

Court No.1**FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****T. A. No. 39 of 2016**

Monday, this the 03rd day of July, 2017

Hon'ble Mr. Justice D.P. Singh, Member (J)

Hon'ble Air Marshal Anil Chopra, Member (A)

Ex- Naik Shiv Sewak son of Ram Dulare resident of Garhewa, Tehsil Bilhore District Kanpur Dehat....**Petitioner**

Ld. Counsel for the : **Shri Yash Pal Singh, Advocate**
Petitioner

Verses

1. Union of India, New Delhi (Ministry of Defence).
2. The Chief Controller of Defence Account (Pension) Allahabad (Grant 3 Selection)
3. The Chief of the Army Staff through Commanding Officer Records Mechanized Infantry Regiment Ahmed Nagar - 414110
4. Deputy Director General Armed Forces Medical Services (Pension) New Delhi.

...Respondents

Ld. Counsel for the : **Shri V.P.S. Vats, Advocate,**
Respondents. Central Govt Standing Counsel.

Assisted by : Maj Salen Xaxa, OIC Legal Cell.

ORDER (Oral)

1. Petitioner being aggrieved by denial of disability pension, had preferred a Writ Petition No. 41675 of 1997 in the High Court of Judicature at Allahabad which has been transferred to this Tribunal in pursuance to powers conferred by Section 34 of the Armed Forces Tribunal Act, 2007 and has been re-numbered as T.A. No. 39 of 2016.
2. We heard Ld. Counsel for the parties and perused the records.
3. Admittedly, Brief of the facts that the Ld. Counsel for the petitioner enrolled in the Indian Army on 10 Jul 1976 and promoted to the rank of Lance Naik followed by promotion on the substantive post of Naik. He was confirmed on the substantive post of Naik in the year 1984. In the year 1987, he also served as member of Peace Keeping Force in Sri Lanka and participated in operation named Pawan where he continued upto the year 1989. On return from Sri Lanka he was posted at Babina in 13th Mechanized Infantry Regiment. While posted at Babina, the petitioner suffered joint pain attended with boils on the body. Thereafter, he was transferred to Base Hospital Lucknow for treatment where he was diagnosed as suffering from Psoriasis Vulgaris. After undergoing treatment at Base Hospital he was discharged and sent back to his parent Unit at Babina. Thereafter, the petitioner was posted at Beas in

Punjab. However, the disease "Psoriasis Vulgaris continued to pester him as a result of which he was again hospitalized at Military Hospital Jalandhar. While undergoing treatment there, the petitioner was downgraded to medical category "CEE" for a period of six months. After expiry of six months, the petitioner again reported for review of his medical category at Military Hospital. This time, he was downgraded to medical category "CEE" (Permanent) and his disability was assessed as 70% and he was recommended for disability pension by the Medical Board. In ultimate analysis, the petitioner was discharged from service on 31.12.1994. After discharge, the case of the petitioner was forwarded to the CCDA Allahabad (Now PCDA Allahabad) for disability pension alongwith appropriate recommendation. However, the claim for disability pension was rejected by the PCDA Allahabad on 31.08.1995. Against the order of rejection, the petitioner preferred an appeal on 10.10.1995 which was also rejected.

4. The submission of the learned counsel for the petitioner is that the PCDA Allahabad has no jurisdiction to reject the disability pension that too in the teeth of the opinion of the Medical Board. It is worthy of notice that while filing counter affidavit, the respondents have not disputed that the petitioner was suffering from Psoriasis Vulgaris. In the letter of under Secretary to the Govt of India received in response to appeal against rejection of

disability pension it is clearly mentioned that on set of disease was in Sept 92 in peace area according to the appellate medical authority and that the Medical authorities has regarded your disability has neither attributable to nor aggravated by duties of Military service and hence you are not entitled to disability pension under the rules.

5. In connection with the above plea, we would like to refer to the decisions of Hon'ble the Apex Court as cited by Learned Counsel for the Petitioner. The first decision is **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).

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)."

6. We also feel called to refer to chapter II of the 'Guide to Medical Officers (Military Pensions) 2002' relates to Entitlement and General Principles. Para 7 of the said Chapter talks of evidentiary value of medical records at the commencement of service. For proper appreciation of the controversy involved in this case, the said paragraph is reproduced below:

"7. Evidentiary value is attached to the record of a member's condition at the time of commencement of service, and such record has, therefore, to be accepted unless any different conclusion has been reached due to the inaccuracy of the record in a particular case or otherwise. Accordingly, if the disease leading to member's invalidation out of service or death while in service, was not noted in a medical report at the commencement of service, the inference would be that the disease arose during the period of member's military service. It may be that the inaccuracy or incompleteness of service record an entry in service was due to a non disclosure of the essential facts by the member, e.g., pre-enrolment history of an injury or disease like epilepsy, mental disorder etc. It may also be that owing to latency or obscurity of the symptoms, a disability escaped detection on enrolment. Such lack of recognition may affect the medical categorization of the member on enrolment and/or cause him to perform duties harmful to his condition. Again, there may

occasionally be direct evidence of the contraction of a disability, otherwise than by service. In all such cases, though the disease cannot be considered to have been caused by service, the question of aggravation by subsequent service conditions will need examination.

The following are some of the diseases which ordinarily escape detection on enrolment:

X x x x x x x x x x

(f) Disease which have periodic attacks, e.g. Bronchial Asthma, Epilepsy, CSOM etc.”

7. We have traversed upon the relevant medical papers and from a punctilious reading of the medical papers and other allied papers, it would transpire that no note of any disease had been recorded at the time of his entry in the Military service. The respondents failed to bring on record any document to suggest that the Applicant was under treatment for the disease at the time of his recruitment or that the disease was hereditary/constitutional in nature.

8. On the question whether the disability is attributable to or aggravated by Military service, we feel called to refer to the decision of the Apex Court **in Union of India vs. Rajbir Singh**, (2009) 9 SCC 140, Hon’ble The Apex Court considered all the above decisions and observed as under:

“16. Applying the above parameters to the cases at hand, we are of the view that each one of the respondents having been discharged from service on account of medical disease/disability, the disability must be presumed to have been arisen in the course

of service which must, in the absence of any reason recorded by the Medical Board, be presumed to have been attributable to or aggravated by military service. There is admittedly neither any note in the service records of the respondents at the time of their entry into service nor have any reasons been recorded by the Medical Board to suggest that the disease which the member concerned was found to be suffering from could not have been detected at the time of his entry into service. The initial presumption that the respondents were all physically fit and free from any disease and in sound physical and mental condition at the time of their entry into service thus remains un-rebutted. Since the disability has in each case been assessed at more than 20% their claim to disability pension could not have been repudiated by the appellants."

9. We may refer to the decision of **Veer Pal Singh vs. Ministry of Defence reported in (2013) 8 SCC 83** in paras 11,12,13,17,18 and 19 of the judgment, the observations made by Hon'ble the Apex Court are as under:-

"11. A recapitulation of the facts shows that at the time of enrolment in the army, the appellant was subjected to medical examination and the Recruiting Medical Officer found that he was fit in all respects. Item 25 of the certificate issued by the Recruiting Medical Officer is quite significant. Therein it is mentioned that speech of the appellant is normal and there is No. evidence of mental backwardness or emotional instability. It is, thus, evident that the doctor who examined the appellant on 22.05.1972 did Not find any disease or abnormality in the behaviour of the appellant. When the Psychiatrist Dr (Mrs) Lalitha Rao examined the appellant, she Noted that he was quarrelsome, irritable and impulsive but he had improved with the treatment. The Invaliding Medical board simply endorsed the observation made by Mr. Rao that it was a case of "Schizophrenic reaction".

12. In Merriam Webster Dictionary "Schizophrenia" has been described as a psychotic disorder characterized by loss of contact with the environment, by noticeable deterioration in the

level of functioning in everyday life, and by disintegration of personality expressed as disorder of feeling, thought (as in delusions), perception (as in hallucinations), and behavior – called also dementia praecox; schizophrenia is a chronic, severe, and disabling brain disorder that has affected people throughout history.

13. The National Institute of Mental Health, USA has described "schizophrenia" in the following words:

"Schizophrenia is a chronic, severe, and disabling brain disorder that has affected people throughout history. People with the disorder may hear voices other people don't hear. They may believe other people are reading their minds, controlling their thoughts, or plotting to harm them. This can terrify people with the illness and make them withdrawn or extremely agitated. People with schizophrenia may Not make sense when they talk. They may sit for hours without moving or talking. Sometimes people with schizophrenia seem perfectly fine until they talk about what they are really thinking. Families and society are affected by schizophrenia too. Many people with schizophrenia have difficulty holding a job or caring for themselves, so they rely on others for help. Treatment helps relieve many symptoms of schizophrenia, but most people who have the disorder cope with symptoms throughout their lives. However, many people with schizophrenia can lead rewarding and meaningful lives in their communities.

17. Unfortunately, the Tribunal did not even bother to look into the contents of the certificate issued by the Invaliding Medical board and mechanically observed that it cannot sit in appeal over the opinion of the Medical board. If the learned members of the Tribunal had taken pains to study the standard medical dictionaries and medical literature like **The Theory and Practice of Psychiatry by F.C. Redlich and Daniel X. Freedman, and Modi's Medical Jurisprudence and Toxicology**, then they would have definitely found that the observation made by Dr Lalitha Rao was substantially incompatible with the existing literature on the subject and the conclusion recorded by the Invaliding Medical board that it was a case of schizophrenic reaction was Not well founded and required a review in the context of

the observation made by Dr Lalitha Rao herself that with the treatment the appellant had improved. In our considered view, having regard to the peculiar facts of this case, the Tribunal should have ordered constitution of Review Medical board for re-examination of the appellant.

18. In Controller of Defence Accounts (Pension) vs. S Balachandran Nair on which reliance has been placed by the Tribunal, this Court referred to Regulations 173 and 423 of the Pension Regulations and held that the definite opinion formed by the Medical board that the disease suffered by the respondent was constitutional and was not attributable to Military service was binding and the High Court was not justified in directing payment of disability pension to the respondent. The same view was reiterated in Ministry of Defence vs A.V. Damodaran. However, in neither of those cases, this court was called upon to consider a situation where the Medical board had entirely relied upon an inchoate opinion expressed by the psychiatrist and No. effort was made to consider the improvement made in the degree of illness after the treatment.

19. As a corollary to the above discussion, we hold that the impugned order as also the orders dated 14.07.2011 and 16.09.2011 passed by the Tribunal are legally unsustainable. In the result, the appeal is allowed. The orders passed by the Tribunal are set aside and the Respondents are directed to refer the case to the Review Medical board for reassessing the medical condition of the appellant and find out whether at the time of discharge from service he was suffering from a disease which made him unfit to continue in service and whether he would be entitled to disability pension.

10. Having heard the learned Counsel for the parties, we converge to the view that the controversy involved in this case is squarely covered by the Judgment of Hon'ble the Supreme Court in the case of **Rajbir Singh and Dharamvir Singh vs Union of India and others, and Veer Pal Singh**

(supra) wherein Hon'ble the Apex Court has decided the similar controversy and has come to the conclusion that if the Medical Board has not assigned any reason as to why the disease is neither attributable to nor aggravated by military service, the opinion of the Medical Board cannot be countenanced.

11. In the next limb of argument, the Learned Counsel for the Applicant assailed the decision of the PCDA (P) submitting that in view of the ex-cathedra decision of Hon'ble The Apex Court in the case **of Ex-Sappier Mohinder Singh vs Union of India in Civil Appeal No 104 of 1993 decided on 14.01.1993** nodded with approval in **Babu Singh Vs Union of India and others CWP No 3296 of 2003 decided on 26.4.2006**. The observation made in the decision of **Ex.Sapper Mohinder Singh (supra)** 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. In view of the above, we fail to understand that once Medical Board has recommended for disability pension assessing the disability at 70%, how on what ground the PCDA had jurisdiction to sit over in appeal over the decision of the Medical Board. The opinion expressed by the Medical Board which comprises experts of the field could not have been interfered with by the PCDA based on opinion expressed by Medical Advisor attached to PCDA.

13. The learned counsel for the Petitioner also prayed for rounding off of the disability which has been assessed at 70% to 75% in view of the policy decision of the Government of India contained in circular dated 31.01.2001 and also the ex-cathedra decision of the Apex Court in **Union of India and Ors Vs Ram Avtar & Ors rendered in Civil Appeal No 418 of 2012 on 10.12.2014** on the point.

14. In **Union of India and Ors v Ram Avtar & ors (supra)**, 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 Armed Forces personnel who have been invalidated out of service in low medical category. The relevant portion of the decision being relevant is excerpted below:-

"4. By the present set of appeals, the appellant(s) raise the question, whether or not, an individual, who has retired on

attaining the age of superannuation or on completion of his tenure of engagement, if found to be suffering from some disability which is attributable to or aggravated by the Military service, is entitled to be granted the benefit of rounding off of disability pension. The appellant(s) herein would contend that, on the basis of Circular No 1(2)/97/D (Pen-C) issued by the Ministry of Defence, Government of India, dated 31.01.2001, the aforesaid benefit is made available only to an Armed Forces Personnel who is invalidated out of service, and not to any other category of Armed Forces Personnel mentioned hereinabove.

5. We have heard Learned Counsel for the parties to the lis.

6. We do not see any error in the impugned judgment (s) and order(s) and therefore, all the appeals which pertain to the concept of rounding off of the disability pension are dismissed, with no order as to costs.

7. The dismissal of these matters will be taken note of by the High Courts as well as by the Tribunals in granting appropriate relief to the pensioners before them, if any, who are getting or are entitled to the disability pension."

15. Relevant portion of Circular dated 31.01.2001 contained in para 7.2 is quoted below.

"7.2 Where an Armed Forced personnel is invalidated out under circumstances mentioned in para 4.1 above, the extent of disability or functional incapacity shall be determined in the following manner for the purposes of computing the disability element:-

<i>%age of disability as assessed by invaliding medical board</i>	<i>%age to be reckoned for computing of disability element</i>
<i>Less than 50</i>	<i>50</i>
<i>Between 50 and 75</i>	<i>75</i>
<i>Between 76 and 100</i>	<i>100</i>

16. In view of the above, the present T.A succeeds and is allowed. The impugned orders dated 8/9.09.97 and 31.08.95

are set aside with all consequential benefits. The petitioner shall be entitled to disability pension at the rate of 70% which if rounded off in terms of policy contained in Circular dated 31.01.2001 and also the decision of the Apex Court in Ram Avtar (supra), shall stand pegged at 75% with effect from the date of discharge with interest at the rate of 10% per annum.

17. Let all consequential benefits be provided within four months from today.

18. There shall be no order as to costs.

(Air Marshal Anil Chopra)
Member (A)

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

Dated: July 3,2017

MH/-