

Decision No. 177

Ahlam Shenouda,  
Applicant

v.

International Bank for Reconstruction and Development,  
Respondent

1. The World Bank Administrative Tribunal, composed of E. Lauterpacht, President, R.A. Gorman and F. Orrego Vicuña, Vice Presidents and P. Weil, A.K. Abul-Magd, Thio Su Mien and Bola A. Ajibola, Judges, has been seized of an application, received on September 3, 1996, by Ahlam Shenouda against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place. The case was listed on September 30, 1997.
2. The Applicant seeks review and reversal of a decision made by the Pension Benefits Administration Committee (PBAC) to deny her a disability pension. The Applicant, who was initially employed by the Bank in 1981 as an Arabic translator, was promoted to the position of Chief of the Arabic Section in 1989. She was serving in that position on January 25, 1994, when she was informed by her Division Chief that the Arabic, English and Russian programs were being merged, that the resulting Section was to be headed by the former Chief of the English Section, and that the Applicant was being asked to administer the Arabic program under his supervision; she was to have the title of Program Manager, without any change in grade or salary.
3. Several months before this reallocation of responsibilities (hereinafter frequently referred to as "the January 1994 incident"), in June 1993, the Applicant had been diagnosed by a rheumatologist, Dr. Sliwinski, as having fibromyalgia, a condition of unknown origin that affects the soft tissues around the body joints and is manifested in fatigue and pain, sometimes severe. The disease, which is commonly aggravated by emotional stress, is not objectively manifested in x-rays or laboratory tests, but is identified by tenderness in a number of so-called "trigger points" on the body. Although there is no precise medical cure for fibromyalgia, the condition typically "comes and goes" and responds to a combination of rest and exercise, physical therapy, pharmaceutical drugs, and diet.
4. Soon after the January 1994 incident, the Applicant again consulted Dr. Sliwinski, who found that her fibromyalgia had grown worse, which he attributed to stress at work. On February 1, 1994, the Applicant -- supported by letters from Dr. Sliwinski and Dr. Umhau -- was granted a period of sick leave. In June 1994, the Applicant began to visit Dr. Rothenberg, a specialist in fibromyalgia syndrome, who confirmed the diagnosis of that illness. She was also examined by a doctor of the Bank's Health Services Staff, who concluded that it was unlikely the Applicant would be able to return to work before December 1.
5. On May 23, 1994, the Applicant entered into a Mutually Agreed Separation (MAS) with the Bank. The MAS provided among other things that she would receive a severance payment, that she would retain her employment status (on sick leave) until November 30, 1994, and that she would be placed on Special Leave thereafter through April 8, 1996. This would "bridge" the Applicant to early retirement, effective on that latter date, at age 57 and with 15 years of service.
6. Some four months after entering into the MAS, the Applicant on September 30, 1994 filed a claim with the Bank for workers' compensation. She was referred by the Bank's Workers' Compensation Administrator to two outside physicians (Dr. Bernad and Dr. Zackrisson) who -- in their reports in May 1995 -- were less than fully confident about the diagnosis, although they definitely acknowledged the symptoms of fibromyalgia. The Claims Administrator initially denied the Applicant's claim in July 1995. The Applicant then consulted two other

physicians (Dr. Rothenberg and Dr. Clauw) who forwarded reports to the Workers' Compensation Appeals Board in October 1995. Those reports confirmed fibromyalgia, its increased severity after the January 1994 incident at work and the Applicant's incapacity to do the work she had been doing before that date. On July 11, 1996, the Applicant was informed of the reconsideration of her claim and that she would be reimbursed under the workers' compensation program only for the medical expenses causally related to that incident.

7. In the meantime, on February 22, 1996, the Applicant filed an application for a disability pension under the Staff Retirement Plan (SRP), the denial of which is the matter to be considered by the Tribunal. "Disability retirement" is treated under Section 3.4(a) of the SRP, as follows:

A participant making contributions to the Plan on the date his written application is received and who has not then reached his normal retirement date, shall be retired on a disability pension if one or more physicians designated by the Administration Committee finds that the participant was then totally incapacitated, mentally or physically, for the performance of any duty with the Employer which he might reasonably be called upon to perform and that such incapacity is likely to be permanent....

8. The Pension Benefits Administration Committee (PBAC) is composed of nine members: two members appointed by the World Bank Staff Association; one appointed by an association of SRP retirees; and six members appointed by the Bank, including two Executive Directors. The PBAC has designated a Medical Advisor. It is his task to review the medical documentation and to assess whether the conditions for disability retirement have been satisfied. The PBAC reviews the same documentation and the Medical Advisor's conclusion, and reaches a decision which, by virtue of Section 10.2(f) of the SRP, is subject to appeal to the Tribunal.

9. On March 29, 1996, the Medical Advisor transmitted to the PBAC a report in which he reviewed the Applicant's medical history and documents from, amongst others, Dr. Sliwinski, Dr. Umhau, Dr. Rothenberg and Dr. Clauw. As is the practice, the Medical Advisor did not directly examine the Applicant. His conclusions were as follows:

Ms. Shenouda probably has a form of fibromyalgia. With appropriate therapy, some degree of functional restoration would be expected. ... Although she is currently incapacitated from performing on a sustained basis, any tasks that The Bank might reasonably ask of her, this incapacity is not expected to be permanent. If she can take anti-depressant or anti-inflammatory medication with a greater degree of cooperation and compliance, and then progress to a regular exercise program, her capacity should be restored, allowing her to function as a translator.

10. On June 3, 1996 -- some two months after the Applicant had formally retired -- the PBAC informed the Applicant that, based upon consideration of the medical evidence submitted with her application, it denied her application for a disability pension: "The Committee's conclusion was that your application did not meet the criteria for disability retirement" as set forth in the SRP.

11. On July 9, 1996, Dr. Rothenberg forwarded a letter to the PBAC in which he stated his disagreement with almost all of the Medical Advisor's observations in his March 29, 1996 report. Based on the letter from Dr. Rothenberg and the request of the Bank's Ombudsman, the PBAC agreed to reconsider its decision. After meeting again on September 11, 1996, along with the Medical Advisor, the PBAC confirmed its earlier decision to deny the Applicant's claim for disability pension, and she was so informed the following day. Just before that second meeting, the Applicant filed this application with the Tribunal.

12. The Tribunal has, in *Courtney (No. 2)*, Decision No. 153 [1996], para. 30, stated its view of its powers in reviewing a decision of the PBAC:

The appeal is made directly to the Tribunal. The determination made by the PBAC in this case, denying the request for a disability pension, cannot be regarded purely as a matter of executive discretion. Accordingly, the Tribunal may examine (i) the existence of the facts, (ii) whether the conditions required by the Staff

Retirement Plan for granting the benefits requested were met or not, (iii) whether the PBAC in taking the decision appealed has correctly interpreted the applicable law, and (iv) whether the requirements of due process have been observed.

13. The principal issue to be addressed here is whether the condition for eligibility for a disability pension set forth in Section 3.4(a) of the Staff Retirement Plan -- a mental or physical disability that totally, and likely permanently, prevents the Applicant from performing any duty which she might reasonably be called upon by the Bank to perform -- has been proved.

14. There appears to be little doubt that the Applicant -- at the time of her disability pension application and of the PBAC's decision -- was suffering from a disability that, at that time, totally prevented her from taking on reasonable assignments from the Bank.

15. It is true that the Respondent, at several points in its pleadings, appears to question whether the Applicant did in fact have a verifiable physical disability. It places emphasis, for example, upon the fact that the worsening of the Applicant's condition coincided with what for her was a downgrading in her prestige at the Bank, and seemed to be linked to her ongoing claims against the Bank for sick leave, separation and workers' compensation. The Respondent also stresses that there have been no objective and tangible test results, such as x-rays or blood tests, that confirm that the Applicant has fibromyalgia.

16. But the four doctors whose diagnoses were reviewed by the Medical Advisor and by the PBAC -- Dr. Sliwinski, Dr. Umhau, Dr. Rothenberg and Dr. Clauw -- all concluded that the Applicant was suffering from fibromyalgia. Although Dr. Sliwinski expressed some puzzlement in June 1994 about the Applicant's symptoms and her purported reaction to medication, it must be noted that he had concluded that she had been suffering from fibromyalgia as early as June 1993, several months before the aggravating January 1994 incident. And, despite the uncertainty expressed by the two doctors appointed by the Bank (Dr. Bernad and Dr. Zackrison) in connection with the Applicant's claim for workers' compensation benefits -- filed before the claim for a disability pension now being considered -- both concluded that fibromyalgia was very strongly indicated, with one of them opining that it was severe. The absence of x-ray or blood-test confirmation carries little weight, given the fact that fibromyalgia is identified only through a physical examination and the exploration of "trigger points" on the patient's body.

17. The conclusion that the Applicant was indeed suffering from fibromyalgia at the time of her disability pension application is strongly reinforced by the Medical Advisor's statement to the PBAC that "Ms. Shenouda probably has a form of fibromyalgia." His prescribed treatment for the Applicant was altogether consistent with that conclusion.

18. There was also consensus among the doctors -- including the Medical Advisor -- that the Applicant's disability at that time was total. For example, the Medical Advisor opined on March 29, 1996: "[S]he is currently incapacitated from performing on a sustained basis, any tasks that The Bank might reasonably ask of her."

19. The question that the Tribunal must now examine is whether there is sufficient proof that that total incapacity was, in the words of Section 3.4(a) of the SRP, "likely to be permanent." The issue of whether the Applicant might well be able in the future to perform "any duty with the Employer which [s]he might reasonably be called upon to perform" becomes somewhat hypothetical because, at the time of the PBAC decision, the Applicant had separated from her employment pursuant to an MAS and had taken early retirement. But it is necessary to resolve it nonetheless, for the issue has not become moot. The Applicant would be entitled to a significant increase in benefits under a disability pension as compared with the early retirement pension being paid to her under the MAS. That difference is some \$2,225 per month, or more than \$28,000 per year. Her eligibility must therefore be assessed as of the date of her disability pension application, when she was still technically in employment status.

20. The Tribunal notes, at the outset, that the Applicant has emphasized, in support of her claim for disability

pension benefits, the fact that she had previously been granted sick-leave benefits and workers' compensation benefits. These facts are of very limited relevance. Eligibility for sick leave turns upon current illness which could, for example, be as temporary as a serious cold or a recuperation from outpatient surgery. Eligibility for workers' compensation benefits turns upon a work-related injury which might be temporary, and only partial, in its impact. The requirements for disability retirement are much more demanding: the applicant must be totally, and in all likelihood permanently, disabled (although not necessarily because of a work injury) from taking on Bank-related assignments. If the disability is either partial or likely to be short-lived, disability pension benefits are, under the SRP, to be denied.

21. The Applicant therefore seriously errs in invoking disability standards under the laws applied in state and federal courts of the United States. Those laws are variable in content and are commonly less demanding than the requirements of the SRP which, of course, govern in this proceeding. The Applicant also seriously errs in contending that her eligibility for disability retirement benefits turns upon proof simply that she will be indefinitely unable to undertake the very same work of the very same position that she had occupied at the time she left the Bank. The Tribunal has unequivocally rejected this contention in *Courtney (No. 2)*, which concluded that the SRP standard means precisely what it says and is much more demanding upon the applicant for benefits. The staff member must be "incapacitated, mentally or physically, for the performance of any duty with the Employer which he might reasonably be called upon to perform."

22. The Tribunal has reviewed the same medical information and opinions that were before the PBAC at the time it considered, and then reconsidered, the Applicant's request, in May and September 1996 respectively. It has focused upon the extent to which the Applicant's condition was or was not improving over time, whether it could be expected to respond to medication, exercise, and the like, and whether the Applicant was reasonably complying or not with such a regimen. The Tribunal concludes that the result reached by the PBAC, which concurred with the Medical Advisor, is contrary to the clear weight of the evidence.

23. The Staff Retirement Plan contemplates that the PBAC is to reach a decision that is warranted by the diagnoses and prognoses of the doctors who have directly examined and treated the applicant. The Committee is not to rely solely upon the secondary assessment of the Medical Advisor, who does not examine the applicant and who, he himself concedes, may not necessarily be an expert in all of the wide range of illnesses that come before the PBAC, including fibromyalgia. Yet Section 3.4(a) of the SRP provides that a staff member "shall be retired on a disability pension if one or more physicians designated by the Administration Committee certify, and the Administration Committee finds," that the applicant was then disabled and likely to remain so. In effect, this prevents the award of a disability pension whenever the Medical Advisor believes it to be unwarranted -- no matter whether the PBAC disagrees. If it does disagree, the only way such a pension can be awarded is if the PBAC appoints another physician who reaches the same conclusion as the PBAC.

24. But the Tribunal is not so constrained. In sitting on "appeal" from the decision of the PBAC, the Tribunal can -- giving some weight to the views of the Medical Advisor -- review independently the written opinions of the physicians who examined or treated the Applicant, and may conclude that the great weight of the evidence, or of the medical opinions, supports or not the claim of a likely permanent disability.

25. The Respondent, in its pleadings, argues that the examining physicians did not opine with any degree of firmness that the Applicant's disability would likely continue for the indefinite future and that, in any event, any failure on the part of the Applicant to improve in health is primarily attributable to her unreasonable failure to take recommended medications, exercise and therapy. These assertions are clearly contradicted by the record, as is demonstrated by a chronological review of the physicians' opinions.

26. Dr. Sliwinski, who apparently treated the Applicant no later than June 1994 -- shortly after the January 1994 incident -- stated then that her condition had not improved, that physical therapy was not helping, and that she was suffering serious side effects from taking prescribed drugs. Dr. Zackrison, who was appointed by the Bank to examine the Applicant in May 1995, stated that her treatment plan thus far had "failed terribly," that certain additional medicines should be prescribed, and that there could be a "dramatic" potential improvement if there were "more aggressive" intervention. At the same time, Dr. Bernad declined to provide any pertinent



prognosis, given the Applicant's imminent retirement pursuant to her MAS.

27. Later still, in October 1995, almost two years after the January 1994 incident at the Bank, Dr. Clauw stated that the Applicant's condition had continued to worsen; he cautiously opined that "I hope that with time this therapy leads to an improvement in her condition.... I feel that she remains totally disabled by this illness." The Tribunal notes that this was merely an expression of hope and not an expectation or a prediction. At that time, Dr. Rothenberg stated that the Applicant was "totally disabled" and that he did not expect her long-term disability "to significantly improve in the next twelve months." Although he suggested medication, therapy and exercise, he acknowledged that the medications she was currently taking "cause sedation" and can prevent her from doing complex intellectual tasks (such as translating and supervising others).

28. Even more pertinent to the issue of future continuation of the Applicant's total disability are later medical opinions contemporaneous with the Applicant's application for disability pension. That month, Dr. Umhau noted the Applicant's "severe" impairment in ordinary daily tasks, and the deterioration of her fibromyalgia condition over the preceding six months. In response to a question on the Bank's medical form with respect to his anticipation of improvement in the Applicant's condition, he wrote: "Pessimistic chance of recovery, unlikely for real/full recovery."

29. Also in February 1996, more than two full years after the January 1994 incident at the Bank, Dr. Rothenberg noted a "severe" impairment in the Applicant's routine daily activities and a "moderate" impairment in her "memory and ability to concentrate" and in her ability to sit comfortably and walk short distances. As to the Applicant's cooperation in her treatment program, Dr. Rothenberg stated that "the severity of her chronic pain" (aggravated by degenerative disk disease and arthritis of the spine) prevented exercise and physical therapy, and that she was no longer able to take certain anti-inflammatory drugs. He concluded: "The patient is 100% disabled and cannot perform any work on a regular basis," and that "I do not expect the patient to improve from her condition." He was "hopeful," but would not "guarantee," that with rest she might be able to undertake exercise and physical therapy; but the Tribunal notes that even so, those were only intermediate steps on the way to even partially overcoming her disability.

30. The Tribunal decides that the only reasonable conclusions to draw from this medical history are that: (a) In early 1996, the Applicant was 100% totally disabled to do Bank-related work; (b) it was much more likely than not that this disability would be permanent; and (c) any failure by the Applicant to use certain medicines and to undergo physical exercise and therapy was very largely attributable to such factors as genuine adverse reactions to prescribed medicines and the pain resulting from the deterioration of her back.

31. The Medical Advisor concluded otherwise with respect to the second and third points. He stated, among other things: "Although she is currently incapacitated from performing on a sustained basis, any tasks that The Bank might reasonably ask of her, this incapacity is not expected to be permanent. If she can take anti-depressant or anti-inflammatory medication with a greater degree of cooperation and compliance, and then progress to a regular exercise program, her capacity should be restored, allowing her to function as a translator." After the negative decision of the PBAC in May 1996, Dr. Rothenberg -- who obviously had been given a copy of the Medical Advisor's evaluation -- took issue at every important point: certain medication would not help to improve her fibromyalgia; others badly upset her stomach; the Applicant was not declining to take prescribed medications; her spinal problems prevented exercise; even daily exercise (by fit athletic patients suffering from fibromyalgia) will not assure improvement; and psychiatric evaluation generally proves unavailing. In the course of his response, Dr. Rothenberg pointed out that he was the director of the medical advisory board of the Fibromyalgia Association of Greater Washington and that he had treated over 400 patients with that ailment.

32. Despite the significant contrary evidence before the PBAC when it decided to deny the application for disability pension in May 1996, and despite the point-for-point rebuttal of the Medical Advisor's opinion by a recognized medical expert in July 1996 -- by then, two and one-half years after the incident that aggravated the Applicant's condition -- the PBAC decided once again, in consultation with the Medical Advisor, to reject the application. There is no evidence of a written response by the Medical Advisor or of the course of discussions

within the PBAC but only a summary statement in the PBAC minutes of its decision to deny.

33. The Tribunal notes that Section 3.4(c) and (d) of the SRP contemplate that the PBAC may direct a staff member “who is receiving a disability pension and who has not reached his normal retirement date to be examined medically from time to time,” and that if the disability has wholly or partly ceased the pension is to be accordingly terminated or reduced. The “normal retirement date” is defined in Section 1.1 as the 62nd birthday of a staff member. It will therefore appear that the determination of whether, under Section 3.4(a), an applicant’s “incapacity is likely to be permanent” is to be made in relation to the normal retirement age of 62. At the time the PBAC decided not to grant her application for disability pension, the Applicant was 57 years of age, she was fully disabled, and such full disability had afflicted her for more than two and one-half years. Under these circumstances, there is no reasonable basis for the PBAC to have concluded that the Applicant’s condition would significantly improve so as to render her physically fit to undertake Bank-related work within the following five years, particularly in light of her inability in September 1996 even to begin to undertake the necessary treatment that would move her toward recovery.

34. In her Reply filed with the Tribunal, the Applicant sought to introduce over the objection of the Respondent as an annex a letter prepared by Dr. Rothenberg on March 7, 1997, purporting to describe her condition at that time. In view of the fact that the Tribunal has already concluded that the decision of the PBAC is contrary to the clear weight of the evidence actually before it, it is unnecessary to consider whether it was appropriate for the Applicant to proffer the later letter from Dr. Rothenberg.

35. In sum, the decision of the PBAC is overruled, and the Applicant should be awarded a disability pension. Such a pension is, of course, subject to the terms of the SRP, which among other things provide for the duration and amount of payments and which also authorize the Bank, as just noted, to direct periodic reassessments of the Applicant’s physical condition.

36. The Tribunal would observe that a decision by the PBAC may also be overruled, among other reasons, if the requirements of due process are not observed (*Courtney (No. 2)*, Decision No. 153 [1996]). Although, in light of the Tribunal’s disposition of the case, there is no need to address this question at length in the present instance, the matter of fair procedure and transparent decision-making in the PBAC proceeding should not be altogether overlooked.

37. The Tribunal notes, *inter alia* that: the PBAC does not give the reasons for rejecting an application for disability pension; the opinion of the Medical Advisor is normally not made available to the applicant (at least before the deliberations of the PBAC); a representative of the applicant is not entitled to participate in the proceedings; the PBAC’s decision-making and approval of benefits is excessively tied to the opinion of the Medical Advisor; there is apparent reluctance to utilize independent medical experts in the pertinent field; and there is great uncertainty as to the meaning of a disability to do Bank-related work, especially in light of the Bank’s reference in its pleadings to the possibility of a staff member’s performing assignments at home during very brief, flexibly scheduled work periods. These are all elements that can readily interfere with due process and with the transparency of decision-making by the Bank.

## DECISION

For the above reasons, the Tribunal unanimously decides that:

- (i) the decision of the Pension Benefits Administration Committee of September 11, 1996 is overruled;
- (ii) the Applicant is entitled to disability pension benefits under the Staff Retirement Plan, with effect from a date to be determined in accordance with Section 3.4(a) thereof;
- (iii) in implementing the decision of the Tribunal, the Respondent may offset the pension benefits paid or currently being paid to the Applicant; and

(iv) in the absence of an itemized statement of costs filed before the close of pleadings as required under Rule 7(3)(f) of the Tribunal, the Respondent shall pay costs in the nominal amount of \$1,000.

Elihu Lauterpacht

/S/ Elihu Lauterpacht  
President

Nassib G. Ziadé

/S/ Nassib G. Ziadé  
Executive Secretary

At Washington, D.C., November 18, 1997