

RESERVED
Court No.1

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

Original Application No. 478 of 2018

Tuesday, this the 18th day of December 2018

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

Brig. M.K. Kushwaha (No. IC31020P), son of Shri Panna Lal Kushwaha, resident of House No.S-2/225, Eldeco, Udyan-II, Raibareli Road, Lucknow (Uttar Pradesh)-226025.

..... Applicant

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

Versus

1. Union of India through Secretary, Ministry of Defence, South Block, New Delhi-110011.
2. Additional Director General of Manpower (Policy and Planning)/MP 5(B), Adjutant General's Branch, Integrated Headquarters of Ministry of Defence (Army), wing No. 3, Ground Floor, West Block-III, R.K. Puram, New Delhi-110066.
3. Appellate Committee of First Appeal through its Chairman, Adjutant General's Branch, Integrated Headquarters of Ministry of Defence (Army), Plot No.108 (West), Brassey Avenue, Church Road, New Delhi-110001.
4. Principal Controller of Defence Accounts (Pension), Draupadi Ghat, Allahabad-211014.

..... Respondents

Ld. Counsel for the
Respondents

:Mohd. Zafar Khan,
Central Govt Counsel.

ORDER**“Per Hon’ble Air Marshal B.B.P. Sinha, 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, whereby the applicant has sought following reliefs:-

- “(a) Issue/pass an order or direction setting aside the order/letter dated 06.11.2017 communicated by the letter dated 14.11.2017 (Annexure No. 1 to the original application) to the extent it has denied the benefit of broad banding of disability pension at the rate of 50% from the date of retirement, after summoning the relevant original records.*
- “(b) Issue/pass an order directing the respondents to consider case of the applicant for broad banding of disability pension at the rate of 50% with effect from 27.12.2008, i.e. the date of retirement and provide the same along with arrears and interest within an specified time.*
- “(c) Issue/pass any other order or direction as this Hon’ble Tribunal may deem fit in the circumstances of the case.*
- “(d) Allow this Original Application with cost.”*

2. Briefly stated facts of the case are that the applicant was enrolled in the Regiment of Infantry of the Indian Army on 15.06.1975 and was discharged in the rank of Brigadier in low medical category S₁H₂A₁P₂E₂ (Permanent) on 27.12.2008. The applicant was discharged after rendering more than 33 years 06 months of service under Rule 13 (3) III (i) of the Army Rules 1954. The Release Medical Board held at the time of discharge assessed his disability “Sensory Neural Hearing Loss (LT)” to be neither attributable to nor aggravated (NANA) by military service and assessed his disability @30% for life. The

applicant thereafter prepared first appeal against the rejection of his disability pension claim vide an application dated 23.08.2014. Since his application dated 23.08.2014 remained pending and undecided till 2016, hence, he preferred Original Application M.A. No. 1573 of 2016. The said Original Application was disposed of vide this Tribunal's order dated 09.01.2017 with the direction to the competent authority to consider and take a decision on the First Review Appeal moved by the applicant. In compliance of said order the respondents vide order/letter dated 06.11.2017 conceded his disability as aggravated by military service and sanctioned disability pension to the applicant at the rate of 30% for life with effect from the date of retirement i.e. 27.12.2008. However, the respondents have extended the benefit of broad banding to the applicant @50% w.e.f. 01.01.2016. Presently the applicant is in receipt of 50% disability pension for life with effect from 01.01.2016.

3. Ld. Counsel for the applicant argued that since the applicant is already in receipt of 30% disability element for life on account of disability from "*Sensory Neural Hearing Loss (LT)*" therefore in view of judgment in O.A. No. 328 of 2016, **Colonel Dharam Raj Singh (Retd)**, decided by Armed Forces Tribunal, Regional Bench, Lucknow on 07.09.2016 and Hon'ble Apex Court judgment in the case of **Union of India and Ors vs Ram Avtar & ors** (Civil appeal No. 418 of 2012 decided on 10th December 2014), the applicant is also entitled to benefit of rounding off of disability element @ 50% for life

with effect from the date after his retirement i.e. 28.12.2008. In this context the Ld. Counsel for the applicant also quoted the decision of Armed Forces Tribunal, Principal Bench, New Delhi vide its order dated 01.12.2017 passed in O.A. No. 1439 of 2016 **Ex. Sergeant Girish Kumar Versus Union of India and Others.**

4. On the other hand, though Ld. Counsel for the respondents contended that the applicant is not entitled to the benefit of rounding off of disability pension with effect from the date of retirement i.e. 27.12.2008 on the ground that the Policy for grant of disability element as per existing Government orders is applicable only with effect from 01.01.2016. Additionally he informed that the Judgment quoted by the Ld. Counsel for the applicant has been stayed vide Hon'ble Supreme Court order dated 13.07.2008 passed in Civil Appeal Diary No. 21811 of 2018, **Union of India through its Secretary & Others Vs. Sgt. Girish Kumar.**

5. We have heard Ld. Counsel for the parties and perused the material placed on record. We have specifically checked the copy of the current P.P.O. vide which the applicant is in receipt of 30% disability element with effect from 28.12.2008 to 31.12.2015 and 50% disability element with effect from 01.01.2016.

6. This is a case where the residual dispute boils down to only one question i.e. what is the date from which the benefit

of broad banding can be rounded off and extended to the applicant?

7. We have gone through the Judgment of the larger Bench of Armed Forces Tribunal, Principal Bench, New Delhi vide order dated 01.12.2017 passed in O.A. No. 1439 of 2016 **Ex Sergeant Girish Kumar vs. Union of India and others.** This Judgment has enunciated that Armed Forces personnel who retired pre 01.01.1996 will be entitled to the arrears of broad banding with effect from 01.01.1996 and in case of those retired on or after 01.01.1996 will be entitled to arrears with effect from the date of their retirement. It was argued by the Ld. Counsel for the applicant that in view of the decision of the Larger Bench in the case of **Ex Sergeant Girish Kumar (supra)**, the applicant is entitled to the benefit of rounding off and payment of arrears of disability pension from the date of his superannuation. In this regard, we have also noticed that Hon'ble the Supreme Court vide order dated 13.07.2018 passed in Civil Appeal Diary No 21811 of 2018, **Union of India through its Secretary & ors vs. Sgt. Girish Kumar** has stayed the decision of the Larger Bench in the case of **Ex Sergeant Girish Kumar (supra)**. For convenience sake, order dated 13.07.2018 is excerpted as under:

"Leave to appeal granted.

Delay condoned.

Issue notice.

In the meanwhile, there shall be a stay of operation of the impugned judgment and order passed by the Armed Forces Tribunal.

However, learned Additional Solicitor General says that he will advise the Union of India to

release the disability pension for a period of three years prior to the date of filing the original application before the Tribunal or the date of retirement as may be applicable."

8. It may also be observed that claim for pension is based on continuing wrong and relief can be granted if such continuing wrong creates a continuing source of injury. In the case of **Shiv Dass vs. Union of India**, reported in 2007 (3) SLR 445, para-9, Hon'ble Apex Court has observed:

"In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition. It would depend upon the fact of each case. If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years. The High Court did not examine whether on merit appellant had a case. If on merits it would have found that there was no scope for interference, it would have dismissed the writ petition on that score alone."

9. Since delay in filing the O.A. has been condoned by this Tribunal, as such, in view of the decision of Hon'ble Supreme Court in the case of **Shiv Dass (supra)**, we are of the considered view that benefit of rounding off of disability pension @ 30% for life to be rounded off to 50% for life may be made applicable to the applicant from the date of his preferring First Appeal (Representation) i.e. 23.08.2014.

10. In view of the above, the Original Application deserves to be allowed partly, hence **allowed partly**. The applicant is entitled to the benefit of rounding off of disability pension from

30% for life to 50% for life with effect from the date of preferring First Appeal (Representation) i.e. 23.08.2014. The respondents are directed to give effect to this order within a period of four months from the date of receipt of a certified copy of this order. Default will invite interest @ 9% per annum till the date of actual payment.

No order as to costs.

(Air Marshal B.B.P. Sinha) (Justice S.V.S. Rathore)
Member (A) Member (J)

Dated : December, 2018

AKD/-