IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/WE/187/98/LS

In the complaint between:

J Reynolds Complainant

and

The Metal and Engineering Industries Provident Fund First Respondent

The Metal and Engineering Industries Permanent Disability Scheme Second Respondent

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

This is a complaint relating to the second respondent's refusal to admit the complainant's application for a disability benefit in terms of its rules. In May of this year, I gave an interlocutory ruling ordering the complainant to be reassessed by an independent physiotherapist, occupational therapist and specialist.

The question to be decided was whether the complainant qualified for disability in terms of the second respondent's rules in 1997 when he stopped working and applied for disability.

Disability benefits are governed by rule 3(2) of the first respondent's rules which reads:

> A Member who has become permanently disabled or incapacitated and not being able to engage in further employment in whatsoever capacity in the Industries, will receive benefits under the Metal and Engineering Permanent Disability Scheme

By virtue of his membership of the first respondent, the complainant claims to be entitled to benefits under The Metal and Engineering Industries Permanent Disability Scheme (hereinafter "the Scheme"). The complaint thus involves a dispute of fact and law in relation to the fund between the Scheme and the complainant.

The Scheme's rules define "permanently disabled" as follows:

> "Permanently Disabled" shall mean a Member becoming permanently disabled or incapacitated and not being able to engage in further employment in whatsoever capacity in the Industries. "Permanent Disability" shall have a corresponding meaning.

In order to qualify for disability under the Scheme, the member has to fall within the above definition. In addition the rules state that the Scheme's board has the sole discretion in deciding who is permanently disabled.

The complainant was involved in a motor vehicle accident in 1989 and as a result thereof sustained spinal injuries. The medical diagnosis was mild left hemi-paresis following a cervical spine fracture. As a result of this injury, the complainant had to undergo fusion surgery and was left partly paralyzed in his left leg and arm. He returned to work after his operation. However in 1997 the complainant's doctor recommended he be boarded on account of his disability and the complainant accordingly resigned from his company at the end of August 1997 and applied for disability.

However the Scheme refused to admit the complainant's claim for disability on the grounds that the medical evidence on hand in 1997 confirmed that he was physically capable of performing the majority of his duties as a sander. According to the Scheme, he could therefore not be considered totally and permanently incapacitated for the performance of his own or any reasonable alternate occupation within the industries as required in terms of the definition to qualify for disability.

Pursuant to the interlocutory order, the complainant has now been reassessed by an independent physiotherapist, occupational therapist and neurologist and I have determined this complaint taking account of their professional opinions as well as the medical evidence available to the Scheme in 1997 when they refused to admit the complainant's claim.

Analysis

The crux of this matter is the meaning of the definition of “permanently disabled” and whether in 1997 when the complainant applied for disability, he fell within that definition.

It is a general principle of our law that an inquiry into the ordinary grammatical meaning of words used is not an end in itself but a method of arriving at the common intention of the parties. (*Total South Africa (Pty) Ltd v Bekker 1992 (1) SA 617).* Accordingly, in determining the meaning of disability clauses, their language must be given a reasonable rather than a literal construction. The reasonable interpretation of the definition of “permanently disabled” quoted above would be that it is not necessary for the applicant to show that he cannot perform any gainful occupation at all and that what is required is that he must, in a practical sense, be unable to carry out his own occupation or any other occupation taking into account his training and mental and physical ability.

The board refused to pay the complainant a disability benefit on the grounds that he was still able to perform the majority of his duties and thus was not totally incapacitated as required in terms of the definition. This decision was based on the report dated 18 March 1997 of Ms Seton, an occupational therapist, and the report dated 22 August 1997 of the medical practitioner appointed by Medassess (Pty) Ltd.

The report of Medassess states that there was no evidence of a deterioration in the complainant’s condition since the accident in 1989 and that his work ability had not altered to any significant degree since his return to work. Therefore since the complainant had returned to gainful employment following his injury and there was no evidence of any deterioration since then, it could not be said that he was no longer able to continue in his own occupation.

However Dr Du Plessis who examined the complainant on 6 July 1999 came to a different conclusion. Although we have to look at the complainant's condition as it was in 1997 when the Scheme made its decision, the report of Dr Du Plessis nevertheless provides medical evidence from which certain inferences can be drawn in respect of the complainant's condition in 1997. This is because the report reveals that the complainant's condition has deteriorated gradually over time.

Dr Du Plessis states that whilst the complainant was able to return to work after the injury, various factors have taken their toll to the point where he is no longer capable of continuing work. For example his immobility has resulted in him putting on weight and this has resulted in his mobility being further jeopardized. In addition due to the ongoing spasticity and stiffness that has occurred on his left side, Dr Du Plessis states that there has developed a certain amount of limitation of joint movement and the range of joint movement has diminished, further jeopardizing the complainant's functional disabilities. In addition the complainant has also developed pain in the left hip limiting the joint movement and this in turn his physical activities such as walking. The complainant is also getting older and other normal ageing factors are taking their toll and have added to his initial degree of disability.

Evidence of the deterioration in the complainant's condition over the years can also be found in the sequence of events following his return to work. Initially the complainant worked in a light duty capacity travelling with his field manager to various projects. However the continuous driving caused further discomfort in his neck and he also started developing pain in the hip area. After two years, the complainant was no longer permitted to drive with his field manager and he was then permitted to work in the factory doing mainly touch-up work. He found greater and greater difficulty working in the factory as he was not capable of lifting heavy objects which was part of his day to day routine. He therefore moved to an area where he was instructed to do sand papering. This was primarily a job where he had to stand most of the time as a result of which he developed more and more pain in his hip.

Therefore it would appear that contrary to the submissions in the report of Medassess , the complainant's condition did deteriorate over the years and that his ability at work did alter to a significant degree. On account of this slow process of deterioration the probabilities are that the factors which according to Dr Du Plessis render the complainant unable to perform any type of physical occupation today also existed in 1997 when he applied for a disability benefit.

The next question to address is whether in 1997, the complainant's condition had deteriorated sufficiently to render him permanently disabled as defined.

Again, I have relied on the report of Dr Du Plessis. However the evidence shows that the nature of the complainant's disability as described by Dr Du Plessis also reflects the nature of the complainant's disability as it was in 1997 and that the Scheme was aware of his condition at that time.

Dr Du Plessis states that the complainant's neck movement is severely restricted in all directions. He has left sided weakness of the upper left and lower limbs and there is an associated deformity of the fingers and the toes resulting from the ongoing spasticity present in the upper limb. He also suffers from left hip pain. The result of these disabilities as they related to his work are borne out in the occupational therapist's report of 1997. They were that the complainant required the assistance of his colleagues to perform his duties at work and was also only able to perform the lighter tasks. He struggled to handle the machinery on account of his restricted mobility and because he worked much slower than before, he often had to work overtime. He did not cope with the long hours of standing either which sanding work entails. However the report also states that there were certain tasks which the complainant was able to perform such as the "touch-up" tasks and what is termed "palm sanding".

Dr Du Plessis's report with which both the independent physiotherapist and

occupational therapist have concurred concludes as follows:

> It is conceded that he would be able to work in a sedentary position, but his background training and experience does not permit him to be employed in a white collar position and from a physical point of view it is my opinion that, taking all factors into account, namely his original injury, the ongoing disability, the progression of his joint stiffness secondary to immobility as well as the fact that he has gained weight because of his relative immobility and also the normal ageing process, Mr Reynolds must be considered permanently disabled from being able to perform any physical type of occupation.

The above reveals that in 1997, although the complainant was able to perform some of his tasks at work, his disability prevented him from performing the primary tasks of his sanding occupation. The day to day routine of a sander requires the lifting of heavy machinery and the handling of that machinery. In addition the action of sanding requires a person to be mobile and flexible and on his feet the whole day. If one measures the complainant's disability as described by Dr Du Plessis against these requirements, the probabilities are that in 1997 the complainant would have been incapable of performing a considerable part of his occupation and this is confirmed in Ms Seton's report.

It is also significant that the complainant's doctor, Dr Daneel, who examined him in July 1997 recommended that he be permanently boarded from work due to his disability in his left arm and leg. Dr Daneel stated in his report that although the complainant was performing a light job, he was not coping.

Thus the evidence shows that in 1997 when the complainant applied for disability, although he was able to do some of the tasks of his sanding occupation, his disability prevented him from doing the majority of tasks. He was, in a practical sense, unable to carry out his work as a sander and required the assistance of colleagues in this regard.

In 1997 the complainant was 43 years of age, had a standard seven education level and had worked throughout his life in a physical capacity. He had never worked in a white

collar position. In addition Dr du Plessis in his report does not simply state that the complainant is unable to work as a sander but goes further than this and states that the complainant is disabled from being able to perform any physical type of occupation.

As mentioned earlier, the definition of “permanently disabled” can be interpreted reasonably to mean that the applicant must show that he, in a practical sense, is unable to carry out his work or any other work taking into account his training and mental and physical ability. This accords with the American and Canadian approach to such clauses. In *Blackstone v Mutual Life Insurance Co* [1945] *1 DLR 165,* the court had to consider an ‘any occupation whatsoever’ clause and held that the assured must be prevented from engaging in such livelihood as he might fairly be expected to follow in view of his station, circumstances and physical or mental capabilities. MacGillivray and Parkington *Insurance Law (8ed 1988) para 1809* quoting a number of American cases conclude that no American court would interpret such a clause so strictly as to ignore the previous employment, training or capabilities of the actual insured.

Therefore it is submitted that taking into account the complainant’s station, training, mental and physical ability and age at the time he made his application in 1997, his disability did in fact prevent him from engaging in further employment in whatsoever capacity in the industries. He therefore fell within the definition of “permanently disabled” and accordingly the Scheme ought to have admitted his claim.

Accordingly I order as follows:

1. The complainant is declared to be permanently disabled within the meaning of Rule 3(1) of the second respondent’s rules.

2. The second respondent is directed to pay the complainant a permanent disability income benefit with effect from 1 September 1997 and in terms of Rule 3(2) of its rules.

3. The second respondent is directed to calculate the amount owing to the complainant for the period 1 September 1997 until 31 August 1999 and to pay the same together with interest in terms of the Prescribed Rate of Interest Act within 6 weeks of the date of this determination.

4. All future benefits shall be payable in terms of the second respondent's rules commencing 1 September 1999.

DATED at **CAPE TOWN** this **11th** day of **August** 1999.

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JOHN MURPHY

PENSION FUNDS ADJUDICATOR