

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/KZN/311/99

In the complaint between:

J M Makhatini

Complainant

and

Iscor Employees' Provident Fund

First respondent

Sanlam Insurance Company Limited

Second respondent

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956

1. This is a complaint lodged with the Pension Funds Adjudicator relating to the fund's refusal to admit the complainant's claim for disability. No hearings were conducted and therefore, in determining this matter, I have relied solely on the documentary evidence and the investigation conducted by my investigator, Lisa Shrosbree.
2. The complainant commenced employment with Iscor Limited on 13 July 1977 and simultaneously became a member of the Iscor Employees' Provident Fund, the first respondent in this matter. The complainant started as an artisan helper but was promoted to maintenance operator in or about 1983.
3. In October 1995, the complainant underwent cervical spine surgery to alleviate his complaint of neck pain and right upper limb weakness. He returned to work some 3 or 4 months later and was allocated the job of storeman to accommodate his disability.
4. Although lighter duty than that of a maintenance operator, the complainant still complained that he had difficulty coping with his duties on account of his disability. He consulted Dr van Graan, a neurosurgeon who submitted a medical

report dated 22 August 1996 confirming that the complainant's disability prevented him from continuing his work as a storeman.

5. On 29 August 1996, on the basis of Dr van Graan's report, Iscor dismissed the complainant on the grounds of incapacity. The complainant has not been formally employed since then.
6. On termination of his services, the complainant became entitled to a withdrawal benefit from the fund in terms of rule A.5 which reads:

WITHDRAWAL FROM SERVICE NOT DUE TO RETRENCHMENT

A.5.1 Option 1

The MEMBER may elect that the TRUSTEES pay his benefit to him in cash or transfer it to an APPROVED PROVIDENT FUND, APPROVED PENSION FUND or APPROVED RETIREMENT ANNUITY FUND nominated by him. In this event the benefit will be equal to

A5.1.1 the MEMBER'S CREDIT

PLUS

A5.1.2 a percentage of the EMPLOYER'S CREDIT calculated in accordance with the following scale:

Number of completed Years of SERVICE	Scale
1	25
2	50
3	75
4	100

...

A5.2 The MEMBER may elect that his benefit be retained in the FUND until his retirement. In this event the benefit will be equal to the MEMBER'S

ACCUMULATED CREDIT. When the MEMBER retires, the TRUSTEES will pay his ACCUMULATED CREDIT to him in cash. The MEMBER may then use his ACCUMULATED CREDIT to purchase an annuity from a REGISTERED INSURER ...

7. Since the complainant had more than 4 years service with Iscor, he was entitled to 100% of the Employer's Credit. On dismissal, the complainant's accumulated credit was an amount of R44 636.32. The fund accordingly sent a cheque for R41 165.11 (the accumulated credit less deductions) to the complainant on 18 October 1996.
8. On his dismissal, the complainant also applied to the fund for a disability benefit.
9. The fund responded in a letter dated 18 October 1996 that the complainant's claim would be processed by Sanlam, the insurers of the benefit, and that should Sanlam admit the claim, a further payment would follow.
10. Rule A.6 of the fund's rules governs disability benefits and reads:

If the MEMBER'S disablement is recognized in terms of Appendix 2, the DISABILITY BENEFIT will, *subject to such further conditions as may be specified in the policy underwriting the DISABILITY BENEFIT*, become payable to the MEMBER. The TRUSTEES may use the DISABILITY BENEFIT to purchase an annuity for the MEMBER from a REGISTERED INSURER. [My italics]

11. Appendix 2 referred to reads:

The TRUSTEES will regard the MEMBER as disabled if he meets the following requirements:

- 1.1 The MEMBER has been prevented by injury, surgical operation or disease from carrying out his own occupation and any other occupation which he could reasonably be expected to follow, taking into account his education, training,

knowledge, status, ability or experience for the duration of the WAITING PERIOD. His participation in the DISABILITY BENEFIT, and, where this benefit has been insured, the appropriate insurance premiums forming part of the contributions in terms of Rule 3.1.2 must continue throughout the WAITING PERIOD and the TRUSTEES and REGISTERED INSURER must be convinced that his disablement is permanent.

OR

1.2 The MEMBER has sustained the loss of

- the use of both hands or both feet or one of each, or
- the sight of both eyes

for the duration of the WAITING PERIOD. His participation in the DISABILITY BENEFIT and the appropriate insurance premiums forming part of the contributions in terms of Rule 3.1.2 must continue throughout the WAITING PERIOD and the TRUSTEES and REGISTERED INSURER must be convinced that his disablement is permanent.

1.3 Both the MEMBER's hands or both his feet or one of each have been severed.

OR

1.4 The MEMBER has sustained the loss of

- the use of one hand or one foot, or
- the sight of one eye

by external, violent and accidental means for the duration of the WAITING PERIOD, while re-insurance is still in force. His participation in the DISABILITY BENEFIT and the appropriate insurance premiums forming part of the contributions in terms of Rule 3.1.2 must continue throughout the WAITING PERIOD and the TRUSTEES and REGISTERED INSURER must be convinced that his disablement is permanent.

OR

- 1.5 The MEMBER has sustained the loss of one hand or one foot or one eye by external, violent and accidental means while re-insurance is still in force.

12. Rule A.6 provides that the disability provisions contained in the rules are subject to the conditions specified in the policy underwriting the disability benefit. The underwriter of the fund's disability benefit is Sanlam Insurance Company Limited. Accordingly the policy of insurance between it and the fund must be incorporated into the rules governing disability benefits. The relevant section of the policy is part 4(2) which reads:

- 2.(1) If an assured becomes totally and permanently disabled after the latest date on which he commences participation in the benefit in terms of this part, but before the benefit cessation date, the disability sum assured shall be paid –
- (a) in a lump sum to the Fund in the case of an assured whose total and permanent disability is not caused at all by a mental disorder; and
 - (b) in monthly instalments to the Fund in the case of an assured whose total and permanent disability is caused to some degree by a mental disorder
- 2.(2) The monthly instalment which becomes payable in respect of an assured in terms of clause (1)(b), is equal to the smallest of the following amounts, namely
- (a) 1,25% of the disability sum assured; or
 - (b) 75% of the assured's monthly salary; or
 - (c) R7 500,

where the assured's monthly salary means his monthly salary applicable on the latest commencement of total and permanent disability.

...

13. "Disability sum assured" is defined in the policy to mean

... his sum assured but not more than R600 000, provided that if the date of payment falls within the 60 months before the benefit cessation date, the disability sum assured which is payable in a lump sum in terms of clause 2(1)(a), shall be equal to his sum assured or R600 000 (whichever is the lesser amount) multiplied by $t/60$, where t represents the period expressed in months from the date of payment until the benefit cessation date; a part of a month shall be counted as a full month;

“Sum assured” is defined to mean

... the death benefit that would have been paid in terms of the policy in the event of his death immediately before the commencement of his total and permanent disability.

14. In terms of Part 4(6) of the policy, before a disability claim is admitted, Sanlam has to be satisfied, by way of medical and other information which is required at its sole discretion, that the assured is totally and permanently disabled.

15. “Total and permanent disability” is defined in the policy to mean a condition in which –

(a) the assured totally and permanently and continuously cannot use the following, namely - both eyes, or both hands, or both feet, or one hand and one foot;

or

(b) the assured experiences loss of remuneration or profit and totally and permanently and continuously is prevented from

- following the regular occupation which he practised immediately before; and
- following the occupations which he may reasonably be expected to follow, taking into account his training and experience and even if further in-service training is required,

and which

- is directly and exclusively caused by bodily injury or an illness to which the assured did not negligently or wilfully expose himself, except in the interests of the law or to protect his or another’s life or property; and
- is not attributable to intentional self-inflicted injury; and

- cannot be substantially removed by surgery or any other medical treatment, which, taking into account the risk and the prospect of success of that treatment, can reasonably be expected of the assured to undergo,

and totally and permanently disabled shall have a corresponding meaning.

16. In assessing the complainant's claim, Sanlam relied on the advice of Dr van Graan and Dr Govender. Dr Govender, also a neurosurgeon, stated in his medical report dated 6 December 1995:

This patient has a degenerative condition involving his cervical spine ... His ability to cope with hard physical aspects of his present occupation which he described as Fitter will be limited. I expect that with time, however he would be able to cope more and more with his present job and it is my opinion that in approximately 6 months time, he would be able to resume his previous occupation.

Dr Govender saw the complainant again in July of the following year. The resultant medical report dated 2 July 1996 reads:

He [the complainant] reported that he was not coping because of a new problem related to his low backache. He still reported some persistent neck pain.

On examination he had some spasms of the neck muscles. He had tender muscle spasm of the lumbar paraspinal muscle. Straight leg raising was preserved. There was some diminished jerk on the right biceps.

ASSESSMENT

I would suggest that this patient be referred to an Occupational Therapist for a full assessment in terms of his ability to cope with his present occupation.

I regret that I am not qualified to assess the patient's suitability to be employed in any capacity. This is a job assessment that needs to be done by an Occupational Therapist.

17. On the basis that the complainant had not been rendered incapable of following an alternative occupation as required by the definition, Sanlam rejected the complainant's application in a letter dated 21 October 1996 which reads in part:

On the strength of the information in the claim documents we are of the opinion that Mr Makhatini can still do light physical work and therefore is not totally and permanently disabled as stipulated in the rules of the fund.

In view of the above we regret to inform you that this claim unfortunately does not qualify for benefits.

18. The complainant however persisted with his claim. He saw Dr Govender again on 13 May 1997. Dr Govender submitted a report dated 28 May 1997 which reads in part:

Clinical examination revealed a generally well patient who appeared depressed. He had a well healed posterior cervical wound. He had stiffness of the neck in all directions due to pain. He had mild residual biceps & shoulder abduction weakness on the right side. All reflexes were present. The leg reflexes were brisk.

This 40 year old patient has developed early degenerative disease of his cervical spine resulting in nerve root compression at C4/5 and C5/6. Despite a Posterior Decompressive procedure, the symptoms have persisted and are clearly related to persistent root compression at these levels. A colleague has agreed that he might require an Anterior Decompression and Fusion which might palliate his symptoms a bit.

However it is my experience in the past that such patients tend to have nagging neck discomfort for the rest of their lives. The patient's present infirmity is pain which is controlled by analgesics. There is no significant neurological fall-out apart from the functional weakness of the right biceps. Due to his inability to cope with his present physical job, he has been boarded. On enquiry from the patient, there has been no significant limitation to his lifestyle despite his claim to severe pain on a daily basis.

It is my unequivocal opinion that circumstances permitted, this patient should be employable in some light duty capacity ONLY.

19. In 1998, the complainant approached “Disputes & Public Loss Assessors” (DIPULA) to assist him. DIPULA wrote to Sanlam in a letter dated 5 May 1998 requesting it to reconsider its decision.

20. Sanlam responded in a letter dated 19 May 1998 as follows:

On the strength of the information in the claim documents we are of the opinion that Mr Makhatini can still do light physical work and therefore is not totally and permanently disabled as stipulated in the rules of the fund.

We are however willing to reconsider our decision on receipt of a report by one of the following doctors:

Dr J Golek ...

Dr E Ackermann ...

21. However the complainant decided to consult Dr Ford, a neurosurgeon whom he had consulted previously in July 1996 for a further assessment. Dr Ford submitted a report dated 19 March 1999 wherein he stated:

I applied to have a MRI Scan performed on Mr J M Makhatini in an attempt to define some site of cervical cord on root compression, in view of his ongoing right sided neck pain and brachialgia. The overall dimensions of the cord and canal are normal and the only apparent abnormal feature is a marginal narrowing of the foramina on the right side, extending from C3 to C7. There is certainly no evidence of significant disc lesion. He does display a congenital occipitalisation of C1 but this would not cause the symptoms that he complained of.

22. Dr Ford saw the complainant again on 24 February 1999 and submitted a further report dated 30 April 1999 which reads in part:

This investigation was performed on 24 02 1999 ... The investigation itself was largely negative and did not establish a surgically significant cause for his [the complainant's] ongoing symptoms and disability

23. Sanlam responded to Dr Ford's report in a letter dated 9 April 1999 which reads:

It is clear from the medical report compiled by Dr Ford (after a MRI Scan was done) that there is no neurological evidence of the cause of your client's neck pain and right sided branchialgie ... We therefore regret to inform you that it is still our opinion that your client is not totally and permanently disabled as defined in the rules of the fund...

24. Later that year, the complainant consulted Dr Golek, the neurosurgeon to whom Sanlam had referred the complainant in May 1998. Dr Golek examined the complainant on 7 December 1999 and submitted a report dated 8 December 1999, wherein he stated:

He [the complainant] gave the impression of heavy exaggeration of his symptoms throughout the examination. The patient walks in an awkward position, slowly, pretending that he cannot move his right hand at all. If observed however, unaware, he dresses and undresses himself very well using his right hand freely ...

The patient has symptoms which are mainly of subjective nature with complaints of severe neck ache and pain down his right upper limb ... The patient does not have any neurological deficit of muscle deficit his muscle development is very good and additionally the patient seems to have functional mobility of the right upper limb which appears to be much better than the patient's subjective description.

Although a certain degree of exaggeration is understandable due to the claim, I find it disproportionate to the neuroradiological and neurological evidence of fairly minor pathology.

25. On the basis of Dr Golek's report, Sanlam remained of the opinion that the complainant was not totally and permanently disabled as defined in the rules

and therefore not entitled to the disability benefit. This forms the basis of the complainant's complaint.

26. The complainant asserts that he is totally and permanently disabled from following not only his own occupation but an alternative occupation as well and that Sanlam therefore erred in declining his claim for a disability benefit since he qualifies in terms of the rules.
27. The question for determination is whether Sanlam's decision to decline the complainant's claim for disability, taking into account all the available medical evidence, was reasonable in the circumstances.
28. The complainant does not fall within the ambit of part (a) of the definition of disability. Therefore in order to qualify for the disability benefit he must show that he falls within part (b) of the definition which requires a claimant to have a condition in which he *experiences loss of remuneration or profit and totally and permanently and continuously is prevented from following the regular occupation which he practised immediately before and following the occupations which he may reasonably be expected to follow, taking into account his training and experience and even if further in-service training is required.*
28. The medical evidence only provides neurological information about the complainant's condition. However the definition describes the disability required from a distinctly practical point of view. For this reason, I requested the respondent to arrange that the complainant be examined by an occupational therapist. This was in any event the recommendation of Dr Govender in his report dated 2 July 1996 wherein he states that the suitability of the complainant to be employed in any capacity is an assessment which ought to be done by an occupational therapist.

29. The respondent accordingly referred the complainant to an independent occupational therapist who examined the complainant on 19 June 2000 and submitted a report dated 27 June 2000 which reads:

On assessment the claimant was found to have slight limitations in terms of right shoulder movement. Neck and lumbar spine movements were assessed to be within normal limits as was his muscle strength in the right upper limb. He did not seem to experience pain at the extremes of movement of the right upper limb. He was able to lift and carry weights of up to approximately 10kg without obvious difficulty. His upper limb musculature was observed to be well developed.

In terms of functional abilities, the claimant is independent in terms of personal care, he can drive but does not have a car. He does little around the home but it would seem that this is not as a direct result of his physical condition but more likely a life long pattern. He spends most of his time selling fruit and vegetables from his yard.

The work of a Maintenance Operator is physically demanding in terms of standing, bending, lifting and carrying heavy weights. Physical strength, agility and endurance would be required. This work may aggravate the claimant's pain. The work of a Storeman is less physically demanding although there is still lifting and carrying of a light to heavy weights required. This work would be less demanding in terms of agility and endurance but strength would still be required intermittently.

To conclude, the claimant's physical limitations were assessed to be mild. Pain is difficult to assess objectively, but during the assessment there were intermittent indications that he was experiencing pain at the extremes of upper limb movements. It would be reasonable to recommend that he avoid performing heavy physical work on a regular basis. Light to moderate physical exertion during the course of the day should be manageable based on the results of the assessment. This would allow him to work in a store where assistance was available for heavy lifting. A further alternative could be assembly work in a factory environment, although I'm not sure if this would offer a salary competitive with his previous one at ISCOR.

30. In light of the above report, the reports from the various neurologists as well as the fact that Iscor dismissed the complainant on the grounds of incapacity, I am

satisfied that the complainant is prevented from following his own occupation as a maintenance operator/fitter.

31. However it is the second part of the definition which is problematic for the complainant. It requires a member to be incapable of following the occupations which he may reasonably be expected to follow, taking into account his training and experience and even if further in-service training is required.
32. The various neurologists' reports reveal that it is difficult to explain the complainant's symptoms neurologically. See for example Dr Ford's report dated 19 March 1999 quoted in paragraph 21 and his further report dated 30 April 1999 wherein he states that he was unable to establish a surgically significant cause for complainant's ongoing symptoms and disability. In the opinion of Dr Golek, the complainant exaggerates his symptoms and although a certain degree of exaggeration is understandable, he states that it is disproportionate to the neuroradiological and neurological evidence.
33. The scepticism of the neurologists who examined the complainant is not contradicted by the evidence of the occupational therapist. The therapist's report states that the complainant's physical limitations are mild and that he is capable of light to moderate physical exertion. According to her assessment, the only activity which the complainant is unable to carry out, is *heavy* physical work. Therefore the complainant would be able to work in a store where assistance was available for heavy lifting. The occupational therapist has suggested a further alternative of assembly work in a factory environment.
34. Thus it would appear that the complainant is capable of following an alternative occupation provided it is not too physically demanding. Therefore the complainant does not fall within the second part of the definition and I am accordingly satisfied that the decision to decline the complainant's claim on this basis was lawful and reasonable in the circumstances.

35. It is interesting to note that the occupational therapist states in her report dated 27 June 2000 that at a meeting with the complainant's former boss, he told her that he was surprised that the complainant had been dismissed on the grounds of incapacity since he had considered him to be a good worker and that he seemed to manage his duties as a maintenance operator without difficulty. This evidence corroborates the neurological evidence that there is no medical explanation for all the symptoms the complainant complains of as well as the evidence of the occupational therapist that the complainant should be capable of performing light to moderate physical work.
36. For the foregoing reasons, the complaint is dismissed.

DATED at CAPE TOWN this 28th day of AUGUST 2000.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR