

**AFR**  
**Court No. 1**

**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW**

**O.A. No. 307 of 2015**

Wednesday, the 03<sup>rd</sup> day of January, 2018

**Hon'ble Mr. Justice D.P. Singh, Member (J)**  
**Hon'ble Air Marshal BBP Sinha, Member (A)**

Ex-Sgt Amit Kumar Pandey S/O Shri Ram Asrey Pandey, H. No. 1196/64 COD Colony Road, Koyla Nagar, Kanpur-208011 (U.P.).  
.... Applicant

Ld. Counsel for the : **ShriVeer Raghav Chaubey, Advocate**  
Applicant

Verses

1. Union of India through the Secretary Ministry of Defence, South Block, New Delhi.
2. Chief of Air Staff, Air Force Head Office Air Force Head Office, Vayu Bhawan, New Delhi-110106.
3. Director of PA Air Headquarter, West Block-VI, R.K. Puram, New Delhi-110066.
4. CPDA, DrowpadiGhat, Allahabad.
5. DGMS (Air), Air HQ RK Puram, New Delhi-110011.

...Respondents

Ld. Counsel for the : **Dr. Shailendra Sharma Atal,**  
Respondents **Advocate,** Assisted by  
Wg Cdr Sardul Singh,  
OIC Legal Cell.

**ORDER (Oral)**

1. We have heard Shri Veer Raghav Chaubey, Ld. Counsel for the applicant and Dr. Shailendra Sharma Atal, Ld. Counsel for the respondents, assisted by Wg Cdr Sardul Singh, OIC Legal Cell and perused the record.

2. The present petition has been preferred for grant and enhancement of disability pension on the basis of medical opinion expressed in resurvey medical board constituted in pursuance to instructions issued by the second appealcommittee.

3. While assailing the impugned orders dated 21.09.2011 and 21.08.2012, learned counsel for the applicant has invited our attention to the documents filed as Annexures No. 4, 5 and 6 to the Compilation- II to O.A., which reveal that the second appealcommittee constituted re-survey medical board, which enhanced disabilityof the applicant to 50%. Accordingly,submission on behalf of applicant is that he is entitled to 75% disability pension in view of settled proposition of law by its rounding off.

4. On the other hand,Dr. Shailendra Sharma Atal, learned counsel for the respondents, assisted by Wg Cdr Sardul Singh, OIC Legal Cell vehemently opposed the prayer made on behalf of the applicant and submitted that the enhancement of disability of the applicant to 50% by the competent authority was for the purpose of civil employment and this disability is not for military service. Submission is that the enhancement of the applicant's disabilitydone on the direction of second appealcommitteeby re-survey medical board is not sustainable under law.

5. This is well settled proposition of law that disability pension is paid subject to the condition that injury sustained by the incumbent co-relates to military service, in the present case Air Force Service. In the present case disability has been considered by the medical board for the reason that his right upper limb became disable and non-functional. It is admitted fact on record that against the decision of respondents,applicant preferred first appeal which was rejected vide letter dated 21.08.2012 directing the applicant to

make second and final appeal before the second appeal committee. After rejection of first appeal, applicant preferred second appeal and it was the second appeal committee who directed to re-constitute re-survey medical board of the applicant. The said board enhanced the disability of the applicant from 20% to 50%, as is evident from orders dated 29.04.2013, 17.09.2013, 28.02.2014 filed as Annexures 3, 4 and 5 to the O.A., which are reproduced in their totality as under:-

**Annexure No 3**

*“BEFORE THE HON’BLE ARMED FORCES TRIBUNAL  
LUCKNOW BENCH, LUCKNOW*

ORIGINAL APPLICATION NO OF 2015

Tele : 2383724/4703

7 Air Force Hospital  
Nathu Singh Road  
Kanpur Cantt-208004

7 AFH/2763/3/Med

29 Apr 2013

JDA V (Med)  
Air Headquarters  
APRO Building  
Subroto Park  
New Delhi-10

MEDICAL BOARD FOR DISABILITY CERTIFICATE : EX AIRMEN  
770129 EX SGT AMIT KUMAR KPANDEY R/O AFRO

1. Reference is made to your letter No Air HQ/99801/5/DAV (Med) dated 26 Feb 2013.
2. It is intimated that the a/m air veteran reported to this hospital on 23 Apr 13 for re-assessment of his disability (Audit Onset Dystonia (Writer’s Cramp) and issue of disability certificate.
3. He was re-assessed by the Senior Advisor (Medicine) and % of disability was given as 50% accordingly disability certificate was issued bearing registration No 7 AFH/09/2013 dated 23 Apr 13 and duly countersigned by AOC of this hospital on 26 Apr 13.
4. This is for your information please.

Sd/- x xxx  
(Anjali Alam)  
GpCapt

Sr Registrar

Copy to DDAV (IC)-For information wrt your letter No Air HQ/99798/5/2<sup>nd</sup> Appeal/98/Sgt/DP/DAV dated 18 Feb 13.”

6. A plain reading of the communication dated 29.04.2003, contained in Annexure No.3 (supra) shows that reassessment of disability of the applicant was held and a fresh disability certificate was issued with 50% disability. It does not speak whether it is for employment or for payment of disability pension. Air Force Rules provide that from Military or Air Force services a disability is paid. Accordingly, disability enhanced by the Medical Survey Board may count a case for disability of 50%.

**Annexure No 4**

“BEFORE THE HON’BLE ARMED FORCES TRIBUNAL  
LUCKNOW BENCH, LUCKNOW

ORIGINAL APPLICATION NO OF 2015

Tele : 011-25684572

AFGIS

IP No : 23307524

Subroto Park

Fax : 011-25691182

New Delhi-110010

E mail: [afgis@isf.nic.in](mailto:afgis@isf.nic.in)

Air HQ/27863/1/GIS/Accts

17 Sep 13

Ex SGT Amit Kumar Pandey (770129)  
H. No. 1196/64, COD Colony Road  
Koyla Nagar, Kanpur  
U.P.-208011

**PAYMENT OF DISABILITY BENEFIT**

1. Please refer your letter dated 20 Jul 13.
2. In this regard, it is intimated that reply to your letter dated 17 May 13 has already been sent to you vide our letter of even number dated 08 Jun 13. Rule position governing disability payment from this society has already been mentioned in our ibid letter.
3. As per IAP 3601 chapter 8, para 18, AFGIS will make subsequent payment, if any due, as per recommendation of Re-survey Medical Board and advice of DGMS (Air). Therefore, you are required to obtain the amendment in the Invaliding Medical Board order dated 24 Aug 2011 as your percentage of disability to 50%. Otherwise, you are not entitled for further disability benefit from this society.

4. It is pertinent to inform you that the Resurvey Medical Board recommendations has not been received by this society from DGMS (MB) till date.
5. This is for your information.

Sd/- x xxx  
(Raj Kumar)  
Wg Cdr  
JD (Sys &Cont)

Copy to: Dte of Air Veterans -For information. Copy of air  
Subroto Park veteran letter address to  
New Delhi AFRO attached.”

**Annexure No 5**

“BEFORE THE HON’BLE ARMED FORCES TRIBUNAL  
LUCKNOW BENCH, LUCKNOW

ORIGINAL APPLICATION NO OF 2015  
Net-2329-7736 Dte of Air Veterans  
Air Headquarters  
Subroto Park  
New Delhi-10

Air HQ/99801/5/DAV (Med) 28 Feb 2014

AFGIS  
Subroto Park  
New Delhi-10

**INVALIDING MEDICAL BOARD CORRESPONDENCE**  
**IN R/O 770129 EX-SGT AMIT KUMAR PANDEY**

1. It is intimated that above named Ex-Air Warrior was invalided out of service on 15 Jun 2011 for the disability Adult Onset Primary Dystonia (Task Specific-Writer’s Cramp). The IMB considered his disability as neither attributable to nor aggravated by service and the percentage of disablement was assessed as 20% for life.
2. The second appeal committee has accepted his appeal for reconsideration of percentage of disablement. Accordingly his disability was re-assessed at 7 Air Force hospital. The duly constituted medical board at 7AFH has recommended his disability as 50%. Accordingly he was issued with a certificate bearing the no. 7 AFH/09/2013 dated 23 Apr 2013 (copy annexed).
3. Now, individual’s brother (Wg Cdr JK Pandey) has represented to undersigned for one time grant for increased percentage of disablement to the Ex-Air Warrior.
4. Copy of certificate no. 7AFH/09/2013 dated 23 Apr 2013 is annexed for your further necessary action.

Sd/- x xx  
 (Shital S Vachhani)  
 Wg Cdr  
 JD AV (Med)

Annexure :As stated.

Copy to:-

Wg Cdr JK Pandey  
 Air Force Police HQ  
 4 P&S Unit, AF N-2 Road  
 Harjinder Nagar Kanpur-208007”

The combined reading of the aforesaid letters shows that the disability of the applicant was assessed to 50% by a duly constituted re-survey medical board in accordance with the rules. It shall be fraud with the constitution in case disability is divided for civil services and military service. Physical disability being the same cannot be bifurcated in two parts, one for the civil employment and other for military service. Such action on the part of respondents shall be fraud under Article 14 read with Article 21 of the constitution. Injury suffered by the members of the Armed Forces in case is the same, respondents have no right to assess it keeping in view the subsequent employment. In case it is done, it shall be fraud with the constitutional right to live with dignity and right to livelihood and all other facets of life necessary under part III of the constitution. No authority even the courts have jurisdiction to deprive a person even by fiction of law, keeping in view catena of judgments of Hon'ble Supreme Court.

7. Otherwise also letters dated 29.04.2013, 17.09.2013, 28.02.2014 at the face of record do not bifurcate applicant's ailment for civil or military service. Even if any letter has been submitted by the applicant for any other purpose whatsoever it shall be against constitutional ethos on the part of the respondents in case they have considered it keeping in view the future employment. Injury suffered by a person during service should not be looked

into and tagged with the subsequent employment. In case it is done it should be stopped immediately. A medical board or re-survey medical board is not supposed to give its opinion keeping in view the future employment of the incumbent serving in the armed forces. Vide letter dated 17.09.2013, filed as Annexure No. 4, reproduced herein above, applicant has been informed that he requires amendment in the invalidating order dated 24.08.2011 for 50% disability. The letter dated 29.04.2013 as contained in Annexure No.3 to the petition, enhancing disability of the applicant to 50% is reproduced as under :-

“ Annexure No. 3

7 Air Force Hospital  
Nathu Singh Road  
Kanpur Cantt 208004

29 Apr 2013

7 AFH/ 2763/3/Med

JDAV (Med)  
Air Headquarters  
APRO Building  
Subroto Park  
New Delhi -10

MEDICAL BOARD FOR DISABILITY CERTIFICATE; EX AIRMEN  
770129 EX SGT AMIT KUMAR PANDEY R/O AFRC

1. Reference is made to your letter No. Air HQ/ 99801/5/DAV (Med) dated 26 Feb 2013.
2. It is intimated that the a/m veteran reported to this hospital on 23 Apr 13 for re-assessment of his disability (Adult Onset Dystonia ( Writer's Cramp)) and issue of disability certificate.
3. He was re-assessed by the Senior Advisor (Medicine) and % of disability was given as 50%, accordingly disability certificate was issued bearing registration No. 7 AFH/09/2013 dated 23 Apr 13 and duly countersigned by AOC of this hospital on 26 Apr 13.
4. This is for your information please.

Sd/-  
(Anjali Alam)  
GpCapt

Sr Registrar

Copy to: DDAV (III)- For information w.r.t. your letter No. Air  
HQ/99798/5/2<sup>nd</sup> Appeal/98/Sgt/DP/DAV dated 18 Feb  
13”

8. Respondents have not denied that the payment of disability @ 50% was accepted, instructing the applicant to get order dated 24.08.2011 amended for enhancement to 50%. Such instruction to a retired employee does not seem to be justified. It was the duty of the respondents and its appropriate authority to take further action for the cause of amendment of the order dated 24.08.2011 instead of directing the applicant to do the job. While deciding the representation dated 20.07.2013 (supra) instead of passing order dated 17.09.2013, shifting the burden on the applicant, respondents themselves should have proceeded to take necessary action required for payment of disability pension to the extent of 50%. Thus, gross in justice has been done by shifting the burden on the applicant.

9. Another letter dated 28.02.2014 shows that it was a second appeal committee which has decided for reconsideration of the % of disablement. The duly constituted medical board recommended disability to 50%. For convenience the order dated 28.02.2014 filed as Annexure No.5 to the petition is reproduced as under :-

“Annexure No.5

Air HQ/99801/5/DAV (Med)

AFGIS

Subrato Park

New Delhi- 10

Dte of Air Veterans  
Air Headquarters  
Subrote Park,  
New Delhi – 10  
28 Feb 2014

INVALIDING MEDICAL BOARD CORRESPONDENCE



I/R/O 770129 EX-SGT AMIT KUMAR PANDEY

1. It is intimated that above named Ex- Air Warrior was invalided out of service on 15 Jun 2011 for the disability Adult Onset Primary Dystonia (Task Specific- Writer's Cramp). The IMB considered his disability as neither attributable to nor aggravated by service and the percentage of disablement was assessed as 20% for life.
2. The second appeal committee has accepted his appeal for reconsideration of percentage of disablement. Accordingly his disability was re-assessed at 7 Air Force Hospital. The duly constituted medical board at 7AFH has recommended his disability as 50%. Accordingly he was issued with a certificate bearing the no. 7AFH/09/2013: dated 23 Apr 2013 (copy annexed).
3. Now, individual's brother (wg Cdr JK Pandey) has represented to undersigned for one time grant for increased percentage of disablement to the Ex- Air Warrior.
4. Copy of certificate no. 7AFH/09/2013 dated 23 Apr 2013 is annexed for your further necessary action.

Sd/-  
(Shital S Vachhani)  
Wg Cdr  
JD AV (Med)

Annexure: As Stated

Copy to:-

Wg Cdr JK Pandey  
Air Force Police HQ  
4 P&S Unit, AF N-2 Road  
Harjinder Nagar Kanpur – 208007 ”

10. Enhancement of disability to 50% has not been done merely on applicant's request by re-survey medical board but it was done in compliance of order passed by second appeal committee. The second appeal committee has exercised statutory power after first appeal committee. Second appeal committee was well within its jurisdiction to direct for re-survey medical board while deciding the appeal, resulting into issuance of certificate dated 29.04.2013.
11. Whether first or second appeal is continuation of original suit or trial ? Order passed by the original authority was subject to scrutiny by first or second appeal committee. The second appeal committee exercised

jurisdiction within its power. It is well settled proposition of law that appeal, in the present case second appeal is in continuation of order passed by first or original authority. The order passed by the first authority or first appeal committee merges into the order passed by the second appeal committee. There is no need for the applicant to move any application for correction or order dated 29.04.2013. It was the statutory duty and administrative function of the respondents or competent authority to issue a fresh order on the basis of finding recorded by the second appeal committee as is evident from order dated 28.02.2014, contained in Annexure No.5 to the petition. Instead of correcting the order by themselves, respondents shifted the burden on the applicant to run from pillar to post, which is abuse of process of law and against the principle of doctrine of merger.

12. It may be mentioned here that appeal is a creation of Statute and it cannot be created by acquiescence of the parties or by the order of the Court. The finding of a Court or a Tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction, as doctrine of nullity will come into operation, vide **United Commercial Bank Ltd vs. Their Workmen**, AIR 1951 SC 230. In **Pranab Kumar Mitra vs. State of West Bengal**, AIR 1959 Hon'ble Supreme Court held that a right of appeal is a statutory right which has got to be recognised by the courts, and the right to appeal, where one exists, cannot be denied in exercise of the discretionary power even of the High Court. (See also **U.P. Power Corporation Ltd. Vs. Virendra Lal**, (2013) 10 SCC 39). Same view has been taken by Hon'ble Supreme Court in **A.R. Antulay vs. R.S. Nayak**, AIR 1988 SC 1531 and **Akhtari Bir vs. State of Madhya Pradesh**, AIR 2001 SC 1528.

13. Hon'ble Supreme Court in **Santosh Hazari vs. Purushottam Tiwari**, (2001) 3 SCC 179, observed as under :-

“The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law.... While writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate Court is entitled to interfere with the finding of fact.”

In view of aforesaid settled proposition of law, appeal committee acted within their jurisdiction directing for resurvey medical board and orders passed by first original authority and first appeal committee merged into it. On the other hand no other argument has been advanced by the respondents nor any document or record has been placed on record to establish that the order of second appeal committee was for different purpose than to grant disability pension.

14. Applicant has suffered with mental pain and agony without any fault. The fault is on the part of the respondents, who have not complied with the order passed by the second appeal committee. Once second appeal committee has passed the order then all earlier orders stand merged in the order of second appeal committee. In such circumstances, applicant has been compelled to approach the Tribunal for implementation of the order passed by the second appeal committee. Hon'ble Supreme Court in the case of **Ramrameshwari Devi and others V. Nirmala Devi and others**, (2011) 8 SCC 249 has given emphasis to compensate the litigants who have been forced to enter litigation. This view has further been

rendered by Hon'ble Supreme Court in the case reported in **A. Shanmugam** **V.**

**AriyaKshetriyaRajakulaVamsathuMadalayaNandhavanaParipala nai Sangam represented by its President and others**, (2012) 6 SCC 430. In the case of **A. Shanmugam** (supra) Hon'ble the Supreme considered a catena of earlier judgments for forming opinion with regard to payment of cost; these are:

1. **Indian Council for Enviro-Legal Action V. Union of India**, (2011) 8 SCC 161;
2. **Ram Krishna Verma V. State of U.P.**, (1992) 2 SCC 620;
3. **Kavita Trehan V. Balsara Hygiene Products Ltd.** (1994) 5 SCC 380;
4. **Marshall Sons & CO. (I) Ltd. V. Sahi Oretrans (P) Ltd.**, (1999) 2 SCC 325;
5. **Padmawati V. Harijan Sewak Sangh**, (2008) 154 DLT 411;
6. **South Eastern Coalfields Ltd. V. State of M.P.**, (2003) 8 SCC 648;
7. **Safar Khan V. Board of Revenue**, 1984 (supp) SCC 505;
8. **Ramrameshwari Devi and others** (supra).

In view of above, it is a fit case where an exemplary cost should be imposed upon the respondents as he suffered mental pain and agony on account of inaction of the respondents in implementation of order passed by the second appeal committee, which is quantified at Rs.50,000/- and shall be released to the applicant through cheque.

15. Since petitioner suffered the injury during the course of employment in the Indian Air Force, he seems to be entitled for dis-ability pension. Question with regard to disability pension is no more res-integra in view of decisions of Hon'ble Supreme Court in the case of **Dharamvir Singh vs. Union of India &Ors** and **Sukhvinder Singh vs. Union of India &Ors**, reported in 2014

STPL (Web) 468 SC and (2013) 7 SCC 316 respectively. While considering the question with regard to attributability of the disease to army services, Hon'ble Supreme Court held as under:-

*"18. A disability "attributable to or aggravated by military service" is to be determined under the Entitlement Rules for Casualty Pensionary Awards, 1982, as shown in Appendix II. Rule 5 relates to approach to the Entitlement Rules for Casualty Pensionary Awards, 1982 based on presumption as shown hereunder:*

*"5. The approach to the question of entitlement to casualty pensionary awards and evaluation of disabilities shall be based on the following presumptions:*

***Prior to and during service***

*(a) A member is presumed to have been in sound physical and mental condition upon entering service except as to physical disabilities noted or recorded at the time of entrance.*

*(b) In the event of his subsequently being discharged from service on medical grounds any deterioration in his health, which has taken place, is due to service."*

*From Rule 5 we find that a general presumption is to be drawn that a member is presumed to have been in sound physical and mental condition upon entering service except as to physical disabilities noted or recorded at the time of entrance. If a person is discharged from service on medical ground for deterioration in his health it is to be presumed that the deterioration in the health has taken place due to service."*

*"28. The learned counsel for the respondent Union of India relied on decisions of this Court in **Om Prakash Singh v. Union of India** (2010)12 SCC 667, **Ministry of Defence v. A.V. Damodara**(2009) 9 SCC 140, **Union of India v. Ram Prakash** (2010) 11 SCC 220 and submitted that this Court has already considered the effect of Rules 5, 14(a), (b) and (c) and held that the same cannot be read in isolation. After perusal of the aforesaid decisions we find that Rules 14(a), 14(b) and 14(c) as noticed and quoted therein are similar to Rule 14 as published by the Government of India and not Rule 14 as quoted by the respondents in their counter-affidavit. Further, we find that the question as raised in the present case that in case no note of disease or disability was made at the time of individual's acceptance for military service, the Medical Board is required to give reasons in writing for coming to the finding that the disease could not have been detected on a medical examination prior to the acceptance for service was neither raised nor answered by this Court in those cases. Those were the cases which were decided on the facts of the individual case based on the opinion of the Medical Board."*

16. In view of aforesaid settled proposition of law, since the applicant suffered injuries while working in Indian Air Force for more than 17 years, injury suffered by the applicant is obviously attributable to Military Service (in

the present case Air Forceservice). The second case we would like to refer to it is **Sukhvinder Singh vs. Union of India &Ors**, reported in 2014 STPL (Web) 468 SC in which the Apex Court held that wherever a member of the Armed Forces is invalided out of service, it perforce has to be assumed that his disability was found to be above twenty per cent and further as per the extant Rules/Regulations, a disability leading to invaliding out of service would attract the grant of fifty per cent disability pension. Relevant portion of the judgment of Hon'ble Supreme Court in the case of **Sukhvinder Singh (supra)** is reproduced as under:-

*“19. We are of the persuasion, therefore, that firstly, any disability not recorded at the time of recruitment must be presumed to have been caused subsequently and unless proved to the contrary to be a consequence of military service. The benefit of doubt is rightly extended in favour of the member of the Armed Forces; any other conclusion would be tantamount to granting a premium to the Recruitment Medical Board for their own negligence. Secondly, the morale of the Armed Forces requires absolute and undiluted protection and if an injury leads to loss of service without any recompense, this morale would be severely undermined. Thirdly, there appears to be no provisions authorizing the discharge or invaliding out of service where the disability is below twenty per cent and seems to us to be logically so. Fourthly, wherever a member of the Armed Forces is invalided out of service, it perforce has to be assumed that his disability was found to be above twenty per cent. Fifthly, as per the extant Rules/Regulations, a disability leading to invaliding out of service would attract the grant of fifty per cent disability pension.*

*20. In view of our analysis, the Appellant would be entitled to the Disability Pension. The Appeal is, accordingly, accepted in the above terms. The pension along with the arrears be disbursed to the Appellant within three months from today.”*

17. In view of the above, O.A. deserves to be allowed. Accordingly, O.A. is allowed and the impugned orders dated 21.09.2011 and 21.08.2012 are set aside with all consequential benefits.

Applicant is further held entitled to 50% disability pension, which is rounded off to 75% in view of settled proposition of law (supra). The applicant shall be paid disability pension @ 20% from the date of his discharge till his re-survey medical board and @ 50% from the date the re-survey medical board has given its opinion i.e. 23.04.2013 with all consequential benefits

within four months from today, failing which applicant shall also be entitled for interest @ 10% till the date of actual payment of amount in question.

Since the applicant suffered mental pain and agony on account of inaction of the respondents in implementation of order passed by the second appeal committee, as held herein above, he is also held entitled for the cost, which is quantified at Rs.50,000/- and shall be released to the applicant through cheque.

**(Justice Devi Prasad Singh)  
Member (J)**

Dated: 03<sup>rd</sup> January, 2018

JPT

I am with respectful disagreement with the view taken by my esteemed Brother (Justice Devi Prasad Singh, Member (J)). I propose to deliver my own judgment. Order reserved.

**(Air Marshal BBP Sinha)  
Member (A)**

Dated: 03<sup>rd</sup> January, 2018

JPT

