Court No.1(List B)

Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 198 of 2015

Wednesday this the 25th day of January, 2017

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

Lt Col (Retd) S N Pandey son of Late Shri JP Pandey resident of
210, B Block, Shyam Nagar, COD Post Office, Kanpur-208013

…….. Applicant

By Legal Practitioner : **Shri Abhishek Singh, Advocate**

Versus

1. Union of India through the Secretary to Government of India, Department of Ex-Servicemen Welfare, Ministry of Defence, New Delhi.

2. Chief of the Army Staff, IHQ of MoD (Army), New Delhi-110011

3. Officer –in-Charge Adjutant General's Branch, IHQ of MoD (Army), Wing No 03, Ground Floor, West Block-III, RK Puram, New Delhi-110066

4. PCDA (Pension), Draupadi Ghat, Allahabad-211014

…… Respondents

By Legal Practitioner: **Shri Amit Jaiswal, 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 he has claimed following reliefs:-

> *"(i) To summon the rejection order of disability pension passed by the opposite party against the applicant and the same may be set aside;*
>
> *(ii) To direct the opposite party to provide the 50% disability pension (with broad banding effect) with effect from 1st Nov 1996 with interest @ 12% per annum as per RMB proceedings of Oct 1996 and 2002.*
>
> *(iii) To grant any other relief, order or direction as the Hon'ble Tribunal may deem just and proper in the interest of justice.*
>
> *(iv) Allow the Original Application with costs."*

2. The factual matrix of the case is that the applicant was commissioned in the Army on 23 Jun 1968 and retired from service on 31 Oct 1996 in low medical category **S1H1A1P2E1** due to disability **'ESSENTIAL HYPERTENSION (401)'**. The Medical Board considered his disability as **not attributable to but aggravated by military service** and assessed it as 30% for 02 years. The applicant was re-employment in the Army on 11 Jan 1997 and retired on 31 Oct 2002 in low medical category **S1H1A1P2E1** due to disabilities **'ISCHEMIC HEART DISEASE** and **PRIMARY HYPERTENSION**'. His Medical Board was conducted again on 23 Oct 2002 wherein his disability was assessed as 50% for life and it was considered as **not attributable to but aggravated by military service**. The claim for the disability pension was examined and rejected by ADG (MP), AG's Branch, IHQ of MoD (Army) vide order dated 07 May 2014 stating that the disability of the applicant is neither attributable to nor

aggravated by military service. Aggrieved, the applicant filed this Original Application.

3. The delay in filing the Original Application has been condoned vide order dated 17.08.2015.

4. Heard Shri Abhishek Singh, Learned Counsel for the applicant, Shri Amit Jaiswal, 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. He submitted that Medical Board held in Oct 1996 has opined at page 3, Part III of the Medical Board Proceedings that '***the disease has occurred to him due to physical and mental stress and strain of military service*****'** and subsequently Medical Board held in 2002 has also opined at page 3, Part III of the Medical Board Proceedings that '***the disease has occurred to him due to stress and strain of military service for both disabilities****'*. As such, it is evident that the disability has occurred during military service. He also submitted that as per Paragraph 173 of Pension Regulations 1961 (Part 1), 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. Ld. Counsel for the applicant submitted that since the Medical Board both in 1996 and also in 2002 has considered his disability as **not attributable to but aggravated by military service** and percentage of disablement has been assessed as more than 20%, as such, the applicant is entitled for grant of disability pension. He also submitted that the applicant is entitled to benefit of rounding off as per policy letter dated 31.01.2001. He further submitted that in large number of similar cases, various Benches

of the Armed Forces Tribunal have granted disability pension and also given the benefit of rounding off.

6. P**er contra**, Learned Counsel for the respondents submitted that disability pension claim of the applicant 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. The assessment made by the board is only recommendatory in nature as per rule 17 (b) of Entitlement Rules to Casualty Pensionary Awards to the Armed Forces Personnel, 1981 and is subject to review by the Competent Medical Authorities as stipulated in Rules 17 (a) and 27 (c) thereof. The proceedings of the Medical Board alongwith other medical documents are examined by the competent Medical and Administrative Authorities and on the basis of their recommendations the officer's claim for disability pension is either accepted or rejected. Hence his disability claim has rightly been rejected. However, subsequently Ld. Counsel for the respondents conceded that in consonance with various judgements of Hon'ble 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 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. On the issue of grant of disability pension, we would also like to recall the judgment passed in the case of **Sukhhvinder 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 commissioned in the Army on 23 Jun 1968 and superannuated from service on 31 Oct 1996 in low medical category **S1H1A1P2E1** due to disability **'ESSENTIAL HYPERTENSION (401)'**. The Medical Board considered his disability as **not attributable to**

but aggravated by military service and assessed it as 30% for 02 years. The applicant was re-employment in the Army on 11 Jan 1997 and retired on 31 Oct 2002 in low medical category **S1H1A1P2E1** due to disabilities **'ISCHEMIC HEART DISEASE** and **PRIMARY HYPERTENSION**'. His Medical Board was conducted again on 23 Oct 2002 which assessed the disabilities as 50% for life but considered it as **not attributable to but aggravated by military service**. Though the Medical Board had considered the disability as not attributable to but aggravated by military service, but ADG (MP), AG's Branch, IHQ of MoD (Army), after examination, considered the disability as neither attributable to nor aggravated by military service and rejected the disability claim.

10. We observe that, sitting over the opinion of the Medical Board, ADG (MP), AG's Branch, IHQ of MoD (Army) has expressed opinion that the disability was **neither attributable to nor aggravated by military service**. It is observed that the respondents have failed to notice that the Medical Board in support of the opinion has mentioned that the disability has occurred due to physical and mental stress and strain of service and has considered the disability as not attributable to but aggravated by military service, but ADG (MP), AG's Branch, IHQ of MoD (Army) has considered the disability as not attributable to nor aggravated by military service. In the cases of **Dharam Vir Singh 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'**.

11. Medical Board held in 1996 as well as in 2002, has considered the disabilities as aggravated by military service but ADG (MP), AG's Branch, IHQ of MoD (Army) has considered the disabilities as neither attributable to nor aggravated by military service. In this connection we recall the judgment of **Hon'ble the Punjab and Haryana High Court in Ex. Havildar Babu Singh Vs. Union of India and others, CWP No. 3296 of 2003, decided on 26.04.2006 in which after referring the judgment of Hon'ble the Supreme Court in the case of Ex. Sapper Mohinder Singh Vs. Union of India in Civil Appeal No. 164 of 1993, decided on 14.01.1993,** wherein it has been observed that pension sanctioning authority cannot sit over the opinion of 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 Corps. The observation made in the judgement 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 petitioner was subjected to any higher Medical Board before the Chief Controller of Defence Accounts (Pension) decided to decline the disability pension to the petitioner. 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."*

12. On the issue of benefit 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 judgement of **Ram Avtar & ors (**supra), we are of the view that the applicant is entitled to the benefit of rounding off.

13. 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."*

14. Keeping in view the judgments of **Dharamvir Singh (supra), Sukhvinder Singh (supra)** and **Mohinder Singh (supra),** we converge to the view that the impugned order passed by the respondents was not only unjust, illegal but was also not in conformity with rules, regulations and law and the impugned order deserve to be set aside,. The applicant is entitled to disability pension @ 30% for two years from 01.11.1996 to 31.10.1998 which needs to be rounded off to 50%. In consonance with recommendations of Medical Board held in Oct 2002, the applicant is also entitled to disability pension @ 50% for life wef 01 Nov 2002, which needs to be rounded off to 75% 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**).

15. Thus in the result, the **Original Application No. 198 of 2015** succeeds and is allowed. The impugned order dated 07 May 2014 passed by the respondents is set aside. The respondents are directed to grant disability pension to the applicant @ 30% for two years from 01 Nov 1996 to 31 Oct 1998, which would stand rounded off to 50%. It is further directed that in consonance with recommendations of Medical Board held in Oct 2002, the respondents to pay disability pension @ 50% for life which would stand rounded off to 75% for life 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)**. The respondents are directed to pay arrears of disability pension from three years prior to filing of the Original Application i.e. 01.07.2011 till the date of actual payment. The respondents are 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.

16. No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

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

Dated : Jan, 2017
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