

Court No. 1**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****ORIGINAL APPLICATION No. 04 of 2022**Friday, this the 08th day of December, 2023**“Hon’ble Mr. Justice Anil Kumar, Member (J)”****“Hon’ble Anil Puri, Member (A)”**

Capt. Sonam Tiwari (Retd.) (NS 23412N) W/o Mr. Suyash Madhur Dixit, R/O B-6, ESIC Residential Complex, Sarvodya Nagar, Kanpur, Uttar Pradesh -208005.

..... Applicant

Ld. Counsel for the Applicant : **Shri Manoj Kumar Awasthi**, Advocate.
Holding brief of
Wg. Cdr. Ajeet Kakkar (Retd.), Advocate

Versus

1. Union of India, through the Secretary, Ministry of Defence, DHQ PO, New Delhi -110001.
2. The Chief of Army Staff, IHQ, MoD (Army), Sena Bhawan, New Delhi -110001.
3. Command Hospital, Air Force, Agram Post, Bangalore -560007.

.....Respondents

Ld. Counsel for the Respondents. : **Shri Rajesh Shukla**, Advocate
Central Govt. Standing Counsel
Assisted by **Major Danish Farooqui**,
Departmental Representative

ORDER

“Per Hon’ble Mr. Justice Anil Kumar, 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 set aside the impugned order/release order 30.11.2018 dated in favour of the applicant.*
- (b) *To set aside the Re-categorization Order of the Applicant dated 06.03.2017 to P2 (p) category even before the expiration of 24 months.*
- (c) *To direct the Respondent No.2 to reinstate the Applicant in services.*
- (d) *Alternatively, to grant disability pension to the Applicant if not reinstated in services.*
- (e) *To direct the respondents to conduct RSMB.*
- (f) *To grant such other relief appropriate to the facts and circumstances of the case as deemed fit and proper.*

2. Briefly stated, applicant was commissioned as Short Service Commissioned Officer in Military Nursing Service of the Indian Army on 01.03.2014 and retired on 28.02.2019 in Permanent Low Medical Category after completion of contractual period. At the time of retirement/release from service, the Release Medical Board (RMB) held at Command Hospital Air Force, Bangalore on 20.02.2019 assessed his disability ‘**MALASCENDED MALROTATED (RIGHT) KIDNEY DISEASE (Q 63.2)**’ @ 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 06.05.2019.

The applicant preferred First Appeal which too was rejected vide letter dated 07.02.2020. The applicant preferred Second Appeal which too was rejected vide letter dated 21.01.2021. 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 Army and there is no note in the service documents that he was suffering from any disease at the time of commissioning in Army. The disease of the applicant was contracted during the service, hence it is attributable to and aggravated by Military Service. He further contended that the applicant was diagnosed with Malascended Malrotated (Right) Kidney with Chronic Kidney Disease via Renal DTPA (Diethylenetriamine Pentacetic Acid) Scan performed on 05.09.2016. In Appeal of Re-Categorization dated 03.06.2017 preferred by the applicant reflected how the Glomerular Filtration Rate (GFR) was found deteriorating 97.8% in 2013 to 64% in 2017 (DTPA were conducted on 05.07.2013, 17.01.2014 and 01.03.2017). This abnormality in GFR was subsequent to Dog Bite incident which happened on 11.08.2016 during service and in the service premises itself. The stress and strains of job and aforesaid incident of dog bite which has aggravated the disability of the applicant. He further submitted that applicant's disability has not come in the way of functioning and nor it affected the working capacity of the applicant. He pleaded that various Benches of Armed Forces

Tribunal have granted disability pension in similar cases, as such the applicant be granted disability pension and its rounding off to 50%.

4. On the other hand, Ld. Counsel for the respondents contended that disability of the applicant @ 40% for life has been regarded as NANA by the RMB, hence as per Regulation 37(a) of Pension Regulations for the Army, 2008 (Part-I) which states that *“an officer who retires on attaining of the age of retirement or on completion of tenure, if found suffering on retirement, from a disability which is either attributable to or aggravated by military service and so recorded by Release Medical Board, may be granted in addition to retiring pension admissible, a disability element from the date of retirement if the degree of disability is accepted at 20% or more”* the applicant is not entitled to 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 four folds:-

- (a) Whether the applicant is entitled for re-instatement after setting aside order of release/retirement?
- (b) Whether the disability of the applicant is attributable to or aggravated by Military Service?
- (c) Whether the Short Commissioned Officer is entitled for the grant of disability pension?

- (d) Whether the applicant is entitled for the benefit of rounding off the disability pension?

6. Upon hearing submissions of Ld. Counsel of both side and considering the facts and circumstances of the case we find that applicant was a Short Service Commissioned Officer and she was placed in Permanent Low Medical Category for the disability '**MALASCENDED MALROTATED (RIGHT) KIDNEY DISEASE (Q 63.2)**', as such after completion of her contractual period her services was not extended for further period and she was released/retired from service, therefore, we do not find any irregularity or infirmity in his Retirement/Releasing Order. In view of this applicant is not entitled for reinstatement.

7. Further, 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)."

8. 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 disability '**MALASCENDED MALROTATED (RIGHT) KIDNEY DISEASE (Q 63.2)**' is neither attributable to nor aggravated (NANA) by service on the ground of congenital disorder, therefore, applicant is not entitled to 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 cryptic, not convincing and doesn't reflect the complete truth on the matter. The applicant was commissioned in Indian Army on 01.03.2014 and the disability has started after the Dog bite on 11.08.2016 inside the campus after more than two years of Army service i.e. in August 2016. 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 military service.

9. Further, consequent upon the issue of Government of India, Ministry of Defence, Department of Ex-Servicemen Welfare, New Delhi letter No. 1(9)/2006/D(Pen-C) dated 30.08.2006 and letter No. 16(01)/2012-D(Pen-Pol) dated 23.03.2015, Principal Controller of Defence Accounts (Pensions), Prayagraj has issued Circular No. 23 dated 27.05.2015 wherein it is provided that *"in the case of aggravation too, service element of disability pension in respect of non-regular officers would be calculated after taking into account the full commissioned service rendered by them as calculated in the case of Regular Commissioned Officer. As such EC/SSC officers in aggravation cases would also be allowed the benefit of revision w.e.f. 30.08.2006 as allowed to attributable cases vide MoD letter dated 30.08.2006."*

10. In view of the Circular No. 23 dated 27.05.2015 issued by the Principal Controller of Defence Accounts (Pension), Prayagraj the

applicant is entitled for disability pension which include disability element as well as service element also.

11. 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 January 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."*

12. 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.

13. As such, in view of the decision of Hon'ble Supreme Court in the case of ***Union of India and Ors vs Ram Avtar & ors (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 her retirement.

14. In view of the above, the **Original Application No. 04 of 2022** deserves to be partly allowed, hence **partly allowed**. The impugned orders, rejecting the applicant's claim for grant of disability pension, are

set aside. The disability of the applicant is held as aggravated by Army Service. The applicant is entitled to get disability pension @40% for life which would be rounded off to 50% for life from the next date of her retirement. The respondents are directed to grant disability pension to the applicant @40% for life which would stand rounded off to 50% for life from the next date of her retirement. 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

15. No order as to costs.

16. Major Danish Farooqui, Departmental Representative orally submitted to grant Leave to Appeal against the above order which we have considered and no point of law of general public importance being involved in the case the plea is rejected.

(Lt. Gen. Anil Puri)
Member (A)

Dated : 08 December, 2023

Ashok/AKD/-

(Justice Anil Kumar)
Member (J)