

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

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 240 of 2015

Friday, this the 26th day of May, 2017Hon'ble Mr. Justice D.P. Singh, Member (J)Hon'ble Lt Gen Gyan Bhushan, Member (A)

Lt Col Vijay Kumar (Retd)
 S/o Late J.N. Maheshwari
 V-51023 Ordnance Factory Estate
 Badmal – 767070
 District : Bolangir (Odisha)

..... Applicant

By Legal Practitioner – Col B.P. Singh (Retd), Advocate
 Learned Counsel for the Applicant

Versus

1. Union of India through Secretary,
 Ministry of Defence, 101 South Block,
 New Delhi-110011.
2. Chief of the Army Staff, Integrated Headquarters of the
 Ministry of Defence (Army), South Block,
 New Delhi – 110011.
3. Principal Controller of Defence Accounts (Pension),
 Draupadi Ghat, Allahabad (UP).
4. Additional Directorate General Personnel Services, AG's
 Branch, Integrated HQ of MoD (Army), DHQ PO New
 Delhi – 110011.
5. IHQ of MoD (Army), Dte Gen of Med Services (Army),
 DGMS/MP RS(O), AG's Branch 'L' Block, New Delhi –
 110011.

..... Respondents

By Legal Practitioner - Shri Amit Jaiswal, Advocate
 Central Government Counsel




ORDER

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

1. The Original Application has been filed by the applicant under Section 14 of the Armed Forces Tribunal Act, 2007, claiming the following reliefs:

- “(a) to issue/pass an order to set aside the impugned order dated 07 July 2014 (Annexure A-2) by which the disability pension has been rejected.*
- (b) to issue/pass an order or direction to the respondents to release the disability pension wef 25 Aug 1999; The date of release of the applicant from the Army.*
- (c) to issue/pass an order for the disability pension to be rounded off from 30% to 50% as per the existing orders on the subject passed by the office of the PCDA (P), Allahabad vide their circular No. 290 dated 01/11/2001, refer para 4 (i) of Annexure-9 and specific direction of the apex Court passed in various cases to this effect.*
- (d) to issue/pass any other order or direction that this Hon’ble Tribunal may deem just, fit and proper under the circumstances of the case, and*
- (e) To allow this original application with costs.”*

2. The factual matrix of the case is that the applicant was commissioned in the Army on 10.04.1978. He took premature retirement from service on 25.08.1999. Medical Board held at the time of his release, considered him a low medical category for three diseases, disability due to first disease ‘**SENSORI NEURAL DEAFNESS BIL**’ is assessed as 6-10% and due to second disease ‘**PANUVEITIS WITH LATTICE DEGENERATION WITH RETINAL HOLES (RT) PHOTO COGULATION AND CRYO APPLICATION DONE**’ is assessed as 6-10% and both were considered as attributable to military service but disability due

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to third disease 'PIVD LV-5-S1' was assessed as 11-14% and was considered as neither attributable to nor aggravated by military service. The composite assessment of disabilities was assessed as 30% for two years. The initial claim for grant of disability pension was not processed as the applicant had retired prematurely prior to 01.01.2006. Post issuance of letter dated 29.09.2009, the applicant approached the respondents for grant of disability pension but the same was denied vide order dated 07.07.2014 on the ground that he had retired prematurely at his own request. Aggrieved, he has filed this Original Application.

3. Delay in filing of the Original Application has been condoned vide order dated 11.09.2015.

4. We have heard learned counsels for the parties and perused the record.

5. Learned counsel for the applicant submitted that the applicant took premature retirement on 25.08.1999 after rendering 21 years and 04 months of service in the army. He submitted that the composite disability of the applicant has been assessed as 30% for two years and has been considered as attributable to military service, as such, keeping in view para 173 of Pension Regulations for the Army, 1961 Part I, he is entitled to disability pension. However, he has been denied disability pension because the applicant has retired voluntarily. Learned counsel for the applicant further submitted that in similar cases Armed Forces Tribunal Benches of Delhi, Chandigarh and Lucknow have granted

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reliefs. He relied on the judgments of Armed Forces Tribunal, Principal Bench, Delhi in the case of **Maj Rajesh Kumar Bhardwaj (Retd) vs. Union of India and others (O.A. No. 336 of 2011)** decided on 07.02.2012 and Armed Forces Tribunal, Lucknow Bench in the case of **Lt Col VM Wadhawan (Retd) vs. Union of India & Others (O.A. No. 9 of 2015)** decided on 26.11.2015, as such, the applicant be granted disability pension.

6. **Per contra**, learned counsel for the respondents submitted that the eligibility conditions for entitlement of disability pension are given in Regulation 48 of Pension Regulations for the Army, 1961, Part-I, which stipulates that unless specifically provided disability pension consisting of service element and disability element may be granted to an officer who is invalided out of service on account of a disability which is either attributable to or aggravated by military service in non-battle casualty cases and the disability is assessed at 20% or more. A low medical category officer who retires on superannuation or on completion of tenure can also be granted disability pension under the provision of Regulation 53 of Pension Regulation for the Army 1961, Part - 1, if he fulfills the twin eligibility conditions as stated except that the percentage of disability should be 20% or more. However, as per Regulation 50 of Pension Regulation for the Army 1961, Part-I, an officer proceeding on voluntary/ premature retirement is not eligible for disability pension, even if he otherwise fulfills the twin eligibility conditions for the same as mentioned above. As per

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recommendations of the VIth Central Pay Commission, Government has issued a policy vide Govt. of India, MOD letter No. 16(5)/2008/D (Pens/Policy) dated 29.09.2009, wherein it has been provided that Armed Forces personnel who are retained in service despite disability, which is accepted as attributable to or aggravated by military service and have forgone lump-sum compensation in lieu of that disability, may be given disability element / war injury element at the time of their retirement / discharge on or after 01.01.2006 whether voluntary or otherwise in addition to Retiring / Service pension or Retiring / Service Gratuity.

7. As per policy, Army officials who have become non effective, prior to 01.01.2006 on account of premature retirement, are not eligible for grant of disability pension, as such the claim of the applicant had been rightly rejected.

8. Learned counsel for the applicant has drawn our attention to the **Armed Forces Tribunal Principal Bench judgment dated 07.02.2012 in O.A. No. 336 of 2011 Maj (Retd) Rajesh Kumar Bharadwaj Vs Union of India and others** in which it has been averred that there can be no distinction between persons, who have sought voluntary retirement prior to 01.01.2006 or subsequently to it. To make an artificial distinction on the basis of cut-off date is a serious violation of Article 14 of the Constitution of India, as persons similarly situated have been treated differently. Relevant

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portions of the above quoted Principal Bench judgment are reproduced below:-

"A similar question came up before us in the case of LI Col P.K. Kapur (Retd) Versus Union of India bearing O.A. Nos. 139 of 2009 decided on 30.06.2010" and after reviewing all cases on the subject and considering the law of precedent held that the latest judgment in point of time has to be accepted in the event of conflict of judgments between the two coordinating bench, decision given in the case of "Union of India & Anr. Versus S.P.S. Vains & Ors. (Supra)" hold field till it is reviewed. In the case of Union of India & Anr. Versus S.P.S. Vains & Ors. (Supra) their Lordships have held that this kind of artificial distinction within the similarly situated persons by putting a cut-off date cannot be said to be rational and reasonable. Following that judgment, we have struck down the notification dated 04.05.2009 to the extent of pre & post distinction of 01.01.2006 in the case of "LI Col P.K. Kapur (Retd) Versus Union of India (Supra)".

After that in a recent judgment delivered Hon'ble Supreme Court in the case of "K.J.S. Buttar Versus Union of India and Anr. (Supra)" their Lordships have further observed that distinction based with regard to Article 14- Disability Pension- Applicant, an ex-captain in Indian Army- Commissioned on 12.01.1969- Suffered serious permanent injuries during service- Invalidated out of service- Injury held attributable to military service and degree of disability assessed at 50%- Released from service in Low Medical Category on 10.04.1997- Granted disability pension w.e.f. 26.07.1979- Prayer for disability to be treated at 75% instead of 50% as per Ministry of Defence letter dated 31.01.2001- Respondent contended that the disability cannot be enhanced to 75% as the relevant provision being para 7.2 of Government of India, Ministry of Defence, letter dated 31.01.2001 is applicable only to those officers who were invalidated out of service after 01.01.1996- Appellant invalidated much before 01.01.1996. Held, such restriction of the benefit is violative of Article 14 and hence illegal. Deoki Nandan Aggarwal's case relied [JT 1991 (3) SC 608]. In case of liberalization of an existing scheme, all are to be treated equally as was the case in hand. But if it is introduction of a new retireal benefit, its benefit will not be available to all. Letter of the Ministry of Defence dated 31.01.2001 is only liberalization of an existing scheme. State v. Justice S.S. Dewan [JT 1997 (5) SC 26] held that the restriction of the benefit to only officers who were invalidated out of service after 01.01.1996 is violative of Article 14 of the Constitution and is hence illegal. We are fortified by the view as taken by the decision of this Court in Union of India & Anr. V. Deoki Nandan Aggarwal [JT 1991 (3) SC 608] (Para 11).

Now coming to the facts of the present case, notification dated 29.09.2009 has been issued for giving benefit to the persons who have sought voluntary retirement as earlier it was not possible to be given because of the Regulation 50. Regulation 50 contemplates that no person shall be entitled to disability pension if he sought voluntary retirement. But this was watered down by issuing notification dated 29.09.2009 which reads as under;

*"No. 16(5)/2008/D(Pen/Policy)
Government of India
Ministry of Defence
Deptt. Of Ex-Servicemen Welfare
New Delhi 29th Sept. 2009*

*To
The Chief of the Army Staff
The Chief of the naval Staff
The Chief of the Air Staff*

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[Signature]

Subject : Implementation of Government decision on the recommendation of the Sixth Central Pay Commission – Revision of provisions regulating Pensionary Awards relating to disability pension/war injury pension etc. for the Armed Forces Officers and Personnel Below Officer Rank (PBOR) on voluntary retirement/discharge on own request on or after 01.01.2006.

Sir,

The undersigned is directed to refer to Note below Para 8 and Para 11 of the Ministry's letter No. 1(2)/97/D(Pen-C) dated 31.01.2011, wherein it has been provided that Armed Forces Personnel who retire voluntarily or seek discharge on request, shall not be eligible for any award on account of disability.

2. In pursuance of Government decision on the recommendations of the Sixth Central Pay Commission vide Para 5.1.69 of their Report, President is pleased to decide that Armed Forces personnel who are retained in service despite disability, which is accepted as attributable to or aggravated by Military Service and have foregone lump-sum compensation in lieu of that disability, may be given disability element/war injury element at the time of their retirement/discharge whether voluntary or otherwise in addition to Retiring/Service Pension or Retiring/Service Gratuity.
3. The provisions of this letter shall apply to the Armed Forces personnel who are retired/discharged from service on or after 01.01.2006.
4. Pension Regulations for the three Services will be amended in due course.
5. This issue with the concurrence of Ministry of Defence (fm) vide their U.O. No. 3545(fm/Pen) dated 29.09.2009.
6. Hindi version will follow.

Yours faithfully,
(Harbans Singh)
Director (Pen/Policy)

Copy to :-

"As per standard list".

As per this notification, the benefit has been extended to the Armed Forces personnel as mentioned in paragraph no. 2 of this notification but in paragraph no. 3, they have said that this will be applicable from 01.01.2006 i.e. the persons who have sought voluntary retirement on or after 01.01.2006 will be benefited and rest will not be benefited. Petitioner has retired prior to 01.01.2006, therefore, he has been denied the benefit on account of cut-off date as per notification dated 29.09.2009.

Learned counsel for the respondents has seriously contested before us that Government has financial constraints, therefore, this benefit cannot be extended uniformly to the persons who sought voluntary retirement prior to 01.01.2006. In this connection, learned counsel for the applicant has invited our attention to the subsequent notification dated 03.08.2010 of PBOR which reads as under :

"Tele – 23335048

Addl Dte Gen Personnel Services
Adjutant General's Branch
Integrated HQ of MoD (Army)
DHQ PO, New Delhi – 110011
B/39022/Misc/AG/PS-4 (L)/BC

All legal Cells
All line Dtes

GRANT OF DISABILITY PENSION TO PREMATURE RETIREMENT
CASES PROCEEDING ON DISCHARGE PRIOR TO 01 JAN 2006

1. Further to this office note No. A/39022/Misc/AG/PS-4 (Legal) dt 22 Feb 2010 on subject matter.
2. It is clarified that as and when a pre-2006 retiree PBOR files a court case to claim disability pension which was denied to him merely because he had

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proceeded on Pre-Mature Retirement, such cases will be immediately processed for Government Sanction through respective Line Dtes and Not contested. Government Sanctions in which cases will also be proposed in the same manner as that followed in cases of Government Sanctions issued in compliance of court cases.

3. This arrangement will be effective till MoD/D(Pen/Legal) formulated and issues comprehensive Govt orders.
4. It is re-iterated that only those cases where disability pension was denied to a PBOR solely on the grnds that he had proceeded on PMR will be processed for sanction and will not be contested. Which implies that as and when a PBOR files a case of similar nature their case files will be processed for Govt sanction without awaiting court order.
5. Contents of this letter are not applicable to officers as PRA, Rule 50 has been upheld by Hon'ble Supreme Court in judgment dt 06.07.2010 in case of Lt Col Ajay Wahi (SLP. No. 25586/2004, Civil Appeal No. 1002/2006).
7. All Line Dtes are requested to give wide publicity to this letter amongst all Record Offices.

(Ajay Sharma)
Col
Dir, AG/PS-4 (Legal)
For Adjutant General

Copy to :

MoD/D (Pen/Legal)

JAG Dept

It has been clarified that as and when a pre 2006 retiree PBOR files a court case to claim disability pension which was denied to him merely because he had proceeded on Pre-Mature Retirement, such cases will be immediately processed for Government sanction through respective Line Dtes and not contested Government sanctions in which cases will also be processed in the same manner as that followed in cases of Government sanctions issued in compliance of court cases. That means Government has relaxed the condition for the PBOR, even if they sought voluntary retirement prior to 2006 they will not be denied the benefits of disability pension as per rules. If the Government can show benevolence for PBOR then why not same benefit can be given to the officers who are far less in number than PBOR.

The plea of the respondents of financial constraints is exploded. The number of PBOR who sought voluntary retirement pre 2006 would be hundred times more than that of officers. Therefore, we think that plea taken by the Government of financial constraints is nothing but an afterthought to somehow justify the administrative action. When this benefit has been extended to PBOR, we see no reason why it should not be released to the officer. More so, the justification of financial constraints pleaded by the respondents is exposed on account of that they have released the benefit to the PBOR which are larger number than that of officer. Therefore, in our opinion, this artificial distinction which has been sought to be made of pre and post 01.01.2006 is without any rational basis. It is only a ploy to deprive the benefits of disability pension to the officers' rank.

Hence, we strike down the Clause 3 of the notification dated 29.09.2009. It will be open for the applicant to make their representations to the authority to seek the disability pension benefit in terms of the aforesaid circular and Government will examine the matter and pass appropriate orders in accordance with law. Petition is accordingly allowed. No order as to costs. Both the connected cases bearing OA Nos. 336/2011 stand disposed of in the light of this order. No order as to costs."

9. The applicant has also drawn our attention to the Armed

Forces Tribunal Lucknow Bench judgment in the case of Lt

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Col VM Wadhawan (supra). The Armed Forces Tribunal, Lucknow Bench judgment has mostly relied upon the Principal Bench judgment quoted above, as such does not need any reproduction.

10. In the instant case, there is no dispute that the composite disability was assessed as 30% for two years and was considered as attributable to military service. As per para 173 of Pension Regulations for the Army, 1961 Part I, pension may be granted to an individual who is invalidated out from service on account of disability, which is attributable to or aggravated by military service and percentage of disablement is assessed as 20% or above. As such, he is entitled to disability pension. However, disability pension was not granted to the applicant on the pretext that he was released from service prematurely at his own request prior to 01.01.2006 and the provisions of the Army Headquarters letter dated 29.09.2009 were not applicable to him. The Principal Bench of the Armed Forces Tribunal vide its judgment in the case of **Maj. (Retd.) Rajesh Kumar Bhardwaj** (supra), relying on the Hon'ble Supreme Court decision, has struck down the Notification dated 29.09.2009 to the extent of pre and post distinction of 01.01.2006.

11. In this case composite disability had been assessed as 30% for 2 years, as such, we recall the judgment of Hon'ble The Apex Court in the case of **Veer Pal Singh vs. Ministry of Defence** reported in **(2013) 8 SCC 83** wherein in paras 11, 12, 13, 17, 18

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and 19 of the judgment, the observations made by Hon'ble the Apex Court are as under :

"11. A recapitulation of the facts shows that at the time of enrolment in the army, the appellant was subjected to medical examination and the Recruiting Medical Officer found that he was fit in all respects. Item 25 of the certificate issued by the Recruiting Medical Officer is quite significant. Therein it is mentioned that speech of the appellant is normal and there is no evidence of mental backwardness or emotional instability. It is, thus, evident that the doctor who examined the appellant on 22.05.1972 did not find any disease or abnormality in the behaviour of the appellant. When the Psychiatrist Dr (Mrs) Lalitha Rao examined the appellant, she noted that he was quarrelsome, irritable and impulsive but he had improved with the treatment. The Invaliding Medical Board simply endorsed the observation made by Dr Rao that it was a case of "Schizophrenic reaction".

12. In Merriam Webster Dictionary "Schizophrenia" has been described as a psychotic disorder characterized by loss of contact with the environment, by noticeable deterioration in the level of functioning in everyday life, and by disintegration of personality expressed as disorder of feeling, thought (as in delusions), perception (as in hallucinations), and behavior - called also dementia praecox; schizophrenia is a chronic, severe, and disabling brain disorder that has affected people throughout history.

13. The National Institute of Mental Health, USA has described "schizophrenia" in the following words:

"Schizophrenia is a chronic, severe, and disabling brain disorder that has affected people throughout history. People with the disorder may hear voices other people don't hear. They may believe other people are reading their minds, controlling their thoughts, or plotting to harm them. This can terrify people with the illness and make them withdrawn or extremely agitated. People with schizophrenia may not make sense when they talk. They may sit for hours without moving or talking. Sometimes people with schizophrenia seem perfectly fine until they talk about what they are really thinking. Families and society are affected by schizophrenia too. Many people with schizophrenia have difficulty holding a job or caring for themselves, so they rely on others for help. Treatment helps relieve many symptoms of schizophrenia, but most people who have the disorder cope with symptoms throughout their lives. However, many people with schizophrenia can lead rewarding and meaningful lives in their communities.

17. Unfortunately, the Tribunal did not even bother to look into the contents of the certificate issued by the Invaliding Medical Board and mechanically observed that it cannot sit in appeal over the opinion of the Medical Board. If the learned members of the Tribunal had taken pains to study the standard medical dictionaries and medical literature like The Theory and Practice of Psychiatry by F.C. Redlich and Daniel X. Freedman, and Modi's Medical Jurisprudence and Toxicology, they would have definitely found that the observation made by Dr Lalitha Rao was substantially incompatible with the existing literature on the subject and the conclusion recorded by the Invaliding Medical Board that it was a case of schizophrenic reaction was not well founded and required a review in the context of the observation made by Dr Lalitha Rao herself that with

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the treatment the appellant had improved. In our considered view, having regard to the peculiar facts of this case, the Tribunal should have ordered constitution of Review Medical Board for re-examination of the appellant.

18. In Controller of Defence Accounts (Pension) vs. S Balachandran Nair on which reliance has been placed by the Tribunal, this Court referred to Regulations 173 and 423 of the Pension Regulations and held that the definite opinion formed by the Medical Board that the disease suffered by the respondent was constitutional and was not attributable to military service was binding and the High Court was not justified in directing payment of disability pension to the respondent. The same view was reiterated in Ministry of Defence vs A.V. Damodaran. However, in neither of those cases, this court was called upon to consider a situation where the Medical Board had entirely relied upon an inchoate opinion expressed by the psychiatrist and no effort was made to consider the improvement made in the degree of illness after the treatment.

19. As a corollary to the above discussion, we hold that the impugned order as also the orders dated 14.07.2011 and 16.09.2011 passed by the Tribunal are legally unsustainable. In the result, the appeal is allowed. The orders passed by the Tribunal are set aside and the respondents are directed to refer the case to the Review Medical Board for reassessing the medical condition of the appellant and find out whether at the time of discharge from service he was suffering from a disease which made him unfit to continue in service and whether he would be entitled to disability pension."

12. On the issue of rounding off of disability pension, we are of

the considered view that the case of the applicant is covered by the

decision of Hon'ble The Apex Court in the case of **Union of India**

and Ors vs. Ram Avtar & ors Civil Appeal No 418 of 2012

dated 10th December 2014). Accordingly, we feel that the applicant is entitled to the benefit of rounding off.

13. Keeping in view the discussions, made hereinabove, we are of the opinion that the instant Original Application deserves to be allowed. The applicant is entitled to 30% disability pension for 02 years which needs to be rounded off to 50%. We are also of the view that in terms of **Veer Pal Singh's** case (supra), the case of the applicant needs to be referred to Review Medical Board for

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reassessing the medical condition of the applicant for further entitlement of disability pension, if any.

14. In the result, the **Original Application** is allowed and the impugned letter is set aside. The respondents are directed to grant 30% disability pension for 02 years from the date of retirement which would stand rounded off to 50%. We also direct the respondents that the case of the applicant be referred to Review Medical Board for reassessing the medical condition of the applicant for further entitlement of disability pension, if any. Respondents are also directed to give effect to the order within 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 stipulated time, they will have to pay interest @9% on the amount of arrear accrued from due date till the date of actual payment

15. No order as to costs.


(Lt Gen Gyan Bhushan)
Member (A)

Date: 26th May, 2017
UK/SB


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