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PER REGISTERED POST

Dear Mr. Zaayman

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): H M ZAAYMAN (“complainant”) v NAMPAK GROUP PENSION FUND (“first respondent”) AND OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED (“second respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the repudiation of a disability benefit claim.
- 1.2 The complaint was received by this office on 24 February 2009. A letter acknowledging receipt thereof was forwarded to the complainant on 19 March 2009. On 20 March 2009 letters were dispatched to the respondents giving them until 20 April 2009 to file their responses. A response was received from the second respondent on 28 April 2009. The response was forwarded to the complainant on 24 July 2009. Further submissions were received from the complainant on 3 and 4 August 2009.

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

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- 1.3 After considering the submissions before this Tribunal it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties they will be repeated only to the extent that they are pertinent to the issues raised herein. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complainant was employed by Nampak Limited (“employer”) from 4 September 2006 until he left employment on 13 January 2007. He became a member of the first respondent by virtue of his employment. The second respondent is the first respondent’s administrator. The first respondent’s Rules make provision for a lump sum disability benefit. This is reinsured with the second respondent. In terms of the Rules, payment of a disability benefit lump sum can only be made upon acceptance of a claim by the underwriting insurer.
- 2.2 The complainant is a qualified artisan by trade. His employment duties included repairing and maintaining machinery used in the production of plastic bottles. His work is mainly physical in nature. His office hours were either from 8h00 to 18h00 for a day shift or from 18h00 to 8h00 when working on night shift.
- 2.3 In January 2007 the complainant injured his back while on duty. He underwent medical treatment and did not return to work. He applied for a temporary monthly Income Replacement Benefit (“Synergy benefit”) which was admitted on 19 July 2007. He consulted with Dr. P. Repko (“Dr. Repko”), a neurosurgeon, on 27 March 2009. He then applied for a total disablement lump sum benefit (“disability lump sum”). The application for the disability lump sum was repudiated on the grounds that the complainant had not become totally and permanently disabled. The Synergy benefit ceased after 24 months, i.e. on 12 March 2009.

[3] COMPLAINT

- 3.1 The complainant is dissatisfied with the repudiation of his claim for a disability lump sum benefit. He submits that his work as an artisan is physical in nature. It consists of maintenance of production machines and pulling trolleys carrying bags of up to 500kg in weight. He has to walk and stand a lot in the factory. He feels pain when walking, standing, sitting or lying down. As a result of his back injury he cannot continue with his work. A medical specialist whom he consulted in November 2008 advised him that he should not go back to doing physical work.
- 3.2 He seeks an order setting aside the repudiation of his claim and that he be paid a disability lump sum benefit.

[4] RESPONSE

- 4.1 In accordance with the neurosurgeon's report, it was acknowledged that due to the extent of the complainant's physical and functional limitations, he had become incapable of performing any physically strenuous activities. Therefore he is considered incapable of performing any occupation that is of a physical nature, including that of his current occupation as an Artisan.
- 4.2 The prerequisite to qualify for lump sum disability benefits is total and permanent disability. The medical evidence at hand does not indicate that the claimant is totally and permanently disabled. It has been noted that the complainant is currently only 44 years of age and has an extensive work history, including managerial and administrative skills. Upon further functional assessment, the second respondent is of the opinion that the claimant would be able to perform a sedentary occupation that does not require physical abilities. Based on these

reasons, he does not qualify for the lump sum benefit and the claim remains declined on medical grounds.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The complainant is dissatisfied with the repudiation of his claim for lump sum disability benefits by the second respondent. This Tribunal must determine whether or not the second respondent should be ordered to pay a lump sum disability benefit to him.

5.2 Rule A.4 of the first respondent's Rules regulates the consideration of applications for permanent disability benefits and the payment thereof. To qualify for these benefits, a member's medical condition must comply with the definition of disablement in the Rules. Rule A.4.1 defines "TOTALLY AND PERMANENTLY DISABLED" in the following terms:

"A MEMBER will be classified as TOTALLY AND PERMANENTLY DISABLED in terms of this Rule if his condition is such as to satisfy the provisions governing disablement which are set out by the REGISTERED INSURER."

5.3 Therefore the first respondent's liability to the complainant in this regard is restricted to the extent that the second respondent as the underwriting insurer accepts his claim for permanent disability benefits in terms of the disability policy. Clause B.3.1.4 of the Risk Policy issued to the first respondent by the second respondent sets out circumstances under which a member's claim for lump sum disability benefits may be admitted. This clause provides that:

"B.3.1.4 Subject to compliance with the conditions set out in clause B.3.1.3, Old Mutual will assess the Member's condition in order to determine whether

B.3.1.4.1 he has completed the *Waiting Period* and the whole duration of such *Waiting Period* was occasioned by an injury, surgical operation or illness which rendered the Member totally and permanently incapable of

in the case of a Pilot, Driver or Security Guard, performing *Any Occupation*, or

in the case of any other Member, performing his *Own Occupation* as well as any *Alternative Occupation*, or

B.3.1.4.2 he has completed the *Waiting Period* and the whole duration of such *Waiting Period* was occasioned by the total and permanent loss of

the use of both hands or both feet or one of each, or

the sight of both eyes, or

B.3.1.4.3 he has sustained the loss of both hands or both feet or one of each.

Where Old Mutual determines that the Member's condition meets the requirements set out above, the Disability Benefit claim will be admitted.

If Old Mutual does not recognise the Member's disablement in relation to such requirements, the Disability Benefit claim will be declined."

5.4 Therefore in terms of the Rules and the Risk Policy, the prerequisites for the second respondent's admission of a claim for lump sum disability benefits are that a member must have completed a waiting period of 104 consecutive weeks of absence from the employer, such absence to be occasioned by the medical condition complained of.

The medical condition must render the member totally and permanently incapable of performing his own occupation as well any alternative occupation. Alternatively, his absence from work must have been occasioned by the total and permanent loss of use of both hands or both feet or one of each or eyesight.

- 5.5 “*Own Occupation*” is defined as the type of work the member was performing immediately prior to the commencement of the Waiting Period. “*Alternative Occupation*” is defined as functions with any employer for which the relevant member is suited, taking into account his age, education, training, knowledge, ability and experience.
- 5.6 When the complainant applied for lump sum disability benefits in terms of Rule A.4.1, he could only be paid the benefit upon satisfying the second respondent as the insurer that he had become totally and permanently disabled as required by clause B.3.1.4 of the Risk policy. The second respondent resolved that the complainant’s medical condition did not satisfy the provisions of the Risk policy and therefore he was not entitled to lump sum disability benefits. To this extent, this Tribunal must accept that the second respondent as the insurer was within its rights to repudiate the claim in terms of the Risk policy.
- 5.7 The Rules vest no authority or discretion in the first respondent’s trustees to reconsider the complainant’s claim for disability benefits notwithstanding the repudiation of the claim by the second respondent. As the second respondent repudiated the claim, this Tribunal cannot make an order against the respondents for payment of the disability benefit to the complainant.

[6] ORDER

1. The complaint is dismissed.

DATED AT JOHANNESBURG ON THIS 16TH DAY OF MARCH 2012

DR. E.M. DE LA REY
ACTING PENSION FUNDS ADJUDICATOR

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