

# Disability Benefits Payable by Retirement Funds under the South African Law

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**Abstract:** *The purpose of the Pension Act 24 of 1956 (the Act) is to provide for the registration, incorporation, regulation and dissolution of pension funds and for matters incidental thereto. Amongst these incidental matters are the retirement fund and death benefits. However, the Act does not make mention of the disability benefits in its context. Against this background, this paper examines the importance of the disability benefits by retirement funds in the South African context. The paper further provides for a broader conceptualized definition of disability and argues for the provision of a medical evidence to substantiate disability. Towards this end, this paper examines the determinations which specifically dealt with disability.*

**Keywords:** disability benefits, retirement, injuries, pension fund

## Introduction

The purpose of the retirement fund is to provide its members with retirement benefits so that members can retire at an appropriate age (Jeram 2009). Funds also provide death benefits to ensure that the member's dependants are taken care of if the member dies before retirement (Jeram 2009). Although the Pension Funds Act 24 of 1956 makes no mention of disability benefits, many funds provide these benefits so that should the member become unable to work, he or she will have an income that will sustain him or her. It is important to know how these benefits are provided, who decides that the member is disabled and what is the employer's role in deciding if the member should get disability benefits (Jeram 2009).

Disability benefits are payable upon the happening of an event specified in the fund's rules or policy documents. For the purpose of this article, disability benefits specified in the policy documents will not be discussed. In most instances, the rules confer discretion on the trustees to determine whether or not a member is disabled as defined and qualifies for the disability benefit (Shrosbree 2005).

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Although the purpose of a discretionary power is to allow the functionary conferred therewith to take the decision, it is nevertheless curtailed by the administrative law requirement that a discretionary power must be exercised properly. A proper exercise of discretion in turn requires that the decision maker considers all relevant factors, discard irrelevant factors and not fetter its discretion. Furthermore, the decision must not reveal an improper purpose. This is where the review function of the Pension Funds Adjudicator comes in. If the complainant shows that the board failed to consider all relevant factors or took into account irrelevant considerations or fettered its discretion, its decision is reviewable on the grounds that there was an improper exercise of discretion (Shrosbree 2005).

In all disability claims, the starting point is the definition of disability contained in the rules, the question being whether the member falls within that definition to qualify for the benefit. The majority of disputes arise because the trustees are of the opinion that the member does not fall within the ambit of the definition whereas the member contends that he or she does.

### **Methodology**

The research methodology used in this study is qualitative as opposed to quantitative. This research is library based and reliance on desktop, Pension Fund Adjudicator's determinations, legislation, and articles. This study is largely a case analysis of the Pension Fund Adjudicator's determination on the disability benefits payable by retirement funds in the South African context. However, a very limited comparative study was employed.

### **Objective**

The primary objective of this paper is to investigate the impact associate with the exclusion of a member from the disability benefit. This paper further seeks to serve as the yardstick on who should qualify the disability benefit payable by the retirement fund.

### **Significance of the Study**

Many employees in the labour force who are injured in their course of duties often find themselves the administrative predicaments associated with the awarding of the disability benefits. It is therefore significant that the fund know the importance of fairly awarding the disability benefit to the qualifying employees as well as the consequences for failure to do so.

### **Literature Review**

First and foremost, this paper acknowledges the fact that in South Africa there is a very limited literature and only a handful scholarly articles and books are written in this subject matter. Much of it is based on the determinations laid by the Pension Funds Adjudicator who regulates supplementary pension schemes

and complaints relating to pension issues. These determinations will form major part of this article and they are well discussed below. It must also be borne in mind that the Pension Funds Adjudicator's decision can be reviewed in the High Court.

Be that as it may, according to Du Preez (2012), employees should not allow their employers to decide for them on whether or not they qualify for a disability benefit. Her argument was founded on the basis that it is the employees' retirement fund or their life assurer and as such they should make the decisions themselves. However, Stevens (2001) differed with Du Preez in her view and argued that employees usually do not know what benefits are available, how the policies or benefits work, and it is usually the left-behind wives who have no idea of the benefits payable to them on their husbands' deaths.

Hence, the rules of the fund provide that, a member who is in receipt of a disability benefit from an insurer will remain a member of the fund notwithstanding the fact that he is no longer employed by a participating employer (Hunter 2001). The rules also say that such a member's membership will terminate if he stops receiving the disability benefit (Hunter 2001).

Against this backdrop, employees need to be properly advised on the issues related to disability benefits there should not be distinct disincentive to work because of a possible loss of disability benefits (Klaus 2012).

### **The Definition of Disability**

Many disability definitions require the member to be unable to pursue his or her own occupation or a similar function. To qualify for disability benefits, the member has to suffer from a physical or mental infirmity that prevents him or her from performing his or her own or similar occupation or he or she will have to be disabled as defined in terms of the definition of disability in the fund rules.

The Dictionary of Occupational Titles (DOT) published by the US Department of Labour, Employment and Training Administration and the US Employment Service is a useful guideline in this regard. It lists the requirements of various occupations and then with reference thereto lists the occupations which may be considered "similar" to it. For example, according to DOT, a diesel mechanic requires a high degree of strength, a reasoning development level which involves the application of rational systems to solve practical problems and interpret instructions in the written, oral, diagrammatic or schedule form, a mathematical development level which includes computing discounts, profits and loss, mark-up and selling price, ratios, percentages, calculating surfaces, volumes, weights and measures, and a language development level which includes the ability to read books, magazines, encyclopaedias, read safety rules, instructions in the use and maintenance of shop tools and equipment and writing reports with proper format. DOT then lists the following alternative occupations as requiring the same level of strength,

reasoning, mathematical development and language development as the occupation of a diesel mechanic: a salesperson of automobile accessories (retail and wholesale), a warehouse manager, a storekeeper and a store man.

A useful test (applied in *Honey v Central South African Railways* 1910 TS 592) in these cases is to determine the main requirement or skill of the occupation in question and then to determine similar occupations with reference to that main requirement or skill. In *Malan v First National Bank Group and Another*, case no. PFA/NW/3284/01/CN, the Adjudicator had to determine whether the occupations of a home loans clerk and management clerk could be said to be “similar” to a Departmental Head Liaison. In applying the test, he considered that the main skills required of a Departmental Head Liaison are supervisory, organisational, control, and managerial skills. The complainant was in charge of the employer’s day-to-day operations relating to customer accounts. She also had to liaise with customers and the public, train and develop subordinate staff, act as a supervisor to the tellers and perform general supervisory control tasks. The occupations of a home loans clerk and a management clerk do not require these supervisory, managerial, and organisational or control skills. They are also predominantly sedentary or administrative in nature. On this reasoning the Adjudicator held in an interim ruling that the occupations of a home loans clerk and management clerk could not be regarded as “similar” to that of a Departmental Head Liaison (*Weidemann v Unifoods (Pty) Ltd and Another* [2004] 10 BPLR 6171 (PFA)).

Many disability definitions require that the member be totally incapable of performing his or her occupation or totally incapable of performing any occupation. This raises the question whether a member who is still able to perform some of the duties of his (or any) occupation can nevertheless be considered totally disabled. A reasonable interpretation of such disability definitions is that the member must, in a practical sense, be unable to carry out his or her work. In other words the word “totally” must be interpreted generously such that even if a member is able to perform some of the duties of his occupation, if he is generally unable to meet the demands of the job on account of his ailment, he may be classified as totally disabled.

In *Reynolds v Metal and Engineering Industries Provident Fund and Another* (2) [2001] 1 BPLR 1513 (PFA), the complainant, a sander by trade, required the assistance of his colleagues to perform the majority of his duties at work on account of his injury. He was also only able to perform the lighter tasks. He struggled to handle the machinery due to his restricted mobility and, because he worked much more slowly than before, he often had to work overtime. Furthermore, he did not cope with the long hours of standing which the work of a sander entails.

The Adjudicator concluded that although the complainant could perform some of the tasks of a sander, he was, in a practical sense, unable to carry out the demands of his job, and thus fell within the ambit of the

definition requiring totality of disability. Some disability definitions require the member to be incapable of performing not only his own occupation, but also any other occupation for which he could reasonably become qualified. A typical clause reads: A member shall be regarded as totally and permanently disabled if in the reasonable opinion of the board he has been so disabled by injury or illness as to be continuously, permanently and totally incapable of engaging in remuneration or profit

- in his own occupation, or
- in any other occupation to which he is suited or which he is or could reasonably be expected to become qualified by his knowledge, training, education, ability and experience.

In this regard, there are two definitions which should not be confused, namely the definition which includes the phrase “may become suited by his training” and the definition which includes the phrase “could reasonably be expected to become suited or qualified by his training and experience”.

The latter definition requires the possibility of further training to be taken into account. However, in respect of the former definition what is contemplated is that the claimant’s present training and experience be taken into account to determine if the member is capable of performing an alternative occupation (*Munnik v Cape Joint Retirement Fund (1)* [2000] 11 BPLR 1257 (PFA) and (2) [2000] 11 BPLR 1270 (PFA)).

The majority of disability definitions require that the disability in question be of a permanent nature. A member will discharge this onus if he can prove that his disability will probably continue for an indefinite period of time. However, he need not go so far as to prove that he has no hope of recovery. Occasionally, the medical evidence reveals that if the complainant underwent surgery or other medical treatment/procedure he might be cured or substantially cured of the condition.

A difficult issue in law is whether the fund may raise this as a defence to a claim of permanent disability. The answer lies in what the rules say. If the rules state that the member shall not be considered disabled if the inability could be substantially removed by medical treatment (or wording to that effect), then the fund is entitled to rely on the possibility of surgery or other medical treatment to repudiate a member’s claim (*Hiebner v Metal and Engineering Permanent Disability Scheme* [2004] 2 BPLR 5451 (PFA)). However, if the rules do not make any such reference, then if the member’s condition constitutes a disability, which without medical intervention would be permanent, he would have satisfied the requirement of permanent disability (*Lee v Motor Industry Fund Administrator (Pty) and Another* [2002] 6 BPLR 3587 (PFA)).

### **The Role of Medical Reports**

The written submissions in the majority of complaints before the Adjudicator focus almost exclusively on the medical evidence. The board supports its decision with reference to the medical reports of their own doctors, usually selected from a medical panel and the complainant supports his complaint against the boards' decision with reference to the medical reports obtained from his own doctor/s. In this regard it is important to distinguish the concepts of "impairment" and "disability".

"Impairment" is a medical concept to be assessed by medical means, whereas "disability" is a legal concept determining the effect of the impairment on a person's life in the context of his job description, the definition of disability and personal factors such as education and experience. As such, boards are not entitled to rely solely on the medical reports obtained, but must also apply their own minds to the question of whether or not a member falls within the disability definition (*Jacobz v Altron Group Pension Fund and Others* [2003] 8 BPLR 5071 (PFA)).

### **Disability Benefits Determinations**

#### *Determination on the delay in the awarding of disability benefit*

In *Gxotiwe v Private Security Sector Provident Fund and Another* [2007] 3 BPLR 303 (PFA), the complainant, Mr Gxotiwe was employed by Sechaba Protection Services Western Cape ("the employer") in February 2003 and became a member of the Private Security Sector Provident Fund ("the respondent") in November of the same year.

In June 2003, Gxotiwe was pushed out of a moving train and suffered an injury to his left leg that led to it being amputated above the knee. In October 2004 the respondent received a termination form from the employer, dated 7 July 2003. Subsequently, while still processing the termination, the respondent received a letter notifying them that Gxotiwe had not resumed his duties since suffering the disabling injury. The respondent then notified African Life Assurance, which handles the fund's risk benefits. African Life responded by informing the fund that the claim had been repudiated on the grounds that the disability claim was lodged more than six months after the disability occurred. The delay had resulted in the claim going out of prescription as per the terms and conditions of the assurance agreement. The sad outcome was relayed to Gxotiwe. In March 2006, the fund's board referred the case to occupational therapists employed by negotiated benefits company Health Risk Management, to assess the validity of the disability or impairment.

The occupational therapists returned a report that validated the disability and further confirmed that Gxotiwe was disabled to the extent that he could not be reasonably expected to engage in any occupation that required his training or experience. Based on the medical reports and the above

information, the board then reviewed the claim and decided to award Gxotiwe an ex gratia and final payment of R11 681, which has been accepted by Gxotiwe without acknowledgment of liability. The respondent informed the Pension Funds Adjudicator that had the employer submitted the claim in time, Gxotiwe would have received double his annual salary of R14 601 and that the total amount would have been R29 969, plus his fund value of R766.

In response, the employer claims to have signed and given the disability claim forms to Gxotiwe on his insistence that he personally wanted to lodge the forms with the respondent, a claim that is denied by the complainant. The Adjudicator ruled that the idea of Gxotiwe holding onto those forms for 17 months is far-fetched, as the forms would have provided financial relief for him. What nails Sechaba Protection Services, is the fact that the administrator's rules place the responsibility for submission of documents on the employer.

Secondly, if indeed it were true that disability forms were signed, the employer should at least have had copies of them in their records. The Adjudicator referred to fund rules that showed that the respondent had acted properly and proved that the employer had acted irresponsibly by not submitting the disability claim on time. That act of omission resulted in Gxotiwe being disadvantaged and losing out to the tune of R18 287. The Adjudicator had finally ordered the employer to pay Gxotiwe the R18 287 with 15% interest within six weeks. This is despite the fact that he has already accepted the ex gratia payment from the respondent. The ruling will force employers to take employee interests more seriously.

The Gxotiwe case is not an isolated case. There are many families that have suffered to the extent that homes have broken down due to financial pressure caused by delayed payment of benefits. In *Barry v Standard Bank Group Retirement Fund* [2005] BPLR 242 (PFA), the dispute between the parties related to the amount of disability benefit payable by the fund to the complainant. In this case, the Adjudicator ruled that in terms of the fund's rules, the amount of the disability benefit is determined by the member's degree of disability. The parties were at odds over whether or not the complainant was more than 50% disabled, with the fund contending that she was less than 50% disabled. The definition of disability required a member to be permanently unable to perform his own occupation or any other occupation. It was found that on a reasonable interpretation this meant that it was not necessary for a member to be unable to perform any of the duties of his occupation. What was required was that a member had to be unable to carry out his work or had to be unable to perform his work effectively.

In determining the complainant's degree of disability in this case, the fund relied largely on its policy guidelines. The Adjudicator found the application of the guidelines to have been incorrect. The fund's requirement that the complainant exhausts all alternative treatments before seeking a benefit, was not supported by the rules or policy guidelines. Finding that the trustees' decision was unreasonable, the

Adjudicator remitted the matter to them for reconsideration, taking into account the observations and findings made in the determination. In assessing disability claims, pension fund trustees are required to consider all the evidence before them.

*Determination based on Incapacity*

The Adjudicator's decision in *D v Sentinel Mining Industry Retirement Fund* Case number PFA/WE/3851/05/LS, unreported was based on the apparent failure of the trustees to properly consider certain evidence that had been submitted. The complainant was employed by the Goldfields Mines ("the employer") as a ventilation observer and was simultaneously a member of the Sentinel Mining Industry Retirement Fund ("the fund"). In 2003, he was dismissed on the grounds of incapacity. He requested the fund to pay him a withdrawal benefit accordingly. However, from the withdrawal form completed by him, it was apparent that he had been dismissed on medical grounds. For this reason, the fund advised the complainant to apply for an ill-health early retirement benefit, which he duly did.

The rules of the fund provide that a member qualifies for disability cover when he becomes, in the sole opinion of the trustees, totally and permanently incapable of carrying out his own and any similar occupation. According to the fund the complainant failed to show that he was disabled as defined and repudiated his claim accordingly. This was the basis of the complaint to the adjudicator. After canvassing all the evidence that had been before the trustees when they made their decision, the Adjudicator found that the conclusion they reached was not reasonable and the fund was ordered to pay the complainant the disability benefit provided for in the rules.

In reviewing the trustees' decision, the Adjudicator relied on the test espoused in *Southern Life Association Limited v Miller* [2005] 4 BPLR 281 (SCA), a decision of Farlam J in the Supreme Court of Appeal. In that case, counsel for the Appellant had referred the court to the case of *Edwards v Hunter Valley Coop Dairy Co Ltd* (1992) 7 ANZ Ins Cas 61-113, a decision of McClelland J sitting in the Supreme Court of New South Wales, Equity Division. McClelland J referred to a series of decisions given in England in the 19<sup>th</sup> century including the decision in *Doyle v City of Glasgow Life Assurance Co* (1884) 53 ILJ Ch 527 in which North J said (at 529):

The only question in the action is whether the dissatisfaction of the directors with the evidence of death adduced is unreasonable. Now, in respect of that it must be observed that reasonable persons may reasonably take different views. It constantly happens that a Judge sitting in the Court below takes one view of evidence and the Judge sitting in the Court above takes another. But no one could suggest for a moment that the view taken by either the one or the other was unreasonable (Cited in *Southern Life Association Limited v Miller* [2005] 4 BPLR 281 (SCA) at page 290).

McClelland J then stated:

Unless the view taken by the insurer can be shown to have been unreasonable on the material then before the insurer, the decision of the insurer cannot be successfully attacked on this ground.



Farlam J held at page 290 E–F that the legal position set out above is in accordance with our law. Therefore, the scope of review of an exercise of discretionary power is narrow. The test is not whether or not the trustees were wrong in repudiating the claim for disability, but rather whether the decision they reached was reasonable on the evidence before them (at paragraph [27]). This means that the reviewing body does not necessarily have to agree with the decision that was taken. It is also restricted to the evidence that was before the decision-maker at the time the decision was made.

In *Konstabel v Metal and Engineering Industries Permanent Disability Scheme and Another* [2002] 7 BPLR 3637 (PFA), the Complainant worked as a laminator until 21 September 1999 when she was dismissed on the basis of incapacity. The first respondent is the Metal and Engineering Industries Permanent Disability scheme and the second respondent is the Metal Industries Provident Fund. The Complainant had injured her back in 27 March 1998 during the course and scope of her duties. Due to persistent pains and lower back pains and pains in her left leg and without any alternative work available which the complainant could perform a decision was taken to terminate the latter's employment on the basis that the complainant was totally incapacitated. The fund subsequently applied for a disability benefit for the complainant.

The Complainant consulted various doctors and specialists before and after her dismissal who suggested that she was not permanently disabled or incapacitated to the extent that she was unable to engage in further employment in whatsoever capacity (*Konstabel v Metal and Engineering Industries Permanent Disability Scheme and Another* [2002] 7 BPLR 3637 (PFA)). It is on this basis that the claim was repudiated.

The question before the adjudicator was whether, in accordance with the rules of the scheme, the Complainant was permanently disabled or incapacitated, and was not able to engage in further employment in whatsoever capacity in the industries, and whether the scheme, having regard to the medical evidence before it, applied its mind properly in repudiating the complainant's claim. The answer to the questions is found in the rules of the scheme which provide that if a claimant is able to perform any employment in the industries, they would not qualify for a benefit.

The Adjudicator had concluded that the complainant would be able to return to work if her tasks are modified to suit her condition and therefore does not qualify her from receiving a disability benefit as required in terms of the rules of the scheme.

So what lessons can we learn from *Konstabel*? The fact that a member experiences persistent pains and suffering does not render such a member. Permanently disabled or incapacitated to the extent that he or she is unable to perform his normal duties. Consequently does not qualify for a disability benefit.

Permanent disability and incapacity would mean in this instance that the injured member must not be able to perform any task, even if such task is modified to suit her condition (*Sithebe v Iscor Employees Provident Fund and Another* [2002] 10 BPLR 3990).

Similarly in *Lee v Motor Industry Fund Administrator (Pty) (Ltd) and Another* [2002] 6 BPLR 3587 the complainant was injured whilst on duty. He stopped working and returned to work some months later however unable to carry out his duties at work and on the recommendation of his doctors he stopped working on the 26 June 1998. The complainant applied to the fund for disability. At first, the First respondent, Motor Industry Fund Administrator (Pty) (Ltd), declined the Complainant's claim but later admitted the claim and paid the Complainant a benefit.

The Complainants however contended that the fund ought to have paid him his benefit from the date on which he incurred his injury at work. Although he returned to work in May 1998, the complainant stated that he was unable to work effectively on account of his injury (at paragraph 7G-H). The question before the adjudicator is what date did the complainant become disabled as required by the rules to qualify for a benefit? Or put it differently on what date did the complainant become continuously and permanently unable to perform his work as a motor technician? The Complainant is entitled to payment of a disability benefit as from that date (at Paragraph 10).

The fund explained that the permanency of the Complainant's condition had not been adequately proved at the time of his initial application, as not all available treatment options had been exhausted. The stance was that since the Complainant had failed to undergo surgery as recommended by his doctors, he could not be considered permanently disabled. This involved the question of whether a disability can be classified as permanent if it can be removed by surgery or other medical treatment (see *Hiebner v Metal and Engineering Industries Permanent Disability Scheme PFA/WE/2947/01*).

In terms of our law, once it is established that a disability is otherwise permanent, the insurer shall be liable despite the fact that surgical procedures might cure the disability, unless it is provided otherwise (*Lee v Motor Industry Fund Administrator (Pty) (Ltd) and Another* [2002] 6 BPLR 3587 at 3588). The adjudicator pointed it out that in this matter there is no provision in the rules stating that the assured shall not be considered totally and permanently disabled if his inability can be substantially removed by surgery or other medical treatment (at paragraph 19). It was further stated that the Complainant's condition without medical intervention was permanent and prevented him from performing his normal work, he satisfied the requirements of the definition and the Second Respondent would have erred in declining his initial claim September 1998. By assuming that the Complainant could not be considered permanently disabled prior to undergoing surgery, the First Respondent took an irrelevant consideration into account and thereby erred in its determination of the date of the disability (*Lee v Motor Industry Fund*

Administrator (Pty) (Ltd) and Another [2002] 6 BPLR 3587 at page 3588). Based on the medical evidence, the complainant was found to be continuously and permanently unable to perform his normal work as from the 26 June 1998. He was therefore entitled to the disability benefit from that date.

*The Fund's unfair refusal to grant member disability benefits*

In *Venter v Municipal Gratuity Fund and Another* 2002 10 BPLR 4008 (PFA), the complainant had been employed as a traffic superintendent at Bethal Transitional Local Council and had been a member of the First respondent, the defined contribution Municipal Gratuity Fund since 1 July 1996. The Complainant allegedly sustained an injury on duty on 30 January 1998 where he hurt his left shoulder and left leg after stepping into a hole in the ground; he received a payout in respect of this injury from the Competition Commissioner. However he suffered from considerable pain in his shoulder and knees thereafter. Surgery to his shoulder in November 1998 did not alleviate the pain. He stated in his application that the pain, difficulty of movement and resultant lack of concentration interfered with his ability to perform his job (at paragraph 4H-I). The Application for disability benefits was refused by the fund on 1 March 2000. The Complainant requested the Fund to review its decision and furnished further medical reports however the decision of the fund was not changed (at paragraph 6). The Complainant contended that the fund unfairly refused his claim and that it had unreasonably amended the disability rule and that the medical investigation of the Second Respondent, Momentum Risk Management Consultancy, was not objective and not based solely on medical criteria in accordance with the fund's rules (at paragraph 6A-B). The rule which regulated disability benefit had been amended several times since the Complainant became a member of the fund. The amount of the benefit had been increased and the definition of the disability had been adjusted in a way that makes it more difficult to qualify.

In essence the rule required that the member be not only permanently but also totally incapable of discharging the duties, not only for which he was appointed, but also "with or without further training" any other duties which such member would reasonably be capable of discharging by virtue of his training and/or experience"(at paragraph 8G-J). The adjudicator stated that "section 37A refers to rights which have already vested, and not to the power of the fund's management committee to make rule amendments. The management committee is entitled to make rule amendments as it sees fit, provided it does so in accordance with the rules and the Act regarding the making of rule amendments, which it had done in this case"(at paragraph 14)

The Adjudicator observed that the Complainant was only entitled to the benefits determined by the rules of the fund at the date of termination of his service and was accordingly had no benefit or right provided under the rules in operation at that time (at page 4009).

*The Old vs The New Insurers? Determination of Munnik v Cape Joint Retirement Fund revisited*

In *Munnik v Cape Joint Retirement Fund* [2000] 11 BPLR 1257 at 1259, the complainant commenced employment with the Winelands District Council as a Professional firefighter in or about 1977 and became a member of the Cape Joint Retirement Fund in 1 July 1990. The Complainant suffered a heart attack on the 21 December 1997 whereupon the latter applied to the Cape Retirement Fund (the Fund) for a disability pension benefit in terms of the rules of the fund on the ground that he had been rendered totally and permanently disabled to continue working as a firefighter (at page 1258-1259). The fund had decided to change the insurers of the disability benefits and the date of the Complainant's disability fell within a window period when benefits were neither insured by the old nor the new insurers. However, the new insurers had agreed to provide assessments of claims that fell within the window period and thus the claim was referred to the new insurers (at page 1261). In terms of the rules of the fund, the trustees would be obliged, after receiving the assessment, to decide whether or not a claim would be paid from the fund's reserve account (at page 1257).

The new insurer called upon the Respondent, on several occasions, to provide them with the definition of "disabled" to be applied in assessing the claim. As no response was received, the insurer applied the definition contained in the insurance contract, which provided that a person was disabled if he was rendered incapable "of engaging in his/her own occupation or in another occupation for which he could reasonably be expected to become qualified by virtue of his/her knowledge, training, education, ability and experience" (at page 1257). It was on this basis that the complainant's claim for disability benefits was denied.

The Adjudicator observed that there was a duty on the trustees to ensure that the insurer had applicable definition at hand when assessing the Complainant's claim especially when they knew that they would be relying exclusively on the insurer's assessment reports. Accordingly, the trustees appear not to have applied their minds as to whether the Complainant falls within the scope and ambit of entitlement to a disability pension in terms of the rules (at paragraph 26F-G). The Adjudicator referred to the case of *Honey v Central South African Railways* where the court looked at the main requirement/skill of the work of previously performed and concluded that similar occupations were those which similarly utilized that main requirement or skill (at paragraph 37F-G).

The insurer in the present case, the insurer came to the conclusion that although the Complainant is incapable of pursuing his own occupation as a fireman on account of his disability, he is capable of engaging in another occupation (at paragraph 38H). The adjudicator found that the main requirements and skills of a firefighter were muscular strength, anaerobic and aerobic fitness and a resilient respiratory system and concluded that the suggested alternative occupations did not require these attributes. In the premise, the Adjudicator was satisfied that the Complainant was disabled to the extent that he can no

longer pursue his own or similar occupation for which he would be qualified by his training and experience as a fireman and that he accordingly falls within the ambit of the definition of disability entitling him to benefits provided in the rules.

From the above cases, the following becomes clear regarding disability claims. Firstly, it is important to determine whether the Complainant is unable to pursue his own occupation or similar occupation for which he could be reasonably expected to become qualified by his knowledge, training, education, ability and experience. Secondly if the Complainant can show that he is unable to perform his own occupation, then it is reasonable to assume that he is unable to perform a similar occupation as well (*Sefako v Firs National Bank Group Pension Fund (1) [2002] 2BPLR 3097(PFA)* at para 23D-F). Thirdly, the focus should therefore be on whether or not the Complainant is able to pursue his own occupation. Fourthly, the onus rests on the Respondent to show that the Complainant is able to perform a similar occupation (*Sefako v Firs National Bank Group Pension Fund (1) [2002] 2BPLR 3097(PFA)* at para 23D-F). Lastly, the Adjudicators are in most instances in favour of granting disability benefits to complainants from date of injury or the date which the Complainant stopped receiving salary (*Kruger v IMATU Retirement Fund [2003] 9 BPLR 5095 (PFA)*).

### **Conclusion and Recommendation**

This paper successfully examined the impacts of failure or omission to adhere to the payment for the disability benefits of the members which are payable to the retirement fund. The furthermore, the paper also provided the clear and broader definitional meaning of disability benefits within the South African pension law jurisprudence. This paper argues that the employee should ensure that it is at the center of claimant for disability benefits once he/she is no longer capable to carry out his/her duties as a result of disability.

Discussion and analysis of the Pension Fund Adjudicator's determinations on the disability benefits unraveled several adversarial conducts by the Fund when awarding the disability benefits to the deserving employees. Chief among these determinations is the delay in the awarding of the disability and the unfair refusal to grant the member with the disability benefits.

Towards this end, this paper suggests that the fund needs to facilitate the awarding of disability benefits to the employees in a fair and equitable manner free of inauspicious procedural hiccups. Indeed, similar facilitation is feasible and warranted in the current pension law jurisprudence.

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