

Court No.1(B)

Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL,
BENCH, LUCKNOW

Original Application No. 114 of 2016

Tuesday this the 11th day of April, 2017

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Lt Gen Gyan Bhushan, Member (A)

EX-Nk Satish Kumar, son of late Jagdish Singh, resident of village – Mulana, Post office Wailana, Tehsil Sadar, District Gautam Budh Nagar, Noida- 203203, U.P.

..... **Applicant**

By Legal Practitioner: Shri AK Singh, Advocate learned counsel for the applicant.

Versus

1. Union of India through the Secretary, Ministry of Defence, New Delhi-110011.
2. Chief of the Army Staff, Integrated Headquarters, Ministry of Defence (Army), New Delhi-110011.
3. Officer Incharge, Records, The Jat Regiment, PIN- 900496, C/O 56 APO.
4. CO, 4th Bn, Jat Regiment C/O 56 APO.
5. PCDA (P) Draupadi Ghat Allahabad U.P.

..... **Respondents**

By Legal Practitioner: Shri Namit Sharma, Learned Standing 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 the applicant has claimed following reliefs:-

“(a) issue/pass an order to quash/set aside the Records, The Jat Regiment letter No. 3185009/DP/JR dated 03/16.04.2008 and rejection letter of first and second appeal by Integrated HQs of MOD (Army) No. B/40502/754/10/AG/PS-4 (IMP-II) dated 10.02.2011 and No.B/38046A/184/0203/AG/PS-4 (2nd Appeal) dated 09.11.2015 respectively as contained in Annexure No. A-1, A-2 and A-3 to this O.A.

(b) issue/pass an order or direction to the Respondents, to grant disability pension from the date of discharge i.e. 31.01.2008 for life @ 50% (rounding off from 30% to 50%).

(c) issue/pass any other order or direction as this Hon,ble Tribunal may deem fit in the circumstances of the case.

(d) allow the application with cost”.

2. The factual matrix of the case is that the applicant was enrolled in the Army on 29.06.1991 and was discharged from service on 31.01.2008 (Afternoon) under Rule 13 (3) Item III (v) of the Army Rules, 1954 in low medical category. The Medical Board held before discharge, considered the disability of the applicant as 30% for life but considered it neither attributable to nor aggravated by military service. The disability pension of the applicant was rejected vide order dated 03/16.04.2008 and subsequently his first and second appeals were also rejected vide orders dated 10.02.2011 and 09.11.2015 respectively. Aggrieved, the applicant filed this instant Original Application.

3. Heard Shri AK Singh, learned counsel for the applicant, Shri Namit Sharma, learned counsel for the respondents and perused the record.

4. Learned counsel for the applicant submitted that the applicant was enrolled in the Army on 29.06.1991 and was discharged from service in Low Medical Category P3 (P) on 31.01.2008 with 30% disability for life. Learned counsel for the applicant further submitted that the applicant was enrolled in the Army in a fit medical condition after proper medical examination at the time of enrolment, therefore the disability which has occurred to him is because of service conditions, as such the disability should be considered as attributable to and aggravated by military service and he should be granted disability pension. Learned counsel for the applicant also submitted that in catena of judgment, various Benches of Armed Forces Tribunals have granted disability pension in similar cases. He further submitted that the disability should be rounded off to 50%.

5. **Per contra**, learned counsel for the respondents submitted that since the applicant, was not fulfilling the primary conditions for grant of disability pension as laid down in Para 173 of Pension Regulations for the Army, 1961 (Part –I), 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 is assessed at 20% or more. Therefore, disability pension of the applicant has correctly been rejected. However, initially he contested the grant of disability pension but subsequently conceded that in consonance with various judgments of Hon'ble The Supreme Court and Armed Forces Tribunals, the applicant is entitled to disability pension.

6. Before dealing with the rival submissions, it would be appropriate to examine the relevant Rules & Regulations on the subject. Relevant portions 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 Pension Award, 1982 are reproduced 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 Pensionary Awards, 1982**

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

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 receive the benefit of any reasonable doubt. This benefit will be given more liberally to the claimants in field/afloat service cases.

Disease

14. In respect of disease, the following rules will be observed:-

(a) For acceptance of a disease as attributable to military service, the following two conditions must be satisfied simultaneously:

i) That the disease has arisen during the period of military service, and

ii) That the disease has been caused by the conditions of employment in military service.

(b) If medical authority holds, for reasons to be stated, that the disease although present at the time of enrolment could not have been detected on medical examination prior to acceptance for service, the disease, will not be deemed to have arisen during service. In case where it is established that the military service did not contribute to the onset or adversely affect the course disease, entitlement for casualty pensionary award will not be conceded even if the disease has arisen during service.

(c) Cases in which it is established that conditions of military service did not determine or contribute to the onset of the disease

but, influenced the subsequent course of the disease, will fall for acceptance on the basis of aggravation.

(d) In case of congenital, hereditary, degenerative and constitutional diseases which are detected after the individual has joined service, entitlement to disability pension shall not be conceded unless it is clearly established that the course of such disease was adversely affected due to factors related to conditions of military services.

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22. **Conditions of unknown Aetiology:-** There are a number of medical conditions which are unknown aetiology. In dealing with such conditions, the following guiding principles are laid down-

(a) If nothing at all is known about the cause of the disease, and the presumption of the entitlement in favour of the claimant is not rebutted, attributability should be conceded.

(b) If the disease is one which arises and progresses independently of service environmental factors than the claim may be rejected.”

7. On the issue of attributability of disability in the case of **Dharmvir Singh Vs. Union of India & others** reported in (2013) 7 SCC 316 the Hon’ble Apex Court has held as under:

“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. In **Sukhvinder Singh Vs. Union of India**, reported in (2014) STPL (WEB) 468 SC. the Hon’ble Apex Court on issue of disability 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. Thirdly, there appears to be no provisions authorizing the discharge or invaliding out of service where the disability is below twenty percent and seems to us to be logically so. Fourthly, wherever 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 percent. Fifthly, as per the extant Rules/Regulations, a disability leading to invaliding out of service would attract the grant of fifty percent disability pension”

9. In the instant case, the applicant has been denied disability pension because the Medical Board has considered the disability as neither attributable to nor aggravated by military service. We observe that in this case the Medical Board has not given any reason on the basis of which it has come to the conclusion that the applicant’s disability is neither attributable to nor aggravated by military service. We also observe that there is no note of such disease or disability in the service record of the applicant at the time of enrolment and respondents have not been able to produce any document to prove that the disease existed before his enrolment. Therefore, we are of the view that in terms of the judgment of the Hon’ble The Apex Court in the cases of **Dharmvir Singh (supra)** and **Sukhvinder Singh (supra)**, since he was enrolled in fit medical conditions and was discharged in low medical category, presumption has to be drawn in favour of the applicant and the disability is to be considered as attributable to and aggravated by military service and he is entitled to disability pension.

10. On the issue of benefits of rounding off of disability pension, we recall the decision of Hon’ble The Apex Court in the case of **Union of India and others vs. Ram Avtar & others, Civil Appeal No. 418 of 2012 dated 10 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 retired on attaining the age of superannuation or completion of their tenure of engagement, if found to be suffering from some disability. In view of Policy Letter No. 1(2)/97/D (Pen-C) dated 31.01.2001 and decision of Hon’ble The Apex Court in the case of **Ram Avtar (supra)**,

we are of the view that the applicant is entitled to the benefit of rounding off.

11. In view of the above, we are of the view that the impugned orders passed were not only unjust, illegal but also not in conformity with Rules, Regulations and Law. The aforesaid impugned orders deserve to be set aside and the applicant is entitled to disability pension @ 30% for life, which needs to be rounded off to 50%.

12. Thus in the result, the **Original Application No. 114 of 2016** succeeds and is allowed. The impugned orders dated 03/16.04.2008, 10.02.2011 and 09.11.2015 are set aside. The respondents are directed to grant disability pension to the applicant @ 30% for life which would stand rounded off to 50% from the date of discharge. The respondents are directed to pay disability pension alongwith arrears within four months from date of receipt of a certified copy of this order. In case the respondents fail to give effect to this order within stipulated time, they will have to pay interest @ 9% on the amount accrued from due date till the date of actual payment.

13. No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

(Justice D.P. Singh)
Member (J)

Dated : April 2017
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