Court No.1
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Transferred Application No. 1399 of 2010

Friday, this the 18th day of December, 2015

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

Rama Shanker Upadhaya son of Late Sri Loknath Upadhaya, resident of village Bhainsor, Post Office Daina Tehsil Chandauli, District Varanasi

…….. Petitioner

By Legal Practitioner Col (Retd) Ashok Kumar & Shri Rohit Kumar, Advocate

Versus

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

2. Additional Secretary, Union of India Ministry of Defence, New Delhi.

3. Chief of the Army Staff, New Delhi (through Brigade/Sub Area Commander Competent Authority to Authorize Discharge of the applicant from service Under Army Rule 13 Table 3(v) and 2-A Under which the applicant is said to have Been discharged from service under Unit 32 M.D.S.R.).

4. O.I.C. Records Signal, Post Box No. 5, Jabalpur 482001

5. Chief Controller, Defence Accounts (P) (C.C.D.A.P.) Allahabad

…… Respondents

By Legal Practitioner Shri Shyam Singh, Learned Counsel for the Central Government

ORDER

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

1. Initially, the petitioner had filed writ petition No.54612 of 2006 before the Hon'ble High Court of Judicature at Allahabad, which after constitution of the Armed Forces Tribunal has been transferred to this Bench of the Tribunal and registered as T.A. No.1399 of 2010.The petitioner has claimed the reliefs as under:-

> *"i) issue, writ, order or direction in the nature of certiorari quashing the impugned order-dated 28.04.2006 passed by the respondent no.3 (Annexure '1' to the writ petition.*
>
> *ii) issue, writ, order or direction in the nature of mandamus directing the respondents to pay the disability pension to the petitioner permissible in accordance with law.*
>
> *ii)A issue writ, order or direction in the nature of certiorari quashing the impugned order dated 30 Apr 1991/24 May1993 passed by the respondent No. 5/Forwarded by the Signal Abhilekh Karyalaya Jabalpur refusing to grant disability pension to the petitioner and to pay entire disability pension to the petitioner permissible under law within the reasonable time as fixed by this Hon'ble Court so that justice may be done.*
>
> *iii) Pass such other and further order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case.*
>
> *iv) Award cost of the writ petition."*

2. The factual matrix of the case is that the petitioner was enrolled in the Indian Army on 13.11.1982 and was discharged from service on 01.11.1990 in medical category "BEE" (Permanent). The release medical board held prior to his discharge considered the disability for "Generalised

Seizures (341)" as 30% for five years, however, it was assessed as neither attributable to nor aggravated by military service. The disability pension claim of the petitioner was rejected on the plea that the disease was assessed as neither attributable to nor aggravated by military service vide order dated 30.04.1991. The appeal submitted by the petitioner against rejection of his claim for disability pension was also rejected for the same reason vide order dated 01.10.1993. Aggrieved, the petitioner filed writ petition No.5429 of 1994 before the Hon'ble High Court of Judicature at Allahabad, which was disposed of vide order dated 11.03.2005 with direction to the respondents to decide the supplementary appeal on filing before the respondents by means of appropriate order. The supplementary appeal of the petitioner was disposed of vide order dated 28.04.2006. Again feeling aggrieved, the petitioner filed writ petition No.54612 of 2006 in the Hon'ble High Court of Judicature at Allahabad, which has come to us by way of transfer.

3. Heard Col (Retd) Ashok Kumar & Shri Rohit Kumar, learned counsel for the petitioner, Shri Shyam Singh learned counsel for the respondents and perused the record.

4. Learned Counsel for the petitioner submitted that the petitioner was enrolled in the Indian Army after proper medical examination 13.11.1982 and he was found medically fit by the medical board. From the time of enrollment in November 1982 to December, 1985 the Fits of the alleged disease of "Generalized Seizure (341)" had never occurred to the applicant and even as per medical board the alleged disease first time occurred in the year 1986, therefore, it is wrong to say the disease is not

attributable to military service. Learned counsel for the petitioner submitted that the petitioner got himself examined by Dr. Diwan Chand Agrawal in April, 1988 and the petitioner's health was found normal. The petitioner was also examined by the Institute of Medical Sciences, S.S. Hospital, Banaras Hindu University and it was medically reported that the petitioner was not suffering from such disease. Medical documents of these two examinations have been attached with the writ petition as Annexures 6 & 7 (now T.A.). Learned counsel for the petitioner further submitted that there is nothing on record to show that the petitioner was suffering from the disease of "Generalized Seizure (341)" before joining the army and it is established fact that he suffered from the Fits of the alleged disease only in the beginning of 1986, as such the disability had occurred due to military service, therefore, disability pension should be granted to the petitioner.

5. Per contra, learned counsel for the respondents submitted that petitioner was suffering from "Generalized Seizure (341)" and was initially downgraded to medical category "CEE" (Temporary) for six months with effect from 08.12.1987 and subsequently, on review, he was placed in medical category "BEE" (Permanent) with effect from 07.08.1989. The petitioner was willing to continue in service, but he was not recommended by his Officer Commanding for suitable sheltered appointment in the unit being not available against authorized strength, as such the petitioner was to be discharged from service under rule 13 (3) III (v) read in conjunction with sub-rule (2-A) of the Army Rules, 1954. Learned counsel for the respondents further submitted that the petitioner has not been granted

disability pension, as he was not fulfilling the primary conditions for grant of disability pension as laid down in Para 173 of Pension Regulations for the Army, 1961 (Part – I), 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.

6. Before dealing with the rival submissions, it would be appropriate to examine the relevant Rules & Regulations on the subject. 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 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) **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. In the case of **Dharmvir Singh Vs. Union of India & others** reported in (2013) 7 SCC 316 the Hon'ble 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 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. In **Sukhvinder Singh Vs. Union of India,** reported in (2014) STPL (WEB) 468 SC. the Hon'ble 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 case of **Veer Pal Singh vs. Ministry of Defence** reported in (2013) 8 SCC 83, the observations made by Hon'ble the Apex Court are as under :

"11. A recapitulation of the facts shows that at the time of enrolment in the army, the appellant was subjected to medical examination and the Recruiting Medical Officer found that he was fit in all respects. Item 25 of the certificate issued by the Recruiting Medical Officer is quite significant. Therein it is mentioned that speech of the appellant is normal and there is no evidence of mental backwardness or emotional instability. It is, thus, evident that the doctor who examined the appellant on 22.05.1972 did not find any disease or abnormality in the behaviour of the appellant. When the Psychiatrist Dr (Mrs) Lalitha Rao examined the appellant, she noted that he was quarrelsome, irritable and impulsive but he had improved with the treatment. The Invaliding Medical Board simply endorsed the observation made by Dr Rao that it was a case of "Schizophrenic reaction".

12. In Merriam Webster Dictionary "Schizophrenia" has been described as a psychotic disorder characterized by loss of contact with the environment, by noticeable deterioration in the level of functioning in everyday life, and by disintegration of personality expressed as disorder of feeling, thought (as in delusions), perception (as in hallucinations), and behavior – called also dementia praecox; schizophrenia is a chronic, severe, and disabling brain disorder that has affected people throughout history.

13. The National Institute of Mental Health, USA has described "schizophrenia" in the following words:

> *"Schizophrenia is a chronic, severe, and disabling brain disorder that has affected people throughout history. People with the disorder may hear voices other people don't hear. They may believe other people are reading their minds, controlling their thoughts, or plotting to harm them. This can terrify people with the illness and make them withdrawn or extremely agitated. People with schizophrenia may not make sense when they talk. They may sit for hours without moving or talking.*

Sometimes people with schizophrenia seem perfectly fine until they talk about what they are really thinking. Families and society are affected by schizophrenia too. Many people with schizophrenia have difficulty holding a job or caring for themselves, so they rely on others for help. Treatment helps relieve many symptoms of schizophrenia, but most people who have the disorder cope with symptoms throughout their lives. However, many people with schizophrenia can lead rewarding and meaningful lives in their communities".

17. Unfortunately, the Tribunal did not even bother to look into the contents of the certificate issued by the Invaliding Medical Board and mechanically observed that it cannot sit in appeal over the opinion of the Medical Board. If the learned members of the Tribunal had taken pains to study the standard medical dictionaries and medical literature like The Theory and Practice of Psychiatry by F.C. Redlich and Daniel X. Freedman, and Modi's Medical Jurisprudence and Toxicology, then they would have definitely found that the observation made by Dr Lalitha Rao was substantially incompatible with the existing literature on the subject and the conclusion recorded by the Invaliding Medical Board that it was a case of schizophrenic reaction was not well founded and required a review in the context of the observation made by Dr Lalitha Rao herself that with the treatment the appellant had improved. In our considered view, having regard to the peculiar facts of this case, the Tribunal should have ordered constitution of Review Medical Board for re-examination of the appellant.

18. In Controller of Defence Accounts (Pension) vs. S Balachandran Nair on which reliance has been placed by the Tribunal, this Court referred to Regulations 173 and 423 of the Pension Regulations and held that the definite opinion formed by the Medical Board that the disease suffered by the respondent was constitutional and was not attributable to military service was binding and the High Court was not

justified in directing payment of disability pension to the respondent. The same view was reiterated in Ministry of Defence vs A.V. Damodaran. However, in neither of those cases, this court was called upon to consider a situation where the Medical Board had entirely relied upon an inchoate opinion expressed by the psychiatrist and no effort was made to consider the improvement made in the degree of illness after the treatment.

19. As a corollary to the above discussion, we hold that the impugned order as also the orders dated 14.07.2011 and 16.09.2011 passed by the Tribunal are legally unsustainable. In the result, the appeal is allowed. The orders passed by the Tribunal are set aside and the respondents are directed to refer the case to the Review Medical Board for reassessing the medical condition of the appellant and find out whether at the time of discharge from service he was suffering from a disease which made him unfit to continue in service and whether he would be entitled to disability pension."

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.

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 appeals were dismissed and the judgments of the High Court and Armed Forces Tribunal Benches were nodded in approval 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 this direction of Hon'ble The Apex Court is applied to the instant case, it leads us to the conclusion that the petitioner, who was discharged from service on account of his being in low medical category before completion of his tenure of engagement, if found to be suffering from some disability, would be entitled to the benefit of rounding off.

12. We have given due considerations to the submissions made on behalf of the parties' learned counsel and we find

that the petitioner was enrolled in the Indian Army in a fit medical condition and he has suffered the disability during service, as such, in view of the judgment of the Hon'ble The Apex Court in the cases of **Dharmvir Singh Vs. Union of India & others** (supra) and **Sukhvinder Singh Vs. Union of India** (supra), since he was enrolled in fit medical conditions and was discharged in low medical category, it is for the respondents to rebut the claim and a presumption has to be drawn in favour of the petitioner.

13. In the instant case, the medical board has not given reasons, on the basis of which the medical board has concluded that the petitioner's disease was not attributable and not aggravated by the service. There is no note of any disease or disability in the service record of the petitioner at the time of enrollment. In fact, medical board in their opinion Part III page 3 (Annexure C.A.-6, page 36 of the C.A.) in the column **"Did the disability exist before entering service"** has mentioned **'NO'**. Since there is no evidence on record to show that the petitioner was suffering from any disease at the time of his enrollment, it is presumed that the disability has occurred due to military service. Therefore, the petitioner is entitled to the relief as per the above judgments of the Hon'ble The Apex Court cited above.

14. In view of the above, we are of the considered view that the impugned orders passed by the competent authority were not only unjust, illegal but also were not in conformity with rules, regulations and law. The impugned orders deserve to be set aside and the petitioner is entitled to disability pension @30% for five yeaers, which would stand rounded off to 50%. The petitioner also deserves to

be paid interest on the amount of arrears @ 9% per annum from the date of discharge. We are also of the view that in terms of **Veer Pal Singh's** case (supra), the case of the petitioner be referred to Review Medical Board for reassessing the medical condition of the for further entitlement of disability pension, if any.

15. Thus in the result, the Transferred Application No. 1399 of 2010 is allowed. The impugned orders dated 30.04.1991, 01.10.1993 and 28.04.2006 are set aside. The respondents are directed to grant disability pension to the petitioner @ 30% for five years from the date of discharge, which would stand rounded off to 50% in terms of the decision of Hon'ble The Apex Court in the case of **Sukhvinder Singh vs. Union of India & others** (supra) and **Union of India and Ors vs. Ram Avtar & ors** (supra). The respondents are also directed to pay arrears of disability pension with interest @ 9% per annum till the date of actual payment. In terms of **Veer Pal Singh's** case (supra), the respondents are further directed to refer the petitioner's case to Review Medical Board for reassessing the medical condition of the petitioner for further entitlement of disability pension, if any. 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)
Member (A)

(Justice V.K. DIXIT)
Member (J)

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Dated : Dec. 2015