

**Court No. 1****ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****Original Application No. 442 of 2021**

Thursday , this the 25<sup>th</sup> day of November, 2021

**Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)**  
**Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)**

No. 6925459Y Ex. Hav. Avadh Bihari Tiwari, Son of Shri Ram Prakash Tiwari, Resident of Village – Khankalajahanpur, Post Office – Pali, Tehsil – Sawajapur, District – Hardoi (UP), Pin-241123.

.... **Applicant**

Ld. Counsel for the : **Shri Manoj Kumar Awasthi**, Advocate  
 Applicant

Versus

1. Union of India, through Secretary, Ministry of Defence (Army), South Block, New Delhi-110011.
2. Chief of the Army Staff, IHQ MOD (Army), Army HQ, South Block, New Delhi-110010.
3. The Officer-in-Charge Records, The AOC Record, Pin-900453, C/o 56 APO.
4. Principal Controller of Defence Accounts (P), Draupadi Ghat, Allahabad.

... **Respondents**

Ld. Counsel for the: **Dr. Gyan Singh**, Advocate  
 Respondents. Central Govt Counsel.

**ORDER**

**“Per Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)”**

1. The instant Original Application has been filed on behalf of the applicant under Section 14 of the Armed

Forces Tribunal Act, 2007, whereby the applicant has sought following reliefs:-

- A. *To issue/pass an order or directions to Set aside/quash the order no. C/6925459/Pen/Dis-II dated 20.09.2008 passed by respondent no. 3, which is being annexed as Annexure No. A-1 to this Original Application.*
- B. *To issue/pass an order or directions to the respondents for grant of disability element of disability pension @1-5% for life from date of discharge i.e. 31.03.2008 along with @12% interest on arrear in light of Hon'le Apex Court Judgment Sukhwinder Singh Vs Union of India (Civil Appeal no. 5605 of 2010 decided on dated 25.06.2014).*
- C. *To issue/pass an order or directions to the respondents for benefit of rounding off disability pension upto @50% for life from date of discharge i.e. 31.03.2008 along with @12% interest on arrear in light of Hon'ble Apex Court Judgment Union of India Vs Ram Avtar and Govt. of India letter dated 31.01.001.*
- D. *To issue/pass an order or directions to the respondents for fresh assessment of applicant's disability by way of constitution of Re-Survey Medical Board so that fresh assessment of said disability could be assessed.*
- E. *To issue/pass any other order or direction as this Hon'ble Tribunal may deem just, fit and proper under the circumstances of the case in favour of the applicant.*

*F. To allow this original application with costs.*

2. Briefly stated, applicant was enrolled in the Army Ordnance Corps of Indian Army on 28.05.1986 and was discharged on 31.03.2008 (AN) in Low Medical Category under Rule 13 (3) Item III (v) read in conjunction with Rule 2A of the Army Rules, 1954. At the time of discharge from service, the Release Medical Board (RMB) held at 176 Military Hospital on 14.02.2008 assessed his disabilities (i) '**CNS (INV) SEIZURE (ICD NO. G-40.6)**' @ 1-5% for life as **attributable to military service** and (ii) '**OBESITY**' @1-5% for life as neither attributable to nor aggravated (NANA) by service, composite disabilities @1-5% for life. The applicant's claim for grant of disability pension was rejected vide letter dated 20.09.2008. It is in this perspective that the applicant has preferred the present Original Application.

3. Ld. Counsel for the applicant pleaded that the applicant was fully fit at the time of enrolment and the first disability was assessed by the RMB as attributable to military service. However, second disability has been assessed as NANA by the RMB. Ld. Counsel for the applicant has relied upon the Hon'ble Apex Court judgment in the case of **Sukhwinder Singh vs Union of India & Ors**, reported in (2014) STPL (WEB) 468 SC and

contended that since applicant's services were cut short and he was discharged from service prior to completion of terms of engagement, therefore his discharge from service should be a deemed invalidation as held in the case of **Sukhwinder Singh** (supra) and applicant deserves to be granted disability element of disability pension.

4. On the other hand, Ld. Counsel for the respondents submitted that as the composite disability of applicant has been assessed @ 1-5% for life i.e. below 20%, he is not entitled to disability element of pension in terms of para 173 of Pension Regulations for the Army, 1961 (Part-I) and his claim was rightly denied by the respondents being disability below 20%. His further submission is that since no sheltered appointment was available, he was rightly discharged from service being in low medical category. He pleaded for dismissal of the Original Application.

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

6. For adjudication of the controversy involved in the instant case, we need to address only two issues; firstly, is the discharge of applicant a case of normal discharge or invalidation? and secondly is applicant is entitled to

disability element of disability pension being disability below 20% attributable to military service.

7. For the purpose of first question as to whether the discharge of the applicant by Release Medical Board is a case of discharge or invalidation. In this context, it is clear that the applicant was medically boarded out from service before completion of his terms of engagement in low medical category and was, thus, discharged from service. In this regard, Rule 4 of the Entitlement Rules for Casualty Pensionary Awards, 1982 defines invalidation as follows:

*"Invaliding from service is a necessary condition for grant of a disability pension. An individual, who, at the time of his release under the Release Regulations, is in a lower medical category than that in which he was recruited will be treated as invalided from service. JCOs/ORs and equivalent 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."*

8. Thus, in light of above definition, it is clear that the applicant was in low medical category as compared the one when he was enrolled and hence his discharge is to be deemed as invalidation out of service.

9. The law on this point is very clear as reported in (2014) STPL (WEB) 468, ***Sukhwinder Singh vs Union of India & Ors.*** Para 9 of the aforesaid judgment being relevant is reproduced 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. Thirdly, there appears to be no provisions authorising the discharge or invaliding out of service where the disability is below twenty percent and seems to us to be logically so. Fourthly, whenever 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.”

10. From the above mentioned Rule on disability pension and ratio of law emerging out of Hon'ble Apex Court's judgment (supra), it is clear that once a person has been recruited in a fit medical category, the benefit of doubt will lean in his favour unless cogent reasons are given by the Medical Board as to why the disease could not be detected at the time of enrolment. In this case, we find that the applicant was placed in low medical category due

to his disabilities and the RMB has declared his first disability as attributable to military service. The aforesaid law also makes clear that in case of invalidation the disability percentage is presumed to 20% irrespective of the disability percentage assessed by RMB/IMB. However, we are agree with opinion of the RMB with regard to second disability as NANA as it is a life style disorder.

11. In view of the above, we are of the considered opinion that applicant's discharge vide Release Medical Board held on 14.02.2008 is to be treated as invalidation in terms of Rule 4 of the Entitlement Rules (supra).

12. The law on the point of rounding off of disability pension is no more RES INTEGRA in view of Hon'ble Supreme Court judgment in the case of **Union of India and Ors vs Ram Avtar & ors** (Civil appeal No 418 of 2012 decided on 10th December 2014). In this Judgment the Hon'ble Apex Court nodded in disapproval of the policy of the Government of India in granting the benefit of rounding off of disability pension only to the personnel who have been invalided out of service and denying the same to the personnel who have retired on attaining the age of superannuation or on completion of their tenure of engagement. The relevant portion of the decision 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.

5. We have heard Learned Counsel for the parties to the lis.

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."

13. It is also observed that claim for pension is based on continuing wrong and relief can be granted if such continuing wrong creates a continuing source of injury. In

the case of ***Shiv Dass vs. Union of India***, reported in 2007 (3) SLR 445, Hon'ble Apex Court has observed:

*"In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition. It would depend upon the fact of each case. If 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."*

14. As such, in view of the decision of Hon'ble Supreme Court in the case of ***Shiv Dass*** (supra), we are of the considered view that benefit of rounding off of disability pension @ 20% for life to be rounded off to 50% for life may be extended to the applicant from three preceding years from the date of filing of the Original Application.

15. In view of the above, the **Original Application No.442 of 2021** deserves to be allowed, hence **allowed**.

The impugned order rejecting the applicant's claim for grant of disability element of disability pension, is set aside. The applicant is entitled to get disability element @20% for life which would be rounded off to 50% for life w.e.f. three years preceding the date of filing of Original

Application. The respondents are directed to grant disability element to the applicant @30% for life which would stand rounded off to 50% for life w.e.f. three years preceding the date of filing of Original Application. The date of filing of Original Application is 11.08.2021. The respondents are further directed to give effect to this order within a period of four months from the date of receipt of a certified copy of this order. Default will invite interest @ 8% per annum till the actual payment

16. No order as to costs.

**(Vice Admiral Abhay Raghunath Karve) (Justice Umesh Chandra Srivastava)**  
**Member (A) Member (J)**

Dated: 25 November, 2021

AKD/-