Court No.1
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 55 of 2011

Thursday this the 17th day of September, 2015

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

Ex Sub G. M. Upadhyay (J.C.No.220675L)
S/o Late Sri S.P. Upadhyay, Resident of
Village & Post – Chanehti, District Bareilly

…….. Applicant

By Legal Practitioner Shri Lal Chandra Sahu, Advocate

Versus

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

2. The Directorate General Medical Services, Army Headquarter, New Delhi.

3. Officer In-Charge Records (Signals), Jabalpur, M.P.

4. Director, P.S-4, A.G's Branch, Integrated H.Q. of M.O.D. (Army) D.H.Q. P.O. – New Delhi-110011.

5. The Principal CDA Pension, G3/VIII. Sector, Draupadi Ghat, Allahabad (U.P.) Pin-211014

……… Respondents

By Legal Practitioner Shri Bhanu Pratap Singh Chauhan, 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, and he has claimed the reliefs as under:-

> *"(a) The Hon'ble Tribunal may please to issue order or direction Commanding respondents to grants 100% disability pension and disability benefits with all consequences benefits forthwith.*
>
> *(b) The Hon'ble Tribunal may please to set aside the orders passed by the respondents.*
>
> *(c) This Hon'ble Tribunal may please to issue order or direction which this Hon'ble Court may deem fit and proper under circumstances of the case."*

2. The factual matrix of the case is that the applicant was enrolled in the Indian Army on 25.03.1972 and was discharged after rendering moiré than 28 years' service with effect from 30.04.2001 (afternoon). At the time of discharge the applicant's medical category was BEE (Permanent) for the disease Transient Ischaemic Attack (L) MCA Territory (30%) and Primary Hypertension (20%) with composite disability 40% for two years. The applicant's claim for disability pension was rejected vide

letter dated 17.01.2002 (Annexure No. 4 to the O.A.). The applicant submitted First Appeal, which was also rejected. While the applicant's second appeal was pending, he filed O.A. No.161 of 2010 before the Armed forces Tribunal, Regional Bench, Lucknow, which was disposed of at the initial stage with direction to the respondents to decide the applicant's second appeal within three months, if not already decided. Based on the second appeal, appeal medical board was held in December, 2007, which assessed the disability of the applicant as 30% for life and considered the disability neither attributable to nor aggravated by military service. Disposal of second appeal was communicated to the applicant and he filed execution application M.A. No. NIL of 2011 in O.A. No. 161 of 2010, which was dismissed in October, 2011 on intimation about disposal of second appeal. Aggrieved due to non-grant of disability pension, the applicant has filed the instant O.A.

3. Heard Shri Lal Chandra Sahu, Learned Counsel for the Applicant, Shri Bhanu Pratap Singh Chauhan, Learned Counsel for the respondents and perused the record.

4. Learned Counsel for the Applicant submitted that when the applicant was enrolled in the Army, he was found

absolutely fit to serve in the Indian Army. The applicant suffered with Transient Ischaemic Attack and Primary Hypertension on 24.03.1999 and was admitted to M.H. Bareilly from 24.03.1999 to 21.04.1999. He had completed about 26 years of service when he suffered from these disease. Therefore, the disability of the applicant had to be considered as attributable to and aggravated by military service and he be granted 100% disability. That apart, there is no note of such disease or disability in the service record of the applicant when he had been enrolled in the Indian Army. The Applicant's Counsel placed reliance on the judgment of Hon'ble the Apex Court in the case of **Dharamvir Singh vs. Union of India & others** reported in (2013) 7 SCC 316, and the subsequent judgment of the Hon'ble Apex Court in the case of **Sukhvinder Singh Vs. Union of India** reported in (2014) STPL (WEF) 468 SC.

5. Per contra Learned Counsel for the Respondents submitted that the applicant was discharged in medical category BEE (Permanent). Initially, Release Medical Board found him suffering from Transient Ischaemic Attack (L) MCA Territory (30%) and Primary Hypertension (20%) with composite disability 40%. Based on his second appeal, the applicant's appeal medical board

was held on 24.12.2007 at base Hospital, Delhi Cantt. which assessed the composite disability @ 30% for life. Both the release Medical Board and the Appeal Medical Board found the disability neither attributable to nor aggravated by military service. Since the applicant was not meeting the primary conditions for grant of disability pension as laid down in Para 173 of Pension Regulations for the Army, his claim was rightly rejected by the competent authority.

6. Precise submission, on which the claim of the applicant for disability pension was rejected, is that the disability was considered neither attributable to nor aggravated by military service.

7. 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), Chapter IV of Entitlement Rules 1982 and the provisions of Rules 5, 9, 14(b) and 20 of the Entitlement Rules for Casualty Pension Award, 1982 are reproduced below:-

(a) **Pension Regulations for the Army 1961 (Part I)**

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) **<u>Chapter IV – Entitlement Rules</u>**

Entitlement Rules for Casualty Pensionary Awards, 1982

Rule 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.

(c) **<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.

<u>Onus of Proof.</u>

a. 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.

<u>Disease</u>

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.

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20. 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."

8. In the case of **Dharmvir Singh Vs. Union of India & others (supra)** the Hon'ble The Apex Court has held as under:

"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 Pension), 2002 -"Entitlement : General Principles", including paragraphs 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."

9. In **Sukhvinder Singh Vs. Union of India (supra),** the 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…………”.

10. In **Union of India and Ors v 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. The relevant portion of the decision being relevant 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.

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> *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.*
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> *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."*

11. The bunch of appeals culminated in being dismissed and the judgments of the High Court and Armed Forces Tribunal Benches were nodded in approval attended with direction that the dismissal of those appeals will be taken note of by the High Courts as well as by the Armed Forces Tribunal Benches in granting appropriate relief to the pensioners before them. When the peremptory direction of the Apex Court is applied to the present case, it would lead us to the conclusion that the applicant, who was invalided out/discharged from of service on account of his 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, would also be entitled to the benefit of rounding off.

12. In the case of **Shiv Das Vs Union of India reported in 2007 (3) SLR page 445 (Supra)** in Para 9 of the judgment, Hon'ble The Apex Court has observed:

> *"In the case of the pension the cause of action actually continues from month. That however, cannot be a ground to overlook delay in filing the pension. It would depend upon the fact of each case. It 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. Having given due considerations to the rival submissions made on behalf of the parties' Learned Counsel, we observe that the applicant had been enrolled in the Indian Army in a fit medical condition and served for over 28 years. He suffered the disability during his service period, and therefore, in view of the judgment of the Hon'ble The Apex Court in the case of **Dharmvir Singh Vs. Union of India & others** (supra) and the subsequent judgment of the Hon'ble The Apex Court in the case of **Sukhvinder Singh Vs. Union of India** (supra), a presumption has to be drawn in favour of the applicant, who is discharged or invalided in low medical category. Since the applicant suffered the disease due to service conditions, it is for the respondents to rebut the claim of the applicant. It is also made clear in the judgments of Hon'ble The Apex Court (supra) that the applicant cannot be called

upon to prove his claim for the disability pension once he was enrolled in fit medical conditions in the service and was discharged or invalided in low medical category. All issues have now been settled, which are applicable or may be raised by the respondents in this case, by the Hon'ble The Apex Court referred to above.

14. In this case, no reasoned opinion has been given by the medical board, on the basis of which the medical board concluded that the applicant's disease is neither attributable to nor aggravated by the service conditions. Mere conclusion without reasons is not a valid medical opinion. There is no note of such disease or disability in the service record of the applicant at the time of acceptance in service. In absence of any evidence on record to show that the applicant was suffering from disability or any ailment at the time of his acceptance in service, it will be presumed that he was in sound physical and mental condition at the time of entering service and deterioration of his health has taken place due to service. Therefore, the medical opinion cannot be accepted and the applicant is entitled to the relief as per the above judgments of the Hon'ble The Apex Court. Keeping in view the judgment of Shiv Das (supra), we are

of the view that the applicant be granted disability pension from three years prior to the date of filing of the case.

15. In view of the facts, circumstances and case laws discussed above, we are of the considered view that the applicant is entitled to grant of disability pension @ 30% for life. The O.A. No. 55 of 2012 is allowed. The impugned orders dated 17.01.2002 and 09.05.2006 are set aside. The respondents are directed to grant disability pension to the applicant @ 30% for life from three years prior to the date of filing the case and pay arrears of disability pension with interest @ 9% per annum from that date till the date of actual payment. In case the Applicant represents, the Respondents shall also consider for rounding off of disability pension @ 50% for life as per policy and in the light of the order passed by Hon'ble The Apex Court in the case of Union of India vs. Ram Avtar (supra). The Respondents are directed to give effect to the order within three months from the date of receipt of a certified copy of this order.

16. No order as to costs.

(Lt Gen Gyan Bhushan) (Justice V.K. DIXIT)
Member (A) Member (J)

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Dated : Sep. 2015