

RESERVED

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

COURT NO 1

O.A. No. 60 of 2013**Thursday, this the 26th day of Nov, 2015****“Hon’ble Mr. Justice Virendra Kumar DIXIT, Judicial Member
Hon’ble Lt Gen Gyan Bhushan, Administrative Member”**

Ex-Sub Harish Chandra Sharma (Army No JC-810766Y) aged about 50 years, Son of Shri Ram Murti Sharma, Permanent resident of House No. 941, Mohalla: Dilazak, (Near Police Line), Powyan Road Distt: Shahjahanpur (U.P.)-PIN-242001.

----Applicant

Versus

1. Union of India, through the Secretary, Ministry of Defence, 101 South Block, New Delhi-110011.
2. Chief of the Army Staff, Integrated Headquarter of the Ministry of Defence (Army), South Block, DHQ PO New Delhi-110011.
3. Director General Personal Services, Adjutant General’s Branch, Integrated HQ of Ministry of Defence (Army), DHQ, PO South Block, New Delhi-110011
4. Officer-in-Charge Records: The Intelligence Corps PIN-908793, C/o 56 APO.
5. PCDA (Pension), Draupadi Ghat, Allahabad.

...Respondents

Ld. Counsel appeared for the Applicant	-	Shri P.K.Shukla, Advocate
Ld. Counsel appeared for the Respondents	-	Shri D.S.Tiwari, Central Govt Standing Counsel

ORDER**"Per Se Hon'ble Virendra Kumar Dixit, Judicial Member"**

1. Present 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 following reliefs-

"(a) to issue/pass an order or direction to the respondents to set aside/quash the arbitrary orders of denial of Disability Pension Claim by way of passing orders of rejection at the initial stage, then the first appeal and finally the second appeal for the disease: Primary Hypertension passed by the various authorities concerned as contained in Annexure No. A-1, Annexure No A-2 and Annexure No.3 respectively to this original application.

(b) to issue/pass an order or direction to the respondents to grant disability pension to the applicant from the date of his discharge i.e. 01 Dec 2008 for life alongwith relevant interest on the arrears of dues so accrued.

(c) to issue/pass any other order or direction as this Hon'ble Tribunal may deem just, fit and proper under the circumstances of the case in favour of the applicant against the respondents.

(d) To allow this original application with costs."

2. The admitted and undisputed facts of the case are that the Applicant was enrolled in the Army on 15.11.1980 and was discharged

from service on 30.11.2008 on account of being in low medical category. The causative factors of his disabilities were; firstly, **"PRIMARY HYPERTENSION, 1-10 & secondly, BRONCHIAL ASTHMA"** and over-all disability was quantified at 20% for life. The Release Medical Board however opined that both the disabilities were not attributable to Military Service but at the same time, they converged to the opinion that the second disability was aggravated by Military Service. It is not disputed that at time of entry in the army service, the Applicant was medically and physically fit as per prescribed standards.

3. The Learned Counsel for the Applicant submitted that the Release Medical Board had categorically opined that the disabilities of the Applicant were aggravated by Military service (by referring to the Medical Opinion dated 30.04.2007 Annexure A-5 to the Original Application) and that being the opinion, the assessment is clearly covered by the Guidelines contained in Para 21 (h) of Chapter VII of Guide to Medical Officers (Military Pension) 2002 and thus he was entitled to disability pension in terms of Para 173 of Pension Regulation for the Army 1961, which clearly postulates that the individual is entitled for disability pension if the disability is assessed to 20% or more. He further referred to Para 19 Annexure III (B) to Entitlement Rules for Causality Pensionary Awards, 1982 for entitlement to Disability Pension. It is further submitted that the PCDA refused to grant disability pension on the count of Primary Hypertension (1-10) vide communication dated 22.12.2008 notwithstanding the categorical opinion of the Release Medical Board which had opined both the disabilities to have been aggravated by the Military service. Against the decision of the PCDA (P), the Applicant

preferred appeal, which was rejected by ACFA vide communication dated 29.04.2010. The Applicant then preferred second appeal which was rejected vide communication dated 27.05.2011.

4. At this stage, Learned Counsel for the Applicant made an oral prayer that in case the disability of the Applicant is pegged at 20% or more, disability of the Applicant, which led to his being invalidated out of service would attract the grant of fifty percent disability pension in the light of decision of Hon'ble The Apex Court and also regard being had to the extant Rules/Regulations.

5. **Per contra**, Learned Counsel appearing for the Respondents repudiated the submissions contending that the disability of the Applicant was opined to be not attributable to Military Service. He however submitted that only second disability namely Bronchial Asthma was opined to be aggravated by Military service by the Release Medical Board by referring to the medical opinion dated 01.12.2008 and his over-all disability was assessed to be 20% for life. consequence, he was granted service pension w.e.f 1.4.2008 vide Allahabad Pension Payment Order dated 04.12.2008. He further contended that the Applicant's disability was rightly assessed at less than 20% for life long. He did not repudiate that the second disability had been aggravated by Military service. However, he relied upon Para 173 of Pension Regulations for the Army 1961 and according to Part I, the disability pension may be granted to an individual who is medically boarded out of service on account of disability which is attributable to or aggravated by Military service and assessed at 20% or above.

6. Without swelling the judgment by unnecessary quotations of the Rules and Regulations on the point, it would suffice to say that Para

173 of the Pension Regulations for the Army 1961 postulates that 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% or above by the competent Medical Authority. The submission substantially is that since second disability was opined to be aggravated by Military service, the PCDA (P) sanctioned disability element in his favour at 20% for Bronchial Asthma J-45.9. To sum up, learned counsel propped up the order of the PCDA (P), the order passed in first appeal and the order passed in second appeal.

7. Learned Counsel for the Applicant referred to Annexure A-5 dated 30.04.2007 to the Original Applicant to prop up his submission that both his disabilities have been opined to be aggravated by Military service. On the other hand, Learned Counsel for the Respondents referred to the opinion of Release Medical Board dated 01.12.2008 wherein, second disability namely, **Bronchial Asthma J-45.9** was opined to be aggravated by the Military service but not connected with service. In respect of disability on the count of Primary Hypertension, in the column whether "aggravated by service or not", initially expression "yes" was written but it was scored off and expression "No" was written. Now the only question that remains for consideration is whether the disabilities of the Applicant were either attributable to or aggravated by the Military service.

8. 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)."

9. 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."

10. 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 Petitioner was under treatment for the disease at the time of his recruitment or that the disease was hereditary in nature.

11. 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 **Dharamvir Singh vs Union of India and others** (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.

12. Coming to the prayer for rounding off of disability pension, we are of the view that regard being had to the decision of **Sukhvinder Singh** reported in 2014 STPL (WEB) 468 SC, the substance of which is "*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*" , the Petitioner is held entitled for disability pension @ 20% for two years from the date of discharge which would stand rounded off to 50%.

13. In the above conspectus, we are of the considered view that the impugned orders dated 22.12.2008, 29.04.2010 and 27.05.2011 passed by the Respondents rejecting his claim for disability pension were not only unjust, illegal but also were not in conformity with rules,

regulations and law. The impugned order passed by the Respondents thus deserve to be set aside and the Applicant is held entitled to disability pension @ 20% for life from the date of discharge which would stand rounded off to 50% with interest at the rate of 9% per annum.

ORDER

14. Thus in the result, the O.A. succeeds and is allowed. The impugned orders passed by the Respondents dated 22.12.2008, 29.04.2010 and 27.05.2011 passed by the Respondents are set aside. The Petitioner is held entitled for disability pension @ 20% for life from the date of discharge. In the light of the decision of Hon'ble The Apex Court in **Sukhvinder Singh** (supra), the disability pension would stand rounded off to 50%. Respondents are directed to pay arrears of aforesaid disability pension alongwith 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.

15. No order as to costs.

(Lt Gen Gyan Bhushan)
Administrative Member

(Justice Virendra Kumar DIXIT)
Judicial Member

Date: Nov. ,2015

MH/-