

Court No. 1**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****Original Application No. 394 of 2020**

Tuesday, this the 07th day of September, 2021

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

Service No 13746512 Ex Naik Bishnu Bahadur Thapa, son of Sri Padam Bahadur, Village- Banjara Wala, Post Office- Nanjara Wala, Tehsil- Dehradun, District- Dehradun (Uttarakhand).

.....Applicant

Ld. Counsel for Applicant: **Shri VP Pandey, Advocate**

Versus

1. The Union of India, through the Secretary, Ministry of Defence , South Block, New Delhi- 110011.
2. The Chief of the Army Staff, Integrated Headquarters of the Ministry of Defence (Army), South Block, New Delhi -110011.
3. Officer in Charge Records, Records, JAK RIF, PIN- 908774, C/o 56 APO.
4. Principal Controller of Defence Accounts (Pension), Draupadi Ghat, Allahabad (U.P.)- 211014.

.....Respondents

Ld. Counsel for the : **Dr. Shailendra Sharma Atal,**
 Respondents **Central Govt Counsel**

ORDER

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

1. This Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 whereby the applicant has claimed the following reliefs:-

(a). *To set aside/quash the rejection order dated 31 March 1999 and 06 Feb 2003 after summoning the same.*

(b). *To issue/ pass an order or directions to the respondents to grant disability pension from the date of discharge that is 31 Oct 1998.*

(c). *To issue/pass an order or direction to the respondents to pay battle causality award to the applicant as disability is caused by war like situation.*

(d). *Any other relief as considered proper by this Hon’ble Tribunal be awarded in favour of the applicant.*

(e). *Cost of the O.A. be awarded to the applicant.*

2. The undisputed factual matrix on record is that the applicant was enrolled in the Indian Army on 15.12.1980 and was invalided out from service 01.11.1998 after rendering total 17 years of service in the army on medical grounds in Low Medical Category for the disease **“SENSORY NEURAL DEAFNESS BILATERAL (NOISE INDUCED DEAFNESS) 389”** The Release Medical Board (RMB) of the applicant held on 11.06.1998 at 170 Military Hospital assessed his disability @

40% for 2 years and considered as attributable to army service. The applicant has been granted service pension for rendering 17 years of service. Medical Advisor at PCDA (Pension) Allahabad considered the disability of the applicant as constitutional disorder and claim of applicant for grant of disability pension was rejected by the respondents vide letter dated 31.03.1999 being NANA. His appeal for grant of disability pension was also rejected vide letter dated 12.12.2018. Being aggrieved, the applicant has approached this Tribunal for grant of disability pension.

3. Learned Counsel for the applicant submitted that applicant was enrolled in the Army in medically and physically fit condition and there was no note in his service documents with regard to suffering from any disease prior to joining, therefore any disability suffered by applicant after joining the service should be considered as attributable to or aggravated by Army service and he should be entitled to disability pension. Learned Counsel for the applicant further submitted that disability of the applicant was considered as aggravated by RMB but Medical Advisor at PCDA (Pension), Allahabad has wrongly assessed as constitutional in nature. He submitted that disability pension claim of applicant has been rejected in a

cavalier manner without assigning any meaningful reason. He pleaded that various Benches of the Armed Forces Tribunal have granted disability pension in similar cases, as such, the applicant is also entitled to disability pension and its rounding off to 50%.

4. Learned counsel for the respondents has not disputed that applicant suffered disability to the extent of 40% for two years, but he submitted that Advisor at PCDA (P), Allahabad while rejecting the claim of the applicant has viewed that disability was found as constitutional in nature and not connected with military service, therefore, in terms of Para 173 of the Pension Regulations for the Army, 1961 (Part-I), the claim of the applicant for the grant of disability pension has correctly been rejected.

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

6. The question before us for consideration is simple and straight whether disability of applicant is attributable to or aggravated by military service and whether applicant is authorized for grant of battle casualty status?

7. The law on attributability of a disability has already been settled by the Hon'ble Supreme Court in the case of ***Dharamvir Singh vs. Union of India & Ors*** (supra). In this case 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)."

8. After considering all issues we have noted that disability was considered as aggravated by military service by the RMB but Advisor at PCDA (P), Allahabad has considered it as constitutional in nature and no reason for denying attributability has been given. We find that when the applicant joined the Army, he was medically examined and found to be in Shape-I and the aforesaid disability was contracted after about 16 years of service which resulted in the downgrading of his medical category. In absence of any evidence on record to show that the applicant was suffering from disability or any ailment at the time of entering in service, it will be presumed that deterioration of his health has taken place due to service and the applicant is entitled to the relief as per the above judgments of the Hon'ble The Apex Court in the case of ***Dharamvir Singh*** (Supra). Therefore, we consider the disease of the applicant as aggravated by military service. We also converge to the view that, in view of law laid down by Hon'ble The Apex Court in the case of ***Veer Pal Singh***, in the

interest of justice, the case of the applicant be referred to Review Medical Board for reassessing the medical condition of the applicant for further entitlement of disability pension, if any.

9. On the issue of rounding off of disability pension, we are of the opinion that the case is squarely covered by the decision of *K.J.S. Buttar vs. Union of India and Others*, reported in (2011) 11 SCC 429 and Review Petition (C) No. 2688 of 2013 in Civil appeal No. 5591/2006, *U.O.I. & Anr vs. K.J.S. Buttar and Union of India vs. Ram Avtar & Others*, (Civil Appeal No. 418 of 2012 decided on 10 December, 2014. Hence the applicant is eligible for the benefit of rounding off also.

10. As far as grant of battle casualty status to the applicant is concerned, applicant has no case as he does not fulfill any criteria for grant of battle casualty status. His prayer for grant of battle casualty status is rejected.

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

12. Accordingly, O.A. is partly **allowed**. The impugned orders passed by the respondents rejecting the claim for the grant of disability pension are set aside. The respondents are

