



## An Analysis of the Concept of Disability Benefit in Social Security Law: a Rights-Based Interpretive Approach

**Mashele Rapatsa<sup>1</sup>**

**Abstract:** South Africa's constitutional supremacy system has promulgated a variety of legislative instruments that protects people living with disabilities. In terms of labour laws governing employment relationships, this is particularly buttressed by a wide range of existing anti-discrimination doctrines, laws and policy measures that prohibits unfair differentiation of persons and discrimination based on a person's disability status. This article analyses the contextual meaning of a disability benefits, with specific focus on critical component of the definition in accordance with the provisions of Labour Relations Act 66 of 1995 (LRA), Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) and the Occupational Health and Safety Act 85 of 1993 (OHS). This is important because social security measures are in principle predicated on alleviating possible suffering that occurs when a person is incapable of sustaining oneself socio-economically. Therefore, the article captures a rights-based argument that embraces an all-encompassing meaning of disability benefit in order to fulfill the spirit and purport of the Constitution's social security initiative regarding workplace incidents that render an employee to be disabled. Methodologically, the article adopted a traditional doctrinal legal approach. It is asserted that there is an inherent interaction between disability and poverty. Hence, it is crucial for poverty alleviation mechanisms to capture disability as a ground of justification when determining the safety net of disability benefits. This is because an employee who become disabled is more vulnerable to poverty and associated socio-economic risks, and is likely to experience acute impediments in various social settings.

**Keywords:** disability benefit; human rights; social security; social transformation; human wellbeing

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<sup>1</sup> Acting-Director, School of Law, University of Limpopo, South Africa; PhD in progress, University of Groningen (the Netherlands), Soevenja, Address: Private Bag X1106, Soevenja 0727. Corresponding author: mashele.rapatsa@ul.ac.za.

## 1. Introduction

Disability, either in temporary or permanent form, has adverse effects on a person's ability to sustain an income and remain productive in the labour force (Kidd, 2018, p. 21). It is for this reason that South Africa's social security legal framework considers disability benefits as one of the critical elements that shaped the conceptual ideals upon which both social assistance and social insurance are predicated. Therefore, disability benefit ought to be understood as one of the crucial social protection programmes that fosters the effort of alleviating poverty (Hanass-Hancock and McKenzie, 2017, p. 2), especially amongst workers who become vulnerable due to an unplanned disability that renders them incapable of performing their usual labour duties. Therefore, a disability benefit ought to provide socio-economic relief lest the worker's earning power is permanently interrupted (Truter, 2000, p. 84), and or temporarily ceased, thereby exposing the person to poverty and destitution. In another context, disability benefit ought to be understood as an anti-discrimination measure aimed at safeguarding workers' equal enjoyment of workplace benefits, especially amongst employees who become disabled due to fatalities that impact on their ability to continue doing regular work duties, and this is inclusive of those accidents that occur outside work. This partly emanates from prevalent anecdotal evidence showing that people with disabilities have for years been marginalised and victimised through unfair discrimination, which prevented them from accessing equal opportunities (Behari, 2017, p. 2226) in the workplace.

While multiple barriers still hampers disabled workers from fully enjoying the benefits of being employed (Grobbelaar-du Plessis & Njau 2019, p. 267), South Africa's legislative framework generally attempts to create an enabling environment within which persons living with disabilities may still participate in the labour market and significantly remain impactful in their own right. Hence, protecting persons with disabilities is crucial towards ensuring that they too participate in the labour market as positive role players. In other jurisdictions, disability benefits are embraced as a vital income during times of income uncertainty (Morris, 2016, p. 12). Notably, the notion of disability benefits remains amongst those with which South Africa's social security system is founded on. Its purpose is undoubtedly to provide or guarantee provision of a sum of money to compensate a fund member, who is struck by illness or injury to the extent of being unable to continue doing regular work related duties (Myrdal, 2008, p. 1). This is guided by the fact that, in most instances, every disabled person is presumed to be

in dire need of means of support in order to retain socio-economic viability, including of those that depended solely on their ability to generate a living wage before the occurrence of the disability. At the centre of attention, this article draws attention to critical components constituting the definition of a disability in the context of rights-based employment relationships.

In the context of employment, the prevailing jurisprudential definitions shall serve as guiding legal instruments because they explain the meaning, nature and form of a disability benefit. Although the concept of disability has been defined in varying ways, funds have generally been applying the definition which states that to qualify for a disability benefit, ‘the member must be totally and permanently disabled such that the disability renders him/her incapable of engaging in his own occupation or in any other occupation for which he or could reasonably be expected to become qualified by virtue of his knowledge, training, education, ability and experience’. Most of the decided cases and disputes over disability benefits were accordingly aligned with this definition. From this definition, four specific phrases attract some attention, to wit; ‘totally’, ‘permanently’, ‘incapable of engaging’ and ‘his occupation’. Immediately, a literal reading and interpretation of the definition presents with some conceptual difficulties, especially from rights-based approaches to human development and wellbeing, and this will be evident in some notable jurisprudence concerning disability benefits. In this regard, the article takes into account how the Pension Funds Adjudicator and the Office of the Ombudsman for Long-Term Insurance have interpreted these terms towards demystifying the meaning of disability.

## **2. Rationale and Research Approach**

At the center of attention, this article seeks to advance a persuasive perspective that favours a social justice orientated disability benefits framework. It also demonstrates that defining the meaning of disability, its nature and scope of application should not only be limited to visible parts of a person’s physical disability. This view is accordingly aligned with the position of the World Health Organisation (WHO), which accentuates that the concept of disability is a multidimensional issue that must be understood in medical, social (Fourie & Botes, 2018, p. 3) and legal terms in order to capture the intended objectives of catering for various forms of impairments that temporarily or permanently interrupts a person’s income and wellbeing in the end. Methodologically, the article adopted a

traditional doctrinal legal research strategy and content analysis method. This approach was considered best suited towards identifying appropriate parameters intended by the legislature when conceptualising disability benefits. This is significant in ensuring that various forms of impairment entitles workers to receive disability benefits when their income and socio-economic wellbeing are threatened. The article supports views expressed in social justice theory, which generally maintains that for social justice to prevail, we must address and eliminate inequalities that manifest through economics, social and cultural settings, and in such a way that the end result become a corrective process of redistributing, recognising and representing the interests of those affected without prejudice (Gray & Mugumbate, 2016, p. 8).

### **3. The Nature and Context of Disability Benefits**

It has been reported that disability and ill-health are part of critical challenges besieging South Africa's active workforce (Hoosain et al, 2019, p. 58). Within this context, a person's livelihood can be prematurely disrupted by virtue of disability and or ill-health. In the context of social security, disability benefits is premised on the idea of providing financial assistance in most cases, to anyone who by virtue of disability is incapable of performing any duty to earn a sustainable income for subsistence. It is disbursed when a member suffers from either physical or mental infirmity, which prevents him from performing his own occupation. It has also been emphasised that disability benefits can arise in the context of various products and is not necessarily limited to occupational pension or provident funds (Jeram, 2008, p. 2). These could be in the form of disability social grant payable by the state, disability benefits payable by the Road Accident Fund and benefits payable in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).

#### **3.1 Unravelling the Conceptual Issues in the Definition of Disability**

Because the definition of disability comprises multiple yet distinct concepts, it is essential to unpack each of them, and ascribe to some extent, particular meanings that give a complete context of disability benefits. A particular requirement that a member must be '*totally*' disabled has received attention in various quotas. However, the concept '*totally*' presents with its inherent problems. This is fundamentally because it apparently carries two interpretations. First, its

determination may have to be premised on the nature of the member's occupation. It means this may be interpreted in the context that the member is wholly unable to carry out and bear with the tasks altogether while his/her occupation makes it peremptory for a person to be considered to have performed work. Second, it could also be interpreted to mean that a person need be disabled to the extent of being incapable of performing any job of any nature. Various enquiries gives rise to some problems. For instance, would a person who is quadriplegic be considered as totally disabled? And if not, then what standard is set to determine if a member is totally disabled and to what extent actually?

The requirement that a member must be 'permanently' disabled is also worth studying. While it appears to be straightforward, what constitutes the permanence of disability should not dependant on a particular case. In that, primarily it must be a disability which not only has a potential of persisting or continue for an indefinite period of time. The disability must show no prospects of recovery, or show no such a probability, for in that event it would not constitute permanence of disability.

The definition also captures the view that requires the person applying for disability benefit to be incapable of engaging in his own occupation. In this regard, this entails that the disability must have rendered such a fund member to be so dormant and reluctant to the point that it is impossible to even imagine carrying out the usual tasks as aligned with conditions of specific job description. There may however be questions on whether the issue of incapacity to perform a particular job constitute disability, and if this could allow a member to file a claim for disability benefits. This part could further be linked with the last component of the definition which is captured as 'or in any other occupation for which he or could reasonably be expected to be qualified'. From this premise, there is a question concerning the possibility of exploring alternatives other than a person's own occupation, which a fund member could perform. It entails that a fund member must demonstrate a failure or inability to perform any other duty than one's own occupation. It is observed that this resonate with an established principle of reasonable accommodation, which is fundamentally concerned with fitting an employee in new workspaces to enable ease of re-integration, and in terms of which the employee's inability to perform such new tasks would accordingly constitutes a disability.

### 3.2. Permanence of Disability as a Justification for Disability Benefit

It has been observed that permanent disability as a person's health condition, has been essential in determining most claims brought before the Pension Fund Adjudicator. It may be argued that this is necessarily because once it is established that a member is permanently disabled as a result of an injury due to work related incident or outside work incident, the easier it is for the claim to be successful. Permanent disability as a determining factor was propounded upon in *Van der Linde v Telkom Retirement Fund* [2004] 11 BPLR 6257 (PFA). In this case, the issue was whether a pension fund can require its member to undergo medical treatment or surgery as a condition for receiving permanent disability benefits in which the adjudicator determined that a member cannot be required to undergo such a process primarily because this did not provided for in the Rules of the Fund. It is asserted that the Pension Fund Adjudicator was cautious of the constitutional implications of subjecting a member to tests when there is no law permitting such a practice, and thus opted to apply a rights-based interpretation, thereby balancing the need to comply the requirement while protecting human rights.

The Adjudicator further contended that for as long as this kind of a condition is not included in the rules of the Pension Fund, there shall be no need for a member to undergo such a treatment. While the Adjudicator was wholly correct in adopting a rights-conscious approach, it becomes somewhat difficult to ascertain the existence of such a permanent disability without testing it while payment of disability benefits depends on ascertaining that indeed such a disability has permanence. In this regard, it is necessary to formulate complementary provisions in the rules of the fund in order to enable further verifications so that a determination is not premised on speculation. Alternatively, the office of the Pension Fund Adjudicator should develop a standard rule in order regulate such circumstances. Such a rule will assist in resolving cases where it can visibly be seen that the complainant has a permanent disability. While aware of the constitutional and rights-based considerations, this article is of the view that in certain circumstances, it may necessary to conduct tests that ascertain permanence of disability.

Permanence of disability was also dealt with in the case of *Hiebner v Metal & Engineering Permanent Disability Scheme* [2004] 2 BPLR 5451 (PFA) where the adjudicator had to determine whether the complainant's condition could properly be classified as permanent when it could be cured or reversed by an operation or other medical treatment. The complainant worked as a boilermaker for a company

known as Novatech. He was diagnosed with trigeminal neuralgia and submitted a claim for permanent disability benefits. The scheme repudiated his claim based solely on what his doctor wrote in his report, which according to the fund, created a doubt with regard to the permanence of the disability of the complainant. In this case, the fund in fact wanted the complainant to undergo a major surgery, which was apparently accompanied by some major risks. The adjudicator found in favour of the complainant arguing that the rules of the fund do not require members to undergo such surgery or testing in order for them to qualify for disability benefits.

In both instances of *Van der Linde* and *Hiebener*, the Adjudicators have stressed that there ought to be no condition requiring members of the fund to undergo medical treatment or surgery, whatever the case may be. A question relating to whether a member who has been requested to submit to a reasonable minor surgery or medical treatment could refuse without affecting their permanent disability arises (Mhango, 2007, p. 1482). While this article is generally not opposed to the idea that a member need not undergo medical treatment or surgery for purposes of determining permanent disability as a condition, it however accepts that there are certain circumstances that necessitates such medical treatment, particularly in instances where tests are conducted solely to establish if indeed a member is permanently disabled. In these circumstances, there might be a need for the Adjudicator to be flexible in order to fulfil what the definition captures, which may not always be discerned through the naked eye. Although the Adjudicators highlighted the high risks associated with the involved medical procedures, it is recommended that the Adjudicator should distinguish between low and high-risk medical treatments when determining the necessity of undergoing such treatment, and thereafter decide if it is desirable for the purpose of satisfying this requirement in the definition (Mhango, 2007).

### **3.3. The Adjudicator on ‘Totality’ Of Disablement**

As read from the definition, and towards satisfying fundamental requirements to be eligible for disability benefit, it can be discerned that a member must be totally disabled from performing material and substantial duties of regular job for a claim of disability benefits to succeed. This was emphasised by the Ombudsman’s in *CR74* in which the Ombudsman had to determine whether the complainant could perform the material and substantial duties of his regular job. The complainant, who worked as a supervisor for city municipality, suffered a stroke but had recovered, although with some mental retardation and impaired speech. Due to the

fact that the occupational therapy report stated that he was able to perform the same supervisory work, it was found that his functional limitations did not amount to total disability (Myrdal, 2008, p. 5). Since the requirement of total disability entails that a member must be unable to perform his material and substantial duties of regular job, the Ombudsman's approach appear to have been appropriate in the circumstance by nullifying the insurer's decision to decline the claim.

Total disablement as a critical element was also propounded upon in *Reynolds v Metal & Engineering Industries Retirement Fund* [2001] 1 BPLR 1507 (PFA) in which the fund repudiated the member's claim arguing that he was still able to perform some of his usual tasks hence not totally disabled. However, the adjudicator found that he was in practical sense unable to carry out his work and as a result met the requisite to be considered to be totally disabled. The issue arose when the fund maintained that complainant was not totally disabled. In this case, one notices the absence of standard guidelines in terms of which total disablement may be determined. Once again, this represented a lacuna that needed the Pension Fund Adjudicator to design applicable standards that guard against misuse of prerogative. It would also assist in assuring that funds do not deliberately renege from their obligations when workers are rotated to alternative workstations in their workplace. Since the adjudicator was guided by the fact that spinal injuries sustained from motor accident left him partly paralysed as he could only do lighter work and worked slowly than before. It is therefore implicit that the fund misconstrued the definition, and was arguing partial permanent disability in that he could continue employment in an alternative setting.

#### **3.4. The Implication of 'Own Occupation' in the Definition of Disability**

The 'own occupation' element requires that regard must be had on the nature of the job that the claimant would have been tasked to perform. In assessing the disability of the complainant, there is a need to consider evaluating the performance of the complainant in relation to a described job both before and after the occurrence of whatever might have led to the disability. This term is commonly interpreted to refer to occupational disability. Often times, the definition of the claimant or the insured's own occupation will either be contractual or depend on a question of fact of evidence, normally drawn from sources such as the claimant, employers, job descriptions and occupational therapist reports (Christie, 1998, p. 9). It is asserted that the claimant's occupation must however be specified and this should not depend on the insured, which makes it simply decisive in determining a question of



disability. The Adjudicator should require the employer to specifically state the nature and form of occupation that the claimant is doing. This would effectively assist in determining the extent of the disability of the claimant in light of own occupation, and whether to or not to continue with work. In the absence of such standard, the employer is effectively enabled to shift the claimant along different occupational sectors which would leave the claimant being capable of doing some other lighter jobs. The problem is that this culminates in the insurer repudiating the claim, basing arguments on the fact that the claimant's ability to perform other duties as determined by the employer renders him fully fit and thus not eligible for disability benefits.

### **3.5. The Meaning of 'Similar Occupation'**

For the purpose of being eligible for disability benefits, what should be understood as similar occupation, and how does it affect the prospects of disability benefit claim? Does 'similar occupation' require that the work be literally the same as that which the claimant used to perform? Some courts have determined that the similarity concept requires that there be some resemblance in certain relevant aspects of the occupation (Jeram, 2008, p. 10). The emphasis on the issue of similarity is put on the content and nature of the occupation. This implies that the fund need to establish what skills and expertise are required to perform the current job in contrast with the proposed occupation. It is asserted that both the employer and employee need to understand occupations which are regarded as similar which may require the employer to understand what skills the employee possesses in determining what kind of occupation would serve an alternative for the employee satisfy the 'similar occupation' element.

In determining what would be considered similar to the claimant's occupation, the notion of reasonableness is important (Myrdal, 2008, p. 9). This entails that what may constitute similar occupation in the eyes of the employer may not necessarily be perceived in the same light by the employee. Hence, both the employer and employee are required to be reasonable in order to satisfy their corresponding expectations. It is amenable that the employer be required to be reasonable in directing a fund member to pursue a particular occupation that is perceived to be similar or that may serve as an alternative to the previous occupation prior to the occurrence of the disability. In *Munnik v Cape Joint Retirement Fund* [2000] 11 BPLR 1270 (PFA), the Adjudicator had to determine whether it was just and equitable for the insurer to repudiate the claim for disability on the basis that the

claimant could perform some duties other than that of being a fire fighter. Following 20 years of service as a fire fighter, the complainant suffered heart attack, yet his application for disability benefits was repudiated. The Adjudicator held that the positions for which the claimant was to be suited could not be regarded as similar occupations. Almost similar facts were reported in case where the Ombudsman had to determine if it was reasonable to expect a 46 years old woman who worked as a saleslady in the fresh produce department, with very low level of education to work as a cashier. This was determined to be unreasonable given that the new role needed more intellectual capacity than her previous role.

In both instances, it can be discerned that the requirement of a similar occupation was not met. It is for this reason that the findings of the Pension Fund Adjudicator and the Ombudsman are considered to have built strong precedence. However, there may be a need to enquire if alternatives are considered when determining the reasonableness of shifting the employee from one post to the other. This is because there can be instances where an employee by virtue of knowledge, education, and relevant experience may be presumed to lack the necessary capacity to perform in such occupation. Further, it can also happen that notwithstanding the absence of these elements, an employee can still be able to perform such a job. This article would argue that what becomes critical is the onus of establishing if an employee is capable of doing such a job irrespective of those factors.

### **3.6. The Context of ‘Any Other Occupation’?**

The literal interpretation of this definition would mean that the complainant’s disability should be of a nature that it allows him to perform any form of occupation. This element of the definition presents with some notable flaw in that it somewhat allows the insurer or fund to creatively find mechanisms of subjecting the claim to processes that would disadvantage the employee. For instance, upon noticing the near disability, the insurer can collude with the employer to place or relocate the employee to various occupational roles in various establishments in an effort to design new occupation that enables the insurer to avoid honouring the claim. It should be noted that the fundamental purpose of disability benefits is to cater for the disabled persons, especially those that become disabled owing to an unfortunate incident. This part of the definition has been said to offer the cheapest form of cover, but which gives the least protection to a member (Jeram, 2009, p. 15), which to some degree defeats the fundamental objective of the concept of disability benefits. This article argues that the phrase any other occupation

compromises the employees because it creates a room for insurers to find a reason to delay honouring claims under the pretext of trying to find the any other occupation that the employee may perform. The bone of contention here is that the phrase it goes far beyond the parameters of expertise that a member may possess, and if this is not true, then it is a superfluous because it may be attempting to cover what 'own occupation' and 'similar occupation' already do.

#### **4. Conclusion**

This article set out to explain the definitional parameters that determine the prospects of claims for disability benefits in respect to either temporary or permanent disabilities caused by work related incident and those that occur outside work. It is shown that disability benefits form part and parcel of critical components of South Africa's social security systems thereby providing a much needed relief to persons whose income and livelihood is interrupted due to temporary or permanent disability. The social security system is predicated on rights-based approaches to human wellbeing and human development, which emanates from a constitutional supremacy system of governance under which workers' rights and livelihood are protected. It is asserted that the post-1994 pension fund schemes that were developed are also rights-conscious, and somewhat capture a historical perspective appreciating that human rights could not develop under apartheid (Sarkin, 1998, p. 628). The article has established that the definition of disability forms a framework that must be met when lodging claims for disability benefits. The definition captures what can best be described as normative requirements to any pension or provident fund member. A member is required to satisfy the requirements before a claim is honoured. It must be shown that a member is totally and permanently disabled, thereby being incapable of performing his own or similar occupation. The burden of proving such a disability rest with the claimant, and is weighed on balance of probabilities. The rules of the fund also obligate the participating employer to inform the fund of any disability suffered by the member (Jeram, 2008, p. 57).

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