RESERVED
Court No.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No 441 of 2017

Monday, this the 18th day of February 2019

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

Smt Rekha Devi W/O No 3183565Y Late Sep Ved Pal Singh, Village-Doghat, P.O.-Doghat, Distt-Baghpat, Meerut (U.P.).

…….. Applicant

Ld. Counsel for the: **Col (Retd) R.C. Dixit**, Advocate
Applicant

Versus

1. Union of India, Through Secretary of Defence, Ministry of Defence, D (Pension Grievances), 227-B Wing, Sena Bhawan, New Delhi-110011.
2. The Chief of Army Staff, Integrated Headquarters of MoD (Army), Sena Bhawan, DHQ PO New Delhi-110011.
3. OIC Records, Records the Jat Regimental Centre, Bareilly, C/O 56 APO.
4. The Controller of Defence Accounts (Pension), Draupadi Ghat, Allahabad.

……Respondents

Ld. Counsel for the Respondents: **Dr. Shailendra Sharma Atal**
Central Govt Counsel.

ORDER

"Per Hon'ble Air Marshal BBP Sinha, Member (A)"

1. The instant Original Application has been filed on behalf of the applicant (widow of a deceased soldier) under Section 14 of the Armed Forces Tribunal Act, 2007, whereby she has sought following reliefs:-

> *(a) That applicant had suffered mental agony against the grave injustice done to her husband by sending him on premature discharge against the provisions of para 3 of Army Order 146/77 (applicant's husband could render 7 years 6 months and 9 days of active service and was left with another 9 years 5 months and 21 days to serve to complete his terms of engagement of 17 years). Keeping in view provisions of para 134 of Regulations for Army applicant's husband was entitled to serve in the Army till 17 years in service. In view of the same Hon'ble Tribunal may order or direct respondents to grant applicant's husband full pay till the date of his death and subsequently grant to his wife family pension till completion of his terms of engagement. Applicant may be granted 20% disability pension (to be compounded to 50% vide para 7 (II) (a) of Ministry of Defence letter No 1 (2)/97/D (Pen C) dated 21.01.2001 as per recommendations of invaliding medical board dated 31 May 1996, to which applicant's husband was entitled as a matter of right. Since the applicant's husband died on 27/28 March 1998 before reassessment medical board could be done, she may be granted:*
>
> > *(i) Disability pension for life in terms of regulation 173 read in conjunction with regulation 179 of Pension Regulations for the Army, 1961; and*
> >
> > *(ii) Ordinary family pension in terms of Regulation 212 of Pension Regulation for the Army 1961.*
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> *(b) That applicant has been denied her legal right in gross violation to para 212 of Pension Regulations for Army 1961 (Annexure A-1 to Annexure A-7 corroborate this fact), in view of the same, she may be granted ex-gratia lump sum compensation towards mental pain and agony*

which she had suffered since such a long time due to glaring lapses of respondents.

(c) Pass any other order as the Hon'ble Tribunal feels appropriate in the matter along with cost.

2. The factual matrix of the case are that No 3183565Y Late Sep Ved Pal Singh (husband of the applicant) was enrolled in the Indian Army on 23.01.1989. He was downgraded to low medical category CEE (temp) for diagnosis 'CNS (INV) Generalized Seizure 345' w.e.f. 07.11.1994 by medical categorization board held at 166 Military Hospital (MH). On subsequent re-categorization medical boards he remained in low medical category and finally placed in low medical category CEE (Permt) w.e.f. 07.11.1995 by medical categorization board held on 16.11.1995. Being placed in low medical category CEE (Permt) the deceased soldier was brought before Release Medical Board (RMB) which recommended him to be discharged from service in low medical category. Therefore he was discharged from service w.e.f. 31.07.1996 with 20% disability for five years neither attributable to nor aggravated by military service (NANA). Disability pension claim was rejected by PCDA (P) Allahabad vide order dated 21.05.1997 on the ground of NANA and disability being constitutional in nature and not related to service. The records reveal that Sep Ved Pal Singh was murdered after discharge while ploughing his

fields on 28.03.1998 for the purpose of snatching his tractor by unknown persons. The Records also reveal that after her husband's death the widow had approached several organisations for grant of disability pension of her deceased husband and family pension but to no avail. Hence this O.A.

3. Ld. Counsel for the applicant pleaded that the deceased soldier was enrolled in the Indian Army on 23.01.1989 in physically and medically fit condition and after enrolment there was no symptom of any ailment up till 1994 i.e. more than 05 years service He further pleaded that Late Sep Ved Pal Singh was a sportsman who participated in wrestling events of his unit since 1990. The Ld. Counsel for the applicant further submitted that the deceased soldier sustained head injury in wrestling competition in the year 1994 which has probably resulted in Generalized Seizure. Further submission of Ld. Counsel for the applicant is that head injury is a common phenomenon during wrestling events and getting hurt is natural process as injuries are an inherent part of this game. The Ld. Counsel further stressed that the disability occurred to the deceased soldier must be viewed in conjunction with the wrestling events as there is a definite correlation between participation in unit wrestling events and head injury which subsequently caused

'Generalized Seizure'. The deceased soldier is entitled for benefit of doubt in his favour, since in absence of any evidence on record to show that the deceased soldier was suffering from 'Generalized Seizure' at the time of acceptance in service, it will be presumed that the deceased soldier was in sound physical and mental condition at the time of entering the service and deterioration in his health has taken place due to head injury which ultimately resulted 'Generalized Seizure'. Thus there is a causal connection between disability and the injury sustained in his head resulting in 'Generalized Seizure'. He pleaded that as per extant rules and regulations on the subject, the deceased soldier is entitled to grant of disability pension as the disability took place while he was in service and it shall be presumed to be attributable to and aggravated by military service. He pleaded that the deceased soldier is entitled to disability pension and widow of the deceased soldier is entitled to family pension after demise of her husband.

4. On the other hand, Ld. Counsel for the respondents pleaded that the deceased soldier was placed in low medical category CEE (permt) w.e.f. 07.11.1995 by medical re-categorization board held on 16.11.1995 and retention of permanent low medical category personnel in service was subject to availability of alternative sheltered

appointment. Since no sheltered appointment commensurate with his medical category was available in the unit, he could not be retained in service and discharged from service under Rule 13 (3) III (v) of Army Rules, 1954. He further pleaded that since the RMB has declared the deceased soldier's disability as NANA, the competent authority has rightly rejected claim of disability pension in accordance with Rule 173 of Pensions Regulations for the Army (Part-I) 1961. Ld. Counsel for the respondents further pleaded that there is no evidence with the records to confirm that the deceased soldier was a wrestler. Additionally, after discharge from service, the deceased soldier did not prefer any appeal during his life time till his murder by thugs on 28.03.1998. Relying upon Hon'ble Apex Court judgment in the case of ***UOI vs Damodaran AV***, SLP (C) No 23727/2008, Ld. Counsel for the respondents concluded that the medical board is an expert body and its opinion is entitled to be given due weight, value and credence, therefore any disability declared as NANA by the medical board must be viewed in that background. On the point of grant of family pension, Ld. Counsel for the respondents submitted that since the deceased soldier was not in receipt of any pension, as such the applicant (wife of the deceased soldier) has no

ground to stake claim for grant of family pension. He pleaded the O.A. to be dismissed.

5. We have heard Ld. Counsel for the applicant as also Ld. Counsel for the respondents. We have also gone through the RMB and rejection order of disability pension claim.

6. For adjudication of the controversy involved in the instant case, we need to address three issues; firstly, is the discharge of the deceased soldier a case of discharge or invalidation?; secondly, is the disability attributable to or aggravated by military service or not? and thirdly, if found to be attributable to or aggravated by military service, can the benefit of rounding off be extended to the applicant?

7. For the purpose of first question as to whether the discharge of the deceased soldier by Release Medical Board is a case of discharge or invalidation. In this context, it is clear that the deceased soldier was medically boarded out from service before completion of his terms of engagement in low medical category and was, thus, discharged from service. In this regard, Rule 4 of the Entitlement Rules for Casualty Pensionary Awards, 1982 defines invalidation as follows:

> "*Invaliding from service is a necessary condition for grant of a disability pension. An individual, who, at the time of his release under the Release Regulations, is in a lower medical category than that in which he*

was recruited will be treated as invalided from service. JCOs/Ors and equivalent 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."

8. Thus, in light of above definition, it is clear that the applicant was in low medical category as compared the one when he was enrolled and hence his discharge is to be deemed as invalidation out of service.

9. So far as attributability or aggravation effect of disability are concerned, the provisions of Pension Regulations for the Army, 1961 (Part-I) and the Entitlement Rules for Casualty Pension Award, 1982 are relevant and the same are excerpted herein below;

"(a) <u>Pension Regulations for the Army 1961 (Part I)</u>

<u>Para 173</u>. 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) <u>Entitlement Rules for Casualty Pension Award, 1982</u>

5. *The approach to the question of entitlement to casualty pensionary awards and evaluation of disabilities shall be based on the following presumptions:-*

<u>Prior to and During Service</u>.

> *(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 be given more liberally to the claimants in field/afloat service cases.*
>
> *Diseases*
>
> *14. In respect of diseases, the following rule will be observed:-*
>
> *(a) cases…….*
>
> *(b) a disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service, if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service."*

10. Additionally, the law on the point of attributability of the disability is no more RES INTEGRA. 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 & Ors*** reported in (2013) 7 SCC 316. The relevant portion of the aforesaid judgment, for convenience sake, is reproduced as under:-

"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)."

11. On the issue of attributability/aggravation we have the photograph (**Annexure A-9 of the O.A.**) of the deceased soldier receiving prize from which it can very

well be made out that the husband of the applicant was a sportsman in the unit and his built-up and general looks resemble a wrestler's body and look whereas in counter affidavit the respondents have brought out that no records are available. Thus this specific averment in the O.A. has not been denied by the respondents and a vague reply has been given. So it would establish that the deceased soldier was a wrestler and took part in unit wrestling events. However considering the long time gap between discharge of applicant's husband and the response of respondents and the way records of sports persons are maintained in units, we would like to give the benefit of doubt to applicant and based on the prize receiving photograph declare him a sports person and a wrestler.

12. Thus, from the above mentioned Rule on disability pension and ratio of law emerging out of Hon'ble Apex Court's judgment (supra), it is clear that once a person has been recruited in a fit medical category and discharged in low medical category, the benefit of doubt will lean in his favour unless cogent reasons are given by the Medical Board as to why the disease could not be detected at the time of enrolment. In this particular case, we find that the deceased soldier was placed in low medical category due to his disability 'Generalized

Seizure' after more than five years of service in SHAPE-I. The deceased soldier had worked with the respondents for more than five years before occurrence of disability and the only reason given in medical board for denial of disability pension is that 'the disease is idiopathic in origin as no cause of seizures has been brought out in investigations done'. Hence it cannot be presumed that the disease/disability was existing prior to enrolment. Additionally no meaningful reason as to why the disease could not be detected at the time of his enrolment, is mentioned either in the medical board proceedings or in the counter affidavit. Thus considering all issues involved in this case, we are of the following considered opinion:

(a) The deceased soldier's discharge vide Release Medical Board held on 03.07.1996 is to be treated as invalidation in terms of Rule 4 of the Entitlement Rules (supra).

(b) Since the deceased soldier was a sportsman and was a wrestler, the fact that his disability after more than five years of service could have originated because of routine head injury received during unit wrestling practices cannot be ruled out. Hence we would like to give benefit of doubt to the deceased soldier and consider his disability as 'attributable' to military service.

13. Also, it is trite law that any disability not recorded at the time of recruitment must be presumed to have been caused subsequently and unless proved to the contrary should be as a consequences of military service. The benefit of doubt must be extended in favour of the applicant. In the instant case since the deceased soldier was found to be suffering from disability after he had put in more than 05 years of service therefore in the totality of circumstances, it should be deemed to be attributable to military service.

14. As a result of foregoing discussion, the O.A. is **allowed.**

15. Since the soldier was murdered on 28.03.1998, therefore question of RSMB does not arise. In view of the above and in the interest of substantive justice the deceased soldier is held entitled to 20% disability pension w.e.f. 01.08.1996 till his date of murder i.e. 28.03.1998 which shall stand rounded off to 50% disability from his discharge till death in terms of ***Union of India*** vs. ***Ram Avtar & Others***, (Civil Appeal No. 418 of 2012 decided on 10 December, 2014. We further hold that the applicant is entitled to family pension, as applicable, to widow of the deceased soldier w.e.f. 29.03.1998 onwards, but the applicant has approached this

Tribunal with delay therefore the arrears shall be restricted to three years prior to filing of the present application in terms of Hon'ble Apex Court judgment in the case of ***Shiv Dass Vs Union of India*** reported in 2007 (3) SLR 445. The O.A. was filed on 31.03.2016. 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 @ 9% per annum.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

(Justice SVS Rathore)
Member (J)

Dated : February, 2019
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