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Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

JUL 07 2004



Re: Bethlehem Steel
Corporation Pension Plan, Case # 196603

Dear

The Appeals Board has reviewed your appeal of PBGC's December 18, 2003 determination that your client, , is not entitled to a Permanent Incapacity (disability) pension under the Bethlehem Plan. For the reasons discussed below, the Board changed PBGC's determination by finding that he is entitled a Permanent Incapacity Retirement. PBGC's Insurance Operations Department, the organization responsible for determining and paying benefits, will send him a new determination of his Permanent Incapacity benefit amount and benefit start date, with a new 45-day right of appeal.

PBGC's letter explained that, to qualify for a disability pension, a participant had to have met the Plan's requirements for the disability pension on or before December 18, 2002, the Plan's termination date. The letter said did not qualify because he became disabled after December 18, 2002 according to Social Security information he included with his correspondence. PBGC's letter also noted that he is entitled to a regular retirement benefit under the Plan.

Your January 14, 2004 appeal said that, while became disabled under the Social Security Administration's definition of disability as of January 22, 2003, he was disabled under the Plan's definition prior to December 18, 2002. You noted that the Social Security decision said that he was unable to perform his past relevant work in December of 2002. You also enclosed a copy of a letter from you believe demonstrates that became disabled prior to December of 2002.

The files available to the Appeals Board show that previously submitted to PBGC a number of documents relating to his medical history. These include a September 19, 2003 decision by Administrative Law Judge Dennis R. Kramer of the Social Security Administration's Office of Hearing and Appeals concerning entitlement to Disability Insurance Benefits under a program administered by the Social Security Administration.

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Background

When the Bethlehem Plan terminated, effective December 18, 2002, it did not have sufficient assets to provide all benefits PBGC guarantees under Title IV of the Employee Retirement Income Security Act (ERISA). The terms of the Plan, the provisions of ERISA, and PBGC regulations and policies determine [] entitlement to a guaranteed benefit. PBGC's regulations require that, to be entitled to a guaranteed benefit, a participant must satisfy the conditions of the plan necessary to establish the right to receive the benefit on or before the earlier of the date the participant's employment ended or the date the plan terminated (see 29 Code of Federal Regulations (CFR) §§4022.3, .4(a)(3)). In [] case, the Plan's termination date, December 18, 2002, is the earlier date.

Under section 2.5 of the 1999 Bethlehem Plan for the Steel Division (Plan Number 244), there are two conditions that a participant must meet to be eligible for the Plan's Permanent Incapacity (disability) retirement: (1) the participant must have at least 15 years of continuous service and (2) the participant must be "permanently incapacitated" as defined by the Plan.

Discussion

As explained above, PBGC cannot guarantee a permanent incapacity benefit for [] unless he satisfied both of the Plan's conditions for the benefit on or before December 18, 2002. The information available to the Appeals Board shows that [] satisfied the first condition because he had more than 15 years of continuous service as of that date. The files also show that he was employed as a millwright and that he had been out on Sickness and Accident Leave for several months when the Plan terminated.

According to the September 19, 2003 decision by Judge Kramer, on December 3, 2001, [] applied to the Social Security Administration (SSA) for Disability Insurance Benefits with a proposed SSA disability onset date of September 7, 2001. After his claim was denied initially and on reconsideration, [] requested a hearing, which was held June 4, 2003 before Judge Kramer. The Judge's decision explained that SSA defines disability for this purpose as "the inability to engage in *any substantial gainful activity* (emphasis added) by reason of any medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months." Judge Kramer concluded that [] became disabled under SSA's definition on January 22, 2003, not on the September 7, 2001 date sought by []

The Appeals Board notes, however, that the definition of permanent incapacity under the Bethlehem Plan is *not* the same as the SSA's disability definition nor is an SSA disability award a prerequisite for the Plan's disability pension. Plan section 2.5 provides that a participant is considered permanently incapacitated only if –

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(a) he has been totally disabled by bodily injury or disease so as to be prevented thereby from engaging in any employment of the type normally performed in his employee category; and

(b) such total disability shall have continued for a period of [five] consecutive months and, in the opinion of a qualified physician, will be permanent and continuous during the remainder of the Participant's life.

Thus, to be eligible for the Plan's disability benefit, [redacted] disability must be both total and of such severity that it prevented him from "engaging in any employment of the type normally performed in his employee category" on or before December 18, 2002.

Judge Kramer's decision cites various medical reports [redacted] submitted to SSA in support of his application for Social Security disability benefits. These reports describe a series of chronic conditions with a steady decline in residual functional capacity from 1999 through January 22, 2003, at which point SSA determined [redacted] was unable to engage in any substantial gainful activity. For example, Judge Kramer found it --

reasonable to conclude that, prior to January 22, 2003, [redacted] retained the residual functional capacity to perform a limited range of light work. . . . He was occasionally able to climb ramps and stairs but he was not able to climb ladders, ropes, or scaffolds at all. In addition, the claimant had very little use of his left arm. This is generally consistent with the State Agency medical opinion of record, as well as the functional capacity evaluation results from May 2002. It is also consistent with the reports from Steel Family Health Care Center that indicated that [redacted] could lift and carry twenty pounds occasionally and ten pounds frequently. Finally, it is consistent with [redacted] August 2002 opinion that [redacted] could not perform his work as a millwright (which was medium exertion).

Judge Kramer found that [redacted] "has not engaged in substantial gainful activity since the alleged onset of disability. His work activity [for Bethlehem Steel] in 2002 was an unsuccessful work attempt and he was accommodated by the employer."

In noting that [redacted] "exertional limitations for the period prior to January 22, 2003 do not allow him to perform the full range of light work," Judge Kramer stated that "there are a significant number of jobs in the national economy that he could perform" and cited as examples information clerk, production inspector, messenger or usher. Because [redacted] was unable to perform the full range of light work during the period preceding January 22, 2003, the Appeals Board found that, as of December 18, 2002, [redacted] could not have performed the duties of the type normally performed in his employee category, e.g., a millwright in a steel plant. As a result, the Board found that he met the requirements for permanent incapacity under Plan section 2.5.

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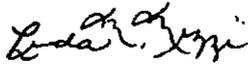
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Decision

Having applied the law, the provisions of the Plan and PBGC policy to the facts in this case, the Appeals Board found that [] is entitled to a Permanent Incapacity Retirement under the Bethlehem Plan. We will forward a copy of this letter to PBGC's Insurance Operations Department, who will send him a new determination of his Permanent Incapacity benefit amount and benefit start date, with a new 45-day right of appeal.

Meanwhile, if you or [] have questions, please call PBGC's Customer Contact Center at 1-800-400-7242.

Sincerely,



Linda M. Mizzi
Member, Appeals Board

cc

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