

E. Court No.1**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW****Original Application No. 130 of 2020**Tuesday, this the 24th day of August 2021**Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)**
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)Personal No. 81588-A, Commander (SD PR) (Retd) Deo Vrat
Tiwari, son of Late Ram Narayan Tiwari, R/o D1/228, Sushant Golf
City, Lucknow- 226030

..... Applicant

Ld. Counsel for the: **Shri Manoj Kumar Awasthi, Advocate**
Applicant

Versus

1. Union of India through the Secretary, Ministry of Defence, (Navy), New Delhi- 110011.
2. Chief of the Naval Staff, Defence (for PDOP/PDPS) Integrated Headquarters, Ministry of Defence (Navy), 'C' Wing, Sena Bhawan, New Delhi - 110011.
3. The Principal Director Integrated Headquarters Ministry of Defence (Navy), Directorate of Pay & Allowances D- II Wing, Sena Bhawan, New Delhi – 110011.
4. The Principal Controller of Defence Accounts (Navy) Pension Cell, No- 1, Cooperage Road, Mumbai- 400039

..... Respondents

Ld. Counsel for the : **Dr. Gyan Singh,**
Respondents **Central Govt Counsel.**

ORDER**“Per Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)”**

1. This Original Application was filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007, whereby the applicant has sought following reliefs:-

- (a) *To issue pass an order or directions to set-aside/ quash the order no. PN/7110/DP/13 dated 10 December 2012, order No PN/7110/DP/13 dated 01.05.2018 and order no. PN/7110/DP/13 dated 20.09.2019 passed by respondent no. 3.*
- (b) *To issue pass an order or directions to the respondents to grant Disability element of disability pension element @ 30% with effect from date of superannuation i.e. 31.10.2013 in light of Hon’ble Apex Court judgments.*
- (c) *To issue pass an order or directions to respondents to grant benefit of rounding off disability element of disability pension @ 30% to @ 50% for life to the applicant and pay due arrears including consequential benefits with interest @ 12% p.a. till final payment is made in light of Hon’ble Apex Court judgments and letter dated 31.01.2001.*
- (d) *Any other relief which the Hon’ble Tribunal may deem fit and proper in the fact and circumstance of the case is also granted alongwith cost of the O.A.*

2. Rejoinder affidavit filed by learned counsel for the applicant is taken on record.

3. Brief facts of the case are that the applicant joined Naval service as a boy on 24.12.1976. He was commissioned on 01.10.1988 and was superannuated from service on 31.10.2013. Release Medical Board of the applicant held at the time of discharge assessed his disability (a) **“PRIMARY HYPERTENSION”** @ 30% and considered as neither attributable

to nor aggravated (NANA) by service and (b) "**MEGALOBlastic ANAEMIA**" @ 20% for 6 months and considered as aggravated by service due to dietary compulsions of service. Applicant has been granted service pension for his services rendered in Navy and he has also been granted disability element for the disability "**MEGALOBlastic ANAEMIA**" for 6 months. Claim of the applicant for grant of disability element for the disability "**PRIMARY HYPERTENSION**" has been rejected by the respondents. Being aggrieved, the applicant has filed the instant O.A. for grant of disability element and its rounding off from the date of retirement for disability "**PRIMARY HYPERTENSION**".

4. Learned counsel for the applicant submitted that at the time of retirement Release Medical Board (RMB) of the applicant was held and his disability (a) **PRIMARY HYPERTENSION** was assessed @ 30% and considered as neither attributable to nor aggravated by service and (b) **MEGALOBlastic ANAEMIA** was assessed @ 20% for 6 months and considered as aggravated by service due to dietary compulsions of service. Applicant was granted service pension for his services rendered in Navy. He further submitted that applicant was granted disability element for six months for disability **MEGALOBlastic ANAEMIA**. No disability element was granted for the disability **PRIMARY HYPERTENSION** assessed @ 30%. Learned counsel for the applicant prayed that applicant should be granted disability

element @ 30% rounded of to 50% for life for the disability **PRIMARY HYPERTENSION** from the date of retirement.

5. Per contra, learned counsel for the respondents submitted that as per rule applicant has been granted service pension for the services rendered in Navy and disability element for the disability **MEGALOBlastic ANAEMIA** for six months. **PRIMARY HYPERTENSION** is an idiopathic disorder with a strong genetic correlation and not attributable to service vide para 43 of Chapter VI, (Guide to Medical officers (Military Pensions), 2002, amendment 2008. Since the disability **PRIMARY HYPERTENSION** was found as neither attributable to nor aggravated by service and no period was mentioned in RMB, hence disability element for the same was rejected.

6. Heard Shri Manoj Kumar Awasthi, Ld. Counsel for the applicant and Dr. Gyan Singh, learned counsel for the respondents and perused the record.

7. On perusal of record, it transpires that applicant has been granted disability element for the disease **MEGALOBlastic ANAEMIA** for six months as recommended by RMB. The claim of the applicant for grant of disability element for the disease **PRIMARY HYPERTENSION** was rejected being NANA. The question before us for consideration is simple and straight whether disability of applicant is attributable to or aggravated by military service and for what period?

8. In RMB, disease of the applicant **PRIMARY HYPERTENSION** has been assessed @ 30% but no period has been mentioned. Since the disease is of permanent nature, it is presumed for life. The law on attributability of a disability has already been settled by the Hon'ble Supreme Court in the case of ***Dharamvir Singh vs. Union of India & Ors*** (supra). In this case 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)."

9. Thus, considering all issues we have noted that Release Medical Board had not given any reason in support of its opinion, particularly there is no note of such disease or disability available in the service record of the applicant at the time of acceptance for Military service. In absence of any evidence on record to show that the applicant was suffering from disease at the time of acceptance of his service and the fact that the applicant had rendered more than 24 years of service when for the first time the disease was detected in the year 2001, it will be presumed that the applicant was in sound physical and mental condition at the time of entering the service and deterioration in his health has taken place due to navy service. Hence in the circumstances of the case, we are inclined to give the benefit of doubt as per the law settled on this matter vide Hon'ble Apex Court decision in the case of ***Dharamvir Singh*** (Supra). Therefore, we consider the disease of the applicant as aggravated by military service.

10. On the issue of rounding off of disability pension, we are of the opinion that the case is squarely covered by the decision of ***K.J.S. Buttar vs. Union of India and Others***, reported in (2011) 11 SCC 429 and Review Petition (C) No. 2688 of 2013 in Civil

appeal No. 5591/2006, **U.O.I. & Anr vs. K.J.S. Buttar and Union of India vs. Ram Avtar & Others**, (Civil Appeal No. 418 of 2012 decided on 10 December, 2014. Hence the applicant is eligible for the benefit of rounding off also.

11. It is also observed that claim for pension is based on continuing wrong and relief can be granted if such continuing wrong creates a continuing source of injury. In the case of **Shiv Dass vs. Union of India**, reported in 2007 (3) SLR 445, Hon'ble Apex Court has observed:

“In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition. It would depend upon the fact of each case. If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years. The High Court did not examine whether on merit appellant had a case. If on merits it would have found that there was no scope for interference, it would have dismissed the writ petition on that score alone.”

12. As such, in view of the decision of Hon'ble Supreme Court in the case of **Shiv Dass (supra)**, we are of the considered view that benefit of rounding off of disability pension @ 30% for life to be rounded off to 50% for life may be extended to the applicant from three preceding years from the date of filing of the Original Application.

13. In view of the above, the Original Application deserves to be allowed, hence **allowed**. The impugned orders passed by the respondents rejecting the claim of the applicant for grant of disability element are set aside. The applicant is entitled to get disability element @30% for life which would be rounded off to 50% for life from w.e.f. three years preceding the date of filing this Original Application. The date of filing this Original Application is 12.02.2020. The respondents are directed to give effect to this order within a period of four months from the date of receipt of a certified copy of this order. Default will invite interest @ 8% per annum till actual payment.

14. No order as to costs.

(Vice Admiral Abhay Raghunath Karve) (Justice Umesh Chandra Srivastava)
Member (A) Member (J)

Dated: 24 August, 2021

Ukt/-