

RESERVED

COURT No.1

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

ORIGINAL APPLICATION No. 199 of 2018

Thursday, this the 30th day of August, 2018

Hon'ble Mr. Justice SVS Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

Ex Sub JC-802551L Harish Chandra Mishra,
S/o Mahesh Chandra Mishra,
Vill & Post – Mohallah Sharda Nagar, Lilmatha
(Near Airtel Tower), Teh- Lucknow, Lucknow- 226002

....Applicant

Ld. Counsel for the Applicant: **Shri Virat Anand Singh,
Advocate**

Vs.

1. Union of India through the Secretary, Ministry of Defence,
South Block New Delhi, 110011.
2. Chief of the Army Staff, Integrated HQ of Mod (Army),
DHO PO New Delhi-110011.
3. Director PS-4, Addl. Dte Gen of Manpower,
Adjutants General's Branch, IHQ of MoD (Army),
PIN - 900256.

.....Respondents

Ld. Counsel for the :
Respondents

**Shri Sunil Sharma,
Central Govt Counsel**

ORDER

“Per Hon’ble Air Marshal BBP Sinha, Member (A)”

1. Present Original Application has been filed by the applicant under Section 14 of the Armed Forces Tribunal Act, 2007 with the following prayers:

(i) To quash and Set aside the finding/opinion of RMB dated 22 Feb 2010 opinion whereby Applicant’s Disability categorised as NOT CONNECTED TO MILITARY SERVICE hence no Disability Pension.

(ii) To direct the respondents to decide, and to grant Disability pension (composite assessment) to the Applicant from date of his Discharge-31 March 2010.

(iii) To direct respondents to also ROUND OFF the disability pension of the Applicant from 30% to 50% as per rounding off policy.

(iv) To direct the respondents to consider applicants right to Ex-gratia payment also, as applicable.

(v) To pass orders which their lordships may deem fit and proper in the existing facts and circumstances of the case.

(vi) Allow this application with cost.

2. Brief facts as emerging from the pleadings on record are that the applicant was enrolled in the Indian Army on 13.03.1982 and discharged from service on 31.03.2010. Applicant’s Release Medical Board was held on 22.02.2010 which assessed BILATERAL POSTERIOR SUB CAPSULAR CATARACT as 6 to 10% and PRIMARY HYPERTENSION as 30%. However, the Medical Board held that both the disabilities were Not Connected with Military service. Feeling aggrieved, the applicant preferred First Appeal praying for grant of disability pension in July 2017

which has not been replied till date. Feeling aggrieved, the applicant has preferred the instant O.A.

3. We have heard learned counsel for the parties and have perused the record.

4. The delay in filing of Original Application has been condoned vide order dated 09.04.2018.

5. Learned Counsel for the applicant submitted that at the time of enrolment, the applicant was found mentally and physically fit for service in the Indian Army and there is no note in the service documents that he was suffering from any disease at the time of entry in service. Learned Counsel for the applicant submitted that since the disease was contacted during the service, it is attributable to and aggravated by military service. He further submitted that various Benches of Armed Forces Tribunal have granted disability pension in similar cases, as such the applicant be granted disability pension as well as arrears thereof. Learned Counsel for the applicant also submitted that as per Government Order dated 31.01.2001 the disability pension be rounded off to 50%.

6. **Per contra**, Learned Counsel for the respondents submitted that as per policy applicant's disability pension claim was preferred to PCDA (Pension), Allahabad, for adjudication and was rightly rejected as per Paragraph 173 of Pension Regulations 1961 (Part-1), which clearly states that pension may be granted to

an individual who is invalided 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. Since his disability was considered as neither attributable to nor aggravated by military service it has been correctly denied to him. However, subsequently Ld. Counsel for the respondents conceded that in consonance with various judgments of Hon'ble The Supreme Court and Armed Forces Tribunals, the applicant is entitled to disability pension.

7. We have heard the parties and examined documents on record.

8. On the issue of attributability of disability to military service, we would like to refer to the decisions of Hon'ble The Apex Court in **Dharamvir Singh Vs. Union of India and Ors** reported in **(2013) 7 Supreme Court Cases 316**, in which Hon'ble The Apex Court took note of the provisions of the Pensions Regulations, Entitlement Rules and the General Rules of Guidance to Medical Officers to sum up the legal position emerging from the same in the following words:

"29.1. Disability pension to be granted to an individual who is invalided from service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20% or over. The question whether a disability is attributable to or aggravated by military service to be determined under the Entitlement Rules for Casualty Pensionary Awards, 1982 of Appendix II (Regulation 173).

29.2. *A member is to be presumed in sound physical and mental condition upon entering service if there is no note or record at the time of entrance. In the event of his subsequently being discharged from service on medical grounds any deterioration in his health is to be presumed due to service [Rule 5 read with Rule 14(b)].*

29.3. *The onus of proof is not on the claimant (employee), the corollary is that onus of proof that the condition for non-entitlement is with the employer. A claimant has a right to derive benefit of any reasonable doubt and is entitled for pensionary benefit more liberally (Rule 9).*

29.4. *If a disease is accepted to have been as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstances of duty in military service [Rule 14(c)]. [pic]*

29.5. *If no note of any disability or disease was made at the time of individual's acceptance for military service, a disease which has led to an individual's discharge or death will be deemed to have arisen in service [Rule 14(b)].*

29.6 *If medical opinion holds that the disease could not have been detected on medical examination prior to the acceptance for service and that disease will not be deemed to have arisen during service, the Medical Board is required to state the reasons[(Rule 14 (b)); and*

29.7 *It is mandatory for the Medical Board to follow the guidelines laid down in Chapter II of the "Guide to Medical Officers (Military Pensions), 2002 -"Entitlement : General Principles", including Paras 7,8 and 9 as referred to above (para 27).*

XXX XXX XXX

31. *In the present case it is undisputed that no note of any disease has been recorded at the time of the appellant's acceptance for military service. The respondents have failed to bring on record any document to suggest that the appellant was under treatment for such a disease or by hereditary he is suffering from such disease. In the absence of any note in the service record at the time of acceptance of joining of appellant, it was incumbent on the part of the Medical Board to call for*

records and look into the same before coming to an opinion that the disease could not have been detected on medical examination prior to the acceptance for military service, but nothing is on record to suggest that any such record was called for by the Medical Board or looked into it and no reasons have been recorded in writing to come to the conclusion that the disability is not due to military service. In fact, non-application of mind of Medical Board is apparent from clause (d) of Para 2 of the opinion of the Medical Board, which is as follows :-

“(d) In the case of a disability under (c) the Board should state what exactly in their opinion is the cause thereof.

YES

Disability is not related to military service”.

XXX

XXX

XXX

33. *In spite of the aforesaid provisions, the pension sanctioning authority failed to notice that the Medical Board had not given any reason in support of its opinion, particularly when there is no note of such disease or disability available in the service record of the appellant at the time of acceptance for military service. Without going through the aforesaid facts the Pension Sanctioning Authority mechanically passed the impugned order of rejection based on the report of the Medical Board. As per Rule 5 and 9 of the Entitlement Rules for Casualty Pensionary Awards, 1982, the appellant is entitled for presumption and benefit of presumption in his favour. In the absence of any evidence on record to show that the appellant was suffering from “Generalised Seizure (Epilepsy)” at the time of acceptance of his service, it will be presumed that the appellant was in sound physical and mental condition at the time of entering the service and deterioration in his health has taken place due to service.*

XXX

XXX

XXX

35. *In view of the finding as recorded above, we have no option but to set aside the impugned order passed by the Division Bench dated 31-7-2009 in Union of India v. Dharamvir Singh and uphold the decision of the learned Single Judge dated 20-5-2004. The impugned order is set aside and accordingly the appeal is allowed. The respondents are directed to pay the appellant the benefit in terms of the order passed by the learned Single Judge in accordance with law*

within three months if not yet paid, else they shall be liable to pay interest as per the order passed by the learned Single Judge. No costs.”

9. In another case of similar nature with regard to grant of disability pension, we would also like to recall the judgment passed in the case of **Sukhvinder Singh Vs. Union of India**, reported in (2014) STPL (WEB) 468 SC, in Para 9 of the judgment Hon'ble The Apex Court has held as under:

“9. 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.....”.

10. In the instant case, the applicant was enrolled in the Army on 13.03.1982 and was discharged from service on 31.03.2010 after fulfilling the conditions of service in low medical category for the disease “PRIMARY HYPERTENSION and BILATERAL POSTERIOR SUB CAPSULAR CATARACT”. We have given due consideration to the rival submissions made by Learned Counsel for the parties. We find that at the time of enrolment the applicant was in sound physical and mental condition and was medically fit to join the Army. There is no note of any disease or disability in the service record of the applicant at the time of enrolment.

Additionally the Release Medical Board has given a cryptic brief one line reason for denying attributability i.e. 'Not connected with Military service'. We do not consider this cryptic one line explanation in Release Medical Board to be good enough to deny attributability and explain as to why the disability could not be detected at the time of enrolment. Thus in view of the above, we are of the considered opinion that while the disability "BILATERAL POSTERIOR SUB CAPSULAR CATARACT" may not be attributable to service. His second disability "Primary Hypertension" is to be considered as aggravated by military service.

11. We are of the considered view that the case of the applicant for rounding off of disability pension is covered by the decision of Hon'ble The Appex Court in the case of **Union of India and Ors vs. Ram Avtar & Ors (Civil Appeal No. 418 of 2012 dated 10 December, 2014)**. Accordingly, we are of the view that the applicant is entitled to the benefit of rounding off.

12. In view of the above, we are of the view that after removing the disability percentage related to "BILATERAL POSTERIOR SUB CAPSULAR CATARACT" i.e. 6% to 10% out of the composite 30% disability assessed by RMB for life, the applicant is entitled to 20% disability for life which shall stand rounded off to 50% for life.

13. Thus in the result, the **Original Application No.199 of 2018** succeeds and is allowed. The respondents are directed to grant disability element of pension to the applicant @ 20% for life which would stand rounded off to 50% from three years prior to filing of this O.A. Date of filing of O.A. is 06.02.2018. The respondents are directed to pay the disability pension to the applicant alongwith arrears within four months from the date of receipt of a certified copy of this order. In case the respondents fail to pay the amount to the applicant within four months, they will have to pay interest @ 9% from due date till the date of actual payment.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

(Justice S.V.S. Rathore)
Member (J)

Dated: August, 2018
ukt