RESERVED

COURT NO.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

TRANSFERRED APPLICATION No. 91 of 2010

Wednesday, this the 31st day of January, 2018

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

Gyanendra Mall Ex No. 5842207 – Rfn Unit 1/9 G R (39, Gorkha Rifles) Varanasi Cantt. R/o Renusagar Colony No. 'L' 34/13 PO Renusagar, P.S. Anpara District Sonebhadra (UP).

…..... Petitioner

Ld. Counsel for the Petitioner : **Shri S.K. Singh Advocate** (Counsel for the petitioner)

Versus

1. Union of India, through Ministry of Defence, New Delhi.

2. Commandant, 39, Gorkha Rifles Training Centre, Varanasi Cantt.

3. The Controller of Defence Accounts (Pension) Allahabad.

…Respondents

Ld. Counsel for the: Respondents. **Shri D.K. Pandey, Advocate,** Addl. Central Govt Standing Counsel.

Assisted by : **Maj Salen Xaxa,** OIC Legal Cell.

ORDER

"Per Hon'ble Air Marshal BBP Sinha, Member (A)"

1. Present T.A has been preferred for the relief of grant of disability pension as against the illegal discharge under Rule 13 (3) (III) of the Army Rules.

2. The facts as are necessary for adjudication of the controversy involved in this petition are that the Petitioner was enrolled in the Indian Army on 19.12.1973 and was invalidated out from service on 08.10.1981 after completing approximately 8 years of service. Initially, the petitioner was admitted to Army Hospital on 13.10.1980 on account of complaint of Granimal fits. Thereafter, he was transferred to Base Hospital for further investigation on 24.10.1980 from where he was transferred to Neurological Centre Amy Hospital Delhi Cantt. On being examined the petitioner was declared unfit for further service in view of recurrent seizures and was recommended to be invalided out of service in medical category (EEE). Thereafter Invalidating Medical Board was held on 08.10.1981 at 150 General Hospital which diagnosed his disability as GRANIMAL SEIZURES (345) and his disability was assessed as 15-19% but at the same time, his disability was opined as neither attributable to nor aggravated by military service. The claim for disability pension was processed and forwarded to PCDA (P) Allahabad which rejected the claim on the premises of

disability being neither attributable to nor aggravated by military service vide communication dated 02.03.1982. The appeal also culminated in being rejected vide communication dated 30.03.1984. The second/final appeal preferred by the petitioner was also rejected vide communication dated 17.02.1986.

3. We have heard learned counsel for the petitioner as also learned counsel for the respondents. We have also perused the material facts on record.

4. The only ground urged in vindication of its stand by the respondents is that since the disability was neither attributable to nor aggravated by military service, the petitioner was not entitled to disability pension in terms of Regulation 173 of Pension Regulations for Army Part 1 1961. The further ground urged is that the petitioner had not completed 10 years of mandatory service in the Army.

5. Learned counsel for the petitioner repudiated the aforesaid contention submitting that the petitioner was a good light weight Boxer which skill was enhanced during military service as taught by the military instructor. The tournaments were held at the instructions of Army officers in which the petitioner participated. It is further stated that on account of repeated punches on the head in the boxing bouts, the petitioner’s brain softened and the disability like medulla oblongata and cerebellum befell upon him resulting in nervous system of the brain being affected. It is further

submitted that on account of punches which the petitioner suffered on his head as a boxer in Army the brain injury aforesaid, became aggravated culminating in serious setback in the nervous system. The aforesaid averments have been specifically made in paras 7 to 10 in the writ petition. In reply to para 7 of the writ petition, it is averred that no evidence of petitioner's participation in boxing championship is available in his service records. However, various sports and games are part of normal military training and organized as such from time to time. In reply to paras 8 and 9 of the writ petition, it is averred that as per opinion of the medical authorities disability "GRANIMAL SEIZURES, was regarded as constitutional disease which had no nexus with the service. In the rejoinder affidavit, again specific plea has been made that reply to the queries whether the petitioner was a light weight boxer or whether he had participated in boxing championship could be given by an officer of 39 Gorakha Rifles of which the petitioner was a soldier and not by the deponent who is Major Rana posted as Senior Record Officer Gorkha Record office Kumraghat Gorakhpur U.P. The petitioner also objected to wearing of the relevant paras on personal knowledge as Maj Rana had no personal knowledge whether the petitioner was a Light Weight boxer or whether he had participated in boxing championship.

6. From the above, it would thus transpire that the reply given to the specific averments made in paras 7 to 10, seems to be evasive and was shrugged off submitting that no such record was available with the military office whether the petitioner had ever been part of boxing championship but at the same time, it is conceded that such activities are part and parcel of military training. Thus, there is no categorical denial as to whether the petitioner had suffered the disability on account of repeated punches during boxing bouts which would amount to admission in law.

7. In the background of facts and circumstances discussed above, now we come to the question of attributability. It brooks no dispute and it is nobody's case that the petitioner had any disability at the time of his recruitment in the Indian Army. There is no evidence on record to show that the petitioner's disability was constitutional. The law on this issue is well settled by catena of decisions including the decision 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 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).

8. There is nothing on record to show that the Appellant was suffering from any disease at the time of his initial recruitment in the Indian Army. Thus, the disease would be deemed to be attributable to or aggravated by the Army Service.

9. Now we come to the second issue of rounding off of disability. In the instant case, the disability was assessed as less than 20% (15-19%). In this case, it would suffice to refer to the decision of the Apex Court in **Sukhvinder Singh Vs. Union of India and Ors** reported in **2014 STPL(Web) 468 SC,** in Para 9 of the judgment, the observation made by Hon'ble The Apex Court is 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 authorising the discharge or invaliding out of service where the disability is below twenty per cent 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 per cent. Fifthly, as per the extant Rules/Regulations, a disability leading to invaliding out of service would attract the grant of fifty per cent disability pension."*

10. The crux of the aforesaid decision is that whenever a member of the Armed Forces is invalidated out of service, it perforce has to be assumed that his disability was found to be above twenty per cent.

11. Thus in the facts and circumstances of the case, the T.A is allowed and the disability of the invalidated out Petitioner is assessed as 20% for life which on being rounded off would

come to 50% for life. The date of registration of Writ Petition in the High Court of Judicature at Allahabad is 21.04.1997. Hence, the petitioner shall be entitled to arrears of disability pension w.e.f 01.01.1996. The arrears shall be paid within four months from the date of production of a certified copy of this order. For default, the petitioner shall be entitled to interest at the rate of 9%.

12. There shall be no order as to costs.

(Air Marshal BBP Sinha)
Member (A)

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

Dated: January, 31 ,2018
MH/-