Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”): BA RÖSNER (“complainant”) v ESKOM PENSION AND PROVIDENT FUND (“respondent”)

[1] INTRODUCTION

1.1 The complaint concerns the repudiation of the complainant’s claim for an ill-health retirement benefit by the respondent.

1.2 The complaint was received by this office on 11 May 2007. A letter acknowledging receipt thereof was sent to the complainant on 7 June 2007. On the same date a letter was dispatched to the respondent giving it until 5 July 2007 to file its response to the complaint. A response that was copied to the complainant was received from the respondent on 10 July 2007. On 19 July 2007, this office received the complainant’s further submissions.

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- The service offered by the Pension Funds Adjudicator is free to members of the public-
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 all the parties, only those facts that are pertinent to the issues raised herein shall be repeated. The determination and reasons therefor appear below.

[2] **FACTUAL BACKGROUND**

2.1 The complainant was employed by Eskom Holding Limited ("the employer") as a Communications Practitioner from June 1989 and is a member of the respondent by virtue of her employment. The complainant was diagnosed with cerebellar ataxia which resulted in a severe balance disturbance and her inability to perform co-ordinated tasks since August 2005. On 1 March 2007, the employer terminated the complainant's employment on the grounds of her ill-health.

2.2 The complainant consulted Dr JW Earle (Neurosurgeon) in December 2006 who, *inter alia*, indicated that the complainant's prognosis is poor and that she will not be able to perform any other occupation in the open labour market as her condition is permanent. The complainant also submitted a questionnaire that was completed by Dr A Mochan (Neurologist) who examined her in September 2006. Dr Mochan indicated that the complainant’s illness causes severe balance disturbance and her inability to perform co-ordinated tasks. He reported that the complainant is functionally impaired and that her condition is permanent.

2.3 On 26 September 2006 the complainant applied for an ill-health retirement benefit to the respondent on the grounds that she is no longer able to perform her normal work due to her illness. The board of the respondent declined the complainant’s claim for ill-health retirement benefit on the grounds that her illness is not permanent and that she is capable of performing other duties. This conclusion was based, *inter
alia, on a medical report by Dr MJ Simon (General Practitioner) who stated that the complainant will be able to perform other duties like that of a receptionist or purely office-type duties on a computer.

[3] **COMPLAINT**

3.1 The complainant’s complaint is that the respondent erred in repudiating her claim for an ill-health retirement benefit. The complainant contends that two specialists diagnosed her with central pontine myelinolysis which damages the central stem of the brain and also caused cerebellar ataxia. She submits that she is wheelchair-bound and has little use of her hands and arms. She argues that her condition is degenerative and her doctors indicated that she will not be able to perform any other occupation in the open labour market.

3.2 Therefore, the complainant requests this tribunal to investigate the rejection of her claim for ill-health retirement benefit by the respondent.

[4] **RESPONSE**

4.1 The respondent confirmed that the complainant was employed as a Communication Practitioner at the date of her impairment. It indicated that the complainant’s duties include receiving visitors to the systems operator and taking them to the auditorium for presentations. It acknowledged that the complainant has a neurological deficit due to cerebellar ataxia. However, it averred that there is nothing in the medical reports which indicates that the complainant’s condition is permanent as required in terms of the rules.

4.2 It referred to Rule 25(1) of the respondent’s rules, as follows:
“(1) For the purpose of this rule, “disabled” means, on a balance of probabilities, permanently incapable as a result of infirmity of body or mind, of performing the duties of the occupation or post in which the MEMBER was employed by the EMPLOYER at the time that the disability arose or was caused (whichever is the earlier), or any other reasonable alternative occupation or post in his EMPLOYER’s business for which he is or may become suitable by virtue of his education, training, experience and/or ability, and “disabled” and “disability” shall bear corresponding meaning (sic) .... ."

4.3 It pointed out that Dr Barrow (Specialist Physician) indicated in his medical report that the complainant’s liver and renal failures were resolved and that the only remaining condition is cerebellar ataxia. Further, it submitted that Dr Barrow reported that there is a marked improvement in the complainant’s condition. It further submitted that the complainant was examined by Dr CA Zambakides (Specialist Physician-Cardiologist) who indicated that the chest pains experienced by the complainant were highly unlikely to be of cardiac (heart) origin. It asserted that there is nothing in Dr Zambakides’s report which indicates that the complainant’s condition was so severe as to render her permanently disabled.

4.4 It referred to a medical assessment that was done by Dr Simon who observed that although the complainant still suffered from weakness and sensory loss, her control over her upper limbs was better. Dr Simon also indicated that although the complainant cannot perform a significant part of her work as a Communication Practitioner, she may be capable of performing some office-based type duties. Thus, it submitted that based on these medical reports the board of the respondent decided that there is nothing which suggests that the complainant’s condition is permanent or renders her incapable of performing her duties after her working conditions were adapted to accommodate her.

4.5 Furthermore, it contended that a medical synopsis provided by Dr Botha indicated that the complainant’s prognosis was good and that
her condition was classified as temporary. It averred that the complainant’s work environment was adapted as follows:

- The complainant’s working hours were adjusted to be from 8h00 to 12h00;
- The employer assigned a driver to provide her with transport from home to work and back;
- In order to help her to travel safely within the building, the following were effected by her employer:
  - a person was assigned to help the complainant wheel her wheelchair up the ramps supplied for disabled persons in her work area;
  - a person was assigned to carry the complainant’s presentations that had to be done;
  - The complainant’s office was moved to the ground floor to access the toilet facilities meant for persons with impairments.

4.6 However, it submitted that the complainant did not return to work despite the adaptations that were made to her work environment to accommodate her impairment. It pointed out that the complainant sent a report by a Neurologist which indicated that she has significant cerebellar ataxia and peripheral neuropath. It submitted that the complaint should be dismissed as the complainant failed to submit any medical report which indicates that she is permanently incapable of performing her duties or any other alternative occupation as set out in the respondent’s rules.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The essence of the complainant’s complaint is that the board of the respondent erred in repudiating her claim for an ill-health retirement benefit. The issue is not whether or not the trustees 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). The rights and entitlements of a member of a fund to an ill-health retirement benefit are regulated by the rules of the fund. The apposite portion of Rule 25(1) of the respondent’s rules reads as follows:

“For the purposes of this rule, “disabled” means, on a balance of probabilities, permanently incapable as a result of infirmity of body or mind, of performing the duties of the occupation or post in which the MEMBER was employed by the EMPLOYER at the time that the disability arose or was caused (whichever is the earlier), or any other reasonable alternative occupation or post in his EMPLOYER’s business for which he is or may become suitable by virtue of his education, training, experience and/or ability, and “disabled” and “disability” shall bear corresponding meanings … .”

5.2 Rule 25(4), in turn, reads as follows:

“The BOARD or the claims assessor appointed by it, if the function referred to in this rule is delegated to such a person, shall in its or his sole discretion determine whether or not a MEMBER is disabled for the purposes of this rule and the date upon which such disablement, if any, commenced. The BOARD, or the claims assessor, as the case may be shall make its or his decision after-

(a) considering such medical evidence as to the state of the MEMBER’s health as may be supplied to it or him;

(b) consulting the MEMBER’s EMPLOYER;

(c) consulting the MEMBER; and

(d) having due regard to the disability assessment procedures established by the BOARD from time to time."

5.3 It is clear that Rule 25(4) of the respondent’s rules confers a discretion on the board of trustees to determine whether or not a member is permanently incapable of carrying out her own occupation or any
similar occupation and in turn, whether or not she is entitled to an ill-health retirement benefit.

5.4 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) at paragraph 6).

5.5 In casu, the board of trustees of the respondent declined the complainant’s claim for an ill-health retirement benefit on the grounds that her disability is not permanent and does not render her incapable of performing her duties or an alternative occupation. The board relied on a medical report by Dr Simon where he indicated that although the complainant is not able to perform a significant part of her duties as a Communication Practitioner, she may be capable of performing other office-related duties. The board also relied on a report by Dr Barrow where he indicated that there was a marked improvement in the complainant’s condition.

5.6 However, the issue is whether having regard to all medical reports that were submitted to the board, the complainant falls within the ambit of the definition of disability as set out in Rule 25(1). That is whether the medical evidence proves that the complainant is permanently incapable of discharging the duties for which she was appointed or any other duties which she would be reasonably capable of discharging by virtue of her training or experience.

5.7 The definition of disability as set out in Rule 25(1) of the respondent's rules can be broken down into the following component requirements: Firstly, the complainant must be permanently incapable of performing her duties; secondly, the complainant must be incapable of discharging
any other reasonable alternative occupation, which she is suitable for, by virtue of her education, training and experience.

5.8 The complainant submitted a medical questionnaire that was completed by Dr Mochan (Neurologist) who indicated that the complainant has cerebellar ataxia and peripheral neuropathy. He also indicated that the condition causes severe balance disturbance and inability to perform co-ordinated tasks. Dr Mochan stated that the complainant’s condition is permanent and that she will not be able to perform any other occupation in the open labour market as she is functionally impaired.

5.9 The medical questionnaire that was completed by Dr Earle (Neurosurgeon) also indicated that the complainant’s prognosis is poor and that her condition is permanent. Dr Earle stated the following in his medical report dated 18 January 2007:

“Permanently unfit for any work.”

5.10 Dr Simon also indicated the following in his medical report:

“I performed a medical assessment on Ms Rösner today. As you know, she has significant pathology of both her central and peripheral nervous systems. The effect of the nervous system illnesses are such that, although she is capable of limited shuffling walk over short distances on level surfaces, she is mostly wheelchair bound. She reports that she is also somewhat unstable in the wheelchair and regularly falls from it. Her control over her upper limbs is better, but she also suffers from some weakness, loss of dexterity and some sensory loss.”

5.11 The medical evidence conclusively shows that, on account of her medical condition, the complainant is permanently incapable of discharging the duties of her occupation as a Communication Practitioner. This is due to the fact that two specialist doctors have
indicated that the complainant’s condition is permanent and that she will not be able to perform her duties as a Communication Practitioner. The medical reports also confirmed that the complainant is wheelchair-bound and experiences loss of dexterity and sensory loss. The fact that the complainant is permanently incapable of performing her normal work was not disputed in any material respect by the medical reports submitted by Dr Simon, Dr Barrow and Dr Zambakides.

5.12 This was confirmed by Dr Simon where he stated as follows:

“Ms Rösner can clearly not perform a significant part of her previous work as a Communication Practitioner. The specific areas of difficulty are: negotiating ramps with her wheelchair (as she lacks adequate arm power), handling heavy files, assisting with catering. She also experiences a fair degree of embarrassment having to deal with visitors while being strapped to a wheelchair. There are also difficulties with ablutions at work.”

5.13 Although Dr Barrow indicated that there was marked improvement in the complainant’s condition, he also indicated that the central pontine myelinolysis may be permanent leading to a chronic ataxic gait. He also referred the complainant to a neuropathy for further assessment. Dr Barrow’s medical report therefore did not indicate with any certainty the complainant’s ability to perform her duties or the permanence or otherwise of her condition. Dr Zambakides’s medical report also did not shed any light on the complainant’s ability to perform her work or any other alternative occupation. He indicated that an exercise stress test could not be performed due to the complainant’s neurological condition. He further reported that he has given the complainant a trial of sublingual TNT and that if her pain improves then she is to return for further investigations for either a sestimebi with pharmacological stressing of the heart to look for ischeamia or coronary angiogram. Further, he stated that if the complainant’s blood is persistently elevated then a small dose of a mild anti-hypertensive would be recommended. Dr Zambakides’s report therefore did not indicate with
any finality the permanence or otherwise of the complainant’s condition or her ability to perform her work.

5.14 The next enquiry is whether the complainant is incapable of discharging any other duties or alternative occupation which she would reasonably be capable of discharging by virtue of her education, training and experience.

5.15 The respondent submitted that the complainant is not entitled to an ill-health retirement benefit as she will be able to perform other work within the employer. The respondent based its reasoning on a medical report by Dr Simon where he indicated that the complainant may be capable of performing other work like that of a receptionist or office-type duties on a computer. Dr Simon further stated that with the aid of a motorized wheelchair the complainant could carry on with the bulk of her current duties in guiding visitors around the centre. It further submitted that the complainant’s work environment was adapted to accommodate her condition.

5.16 However, it is evident that the complainant could not return to work due to her illness even after her work environment was adjusted to accommodate her. The complainant submitted a medical report to the respondent following the adjustment to her work environment which indicates that she will not be able to work due to her cerebellar ataxia which adversely affect her balance and result in sensory loss. The complainant’s condition and the amount of sick leave it necessitated (several months) appear to indicate clearly that she was not able to perform her duties or any other alternative occupation. The fact that her employment had to be terminated on the grounds of her ill-health indicates that her condition is permanent and that she was not able to perform any other alternative work.
5.17 The weight of the medical evidence is that the complainant is not capable of discharging any other duties which she would reasonably be capable of discharging by virtue of her education, training and experience. In any event, if one considers that there is no clear medical evidence which indicates that the complainant's condition has improved despite several treatments and is combined with the fact that she is wheelchair-bound and functionally impaired, the conclusion is inescapable that she is permanently incapable of performing her own occupation as a Communication Practitioner and the probabilities are that she is also incapable of performing any other alternative occupation.

5.18 In the circumstances, it is my finding, having considered all the submissions and medical reports and other evidence, that the complainant is indeed permanently incapable of carrying out her own occupation and any other alternative occupation.

[6.] ORDER

6.1 In the result, the Order of this tribunal is as follows:

6.1.1 It is declared that the complainant qualifies for an ill-health retirement benefit in terms of Rule 25(1) of the respondent's rules.

6.1.2 The board of the respondent's decision to repudiate the complainant's application for ill-health retirement benefit was unreasonable and is hereby set aside.

6.1.3 The respondent is ordered to pay the complainant her ill-health retirement benefit in terms of Rule 25(1)(3) within six weeks of the date of this determination.
DATED AT JOHANNESBURG ON THIS 5TH DAY OF JUNE 2011

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MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR