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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956 (“the Act”) – D v SENTINEL MINING INDUSTRY RETIREMENT FUND

INTRODUCTION

- [1] This complaint concerns the fund’s repudiation of your claim for a disability benefit.
- [2] The complaint was received by this office on 9 June 2005 and a letter acknowledging receipt thereof sent to you on 15 June 2005. On 12 September 2005 a letter was dispatched to the respondent giving it until 3 October 2005 to file a response to the complaint. The response dated 26 September 2005 was received on 3 October 2005. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter.

FACTUAL BACKGROUND

- [3] You were employed by Goldfields Mines (“the employer”) as a ventilation observer and were simultaneously a member of the Sentinel Mining Industry Retirement Fund (“the fund”).
- [4] With effect from 28 November 2003 you were dismissed on the grounds of incapacity. On 8 January 2004 you requested the fund to pay you a withdrawal benefit by completing and submitting a form titled “Application for Withdrawal Benefit (Resignation, Retrenchment or Dismissal)”.
- [5] Attached to the withdrawal form was a memorandum dated 20 November 2003 from the Assistant Payroll Accountant to the Senior Manager of

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Office Manager: L Manuel

Operations which stated that you “had been found permanently unfit for all underground / surface employment” and that “restrictions as indicated by St Helena Hospital – Occupational Department, are such that [you] can no longer work in [your] present occupation as a Ventilation Observer”.

- [6] The fund states that it was apparent from this that you had been dismissed on medical grounds and for this reason advised you to apply for an ill-health early retirement benefit. You was handed a form titled “Application for Permanent Disability Benefit” to complete.
- [7] On 27 February 2004 you submitted the completed disability form to the fund together with various reports, assessments and certificates including a medical report dated 24 February 2004 by Dr Ralph Nhiwatiwa, a specialist physician. In his report Dr Nhiwatiwa stated that you were suffering from pulmonary tuberculosis, noise-induced hearing loss and moderate muscle bulk wasting.
- [8] The claim was referred to the fund’s multi-disciplinary team that assists the Trustees’ Claims Committee in assessing disability applications. However the multi-disciplinary team decided that there was insufficient evidence to enable it to make a decision. Accordingly in a letter dated 15 March 2004 one Janine Oosthuizen, an occupational therapist of the multi-disciplinary team addressed a letter to you requesting an updated report from a specialist physician and an occupational therapist. Attached to this letter were also letters for you to give to the physician and the occupational therapist that you consulted which explained the fund’s requirements. The fund states that it contacted Dr Nhiwatiwa directly to explain its requirements in this regard.
- [9] However you failed to submit further medical evidence as requested. A follow-up letter dated 17 May 2004 was sent to you requesting same.
- [10] You responded by sending an undated letter to the claims committee apologizing for your inability to provide further updated reports as requested and explaining that this was due to the death of your wife, the lack of facilities in your home town and your inability to use a telephone on account of your deafness.
- [11] However you subsequently obtained a further report dated 4 June 2004 from Dr Nhiwatiwa. According to the fund, upon receipt of this report, given your circumstances as described above, a decision was taken to waive its normal policy of requiring two specialist’s reports. It further did not insist on another occupational therapist’s report and your claim was tabled at the following meeting of the claims committee.

- [12] At that meeting the claims committee decided that the medical evidence failed to show that you qualified for the disability benefit and declined your claim on that basis.
- [13] On 2 August 2004 you submitted a second 'application for withdrawal benefit' form to the fund. On receipt of the tax directive from SARS the fund paid you a withdrawal benefit of R180 646.02 net of tax.

THE COMPLAINT

- [14] You contend that you are entitled to the disability benefit and that the fund erred in repudiating your claim.

THE RESPONSE

- [15] The fund states that the rules place the onus on the member to show that he is totally and permanently disabled as defined.
- [16] According to the fund initially the only "functional information" provided by you was Dr Nhiwatiwa's report dated 24 February 2004 which reads:

"The named client has been under my care from year 2000.

Background problem

Hypertension, which is well controlled on Adalat XL.
No target organ disease.
Had generalized anxiety disorder for which he received Alprazolam in 2002.

"Current problems

Pulmonary tuberculosis, treatment commenced 05/08/03, recovery well.
Noise induced hearing loss.
Moderate muscle bulk wasting with weakness.

Prognosis

He is likely to recovery [sic] completely on completion of TB treatment. Deafness is irreversible."

- [17] The fund refers in particular to Dr Nhiwatiwa's positive prognosis in this report regarding your Tuberculosis.
- [18] Dr Nhiwatiwa's second report dated 4 June 2004 reads as follows:

"Diagnosis – Hypertension
Noise-induced deafness
Anxiety disorder
Cared for pTB

Treatment - Adalat
Alprazolam

Results of investigations - Sputum was positive for TB, presently negative.

Compliance – Very compliant with treatment

Physical limitation – No limitation with ADL's and self care activities.
Cannot walk long distances, stand for long or with stand (sic) manual work due to muscle wasting and body weakness.
Very poor hearing.

Secondary problem – Nil

Future treatment – Continue anti-hypertension treatment and suggest termination of services on medical grounds.

Chances of recovery are negligibly small.
Above reasons and conditions warrant medical disability.”

- [19] The fund contends that this report appears to be contradictory in certain respects and not specific enough regarding the diagnosis and prognosis of each condition. On this basis the trustees concluded that you had not discharged the onus of proof that you were totally and permanently disabled as defined in the rules. The Claims Committee's motivation for the repudiation was expressed thus:

“D is 46-years old and suffers from mild to moderate noise induced hearing loss, resolved pulmonary tuberculosis and moderate muscle wasting secondary to the tuberculosis. He should be able to continue in his occupation, being light physical in nature.”

- [20] The fund states further that in any event since you have now received a withdrawal benefit from the fund you are no longer a member and therefore ineligible for the disability benefit.

DETERMINATION AND REASONS THEREFOR

- [21] I do not agree with the fund's contention that having been paid a withdrawal benefit, you are no longer a member of the fund and therefore ineligible for the disability benefit. The definition of a member in the Pension Funds Act includes a former member who has not received all the benefits due to him. Therefore if the evidence shows that the trustees erred in repudiating your claim for a disability benefit, you will have an enforceable claim against the fund.

- [22] 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.”

[23] 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 ...”

[24] “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).”

[25] 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”.

[26] 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 ...”

- [27] 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 were wrong in repudiating your claim but rather whether the decision they reached was 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).
- [28] The fund appears to have placed almost exclusive reliance on the two reports of Dr Nhiwatiwa (see paragraphs [16] and [18] above). I do not agree with the contention that Dr Nhiwatiwa’s first report constituted the only ‘functional information’ provided by you. The report provides a medical diagnosis of your various ailments but does not indicate at all how they affect your daily functioning let alone your ability to do your job.
- [29] The fund has also made much of Dr Nhiwatiwa’s positive prognosis with respect to the Tuberculosis. However in the same report Dr Nhiwatiwa states that your deafness is ‘irreversible’. Therefore with respect to this ailment he provides an unequivocal negative prognosis.
- [30] In the final analysis, the sole inquiry is whether or not you are totally and permanently incapable of carrying out your own or any similar occupation (rule 6.2.2.3). Therefore, the fact that you may recover completely from the Tuberculosis does not necessarily preclude a successful claim given that you suffer from other ailments which also affect your ability to work. The inquiry, of necessity, entails an *overall* assessment of your condition and how it affects your ability to work.
- [31] The fund fails to substantiate its contention that Dr Nhiwatiwa’s second report is contradictory. In my opinion, the second report is more relevant to the inquiry than the first in that it provides some indication of your functionality. Your work (as set out more fully in paragraph [38] below) entails walking long distances (approximately 4 hours) and standing for long periods of time (approximately 2 hours). It also requires physical strength. Dr Nhiwatiwa states in this report that you are unable to walk long distances or stand for long periods of time. He states further that you are unable to withstand manual work due to muscle wasting and body weakness. Therefore based on Dr Nhiwatiwa’s evidence alone, you are clearly unable to perform your own occupation or any occupation similar to it.
- [32] I turn now to deal with the other evidence apparently not considered by

the fund on the basis that it 'did not contain enough functional information on which to make any kind of assessment'.

[33] That evidence was the following: the section of the claim form headed "Declaration by employer" completed by the Human Resources Manager of the employer; the section of the claim form headed "Medical information in support of an application for disability benefits" completed by Dr MS Kajee, a physician; an ability report (dated 25 February 2004) completed by your supervisor, Sean Haupt; an ability report (undated) completed by Dr Nhiwatiwa, a specialist physician; a work assessment report (dated 14 November 2003) by Alida Blignaut, an occupational therapist and a medical certificate of unfitness (dated 17 November 2003) completed by Dr Leon Hugo.

[34] The "Declaration by employer" section referred to reads as follows:

Employee's essential job functions: Recording and reporting environmental conditions u/ground

Essential job functions that the employee is unable to perform: Physically unable to perform the abovementioned.

Essential job junctions that the employee is able to perform: None"

[35] Therefore as far as your employer is concerned you are unable to perform any of the functions of your current occupation.

[36] Dr Kajee's section titled "Medical information in support of an application for disability benefits" reads as follows:

"Specific diagnosis of the impairment? Pulmonary tuberculosis

Specific details pertaining to the impairment: Tiredness
Weakness

How does the impairment restrict the patient in performing his/her duties?
Patient tires easily

What treatment has the patient received?
Anti T.B therapy

What are the duration and the results of mentioned treatment?
6/12 treatment – satisfactory

What duties will the patient be able to perform?
Clerical work at a desk

Is the condition permanent without prospect of recovery?
Permanent"

[37] According to Dr Kajee your Pulmonary Tuberculosis causes you to suffer

from weakness and to tire easily. Although the results of treatment have been satisfactory, your condition, which Dr Kajee states is permanent, restricts you to clerical work at a desk.

- [38] The ability report completed by Sean Haupt takes the form of a questionnaire. The following is a summary of his answers to the questions posed: your work requires you to be mobile on uneven terrain, slopes and inclines; 100% mobility is required; in a day the job entails 2 hours of standing, 4 hours of walking and 2 hours of sitting; the total distance covered is approximately 8km per day; physical strength is required in both arms, both legs, the shoulders, hips, neck rotation and the back; the job also entails lifting weights of between 10 and 30kg, carrying weights of between 0 and 10kg, pushing and pulling weights of between 30 and 50kg; it also entails climbing ladders, stooping, kneeling, bending, hearing, moving in confined spaces and reaching above the shoulders; decision-making and problem solving are also required; you are exposed to heat, cold, noise and vibrations; high abilities in speech, hearing, vision, memory, coordination and balance are also necessary.
- [39] The above report sets out in detail the demands of your current occupation and in turn enables one to determine what occupations can be considered similar to it. It is clear that your occupation is physically very demanding. It requires a range of body movements including bending, stooping, pushing and pulling heavy weights. Therefore Dr Kajee's opinion that you could perform clerical work at a desk is irrelevant given that the very nature of clerical work is that it is not physically demanding and therefore cannot be regarded as being 'similar' to your own occupation as a ventilation observer.
- [40] Under the heading "basic abilities" of her work assessment report, Alida Blignaut states that you have wasted and decreased muscle strength overall as well as a hearing problem. With respect to your functional abilities, she states that you do not cope with any physical work due to your poor basic abilities and that you are at high risk for underground work due to your poor physical condition. She describes your general working endurance as "poor".
- [41] Again with reference to the demands of your own occupation as set out in Mr Haupt's report, Ms Blignaut's assessment of your condition is such that the probabilities are that your condition renders you incapable of performing your own occupation and any occupation similar to it.
- [42] Dr Hugo's medical certificate of unfitness states that you are not fit to perform your normal duties and that your condition is permanent. He states further that you are not fit for underground work or for strenuous work on the surface. Based on this evidence, too, you appear to meet the

requirements to qualify for disability cover.

- [43] Considering the above, I am not satisfied that the trustees' decision to decline your claim was reasonable based on the evidence before them. In fact, in my opinion, the evidence strongly supported your claim and the trustees' decision was wholly unreasonable. Not one piece of evidence appears to have placed doubt over your inability to perform your own occupation or any similar occupation.
- [44] The fund placed much reliance on the provision in rule 6.2.2.3 that the member bears the burden of proof to show that he is totally and permanently disabled. While I think that such a rule is questionable in the context of the fiduciary relationship which exists between members and trustees, I am satisfied that in any event you discharged that onus.
- [45] Apparently only the two reports of Dr Nhiwatiwa were considered. But even if this had been the only evidence before the trustees I seriously doubt that the decision to repudiate your claim would, even then, have passed the test of reasonableness.
- [46] As to the appropriate relief, I could send the matter back to the trustees to exercise their discretion afresh. This is in accordance with the general principle of administrative law that a court will not attempt to substitute its own decision for that of a public authority which has been entrusted by statute with a discretion. However this principle is departed from in certain circumstances. One such circumstance is where the end result is in any event a foregone conclusion and it would be merely a waste of time to order the tribunal or functionary to reconsider the matter. The present case fits into this category. In paragraph 7.1 of the fund's response it states as follows:
- “7. If this tribunal rules in your favour, it can in our opinion make one of three orders against the Fund.
- 7.1 The first option is an order that the existing medical evidence be submitted back to the Board's Claims Committee to review its earlier decision.
- However, as there is no apparent reason why the Committee would change its mind, such an order seems unlikely. A reversal by the Committee of its earlier decision motivated only by the desire to avoid an adverse determination would, for obvious reasons, fall foul of the fiduciary or statutory duties imposed on the trustees to act impartially and with due care, diligence and good faith.”
- [47] It seems clear from the above that the trustees are unlikely to change their minds and that it would therefore be futile to send the matter back to them for reconsideration.

[48] In the circumstances, it is my finding, having considered all the arguments, correspondence and medical reports and other evidence with due regard to rules of the fund, that you are indeed totally and permanently incapable of carrying out your own occupation and any similar occupation.

RELIEF

[49] In the result I make the following order:

- 49.1 The fund's repudiation of your claim for the disability benefit is hereby set aside.
- 49.2 It is hereby declared that at the time of your dismissal on 28 November 2003 you were totally and permanently incapable of carrying out your own occupation and any similar occupation.
- 49.3 The fund is directed within six weeks of this determination to pay you the disability benefit in terms of rule 6.2 less amounts already paid and further less any deductions permitted by the Act together with interest thereon at the rate of 15,5% per annum from 1 December 2003 to date of payment.

DATED AT CAPE TOWN ON THIS THE DAY OF 2006.

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR