Reserved
Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No 580 of 2017

Tuesday, this the 15th day of May 2018

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

No. 14506685 Ex Nk. Ram Prabash Tiwari, son of Shri B.N. Tiwari, resident of village Marhapur, PO Kureshar, District Gazipur, U.P.

……Applicant

Ld. Counsel for the Applicant: Shri V.P. Pandey, Advocate

Versus

1. Union of India, through Secretary, Ministry of Defence, 101 South Block, New Delhi - 110011

2. Chief of the Army Staff, Integrated Headquarters, Ministry of Defence South Block, New Delhi – 110001

3. Officer-in-Charge Records, EME Records, Secunderabad-21.

4. Principal Controller of Defence Account (P) Draupadi Ghat, Allahabad.

…Respondents

Ld. Counsel for the Respondents : Ms. Amrita Chakraborty, Addl Central Government Counsel

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O R D E R

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

1. The present O.A. has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 being aggrieved by non grant of disability pension.

2. Shorn of details, the facts as they emerge from the record are that the applicant was enrolled in the Indian Army 20.08.1971 and was discharged on 31.07.1989 under Army Rule 13(3) III (V) on completion of 17 years 11 months of service. On 24.04.1989, the applicant was subjected to Release Medical Board (RMB), which placed him in low medical category CEE (Permanent) due to disability OSTOCLEROSIS (BILATRAL) 389 (V-67). The RMB opined the disability suffered by the applicant as 'neither attributable nor aggravated' by military service and assessed it at 40% for two years. The applicant's case for grant of disability pension was rejected by the PCDA (P) vide order dated 28.12,1990. Feeling aggrieved, the applicant preferred appeal against rejection of his claim for disability pension which met the same fate and was rejected by the appellate authority by means of order dated 18.03.1990, hence the present Original Application.

3. Before proceeding further, we feel apposite to mention that the delay of about 29 years in approaching the Tribunal for redressal of applicant's grievance has been condoned by this Tribunal vide order dated 23.11.2017 keeping in view that the controversy involved recurring cause of action.

4. Submission of learned counsel for the applicant is that the RMB has opined the disease suffered by the applicant to be hereditary and progressive, but no such note of the disease has been recorded at the time of the appellant's acceptance for military service. He strenuously submitted that The respondents have failed to bring on record any document to suggest that the appellant was under treatment for such a disease and in the absence of any note in the service record at the time of acceptance of joining of appellant, the disability imputed to the applicant is to be considered as attributable to and aggravated by military service having casual connection with military service.

5. Refuting arguments of learned counsel for the applicant, learned counsel for the respondents submitted that the applicant was physically examined by a duly constituted Medical Board and the opinion of the Release Medical Board being an expert body declaring his disability as neither attributable to nor aggravated (NANA) by Military service, should not be ignored.

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

7. The law on the point of attributability of disability is no more RES INTEGRA. While considering the question with regard to grant of disability pension, their Lordships of Hon'ble Supreme Court in the case of ***Dharamvir Singh vs. Union of India & Ors***, (2013) 7 SCC 316, have laid down that an Army personnel 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. 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 not attributable to or 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).*
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> *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)].*
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> *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).*
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> *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]*
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> *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)].*
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> *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*
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> *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. In the instant case, the RMB has expressed its opinion that the disease is not attributable to service condition. The reasons given by RMB to declare the disease as neither attributable to nor aggravated by military service is cryptic, i.e. heridatory and progressive. These two words are cryptic and are not in consonance with the spirit of the judgment in the case of ***Union of India vs. Dharamvir*** *(supra)* since at the time of initial entry in Army Service no mention was made by the Screening Medical Board that the applicant was suffering from the disability. It cannot be ignored that the applicant had put in more than 17 years before being discharged, as such, it is to be presumed that the applicant 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, as such, opinion of the Medical Board that the disease is neither attributable to nor aggravated by Army Service is not at all justified.

9. Since the RMB assessed the disability as 40% for two years, keeping in view the judgment of ***Veer Pal Singh*** vs. ***Ministry of Defence***, reported in (2013) 8 SCC 83, we feel that the case of the applicant should be recommended for Re-survey Medical Board to reassess further entitlement of disability pension, if any.

10. There is no gainsaying that in case the Re-survey Medical Board is of the opinion that the applicant continues to suffer from disability and assesses percentage of his disability, the disability shall be rounded of in consonance with the observations of their Lordships of the Supreme Court in the cases of ***Union of India*** vs. ***Ram Avtar &***

Others, (Civil Appeal No. 418 of 2012 decided on 10 December, 2014.

11. In view of the above the Original Application deserves to be allowed.

12. Accordingly the **O.A. No. 580 of 2017** is **allowed**. The impugned orders passed by the respondents are set aside. The respondents are directed to grant disability pension to the applicant @ 40% for two years from the date of discharge i.e. 31.07.1989. The respondents are also directed to refer the applicant's case for Re-survey Medical Board for further entitlement of disability pension, if any. The respondents shall give effect to this order within a period of four months from the date of receipt of a certified copy of this order failing which, the applicant shall be entitled to get simple interest @ 9% per annum on the amount accrued from due date till the date of actual payment.

13. No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

(Justice S.V.S. Rathore)
Member (J)

Dated: May, 2018
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