

Court No. 1**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****ORIGINAL APPLICATION No. 369 of 2023**Tuesday, this the 22nd day of August, 2023**“Hon’ble Mr. Justice Ravindra Nath Kakkar, Member (J)”****“Hon’ble Vice Admiral Atul Kumar Jain, Member (A)”**

No. 6948454M, Ex. Hav. Pradeep Kumar Singh S/o Shri Ram Surat Singh, Residing now at House No. 281, Sector 02, Janakipuram Extension, Janakipuram, Lucknow -226031.

..... Applicant

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

Versus

1. Union of India, through Secretary, Ministry of Defence, South Block, New Delhi.
2. Chief of the Army Staff, Integrated HQ of MoD (Army), DHQ PO, New Delhi -110011.
3. Director PS-04 (MP) -02 AH Branch, IHQ of MoD (Army), AHQ, New Delhi -11.
4. Officer in Charge, AOC Records, C/o 56 APO.....

.....Respondents

Ld. Counsel for the Respondents. : **Ms. Kavita Mishra**, Advocate
Central Govt. Standing Counsel
Assisted by **Major Uma Yadav**,
Departmental Representative

ORDER

“Per Hon’ble Mr. Justice Ravindra Nath Kakkar, Member (J)”

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

- (A) *To quash or set aside the finding of the medical Board whereby for not recommending applicant disability for Disability Pension.*
- (B) *To issue order or directions to the respondents to grant disability pension to the applicant for the disability he had, with effect from date of discharge (31/12/2020) with all consequential benefits including rounding off benefit from 36% to 50% in terms of Govt. of India letter dated 31 Jan 2001 and judgment passed by Hon’ble Apex Court in case of Ram Avatar Vs Uol & Others.*
- (C) *Any other relief as considered proper by the Hon’ble Tribunal be awarded in favour of the applicant.*
- (D) *Allow this application with cost.*

2. Briefly stated, applicant was enrolled in the Army Ordnance Corps of Indian Army on 20.02.2004 and discharged on 31.12.2019 in Low Medical Category at his own request on compassionate ground under Rule 13 (3) Item III (iv) of the Army Rules, 1954. At the time of discharge from service, the Release Medical Board (RMB) held at Command Hospital (Eastern Command) on 29.11.2019 assessed his disabilities (i) **‘CHONDROSARCOM A DISTAL PHALANX RIGHT THUMB (OPTD) WITH RECURRENCE (AMPUTATION DONE) @20%** (ii) **‘INTRA DURAL EXTRA MEDULLARY SOL LV1 – LV2’ @ 20%, composite**

disabilities @36% for life and opined the disabilities to be neither attributable to nor aggravated (NANA) by service. The applicant's claim for grant of disability pension was rejected vide letter dated 19.08.2020. The applicant preferred First Appeal which too was rejected vide letter dated 07.05.2021 which was communicated to the applicant vide letter dated 06.07.2021. The applicant preferred Second Appeal which too was rejected vide letter dated 14.09.2022 which was communicated to the applicant vide letter dated 06.10.2022. It is in this perspective that the applicant has preferred the present Original Application.

3. Learned Counsel for the applicant pleaded that at the time of enrolment, the applicant was found mentally and physically fit for service in the Army and there is no note in the service documents that he was suffering from any disease at the time of enrolment in Army. The diseases of the applicant were contracted during the service, hence they are attributable to and aggravated by Military Service. He pleaded that various Benches of Armed Forces Tribunal have granted disability element of disability pension in similar cases, as such the applicant be granted disability element of disability pension and its rounding off to 50%.

4. On the other hand, Ld. Counsel for the respondents contended that composite disabilities of the applicant @ 36% for life have been regarded as NANA by the RMB, hence as per Regulation 81(a) of Pension Regulations for the Army, 2008 (Part-I) the applicant is not entitled to

disability element of disability pension. She pleaded for dismissal of the Original Application.

5. We have heard Ld. Counsel for the applicant as also Ld. Counsel for the respondents. We have also gone through the Release Medical Board proceedings as well as the records and we find that the questions which need to be answered are of three folds:-

- (a) Whether the disabilities of the applicant are attributable to or aggravated by Military Service?
- (b) Whether the applicant is entitled to disability pension being a case of discharge on his own request?
- (c) Whether the applicant is entitled for the benefit of rounding off the disability element of disability pension?

6. The law on attributability of a disability has already been settled by the Hon'ble Supreme Court in the case of ***Dharamvir Singh Versus Union of India & Others***, reported in (2013) 7 Supreme Court Cases 316. 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)."

7. In view of the settled position of law on attributability, we find that the RMB has denied attributability to the applicant only by endorsing that the disabilities '**CHONDROSARCOM A DISTAL PHALANX RIGHT THUMB (OPTD) WITH RECURRENCE (AMPUTATION DONE)**' and '**INTRA DURAL EXTRA MEDULLARY SOL LV1 – LV2**' are neither

attributable to nor aggravated (NANA) by service on the ground that first onset of the first disability in December, 2015 at Kanpur (UP) and the disability is a bone tumor likely related to genetic or chromosomal component and the second disability onset during Sep, 2016 at Jaisalmer, Rajasthan (Modified Field) and it is benign tumor, therefore, applicant is not entitled to disability element of disability pension. However, considering the facts and circumstances of the case, we are of the opinion that this reasoning of Release Medical Board for denying disability element of disability pension to applicant is not convincing and doesn't reflect the complete truth on the matter. The applicant was enrolled in Indian Army on 20.02.2004 and the disability has started after more than 14 and 15 years of Army service respectively i.e. in Dec 2015 and Sep 2016. We are therefore of the considered opinion that the benefit of doubt in these circumstances should be given to the applicant in view of ***Dharamvir Singh vs Union of India & Ors*** (supra), and both the disabilities of the applicant should be considered as aggravated by military service.

8. Government of India, Ministry of Defence letter No. 16(5)/2008/D(Pen/Policy) dated 29.09.2009 stipulates that *"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 voluntarily or otherwise in addition to Retiring/Service Pension or Retiring/Service Gratuity.” In view of aforesaid letter, the applicant is entitled for grant of disability element of disability pension even if he has been discharged on his own request on compassionate grounds.

9. The law on the point of rounding off of disability pension is no more RES INTEGRA in view of Hon'ble Supreme Court judgment in the case of ***Union of India and Ors vs Ram Avtar & ors*** (Civil appeal No 418 of 2012 decided on 10th January 2014). In this Judgment the Hon'ble Apex Court nodded in disapproval of the policy of the Government of India in granting the benefit of rounding off of disability pension only to the personnel who have been invalidated out of service and denying the same to the personnel who have retired on attaining the age of superannuation or on completion of their tenure of engagement. The relevant portion of the decision is excerpted below:-

“4. By the present set of appeals, the appellant (s) raise the question, whether or not, an individual, who has retired on attaining the age of superannuation or on completion of his tenure of engagement, if found to be suffering from some disability which is attributable to or aggravated by the military service, is entitled to be granted the benefit of rounding off of disability pension. The appellant(s) herein would contend that, on the basis of Circular No 1(2)/97/D (Pen-C) issued by the Ministry of Defence, Government of India, dated 31.01.2001, the aforesaid benefit is made available only to an Armed Forces Personnel who is invalidated out of service, and not to any other category of Armed Forces Personnel mentioned hereinabove.

5. *We have heard Learned Counsel for the parties to the lis.*

6. *We do not see any error in the impugned judgment (s) and order(s) and therefore, all the appeals which pertain to the concept of rounding off of the disability pension are dismissed, with no order as to costs.*

7. *The dismissal of these matters will be taken note of by the High Courts as well as by the Tribunals in granting appropriate relief to the pensioners before them, if any, who are getting or are entitled to the disability pension.*

8. *This Court grants six weeks' time from today to the appellant(s) to comply with the orders and directions passed by us."*

10. Additionally, consequent upon the issue of Government of India, Ministry of Defence letter No. 17(01)/2017(01)/D(Pen/Policy) dated 23.01.2018, Principal Controller of Defence Accounts (Pensions), Prayagraj has issued Circular No. 596 dated 09.02.2018 wherein it is provided that the cases where Armed Forces Pensioners who were retired/discharged voluntary or otherwise with disability and they were in receipt of Disability/War Injury Element as on 31.12.2015, their extent of disability/War Injury Element shall be re-computed in the manner given in the said Circular which is applicable with effect from 01.01.2016.

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)** as well as Government of India, Ministry of Defence letter No. 17(01)/2017(01)/D(Pen/Policy) dated 23.01.2018, we are of the considered view that benefit of rounding off of disability pension @ 36% 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 No. 369 of 2023** deserves to be partly allowed, hence **partly allowed**. The impugned orders, rejecting the applicant's claim for grant of disability element of disability pension, are set aside. Both the disabilities of the applicant are held as aggravated by Army Service. The applicant is entitled to get disability element @36% for life which would be rounded off to 50% for life w.e.f. three years preceding the date of filing of Original Application. The respondents are directed to grant disability element to the applicant @36% for life which would stand rounded off to 50% for life w.e.f. three years preceding the date of filing of Original Application. The date of filing of Original Application is 27.03.2023. The respondents are further 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 the actual payment

14. No order as to costs.

15. Maj. Uma Yadav, Departmental Representative orally submitted to grant Leave to Appeal against the above order which we have considered and no point of law of general public importance being involved in the case the plea is rejected.

(Vice Admiral Atul Kumar Jain)
Member (A)

Dated : 22 August, 2023

AKD/Ashok/-

(Justice Ravindra Nath Kakkar)
Member (J)