Court No.1
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 273 of 2015

Friday this the 23rd day of September, 2016

Hon'ble Mr. Justice Abdul Mateen, Member (J)
Hon'ble Lt Gen Gyan Bhushan, Member (A)

No. JC 217221M Subedar (Hony Lt.)
Jawahar Lal Singh, Son of Late Govind Singh
R/o Village – Amahiya, P.O. – Amahiya
Tehsil – Chauri Chaura, District – Gorakhpur Pin – 273202

…….. Applicant

By Legal Practitioner- Shri Rohit Kumar, Advocate

Versus

1. Raksha Mantri Appellate Committee
   Through Secretary
   Ministry of Defence
   DHQ PO, New Delhi 110011

2. Additional Director General DV
   Adjutant Generals Branch (AGPS-4-Imp-II)
   Army Headquarters, DHQ PO
   New Delhi

3. Commandant cum Chief Records Officer
   EME Records,
   Secunderabad

4. Principal Controller of Defence Accounts (Pensions)
   Draupadighat, Allahabad

……… Respondents

By Legal Practitioner - Dr. Shailendra Sharma Atal
Central Government Counsel

JUDGMENT

1. The instant Original Application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007, whereby he has claimed the reliefs as under:-

> *"(a) For quashing the Principal Controller of Defence Accounts (Pensions) Allahabad rejection order bearing No. JC 217221/DP-1Pen dated 25 Feb 2002 with all the consequential benefits to the applicant.*
>
> *(b) For quashing the rejection order of First Appellate Committee contained in EME Records letter bearing No. JC-217221/DP-1/Pen dated 16 Aug 2007 with all the consequential benefits to the applicant.*
>
> *(c) For quashing the Raksha Mantri Appellate Committee rejection order bearing No. B/38046A/232/2013/AGPPS-4 (IInd Appeal dated 07 May 2015 with all consequential benefits to the applicant.*
>
> *(d) To issue any other order or direction considered expedient and in the interest of justice and equity.*
>
> *(e) Award cost of the petition."*

2. The factual matrix of the case is that the applicant was enrolled in the Indian Army on 28.07.1971 and was discharged from service on 31.07.2001(afternoon) under item I (i) (a) of table annexed to Rule 13 (3) of Army Rule 1954 in low medical category **'P2' (Permanent)** for the disease **'CARCINOMA BLADDER (OIPTD)-188-V67'.** Release Medical Board before his discharge assessed his disability as 60% for 2 years and considered it neither attributable to nor aggravated by military service. His claim for disability pension was rejected vide order dated 20.01.2002. The applicant made appeal against rejection of his disability pension and based on directions of Appellate Committee

of First Appeal, Appeal Medical Board held at Base Hospital, Delhi Cantt. Medical Board assessed the disability as 20% for life and considered it as neither attributable to nor aggravated by military service as such First Appellate Committee rejected claim of disability pension. Subsequently Second Appeal of the applicant was also rejected on the same ground. Being aggrieved, the applicant has filed the instant Original Application.

3. Heard Shri Rohit Kumar, Learned Counsel for the applicant and Dr. Shailendra Sharma Atal, Learned Counsel for the respondents and perused the record.

4. Learned Counsel for the applicant submitted that the applicant was enrolled in the Indian Army on 28.07.1971 and at the time of enrollment, he was examined by the medical board and was found mentally and physically fit for service in the Indian Army and there is no note, whatsoever, in the service documents that he was suffering from any disease. His claim for disability pension was rejected by PCDA (Pension), Allahabad, stating that disability of the applicant is neither attributable to nor aggravated by military 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 and that his case is covered by judgment of Hon’ble The Apex Court in the case of **Dharamvir Singh Vs. Union of India & others** reported in **(2013) 7 SCC 316**, as such the applicant be granted disability pension

as well as arrears thereof. Learned Counsel for the applicant also made an oral submission (though not contained in the pleadings) that as per Government Policy dated 31.01.2001 the disability pension be rounded off to 50%.

5. **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. Therefore, the applicant has no case and his disability pension has rightly been denied by the competent authority vide order dated 20.01.2002 which has been confirmed by the First and Second Appellate authorities also.

6. Before dealing with the rival submissions, it would be appropriate to examine the relevant Rules and Regulations on the point. Relevant portions of the Pension Regulations for the Army 1961 (Part I), and the provisions of Rules 4, 5, 9, 14 and 22 of the Entitlement Rules for Casualty Pensionary Awards, 1982 are reproduced below:-

> "(a) **<u>Pension Regulations for the Army 1961 (Part I)</u>**
>
> *"Para 173. Unless otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an individual who is invalided out of service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20 percent or over.*

The question whether a disability is attributable to or aggravated by military service shall be determined under the rule in Appendix II.”

“(b) **Entitlement Rules for Casualty Pensionary Awards, 1982**

4. Invaliding from service is necessary condition for grant of a disability pension. An individual who, at the time of his release under the Release Regulation, is in a lower medical category than that in which he was recruited, will be treated as invalided from service. JCOs/ORs & equivalents in other services who are placed permanently in a medical category other than ‘A’ and are discharged because no alternative employment suitable to their low medical category can be provided, as well as those who having been retained in alternative employment but are discharged before the completion of their engagement will be deemed to have been invalided out of service.

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.

Onus of Proof.

9. The claimant shall not be called upon to prove the conditions of entitlement. He/she will receive the benefit of any reasonable doubt. This benefit will be given more liberally to the claimants in field/afloat service cases.

Disease

14. ***In respect of disease, the following rules will be observed:-***

(a) For acceptance of a disease as attributable to military service, the following two conditions must be satisfied simultaneously:

i) That the disease has arisen during the period of military service, and

ii) That the disease has been caused by the conditions of employment in military service.

(b) If medical authority holds, for reasons to be stated, that the disease although present at the time of enrolment could not have been detected on medical examination prior to acceptance for service, the disease, will not be deemed to have arisen during service. In case where it is established that the military service did not contribute to the onset or adversely affect the course disease, entitlement for casualty pensionary award will not be conceded even if the disease has arisen during service.

(c) Cases in which it is established that conditions of military service did not determine or contribute to the onset of the disease but, influenced the subsequent course of the disease, will fall for acceptance on the basis of aggravation.

(d) In case of congenital, hereditary, degenerative and constitutional diseases which are detected after the individual has joined service, entitlement to disability pension shall not be conceded unless it is clearly established that the course of such disease was adversely affected due to factors related to conditions of military services.

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22. **Conditions of unknown Aetiology**:- There are a number of medical conditions which are unknown aetiology. In dealing with such conditions, the following guiding principles are laid down-

(a) If nothing at all is known about the cause of the disease, and the presumption of the entitlement in favour of the claimant is not rebutted, attributability should be conceded.

(b) If the disease is one which arises and progresses independently of service environmental factors than the claim may be rejected."

7. On the question of attributability of disability to military service, we would like to refer to the judgment and order of Hon'ble The Apex Court in the case of **Dharamvir Singh Vs. Union of India and Ors** reported in **(2013) 7 Supreme Court Cases 316,** in which Hon'ble The Apex Court had observed the provisions of the Pension 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).

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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".

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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.

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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."

8. On the issue of grant of disability pension, we would also like to recall the judgment passed in the case of **Sukhhvinder 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…………".

9. In the instant case, the applicant was enrolled in the army on 28.07.1971 and he was discharged in low medical category **'P2' (Permanent)** on 31.07.2001. He has been denied disability pension because the Medical Board has considered the disability as neither attributable to nor aggravated by military service. We observe that in this case the Medical Board has not given any reason on the basis of which it has come to the conclusion that the applicant's disability is neither attributable to nor aggravated by military service. We also

observe that there is no note of such disease or disability in the service record of the applicant at the time of enrolment and respondents have not been able to produce any document to prove that the disease existed before his enrolment. In fact, Medical Board in their opinion on page 5 against column 2 i.e. '**Did the disability exist before entering service', has mentioned 'NO'**.

10. It is made clear in the aforesaid judgments of Hon'ble The Apex Court (supra) that once a person has been enrolled in fit medical conditions and is discharged in low medical category, simply recording a conclusion that the disability is not attributable to military service, without giving reason as to why the disease or disability is not deemed to be attributable to service, clearly shows lack of proper application of mind by the Medical Board. In absence of any evidence on record to show that the applicant was suffering from any ailment at the time of his enrollment in service, it will be presumed that deterioration of his health has taken place due to military service. Therefore, in view of the judgment of Hon'ble The Apex Court in the cases of **Dharmvir Singh** (supra) and **Sukhvinder Singh** (supra), since he was enrolled in fit medical conditions and was discharged in low medical category, presumption has to be drawn in favour of the applicant and the disability is to be considered as attributable to and aggravated by military service.

11. Although, learned counsel for the applicant has not pleaded in the petition for the benefit of rounding off of disability pension but we feel that the matter with respect to rounding off should also be dealt with to

do complete justice, as such in the interest of justice in view of the law laid down by Hon'ble The Apex Court, we propose to decide this issue also. In consonance with the Policy Letter No.1(2)/97/D (Pen-C) dated 31.01.2001 and in terms of 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)** in which Hon'ble The Apex Court nodded in disapproval the policy of the Government of India in not granting the benefit of rounding off of disability pension to the personnel who have been invalided out of service on account of being in low medical category or who has retired on attaining the age of superannuation or completion of his tenure of engagement, if found to be suffering from some disability. We are of the view that the applicant is entitled to the benefit of rounding off.

12 On the issue of delay and payment of arrears, we recall the case of **Shiv Dass Vs Union of India reported in 2007 (3) SLR 445** wherein in Para 9 of the judgment, Hon'ble The Apex Court has observed:-

> *"9. In the case of the pension the cause of action actually continues from month to month. That however, cannot be a ground to overlook delay in filing the pension. 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."*

13. In view of the above, we converge to the view that the impugned orders passed by the competent authority were not only unjust, illegal

but were also not in conformity with rules, regulations and law. The impugned orders deserve to be set aside, keeping in view the judgment of **Dharamvir Singh** (supra) and **Sukhvinder Singh** (supra). The applicant is entitled to disability pension @ 20% for life, which needs to be rounded off to 50% as per policy letter dated 31.01.2001 and in terms of decision of Hon'ble The Apex Court in the case of **Ram Avtar** (supra).

14. Thus in the result, the **Original Application No. 273 of 2015** succeeds and is allowed. The impugned orders dated 25.02.2002, 16.08.2007 and 07.05.2015 passed by the respondents are set aside. The respondents are directed to grant disability pension to the applicant @ 20% for life, which would stand rounded off to 50% in terms of the decision of Hon'ble The Apex Court in the case of **Ram Avtar** (supra). The respondents are also directed to pay arrears of disability pension with interest @ 9% per annum from 3 years prior to filing of Original Application i.e. 06.10.2015 till the date of actual payment. The respondents are directed to give effect to the order within four months from the date of receipt of a certified copy of this order.

15. No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

(Justice Abdul Mateen)
Member (J)

Dated : September, 2016
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