RESERVED
COURT No.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 445 of 2017

Wednesday, this the 24th day of January, 2018

"Hon'ble Mr. Justice S.V.S.Rathore, Member (J)
"Hon'ble Air Marshal BBP, Sinha, Member (A)"

No**.** 14395948P Ex Gunner Badri Prasad Sharma son of Late Ishwar Dayal Sharma resident of village Pampapur PO Chandam, Tehsil Poornagiri District Champawat (Uttrakhand).
.....Applicant

Ld. Counsel for the Applicant : **Shri Rohit Kumar, Advocate** (Counsel for the applicant)

Versus

1. Second Appellate Committee Additional Directorate General Personnel Services Adjutant Generals Branch Integrated Headquarters of Ministry of Defence (Army) Room No/ 11, Plot No. 108 (West) Brassey Avenue, Church Road New Delhi 110001.
2. Commandant cum Chief Record Officer Artillery Centre and Records Nasik Road Maharashtra,
3. Principal Controller of Dfence Accounts (Pension) Draupadighat Allahabad
4. Union of India through Secretary, Ministry of Defence New Delhi.

...Respondents

Ld. Counsel for the: Respondents. Shri Amit Jaiswal**, Advocate,** Central Govt Standing Counsel.

Assisted by : Maj Salen Xaxa, OIC Legal Cell.

ORDER

(Per Air Marshal BBP Sinha, member (A))

1. Present O.A has been preferred under section 14 of the Armed Forces Tribunal Act for the relief of grant of disability pension and for setting aside the orders dated 22.08.2017, 08.12.2016 and also order of the PCDA (P) Allahabad whereby the claim for disability pension was rejected.

2. The facts draped in brevity are that the applicant was enrolled in the Indian Army on 14.08.1986 and was discharged from service with effect from 31.03.1994 being in low medical category (CEE Permanent) on account of suffering from GENERALISED SEIZURES (345). Before discharge, he was brought before the Release medical Board held at Military Hospital Babina on 11.01.1994. The Release Medical Board however opined his disability as neither attributable to nor aggravated by the military service. To rephrase it, it was held to be constitutional idiopathic in nature. The degree of disability was assessed as 30% for two years. The claim for disability was processed and transmitted to PCDA (P) Allahabad which in ultimate analysis was rejected vide communication dated 16.12.1995. It is stated that first appeal was filed after efflux of 19 years i.e. on 01.01.2015. Thereafter, the Applicant filed O.A No 16 of 2016 before the Armed Forces Tribunal for the relief of direction to decide the first appeal. The said O.A was allowed vide

order dated 13.01.2016. The said appeal culminated in being rejected vide order dated 08.12.2016. Thereafter as advised, second appeal was preferred which was also rejected vide communication dated 22.08.2017. It is in the above backdrop that the present O.A has come to be filed.

3. We have heard learned counsel for the parties and have also gone through the material facts on record.

4. The main brunt of submission advanced across the bar by learned counsel for the respondents is that in terms of para 173 of the Pension Regulations for the Army 1961 Part I disability pension is granted to an individual who is invalided out of service and that his disability is viewed as attributable to and aggravated by military service.

5. The total service rendered by the applicant before discharge was approximately eight years. At this stage the legal questions which come up for consideration are two-fold. Firstly, whether it right to discharge the applicant through Release Medical Board (RMB) and not Invalidating Medical Board (IMB) and whether his services were being cut short on medical grounds. Second point for consideration is whether in the light of various decisions of the Apex Court, the disability of the Applicant should be deemed to be attributable to and aggravated by military service.

6. The law on release through IMB/RMB has been well settled by the Hon'ble Supreme Court vide its judgment in case of ***Rajpal Singh Vs. UOI & Ors*** reported in (2009) 1 SCC 216**.** Relevant extract of the aforesaid judgment is reproduced as under:-

> "18.The afore-extracted Rule 13 (1) clearly *enumerates the authorities competent to discharge from service, the specified person; the grounds of discharge and the manner of discharge. It is manifest that when in terms of this Rule an army personnel is discharged on completion of service or tenure or at the request of the person concerned, no specific manner of discharge is prescribed. Naturally, the Regulations or Army Orders will take care of the field not covered by the Rules. However, for discharge on other grounds, specified in Column (2) of the Table, appended to the Rule, the manner of discharge is clearly laid out. It is* plain that a discharge on the ground of having been found "medically unfit for further service" is specifically dealt with in Column (I) (ii) of the Table, which stipulates that discharge in such a case is to be carried out only on the recommendation of the Invalidating Board. It is a cardinal principle of interpretation of a Statute that only those cases or situations can be covered under a residual head, which are not covered under a specific head. It is, therefore, clear that only those cases of discharge would fall within the ambit of the residual head, viz. I (iii) which are not covered under the preceding specific heads. In other words, if a JCO is to be discharged from the service on the ground of "medically unfit for further service", irrespective of the fact whether he is or was in a low medical category, his order of discharge can be made only on the recommendation of an Invalidating Board. The said rule being clear and unambiguous is capable of only this interpretation and no other.
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> *19. Having reached the said conclusion, we feel that the appellants were bound to follow Rule 13 (3) (I) (ii), more so having placed the respondent in*

> *low medical category (permanent) for a period of two years from October, 2001 he was discharged from service on 31st August, 2002, relying on the recommendation of the Re-categorisation Board held on 24th October, 2001. As noted in the show cause notice, extracted above, the said Board had placed the respondent in "permanent low medical category". Be that as it may, the main ground of discharge being medical unfitness for further service, the appellants were bound to follow the prescribed rule.*
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> *20. It is well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Justice Frankfurter in Viteralli Vs. Saton7, where the learned Judge said:*
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> *359 U.S. 535 : Law Ed (Second series) 1012 "An executive agency must be rigorously held to the standards by which it professes its action to be judged... Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed...This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword."*

7. Thus it is clear that premature release of the applicant on medical grounds through RMB was illegal. He ought to have been released through IMB because his engagement period was being cut short on Medical grounds. Thus, his release on date 31.03.1994 is to be deemed to be an **INVALIDMENT OUT OF SERVICE** and not a routine release.

8. The next question is attributability of his disability. The law on the issue of attributability has been well settled by Hon'ble Supreme Court in the case of ***Dharamvir Singh vs. Union of India & Ors*****:**

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

9. In the instant case medical board has not given any reasoned opinion on the basis of which they have concluded that the applicant's disease **'GENERALISED SEIZURES (345)'** is neither attributable to nor aggravated by the service conditions. Mere conclusion without reasons is not a valid medical opinion. There is no note of such disease or disability in the service record of the applicant at the time of acceptance in service. In absence of any evidence on record to show that the applicant was suffering from disability or any ailment at the time of his acceptance in service, it will be presumed that he was in sound physical and mental condition at the time of entering service and deterioration of his health has taken place due to service. Therefore, the medical opinion cannot be accepted and the applicant is entitled to the relief as per the above judgments of the Hon'ble the Apex Court.

10. Hence in the light of the law established on attributability, the disability of the applicant is to be treated as 'ATTRIBUTABLE TO MILITARY SERVICE.'

11. The law on the rounding off of Disability percentage is again well settled by the Hon'ble Supreme Court. Hence, we would like to refer to a decision of the Apex Court in ***Sukhvinder Singh Vs UOI & Ors,*** reported in (2014) STPL

(WEF) 468 SC, in which the Apex Court clearly held that whenever 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 and further as per the extant Rules/Regulations, a disability leading to invaliding out of service, would attract the grant of fifty per cent disability pension.

12. There is no denying of the fact that the applicant was prematurely discharged from service on the ground of being in low medical category. This discharge as mentioned was illegal and therefore is to be deemed as INVALIDATION OUT OF SERVICE. In the circumstances, regard being had to the decision of the Apex Court in ***Sukhvinder Singh vs Union of India*** (supra), we converge to the conclusion that the assessment of 30% disability for two years by the Medical Board has to be rounded off to 50% for two years.

ORDER

13. Thus as a result of foregoing discussion, the O.A is allowed and the impugned orders are set aside. The Applicant is held entitled to disability pension to the extent of 30% for two years which is to be rounded off to 50% for two years. The Respondents are also directed to pay arrears of aforesaid disability pension from the date of discharge . It is also directed that the Applicant shall be brought before Resurvey medical Board within a period of three months from today and further

entitlement of disability pension shall be subject to the opinion of the RSMB. After Re - Survey Medical Board (RSMB) his disability pensionary if entitled shall be paid from three preceding years of filing this O.A. The date of filing this O.A. is 13.10.2017. The Respondents are further directed to give effect to the order within five months from the date of receipt of a certified copy of this order failing which the Applicant shall be entitled to interest at the rate of 9% per annum.

14. No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

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

Dated: January, 2018
MH/-