

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW**ORIGINAL APPLICATION NO. 243 OF 2017****Friday this the 2nd day of February, 2018****Hon'ble Mr. Justice S.V.S. Rathore, Member (J)****Hon'ble Air Marshal B.B.P.Sinha, Member (A)**

Ex CFN Kamlesh Kumar Dey (No.14675519L),
R/o C-3/9 Geeta Palli, Alam Bagh,
Lucknow-226005.

..... Applicant

By Legal Practitioner: Col AK Srivastava (Retd), learned counsel for the
applicant.

Versus

1. Union of India, through the Secretary, Ministry of Defence, South Block, New Delhi.
2. The Chief of the Army Staff, Integrated Headquarters of Ministry of Defence (Army), South Block, New Delhi -110011.
3. The ADGPS, IHQ of MoD (Army), South Block, DHQ P.O. New Delhi-110011.
4. OC EME Records, Secundrabad.
5. Principal Controller of Defence Account (Pension), Draupadi Ghat, Allahabad 211014.

... Respondents

By Legal Practitioner: Mrs Appoli Srivastava, learned counsel for the
respondents assisted by Major Piyush Thakran,
Departmental Representative.

ORDER**Per Hon'ble Mr. Justice S.V.S. Rathore, Member (J)**

1. By means of this Original Application (O.A.), the applicant has prayed the following reliefs:-

“(a) Issue/pass an order or direction of appropriate nature to quash/set-aside rejection of the disability pension claim w.e.f. 30 Sep 1979 of the applicant vide Army HQ letter dated 16 Oct 2014 and 07 Jun 2016, photocopies annexed as Annexure No.A-3 and A-4) and direct the respondent to grant him minimum 20% disability till entitled to its rounding to 50% w.e.f. 01 Jan 1996.

(b) Issue/pass an order or direction of appropriate nature to the respondents to carry out rounding off 11-15% disability of the Applicant to 50% and give the benefits of “rounding off” of the disability pensionary benefits to the applicant as provided vide Government of India, Ministry of Defence letter No.1(2)/97/D (Pen-C) dated 31-01-2001 supported by the position held by the Supreme Court.

(c) Issue/pass any other order or direction of appropriate nature to quash/set-aside the defective IMB proceedings dated 09 Aug 1979 and RMB dated 30 Aug 1979 and order to invalid out the Applicant w.e.f. 30 Sep 1979 and reinstate the applicant notionally from date he was invalid out from service with all consequential benefits of pay & allowances (the difference vis a vis what he is been given in 512 Army Base workshop, Pune from time to time as a civil employee), promotions and pensionary benefits, photocopies of IMB and RMB are annexed as Annexure No.A-4 and A-5.

(d) Issue/Pass any other order or direction as this Hon'ble Tribunal may deem fit in the circumstances of the case.

(d) Allow this application with cost”

2. The factual matrix of the case is that the applicant was enrolled in the Army on 30.03.1975 and was discharged from service on 30.09.1979 under Army item III (iii) of Rule 13 (3) of the Army Rules 1954 after having been found medically unfit for further service due to his disability “**EPILEPSY (GRANDMAL) SEIZURE**” in low medical category “EEE”. Invaliding Medical Board held before discharge, assessed the disability of the applicant as 11-14% for two years and considered it as neither attributable to nor aggravated by military service, but constitutional disease. His First and Second appeals for grant of disability pension were rejected vide order dated 16.10.2014 and 07.06.2016 respectively, on the ground that medical board has found the disability as neither attributable to nor aggravated by military service.

3. The delay in filing of Original Application has been condoned vide order dated 18.07.2017.

4. Heard Col AK Srivastava (Retd), learned counsel for the applicant, Ms Appoli Srivastava, learned counsel for the respondents and perused the record.

5. Learned Counsel for the applicant submitted that at the time of enrollment, the applicant was found mentally and physically fit for service in the Indian Army and there is no note in the service documents that he was suffering from any disease at the time of entry into service. Learned Counsel for the applicant submitted that since the disease was contracted during the service, it is attributable to and aggravated by military service. He further submitted that various Benches of Armed Forces Tribunal have granted disability pension in similar cases, as such the applicant be granted disability pension as well as arrears thereof. Learned Counsel for the applicant also submitted that as per Government Order dated 31.01.2001 the disability pension be rounded off to 50%.

6. **Per contra**, Learned Counsel for the respondents submitted that as per policy applicant's disability pension claim was preferred to PCDA (Pension), Allahabad, for adjudication and was rightly rejected as per Paragraph 173 of Pension Regulations 1961 (Part-1), which clearly states that pension may be granted to an individual who is invalided out of service on account of disability, which is attributable to or aggravated by military service and percentage of disablement is assessed as 20% or above. Since his disability was assessed below 20 % and considered as neither attributable to nor aggravated by military service, hence it has been correctly denied to him. However, subsequently Ld. Counsel for the respondents conceded that in consonance with various judgments of Hon'ble the Supreme Court and Armed Forces Tribunals, the applicant is entitled to disability pension.

7. We have examined documents on record and relevant rules of the Pension Regulations for the Army 1961 (Part I) and the provisions of Rules 4, 5, 9, 14 and 22 of the Entitlement Rules for Casualty Pensionary Awards, 1982.

8. In the instant case, the applicant was enrolled in the Army on 30.03.1975 and was discharged from service on 30.09.1979 under Army item III (iii) of Rule 13 (3) of the Army Rules 1954 after having been found medically unfit for further service due to his disability "**EPILEPSY (GRANDMAL) SEIZURE**" in low medical category EEE. We have given due consideration to the rival submissions made by learned counsel for the parties. We find that at the time of enrolment, the applicant

was in sound physical and mental condition and was medically fit to join the Army. There is no note of any disease or disability in the service record of the applicant at the time of enrolment 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 applicant was suffering from any ailment at the time of his enrolment in service, it will be presumed that disability has occurred during service. In view of the judgments of the Hon'ble The Apex Court in the cases of **Dharmvir Singh** (supra), **Sukhvinder Singh** (supra), since he was enrolled in fit medical conditions and was discharged in low medical category the applicant is entitled to disability pension. On the issue of attributability of disability to military service, we would like to refer to the decisions of Hon'ble The Apex Court in **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).

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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".

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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.

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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."

9. Thus in light of the law settled by Hon'ble the Apex Court the disability of the applicant is considered as attributable. As far as disability percentage of the applicant is concerned, we would also like to recall the judgment passed in the case of **Sukhvinder 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. Thirdly, there appears to be no provisions authorizing the discharge or invalidating out of service where the disability is below twenty percent and seems to us to be logically so. **Fourthly, wherever a member of the Armed Forces is invalidated out of service, it perforce has to be assumed that his disability was found to be above twenty percent. Fifthly, as per the extant Rules/Regulations, a disability leading to invalidating out of service would attract the grant of fifty percent disability pension.**”

10. In view of the above, we are of the view that the impugned orders passed by the competent authority were not only unjust, illegal but also not in conformity with Rules, Regulations and Law. The impugned orders deserve to be set aside and the applicants’ disability considered as 20% needs to be rounded off to 50% for two years.

11. Thus in the result, the **Original Application No. 243 of 2017** succeeds and is allowed. The impugned orders rejecting the disability pension are set aside. The respondents are directed to grant disability pension to the applicant @ 20% for two years which shall stand rounded off to 50% from the date of discharge. The respondents are also directed to refer the applicant’s case to Re-Survey Medical Board for reassessing the medical condition of the applicant for further entitlement of disability pension, if any, within a period of three months from this date. The respondents are directed to pay to the applicant the disability pension alongwith arrears within four months from the date of receipt of a certified copy of this order. In case the respondents fail to pay the amount to the applicant within four months, they will have to pay interest @ 9% from due date till the date of actual payment.

12. No order as to costs.

(Air Marshal B.B.P. Sinha)
Member (A)
Dated: February , 2018.

(Justice S.V.S. Rathore)
Member (J)

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