzu case for the production of the file of the Advisory Board should be followed; the correspondence between the Medical Director and Dr. Pisani and the memoranda passing between the Medical Director and the Advisory Board should also be produced since they are relevant to the case.

2. Concerning the pleas addressed to the Tribunal under article 9.2 of its Statute: The procedure followed by the Advisory Board in arriving at the recommendation approved by the Respondent on 14 February 1967 failed to meet the requirements of due process since the Applicant was not permitted to examine the documents submitted to the Advisory Board and since the Respondent erred in making his *ex gratia* offer of financial assistance to the Applicant conditional on her hospitalization for the purpose of observation and diagnosis.

3. Concerning the pleas addressed to the Tribunal under article 9.1 of its Statute:

(a) The Advisory Board exceeded its competence when it recommended that the findings of a majority of the Medical Board should be disregarded. The findings of the majority of a medical board established under article 17 (b) of Appendix D to the Staff Rules on the medical issues raised by an appeal under article 17 (a) are conclusive and binding on the Advisory Board and the Respondent. The Advisory Board exceeded its competence when it recommended that the decision of the Medical Board on the medical issue of causality should be disregarded;

(b) The reasons which the Advisory Board gave in support of its recommendation of 31 January 1967 were completely unfounded: The report of the Medical Board was, on its face, neither "inconclusive" nor "ambiguous" as to the attributability of the Applicant's arm symptoms and other symptoms to service; the Medical Director did not find the report inconclusive or ambiguous on the issue of attributability; the fact that the votes of the Medical Board were divided on the issue of causality did not justify the Advisory Board's conclusion that the Medical Board's report was inconclusive on that issue; the Advisory Board made no attempt to obtain a clarification of the findings of the Medical Board on the issue of attributability; and the considerations which actually motivated the Advisory Board's recommendation of 31 January 1967 did not justify that recommendation;

(c) The Advisory Board's recommendation approved by the Respondent's original decision of 22 June 1966 was arrived at by an unauthorized delegation of power in violation of the provisions of Appendix D to the Staff Rules. Therefore,

the Respondent's original decision was likewise invalid, and the Respondent's decision of 14 February 1967 reaffirming that invalid decision should be rescinded;

(d) The Advisory Board failed to draw the appropriate legal conclusions from the report which it adopted as the only valid medical opinion and from the views subsequently expressed by the author of that report.

Whereas the Respondent's principal contentions are:

1. The Advisory Board, whose recommendations the Secretary-General has accepted, is, as the name implies, purely an advisory body. Under Appendix D, the decisions are made by the Secretary-General, who is not bound to accept the recommendations of the Advisory Board.

2. The Secretary-General and the Advisory Board acted in accordance with Appendix D and procedures established for compensation claims:

(a) Far from being an unauthorized delegation of authority, the use of an independent medical practitioner is totally consistent with article 13 of Appendix D;

(b) The history of the case at the time of the selection of Dr. Pisani by the Applicant and the agreement by the Respondent make it clear that Dr. Pisani was nominated by the Applicant for both compensation and sick leave questions;

(c) When it received the opinion of the independent medical practitioner, the Advisory Board was aware that the medical practitioner had had available to him a great quantity of medical evidence and it felt justified in acting on the basis of the findings of that practitioner;

(d) There were deficiencies in the Medical Board report, which was not unanimous on whether there was permanent disability, failed to provide an estimate of degree of permanent disability in terms which were familiar or comprehensible to the Advisory Board, and contained an administrative conclusion without providing the medical conclusions on which that administrative conclusion was based;

(e) The Advisory Board made a reasonable attempt to work with the Medical Board report which it found to be vague and inconclusive. To assist the Applicant pending receipt of further clarification, the Advisory Board suggested granting an *ex gratia* award to the Applicant, a proposal which was simply an offer of hospitalization and was not considered by the Advisory Board in any other terms. Finally, in order to provide the Applicant a further opportunity to prove her claim, the Advisory Board suggested—and the Secretary-General accepted—that a new Medical Board of eminent physicians be convened at United Nations expense.

3. The Advisory Board's actions were neither arbitrary nor capricious:

(a) Neither the Advisory Board nor the Secretary-General is bound to accept the findings of a Medical Board on the medical aspects of the case;

(b) There was no impropriety on the part of the Advisory Board in its failure to comply with the Applicant's request to examine its files relating to her case.

The Tribunal, having deliberated from 8 to 23 April 1968, now pronounces the following judgement:

I. Concerning the Applicant's request for production of the file opened on her case by the Advisory Board on Compensation Claims, the Tribunal notes that this file was submitted to the Tribunal on 8 April 1968 under the procedure suggested by the Respondent and accepted by the Applicant. Upon inspection of the file, the Tribunal found in it no relevant papers which had not been submitted already as annexes to the various pleadings. Accordingly, the Tribunal did not

call for the production of additional papers. As to the request for production of all correspondence between the Medical Director and Dr. Pisani, and between the Medical Director and the Advisory Board, the Tribunal feels that the opinion of the Medical Director is made abundantly clear in various annexes to the pleadings. Therefore, the production of such correspondence is not necessary.

II. The Applicant requests the Tribunal to order the rescinding of the Respondent's decision taken on an appeal filed under article 17 of Appendix D to the Staff Rules and communicated to the Applicant in a letter of 17 February 1967 from the Secretary of the Advisory Board on Compensation Claims.

This letter confirmed the original decision communicated in a letter dated 23 June 1966 by which the Secretary of the Advisory Board informed the Applicant through her counsel that the recommendations of the Advisory Board had been approved by the Secretary-General.

In these recommendations, a "temporary disability . . . during the period between 25 March 1963 and 28 August 1964" was "recognized as attributable to service" and responsibility was assumed by the Organization for the "reasonable medical expenses incurred . . . in connexion with the temporary disability"; on the other hand, it was recommended that "claims for the alleged thirty per cent permanent partial impairment, loss of earning capacity, and reimbursement of medical expenses subsequent to 28 August 1964, be denied".

Thus, following the Applicant's appeal filed under article 17 of Appendix D to the Staff Rules against the decision of 23 June 1966, her claim that she was suffering from a permanent disability attributable to service was rejected by the Respondent.

III. The Tribunal notes that, in the above-mentioned letter of 17 February 1967, the Respondent made the following suggestion to the Applicant:

" . . . in view of the fact that the opinions of the members of the medical board were divided on the extent and nature of any disability and on the causes of your various symptoms, and that the report of the medical board was inconclusive and ambiguous on the essential issue of whether or not the injury or illness is attributable to the performance of official duties on behalf of the United Nations, the Secretary-General is prepared at your option, to have a new medical board convened, which should be composed of three eminent physicians. The findings of such a board on the issues involved would enable the Secretary-General to re-open your case under article 9 of Appendix D. The entire cost of such a board would be borne by the United Nations."

The Tribunal notes that under article 9 of Appendix D to the Staff Rules the Secretary-General is empowered to reopen a case on his own initiative or upon the request of the person concerned. In any event, if the Respondent considers that the circumstances of the case justify recourse to article 9, the decision rests with him. The so-called "option" stated to be open to the Applicant in the letter of 17 February 1967 is not in fact an option, since the Respondent is the sole judge of whether the findings of a new Medical Board do or do not enable him to reopen the case.

Besides, whereas article 17 makes provision for a Medical Board, article 9 contains no such provision, and the membership and functions of the Board proposed in the letter of 17 February 1967 are matters left wholly to the Respondent's discretion.

Consequently, the "option" suggested to the Applicant cannot be regarded as affecting the legal situation resulting for her from the confirmation of the letter of 23 June 1966. The power conferred on the Secretary-General by article 9 is exercisable at his discretion. But so long as the Respondent has not put article 9 into operation, the Applicant is in a situation where the existence of permanent disability attributable to service has not been admitted by the Respondent.

In the present proceedings, therefore, the question of reopening the case does not arise and the Tribunal can find no legal justification or reason for the institution of yet another Medical Board. By any such process there could be an indefinite continuation of appointments of Medical Boards.

IV. The decision communicated on 17 February 1967 was reached on an appeal duly filed under article 17 of Appendix D to the Staff Rules. Since the claim of a permanent disability attributable to the performance of official duties was based on medical grounds, the Medical Board provided for in article 17 (b) was set up.

Article 17 (b), (c) and (d) lays down the rules governing the membership and functions of the Medical Board.

The Tribunal directs attention to the following points. In the first place, the Medical Board must consist of:

"(i) a qualified medical practitioner selected by the claimant; (ii) the Medical Director of the United Nations or a medical practitioner selected by him; (iii) a third qualified medical practitioner who shall be selected by the first two, and who shall not be a medical officer of the United Nations."

From this it will be seen that the Medical Board is to include the Medical Director of the United Nations or a medical practitioner selected by him; thus it is at the meetings of the Medical Board itself that the point of view of the Organization's Health Service should normally be stated. On the other hand, the third medical practitioner, selected by the first two, "shall not be a medical officer of the United Nations". Consequently, the membership of the Medical Board—which deals with a case on appeal—is such as to ensure that two out of its three members are independent of the Health Service. Again, the Medical Board is called upon "to consider and to report to the Advisory Board . . . on the medical aspects of the appeal". The Medical Board's report must be transmitted to the Secretary-General for his consideration before he comes to a final determination (article 17 (c) and (d)). It is true that the Secretary-General will at the same time have received the recommendations of the Advisory Board, but the Medical Board's report is the only medical document referred to in article 17 of Appendix D.

It follows that, so far as the medical aspects of an appeal are concerned, this medical report is of crucial importance.

V. The views of the Tribunal as to the value of a system whereby there is consideration of medical cases by a panel of three medical practitioners, two appointed one from each side and a third by agreement between the first two, have been expressed in numerous judgements, more recently in Judgements Nos. 83, 91 and 107. The Tribunal recalls, for instance, that in Judgement No. 91 it recorded:

"The Tribunal notes with satisfaction that a medical procedure has now been adopted in which the staff member and the Administration each appoints a doctor and these two doctors in turn nominate a third doctor to constitute a panel to consider cases of termination 'for reasons of health'. Had this

procedure been followed earlier and material made available, the prolonged litigation in this case might have been avoided."

Those judgements dealt with situations which were different from that involved in the present case, where there are already regulations set down clearly in Appendix D to the Staff Rules with a view to ensuring to staff members an obviously impartial medical assessment of the issues raised.

VI. Under article 17 of Appendix D to the Staff Rules the Medical Director of the United Nations is entitled to sit on the Medical Board when he has not appointed another medical practitioner for the purpose, but there is no provision which gives him special authority as regards the Medical Board's report when he has chosen to be represented on the Medical Board by someone else.

VII. In the present case, the contested decision was taken on the basis of recommendations submitted in a memorandum addressed to the Secretary-General by the Acting Chairman of the Advisory Board on 31 January 1967. The recommendations themselves are contained in paragraph 4 of that memorandum. The grounds which, in the Advisory Board's view, justify these recommendations are, in essence, stated in paragraph 3. These grounds are also set out in the letter of 17 February 1967 informing the Applicant of the Secretary-General's decision.

VIII. The Tribunal notes that the Advisory Board, in proposing the "option" mentioned above, declared that it was acting "in the light of all the evidence and medical opinions received in the case". Thus, the Advisory Board relies, not on what article 17 of Appendix D treats as the essential element, i.e. the report of the Medical Board, but on an unspecified set of elements.

IX. The Tribunal observes that the Advisory Board, when it took up the Applicant's appeal at its 142nd meeting, had before it the report of the Medical Board together with comments of the Medical Director, dated 12 December 1966, on the Medical Board's report. These comments showed a clear preference for the minority opinion of the medical practitioner appointed to the Medical Board by the Medical Director himself.

The Tribunal also notes that the Secretary of the Advisory Board indicated to the Board that:

"In view of the lack of unanimity of the medical board, [the Advisory Board] must decide:

"(a) whether to accept the finding of the medical board or to seek further specialist opinion.

". . .".

The Tribunal is unable to find any legal basis for the statement that the Advisory Board *must* so decide.

In the papers prepared for the same meeting the Secretary of the Advisory Board drew insinuatingly the attention of the Board to the opening paragraph of Dr. Pyrros's individual report of 9 November 1966 to the effect that "[the] patient was examined . . . at the request of Dr. Waltier. . . . The history and present illness reviewed from Dr. Waltier's attached report . . .".

X. The Advisory Board decided to ask "the Medical Director to provide it with a written statement clarifying the report before giving it further consideration". Thus the Medical Director, who was represented on the Medical Board by another medical practitioner, was placed in a position where he could review that body's report. And in his analysis of 22 December 1966 of the Medical Board's report,

he saw fit to refer to a report made, prior to the establishment of the Medical Board, by the medical practitioner who had represented him on that board.

The minutes of the 143rd meeting, held on 11 January 1967, expressly state that the Advisory Board "again considered the report of the medical board, together with the statement of the Medical Director". Thus, the point of view of the Medical Director was placed on the same footing as the Medical Board's report. However, no decision was taken at that stage.

When the recommendation was finally adopted at the 144th meeting, on 25 January 1967, it was based on "all the evidence and medical opinions received in the case". The Medical Board's report was to all intents and purposes set aside.

XI. This disregard of the report of the Medical Board is explained in the opinion expressed by the Advisory Board regarding the report:

"In the course of three meetings, on 14 December 1966, 11 and 25 January 1967, the Advisory Board studied the report of the medical board and in particular the findings contained therein on the extent and nature of any disability of the appellant and the causes of her various symptoms. The advisory Board found the report of the medical board, whose votes were divided on each issue, inconclusive and ambiguous as to that element which is basic to the competence of the Advisory Board and essential in the determination of entitlement to compensation under Appendix D, namely, whether or not the injury or illness of the claimant is attributable to the performance of official duties on behalf of the United Nations."

These considerations indicate the grounds upon which the recommendations were made to the Secretary-General by the Advisory Board. The Respondent has accepted both the proposed decisions and the grounds thereof.

XII. Under article 17 (c) of Appendix D to the Staff Rules it is the Secretary-General who makes the final determination after receiving the recommendations of the Advisory Board together with the report of the Medical Board.

Nevertheless, as was recalled in Judgement No. 103 (Azzu) in connexion with a case referred to the Advisory Board, "the duty to observe the requirements of due process providing adequate safeguards for the rights of the individuals concerned is a general and universally recognized principle which the Respondent must respect".

When the applicable rules provide for the submission of a medical report, due process requires, first, that any opinion expressed on the contents of the report should be compatible with its actual terms, and, second, that the very authority of the body which prepared the report should not be called in question.

XIII. In drawing up its recommendations, the Advisory Board said that, in the Medical Board, "votes were divided on each issue", and that the report was "inconclusive and ambiguous".

The Tribunal notes that four questions which the Medical Director had formulated—apparently without consulting the Applicant's counsel—were put to the Medical Board. As regards these four questions it is clear from the report that the medical practitioner selected jointly by the doctors designated by the Applicant and the Medical Director respectively was of the same opinion as the medical practitioner appointed by the Applicant. On the other hand, the medical practitioner appointed by the Medical Director was of a different opinion. It must be noted, however, that the last-mentioned medical practitioner did not deny that

the Applicant might at present be disabled, although he drew different conclusions therefrom.

Furthermore, it cannot be denied that a majority opinion was expressed. That possibility was taken into account when Appendix D to the Staff Rules was drafted; otherwise the presence of the third medical practitioner would be pointless. The replies given by the majority to the four questions cannot be termed inconclusive or ambiguous; they express, concerning the existence of the disability, the origin of the symptoms, the probable development and the situation at the time of separation, precise opinions from which conclusions could be drawn regarding the obligations of the Respondent.

XIV. In fact, additional to the expressions in the report of the Medical Board, there had been other indications in letters addressed to the Advisory Board of a very clear view of the two medical practitioners in the majority.

For instance, on 7 November 1966, after the constitution of the Medical Board, Dr. Richard Waltier had written stating:

"I maintain that the disability in this case is 100%. The reference of JAMA only refers to disabilities of the extremities. This is not the case of an injured workman where only one part of the body is involved. In my report of March 30, 1966 under heading of 'Diagnoses', ALL seven so listed are causally related to this patient's injury of March 25, 1963.

"Miss Khederian is presently disabled for her regular duties."

Further, the Secretary of the Advisory Board, on 27 December 1966, after the report of the Medical Board had been issued, had written to Dr. Waltier stating as follows:

"As I indicated to you on the telephone recently, the Advisory Board on Compensation Claims still has the report of the Medical Board, of which you were a member, concerning Miss Khederian under consideration.

"It is noted that in that report you indicate an 84% disability of the right upper extremity. It is also noted that in your separate report of 7 November, you indicate that American Medical Association guides to the evaluation of permanent impairments is not applicable in this case.

"In order to assist the Advisory Board in formulating a recommendation to the Secretary-General, it would be of great assistance to know the basis for your assessment of 84% disability. Is this assessment a matter of opinion, or were other standards of measurement used?"

Dr. Waltier, on 9 January 1967, replied to the Secretary of the Advisory Board in the following terms:

"I have repeatedly reported that Miss Khederian is 100% disabled. Industrially, for her specific United Nations employment this statement is still true—100% disabled.

"The conclusion of my many consultations with and examinations of this patient is that she is not able to perform more than 10% of her former work load. Miss Khederian may be able to do small card filing on a very much limited time basis.

"Considering that Miss Khederian's causally related injuries are progressively worsening, and also considering the work objective and the total picture, I stand firm that Miss Khederian has 84% permanent partial disability."

Meanwhile, on 21 November 1966, Dr. Pyrros had written to the Advisory Board stating:

“... I believe that the degree of disability is permanent and that patient is disabled from carrying her normal duties as a typist since she lost the co-ordination of the fine finger motion.”

XV. For the above reasons the Tribunal finds that the recommendations of the Advisory Board were made under misapprehension of the functioning of the Medical Board and of the purport of article 17 (b) in providing for the appointment of a third medical practitioner selected by agreement between the medical practitioners appointed by the parties. The Tribunal therefore rules that the Respondent's decision in accepting the Advisory Board's erroneous grounds and recommendations was arrived at by irregular procedure.

XVI. The Tribunal having taken action under article 18 of its Rules, the Respondent requested that the case be remanded for correction of the procedure. Without determining the ultimate merits of the case, the Tribunal remands the case for correction of the procedure in accordance with paragraph 2 of article 9 of the Statute of the Tribunal. The Tribunal, in remanding the case, is clear that all the necessary information upon which accurate and adequate recommendations can be made to the Secretary-General, is already in the possession of the Advisory Board, in the report of the Medical Board.

XVII. Under paragraph 2 of article 9 of the Statute, should the Tribunal order the case remanded for correction of the required procedure, it may order payment to the Applicant of compensation not to exceed the equivalent of three months' net base salary. Having regard to all the circumstances of the case the Tribunal awards to the Applicant compensation equivalent to three months' net base salary for all loss caused to her by procedural delay.

XVIII. The Applicant's request for costs now before the Tribunal is on matters extraneous to the present proceedings. The Tribunal therefore cannot entertain it and rejects it.

XIX. The Tribunal, without deciding the merits of the case, orders that:

(a) The case be remanded for correction of the procedure in accordance with article 9, paragraph 2, of the Statute of the Tribunal; and

(b) The Applicant be paid as compensation a sum equivalent to three months of her net base salary for the loss caused to her by the procedural delay.

(Signatures)

Suzanne BASTID
President

CROOK
Vice-President

Zenon ROSSIDES
Member

Geneva, 23 April 1968.

H. GROS ESPIELL
Alternate Member
Jean HARDY
Executive Secretary

DÉCLARATION DE M. HÉCTOR GROS ESPIELL

J'ai lu en français le projet final du jugement dans cette affaire et je suis d'accord avec la décision.

Genève, le 23 avril 1968.

(Signature)
H. GROS ESPIELL