IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

In the complaint between:

J Reynolds Complainant

and

The Metal and Engineering Industries Retirement Fund Respondent

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

Introduction:

This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956.

The complainant is J Reynolds who is a member of the respondent.

The respondent is the Metal and Engineering Industries Retirement Fund (“the fund”), a fund registered under the Pension Funds Act of 1956.

The complainant lodged a written complaint with the Pension Funds Adjudicator on 24 July 1998. The complainant has complied with the provisions of section 30A(1) which requires the complainant to lodge a written complaint with the fund before lodging with the Pension Funds Adjudicator. The fund has properly considered the complaint and has replied thereto in writing as required by section 30A(2) of the Pension Funds Act.

No hearings were conducted and therefore in determining this matter, I have relied exclusively on documentary evidence and the report by my investigator, Lisa Shrosbree.

The complaint concerns the fund's repudiation of the complainant's claim for a permanent
disability income benefit in terms of its rules. I have jurisdiction to consider this complaint insofar as it relates to the interpretation and application of a fund's rules and alleges that a decision taken in terms of the rules was an improper exercise of its powers.

Factual background

The complainant worked for Premiere Wire Homberg (Pty) Ltd (“the company”) as a sander from 1985 to 1997. He is married with three children. The two younger children are still at school and the eldest child works for the company.

On the 11th of March 1989, the complainant was involved in a motor vehicle accident and 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.

After recovering from the surgery, the complainant returned to work as a sander but with the assistance of colleagues in the case of tasks of heavy physical demand.

The complainant's orthopaedic surgeon is Dr J P Daneel whom the complainant consulted at the time of his accident in 1989 and periodically thereafter.

In July 1997, Dr Daneel recommended to the medical supervisor of the company in a letter dated 15 July 1997 that the complainant be permanently boarded from work on account of his disability. That letter reads:

“I have re-evaluated Mr Reynolds and it would appear that he is not coping at work. I have a report also from an occupational therapist who assessed his work. I recommended that he be permanently boarded from further work due to his disabilities in his (L) arm and leg.”

On the advice of Dr Daneel, the complainant stopped working on 22 August 1997. The complainant has since been unable to find further employment due to his disability.
The complainant then applied for a permanent disability income benefit under the fund's permanent disability scheme of which he was a member. The relevant rule is rule 3(2) which reads:

A member who has been Permanently Disabled for an uninterrupted period of six complete months shall, subject to the provisions of Rules 4 and 5, become entitled to a Permanent Disability Income Benefit equal to:

(i) In the case of a Member who will have completed ten years’ continuous Service in the Industries by the time that he reaches age 65

(b) if the Member is a weekly-paid Member: 75% of 4 1/3 times his Remuneration at the date of his ceasing employment due to Permanent Disability, plus any increases declared by the Board in terms of Rule 3(5)(i)

Rule 3(1)(i) defines “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.

“Industries” is defined in the rule as follows:

Industries shall mean industries known as the Iron, Steel, Engineering and Metallurgical Industries

In terms of rule 3(1)(ii), the board has the sole discretion in deciding who is permanently disabled and accordingly qualifies for a permanent disability income benefit in terms of rule 3(2) quoted above. That rules reads:

The Board shall have the sole discretion in deciding whether a member is Permanently Disabled and the date on which he became Permanently Disabled and, at the expense of the Scheme, shall have
In response to the complainant's application, the fund requested a medical report from Dr Daneel. The report indicated that the complainant suffered neck pain and weakness in his left hand, arm and leg due to the spinal injury. Further that the complainant had undergone treatment in the form of surgical operation and medication to control his spasticity. In the opinion of Dr Daneel, the complainant's disability was of a permanent nature as his condition had remained stable for the last number of years. In answer to the question whether the complainant's disability prevented him from performing his occupation, Dr Daneel submitted that although the complainant was already performing a light job, he was not coping. Therefore he recommended that the complainant be permanently boarded from further work due to his disability in his arm and leg.

The fund relied mainly on a report from Dr Daneel's attending occupational therapist, Ms Seton. A portion of that report reads:

2.3.2 Uitvoering van werkstake

Mnr Reynolds het genoem dat hy tans in die area werk waar rakke vir winkels vervaardig word. Hy verrig hoofsaaklik skuurwerk met ’n skuurnasjien in sy regterhand en staan die hele dag terwyl hy werk.

Die voorwerpe wat hy skuur moet opgetel word en volgens hom hanteer hy die swaar voorwerpe moeilik a.g.v. die beperkte mobiliteit en verswakte linkergreep. Hulp moet dan verkry word.

Mnr Reynolds het genoem dat hy wel die werk kan verrig, maar nie soos voorheen nie omdat hy nou stadiger werk. Hy wil egter nie altyd kla nie, aangesien hy die werk wil behou.

Hy werk wel oortyd.

2.3.3. Werkbesoek : 18 Maart 1997
‘n Besoek is op die 18/03/97 by Premier Wire uitgevoer en Mnr Reynolds is waargeneem in die uitvoering van sy werkstake.

Kollateraal is ook verkry vanaf Mnr P Freeks, die Supervisor in die area.

Mnr Reynolds was besig om winkelrakke te skuur en af te werk. Hy kon die rak met sy regterhand optel en op sy werkstafel plaas. Afwerking (“touch up”) het bilaterale handfunksies vereis en hy was in staan om dit uit te voer.

Skuurwerk word hoofsaaklik met ‘n elektriese palmskuurder uitgevoer (“palm sander”) wat hy in sy regterhand vashou en daar word slegs met die hand geskuur in areas waar die elektriese skuurder nie kan inkom nie. Geen probleme word met hierdie taak ondervind nie.

Mnr Reynolds het voltyds gestaan tydens die evaluasie. Hy dra meer gewig op sy regterbeen en wanneer hy loop word die linkerbeen deurgeswaai. Hy het gekla dat sy linker knie soms seer word wanneer hy so lank moet staan.

Mnr Freeks het genoem dat Mnr Reynolds ook soms fyn afwerking moet doen en dat hy dan kan sit. Volgens Mnr Reynolds gebeur dit egter selde. Hy help ook soms om voorraad van ‘n trollie te tel, maar daar is altyd persone wat hom help.

Volgens Mnr Freeks is daar wel ‘n afname in Mnr Reynolds se produksiespoed, maar daar word nie onnodige druk op hom geplaas nie. Daar is ook altyd persone in die area wat hom kan help met die optel van enige swaar voorraad.

Mnr Freeks het bevestig dat Mnr Reynolds wel oortyd werk en soms uit sy eie versoek om so te werk. Hy het ook genoem dat Mnr Reynolds nie juist fisiese klagtes teenoor hom het nie en dat hy te vrede is met die kwaliteit van sy werk.

3. **GEVOLG TREKKING**

3.1 Mnr Reynolds ervaar steeds sekere beperkinge t.o.v. die funksie van sy linkerbeen en linkerhand en dit beinvloed sy daaglikse funksionering.

3.2 Hy benodig soms hulp met sy daaglikse aktiwiteite, bv. selfsorhtake en
instandhoudingstake tuis.

3.3 Mnr Reynolds is ook nie meer in staat om die nutsmantake wat hy voorheen in sy vrye tyd verrig het, uit te voer nie.

3.4 Mnr Reynolds het ‘n ligter werk begin verrig na sy besering. Hy is tans instaat om die werk te verrig en ontvang hulp met aktiwiteite wat hy nie alleen kan uitvoer nie, bv. optel van swaar voorwerpe. Die werk maak ook aanpassings vir die verlaagde produktiwiteit.

Hy het subjektiewe klagtes t.o.v. ongemak wat hy ervaar na ’n dag se werk, maar dit blyk dat hy wel steeds bereid is om oortyd te werk en dit selfs versoek.

Myns insiens moet Mnr Reynolds op hierdie stadium voortgaan met sy werk en kan hy oorweeg om minder oortyd ...

3.5 Beperkinge kan egter weereens aan die werk gestel word t.o.v. van die gewig van voorwerpe wat hy moet hanteer.

‘n Evaluasie van die stand van sy linkerknie sal ook ‘n aanduiding kan gee van enige probleme wat hy daarmee ervaar. Aanpassings t.o.v. sy uitgangsposisie by die werk kan dan moontlik oorweeg word.

3.6 Vervroegde pensioen kan oorweeg word indien hy op ‘n stadium nie meer in staat is om die werk te verrig nie a.g.v. sy fisiese beperkinge.

3.7 Mnr Reynolds moet verkieslik toelaat dat sy seun soveel moontlik bestuur om sodoende te verhoed dat hy in ‘n gevaarlike situasie beland wanneer hy ‘n spasma ervaar.
Based on the report submitted by Dr Daneel and Ms Seton, the fund concluded that the complainant was not permanently disabled and accordingly refused his application. The letter advising the complainant of its decision reads as follows:

We refer to the above and wish to advise that the Scheme Medical Advisor has declined your claim as the medical evidence on hand confirms that you are physically capable of performing the majority of the duties of your normal occupation as a sander.

Therefore you cannot be regarded as totally and Permanently incapacitated for the performance of your own or any reasonable alternate occupation within the industries.

In this regard we wish to point out that in terms of the Rules of the Scheme ‘Permanently disabled’ means a member’s becoming permanently disabled or Incapacitated or not being able to engage in further employment, in whatsoever capacity in the Industries.

In December 1997, the complainant approached Legal Wise to assist him.

Legal Wise addressed a letter to the fund requesting it to reconsider the complainant’s application. The fund replied in a letter dated 16th January 1998 which reads as follows:

We refer to your letter dated 05/12/1997 and wish to advise that Mr Reynolds claim was rejected on the basis of medical and vocational evidence received from Dr P J Neel and occupational therapist, who indicate that the claimant’s neurological or orthopaedic status has in fact remained stable following cervical spine surgery performed at that time. At the request of Dr Daneel an occupational therapy assessment and workplace visit was performed during February 19997, which confirmed that in spite of the claimant’s left sided hemi paresis, the claimant in fact remains capable of performing the physical demands of his normal duties.

In this regard we wish to pint out that in terms of the Rules of the Scheme “Permanently disabled” means a member’s becoming Permanent Disabled or incapacitated and not being able to engage in further employment in whatsoever capacity in the Industries.

In March 1998, the complainant approached his attorney who then contacted one Mrs
Correira from the fund's permanent disability claims department. Mrs Correra reiterated that in order to qualify for benefits in terms of the disability scheme, one had to fall within the rule and that the fund was of the opinion that the complainant was capable of doing “light work”.

The complainant's attorneys thereafter lodged a complaint with this office for adjudication.

**The complaint**

The complainant contends that he qualifies for a disability income benefit in terms of the fund's rules.

The fund asserts that based on the medical report of Dr Daneel, his attending occupational therapist as well as the statements by the complainant's supervisor regarding his performance at work after the accident, the complainant is not permanently disabled as defined in the rules and therefore does not qualify for a disability income benefit.

**Analysis**

The fund gives a number of reasons to justify its decision to refuse the complainant's application. In sum its states that in spite of the complainant's left sided hemi-paresis, according to the occupational therapist's report, he is still capable of performing the physical demands of his normal duties.

However, the occupational therapist's report also states that the complainant struggles with the heavy machinery he has to work with and requires assistance from his colleagues. The disability in the complainant's left arm and leg affects his daily functioning. For example, his left knee gives him problems when he has to stand the entire day. Dr Daneel submits that although the complainant is already performing a light job, he is not coping and recommends that he be permanently boarded.
The fund relies on Dr Daneel's submission that the complainant's condition has remained stable over the last number of years to show that the complainant is not permanently disabled or incapacitated. However Dr Daneel's medical report takes the form of a questionnaire. Question number 10 asks if, in his opinion, the complainant's disability is total and permanent. This is answered in the affirmative. The second part of the question then requires reasons for this opinion. In answer to this, Dr Daneel writes that the complainant's condition has remained stable for the last number of years. Therefore Dr Daneel is not stating that the complainant's condition is stable as the fund asserts but rather that since his condition has remained the same for a period of time, that would seem to indicate that his condition is permanent. Moreover, as mentioned, he recommends that the complainant be permanently boarded.

I am satisfied therefore that there is evidence to indicate that the complainant is possibly not capable of continuing his normal activities at work and that further medical investigation is required for me to make a determination as to whether the fund's decision to refuse the complainant's application was reasonable in the circumstances.

Order

The fund has advised that it is prepared to obtain further specialist medical evidence and/or occupational therapy assessment and objective work evaluation at its own expense and is to be commended on this score.

I accordingly order that the complainant be assessed by Elsa Wakefield, a registered physiotherapist practising in Cape Town to determine whether, in her opinion, the complainant's disability prevents him from working in the industries and also to refer him to the appropriate specialist for an assessment. The physiotherapist's report shall be filed within 21 days of this determination or within such further period as the Pension Funds Adjudicator may allow on application showing good cause.
I also order that the complainant be assessed by Marion Fourie, a registered occupational therapist practising in Cape Town to determine whether, in her opinion, the complainant’s disability prevents him from working in the industries and also to refer the complainant to the appropriate specialist for an assessment. The occupational therapist’s report shall be filed within 21 days of this determination or within such further period as the Pension Funds Adjudicator may allow on application showing good cause.

DATED AT CAPE TOWN THIS 7th DAY OF MAY 1999.

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Prof John Murphy
PENSION FUNDS ADJUDICATOR