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Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – MJ JONKER (“the complainant”) v SENTINEL MINING INDUSTRY RETIREMENT FUND (“the respondent”)

1. Introduction

- [1.1] The complaint concerns the respondent’s failure to pay the complainant a disability benefit.
- [1.2] The complaint was received by this office on 20 October 2005. A letter acknowledging receipt thereof was sent to the complainant on 26 October 2005. On the same date a letter was dispatched to the respondent giving it until 16 November 2005 to file its response to the complaint. A response was received from the respondent on 15 November 2005. The response was forwarded to the complainant on 29 November 2005 for his further submissions. On 24 January 2006 this office received the complainant’s reply.
- [1.3] After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

2. Factual Background

- [2.1] The complainant was employed by AngloGold Limited – Tautona Mine

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E de la Rey (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), M Qhali (Assistant Adjudicator),

Office Manager: L Manuel, Financial Manager: F Mantsho

- (“the employer”) as an Advanced Surveyor and by virtue thereof he was a member of the first respondent.
- [2.2] With effect from 24 June 2002 the complainant was dismissed on the grounds of incapacity pursuant to the employer having received Dr Beetge’s medical report, which recommended *inter alia* that he is “at least unfit in the short term (couple of months) to conduct any physical activities of even moderate work”.
- [2.3] Prior to his dismissal, and on 23 October 2001, the complainant had a myocardial infarct whilst working underground. Following which he underwent a 3-vessel coronary bypass operation.
- [2.4] The complainant recommenced employment on 18 December 2001, however, his doctor, Dr Deetlefs, recommended “lighter work in future”.
- [2.5] Dr Banyini, an occupational health medical practitioner of Anglogold Health Service (Pty) Ltd (“Anglogold Health Service”) referred the complainant to Dr Hunter of the Anglogold Health Service for a Heat Tolerance Test to establish whether he would be able to return to “normal” work underground as he was advised to do by the human resources department of the employer. Following the examination Dr Hunter stated that “I do not advise underground work. Fit for surface work only.” Dr Hunter thereafter referred him to the Occupational Health Centre of the Anglogold Health Service. On 1 February 2001 they provided him with a “Memorandum Advice of a Medically Affected Employee” which he was required to provide to the employer’s human resources department.
- [2.6] Pre-empting his termination the complainant applied to the employer for an alternative position of production planning co-ordinator, which application he was advised on 7 March 2002 was unsuccessful.
- [2.7] On 25 March 2002 the complainant received a “NOTICE OF TERMINATION OF SERVICE (MEDICAL INCAPACITY)” letter from the employer informing him that all attempts and efforts in securing him alternative surface employment since 29 November 2001 had been unsuccessful. The letter further served to give him notice of termination on 28 March 2002, expiring on 29 April 2002. It further required him to undergo an Exit Medical Examination before 26 April 2002.
- [2.8] The respondent states that during September 2002, the complainant submitted an application to be found totally and permanently disabled for his own and similar occupations in terms of its rules. It stated further that the complainant attached various documents, including medical reports from Dr L Rampini (a cardiothoracic surgeon) dated 28 November 2001

and Dr Beetge (specialist physician) dated 20 June 2002.

- [2.9] The claim was referred to the respondent's multi-disciplinary team that assists the Trustees' Claims Committee in assessing disability applications. However the multi-disciplinary team was of the opinion that Dr Rampini's report was dated, had insufficient detail and, moreover, did not indicate total and permanent disability. Dr Beetge's report further did not indicate total and permanent disability; he recommended short term unfitness for any physical activities. Accordingly, they sought an updated and more detailed report from Dr Rampini.
- [2.10] During 2003, the complainant provided a second report by Dr Beetge. However, this was exactly the same report previously furnished to the respondent save for the change of date. The respondent contacted the complainant's sister, Ms Jacobs, and repeated its requirements. Further, a document listing the respondent's requirements for a specialist medical report was sent by it to Dr Rampini's offices. The complainant and/or Dr Rampini failed to submit further medical evidence as requested and nothing further was heard from the complainant.
- [2.11] During June 2004, the respondent sent the complainant a letter advising him that it held an unclaimed benefit and asked him to contact the respondent as a matter of urgency. The complainant contacted the respondent and requested an estimate of benefits if he were on disability and early withdrawal. The complainant was furnished with an estimate setting out his fund credit and disability cover.

3. Complaint

- [3.1] The essence of the complainant's complaint is that he is entitled to a disability benefit and that the respondent erred in failing to provide him with a disability early retirement benefit.
- [3.2] The complainant contends that the employer's allegation in its letter dated 25 March 2002 in which it alleges that it has made attempts to secure him alternative surface employment since 29 November 2001 is simply not true because at that time he was still on sick leave following his heart operation. He submits that it was only on 1 February 2002 following Dr Hunter's letter that it was said that he could no longer work underground.
- [3.3] He further submits that he was referred to Dr Beetge for an evaluation and that Dr Beetge found him to be medically unfit.
- [3.4] He submits that he fails to understand the respondent's reasoning for refusing to pay him the disability portion of the benefit. He further

submits that due to having no income he is unable to obtain further medical reports.

- [3.5] He submits that he is unable to find work elsewhere and due to his health he is unable to ever work underground again.

4. Responses

- [4.1] Mr G Meyer, the manager of the legal department of MPF Management Services, filed a response on behalf of the respondent. The respondent submits that it is unclear what the complainant is complaining about. However, he argues, that it appears from the lengthy complaint that the complaint relates to the fact that the complainant was not found disabled. He submits that it appears that the complainant accepts that a further report is needed but that he is unhappy with the benefit options.
- [4.2] The respondent submits that during June 2004 the complainant had an option of either electing to terminate his membership in which case he would become eligible to a withdrawal benefit consisting of his fund credit or to transfer the amount to an approved fund; or proceeding with his original application to be found disabled in service.
- [4.3] The respondent submits that to succeed with a disability application the complainant would have to satisfy the Claims Committee that he was totally and permanently disabled for his own and similar occupations whilst in service. If successful, the complainant would be eligible for a disability early retirement benefit, comprising lifelong pension from the respondent that is funded from the total of his fund credit and his disability cover. Before the application could be considered, the respondent submits that the complainant would have to provide the medical evidence that it had previously requested.
- [4.4] The respondent states further that from the complaint it appears that the complainant wishes to take a withdrawal benefit and remain eligible for a disability retirement benefit. It submits that a member cannot take a withdrawal benefit and a disability early retirement benefit in respect of the same period of service. It submits that when the member receives a withdrawal benefit from the respondent he is no longer a member of it and therefore ineligible for the disability benefit. It further submits that fund credit and disability cover cannot be awarded as separate benefits.
- [4.5] The respondent contends that the complainant seeks relief that this tribunal cannot provide thus for this reason alone the complaint cannot succeed.
- [4.6] The respondent submits that the complainant must make a decision

whether or not he wishes to proceed with his disability application as taking a withdrawal benefit in light of the rule amendments may not be possible. If he does the respondent submits that he faces the difficulty of providing medical evidence now that can prove that he was totally and permanently disabled for his own or similar occupations more than three years ago. If he cannot do so, the disability benefit will be based on fund credit only. The respondent further submitted that should the complainant be found to have been disabled whilst in service the benefit would be deemed to have accrued in 2003, which would have tax implications as he would be liable for penalties and interest levied by SARS. The respondent further submits that it is further subject to SARS approving the situation in light of restrictions imposed by its General Note GN35 issued during 2004.

- [4.6] The respondent lastly submits that if the complainant is in fact complaining about the fact that his application in 2002 was not successful, then it submits that the medical evidence that he submitted clearly does not support a finding that he was totally and permanently disabled for his own or similar occupations whilst in service.

5. Determination and reasons therefor

- [5.1] Rule 5.3.1 reads:

"If the TRUSTEES, after considering medical evidence acceptable to them, are satisfied that a CONTRIBUTORY MEMBER qualifies for DISABILITY COVER, they may agree to his retirement at any time before he reaches NORMAL RETIREMENT DATE in which event the benefit referred to in Rule 6.2 shall be paid."

- [5.2] Rule 6.2 referred to reads:

"6.2.1 Benefit Amount

A CONTRIBUTORY MEMBER who retires in terms of Rule 5.3.1 shall become entitled to a PENSION of such amount as can be purchased by the sum of:

- (a) his FUND CREDIT at that date and
- (b) subject to the provisions of RULES 6.2.2. and 6.2.3, his DISABILITY COVER at that date ..."

- [5.3] "Disability cover" is defined as follows:

"“DISABILITY COVER” shall mean in relation to each CONTRIBUTORY MEMBER, for each twelve-month period from 1 January to 31 December, such amount of disability cover applicable to the MEMBER in accordance with a defined age-related multiple of AVERAGE FUND SALARY scale, as can be provided by the contributions in terms of Rule 4.2(b)."

[5.4] Rules 6.2.2 reads as follows:

“6.2.2. Conditions

- 6.2.2.1 The defined age-related multiple of AVERAGE FUND SALARY scale shall be determined annually by the TRUSTEES in consultation with the ACTUARY.
- 6.2.2.2 The DISABILITY COVER shall be notified to the MEMBERS annually in advance.
- 6.2.2.3 The TRUSTEES shall, at their sole discretion, determine the percentage of the DISABILITY COVER to be paid to each CONTRIBUTORY MEMBER when such member becomes, in their sole opinion, totally and permanently incapable of carrying out his own and any similar occupation. The burden of proof of such total and permanent disability rests with the member”.

[5.5] Rule 6.2.3 reads:

“6.2.3 Restrictions

- 6.2.3.1 The TRUSTEES may require a MEMBER to be examined at the FUND’S expense by a medical practitioner agreed to by the TRUSTEES.
- 6.2.3.2 Acting on the results of this examination, the TRUSTEES may decide that the DISABILITY COVER shall be restricted in such manner as they decide.
- 6.2.3.3 At the time of awarding a disability benefit in terms of Rule 6.2, the TRUSTEES shall, in their sole discretion, exclude the medical condition and related impairments in terms whereof the disability benefit is awarded for purposes of future DISABILITY COVER.
- 6.2.3.4 The TRUSTEES must inform the MEMBER in writing of the terms of any restriction imposed in terms of Rule 6.2.3.
- 6.2.3.5 ...”

[5.6] Rule 6.2.2.3 confers a discretion on the trustees to determine whether or not a member is totally and permanently incapable of carrying out his own occupation or any similar occupation and in turn, whether or not he is entitled to the disability cover. This means that the enquiry is not whether or not the trustees are wrong in repudiating a claim but rather whether the decision they reached is reasonable on the evidence before them (see *Southern Life Association Limited v Miller* [2005] 4 BPLR 281 (SCA) at paragraphs [33] – [35] and the authorities referred to therein).

[5.7] However, *in casu* the respondent has not made a decision in respect of whether or not the complainant is totally and permanently incapable of carrying out his own or any similar occupation (rule 6.2.2.3). It would therefore be premature to rule on the matter as if the trustees had already repudiated the complainant’s disability claim.

[5.8] It is evident from the papers before me that the respondent’s multi-disciplinary team that assists the Trustees’ Claims Committee in

assessing disability applications was of the opinion that Dr Rampini's report was dated, had insufficient detail and, moreover, did not indicate total and permanent disability. Thus they sought an updated and more detailed report from Dr Rampini indicating whether or not the complainant was totally and permanently disabled whilst in the employer's service. This they required in order to make a finding on the complainant's disability status. The respondent's requirements for a specialist medical report were further apparently furnished to Dr Rampini.

- [5.9] Thus the appropriate relief in this case would be to order the complainant to provide the respondent's trustees with a medical report from Dr Rampini as requested in order for them to exercise their discretion in terms of rule 6.2.2.3 to determine whether or not the complainant was totally and permanently incapable of carrying out his own occupation or any similar occupation and would therefore be entitled to the disability cover.

6. RELIEF

In the result I make the following order:

- [6.1] The respondent is required to furnish the complainant with its requirements for the specialist medical report which it seeks from Dr Rampini forthwith but not later than within 7 days of this determination.
- [6.2] The complainant is ordered to furnish the respondent with a copy of Dr Rampini's medical report as requested in paragraph [2.9] within 14 days of this determination.
- [6.3] The respondent is directed within four weeks of receipt of the aforesaid report as referred to in paragraph [6.1] and [6.2] above to make a decision in respect of whether or not the complainant was totally and permanently incapable of carrying out his own or any similar occupation in terms of rule 6.2.2.3 of the respondent's rules.

DATED AT JOHANNESBURG ON THIS DAY OF 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR