

IN THE FINANCIAL SERVICES TRIBUNAL

In the matter between:

REYMONDO VALENTINE CANNON

Applicant

and

THE PENSION FUNDS ADJUDICATOR

First Respondent

MONDI IMPACT GROUP FUND (PROVIDENT SECTION)

Second Respondent

DR F H FOX

Third Respondent

OLD MUTUAL GROUP ASSURANCE

Fourth Respondent

**THE OFFICE FOR THE OMBUDSMAN FOR LONG-
TERM INSURANCE**

Fifth Respondent

Coram: LG Nkosi-Thomas SC, E Phiyega, and A Jaffer

Reconsideration of the Pension Fund Adjudicator's decision in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 (the "FSR Act"). Application falls properly to be dismissed on account of the applicant's non-compliance with the provisions of section 230(2)(b) of the FSR Act inasmuch as the application was brought after the lapse of a 90-day period of the date of the impugned decision and the absence of a showing of irrationality, unlawfulness or illegality attaching to the impugned decision.

DECISION

A. INTRODUCTION

1. This is an application for the re-consideration of a decision of the Pension Fund Adjudicator (“the PFA”) handed down on 5 June 2018, brought in accordance with the provisions of Section 230 of the Financial Sector Regulation Act 9 of 2017 (the “FSR Act”). The pertinent facts are set out briefly below, for context.
2. The applicant entered into a contract of employment with Mondi Limited (“Mondi Limited”), a participating employer in Mondi Impact Group Fund Provident Section (“the Fund”) on 1 September 2014 in the capacity of Officer Fire Shift.¹ His employment was terminated on 31 August 2016 on account of incapacity.
3. The fourth respondent, Old Mutual Life Assurance Company SA Ltd (“Old Mutual”) acted as the medical assessor at the instance of the Fund.²
4. In terms of the service level agreement entered into between the Fund and Old Mutual, the scope of Old Mutual’s mandate was stated to be:

¹ Record, p 330.

² Record, p 324 – 329.

“To act as disability assessment adviser, which will mean that employees’ application for disability benefits under the scheme be evaluated in accordance with the rules thereof and a recommendation be made for a decision for the Fund if a retirement or ill-health due to disability is justified or not.”³

5. On 15 August 2016, and acting pursuant to the above, Old Mutual performed an assessment of the Applicant and concluded thus:⁴

“Mr Cannon is a 40-year-old Shift Fire Officer at Mondi. It appears that there are physical and supervisory components to his occupation. He has lower back pain caused by the deterioration of his lower back vertebra, with no neurological involvement. He has been treated conservatively and undergone a surgical day procedure but continues to complain of pain. However, there are still further treatment options open to him.

It is understood that Mr Cannon would have difficulty performing the physical components of his occupation. However, he is young, educated and has a great deal of experience and training in his field. He is considered capable of performing an occupation that draws on his experience and is also considered a suitable candidate for reskilling.

Given the above, Mr Cannon is not considered to be totally and permanently disabled for his own or another reasonable alternative occupation with his own or another employer. Old Mutual’s opinion is therefore that Mr Cannon does not qualify for the Lumpsum Disability Benefit.”

³ Record, p.325.

⁴ Record, p.144.

6. Subsequently, a further assessment was conducted by Old Mutual in which the following conclusion was reached:⁵

“The medical evidence considered during the initial application as well as this review confirms that Mr Cannon has a medical condition which has not responded to conservative treatment and that further improvement in his condition is not currently anticipated. Due to the functional impairment caused by the condition and the physical activities which are contraindicated by the condition he is considered totally and permanently unable to perform his own occupation as a fireman.

The updated information from the occupational therapy assessment indicates that Mr Cannon remains with pain and functional impairment which would impact on his ability to perform light physical or sedentary alternative occupation. Alternative occupations in his field of experience e.g. training is likely to involve a moderate degree of physical tasks which he cannot perform. His level of education and work experience does not provide him with the core skills required in a sedentary office-based occupation. For this reason, an alternative occupation in the open labour market would not be considered reasonable and Mr Cannon can be considered totally and permanently unable to perform a reasonable alternative in the open labour market.

Based on a review of all the information available it is Old Mutual’s opinion that Mr Cannon would qualify for the lumpsum disability benefit.”

7. As stated, the Applicant’s employment was terminated on 31 August 2016 on account of incapacity.⁶ The Board of Trustees of the Fund rejected the

⁵ Record, p. 147.

⁶ Record, p 330.

Applicant's disability benefit claim as well as Old Mutual's recommendation by Old Mutual in the following terms⁷:

"We have once again raised this with the MMGF Trustees who have carefully reviewed the evidence and recommendations made by Old Mutual. After much consideration the Trustees have decided to uphold their previous decision to decline the disability application. It is the Trustees view that the assessment made by Old Mutual should be based on that presented and submitted whilst still in the employ of Mondi and not subsequent evidence submitted more than 10 months ago after his last day of employment during which any number of factors may have impacted on Mr Cannon's health. The review of the medical evidence submitted must be based on that submitted whilst in the employ of Mondi and upon which Old Mutual assessed the claim and found Mr Cannon not to be disabled in terms of the assessment criteria."

B. BEFORE THE ADJUDICATOR

8. The applicant having lodged a complaint with the Pension Fund Adjudicator ("the Adjudicator"), the Adjudicator on 5 June 2018 made the following determination:⁸

"ORDER

"6.1 In the result, the order of this Tribunal is as follows:

⁷ Record, p.254.

⁸ Record, p.95.

6.1.1 *The complainant is directed to provide the first respondent with all medical evidence which attest to his medical condition, within three weeks of this determination;*

6.1.2 *The first respondent is ordered to review all medical evidence submitted by the complainant and the medical evidence considered by the medical assessors, within eight weeks of this determination;*

6.1.3 *The first respondent is ordered to make a decision to whether or not the complaint qualifies for a disability benefit provided in rule 6.5 of its rules, within two weeks of completing a review of all medical evidence as stated in paragraph 6.1.2 above; and*

6.1.4 *The first respondent is ordered to inform the complainant and this Tribunal of its decision in terms of paragraph 6.1.3 above, within one week of making its decision.”*

9. Pursuant to the above and during July 2018, the Fund instructed Dr Fox (The Third Respondent), to review the applicant’s disability claim. Dr Fox reached the following conclusion:⁹

“I can only base my opinion on the information provided and that concerns Mr Cannon’s state of fitness at the time of his application for benefit.

In my opinion, at the time of the application, Mr Cannon was unfit for the position of firefighter but was fit for alternative work that did not involve heavy lifting, sustained bending and

⁹ Record, p.270.

twisting and working in awkward positions. In my opinion, the Old Mutual assessment at that time was correct. He did not meet the criteria for award of the benefit.

The second (revised) Old Mutual assessment was made because of a work capacity assessment undertaken some 12 months after the fact and recommends award of the benefit. In my opinion this is incorrect as there is no further medical evidence about ongoing treatment or investigation of Mr Cannon's medical condition provided. It cannot be concluded that his condition is final, and all treatment options have been exhausted."

10. Dr Fox is an independent occupational medicine specialist.
11. On 5 July 2018, the Fund advised the Adjudicator of the above in the following terms:

"Having received the opinion of the Independent Occupation Medicine Specialist, the Trustees also considered the following facts:

- *The self-insured capital disability benefit is only available while a member of the Fund. Mr Cannon had ceased to be a member almost 12 months before the Old Mutual revised assessment.;*
- *While Mr Cannon's medical condition may prevent him working as a firefighter it does not prevent him from working in an alternative occupation based on his age and additional skills.*

The trustees maintain their view and decision that Mr Cannon does not qualify for the award of the Fund's self-insured capital disability benefit."

12. On 24 July 2018, the Fund furnished the Adjudicator with an elaborate response to his determination of 5 June 2018 where it reiterated its decision that the applicant is not entitled to a capital disability benefit.¹⁰
13. On 24 July 2018 the Adjudicator advised the applicant that he regards the matter as closed.¹¹

C. BEFORE THIS TRIBUNAL

14. On 3 December 2018 the applicant brought this application for the reconsideration of the Adjudicator's decision "*contained in the decision letter, dated 5 June 2018, and received by the applicant on 5 June 2018*".¹²
15. However, when this application was argued, the applicant stated that the impugned decision, in respect of which he sought a reconsideration by this Tribunal, was that of 24 July 2018 in terms of which he was informed that the Adjudicator regards the matter as closed.

¹⁰ Record, p. 274

¹¹ Record, p 100.

¹² Record p 1, para 1.2.

16. The crux of the applicant's complaint is that the Adjudicator's decision to uphold the Fund's repudiation of his disability benefit claim stands to be reconsidered, set aside and remitted for further consideration in terms of section 234(1)(a) of the FSR Act inasmuch as he is totally and permanently incapable of efficiently performing his functions and that his condition renders him eligible for the disability benefit, both in terms of Rule 5.2.3 and Rule 6.5.2 of the Fund Rules.

17. In the view that I take of this matter, this application falls properly to be dismissed for the following reasons:

17.1 The applicant's non-compliance with the provisions of section 230(2)(b) of the FSR Act; and

17.2 The absence of a showing of irrationality, unlawfulness or illegality attaching to the impugned decision.

18. I deal with both the above in detail below.

19. Section 230(2)(b) of the FSR Act provides that:

“(2) The application [for reconsideration] must be made-

(a) if the applicant requested reasons in terms of section 229, within 30 days after the statement of reasons was given to the person; or

(b) *in all other cases, within 60 days after the applicant was notified of the decision, or such longer period as may on good cause be allowed.”*

20. *In casu*, there is nothing to suggest that the applicant called for the Adjudicator’s reason for his decision to close the file after the Fund’s contended compliance with the Adjudicator’s decision of 5 June 2018. Accordingly, it behoved the applicant to bring this reconsideration application “*within 60 days after*” 24 July 2018.¹³

21. The applicant brought this section 230 application on 3 December 2018¹⁴ after the lapse of a 60-day period provided for in the above to subsection.

22. Accordingly, absent the granting of an extension of time on a showing of good cause, the application is simply incompetent and thus falls to be dismissed on this ground alone.

23. I am, however, acutely aware of the fact that none of the parties before us addressed legal argument on this point. This is hence I now turn to the other ground for the dismissal of this application.

24. The Fund was directed by the Adjudicator to specifically decide if the applicant qualifies for a disability benefit under Rule 6.5 of the Rules within

¹³ Record, p.100.

¹⁴ Record, p.5.

two weeks of completing a review of all medical evidence considered by the medical assessors.¹⁵

25. Rule 6.5.2, being the applicable rule, provides in material part that:

*“A member who has retired in terms of RULE 5.2.3 on becoming permanently disabled while in SERVICE shall in addition to benefit payable in terms of RULE 5.1 be entitled to the following benefit:
...”*

26. The test for the insured disability is, in terms of the applicable Rule, permanent disability.
27. I have quoted extensively from the report of Dr Fox above. It is plain that Dr Fox has had regard to all the medical evidence implicating the applicant's case and that the conclusion he reaches draws extensively therefrom.
28. Based on Dr Fox 's report, the Fund concluded that the applicant was not eligible for the claimed permanent disability benefit.
29. The Adjudicator was, in his turn, satisfied that his decision of 5 June 2018 had been complied with by the Adjudicator, resulting in the Adjudicator's impugned decision of closing his file regarding this matter.

¹⁵ Record, p.266, para 6.1.3.

30. This application thus falls to be dismissed on this further ground. The impugned decision was not tainted by any irrationality, unlawfulness or illegality. There is thus no basis in fact or law for its remission to the Adjudicator for reconsideration.

D. CONCLUSION

31. Based on the foregoing, the following order is made:

31.1 This application is dismissed.

31.2 No order as to costs is made.

A handwritten signature in black ink, consisting of a large, stylized 'N' followed by a long horizontal stroke that curves upwards at the end.

LG NKOSI-THOMAS SC

CHAIRPERSON

SANDTON

14 JUNE 2019