

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/FS/23/98

In the complaint between:

E M Sefako

Complainant

and

First National Bank Group Pension Fund

Respondent

INTERIM 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 disability. 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 is employed by First National Bank and is a member of the First National Bank Group Pension Fund.
3. Initially he worked as a driver. However in 1990 the complainant was involved in a motor vehicle accident in which he sustained multiple injuries including a left femur fracture, fracture dislocation of the mid-tarsals of his left foot and fractured ribs. The main injury was however to his left foot.
4. The complainant was hospitalized after the accident. On his return to work, he was re-deployed to the position of Senior Retrieval Officer to accommodate his injuries for which he continued to receive periodic treatment.
5. Some six years later, in 1996, the complainant applied to the fund for disability on the grounds that he could no longer carry out his duties at work.

6. Rule 6 governs disability benefits. The relevant part reads:

6.1 If at any time prior to the NORMAL RETIREMENT DATE a MEMBER, other than a DEFINED BENEFIT MEMBER, as a result of an accident, disease or illness, is in the opinion of the TRUSTEES after consulting the FUND'S medical advisers, unable to pursue his own occupation or a similar occupation for which he could be reasonably expected to become qualified by his knowledge, training, education, ability and experience, he will, provided SERVICE is equal to or greater than five years, be permitted to retire and the following provisions shall apply, subject to the provisions of Rule 9.3...

(1) The MEMBER will be entitled to retire from SERVICE and he shall receive a PENSION as determined by Rule 4.1, subject to the provisions of Rule 3.1(3). Such PENSION will vest on the first day of the month coinciding with or immediately following the day he leaves the SERVICE of the EMPLOYER.

7. In terms of the above, a member qualifies for the disability benefit if due to an accident, disease or illness he/she is in the opinion of the trustees unable to pursue his own occupation or similar occupation.

8. The fund declined the complainant's initial application on the grounds that he did not fall within the ambit of rule 6.1. However the fund has failed to provide me with the medical evidence upon which it relied for this decision.

9. The only evidence in this regard is a letter dated 15 August 1996 from the Senior Manager of the fund addressed to the complainant's employer which reads:

Further to previous correspondence, I must advise that while our medical assessors concede that Mr Sefako probably does have some degree of chronic symptomatology related to his orthopaedic injuries, most likely in the form of degenerative osteo arthritis, they cannot agree that this causes such impairing symptomatology, as to render him totally and permanently disabled. They are of the opinion that not all possible treatment options have been exhausted in attempting to alleviate his reported pain. Furthermore,

the pain associated with his apparent Reflex Sympathetic Dystrophy will in all likelihood burn itself out. It is therefore their considered opinion that there are insufficient grounds for the approval of a disability application at this point in time.

The Trustees are in agreement with this opinion and Mr Sefako's request for retirement is consequently declined...

10. It would appear that the complainant consulted various doctors at the time of his application for disability in 1996.

11. A report dated 13 February 1996 from Dr Kruger reads in part:

Mnr EM Sefako is op hierdie stadium 46 jaar oud en volgens inligting moet hy baie loopwerk by sy werk uitvoer. Hy moet ook dikwels swaar voorwerpe dra met leers in. Hy werk in die liasseerkamer en moet baie liassererwerk doen. Hy word gedurig na die Bank toe gestuur. Aangesien hy baie pyn in sy linkerbeen en linkerknie en linkervoet ondervind dink ek dat die werkslas op hierdie stadium vir hom te veel is en dat daaraan gedink moet word om hom Medies Ongeskik te verklaar vir sy beroep.

Ek bevel dus aan dat hy Medies Ongeskik is vir sy huidige beroep en dat hy a.g.v. Mediese en Gesondheids redes op pensioen geplaas word.

12. The complainant also consulted Dr Prinsloo whose report dated 30 April 1996 reads in part:

Hiermee wil ek graag aanbeveel dat Mnr Sefako medieseongeskik verklaar word aangesien hy weens probleme met sy knie en voet na 'n motorongeluk nie meer in staat is om te werk nie.

Sy ortopeed, Dr Johan Kruger, het ook aanbeveel dat hy op ongeskikheidspensioen geplaas word. Ek will dit graag motiveer deur middle van volgende feite:-

Ek het hom 14/9/95 gesien met erge pyn en ongemak in sy linker voet en linker knie na die vorige ongeluk. Hy was geopereer maar as gevolg van die feit dat hy baie moet staan en loop in sy werk, verduur hy baie pyn.

Hy was 15/2/96 weer by my nadat hy 'n arthroskopie van sy knie gehad het en ek het hom vir fisioterapie gestuur om sy spiere te probeer rehabiliteer. Op 2/4/96 het ek hom weer in opvolg gesien en 'n reeks inspuitings vir sy pyn aanbeveel, maar sy probleme is inomkeerbaar en ek stel dus voor dat hy nie meer geskik is om sy huidige beroep te beoefen nie.

Ek vertrou dat bogenoemde goedgunstig oorweeg sal word.

13. The complainant also consulted Dr Travers whose report dated 16 May 1996 reads in part:

Die beeld waarmee hy nou presenter is tipies van die wat beskryf word as 'n Refleks Simpatiese Distrofie. Die beeld is baie hardnekkig en weerstandig teen behandeling en die algemene prognose van die toestand is nie baie goed nie.

Ek hanteer hom deur middel van die aanvaarde terapie van herhaalde Simpatolise deur middle van Bierblokke. Ek plaas hom verder ook op medikasie in 'n poging om die abnormale pynsiklus te breek. Hy ondervind egter redelike strawwe newe-effekte van die pynmedikasie en ek is genoodsaak om dit te verminder.

Met die oog op sy langtermyn herstel is ek minder optimisties. Die toestand is, soos reeds genoem, baie moeilik om onder beheer te bring waneer die beeld eers gevestig is. Ek help so ver moontlik om hom 'n mate van verligting te bied...

14. Thus the complainant's doctors all concurred that the complainant was incapable of pursuing his own occupation as a retrieval officer.
15. On being informed by the employer that his claim had been repudiated, the complainant approached SACCAWU for assistance. When SACCAWU could not reach an agreement with the employer, the matter was referred to the CCMA.
16. It is difficult to determine from the evidence exactly what the outcome of the CCMA enquiry was. What is clear is that it did not resolve the dispute and the complainant continued to work for approximately another year. He then re-applied to the fund

for disability in 1998. The fund's medical assessors, Medassess, were then called upon to facilitate an evaluation of the complainant's condition.

17. Medassess referred the complainant to Professor Shipley of the Orthopaedics Department at the University of the Orange Free State. Professor Shipley's report dated 21 April 1998 reads in part:

Mr Sefako sustained a midshaft fracture of the left femur, and probably a fracture dislocation at the mid-tarsal joint of the left foot (Lisfranc dislocation). His injuries healed satisfactorily, with normal hip, knee and ankle function, probably a degree of R.S.D., now resolved, and residual midtarsal joint pain and degeneration in the left foot. The patient has severe symptoms of hip, thigh and knee pain for which no orthopaedic cause is evident. He has reasonable cause for a moderate degree of foot pain, which should allow employment in a fairly sedentary capacity, probably including driving, and should be amenable for further treatment – (including a fusion of the 1st and 2nd tarso-metarsal if necessary).

18. Based on the above medical report, all medical and collateral information in their possession and a discussion with their consulting orthopaedic surgeon, Medassess submitted a report dated 9 June 1998 to the fund stating that, in its opinion, the complainant was capable of performing sedentary to light occupations and therefore did not qualify for the disability benefit in terms of the rule 6. Based on this report, the fund repudiated the complainant's claim for a third time.
19. The complainant however persisted and in 1999 applied for disability for a fourth time. Medassess were again called upon to reassess the claim. Medassess arranged for an occupational therapist, one Mrs J van Wyk, to visit the complainant's work site on 28 September 1999.
20. The respondent has not provided me with a copy of Mrs van Wyk's report. However Medassess discuss the report at length in their report dated 30 September 1999 which reads in part:

During the Occupational Therapy evaluation, the claimant constantly mentioned his swollen left foot while mild atrophy of the lateral aspect of the left thigh was noted, the circumference of the ankles, calves and knees measured exactly the same bilaterally. During assessment of range of movement and muscle strength, the claimant was inconsistent in his responses when Mrs. Van Wyk repeated these assessments, and in addition, displayed varying degrees of limping when walking, depending on whether he was being observed or not...

During assessment of the claimant's work tasks, it came to light that the claimant spends 80% of his time preparing folders at his desk and carries these to another area on completion, and the other 20% of his time is spent performing retrieval work, indicating that these tasks have effectively been adapted / changed. Mrs van Wyk observed that, amongst others, that the claimant was capable of carrying 50 folders, opening steel cabinet drawers, and pushing and pulling a trolley containing folders without any difficulty, despite the fact that he reported experiencing difficulty performing these tasks. Discussion with the claimant's Supervisor, Mrs M. Nel, revealed that the section in which the claimant is currently working will be moving to Durban in due course, and employees had been requested to stipulate a position of preference to management, and Mr Sefako indicated the Repossessions Department where he had previously worked as a Driver/Storeman. Mrs Nel mentioned however, that Mr Sefako could be accommodated in a clerical / administrative position within that department.

In summary, Mrs van Wyk indicated that the claimant appeared to present with underlying depression, as he feels that his pain and stressors are becoming unbearable to the extent that he is no longer capable of working. She noted however that his responses during physical assessment were fraught with inconsistencies when presented with the same stimuli. Nevertheless, his left lower limb and foot were assessed as functioning within normal limits apart from mild limp due to a limitation in the rolling action when placing his left foot when walking. Furthermore, the claimant demonstrated no functional problems or limitations in the performance of his work tasks, and the physical demands within his work setting fall within the light category and are of low frequency.

Based on the finding of her Occupational Therapy evaluation, Mrs van Wyk was of the considered opinion that Mr Sefako is capable of continuing in his current occupation as a Senior Retrieval Officer, and should he have to return to working in the Repossessions Department, she is of the opinion that he would be capable of functioning optimally in a clerical/administrative position...

21. On the basis of Mrs van Wyk's report, Medassess advised the fund to repudiate the complainant's claim. This is duly did in a letter dated 26 October 1999.
22. The complainant's complaint is that the fund ignored the medical opinion of his own doctors that he was and still is incapable of pursuing his own occupation and that it therefore exercised its discretion unreasonably in repudiating his claim for disability.
23. The question for determination is whether the complainant falls within the ambit of rule 6, that is, whether he is unable to pursue his own occupation or a similar occupation for which he could be reasonably expected to become qualified by his knowledge, training, education, ability and experience. If the complainant can show that he is unable to perform his own occupation as a retrieval clerk, then it is reasonable to assume that he is unable to perform a similar occupation as well. The focus should therefore be on whether or not the complainant is able to pursue his own occupation. The onus will rest on the respondent to show that the complainant is able to perform a similar occupation.
24. To determine this, one has to rely on medical opinion as to the nature and severity of the complainant's injuries and the effect it has on his ability to perform his duties or similar duties at work.
25. As shown above, the medical evidence provided by the fund is at complete variance with that submitted by the complainant. On the one hand, the import of the medical opinion submitted by the fund is that, in spite of his injuries, the complainant is still capable of performing his occupation. (Refer paragraphs 18 and 21 above). This is supported by the fact that the complainant has continued to work for over 4 years pending the outcome of his application for disability which shows that he somehow manages despite his injury. However I should stress that this does not necessarily mean that the complainant is disqualified from receiving

the disability benefit. For example if he is working under extreme paid or if continuing to work in his current occupation will severely worsen his injury, then that constitutes an inability to pursue his own occupation as required by rule 6. In other words being able to pursue you own occupation means being capable of performing it without detriment to your health.

26. On the other hand, the complainant's doctors all agree that the complainant is not able to pursue his own occupation as a retrieval clerk. A recent report dated 5 June 2000 submitted by Dr Kruger reads:

Due to Medical Reasons Mr EM Sefako is disabled for his CURRENT OCCUPATION due to constant and chronic pain in the left leg, left knee and left foot. He walks with great difficulty during the day and climbing up and down on stairs causes severe pain. The left knee also gives away underneath him and may cause severe injuries if he should fall.

DUE TO THE FACT THAT HE HAD NO OTHER EDUCATION OR QUALIFICATION FOR ANY OTHER KIND OF WORK I WOULD RECOMMEND THAT HE IS MEDICAL UNFIT FOR HIS CURRENT OCCUPATION AND THAT IS PERMANENT. HIS PRESENT CONDITION WILL DETERIORATE IN THE FUTURE AND GET WORSE.
[sic]

27. The complainant's doctors have stated with resolve that the complainant is not able to continue working, that his prognosis is not good and that he should be medically boarded.
28. The inconsistency in the medical evidence makes my task of determining whether or not the complainant qualifies for disability in terms of the rules an impossible one. It is therefore necessary to obtain an independent assessment of the medical evidence submitted by the parties. On receipt of the independent assessment, I shall hand down a determination.
29. The interim ruling of this tribunal is accordingly as follows:

28.1 The matter is referred to Dr David Bass (M.Med (UCT), FCS(SA), an orthopaedic surgeon of 61 Boschhoff Avenue, Newlands, Cape Town for his independent assessment of the medical evidence submitted by the parties.

28.2 The respondent is directed to pay the costs of Dr Bass's assessment.

28.3 The matter is postponed until 20th May 2001 whereupon, based on Dr Bass's assessment, I shall hand down my determination.

DATED at CAPE TOWN this 2nd day of MAY 2001.

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JOHN MURPHY

PENSION FUNDS ADJUDICATOR