

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW**ORIGINAL APPLICATION NO 435 of 2017****Friday, this the 18th day of May, 2018****Hon'ble Mr. Justice SVS Rathore, Member (J)**
Hon'ble Air Marshal BBP Sinha, Member (A)

Ex-Corporal Kuldeep Upadhyay, son of late Jagdamba Prasad Upadhyay, resident of village Barra-8, F-Block, Room No. 866, Barra, Kanpur Nagar.

.....Applicant

Ld. Counsel for the: **Col (Retd) R.N. Singh & R. Chandra,**
Applicant **Advocates**

Versus

1. Chief of the Air Staff, Air Headquarters, Vayu Bhawan, New Delhi – 110011.
2. OIC, Air Force Record Office, Pension and Welfare Wing (ODP), Subrato Park, New Delhi – 110010.
3. Commanding Officer, 263, Signal Unit, C/o 56 APO.

.....

Respondents

Ld. Counsel for the : **Mrs Anju Singh, Addl Central Government**
Respondents **Counsel**

ORDER

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

1. By means of the present O.A. the applicant has approached this Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007 for grant of disability pension. The applicant has further prayed for setting aside Government of India, Ministry of Defence Letter No. 1(361)2009/D(Pen) dated 29.04.2019.

2. Brief facts as emerging from the record are that the applicant was enrolled in the Indian Air Force on 16.12.2002 in the trade of 'catering assistant'. On 18.11.2007, the applicant was found suffering from disease 'UNSPECIFIED DISORDER OF ADULT PERSONALITY AND BEHAVIOUR ICDF 69". The applicant was subjected to Invaliding Medical Board which vide opinion dated 25.03.2008 assessed the percentage of disability as 11 to 14%. However, the Invaliding Medical Board assessed his net assessment qualifying for disability pension as NIL and further opined the disability as 'neither attributable to nor aggravated by Air Force services. The Invaliding Medical Board recommended discharge of the applicant on medical grounds. Accordingly, the applicant was discharged on 25.04.2008 after rendering more than five years of service. The applicant's claim for grant of disability pension was denied by the authority concerned vide order dated 04.07.2008. The applicant's first appeal for grant of disability pension was rejected vide order dated 23.07.2008. The second appeal preferred by the applicant also met with the same fate and was rejected vide order dated 29.04.2010. Being aggrieved by denial of disability pension and its rounding off, the applicant has preferred the present OA.

3. We have heard learned counsel for the parties and perused the record.

4. Learned counsel for the applicant submitted that at the time of entry in the Air Force, the applicant was in a fit medical condition, as such, his disability should be considered as attributable to and aggravated by service and disability pension should be granted to the applicant.

5. Rebutting the arguments advanced by learned counsel for the applicant, learned counsel for the respondents defended the action of the respondents and submitted that disability pension has rightly been denied to the applicant since the applicant did not not fulfill the primary conditions for grant of disability pension as laid down in Para-153 of the Pension Regulations for the Air Forces, 1961 (Part-1) which enunciates that disability pension is applicable to such Air Force personnel who are invalided out from service on account of disability attributable to or aggravated by Air Forces service and disability is assessed 20% or above.

6. The applicant has placed on record the proceedings of the Invaliding Medical Board. A perusal of the same indicates that initially the Invaliding Medical had assessed the percentage of disability as 11 to 14 % for life and net assessment qualifying for disability pension as less than 20% for life. However, the entry made in the column for 'net assessment qualifying for disability pension' has been scored out and has been substituted as 'NIL'. In the counter affidavit, no reason is forthcoming as to under whose authority and why the initial entry made in column for 'net assessment qualifying for disability pension' has been

scored out. However, the respondents in the counter affidavit (para-8) are also conceding disability to be 20% for life, but qualifying that for the purpose of disability pension, the percentage is NIL.

7. The law on the point of grant of disability pension and its rounding off is no more RES INTEGRA. In the case of ***Dharamvir Singh vs. Union of India & Ors***, (2013) 7 SCC 316, while considering the question with regard to payment of disability pension, their Lordships of Hon'ble Supreme Court held that an Army personnel, in the present case Air Force, shall be 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 and in the event of his being discharged from service on medical grounds, any deterioration in his health, which may have taken place, shall be presumed due to service conditions. In ***Dharamvir Singh's*** (supra), their Lordships further held that the onus of proof shall be on the respondents to prove that the disease from which the incumbent is suffering is neither attributable to nor aggravated by military service. Observation made by their Lordships in the case of ***Dharmvir Singh*** (supra) 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)."*

8. Thus, in view of the above judgment and settled law on the point of attributability/aggravation, we are of the considered opinion that the disability of the applicant is attributable to Air Force service. The issue of rounding off of disability pension on invalidation has also been well settled by Hon'ble Supreme Court. In this regard, we would like to refer to the decisions of Hon'ble the Supreme Court in the case of ***Sukhvinder Singh Vs Union of India and Ors*** reported in **2014 STPL (WEB) 468 SC**. In our view, the case is fully covered by the aforesaid decision of Hon'ble Supreme Court wherein in substance it has been held that even if an individual being invalided out is assessed to be less than 20%, the disability leading to invaliding out of service would be assumed to be above 20% and shall attract the grant of fifty per cent disability pension after rounding off. Para 9 of the judgment, being relevant is quoted 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.**”*

9. In view of the settled position of law, applicant’s disability of less than 20% (i.e. 11 to 14%) will be deemed to be 20% for life and shall stand rounded off to 50% for life.

10. Accordingly, O.A. No. 435 of 2017 is **allowed**. The impugned orders are set aside. The respondents are directed to grant disability pension to the applicant at the rate of 20% for life which shall stand rounded off to 50 % for life from three years prior to the filing of the present O.A. i.e. 23.08.2014. The entire exercise shall be completed by the respondents within four months from the date of production of certified copy of this order failing which the applicant shall be entitled to simple interest @ 9% per annum on the amount accrued from due date till the date of actual payment.

No order as to cost.

(Air Marshal BBP Sinha)
Member (A)

(Justice SVS Rathore)
Member (J)

Dated : May 18, 2018

anb