Court No.1
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW

Original Application No. 250 of 2014

Tuesday this the 8th day of December, 2015

Hon'ble Mr. Justice V.K. DIXIT, Member (J)
Hon'ble Lt Gen Gyan Bhushan, Member (A)

JC 755906X Ex Subedar Ashok Kumar Sharma
Son of Late Ram Dutt Sharma
Resident of Village Birajmar, Post : Salempur,
Tehsil : Salempur, District : Deoria (UP)

…….. Applicant

By Legal Practitioner Col. (Retd) Ashok Kumar and Shri Rohit Kumar, Advocate

Versus

1. Chairperson
   Second Appellate Committee on Pensions (SACP) IV Floor, Room No. 435 Sen Bhawan, Army Headquarters, DHQ PO, New Delhi

2. Commandant cum Chief Records Officer
   EME Records, Secunderabad

3. Principal Controller of Defence Accounts (P)
   Draupadighat, Allahabad

4. Union of India
   Through Secretary Ministry of Defence New Delhi

…… Respondents

By Legal Practitioner Shri Ashutosh Kumar Srtivastava, Learned 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, and he has claimed the reliefs as under:-

> *"(a) To quash the rejection order of Second Appellate Committee on Pensions contained in Army Headquarters Additional Director General Personnel Services, Adjutant General Branch, Integrated Headquarters of Ministry of Defence (Army) Room No. 11 Plot No. 108 (West) Brassey Avenue, Church Road, New Delhi letter no. B/38046A/091/2012/AG/PS/4(2nd Appeal) dated 23 Sept 2014, with all the consequential benefits to the applicant.*
>
> *(b) Quash the rejection order of the First Appellate Committee through Additional Director General Personnel Services-4, New Delhi bearing B/40502/570/10/AG/PS-4 (Imp-II) dated 30 Dec 2010 rejecting the claim of the applicant for grant of disability pension with all the consequential benefits to the applicant.*
>
> *(c) Grant disability pension to the applicant from the day applicant was discharged based on Release Medical Board.*
>
> *(d) To issue any other order or direction considered expedient and in the interest of Justice and equity.*
>
> *(e) Award cost of the petition.*
>
> *(f) Quash the Principal Controller of Defence Accounts (Pension) Allahabad rejection order contained in EME Records letter No. JC-751675P/DP-1/Pen dated 15 Jan 2010, with all the consequential benefits to the applicant."*

2. The factual matrix of the case is that the applicant was enrolled in the Indian Army on 19.12.1991 and was discharged from service under Army Rule 13 (3) 1 (ii) with effect from 31.12.2009 in category H2 (P) due to his disability CSOM (RT) EAR OPTD H.65.2. The disability of the applicant was considered as attributable to military service but was assessed as 6-10% for life and net assessment for qualifying disability

pension @ 10% for life. The disability claim of the applicant was rejected vide order dated 15.01.2010 and subsequently his both first and second appeals were also rejected vide order dated 30.12.2010 and 23.09.2014. Aggrieved, the applicant has filed the instant Original Application.

3. Heard Col (Retd) Ashok Kumar and Shri Rohit Kumar, learned Counsel for the applicant, Shri Ashutosh Kumar Srivastava, learned Counsel for the respondents and perused the record.

4. Learned counsel for the applicant has submitted that the applicant was discharged from service initially on 30.06.2008 in view of his low medical category and was granted disability pension. However in compliance of judgment of Hon'ble The Apex court in Civil Appeal No. 6587/2008 dated 07.11.2008, he was reinstated in service on 16.02.2009 and was again discharged under Army Rule 13 (3) 1 (ii) after Release Medical Board with effect from 31.12.2009 in category H2 (P). Though after his initial discharge in June 2008, he was granted disability pension, but when he was reinstated in service and discharged again on 31.12.2009, he was not granted disability pension. His claim for disability pension was rejected vide order dated 15.01.2010 at Annexure No. 3. Subsequently his first and second appeals were also rejected vide order dated 30.12.2010 and 23.09.2014 (Annexure No. 4 & 5).

5. Learned counsel for the applicant submitted that there is no note of such disease or disability in the service record of the applicant when he had been enrolled in the Indian Army. The Applicant's Counsel placed reliance on the judgment of Hon'ble the Apex Court in the case of **Sukhvinder Singh Vs. Union of India** reported in (2014) STPL (WEB) 468 SC for grant of disability pension.

6. Per contra, Learned Counsel for the Respondents submitted that the applicant was not entitled to disability pension because his disability has been considered less than 20% and the applicant was not meeting the primary conditions for grant of disability pension as laid down in Para 173 of the Pension Regulations for the Army, his claim was rightly rejected by the competent authority.

7. Before dealing with the rival submissions, it would be appropriate to examine the relevant Rules and Regulations on the point. Relevant portions of the provisions of Rules 5, 9, 14(b) and 20 of the Entitlement Rules for Casualty Pension Award, 1982 are reproduced below:-

Entitlement Rules for Casualty Pension Award, 1982

"5. *The approach to the question of entitlement to casualty pensionary awards and evaluation of disabilities shall be based on the following presumptions:-*

Prior to and During Service.

(a) A member is presumed to have been in sound physical and mental condition upon entering service except as to physical disabilities noted or recorded at the time of entrance.

(b) In the event of his subsequently being discharged from service on medical grounds any deterioration in his health which has taken place is due to service.

Onus of Proof.

9. The claimant shall not be called upon to prove the conditions of entitlement. He/she will be given more liberally to the claimants in field/afloat service cases.

Disease

14. In respect of diseases, the following rule will be observed:-

(a) cases…….

(b) a disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service, if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated, that the disease could not

have been detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service.

x x x x x x x x

20. Conditions of unknown aetiology:- There are a number of medical conditions which are unknown aetiology. In dealing with such conditions, the following guiding principles are laid down-

(a) If nothing at all is known about the cause of the disease, and the presumption of the entitlement in favour of the claimant is not rebutted, attributability should be conceded.

(b) If the disease is one which arises and progresses independently of service environmental factors than the claim may be rejected."

8. In **Sukhvinder Singh Vs. Union of India** reported in (2014) STPL (WEB) 468 SC, the Hon'ble Apex Court has held as under:

"5. On 16.2.2002, the Appellant was presented before the Medical Board which recommended that the Appellant be invalided out of service with disability of 6 per cent to 10 per cent on account of hearing impairment. It will bear repetition that the exercise as to whether the Appellant could be retained in service in some other category was not even thought of or considered or undertaken, in the face of the Pension Regulation for the Army, 1961, Part I, Appendix II (4) and (9) which postulates that "the claimant shall not be called upon to prove the conditions of entitlement. He/she shall receive the benefit of any reasonable doubt. This benefit shall be given more liberally to the claimants in field/afloat service cases."

In its letter dated 18th October, 2004 the respondents have recorded that the Invaliding Medical Board (IMB) had considered the Appellant's Invalided Disability (ID) and had concluded it to be:-

(i) as neither attributable nor aggravated by Military Service; and

(ii) as assessed the degree of disablement of the said disease at 6 to 10 per cent, permanently for life.

Inexplicably, but very significantly, it has also been recorded that the above disability had existed before entering service, but had remained

undetected by the recruiting Medical Officer. It has further been conveyed to the Appellant by the said letter that as per Regulation 173 of the Pension Regulations for the Army 1961, Part-I, disability pension is granted to an individual on his invalidment from service only when his disability is viewed as attributable or aggravated by Military Service and is assessed at 20 per cent or above by the competent Medical Authority, and since neither of these two factors was present, the Appellant was not entitled to grant of disability pension in terms of the said Regulation. The said Regulation is reproduced below for ease of reference:- "173. Unless otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an individual who is invalided out of 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.

> *173-A. Individuals who are placed in a lower medical category (other than 'E') permanently and who are discharged because no alternative employment in their own trade/category suitable to their low medical category could be provided or who are unwilling to accept the alternative employment or who having retained in alternative employment are discharged before completion of their engagement, shall be deemed to have been invalided from service for the purpose of the entitlement rules laid down in Appendix II to these Regulations.*
>
> *Note: The above provision shall also apply to individuals who are placed in a low medical category while on extended service and discharged on the account before the completion of the period of their extension. The question whether a disability is attributable to or aggravated by military service shall be determined under the rule in Appendix II."*

6. We think that it is beyond cavil that a combatant soldier is liable to be invalided out of service only if his disability is 20 per cent or above and there is a further finding that he cannot discharge duties even after being placed in a lower medical category. We are indeed satisfied to note that Rule 173 Appendix-II (10) postulates and permits preferment of claims even "where a disease did not actually lead to the member's discharge from service but arose within ten years thereafter." We, just as every other citizen of India, would be extremely disturbed if the Authorities are perceived as being impervious or unsympathetic

towards members of the Armed Forces who have suffered disabilities, without receiving any form of recompense or source of sustenance, since these are inextricably germane to their source of livelihood. Learned Counsel for the respondents has failed to disclose any provision empowering the invaliding out of service of any person whose disability is below 20 per cent. Indeed, this would tantamount to dismissal of a member of the Armed Forces without recourse to a court-martial which would automatically entitle him to reinstatement. Regulation 143 envisages the 'Re-Enrolment of Ex-Servicemen Medically Boarded Out', where the disability is reassessed to be below 20 per cent. It is, therefore, self contradictory to contend that the invaliding out of service of the Appellant was justified despite his disability being of trivial proportions having been adjudged between 6 to 10 per cent only. We shall presume, albeit fortuitously for the Respondents, that re-assessment of the Appellant's disability was not required to be performed because it was found to be permanent. Otherwise, there would be a facial non-compliance with Regulation 143, which is extracted below for ease of reference:-

> *"143.Re-Enrolment of Ex-Servicemen Medically Boarded Out._*
>
> *(a) Ex-Servicemen, who are in receipt of disability pension, will not be accepted for re- enrolment in the Army.*
>
> *(b) Ex-Servicemen, medically boarded out without any disability pension or those whose disability pensions have been stopped because of their disability having been re-assessed below 20% by the Re-Survey Boards, will be eligible for re-enrolment, either in combatant or non-combatant (enrolled) capacity in the Army, provided they are re-medically boarded and declared fit by the medical authorities. If such an ex-serviceman applies for re-enrolment and claims that he is entirely free from the disability for which invalided, he will be medically examined by the Rtg MO and if he considers him fit, the applicant will be advised to apply to officer-in- charge, Records Office concerned, through the recruiting officer for getting himself re-medically boarded. The officer-in-charge, Records Office concerned, on receipt of the application, will arrange for his medical examination at a Military Hospital nearest to his place of residence. The individual concerned will have to pay all his expenses, including that on accommodation and journey to and from the place of medical examination. If the individual is found fit and re-enrolled on regular engagement, he will be enlisted for the full period of combined colour and reserve service, subject to the following conditions:-*
>
> > *(i) If he had not previously completed the minimum period of colour service after which he could be*

transferred to the reserve, he will rejoin the colours and his previous colour service will count towards the minimum service required for transfer to the reserve.

(ii) If he had previously completed the minimum period of colour service required for transfer to the reserve and is fully trained and suitable in all other respects, he may be re-enrolled, provided a vacancy in the reserve exists, and be immediately transferred to the reserve.

(c) The counting of former service for pension or gratuity is governed by the provisions of Pension Regulations."

7. The next submission on behalf of the respondents is that the injury/disability sustained by the Appellant is neither attributable nor aggravated by Military Service, thereby disentitling him for grant of disability pension. We must draw an adverse presumption against the respondents, inasmuch as no impairment in the Appellant's hearing had been detected at the time when he was enrolled on 15.3.2001, pursuant to a complete physical check up. In fact, an adverse presumption is postulated in Appendix II (supra). In our opinion, the version of the Appellant that injury was sustained by him as a result of his having been slapped by his Instructor, or for that matter by any other Combatant, has credibility. We had already adverted to the Confidential Medical Report dated 5th August, 2001 which specifically contains a mention of the Appellant having been assaulted. In the circumstances, we cannot but conclude that the injury was 'either attributable or aggravated by Military Service'. Having undergone a thorough medical examination only one year prior to the incident, had the injury or disability been congenital or been in existence at the time of recruitment, it would have been duly discovered. Therefore, on both counts viz. disability to the extent of less than 20 per cent, as well as it having been occurred in the course of Military Service, the findings have to be in favour of the Appellant.

8. Paragraph 183 of the Pension Regulations for the Army 1961, (Part-I) stipulates as under:-

> *"183. The disability pension consists of two elements viz. Service element and disability element which shall be assessed as under:*
>
> *(1) Service element .....*
>
> *(2) Disability element ……..*
>
> *In case where an individual is invalidated out of service before completion of his prescribed engagement/service limit on account of disability which is attributable to or aggravated by military service and is assessed below 20 percent, he will be granted an award equal to service element of disability pension determined in the manner given in Regulation 183 Pension Regulations for the Army Part-I(1961). "*

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. In view of our analysis, the Appellant would be entitled to the Disability Pension. The Appeal is, accordingly, accepted in the above terms. The pension along with the arrears be disbursed to the Appellant within three months from today."

9. In the instant case, the medical board has opined that disability due to CSOM (RT) EAR OPTD H.65.2 is 6-10% and has considered it attributable to military service. So, the precise

reason for not granting disability pension, is because disability has been considered less than 20%. In the judgment **Sukhvinder Singh vs. Union of India** (supra), it is clearly mentioned that "whenever a member of the Armed Forces is invalided out of service, it perforce has to be assumed that his diability was found to be above twenty percent and as per extant Rules/Regulations, disability leading to invaliding out of service would attract the grant of fifty percent disability." In this case, Medical Board has opined that disability is attributable to military service, even otherwise in view of judgment of **Dharamvir Singh vs. Union of India & others** reported in (2013) SC 316, the disability has to be considered as attributable to military service because the applicant was enrolled in medically fit condition and there is no note of any disability at the time of enrolment and he has been discharged in low medical category after approx 17 years of service.

10. Having given due considerations to the rival submissions made on behalf of the parties' Learned Counsel, we observe that the applicant had been enrolled in the Indian Army in a fit medical condition and has served for over 17 years. He suffered the disability during his service period and has been discharged in low medical category, therefore, in view of the judgment of the Hon'ble The Apex Court in the case of **Sukhvinder Singh Vs. Union of India** (supra), he is entitled to disability pension @ 50%.

11. In the above conspectus, we are of the considered view that the impugned orders passed by the respondents were not only unjust, illegal but also were not in conformity with rules, regulations and law. The impugned orders passed by the respondents deserve to be set aside and the applicant is entitled to disability pension @ 50% for life from the date of discharge as laid down in judgment of **Sukhvinder Singh vs. Union of India &**

others (supra). He is also liable to be paid arrears of disability pension with interest @ 9% per annum from the date of discharge till the date of actual payment.

12. The O.A. No. 250 of 2014 is allowed. The impugned orders dated 15.01.2010, 30.12.2010 and 23.09.2014 are set aside. The respondents are directed to grant disability pension to the applicant @ 50% for life from the date of discharge. The respondents are also directed to pay arrears of disability pension with interest @ 9% per annum from the date of discharge till the date of actual payment. The Respondents are directed to give effect to the order within three months from the date of receipt of a certified copy of this order.

13. No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

(Justice V.K. DIXIT)
Member (J)

Dated : December, 2015
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