

Court No.2
ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 404 of 2022

Thursday, this the 08th day of December, 2022

“Hon’ble Mr Justice Ravindra Nath Kakkar (J)”

“Hon’ble Lt Gen Rakesh Kumar Anand (A)”

Gp Capt Rajesh Kumar Mishra (18743-H), AE(L) (Retd)

S/o Shri Chandra Bhushan Mishra,

Resident of 3G-204, AWHO Township,

Gujinder Vihar, Pocket -5, Sector Chi-1,

Greater Noida, Gautam Buddha Nagar,

Uttar Pradesh-201315.

..... Applicant

Ld. Counsel for the: **Wg Cdr S.N. Dwidevi (Retd), Advocate.**

Applicant

Versus

1. Union of India, through the Secretary, Ministry of Defence, South Block, New Delhi.
2. Chief of the Air Staff, Air Headquarters, Vayu bhanwan, New Delhi-1100106.
3. Air Cmde AV, Directorate of Air Veterans, Air Headquarters, SMC Building (First Floor), Subroto Park, New Delhi-110010.
4. Joint Controller of Defence Accounts (Air Force), Subroto Park, New Delhi -110010.
5. Principal Controller of Defence Accounts (Pension), Draupadi Ghat, Allahabad, (U.P).

.....Respondents

Ld. Counsel for the
Respondents.

: **Shri Bipin Kumar Singh,
Central Govt. Counsel**

ORDER

“Per Hon’ble Mr Justice Ravindra Nath Kakkar, Member (J)”

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs

:-

- (a) *To issue/pass an order to set aside the impugned order dated 08.04.2022 (Annexure A-1) and 31.08.2021 9annexure A-20 by which the first Appeal against non grant of disability element to the applicant, has been rejected.*
- (b) *To issue/pass any order or direction to modify the assessment of the Release Medical Board (Annexure No.3) of the applicant held on 02.03.2021 to the extent that the diseases of Primary Hypertension and Diabetes Mellitus Type-II with disability @30% and @20% respectively, with composite assessment for both the disabilities at 40% for life, be declared as attributable / aggravated due to Air Force service conditions, with net assessment qualifying for disability pension @40% for life, rounded up to 50% as per policy issued vide GOI, Ministry of Defence letter No.*

17(01)/2017/D(Pen/Policy) dated 23.01.2018 and the same circulated vide PCDA (P) Allahabad circular No. 596 dated 09.02.2018.

- (c) To issue/pass any other order or direction to respondent to pay the disability element with effect from 01.11.2021 for life and pay the accrued arrears.*
- (d) To issue/pass any other order or direction that this Hon'ble Tribunal may deem fit, just and proper under the circumstances of the case.*

2. Briefly stated, applicant was commissioned in the Indian Air Force on 16.02.1987 and retired from service on 31.10.2021 on attaining the age of superannuation. At the time of discharge from service, the Release Medical Board (RMB) held at Air Force Station, New Delhi on 02.03.2021 assessed his disabilities (i) **'PRIMARY HYPERTENSION (OLD)'** @ 30% for life and (ii) **TYPE II DIABETES MELLITUS (OLD)** @20% for life **composite disabilities @40 %** for life and opined the disability to be neither attributable to nor aggravated (NANA) by service. The applicant's claim for grant of disability pension was rejected vide letter dated 31.08.2021. The applicant preferred First Appeal which too was rejected vide letter dated 08.04.2022. It is in this perspective that the applicant has preferred the present Original Application.

3. Learned Counsel for the applicant pleaded that at the time of commissioning, the applicant was found mentally and physically fit for service in the Air Force and there is no note in the service documents that he was suffering from any disease at the time of commissioning in Air Force. The diseases of the applicant was contracted during the service, hence they are attributable to and aggravated by Air Force Service. He pleaded that various Benches of Armed Forces Tribunal have granted disability pension in similar cases, as such the applicant be granted disability element of disability pension and its rounding off to 50%.

4. On the other hand, Ld. Counsel for the respondents contended that composite disabilities of the applicant @ 40% for life has been regarded as NANA by the RMB, as per Regulation 37 of Pension Regulations for the IAF, 1961 (Part – I) the applicant is not entitled to disability element of disability pension. He pleaded for dismissal of the Original Application

5. We have heard Ld. Counsel for the applicant as also Ld. Counsel for the respondents. We have also gone through the Release Medical Board proceedings as well as the records and we find that the questions which need to be answered are of two folds:-

- (a) Whether the disabilities of the applicant are attributable to or aggravated by Air Force Service?
- (b) Whether the applicant is entitled for the benefit of rounding off the disability element of disability pension?

6. The law on attributability of a disability has already been settled by the Hon'ble Supreme Court in the case of ***Dharamvir Singh Versus Union of India & Others***, reported in (2013) 7 Supreme Court Cases 316. In this case 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)."

7. In view of the settled position of law on attributability, we find that the RMB has denied attributability to the applicant only by endorsing that the composite disabilities **'PRIMARY**

HYPERTENSION (OLD) and **'TYPE II DIABETES MELLITUS (OLD)**' are neither attributable to nor aggravated (NANA) by service on the ground of onset of disability in March 2008 while posted in Peace location (Allahabad), therefore, applicant is not entitled to disability element of disability pension. However, considering the facts and circumstances of the case, we are of the opinion that this reasoning of Release Medical Board for denying disability pension to applicant is not convincing and doesn't reflect the complete truth on the matter. Peace Stations have their own pressure of rigorous Air Force training and associated stress and strain of Air Force service. The applicant was commissioned in Indian Air Force on 16.02.1987 and the composite disabilities has started after more than 20 years of Air Force service i.e. in March 2008. We are therefore of the considered opinion that the benefit of doubt in these circumstances should be given to the applicant in view of ***Dharamvir Singh vs Union of India & Ors*** (supra), and the disability of the applicant should be considered as aggravated by Air Force service.

8. The law on the point of rounding off of disability pension is no more RES INTEGRA in view of Hon'ble Supreme 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). In this Judgment the Hon'ble Apex Court nodded in disapproval of the policy of the Government of India in granting the benefit of rounding off of disability pension only to the personnel who have been invalidated out of service and denying the same to the personnel who have retired on attaining the age of superannuation or on completion of their tenure of engagement. The relevant portion of the decision is excerpted below:-

“4. By the present set of appeals, the appellant (s) raise the question, whether or not, an individual, who has retired on attaining the age of superannuation or on completion of his tenure of engagement, if found to be suffering from some disability which is attributable to or aggravated by the military service, is entitled to be granted the benefit of rounding off of disability pension. The appellant(s) herein would contend that, on the basis of Circular No 1(2)/97/D (Pen-C) issued by the Ministry of Defence, Government of India, dated 31.01.2001, the aforesaid benefit is made available only to an Armed Forces Personnel who is invalidated out of service, and not to any other category of Armed Forces Personnel mentioned hereinabove.

5. We have heard Learned Counsel for the parties to the lis.

6. We do not see any error in the impugned judgment (s) and order(s) and therefore,

all the appeals which pertain to the concept of rounding off of the disability pension are dismissed, with no order as to costs.

7. The dismissal of these matters will be taken note of by the High Courts as well as by the Tribunals in granting appropriate relief to the pensioners before them, if any, who are getting or are entitled to the disability pension.

8. This Court grants six weeks' time from today to the appellant(s) to comply with the orders and directions passed by us."

9. Additionally, consequent upon the issue of Government of India, Ministry of Defence letter No. 17(01)/2017(01)/D (Pen/Policy) dated 23.01.2018, Principal Controller of Defence Accounts (Pensions), Prayagraj has issued Circular No. 596 dated 09.02.2018 wherein it is provided that the cases where Armed Forces Pensioners who were retired/discharged voluntary or otherwise with disability and they were in receipt of Disability/War Injury Element as on 31.12.2015, their extent of disability/War Injury Element shall be re-computed in the manner given in the said Circular which is applicable with effect from 01.01.2016.

10. It is also 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, 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.”

11. As such, in view of the decision of Hon'ble Supreme Court in the case of **Shiv Dass (supra)** as well as Government of India, Ministry of Defence letter No. 17(01)/2017(01)/D (Pen/Policy) dated 23.01.2018, we are of the considered view that benefit of rounding off of disability pension @ 40% for life to be rounded off to 50% for life may be extended to the applicant from the next date of discharge.

12. In view of the above, the **Original Application No. 404 of 2022** deserves to be allowed, hence **allowed**. The impugned orders, rejecting the applicant's claim for grant of disability element of disability pension are set aside. Both the disabilities of the

applicant are held as aggravated by Air Force Service. The applicant is entitled to get disability element @40% for life which would be rounded off to 50% for life from the next date of his discharge. The respondents are directed to grant disability element to the applicant @40% for life which would stand rounded off to 50% for life from the next date of his discharge. The respondents are further 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 @ 8% per annum till the actual payment

13. No order as to costs.

(Lt Gen Rakesh Kumar Anand)
Member (A)

(Justice Ravindra Nath Kakkar)
Member (J)

Dated : 08 December,2022
Ukt/-