4th Floor
Riverwalk Office Park
Block A, 41 Matroosberg Road
Ashlea Gardens
PRETORIA
SOUTH AFRICA
0081

P.O. Box 580, **MENLYN,** 0063
Tel: 012 346 1738, **Fax:** 086 693 7472
E-Mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our reference: **PFA/KZN/12539/2012/ZC**

REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"): EB MNCWANGO ("complainant") v TEXTILE INDUSTRY PROVIDENT FUND ("first respondent"), AUNDE TAP (PTY) LTD ("second respondent") AND MMI GROUP LTD ("third respondent")

[1] INTRODUCTION

1.1 This complaint concerns the payment of a disability benefit.

1.2 The complaint was received by this Tribunal on 19 July 2012. A letter acknowledging receipt of the complaint was sent to the complainant on 23 July 2012. On 24 July 2012, the complaint was sent to the first and second respondents seeking their responses by 24 August 2012. On 30 July 2012, the second respondent submitted its response.

On 14 January 2013, the complaint was dispatched to the third respondent seeking its response by 14 February 2013. On 13 February 2013, the third respondent submitted its response. This Tribunal sought further information from the third respondent on 26 March 2013, which

was received on the same date. No further submissions were received from the parties.

1.3 Having considered the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are well-known to the parties, only those facts that are pertinent to the issues raised herein shall be considered. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

2.1 The complainant was employed by the second respondent for 21 years and 11 months. He was employed in the capacity of a shift dyer supervisor at the time of the termination of his employment. He became a member of the first respondent by virtue of his employment. The second respondent was a participating employer in the first respondent. The third respondent, an insurer, is the underwriter of the permanent and total disability income insurance policy issued to the first respondent. The third respondent is also the underwriter of the group temporary disability income insurance policy issued to the National Textile Bargaining Council. The complainant enjoyed cover under both policies.

2.2 Following the complainant's permanent loss of hearing in both ears, on 21 May 2012, the third respondent admitted the complainant's temporary disability claim. The third respondent has, however, repudiated the complainant's claim for a permanent disability benefit. This forms the subject-matter of the dispute before this Tribunal.

[3] COMPLAINT

3.1 The complainant is aggrieved by the third respondent's repudiation of his permanent disability benefit claim. He submitted that the doctors

have confirmed that he is deaf. He submits that he is surprised that the third respondent paid him a temporary disability benefit but refuses to pay him a permanent disability benefit when the doctors have confirmed that he is permanently disabled.

3.2 He submitted that he was last active at work on 20 October 2011, and that the second respondent has advised that it has no work for him but they cannot help in convincing the third respondent to pay him a disability benefit.

3.3 The complainant is requesting this Tribunal to order the payment of a permanent disability benefit.

[4] RESPONSES

First Respondent

4.1 The first respondent was granted an opportunity to comment on the allegations made against it as is required in terms of section 30F of the Act. No response was received from the first respondent.

Second Respondent

4.2 The second respondent submitted that it applied for medical boarding for the complainant.

4.3 The second respondent further submitted that on 21 May 2012 it was informed that the complainant's application for a permanent disability benefit was repudiated by the third respondent but that it had agreed to admit his temporary disability claim. It submitted that the reason supplied by the third respondent was as follows:

> "Although he is unable to continue working in his own occupation due to the dangers associated with his hearing loss in his current work environment, he

> would be able to perform an alternative occupation in a safer work environment. For this reason, he is not considered totally and permanently unable to perform any occupation in the open labour market. The lump sum (PTD) disability benefit is subsequently declined."

4.4 It further submitted that the employer's workplace is considered a dangerous environment for the complainant and is therefore, unable to offer him any safe employment and the complainant is in agreement with this statement.

Third Respondent

4.5 The third respondent submitted that its Group Temporary Disability Income Insurance Policy in paragraph 3.6.1 provides that:

> "A member shall be regarded as Disabled and entitled to his Benefit as from the expiry of the Waiting Period if, in the reasonable opinion of Momentum, injury or illness has rendered him total (*sic*) incapable of engaging in his **Own Occupation**."
>
> (Emphasis added)

4.6 The third respondent submitted that having regard to the medical evidence available to it, the complainant was regarded as totally incapable of engaging in his own occupation and therefore, qualified for the temporary disability benefit. It submitted that it paid the temporary disability benefit for a period of 5 months excluding the one month waiting period as provided for in the policy.

4.7 It further submitted that in terms of its permanent and total disability reassurance policy, the complainant's condition did not fall within the definition of disability.

4.8 The third respondent submitted that it acknowledged that due to the complainant's permanent loss of hearing, he is unable to perform his "own occupation". However, in order to qualify for total and permanent

disability as provided for in the policy, in addition to being unable to perform his "own occupation", a member must also be unable to perform any other occupation. It submitted that the complainant had matric, he attended Damelin College from 1996 to 1998 and Natal Technicon from 2000 to 2002. He holds a Diploma in Production and Supervision, Production Management and has acquired some in-house training.

4.9 The third respondent, moreover, submitted that it was its considered view, taking into account the complainant's medical evidence as well as his knowledge, training, education, ability and experience that he was not totally and permanently unable to work and could perform "any other occupation".

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issue for determination is whether or not the first and third respondents failed to comply with their duties in terms of the rules and policy provisions, respectively, with regard to the payment of a permanent disability benefit to the complainant.

5.2 The payment of any benefit that is due to a member of a fund is regulated by the fund's rules (see *Tek Corporation Provident Fund & Another v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-E and section 13 of the Act).

5.3 The apposite portion of Rule 7.3 of the first respondent's rules reads as follows:

> "**LUMP SUM BENEFIT PAYABLE ON TOTAL AND PERMANENT DISABILITY**
>
> Unless otherwise specified in the SPECIAL RULES and subject to the provisions of rule 9.5, if at the sole discretion of the TRUSTEES, a MEMBER

is regarded as totally and permanently disabled in terms of the provisions governing disablement set out in the policy of insurance issued by an INSURER for this purpose, he shall be entitled to receive a benefit as follows:

(a) in the case of a MEMBER where the combined MEMBER and PARTICIPATING EMPLOYER contribution is greater than 11.0% of FUND SALARY, an amount equal to the greater of

(i) 3,5 times his annualized FUND SALARY at the date of disablement (provided that this amount shall be reduced by 0.833% for each month that the MEMBER is over the age of 55 years), and

(ii) his FUND CREDIT at the date of disablement ."

5.4 Rule 9.5, in turn, provides as follows:

"**LIMITATION**

(1) The TRUSTEES shall reinsure the benefits described in rules 7.1(1)(a), 7.1(2)(a), 7.3(a)(i) and 7.3(b)(i) with an INSURER. The said benefits shall be subject to the conditions imposed by the INSURER concerned and each MEMBER shall only be entitled to the said benefits to the extent that the claim thereof has been accepted by the said INSURER; provided that the PARTCIPATING EMPLOYER may, in its sole discretion, … pay any part of any benefit which has been reduced or pay the whole benefit, where the said INSURER has refused to admit a claim in respect of any benefit.

(2) The TRUSTEES shall inform any MEMBER in respect of whom the benefits in terms of rules 7.1(1)(a), 7.1(2)(a) and 7.3(b)(i) are restricted in terms hereof in writing of the extent of such restriction."

5.5 It is clear from the above that a disability benefit can only be paid by the first respondent to a member once the claim has been approved by the registered insurer.

5.6 The issue is not whether or not the first and third respondents were wrong in repudiating the complainant's 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).

5.7 It is clear that Rule 7.3 of the first respondent's rules confer a discretion on the board of trustees to determine whether or not a member is permanently disabled.

5.8 In terms of administrative law, although the very purpose of a discretion is to allow the authority conferred with the discretion to arrive at its own decision, the authority is still required to exercise that discretion properly and it must not fetter its discretion (see *Tobin v Motor Industry Pension Fund* (1) [2001] 11 BPLR 2769 (PFA)).

5.9 The policy of the third respondent defines total and permanent disablement as follows:

> "Disability Definition
>
> PTD: 1.2.29 **Total and Permanent Disability** shall mean
>
> 1.2.29.1 the total, permanent and continuous inability, in the opinion of Momentum, of a Member due to injury or illness to engage for remuneration or profit in his own occupation or any other occupation to which he is suited or for which he is or could reasonably be expected to become qualified by virtue of his knowledge, training, education, ability and experience …"

5.10 The third respondent declined the complainant's claim for a permanent disability benefit on the grounds that, on the basis of the available medical evidence, and given the complainant's knowledge, training, education, ability and experience he is not totally and permanently unable to work and can perform "any other occupation".

5.11 The meaning of “any other occupation” operates in a particular context, which requires having regard to the complainant’s original occupation. Similarly, an occupation to which the complainant is “suited” or for which he is or could reasonably be expected to become qualified by virtue of training, etc. must be interpreted within the context of his original occupation. Put differently, it is not contemplated within the provisions of the rules and policy that “any other occupation” means any other occupation in the broad sense (see *CR13*, unreported ruling of the Long Term Insurance Ombudsman, available at www.ombud.co.za, accessed on 3 April 2013).

5.12 The crux of the matter is whether or not, having regard to the medical evidence that was submitted to the first and third respondents, the complainant falls within the ambit of the definition of disability as set out in the policy of the third respondent. That is, whether or not the medical evidence proves that the complainant is totally and permanently incapable of performing his own occupation or any other occupation to which he is suited or for which he is or could reasonably be expected to become qualified by virtue of his knowledge, training, ability and experience.

5.13 The complainant submitted a medical questionnaire that was completed by Dr T Bisnath (Addington Hospital) who indicated that the complainant has bilateral profound hearing loss, that he was unable to hear at all, which was confirmed by an audiogram. There was no treatment for his hearing loss and he would not benefit from hearing aids. He has been put on the cochlear transplant waiting list but he was unlikely to receive one in the public sector. His prognosis was poor. Profound deafness prevented him from returning to his own occupation. When asked what prevented him from returning to an alternative occupation, Dr Bisnath responded that there were no alternative

occupations available and that he was not trained for any other occupation. The condition was furthermore permanent.

5.14 The third respondent persisted in its contention that even though the complainant was unable to perform his own occupation, he was capable of performing an alternative occupation. This Tribunal during its investigations, on 26 March 2013, sought to establish from the third respondent what alternative occupations the complainant was able to perform. The third respondent failed to provide this Tribunal with a list of alternative occupations that the complainant could perform. It submitted that it only provided a list of alternative occupations when it has been paying the claimant a disability benefit. It further submitted that in relation to alternative occupations that the complainant could perform, it provided him with the contact details of the Kwazulu-Natal Deaf Association ("the KZN Deaf Association") and the Kwazulu-Natal Blind and Deaf Society ("the KZN Blind and Deaf Society") who assist with re-skilling, sign language training and job placements.

5.15 However, the weight of the medical evidence is that the complainant is not capable of performing any other occupation which he would reasonably be capable of discharging by virtue of his education, knowledge, training and experience. He has worked for the second respondent for almost 22 years, the work which he did appears to be machinery intensive and his education, knowledge, training and experience all appear to relate to that occupation. Moreover, this Tribunal sought clarity from the third respondent on the alternative occupations which the complainant may perform and it failed to provide this Tribunal with any specific alternative occupation. Instead in relation to alternative occupations that the complainant may perform, it simply stated that it provided the complainant with contact details of the KZN Deaf Association and the KZN Blind and Deaf Society, which is not an alternative occupation. The complainant's deafness is a safety issue, which precludes him from engaging in alternative occupations

contemplated in terms of the rules of the first respondent, read together with the provisions of the third respondent's reassurance policy. This leads to the inescapable conclusion that the complainant is incapable of performing any other alternative occupation.

5.16 In the circumstances, it is this Tribunal's finding, having considered all the submissions and medical reports and other evidence that the complainant is indeed permanently incapable of carrying out his own occupation and any other alternative occupation and is therefore permanently and totally disabled as contemplated by the rules of the first respondent and the provisions of the permanent disability policy of the third respondent.

5.17 This Tribunal notes that the second respondent was required to exercise its discretion in terms of rule 9.5 of the first respondent's rules, which also did not occur.

[6] <u>ORDER</u>

6.1 In the result, the order of this Tribunal is as follows:

6.1.1 The first and third respondent's decision to repudiate the complainant's application for a permanent disability benefit was unreasonable and is hereby set aside;

6.1.2 It is declared that the complainant qualifies for a disability benefit in terms of Rule 7.3 of the first respondent's rules read with clause 1.2.29 of the second respondent's Permanent and Total Reassurance Policy.

6.1.3 The first and third respondents are ordered to pay the complainant his disability benefit in terms of Rule 7.3 within six weeks of this determination.

DATED AT PRETORIA ON THIS 11TH DAY OF APRIL 2013

MA LUKHAIMANE

DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court

Parties: Unrepresented