Court No. 2
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 264 of 2015

Thursday this the 23rd day of November 2017

Hon'ble Mr. Justice S.V.S Rathore, Member (J)
Hon'ble Lt Gen Gyan Bhushan, Member (A)

No. 10374011X Ex NK Natha Yadav resident of Village : Pipary, Post Office : Majholia, District : Deoria (UP)

…….. Applicant

By Legal Practitioner – Mohd Shariq Khan, Advocate
Learned Counsel for the Applicant

Versus

1. Union of India through Secretary Ministry of Defence , New Delhi-11

2. Chief of the Army Staff, Integrated Headquarters of Ministry of Defence (Army), DHQ Post Office, New Delhi-11

3. Director General, Armed Forces Medical Service, Integrated Headquarters of the Ministry of Defence, M Block, New Delhi-11

4. Additional Director General Personnel Services, Adjutant General's Branch, Integrated Headquarters of the Ministry of Defence (Army), Room No. 11, Plot No 108 (West) Brassey Avenue, Church Road, New Delhi-11

5. Defence Security Corps, Senior Record Officer for OIC Records

6. Defence Security Record Officer for OIC Records.

…… Respondents

By Legal Practitioner – Shri Amit Jaiswal
Learned Counsel for the Central Government

ORDER

"Hon'ble Lt Gen Gyan Bhushan, Member (A)"

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

> *(a) Issue/pass an order or direction of appropriate nature whereby commanding the respondents to produce the record in original and thereafter quash the impugned orders dated 31.07.2015 passed by opposite party no. 4 whereby rejecting the second appeal filed by the applicant against the order dated 19.06.2014 passed by the opposite party no. 5 in First Appeal preferred by the applicant against the order dated 13.09.2013 passed by the oopposite party No. 6 by which the claim of the applicant of disability pension was rejected annexed as Annexure No. A-1(i), (ii) & (iii) with the application.*
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> *(b) Issue/pass an order or direction of appropriate nature whereby commanding the respondents to grant the disability pension to the applicant forthwith.*
>
> *(c) Allow the application with all consequential benefits with exemplary cost.*

2. The factual matrix of the case is that the applicant was enrolled in the Army on 04.12.1985 and discharged from service on 30.04.1993 at his own request on extreme compassionate grounds. The applicant got re-enrolled in the Defence Service Corps (DSC) on 24.08.1993 for 10 years as initial term of engagement. However, his service was extended from time to time and was discharged on 31.08.2013(A/N). While in service, the applicant was placed in Low Medical Category P-2 (Permt) w.e.f. 09.04.2011 for disability due to "COMPLETE HEART BLOCK" and "DIABETES MALLITUS TYPE-II". Inspite of low medical category, he was allowed to continue in service and was finally discharged w.e.f. 31.08.2013 (AN) under the provisions of Rule 13(3) III (i) of Army Rule 1954. Before discharge, he was brought before a duly constituted Release Medical Board which assessed his disabilities as neither attributable to nor aggravated by military service. His percentage of disablement was considered as 40% for life for 'COMPLETE HEART BLOCK PPI DONE' and 30% for life for 'TYPE-II DM', whereas composite assessment for disabilities was assessed as 60% for life. However, disability qualifying for disability pension and net assessment qualifying for disability pension was assessed as Nil for life. Since net assessment qualifying for disability was considered as Nil for life, his disability claim was rejected by Defence Security Corps Records vide their letter dated 13.09.2013 stating that

both the disabilities had no connection with service and onset and course of disease was detected while serving in peace area. His both appeals were also rejected on the same ground on 19.06.2014 and 31.07.2015 respectively. Aggrieved, the applicant has filed this Original Application.

3. Heard Mohd Shariq Khan, Learned Counsel for the applicant, Shri Amit Jaiswal, Learned Counsel for the respondents and perused the record.

4. Learned Counsel for the applicant submitted that at the time of enrollment, the applicant was considered medically and physically fit to join Indian Army and subsequently to join DSC and he was discharged from DSC in low Medical Category P-2 (Permanent). It was during his service period only that his heart ailment was diagnosed and hence, by no stretch of imagination it can be said that his service is not responsible for his heart ailments. He further submitted that his heart trouble is the outcome of stressful military duties, hence he is fully entitled for the disability pension. He further submitted that large number of judgments have been passed by various Benches of Armed Forces Tribunal on this point, as such, the applicant on the ground of parity should also be granted disability pension. The denial of disability pension to the applicant is arbitrary, mala fide and not sustainable in the eyes of law and hence the impugned orders passed by the respondents be set aside.

5. While arguing the case, Ld. Counsel for the applicant has made oral prayer that the disability pension @ 60% be rounded off to 75% in terms of Government of India, Ministry of Defence letter dated 31.01.2001.

6. P**er contra**, Learned Counsel for the respondents submitted that as per policy applicant's disability pension claim was adjudicated 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 and net assessment was considered as Nil for life, his claim has rightly been rejected. 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 gone through the relevant rules and regulations on the issue 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).*
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> *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)].*
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> *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).*
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> *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]*
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> *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)].*
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> *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*
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> *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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> *XXX XXX XXX*
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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***
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> *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. We would like to recall the judgment on grant of disability pension 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……".*

9. We would also like to refer to the judgment and order of Hon'ble The Apex Court in the case of **Union of India vs. Rajbir Singh, Civil Appeal No. 2904 of 2011 decided on 13.02.2015** in which Hon'ble The Apex Court has held as under:

> *"16. Applying the above parameters to the cases at hand, we are of the view that each one of the respondents having been discharged from service on account of medical disease/disability, the disability must be presumed to have been arisen in the course of service which must, in the absence of any reason recorded by the Medical Board, be presumed to have been attributable to or aggravated by military service. There is admittedly neither any note in the service records of the respondents at the time of their entry into service nor have any reasons been recorded by the Medical Board to suggest that the disease which the member concerned was found to be suffering from could not have been detected at the time of his entry into service. The initial presumption that the respondents were all physically fit and free from any disease and in sound physical and mental condition at the time of their entry into service thus remains unrebutted. Since the disability has in each case been assessed at more than 20%, their claim to disability pension could not have been repudiated by the appellants."*

10. In the instant case, the applicant was re-enrolled in the DSC after his discharge from Indian Army on 24.08.1993 and he was discharged from DSC in low medical category on 31.08.2013 because of disability due to "COMPLETE HEART BLOCK PPI DONE" and "DIABETES MALLITUS TYPE-II". The Medical Board considered his disability as neither attributable to nor aggravated by military service and assessed it as 60% composite for life but Nil for life in the net assessment qualifying for disability pension. In the cases of Dharamvir Singh (supra) and Sukhvinder Singh (supra), it has been clearly postulated that when there is no note of such disease or disability available in the service record of the applicant at the time of acceptance for Army service, it would 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 service We observe that Medical Board in the opinion in the Medical Board Proceedings in Part V at Page 6, Para 2 has mentioned "***Did the disability exist before entering service – No",*** and in Para 3 " ***In case the disability existed at the time of entry, is it possible that it could not be detected during the routine medical examination carried out at the time of the entry - NA.*** It clearly comes out that at the time of enrolment the applicant was considered medically fit to join the Army/DSC. We are of the view that his case is squarely covered by the decisions of Hon'ble The Apex Court in the cases of **Dharamvir Singh** (supra), **Sukhvinder Singh** (supra) and **Rajbir Singh** (supra) in which it has been clearly postulated that

when there is no note of such disease or disability available in the service record of the applicant at the time of acceptance for Army service, it would 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 service.

11. As regards entitlement of rounding off of disability pension, we are of the considered view that the case of the applicant for rounding off is covered by the decision of Hon'ble The Apex Court in the case of Union of India and Ors vs Ram Avtar & ors in Civil Appeal No 418 of 2012 dated 10th December 2014. Accordingly, 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 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."*

13. Keeping in view the judgments of **Dharamvir Singh** (supra) **Sukhvinder Singh** (supra), and **Rajbir Singh** (supra), we converge to the view that the impugned orders passed by the respondents are not only unjust, illegal but are also not in conformity with Rules, Regulations and Law; as such, the impugned orders deserve to be set aside. The applicant is entitled to disability pension @ 60% for life which needs to be rounded off to 75% as per policy letter dated 31.01.2001 and in terms of decisions of Hon'ble The Apex Court in the case of **Ram Avtar** (supra).

14. Thus in the result, the **Original Application No. 264 of 2015** is allowed and the impugned orders dated 13.09.2013, 19.06.2014 and 31.07.2015 are set aside. The respondents are directed to grant disability pension to the applicant @ 60% for life which would stand rounded off to 75% for life. The respondents are also directed to pay arrears of disability pension from three

years prior to filing of the Original Application i.e. 30.09.2015. 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. In case the respondents fail to give effect to this order within the time stipulated above, the applicant would start earning interest on the amount accrued at the rate of 9% from due date till the date of actual payment.

15. No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

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

Dated : Nov, 2017

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