Court No.1

Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW

Original Application No. 146 of 2012

Monday this the 3rd day of October, 2016

Hon'ble Mr. Justice Abdul Mateen, Member (J)
Hon'ble Lt Gen Gyan Bhushan, Member (A)

Ex-Naik Om Prakash Tiwari
(No. 14352597X) of 302 Light Regiment, C/o 56 APO,
son of Late Brij Kishore Tiwari, resident of Village - Gadamar,
Post Office - Bharwar, Police Station – Shankargarh,
Tehsil – Bara, District – Allahabad (U.P.).

…….. Applicant

By Legal Practitioner - Shri P.N. Chaturvedi, Advocate

Versus

1. Chief of the Army Staff, Integrated Headquarter of the Ministry of Defence (Army), South Block, New Delhi-110011.

2. Officer-in-Charge, Artillery Records, Nasik Road Camp, APS Pin-908802.

3. Commanding Officer, 302 Light Regiment, Pin-926302, C/o 56 APO.

4. Principal Controller Defence Accounts (Pension),
Draupadi Ghat, Allahabad.

…… Respondents

By Legal Practitioner - Mrs. Deepti Prasad Bajpai, Learned Counsel for the Central Government

JUDGMENT

1. The instant Original Application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007, and he has claimed the reliefs as under:-

> *"(a) To issue an order, direction to the respondents to quash /set aside the rejection of Disability Pension claim by the office of PCDA (P) Allahabad vide their order dated 06.03.2003 (Annexure SA-1) and letter given to the applicant vide Artillery Record Nasik Road Camp dated 15.04.2003 (Annexure SA-2), having been passed without proper application of mind, ignoring the relevant provisions on the subject.*
>
> *(b) Issue/pass an order or direction to the respondents to quash/set aside the rejection of the First Appeal vide Government of India, Ministry of Defense letter dated 11.08.2011 (Annexure No. A-1 (iv)).*
>
> *(c) To issue/pass an order or direction of appropriate nature to the respondents to grant the disability pension to the applicant to the extent of 40% (which will be 50%) as decided by the Release Medial Board with effect from 01.09.2002 for life.*
>
> *(d) Issue/pass any other order or direction as this Hon'ble Tribunal may deem fit in the circumstances of the case.*
>
> *(e) Allow this application with costs."*

2. The factual matrix of the case is that the applicant was enrolled in the Indian Army on 08.09.1980 and was discharged from service with effect from 31.08.2002 (afternoon) under Rule 13 (3) III (V) of the Army Rules, 1954 in low medical category for the disease **"OBESITY 278"** and "**PRIMARY HYPERTENSION 401**". Medical Board considered the disability due to "**OBESITY**

278" as 10% for life and considered it as neither attributable to nor aggravated by military service and "**PRIMARY HYPERTENSION 401"** as 30% for life and considered it as not attributable to but aggravated by military service. Composite disability was considered as 40% for life. His claim for grant of disability pension was forwarded to PCDA (P) Allahabad but it was rejected vide order dated 06.03.2003 on the grounds that the disability is neither attributable to nor aggravated by military service. Thereafter, the applicant preferred his appeal against the rejection of his claim but the same was also rejected vide order dated 11.08.2011. Aggrieved, the applicant has filed this Original Application.

3. Heard Shri P.N. Chaturvedi, Learned Counsel for the applicant, Mrs. Deepti Prasad Bajpai, Learned Counsel for the respondents and perused the record.

4. Learned Counsel for the applicant submitted that at the time of enrollment, the applicant was examined by the medical board and was found mentally and physically fit for a service in the Indian Army and there is no note, whatsoever, in the service documents that he was suffering from any disease at the time of entry in service. Learned Counsel for the applicant further submitted that applicant was entitled for disability pension in view of Para 173 of the Pension Regulations (Part-I) 1961, since

his disability for **"PRIMARY HYPERTENSION 401"** has been considered as aggravated by service, however, PCDA (P) Allahabad has changed the recommendation and considered it as neither attributable to nor aggravated by military service which is not legal. He should be granted disability pension as per recommendation of medical board. .

5. **Per contra**, Learned Counsel for the respondents submitted that the Medical Board has considered disability due to "**OBESITY 278**" as neither attributable to nor aggravated by military service and the second disability "**PRIMARY HYPERTENSION 401"** of the applicant has been considered as aggravated by military service and assessed as @ 30% for life and composite disability has been considered as 40% for life but the pension sanctioning authority i.e. PCDA (Pension) Allahabad in consultation with Medical Advisor (Pension) attached to their office has considered the disability as neither attributable to nor aggravated by military service. As such his claim for disability pension has been rightly rejected in accordance with Para 173 of the Pension Regulations which clearly states that disability pension is admissible to an individual who is invalided out from service on account of disability, which is attributable to or aggravated by military service and is assessed at 20% or more.

6. We have examined documents on record and relevant rules 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 Pensionary Awards, 1982.

7. On the issue of attributability of disability to military service, we would like to refer to the decisions of Hon'ble The Apex Court in **Dharamvir Singh Vs. Union of India and Ors** reported in **(2013) 7 Supreme Court Cases 316,** in which Hon'ble The Apex Court took note of the provisions of the Pensions Regulations, Entitlement Rules and the General Rules of Guidance to Medical Officers to sum up the legal position emerging from the same in the following words.

> *"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).

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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. On the issue of disability pension, we also recall the case of **Sukhvinder Singh Vs. Union of India,** reported in (2014) STPL (WEB) 468 SC wherein Hon'ble The 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. Keeping in view submission of the learned counsel for the parties, a Doctor from Command Hospital was directed to assist the Court. Col (Dr.) V.P. Singh from Command Hospital, Lucknow was present and after going through the medical documents, apprised the Court that "**OBESITY 278**" was first detected in August 2000 and it was considered as neither attributable to nor aggravated by military service with 10%

disability for life. However second disability due to the disease "**PRIMARY HYPERTENSION 401"** was detected on 09.05.2002 and as per medical board it was due to stress and strain of service and it was considered as **not attributable to but aggravated by military service** and disability was assessed as 30% for life and Composite disability was 40% for life for both diseases. However, claim for disability pension of the applicant has been rejected by PCDA (Pension) Allahabad who in consultation with Medical Advisor (Pension) attached with PCDA (P) has considered the disability as neither attributable to nor aggravated by military service.

10. It is observed that in the instant case, sitting over the opinion of the medical board, the Medical Advisor attached to PCDA (P) has expressed opinion that the disease was neither attributable to nor aggravated by service. Respondents have failed to notice that the Medical Advisor had not given adequate reason in support of his opinion. In the case of **Dharmvir Singh** (supra), it has been clearly postulated that when there is no note of such disease in the service record of the applicant at the time of enrolment in the Army, it would be considered that the applicant was in sound physical and mental condition at the time of joining the service and deterioration in his health is due to service. In this case it is also observed that though the medical board has

considered the disability due to **"PRIMARY HYPERTENSION 401"** as not attributable to but aggravated by military service but PCDA (P) Allahabad has altered the recommendation and considered it as neither attributable to nor aggravated by military service. This contention does not commend to us for acceptance in view of the decisions of **Hon'ble The Apex Court in Ex. Sapper Mohinder Singh vs. Union of India in Civil Appeal No 104 of 1993 decided on 14.01.1993** nodded with approval in **Babu Singh Vs Union of India and others CWP No 3296 of 2003 decided on 26.4.2006**. The observation made in the decision of **Ex. Sapper Mohinder Singh** (supra) being relevant is quoted below:

> *"From the above narrated facts and the stand taken by the parties before us, the controversy that falls for determination by us is in a very narrow compass viz. whether the Chief Controller of Defence Accounts (Pension) has any jurisdiction to sit over the opinion of the experts (Medical Board) while dealing with the case of grant of disability pension, in regard to the percentage of the disability pension, or not. In the present case, it is nowhere stated that the Applicant was subjected to any higher medical Board before the Chief Controller of Defence Accounts (Pension) decided to decline the disability pension to the Applicant. We are unable to see as to how the accounts branch dealing with the pension can sit over the judgment of the experts in the medical line without making any reference to a detailed or higher Medical Board which can be constituted under the relevant instructions and rules by the Director General of Army Medical Core."*

11. Having given considerations to the rival submissions made on behalf of the parties' Learned Counsel, we find that the applicant had been enrolled in the Army in a fit medical condition and he suffered the disability due to stress and strain during his service, therefore, in view of the judgment of the Hon'ble The Apex Court in the cases of **Dharmvir Singh** (supra) and **Sukhvinder Singh** (supra), a presumption has to be drawn in favour of the applicant. Even if we disregard the disability due to obesity we find that disability due to **"PRIMARY HYPERTENSON 401"** has been considered as aggravated by military service and the Medical Advisor attached to the PCDA (P) has changed the recommendations of the medical board without giving any reasoned opinion, as such in view of decision of Hon'ble The Apex Court in **Ex. Sapper Mohinder Singh** (supra), it is unjust and illegal.

12. In this case disability due to Hypertension has been considered as aggravated by military service as such as per Pension Regulations, the applicant is entitled to disability pension. Also, no reasoned opinion has been given by the Medical Advisor, on the basis of which, it was concluded that the applicant's disability was neither attributable to nor aggravated by the service. There is no note of such disease in the service record of the applicant at the time of enrollment in service and there is no

evidence on record to show that the applicant was suffering from any disease at the time of his enrollment in service. Therefore, he is entitled to the relief as per the judgments of the Hon'ble The Apex Court in the cases of **Dharmvir Singh** (supra), **Sukhvinder Singh** (supra) and **Ex. Saper Mohinder Singh** (supra).

13. Learned counsel for the applicant has not pleaded in the petition for the benefit of rounding off of disability pension but has made oral prayer. We feel that the matter with respect to rounding off should also be dealt with to do complete justice. In consonance with the Policy Letter No.1(2)/97/D (Pen-C) dated 31.01.2001 and in terms of the decision of Hon'ble The Apex Court in the case of **Union of India and Ors vs. Ram Avtar & ors Civil Appeal No 418 of 2012 dated 10th December 2014)**, we are of the view that the applicant is entitled to the benefit of rounding off.

14. In view of the above, we are of the considered view that the impugned orders passed by the competent authority were unjust, illegal and not in conformity with rules, regulations and law. The impugned order deserves to be set aside and the applicant is entitled to disability pension @ 30% for life which needs to be rounded off to 50% with interest @ 9% per annum from the date of discharge.

15. Thus in the result, the Original Application **No. 146 of 2012** succeeds and is allowed. The impugned orders dated 06.03.2003 and 11.08.2011 are set aside. The respondents are directed to grant disability pension to the applicant @ 30% for life in terms of decision of Hon'ble The Apex Court in cases of **Dharmvir Singh** (supra), **Sukhvinder Singh** (supra) and **Ex Saper Mohinder Singh** (supra) 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 **Ram Avtar (**supra). The respondents are also directed to pay arrears of disability pension with interest @ 9% per annum from the date of discharge till the date of actual payment. Respondents are directed to give effect to the order within four 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 Abdul Mateen)
Member (J)

Dated : October, 2016
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