

**Court No 1**  
**ARMED FORCES TRIBUNAL, REGIONAL BENCH,**  
**LUCKNOW**

**Review Application No 03 of 2021 Inre Original  
Application No 219 of 2019**

Thursday, this the 16<sup>th</sup> day of February, 2023

**Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)**  
**Hon'ble Vice Admiral Atul Kumar Jain, Member (A)**

IC-21849A Brig Yatindra Mohan Tewari, SM (Retd),  
11/119, Devlok Colony, Vishnupuri, Church Road, Aliganj,  
Lucknow-226022.

.....Review applicant

Ld. Counsel for the: **Shri Raj Kumar Mishra**, Advocate  
Applicant

Versus

1. Union of India, through Secretary, Ministry of Defence,  
South Block, New Delhi-110011.
2. Chief of the Army Staff, Integrated HQ of MoD (Army),  
South Block, DHQ, PO-New Delhi-110011.
3. Additional Directorate General Personnel Services,  
Adjutant General's Branch/PS-4 (Imp-II), Integrated  
Headquarters of MoD (Army), DHQ, PO-New Delhi-  
110011.
4. Principal Controller of Defence Account (Pension),  
Draupadi Ghat, Allahabad (UP)-221014.

...Respondents

Ld. Counsel for the : **Shri Rajiv Pandey**, Advocate  
Respondents. Central Govt Counsel.

**ORDER (Oral)**

1. This review application has been filed for review of order dated 09.12.2020 passed in O.A. No 219 of 2019.

The applicant has sought following reliefs:-

(a) Allow the review application and the order passed on 09<sup>th</sup> day of December 2020 in Original Application No 219 of 2019 as mentioned in Para 1 of Review Application may kindly be reviewed and Original Application may please be allowed.

(b) Issue/pass any other order or direction as this Honourable Tribunal may deem fit and proper in the circumstances of the case.

(c) Allow the Review Application with costs.

(d) The applicant through his counsel may please be permitted to contest the Review Application in physical hearing.

2. Applicant has filed this review application for review of order dated 09.12.2021 on the ground that O.A. was dismissed as per Para 90 of Pension Regulations for the Army, 2008 (Part-I) which was inapplicable in his case as

he was prematurely discharged from service w.e.f. 27.01.2007, and his disability DM Type-II should not be less than 20% as per letter dated 20.07.2012.

3. We have perused the documents placed on record and we find that the aforesaid Para of Pension Regulations for the Army is not applicable in case of the applicant and his disability 'DM Type-II' ought to be 20%. Accordingly, order dated 09.12.2020 is re-called.

4. Briefly stated facts of the case are that applicant was commissioned in the Indian Army on 31.03.1972 and he was discharged on 27.01.2007 in Low Medical Category at his own request. At the time of discharge from service, the Release Medical Board (RMB) held on 07.12.2006 assessed his disability 'DM Type-II' @15-19% for life neither attributable to nor aggravated by military service. The applicant's claim for grant of disability pension was rejected by the respondents vide letter dated 22.12.2006. The applicant preferred First and second appeals which too were rejected vide orders dated 13.10.2017 and 23.10.2018 respectively. It is in this

perspective that the applicant has preferred the present Original Application.

5. Learned Counsel for the applicant pleaded that at the time of commissioning, 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 commissioning in the Army. The disease 'DM Type-II' of the applicant was contracted during the service, hence it is attributable to and aggravated by Military Service. He pleaded that various Benches of Armed Forces Tribunal have granted disability element of pension in similar cases, as such the applicant be granted disability element of pension as well and arrears thereof, as such the applicant is entitled to disability element of pension and its rounding off to 50%.

6. On the other hand, Ld. Counsel for the respondents submitted that applicant's disability being at 15-19% i.e. below 20%, he is not entitled to disability element of pension. He further contended that disability 'DM-II' of the applicant has been regarded as NANA by the RMB, hence applicant is not entitled to disability element of

pension. He pleaded for dismissal of the Original Application.

7. 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. The questions which needs to be answered are of two folds :-

(a) Whether the second disability of the applicant is also attributable to or aggravated by Air Force Service?

(b) Whether the applicant is entitled for the benefit of rounding off the disability pension?

8. 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)."*

9. 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 disability 'DM Type-II' is neither attributable to nor aggravated (NANA) by military service on the ground of onset of disability while posted in Peace location, therefore, applicant is not entitled to disability element of pension. We are of the opinion that this reasoning of Release Medical Board for denying disability element of pension to applicant is not convincing and doesn't reflect the complete truth on the matter. Peace Stations have their own pressures of rigorous military training and associated stress and strain of Army service. The applicant was commissioned in the Army on 31.03.1972 and the disability has started after more than 30 years of Army service i.e. on 28.04.2003. 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 the disability of the applicant should be considered as aggravated by Army service.

10. The law on the point of rounding off of disability element of pension is no more RES INTEGRA in view of the 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 December 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 invalided 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."*

9. *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."*

11. As such, in view of the decision of the 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 @ 20% 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.

12. Additionally, we find that since the applicant was prematurely discharged from service, he will be deemed to be invalided out of service and in that case his disability shall be deemed to be 50% in view of the Hon'ble Apex Court judgment in the case of **Sukhwinder Singh vs Union of India & Ors**, (2014) STPL (WEB) 468, the operative part of which is excerpted below:-

*“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. Thirdly, there appears to be no provisions authorizing the discharge or invaliding out of service where the disability is below twenty per cent and seems to us to be logically so. Fourthly, wherever a member of the Armed Forces is invalided out of service, it perforce has to be assumed that his disability was found to be above twenty per cent. Fifthly, as per the extant Rules/Regulations, a disability leading to invaliding out of service would attract the grant of fifty per cent disability pension.”*

13. In view of the above, the Review Application No. 03 of 2021 deserves to be allowed, hence **allowed**. The impugned orders are set aside. The respondents are directed to grant disability element of pension to the applicant @ 20% for life which would stand rounded off

to 50% for life w.e.f. three years preceding the date of filing this Original Application. The date of filing this Original Application is 26.03.2019. 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.

15. Pending application(s), if any, stand disposed off.

**(Vice Admiral Atul Kumar Jain)**  
**Member (A)**

Dated: 16.02.2023  
*rathore*

**(Justice Umesh Chandra Srivastava)**  
**Member (J)**