

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/WE/268/98

In the complaint between:

Herbert E Tobin

Complainant

and

Motor Industry Pension Fund

Respondent

PRELIMINARY RULING IN TERMS OF SECTION 30J OF THE PENSION FUNDS ACT OF 1956

1. This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A of the Pension Funds Act relating to the fund's refusal to admit the complainant's claim for a disability benefit. No hearings were conducted and therefore in determining this matter, I have relied on the documentary evidence and the investigation conducted, under my supervision, by my investigator, Lisa Shrosbree.
2. The complainant was employed by Bay Motors CC as a spray painter in 1971 and simultaneously became a member of the Motor Industry Pension Fund ("the Fund").
3. In 1996, the complainant states that he was suffering from depression. He consulted his psychiatrist, Dr George of Claremont, Cape Town, who diagnosed him with dysthymic disorder and a major depressive episode.
4. On the basis that he was unable to continue his work as a spray painter due to his illness, the complainant applied to the fund for a disability benefit in terms of rule 6(5) which reads:
 - (a) If any MEMBER becomes, in the opinion of the BOARD through accident or ill-health continuously and permanently unable to perform his normal work in the MOTOR

INDUSTRY, and he is not required to receive a benefit in terms of Rule 6(5), he shall be entitled to:

- (i) a disability benefit which subject to the provisions of Rule 4(2), shall be equal to twice his annual REMUNERATION at the date of disability; plus
 - (ii) the MEMBER'S total contributions in terms of Rule 5(1), plus any additional contributions paid by him in terms of Rule 5(2), plus one twenty-fifth of such total for each completed 12 months period that the MEMBER has contributed to the Fund.
 - (b) If any MEMBER has attained the age of 55 years he shall receive the benefits described in sub-rule (5) hereof, subject to the provisions of Rule 4(2).
 - (c) If it is so wished, the benefit in terms of clause (a) of this sub-rule shall be paid in the form of an annuity, the conditions of payment of which shall be determined by the BOARD having regard to the wishes of the MEMBER. The actual amount of such annuity shall then be determined by the Board having regard to the advice of THE ACTUARY.
5. Rule 6(5) thus confers a discretion on the Board to determine if a member is continuously and permanently unable to perform his normal work in the motor industry and accordingly entitled to a disability benefit in terms of the rules.
 6. 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 curtailed by the requirement that it exercise that discretion properly and that it not fetter its discretion.
 7. The question for determination is therefore whether the Board exercised its discretion properly and did not fetter its discretion in declining the complainant's claim for a disability benefit.
 8. The complainant submitted two medical reports from Dr George and a report by his employer in support of his application. Dr George's report dated 26 May 1997 reads:

The above presents with a history of chronic intermittent depression of several years duration. He was first referred to me in February 1997 with symptoms of severe depression associated with impaired energy, tiredness and insomnia.

I diagnosed dysthymic disorder and a major depressive episode and he has been treated with Fluoxetine 20mg. Daily, Dormonoc 2mg. nocte and a period of extensive leave. Despite treatment his depressive symptoms persist and I have changed his medication to Serzone 100mg. b.d.

In view of the chronic nature of his depressive disorder with a progressive deterioration, the prognosis for complete recovery and ongoing productive employment is poor. Mr. Tobin would like to apply to be boarded and I support his application on medical grounds.
[sic]

9. The questionnaire dated 29 May 1997 completed by the complainant's employer reads in part:

MEMBER'S ABILITY TO DO HIS PRESENT JOB	He is unable to do his present job adequately
MEMBER'S ABILITY TO DO ANOTHER JOB WITHIN THE COMPANY	He is not able to apply himself to any other job within the company
EMPLOYER'S RECOMMENDATION IN SUPPORT OF THIS APPLICATION	Our spraypainter is an integral part of our business and any disruption to this function affects us severely. Mr Tobin is unable to perform this task adequately.

10. The fund referred the complainant's claim to its medical consultants (Medassess (Pty) Ltd) for further evaluation. Medassess relied on the aforementioned report of Dr George, the employer's completed questionnaire and a discussion with its

consulting Psychiatrist (in respect of whom no details are provided) in coming to the following conclusion in its report dated 18 August 1997:

While Mr Tobin may currently be suffering from a depressive disorder, this cannot at this point in time, based on the medical and collateral evidence in our possession, be considered of such severity and permanence as to render continuous vocational incapacity. Such a condition must at this point in time, be considered as an acute psychiatric illness requiring intensive and ongoing pharmacological intervention and psychotherapy for a reasonable period of time, rather than a chronic depressive disorder unresponsive to maximised therapy resulting in permanent vocational incapacity. Medassess is therefore of the considered opinion that he not qualify for benefits from the Motor Industry Pension Fund and advise this claim be repudiated.

11. On receipt of the above report, the fund advised the complainant that his claim had been denied. It is not clear whether the complainant was informed in writing or telephonically and on what date he was so informed. However in response to a letter dated 27 November 1997 addressed to the fund from the complainant's attorney querying the decision, the fund replied in a letter dated 2 December 1997 as follows:

The available evidence does not in our opinion substantiate that Mr Tobin is incapacitated to the extent that he is totally and permanently disabled from performing the requirements of his job as a Spray Painter.

12. Medassess concedes in its report that its conclusions as to the severity of the complainant's condition were based on the limited medical and psychiatric evidence provided. It states in its report

Minimal information regarding the nature of his depressive symptomatology and the extent to which these symptoms have in fact affected his general and vocational level of functioning have been provided.

It seems strange that the complainant was not requested to undergo further medical examination on that account.

13. Moreover it seems that rather than conduct a thorough investigation into the complainant's condition, Medassess relied on the *usual* symptoms associated with the complainant's condition. The report reads in part:

Medassess would also like to emphasize that a depressive disorder is by its very nature intermittent and characterised by periods of well being interspersed with periods of symptomatology.

14. The fact that a depressive order is usually intermittent is not conclusive in the enquiry into whether or not *the complainant's* depressive disorder is intermittent or continuous. It is well documented that depression is a relatively unknown area in the medical field and therefore I would have thought it imperative that each case be assessed on its own merits.
15. On the very question of the permanence of the complainant's depressive illness, Dr George's report states that the complainant's depressive symptoms are persistent and that the prognosis for complete recovery is poor. However Medassess does not canvass this medical finding at all.
16. Although the employer's statement does not touch on the permanence of the complainant's condition, it does provide confirmation of the complainant's inability to perform his normal work due to his depressive illness. This goes contrary to Medassess's assertion that the available evidence does not substantiate the complainant's alleged incapacity to perform the requirements of his job. Again, Medassess does not allude to the employer's assertions in this regard at all.

17. In light of the above, in arriving at the conclusion that the complainant was not continuously and permanently incapacitated from performing his work as a spray painter, Medassess must have either disregarded or rejected the available medical evidence. Yet, other than a discussion with its own consulting psychiatrist, Medassess did not investigate the matter any further by for example requesting that the complainant submit to further medical examination. This places a question mark over the reliability of the Medassess's conclusions.
18. It should be stressed that this is not a criticism of Medassess. At the end of the day, it was the Board's decision whether or not the complainant fell within the ambit of the definition of disability and accordingly qualified for the benefit and not Medassess. I assume that the arrangement between Medassess and the fund is that the fund provide Medassess with medical evidence and that the latter is then required to provide the fund with an opinion based upon that evidence. This is precisely what Medassess did.
19. However where Medassess specifically states that there is insufficient information upon which to make a definitive finding regarding the complainant's condition, it is the responsibility of the Board to ensure that all relevant information necessary to the enquiry of whether the complainant falls within the ambit of the disability definition is obtained.
20. Yet there is no evidence to show that the Board applied its mind to the complainant's claim at all. On the contrary, it would appear that the Board simply 'rubber stamped' the decision of Medassess which, as stated, did not have sufficient medical evidence before it.
21. In light of the above, I am not satisfied that the Board has exercised its powers properly. It failed to obtain all the necessary medical evidence, that is, failed to take all relevant considerations into account in the exercise of its discretion and furthermore fettered its discretion by failing to apply its own mind to the

complainant's claim and by simply relying on Medassess's report. Accordingly the Board's decision should be set aside on the grounds that it constituted an improper exercise of powers and because it constituted maladministration causing prejudice to the complainant.

22. However, as discussed, there is insufficient medical evidence to determine whether or not the complainant qualifies for the disability benefit in terms of the rules. It is therefore appropriate for me to make a preliminary ruling referring the matter back to the Board for further investigation and medical assessment and to exercise its discretion afresh.
23. I accordingly make the following ruling:
 - 23.1 The decision taken by the respondent in or about August 1997 in respect of the complainant's claim for a disability benefit in terms of rule 6(5) is hereby set aside.
 - 23.2 The matter is referred back to the respondent for further investigation, medical assessment and a fresh decision within 6 weeks of this determination.
 - 23.3 The respondent is directed to advise this tribunal and the complainant of its decision within 7 days of the decision and to furnish all relevant documentation and information in that regard.
 - 23.4 The complainant shall be entitled to approach this tribunal on the same papers, as supplemented, for appropriate final relief in relation to the decision to be taken in paragraph 23.2 above, or in the event of the respondent failing to take the decision timeously.

DATED AT CAPE TOWN THIS 11th DAY OF DECEMBER 2000.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR