

Reserved Judgment**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW
(CIRCUIT BENCH AT NAINITAL)****TRANSFERRED APPLICATION No. 57 OF 2013**Friday, this the 03rd day of May, 2019**Hon'ble Mr. Justice V.K. Shali, Member (J)**
Hon'ble Air Marshal B.B.P. Sinha, Member (A)

Ex. Sepoy Daulat Chand, No. 4167641, S/o Late Shri Lachhi Chand, R/o Village Bichai, P.O. Tanakpur, District Champawat, Uttaranchal.

..... Petitioner

Ld. Counsel for the : **Shri Kishore Rai**, Advocate
Petitioner

Versus

1. Union of India, through Secretary Ministry of Defence, Government of India, New Delhi.
2. The Chief Controller (Defence Accounts) Pension, Allahabad, Uttar Pradesh.
3. The Chief of Army Staff, Army Head Quarters, New Delhi.
4. The Officer-in-Charge, Records, Mechanized Infantry Regiment, Ahmed Nagar- 414110.

.....Respondents

Ld. Counsel for the : **Shri Neeraj Upreti**, Advocate
Respondents Central Govt Standing Counsel

ORDER

“Per Hon’ble Air Marshal B.B.P. Sinha, Member (A)”

1. After discharge by an Invalidating Medical Board (IMB) and denial of disability pension by the respondents, the petitioner had preferred a Writ Petition bearing No. 428 of 2006 (S/S) in the Hon’ble High Court of Judicature at Nainital which has been transferred to this Tribunal in pursuance to powers conferred under Section 34 of the Armed Forces Tribunal Act, 2007 and re-numbered as T.A. No. 57 of 2013. The petitioner has sought the following reliefs:-

(a) Issue a writ, order or direction in the nature of Certiorari to quash the impugned appeal rejection order dated 29th November, 1982 passed by the respondent no.2 and second appeal rejection order dated 25th June, 1986 passed by the respondent no.1 respectively.

(b) Issue a writ, order or direction in the nature of mandamus directing the respondents to pay the disability pension to the petitioner w.e.f. 5th August, 1982 and grant him all arrears of pension along with interests @ 12% per annum from 5th August, 1982, the day from pension became due to the petitioner.

(c) Issue, any other appropriate writ, order or direction which this Hon’ble Court may deem fit and proper in the facts and circumstances of the case.

(d) Award cost of the petition to the petitioner.

2. The petition was earlier dismissed due to non-prosecution vide order dated 15.04.2015 and a restoration application has been filed on 11.10.2018 after an inordinate delay of more than 03 years. The reasons shown in delay condonation application with regard to restoration

application seem to be genuine, hence we condone the delay, admit the petition and proceed to decide the present controversy on merit.

3. Shorn of details, the facts emerging from the record are that that petitioner was enrolled in the Indian Army as Sepoy on 01.01.1976 and was invalidated out of service w.e.f. 05.08.1982 in low medical category for the disability 'Grandmal Seizure' with 20% disability for two years. The IMB has declared the disability as neither attributable to nor aggravated by military service (NANA). Accordingly Claim for disability pension was rejected by the PCDA (P), Allahabad and communicated to the petitioner vide letter dated 17.08.1984. Thereafter, the first and second appeals against rejection of disability pension claim were also rejected by the respondents. Hence this O.A.

4. Learned Counsel for the petitioner pleaded that at the time of enrolment, the petitioner was found mentally and physically fit for service in the Army and there is no note in his service documents that he was suffering from any disease at the time of enrolment in Army. The disease of the petitioner was contacted 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 pension in similar cases, as such the petitioner be granted disability pension as well as arrears thereof, and the petitioner is entitled to disability pension and its rounding off to the tune of 50%.

5. On the other hand, Ld. Counsel for the respondents submitted that as per the opinion of the Invalidating Medical Board (IMB) the disability from which the petitioner suffered is neither attributable to nor aggravated by military service (NANA). Additionally the IMB considered the disease as a constitutional disease and not related to military service, hence the pension sanctioning authority has rightly rejected claim of the petitioner. He pleaded for the petition to be dismissed.

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

7. For adjudication of the controversy involved in the instant case, we need to address two issues; firstly, is the disability attributable to or aggravated by military service? and secondly, if found to be attributable to or aggravated by military service, can the benefit of rounding off be extended to the petitioner?

8. The provisions of Pension Regulations for the Army, 1961 (Part-1) and the Entitlement Rules for Casualty Pension Award, 1982 are relevant and the same are excerpted herein 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 Pension Award, 1982

"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 be given more liberty to the claims in field/afloat service cases.

Diseases

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.

9. The law on the point of attributability of the disability is no more RES INTEGRA in view of a catena of decisions on the subject. On the question of attributability of disability to military service, we would like to refer to the judgment and order of Hon'ble the Apex Court in the case of **Dharamvir Singh vs Union of India & Ors** reported in (2013) 7 SCC 316. The relevant portion of the aforesaid judgment, for convenience sake, 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)."

10. It is clear from the record that the applicant's disability "Grandmal Seizure" has started for the first time in the month of February 1982 i.e. after completion of 06 years of military service. We have noted that the IMB has given a very cryptic sentence to deny attributability to military service i.e. "A constitutional disease, not connected with service". We find that this cryptic sentence does not justify the denial of attributability to military service adequately, specially so when medical literature is clear that this disease can also be caused by head injury or certain types of infections. Thus considering the facts of the disease and the cryptic comments of IMB, we would like to extend the benefit of doubt in favour of the applicant. Therefore, in view of the above judgment and settled law on the point, we are of the considered opinion that the disability of the petitioner is to be considered as aggravated by military service.

11. In the instant case, there is no dispute that the IMB has considered the disability element @ 20% for two years after his discharge. The respondents will therefore be

required to hold a Re-survey Medical Board (RSMB) of the petitioner.

12. Since the policy with regard to rounding off of disability pension came into existence w.e.f. 01.01.1996 and the petitioner was discharged from service w.e.f. 05.08.1982, he is not entitled to the benefit of rounding off of disability pension.

13. However in view of the law of limitations as laid down in the case of ***Shiv Dass vs Union of India***, reported in (2007) 3 SLR 445 and the fact that this petition was dismissed for non-prosecution on 15.04.2015 and thereafter though due to special circumstances this petition has been restored, the law of limitation will apply from the date this petition was received by this Tribunal. Since the petition was received on 13.06.2013, the petitioner shall be entitled to receive disability pension three years prior to receipt of the petition by this Tribunal i.e. 13.06.2010.

14. In view of the above, the Original Application deserves to be partly allowed, hence **partly allowed**. The petitioner is entitled to disability pension @ 20% for two years w.e.f. his date of discharge. However due to law of limitations the petitioner is entitled to service element w.e.f. three years

prior to receipt of the transferred application to this Tribunal. The petition was received by this Tribunal on 13.06.2013. He is not entitled to any arrears on his disability element. His future entitlement to disability element is subject to outcome of RSMB. The respondents are directed to conduct an RSMB within 04 months from the date of receipt of a certified copy of this order. Default will invite an interest @ 9% per annum.

No order as to costs.

(Air Marshal B.B.P. Sinha)
Member (A)

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

Dated : May, 2019
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