Court No. 1 (List B)
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW

Transferred Application No. 25 of 2014

Tuesday this the 21st day of February, 2017

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

Shashi Kumar Mishra son of Sri Y.P Mishra of 509 Army Base Workshop (E.M.E.) Agra Cantt, at present Village Kachor, Post Office – Phulkaha via Bhutahi, District Siatamarhi, Bihar. ……..... Petitioner

By Legal Practitioner : Col Ashok Kumar (Retd) and
Shri Rohit Kumar,
Ld. Counsel for the Petitioner.

Vs.

1. Union of India through the Secretary, Ministry of Defence, South Block DHQ PO, New Delhi.

2. 509 Army Base Workshop, Agra Cantt-282001through its Commanding Officer.

3. Director General of EME (EME Pers) Master General Ord Branch Integrated HQ MOD (Army) DHQ PO, New Delhi - 900250

4. Commandant-cum-Chief Records Officer, EME Centre and Records, Secunderabad.

…… Respondents

By Legal Practitioner : Shri DK Pandey,
Ld.Counsel for the respondents.

<u>O R D E R</u>

<u>Per Hon'ble Air Marshal Anil Chopra, Member (A)</u>

1. Being aggrieved by the alleged dismissal on the ground of Low Medical Category "Bilateral Mixed Deafness", the petitioner has preferred Writ Petition bearing no.33731 of 2008 in the Hon'ble High Court of Judicature at Allahabad which has been transferred to this Tribunal and renumbered as T.A. No.25 of 2014 in pursuance of the provisions contained in Section 34 of the Armed Forces Tribunal Act, 2007 and now processed for hearing after exchange of affidavits.

2. The petitioner has prayed the following reliefs :

" (a) To quash the impugned rejection order of the respondent No.1 dated 15 Mar 2008 (Annexure-11 filed page 37 of TA refers) with all the consequential benefits to the petitioner.

(b) To issue a direction to the respondents to grant Disability pension to the petitioner from the date of his discharge (with effect from 01 Feb 2001 (FN) rounding off 30% of disability to 50%.

(c) To issue any other writ, order or relief considered expedient and in the interest of Justice & Equity.

(d) To award cost."

3. The factual matrix of the case is that the petitioner was enrolled in the Army on 23.03.1983 and was discharged from service with effect from 01.02.2001 on being placed in low medical category "BEE (Permanent)" for the disease **"BILATERAL MIXED DEAFNESS".** Release Medical Board held before his discharge found his disability as neither attributable to nor aggravated by Military Service and considered the disability as 30% for two years. The claim of the petitioner for grant of disability pension was rejected by the competent authority. The Petitioner filed Writ Petition No 55293 of 2000 before the Hon'ble High Court of Allahabad which was disposed of vide Judgment dated 10.07.2007 with a direction to the respondents to

consider the case of the petitioner in accordance with law in case he appears before the Medical Board pursuant to the reference of the Commanding Officer 509 Army Base Workshop Agra. The Petitioner was brought before Re-Survey Medical at Military Hospital, Agra on 08.10.2007 which recommended continuance of the petitioner in low medical category H-2 (permanent). However, he was not granted disability pension by the respondents on the ground that since Medical Board has considered the disability of the petitioner as neither attributable to nor aggravated by Army service, petitioner is not entitled to disability pension. Aggrieved, the petitioner filed Writ Petitioner No 33731 of 2008 in the Hon'ble High Court, Allahabad which has been transferred to this Tribunal and renumbered as T.A. No.25 of 2014.

4. We have heard Shri Rohit Kumar, learned counsel for the petitioner and Shri D.K.Pandey, learned counsel for the respondents and perused the record.

5. Learned counsel for the petitioner submitted that on 09.05.2000 the petitioner was issued a show cause notice as to why his services should not be terminated due to low Medical Category "Bilateral Mixed Deafness". The petitioner submitted his reply to the show cause notice on 10.05.2000, but the respondent no.1 issued discharge order on 08.08.2000 without considering his reply to be discharged from service w.e.f. 01.02.2001. On 12.02.2008, the petitioner's right ear was operated by the Command Hospital, Lucknow and since he was found fully fit, was discharged after examination by the Classified Specialist for ENT. The petitioner sent a letter to the respondent no.2 on 19.02.2008 requesting for re-instatement in service as his hearing capacity is within formal limit. The respondent no.1 without considering the case of the petitioner rejected the claim of the petitioner vide the impugned order dated 15.03.2008. Against the said order, the petitioner preferred writ petition before the Hon'ble High Court at Allahabad, which has been transferred to this Tribunal.

6. **Per contra**, learned counsel for the respondents submitted that the petitioner was discharged from service due to low Medical Category "BEE (Permanent)" and the category being surplus. The disability **"BILATERAL MIXED DEAFNESS"** was considered by the Release Medical Board (RMB) and his disability was found as neither attributable to nor aggravated by Military Service and was assessed at 30% for two years. The learned counsel for the respondents further submitted that since the petitioner was not meeting the primary condition for grant of disability pension, his claim was rejected by the PCDA (P), Allahabad on 28.06.2002. It is further submitted that in compliance of the earlier judgment of the Hon'ble High Court, the petitioner was brought before the Re-Survey Medical Board at Military Hospital, Agra on 08.10.2007 and the Re-Survey Medical Board recommended to continue the petitioner in Low Medical Category H-2 (Permanent), hence the discharge of the petitioner was valid.

7. We have gone through the relevant rules and regulations on the issue on the question of attributability of disability to military service. We would like to refer the judgment and order of Hon'ble The Apex Court in the case of **Dharamvir Singh Vs. Union of India and Ors** reported in (2013) 7 Supreme Court Cases 316, in which Hon'ble The Apex Court had observed the provisions of the Pension 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).

XXX XXX XXX

31. In the present case it is undisputed that no note of any disease has been recorded at the time of the appellant's acceptance for military service. The respondents have failed to bring on record any document to suggest that the appellant was under treatment for such a disease or by hereditary he is suffering from such disease. In the absence of any note in the service record at the time of acceptance of joining of appellant, it was incumbent on the part of the Medical Board to call for records and look into the same before coming to an opinion that the disease could not have been detected on medical examination prior to the acceptance for military service, but nothing is on record to suggest that any such record was called for by the Medical Board or looked into it and no reasons have been recorded in writing to come to the conclusion that the disability is not due to military service. In fact, non-application of mind of Medical Board is apparent from clause (d) of Para 2 of the opinion of the Medical Board, which is as follows :-

"(d) In the case of a disability under (c) the Board should state what exactly in their opinion is the cause thereof.

YES

Disability is not related to military service".

XXX XXX XXX

33. In spite of the aforesaid provisions, the pension sanctioning authority failed to notice that the Medical Board had not given any reason in support of its opinion, particularly when there is no note of such disease or disability available in the service record of the appellant at the time of acceptance for military service. Without going through the aforesaid facts the Pension Sanctioning Authority mechanically passed the impugned order of rejection based on the report of the Medical Board. As per Rule 5 and 9 of the Entitlement Rules for Casualty Pensionary Awards, 1982, the appellant is entitled for presumption and benefit of presumption in his favour. In the absence of any evidence on record to show that the appellant was suffering from "Generalised Seizure (Epilepsy)" at the time of acceptance of his service, it will be presumed that the appellant was in sound physical and mental condition at the time of entering the service and deterioration in his health has taken place due to service.

XXX XXX XXX

35. In view of the finding as recorded above, we have no option but to set aside the impugned order passed by the Division Bench dated 31-7-2009 in Union of India v. Dharamvir Singh and uphold the decision of the learned Single Judge dated 20-5-2004. The impugned order is set aside and accordingly the appeal is allowed. The respondents are directed to pay the appellant the benefit in terms of the order passed by the learned Single Judge in accordance with law within three months if not yet paid, else they shall be liable to pay interest as per the order passed by the learned Single Judge. No costs."

8. On the issue of grant of disability pension, we would also like to recall the judgment passed in the case of **Sukhhvinder Singh Vs. Union of India,** reported in (2014) STPL (WEB) 468 SC, in para 9 of the judgment Hon'ble The Apex Court has held as under:-

"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…………".*

9. In the instant case, the petitioner was enrolled in the Indian Army on 23.03.1983 and was discharged from service with effect from 01.02.2001 on being placed in low medical category "BEE (Permanent)" for the disease **"BILATERAL MIXED DEAFNESS**". Release Medical Board (RMB) held at the time of discharge considered his disability as neither attributable to nor aggravated by Military Service and assessed it as 30% for two years. The claim of the petitioner for grant of disability pension was rejected by the competent authority. The Petitioner filed Writ Petition No 55293 of 2000 before the Hon'ble High Court of Allahabad which was disposed of vide judgment dated 10.07.2007 with a direction to the respondents to consider the case of the petitioner in accordance with law in case he appears before the Medical Board pursuant to the reference of the Commanding Officer 509 Army Base Workshop Agra. The Petitioner was brought before Re-Survey Medical at Military Hospital, Agra on 08.10.2007 which recommended continuance of the petitioner in low medical category H-2 (permanent). However, he was not granted disability pension by the respondents on the ground that since Medical Board has considered his disability as neither attributable to nor aggravated by Army Service, the petitioner is not entitled to disability pension. We have given due consideration to the rival submissions made by Learned Counsel for the parties. Keeping in view the available documents, even then the factual matrix which stands out is that the petitioner was enrolled in a medically fit condition and was discharged after approximately 17 years of service in low medical category. We find that at the time of enrolment, the petitioner was in sound, physical and mental condition and was medically fit at the time he joined the Army. There is no note of any disease or disability in the service record of the petitioner at the time of enrolment in service and respondents have not been able to produce any document to prove that the disease

existed before his enrolment. In absence of any evidence on record to show that the petitioner was suffering from any ailment at the time of enrollment in service, it will be presumed that disability has occurred during service. We find that the petitioner was enrolled in the Army in a fit medical condition and he has suffered the disability during service, therefore, in view of the judgment of the Hon'ble The Apex Court in the cases of **Dharmvir Singh** (supra), **Sukhvinder Singh** (supra), the petitioner is entitled to disability pension.

10. On the issue of admissibility of the disability pension to the petitioner for two years as recommended by Release Medical Board or for permanent as recommended by Re-Survey Medical Board, we feel that since the disability 'BILATERAL MIXED DEAFNESS' has been declared as permanent by Re-Survey Medical, petitioner is entitled to disability pension for life.

11. As regards benefits of rounding off of disability pension, we recall the decision of Hon'ble The Apex Court in the case of **Union of India and others vs. Ram Avtar & others, Civil Appeal No. 418 of 2012 dated 10 December, 2014**, in which Hon'ble The Apex Court nodded in disapproval the policy of the Government of India in not granting the benefit of rounding off of disability pension to the personnel who have been invalided out of service on account of being in low medical category or who has retired on attaining the age of superannuation or completion of his tenure of engagement, if found to be suffering from some disability. In view of Policy Letter No. 1(2)/97/D (Pen-C) dated 31.01.2001 and decision of Hon'ble The Apex Court in the case of **Ram Avtar** (supra), we are of the view that the petitioner is entitled to the benefit of rounding off.

12. On the issue of delay and payment of arrears, we recall the case of **Shiv Dass Vs Union of India reported in 2007 (3) SLR 445** wherein in Para 9 of the judgment, Hon'ble The Apex Court has observed:-

> *"9. In the case of the 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."*

13. In view of the above, we are of the view that the impugned order passed by the competent authority was not only unjust, illegal but also not in conformity with Rules, Regulations and Law. The impugned order deserves to be set aside and the petitioner is entitled to disability pension @ 30% for life, which needs to be rounded off to 50%.

14. Thus in the result, the Transferred Application **No. 25 of 2014** succeeds and is **allowed**. The impugned order dated 15th March 2008 passed by the respondents is set aside. The respondents are directed to grant disability pension to the petitioner @ 30% for life in terms of decision of Hon'ble The Apex Court in cases of **Dharmvir Singh** (supra) and **Sukhvinder Singh** (supra) from three years prior to filing of the writ petition before the Hon'ble High Court at Allahabad i.e. 14.07.2008 till the date of actual payment, which would stand rounded off to 50% in terms of the decision of Hon'ble The Apex Court in the case of **Ram Avtar (**supra). The respondents are directed to give effect of this order within a period of four months from the date of receipt of a certified copy of this order. In case the respondents fail to give effect to this order within the stipulated time, they will have to pay interest @ 9% on the amount accrued from due date till the date of actual payment.

15. No order as to costs.

(Air Marshal Anil Chopra) Member (A)	(Justice D.P. Singh) Member (J)

Dated :February ,2017
PKG