Court No.1 (List B)

ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW

Transferred Application No. 72 of 2016

Tuesday, this the 23rd day of May, 2017

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

Deena Nath Mishra, S/o Shri Ram Kishan Mishra,
Resident of – Undi, P.S. – Shivpur (Sarsawan), Teh – Varanasi,
District – Varanasi.

..... Petitioner

By Legal Practitioner - Shri Ashwani Mishra,
Learned Counsel for the Petitioner

Versus

1. The Government of India through the Secretary
   Ministry of Defence, New Delhi.

2. The Officer - In-Charge, EME Records,
   N.E. Section, Secunderabad – 21, (Andhrapradesh)

..... Respondents

By Legal Practitioner - Shri Adesh Kumar Gupta,
Learned Counsel for the Respondents

ORDER (ORAL)

1. Being aggrieved by the denial of disability pension by impugned order dated 15.11.1980, petitioner preferred Civil Misc Writ Petition No 53399 of 1999 before the Hon'ble High Court of Judicature at Allahabad which has been transferred to this Tribunal in pursuance to provisions contained in Section 34 of Armed Forces Tribunal Act 2007 and renumbered as T.A. No. 72 of 2016.

2. We have heard Shri Ashwani Mishra, learned counsel for the petitioner and Shri Adesh Kumar Gupta, learned counsel for the respondents assisted by Maj Salen Xaxa, Departmental representative and perused the record.

3. The factual matrix of the case is that the petitioner was enrolled in the Army on 30.05.1973 and was discharged from service with effect from 26.10.1979 after rendering 5 years, 10 months and 26 days of service under Rule 13 (3) III (iii) of Army Rules, 1954 due to disease "**NEUROSIS (300)**" with 40% disability for two years. His claim for grant of disability pension was rejected vide order dated 15.11.1980. Being aggrieved, the petitioner had filed Writ Petition before Hon'ble High Court of Judicature at Allahabad, which has been transferred to this Tribunal.

4. Learned Counsel for the petitioner submitted that at the time of enrolment, the petitioner was found mentally and physically fit for enrolment in the Army and there is no note in the service documents that

he was suffering from any disease at the time of entry into service. The petitioner participated in battle training which continued for three months for day and night and petitioner worked day and night to complete the task assigned to him as Mechanic and due to this continuous hard duty, the petitioner felt a lot of pain and stress and developed disease **"NEUROSIS 300"**. Learned counsel for the applicant further submitted that various Benches of Armed Forces Tribunal have granted disability pension in similar cases, as such the petitioner be granted disability pension as well as arrears thereof. He made an oral submission, though not contained in the pleadings, that as per Government Order dated 31.01.2001 the disability pension be rounded off to 50%.

5. **Per contra**, Learned Counsel for the respondents submitted that on account of family dispute the petitioner was suffering from pain and stress resulting into disease **"NEUROSIS 300"** and Medical Board considered the disability of the petitioner as 40% for two years which was considered as neither attributable to nor aggravated by military service. Therefore, the petitioner 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 out from service on account of disability, which is attributable to or aggravated by military service and is assessed at 20% or more. He further submitted

that disability pension of the petitioner has correctly been rejected as per laid down policy.

6. 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).*
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> *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)].*
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> *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).*
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> *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]*
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> *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."

7. In another case of similar nature with regard to grant of disability pension, we would also like to recall the judgment 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.....".

8. Since the Medical Board has assessed the disability as 40% for two years, as such keeping in view Hon'ble The Apex Court judgment in the case of **Veer Pal Singh vs Ministry of Defence**, reported in **(2013) 8 SCC 83**, we feel that the case of the petitioner should be recommended for Re-survey Medical Board to reassess further entitlement of disability pension.

9. In the instant case, the petitioner was enrolled in the Indian Army on 30.05.1973 and he was invalided out of service on 26.10.1979 in low medical category. We have given due consideration to the rival submissions made by Learned Counsel for the parties. Learned Counsel for the respondents has failed to show any document to prove that there was any family dispute in the counter affidavit. Respondents came to know about family dispute after the petitioner joined the duty after availing the leave. The opinion expressed by Medical Board and respondents seem to be based on unfounded fact. Even from perusal of his medical board opinion, it appears that the petitioner was in SHAPE-1 at the time of enrolment. Moreover the petitioner has discharged his duty for more than 5 years without any health problem. Accordingly, inference will be drawn that petitioner suffered the disability due to pain and stress of military service which is attributable to and aggravated by military service. Otherwise also there is settled proposition of law by Hon'ble the Apex Court that since the petitioner joined military service in medical fit category, hence disability is to be considered as attributable to and aggravated by military service. Since

the petitioner was not suffering from any ailment at the time of his enrolment in service, it will be presumed that he was in sound health at the time of entering into service. Deterioration of his health has taken place due to military service, as such, the petitioner is entitled to the relief as per judgments of the Hon'ble The Apex Court in the cases of **Dharamvir Singh** (supra) and **Sukhvinder Singh** (supra) and the petitioner is entitled to disability pension.

10. On the issue of rounding off of disability pension, we are of the considered view that the case of the petitioner is covered by 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.** Accordingly, we feel that the petitioner is entitled to the benefit of rounding off.

11. In view of the above, we are of the view that the instant Transferred Application deserves to be allowed. The petitioner is entitled to 40% disability pension for 02 years which needs to be rounded off to 50% as per policy and in the light of the judgments of Hon'ble The Apex Court in the cases of **Dharmvir Singh** (supra), **Sukhvinder Singh** (supra) and **Ram Avtar & ors** (supra). We are also of the view that in terms of **Veer Pal Singh's** case (supra), the case of the petitioner needs to be referred to Review Medical Board for re-assessing the medical condition of the petitioner for further entitlement of disability pension, if any.

12. Thus in the result, the **Transferred Application No. 72 of 2016** succeeds and is allowed. The impugned order is set aside and the respondents are directed to grant disability pension to the petitioner @ 40% for two years from the date of discharge which would stand rounded off to 50%. We also direct that the case of the petitioner be referred to Review Medical Board for reassessing the medical condition of the petitioner for further entitlement of disability pension, if any. The respondents are directed to give effect to the order within 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.

13. No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

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

Dated : 23rd May, 2017
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