

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/KZN/499/00

In the complaint between:

M D Mthembu

Complainant

and

Iscor Limited

First respondent

Iscor Employees' Provident Fund

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 in terms of section 30A of the Pension Funds Act relating to the fund's refusal to medically board the complainant and to pay him a disability benefit. No hearings were conducted and therefore in determining this matter, I have relied on the documentary evidence and the investigation conducted by my investigator, Lisa Shrosbree.
2. The complainant was employed by Iscor Limited on 11 September 1989, the first respondent in this matter and simultaneously became a member of the Iscor Employees' Provident Fund ("the fund"), the second respondent in this matter.
3. In April 1996, in order to assist the complainant with a sleeping disorder, the first respondent transferred the complainant to a section where he was accommodated in a permanent day-shift post.
4. However a year later, the complainant, of his own accord, applied to be transferred back to shift duties for a post on a higher grading, that is, the post of quality inspector which application was successful.

5. On 30 April 1999, the complainant was retrenched and accordingly requested that his withdrawal benefit from the fund be paid into his bank account. The fund accordingly deposited a cheque for R5 330.53 into the complainant's bank account on 22 June 1999 which amount was calculated as follows:

Accumulated Fund Credit	R36 612.17
Less tax	R 4 881.64
<u>Less cession ifo Iscor Landgoed</u>	<u>R26 400.00</u>
Nett payment	R5 330.53

6. The complainant's complaint is that, on account of his sleeping disorder, the fund ought to have paid him a disability benefit and not a retrenchment benefit.
7. Rule 10 governs disability benefits and reads:

If a MEMBER who has not yet attained the NORMAL RETIRMENT AGE is permanently disabled and provided that satisfactory proof of such disability is submitted to the FUND and the INSURER, the following provisions shall apply:

10. QUALIFICATION FOR DISABILITY BENEFIT

10.1.1 Subject to the provisions of rule 10.4 and 10.5, if a MEMBER has, for an uninterrupted period of 26 consecutive weeks, as a result of an injury, surgical operation or disease been prevented from carrying out his own occupation and any other occupation which the MEMBER could reasonably be expected to follow: taking into account his education, training, status, ability or experience and provided the TRUSTEES and INSURER are satisfied that such disablement is permanent, such MEMBER shall qualify to receive a disability benefit.

10.1.2 For the purposes of this rule permanent disablement shall include but shall not be confined to the following:

8. The respondents' response to the complaint is that since the complainant's sleeping disorder was minor and easily treatable, he did not fall within the ambit of rule 10 to qualify for the disability benefit.
9. Rule 10 requires a member, as a result of an injury, surgical operation or disease to be prevented from carrying out his own occupation and any other occupation which he could reasonably be expected to follow taking into account his education, training, status, ability or experience and provided the trustees and insurer are satisfied that such disablement is permanent. The question for determination is therefore whether the complainant met these requirements.
10. It is common cause that prior to his retrenchment the complainant never applied to the first or second respondent to be medically boarded and to be paid a disability benefit. (He only did so some three months after he was retrenched). However, contrary to the complainant's contentions, it would appear that, prior to his retrenchment, the complainant was in fact considered by the second respondent for possible medical boarding and the payment of a disability benefit. The various medical examinations and tests undergone by the complainant in this regard prior to his retrenchment are set out below.
11. On 29 June 1998, the complainant was examined by Dr Magubane, a general practitioner, who made a diagnosis of *narcolepsy* described as a rare syndrome of recurrent attacks of sleep, sudden loss of muscle tone, sleep paralysis and hypnagogic phenomena. This is a fairly serious condition which might have justified medical boarding and the payment of a disability benefit.
12. Dr Magubane referred the complainant to the neurological department of Wentworth Hospital for further investigation. The complainant was examined by Dr Ramogi whose finding in a report dated 21 August 1998 was that the complainant may possibly be suffering from narcolepsy but that this was not conclusive.

13. The complainant was thereafter referred by Dr Ramogi for a sleeping test on 17 September 1998. However the results of this test were also inconclusive.
14. Dr Ramogi then wrote to Dr Bruwer, the first respondent's occupational medical practitioner in a letter dated 20 November 1998 to suggest that a so-called Polysomnogram tests be conducted on the complainant for conclusive results. Dr Ramogi also attached a report of one Dr Patel, a neurologist, dated 19 November 1998 who the complainant had previously consulted for sleeping tests. His report reads in part:

This sleep study does not lend conclusive support to a sleep apnoea disorder and if it does exist, it is mild. A full polysomnogram is advised. In the absence of this, weight loss, sleeping on the side and an abstinence from alcohol or sedatives is suggested.

15. Pursuant to the recommendation of both Dr Patel and Dr Bruwer, the complainant consulted Dr Bartel, a neurologist, for a polysomnogram test.
16. In the meantime, Dr Bruwer referred the complainant to Dr Savov, a specialist psychiatrist for assessment in order to determine whether the complainant's case should be referred to the first respondent's medical panel for possible medical boarding on the grounds of medical incapacity. Dr Savov's report dated 3 February 1999 reads in part:

1. Mr Mthembu suffers from NARCOLEPSY. This is a disorder which belongs to the group of primary sleep disorders manifested by irresistible sleep attacks for at least 3 months together with Cataplexy and Polysomnographic changes.
2. It seems that his problems started in 1992 and deteriorated over the years and despite treatment.
3. It seems his problem is severe enough to cause major impairment of functioning. There is no evidence of any secondary gain factors.

4.
 5. It seems that he is a treatment resistant case which is often seen in clinical practice. In this regard the prognosis for recovery is poor.
 6. There is no doubt that his sleeping disorder is grossly affecting his lifestyle and working capabilities. He could be a danger to himself and others at his work place at Iscor. His sleeping problem may cause a major problem and significant consequences eg: if operating with machinery but also in all other areas of occupation.
 7. I would consider him as not fit for any services in Iscor and therefore I would strongly recommend a medical boarding on Psychiatric grounds.
17. Based on Dr Savov's report, the complainant was notified by Dr Bruwer to appear before the first respondent's medical panel on 22 January 1999.
18. However a day before the complainant was due to appear Dr Bruwer received the results of the polysomnogram tests. The resultant report dated 20 January 1999 reads:
- We have ... of the polysomnogram results. We do believe that the patient has sleep apnoea (and not narcolepsy) as diagnosed by the Psychiatrist. We are unable to furnish with any further information. Advice to patient – try and loss (sic) weight.
19. Sleep apnoea is a condition whereby the sufferer stops breathing during sleep for ten seconds or more up to 300 times per night. This results in, amongst other symptoms, daytime drowsiness. However the condition is treatable. One aspect of treatment is the use of a so-called positive pressure air flow mask during sleeping.

20. Dr Bruwer then telephoned Dr Patel to inform him of these results. Dr Patel in turn recommended that the complainant was not a suitable candidate for boarding on the grounds of medical incapacity and that the complainant could in fact function normally if he was issued with the said air flow mask. Furthermore Dr Patel stated that the complainant's condition would improve if he lost weight.
21. Accordingly on arriving for his appointment with the medical panel on 22 January 1999, the complainant was advised that as a result of the polysomnogram test which revealed that he suffered from sleep apnoea and not narcolepsy, he could not be considered for medical boarding. However that Dr Bruwer had booked him off work for the period 2 February 1999 to 5 February 1999 for the purposes of collecting his positive pressure air flow mask at the Wentworth Hospital. (However, according to the respondents, the complainant has never collected the flow mask).
22. I agree with the respondents that in the light of the above medical evidence, it would appear that the complainant was not prevented him from carrying out his own occupation or another occupation as required by rule 10 to qualify for the disability benefit; that the weight of the medical evidence revealed that the complainant was suffering from sleep apnoea (and not narcolepsy) and that he could function normally with the prescribed treatment, that is, he could perform his *own* occupation and *another* occupation.
23. The complainant seems to base his claim that he is entitled to the disability benefit on the findings of Dr Magubane, a general practitioner and Dr Savov, a psychiatrist. However, as pointed out by the respondents, sleeping disorders are neurological conditions best diagnosed by neurologists. The consensus of the neurologists which the complainant consulted was that the complainant suffers from sleep apnoea and not narcolepsy as contended by Dr Magubane and Dr Savov.

24. In light of the above, I am satisfied that the complainant did not fall within the ambit of rule 10 and therefore did not qualify for the disability benefit as he contends.
25. It is noteworthy that, after being transferred by Iscor to day shift duty only in 1996 to accommodate his disability, the complainant, of his own volition, elected a year later to transfer back to night shifts. This shows that the complainant's condition is possibly not as serious as he claims.
26. It is also noteworthy that the complainant failed to collect the flow mask provided by Isocr which, according to his doctors, would alleviate his condition substantially, if not entirely. If the complainant's disability was sufficiently serious to warrant payment of the disability benefit, I would have thought any relief from its symptoms would have been welcomed.
27. For the foregoing reasons, the complaint is dismissed.

DATED at CAPE TOWN this 29th day of September 2000.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR