

A.F.R.**Court No.1(B)****Reserved Judgment**

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

**Original Application No. 225 of 2011
Friday this the 28th day of April 2017****Hon'ble Mr. Justice D. P. Singh, Member (J)****Hon'ble Lt Gen Gyan Bhushan, Member (A)**

Ex JC-539073L Nb /Sub Shankar Datt Upadhyay son of Late Shri
Ghanshyam Upadhyay resident of village : Lamara, Post Office :
Kanalichhina, Distt : Pithoragarh (Uttarakhand)

..... ApplicantLd. Counsel for the applicant : **Shri Abhinav Singh, Advocate**

Versus

1. Union of India, through Secretary, Ministry of Defence, New Delhi.
2. PCDA, (P) Allahabad
3. Record Office of Kumaon Regiment, Ranikhet
4. Officer Incharge, Records Rajputana Rifles, Delhi Cantt.
5. CO, 8 Kumaon.

..... RespondentsLd. Counsel for the Respondents : **Shri D K Pandey, Central
Government Counsel.**

ORDER

“Hon’ble Lt Gen Gyan Bhushan, Member (A)”

1. The instant Original Application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007, whereby the applicant has claimed the following reliefs :-

“(a) An order or direction quashing the order impugned passed by the authorities annexed as Annexure No. A-1 to this O.A. and directing the respondents to pay the war injury pension in lieu of the disability pension.

(b) An order or direction allowing the application with costs.

(c) Any other or further order or direction which this Hon’ble Court may deem just, fit and proper in the circumstances of the case.”

2. The factual matrix of the case is that the applicant was enrolled in the Army on 24.12.1977. On 19 Mar 2003, the applicant was part of the vehicle patrol detailed to carry out area domination in operation RHINO-II in Assam. While the party was returning to company operating base in a civil requisitioned bus, a civil truck approaching from opposite direction hit the bus. The applicant was sitting just behind the driver next to the window got the direct impact resulting in severe injury to his right hand. The injury was considered as attributable to military service and he was granted extension of two years service from 24.12.2003 to 23.12.2005. While the applicant was undergoing treatment at Artificial Limb Centre, Pune, he was recommended to be invalided out of service by a Classified Specialist (Surgery) due to loss of dominant right upper limb. Accordingly, the applicant was brought before a duly constituted Invaliding Medical Board in Dec 2003 and was discharged from service with effect from 12.02.2004 under Rule 13(3) I (ii) of Army Rules, 1954 after rendering 26 years 01 month and 19 days service in medical category S1H1A5P1E1. He was granted disability pension @ 80% for life. Applicant submitted a representation for grant of War Injury Pension but after review it was rejected by PCDA (Pension) Allahabad stating that injury sustained by the applicant was accidental and

not due to operation though it occurred during the operation. Aggrieved by the grant of disability pension, the applicant has filed the instant Original Application for grant of War Injury Pension.

3. Heard Shri Abhinav Singh, Learned Counsel for the applicant, Shri D K Pandey, Learned Counsel for the respondents and perused the record.

4. Learned Counsel for the applicant submitted that applicant's unit was involved in Operation RHINO-II in Assam. The applicant was part of the vehicle patrol detailed to carry out area domination in operation RHINO-II in Assam. The applicant along with other soldiers was returning in a civil requisitioned bus to company operating base after carrying out the area domination. A civil truck approaching from opposite direction hit the bus in which these soldiers were travelling. The applicant was sitting just behind the driver next to the window got the direct impact resulting in severe injury to his right hand. He was immediately evacuated to Hospital for the treatment where his right hand was amputated. Due to this disability, he was invalided out of service with 80% disability pension for life. The disability of the applicant was considered as attributable to military service and classified as Battle Casualty, however, instead of sanctioning war injury pension to the applicant, he was sanctioned only disability pension.

5. Learned Counsel for the applicant further submitted that injury was caused to the applicant while on Counter Insurgency Operation in operation RHINO (II). At the time of the accident he was on bonafide operational military duty and the disability was declared as attributable to military service and was classified as Battle Casualty. The applicant should have been sanctioned War Injury Pension instead of disability pension.

6. **Per contra**, Learned Counsel for the respondents submitted that the applicant was enrolled in the Army on 24.12.1977. The applicant was part of the vehicle patrol detailed to carry out area domination. While the party was returning to company operating base in a civil requisitioned bus, a civil truck approaching from opposite direction hit the bus. The applicant was sitting just behind the driver next to the window got the direct impact

resulting in severe injury in his right hand. The injury was considered as attributable to military service. Being a case of Battle Casualty, he was granted extension of two years from 24.12.2003 to 23.12.2005. While the applicant was undergoing treatment at Artificial Limb Centre, Pune, he was recommended to be invalided out of service by a Classified Specialist (Surgery) due to loss of dominant right upper limb. Accordingly, the applicant was brought before a duly constituted Invaliding Medical Board in Dec 2003 and discharged from service with effect from 12.02.2004 under Rule 13(3) I (ii) of Army Rules, 1954 after rendering 26 years 01 month and 19 days service in medical category in S1H1A5P1E1 and he has been granted disability pension. On receipt of representation from the applicant, his case for grant of War Injury Pension was submitted to PCDA (Pension) Allahabad but after review it was rejected stating that injury sustained by the applicant was accidental and not due to operation though it occurred during the operation.

7. Before dealing with the rival submissions, it would be appropriate to examine the relevant Rules and Regulations on the subject matter which are reproduced as under :-

Army Order 1/2003

Physical/Battle Casualties

Para 1 to 3. x x x x x x x x x

4. *Battle Casualties: Battle Casualties are those casualties sustained in action against enemy forces or whilst repelling enemy air attacks. Casualties of this type consist of the following categories:-*

- (a) *Killed in action*
- (b) *Died or wounds or injuries
(other than self-inflicted)*
- (c) *Wounded or injured (other than
self-inflicted)*
- (d) *Missing*

6. *Circumstances for classification of Physical/Battle Casualties are listed in Appendix 'A'*

Appendix A to AO 1/2003

Battle Casualties

1. The circumstances for classifying personnel as battle casualties are as under:-

(a) Casualties due to encounter with troops or armed personnel or border police of a foreign country or during operations while in service with peace keeping missions abroad under government orders.

(b) Air raid casualties sustained as a direct or indirect result of enemy air action

(c) Casualties during action against armed hostiles and in aid to civil authorities to maintain internal security and maintenance of essential services.

(d) Accidental injuries and deaths which occur in action in an operational area.

(e) Accidental injuries which are not sustained in action and not in proximity to the enemy but have been caused by fixed apparatus (e.g. land mines, booby traps, barbed wire or any other obstacle) laid as defence against the enemy, as distinct from those employed for training purposes, and if the personnel killed, wounded or injured were on duty and are not to blame, will be classified as battle casualties, notwithstanding the place of occurrence or agency laying those, viz. own troops or enemy, provided the casualties occur within the period laid down by the government.

(f) Casualties during peace time as result of fighting in war like operations, or border skirmishes with a neighbouring country.

(g) Casualties occurring while operating on the International Border or Line of Control due to natural calamities and illness caused by climatic conditions.

(h) Casualties occurring in aid to civil authorities while performing relief operations during natural calamities like flood relief and earthquake.

(i) Casualties occurring while carrying out battle inoculation/training or operationally oriented training in preparation for actual operations due to gunshot wound/explosion of live ammunition/explosives/mines or by drowning/electrocution.

(j) Casualties occurring while carrying out battle inoculations/training or operationally oriented training in preparation for actual operations due to gunshot wound/explosion of live ammunition/ explosives/mines or by drowning/electrocution.

(k) Army personnel killed/wounded unintentionally by own troops during course of duty in an operational area.

(l) Casualties due to vehicle accidents while performing bonafide military duties in war/border skirmishes with neighbouring countries including action on line of control and in counter insurgency operations.

(m) Casualties occurring as a result of IED/bomb blasts by saboteurs/ANEs in trains/buses/ships/aircrafts during mobilization or deployment in war/war like operations.

(n) Casualties occurring due to electrocution/snake bite/drowning during course of action in counter insurgency/war.

(o) Accidental death/injuries sustained during the course of move of arms/explosives/ammunition for supply of own forces engaged in active hostilities.

(p) Death due to poisoning of water by enemy agents resulting in death/physical disabilities of own troops deployed in operational area in active hostilities.

transport, indiscriminate shooting incidents in public, etc. would be covered under this category, besides death/disability occurring while employed in the aid of civil power in dealing with natural calamities.

Category E

Death or disability arising as a result of:-

- a) Enemy action in international war.
- b) Action during deployment with a peace keeping mission abroad.
- c) Border skirmishes.
- d) During laying or clearance of mines including enemy mines as also minesweeping operations.
- e) On account of accidental explosions of mines while laying operationally oriented mine-field or lifting or negotiating mine-field laid by enemy or own forces in operational areas near international borders or the line of control.
- f) War like situations, including cases which are attributable to/aggravated by :-
 - (i) Extremist acts, exploding mines etc., while on way to an operational area
 - (ii) Battle inoculation training exercises or demonstration with live ammunition.
 - (iii) Kidnapping by extremists while on operational duty.
- (g) An act of violence/attack by extremists, anti- social elements etc while on operational duty.
- (h) Action against extremists, antisocial elements, etc. Death/disability while employed in the aid of civil power in quelling agitation, riots or revolt by demonstrators will be covered under this category.

(j) Operations specially notified by the Govt. from time to time.

4.2 Cases covered under category 'A' would be dealt with in accordance with the provisions contained in the Ministry of Defence letter No. 1(6)/98/D(Pen/Services) dated 3.2.98 and cases under category 'B' to 'E' will be dealt with under the provisions of this letter.

Notes:-

- (i) The illustrations given in each category are not exhaustive. Cases not covered under these categories will be dealt with as per Entitlement Rules to casualty pensionary awards in vogue.
- (ii) The question whether a death/disability is attributable to or aggravated by military service will be determined as per provisions of the Pension Regulations for the Armed Forces and the Entitlement Rules in vogue as amended from time to time.
- (iii) In case of death while in service which is not accepted as attributable to or aggravated by Military Service or death after retirement/discharge/invalidment, Ordinary Family Pension shall be admissible as specified in Min of Def letter No. 1 (6)/98/D(Pen/Ser) dated 03 Feb 98 as modified vide Ministry of Defense letter No.1(I)99/D(Pen/Ser) dated 7.7.99.
- (iv) Where an Armed Forces personnel is invalided out of service due to non-attributable/non-aggravated causes, Invalid pension/gratuity shall be paid in terms of Para 9 of Ministry of Defense letter No 1 (6)/98/D (Pen/Ser) dated 03 Feb 98 as amended/modified vide Ministry of Defense letter No. 1 (I)99/D(Pen/Ser) dated 07.06.99.

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10.1 Where an Armed Forces Personnel is invalided out of service on account of disabilities sustained under circumstances mentioned in Category "E" of Para 4.1 above, he/she shall be entitled to War Injury Pension consisting of Service element and War Injury element."

8. In the instant case, the applicant was part of the vehicle patrol detailed to carry out area domination in operation RHINO-II in Assam. While the party was returning to Company Operating Base in a civil requisitioned bus, a civil truck approaching from opposite direction hit the bus. The right hand of the applicant was severely injured and was amputated during the treatment. As a result, the applicant was declared a case of 'Battle Casualty (Wounded)' and his injury was considered as attributable to military service. He was discharged from service with 80% disability pension for life and he is in receipt of the same.

9. The applicant is aggrieved by non grant of War Injury Pension. It is not disputed that **the applicant has suffered injury in the operation RHINO-II in Assam which was a notified operational area.** He was declared a case of 'Battle Casualty (Wounded)', the injury was regarded as attributable to military service and being a case of battle casualty, he was also granted extension of two years of service (**Para 4 of the Counter Affidavit**). When the case for grant of War Injury Pension was forwarded to P.C.D.A. (Pension) Allahabad, the same has been rejected by them stating that the injury sustained by the applicant was not due to operation though it occurred during the operation.

10. The applicant sustained injury while on a patrol in Operation RHINO-II in Assam which has been accepted by his Commanding Officer in the Court of Inquiry conducted to enquire into the circumstances under which the applicant had sustained injury. The recommendations of the Commanding Officer and Officiating Brigade Commander in the Court of Inquiry are reproduced as under :-

"RECOMMENDATIONS OF THE COMMANDING OFFICER

1. *JC-539073L Nb Sub Shankar Datt Upadhyay sustained Traumatic Amputation (Rt) Humerus while on a ptl in CI Ops under OP RHINO-II on 19 Mar 2003 in Gauripur area of Dhubri District.*

2. *The injury sentenced was accidental in nature and no one is to be blamed for the same."*

“RECOMMENDATIONS OF OFFG CDR 11 MTN BDE ON C OF I TO INVESTIGATE INTO THE CIRCUMSTANCES UNDER WHICH JC-539073L NB SUB SHANKAR DATT UPADHYAY OF 8 KUMAON GOT INJURED DURING VEH PTL

1. *I agree with the findings of the Court. The injury sustained is accidental and no one is to be blamed for the same.*
2. *The injury sustained by JC-539073L Nb Sub Shankar Datt Upadhyay, while on Veh Ptl, is attributable to military service.”*

11. Remarks of the Commanding Officer at Para 11, Part III of the Medical Board Proceedings Invalidment in Low Medical Category solely on Medical Grounds, annexed with Supplementary Counter Affidavit is reproduced as under :-

Statement of Commanding Officer at Para 11, Part III,

“11. Do you consider the disability is attributable to service ? (Give reasons).

- BATTLE CAS.”

12. We have also gone through Serial 1 (d) and (l) of the Appendix ‘A’ to AO 1/2003, Para 4.1 Category E (j) and Para 10.1 of Government of India, Ministry of Defence letter No. 1(2)/97/D (Pen-C) dated 31.01.2001, which reads as under :-

Appendix ‘A’ to AO 1/2003

Serial 1 (d)

“Accidental injuries and deaths which occur in action in an operational area.”

Serial 1(l)

“Casualties due to vehicle accidents while performing bonafide military duties in war/border skirmishes with neighbouring countries including action on line of control and in counter insurgency operations.”

Government of India, Ministry of Defence letter No. 1(2)/97/D (Pen-C) dated 31.01.2001

Para 4.1 Category E (j)

“(j) Operations specially notified by the Govt. from time to time.”

Para 10.1

“10.1. Where an Armed Forces Personnel is invalided out of service on account of disabilities sustained under circumstances mentioned in Category ‘E’ of Para 4.1 above, he/she shall be entitled to War Injury Pension consisting of Service element and War Injury element.”

13. It is clearly mentioned in the above policy letters that accidental injuries and deaths which occur in action in an operational area as also casualties due to vehicle accidents while performing bonafide military duties in counter insurgency operations will be considered as Battle Casualty. It is also mentioned that where an Armed Forces Personnel is invalided out of service on account of disabilities sustained in operation specially notified by the Government, he/she shall be entitled to War Injury Pension consisting of Service element and War Injury element.

14. It is also undisputed fact that the applicant sustained injury in operation ‘RHINO-II in Assam which was a notified operational area and the Army authorities have considered the applicant as Battle Casualty and granted him extension of two years service but P.C.D.A. (Pension) Allahabad has considered the injury as accidental injury only on the ground that injury sustained by him was accidental and not due to operation though it occurred during the operation. The contention of the P.C.D.A. (Pension) Allahabad seems to be inappropriate as the injury sustained by the applicant was due to vehicle accident which occurred while performing bonafide military duty in an operational area in operation RHINO-II in Assam which was a notified operational area.

15. Keeping in view the aforesaid facts and circumstances of the case and various policies, we converge to the view that the applicant should be considered as Battle Casualty and he be granted War Injury Pension with all consequential benefits.

16. Accordingly, **Original Application 225 of 2011** succeeds and is allowed. The impugned order dated 05.08.2010 vide which the claim for grant of War Injury Pension to the applicant has been denied, is hereby set aside. The respondents are directed to grant War Injury Pension to the applicant with all

consequential benefits treating him as Battle Casualty from the date of discharge and to make necessary calculations with regard to deficiency in pension so accrued on grant of War Injury Pension and pay the same to the applicant within a period of four months from the date of receipt of a certified copy of this order. In case the respondents fail to give effect to this order within the time stipulated above, the applicant would start earning interest on the amount accrued at the rate of 9% from due date till the date of actual payment.

17. There shall be no order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

(Justice D.P. Singh)
Member (J)

Dated: Apr 2017

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