Court No.2
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 176 of 2015
Tuesday, this the 25th day of July 2017

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)
Hon'ble Lt Gen Gyan Bhushan, Member (A)

Ex. Naib Subedar Ganesh Prasad Kushwaha (JC-368725X) of EWS-104, Ratnakar Khand, South City, Raibareli Road, P.O. B.R. Ambedkar University, District – Lucknow-226025 (Uttar Pradesh)

…….. Applicant

By Legal Practitioner – Shri Om Prakash Kushwaha,
Learned Counsel for the Applicant

Versus

1. Union of India through Secretary Ministry of Defence , New Delhi-110011.
2. Chief of the Army Staff, Integrated Headquarters of Ministry of Defence (Army), South Block, New Delhi-110011
3. Signals Records, Jabalpur (MP)
4. Commanding Officer, Central Command Signal Regiment, Lucknow
5. The Principal Controller of Defence Accounts (Pension), Draupadi Ghat, Allahabad.

…… Respondents

By Legal Practitioner – Shri Namit Sharma
Learned Counsel for the Central Government

ORDER

"Hon'ble Lt Gen Gyan Bhushan, Member (A)"

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

> *(a) Issue/pass an order or direction to the respondents to grant the applicant 20% disability for 5 years as assessed by the Release Medical Board because the disability was due to the disease HYPOTHYROIDISM was attributable to and/aggravated by military service. It was due to stress and strain of service.*
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> *(b) Issue/Pass order or direction to the respondent to grant him 20% disability for 5 years after the discharge of the applicant from service and thereafter there should be Re-Survey medical Board to reassess the disability pension from the very inception may be ordered to be rounded off to 50% disability as per the existing provisions on the subject.*
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> *(c) Issue/pass any other order or direction as this Hon'ble Tribunal may deem fit in the circumstances of the case.*

2. The factual matrix of the case is that the applicant was enrolled in the Army on 21.10.1971 and was discharged on 31.10.1997 under Rule 13(3) I (i) (a) in low medical category 'B' (Permanent) for the disease "**1^{o} Hypothyroidism-246"**. Medical Board assessed his disability as 20% for five years and considered it as neither attributable to nor aggravated by military service. The disability pension claim of the applicant was rejected by P.C.D.A. (Pension) on 03.04.1998 stating that the disability is neither attributable to nor aggravated by military service, constitutional in nature and not related to the military service. Aggrieved by the rejection of his disability pension claim, the applicant has filed this Original Application.

3. The delay in filing of the Original Application has been condoned vide order dated 05.08.2015.

4. Heard Shri Om Prakash Kushwaha, Learned Counsel for the applicant, Shri Namit Sharma, Learned Counsel for the respondents and perused the record.

5. Learned Counsel for the applicant submitted that at the time of enrollment, the applicant was considered medically and physically fit

to join the Army. The disease has occurred to him due to stress and strain of the military service, as such, keeping in view the large number of judgments passed by the various Benches of Armed Forces Tribunal, his disability must be considered as attributable to and aggravated by military service and he should be granted disability pension. He further submitted that the applicant is also entitled to benefit of rounding off of the disability pension as per policy letter dated 31.01.2001.

6. P**er contra**, Learned Counsel for the respondents submitted that as per policy applicant's disability pension claim was preferred to PCDA (Pension), Allahabad, for adjudication and was rightly rejected as per Paragraph 173 of Pension Regulations 1961 (Part-1), which clearly states that pension may be granted to an individual who is invalided from service on account of disability, which is attributable to or aggravated by military service and percentage of disablement is assessed as 20% or above. Since his disability was considered as neither attributable to nor aggravated by military service it has been correctly denied to him. However, subsequently Ld. Counsel for the respondents conceded that in consonance with various judgments of Hon'ble The Supreme Court and Armed Forces Tribunals, the applicant is entitled to disability pension.

7. We have gone through the relevant rules and regulations on the issue 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 and Ors** reported in **(2013) 7 Supreme Court Cases 316,** in which Hon'ble The Apex Court had observed the provisions of the Pension 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. We would like to recall the judgment on grant of disability pension passed in the case of **Sukhvinder Singh Vs. Union of India,** reported in (2014) STPL (WEB) 468 SC, in para 9 of the judgment 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. In the instant case the applicant was enrolled in the Army on 21.10.1971 and was discharged on 31.10.1997 under Rule 13(3) I (i) (a) in low medical category 'B' (Permanent) for the disease "**1^{o} Hypothyroidism-246"**. Medical Board assessed his disability as 20% for five years and considered it as neither attributable to nor aggravated by military service. In the cases of **Dharamvir Singh** (supra) and **Sukhvinder Singh** (supra), it has been clearly postulated that when there is no note of such disease or disability available in the service record of the applicant at the time of acceptance for Army service, it would 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. In this case the Medical Board in their opinion on page 3 against column 1 i.e. '**Did the disability exist before entering service',** has mentioned **'No'**. The Medical Board in the opinion has also mentioned that the disability has occurred due to physical and mental stress and strain of service.

Respondents have not produced any evidence to prove that the disease existed prior to enrolment.

10. Since the Medical Board has assessed the disability as 20% for five years, as such keeping in view Hon'ble The Apex Court judgement in the case 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 Review Medical Board to reassess further entitlement of disability pension.

11. For entitlement of rounding off, we recall the decision of Hon'ble The Apex Court in the case of **Union of India and Ors v Ram Avtar & ors Civil Appeal No 418 of 2012 dated 10th December 2014** in which Hon'ble The Apex Court nodded in disapproval the policy of the Government of India in not granting the benefit of rounding off of disability pension to the personnel who have been invalided out of service on account of being in low medical category or who has retired on attaining the age of superannuation or completion of his tenure of engagement, if found to be suffering from some disability. Keeping the policy letter dated 31.01.2001 and judgment of **Ram Avtar & ors (**supra), we are of the view that the applicant is entitled to the benefit of rounding off.

12. On the issue of delay and payment of arrears, we recall the case of **Shiv Dass Vs Union of India reported in 2007 (3) SLR 445** wherein in Para 9 of the judgment, Hon'ble The Apex Court has observed:-

> *"9. In the case of the 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."*

13. Keeping in view the judgments of **Dharamvir Singh**, and **Sukhvinder Singh**(supra), we converge to the view that the impugned orders passed by the respondents were not only unjust, illegal but was

also not in conformity with rules, regulations and law; and the impugned orders deserve to be set aside. The applicant is entitled to disability pension @ 20% for five years which needs to be rounded off to 50% as per policy letter dated 31.01.2001 and in terms of decision of Hon'ble The Apex Court in the case of **Ram Avtar** (supra). We are also of the view that the applicant needs to be brought before Review Medical Board to reassess his medical condition for further entitlement of disability pension, if any.

14. Accordingly the **Original Application No. 176 of 2015** succeeds and is allowed. The impugned order dated 03.04.1998 passed by the respondents is set aside. The respondents are directed to grant disability pension to the applicant @ 20% for five years which would stand rounded off to 50% alongwith interest @ 9% from three years prior to filing of the Original Application i.e. 22.08.2011. The respondents are also directed to refer the applicant's case to Re-Survey Medical Board for reassessing the medical condition of the applicant for further entitlement of disability pension, if any. 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. In case the respondents fail to give effect to this order within the stipulated time, they will have to pay interest @ 9% on the amount accrued from due date till the date of actual payment.

15. No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

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

Dated : July 2017

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