

RESERVED
COURT NO.1

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

ORIGINAL APPLICATION No. 633 of 2017

Friday, this the 18th day of January, 2019

“Hon’ble Mr. Justice SVS Rathore, Member (J)
Hon’ble Air Marshal BBP, Sinha, Member (A)”

Ex Sepoy Abinash Chand, son of Late Santu, resident of Village-Ashapur, Post-Darshan Nagar, Tehsil-Sadar, PS-Kotwali Ayodhya, Distt-Faizabad (U.P.), PIN-224001.

.....Applicant

Ld. Counsel for : **Col (Retd) Y.R. Sharma**, Advocate.
the applicant

Versus

1. Union of India, through the Secretary, Ministry of Defence, New Delhi-110011.
2. Chief of the Army Staff, Integrated Headquarter of the Ministry of Defence (Army), South Block, New Delhi-110011.
3. General Officer Commanding-in-Chief, Central Command, C/O 56 APO.
4. Director General Medical Services (Army), IHQ of MoD (Army), 'L' Block, New Delhi-110011.
5. Officer-in-Charge Records, Army Medical Corps, Records Lucknow.

.....Respondents

Ld. Counsel for the: **Shri Ashish Kumar Singh**,
Respondents. Central Government Standing Counsel.

ORDER**“Per Hon’ble Air Marshal BBP Sinha, Member (A)”**

1. The present Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007. The applicant has sought the following reliefs:-

- (i) *Issue/pass an order or direction of appropriate nature to the respondents to grant deserved and entitled disability pension to the extent of 20% as recommended by the Invaliding Medical Board which is to be rounded off to 50% as per the Govt of India letter No 1 (2)/97/I/D (Pen-C) dated 31.01.2001 (Annexure No. A-5) and pensionary benefits as recommended by the Invaliding Medical Board and to the applicant Ex-Sepoy Abinash Chand.*
- (ii) *Issue/pass an order or direction of appropriate nature to the respondents to pay appropriate compensation because of the recurring loss of the entitled pension to the applicant w.e.f. 25.10.1970 i.e. date of illegal discharge because of non-adherence of the relevant provisions on the subject.*
- (iii) *Issue/pass any other order or direction as this Hon’ble Tribunal may deem fit in the circumstances of the case.*
- (iv) *Allow this application with cost.*

2. The brief facts of the case are that the applicant was enrolled in the Indian Army on 09.10.1964 and was discharged from service in terms of clause 13 (3) III (iii) of Army Rules, 1954 on 15.06.1970 in low medical category having completed only 05 years and 250 days of service. The Release Medical Board (RMB) held at Base Hospital, Lucknow on 16.01.1970 assessed his disability ‘PERIPHERAL VASCULAR DISEASE (LT) FOOT 723’ @ 20% for one year and opined the disability to be neither attributable to nor aggravated by military service (NANA). Disability pension claim was rejected by PCDA (P),

Allahabad vide order dated 26.08.1970. Thereafter petition against rejection of disability pension submitted by the applicant on 27.06.2016 was also rejected vide order dated 28.09.2016. It is in this perspective that the applicant has preferred the present O.A.

3. Ld. Counsel for the applicant pleaded that the applicant was fully fit at the time of enrolment and asserted that having served for more than 04 years, on 03.12.1968 he was found to be suffering from Cellulitis foot disease i.e. a type of disease related to Peripheral Vascular Disease for which he was administered treatment at Base Hospital, Lucknow for the period from 03.12.1968 to 13.01.1969 and his medical category was downgraded to CEE (Permt) w.e.f. 03.10.1969. Ld. Counsel for the applicant has also relied upon the judgments of this Tribunal in the case of **Ex Sigmn Lal Bahadur Patel vs. UOI & Ors**, O.A. No. 701 of 2017 decided on 09.05.2018, **Ex Spr Ram Raj Singh vs. UOI & Ors**, O.A. No. 305 of 2018 decided on 23.07.2018 and **Sep Rajendra Singh vs. UOI & Ors**, O.A. No. 380 of 2017 decided on 26.07.2018 and contended that the instant case is identical to the aforementioned cases. He pleaded that the applicant is entitled to grant of disability pension. Further, Relying upon the Hon'ble Apex Court judgment in the case of **Dharamvir Singh vs Union of**

India & Ors, reported in (2013) 7 SCC 316, Ld. Counsel for the applicant vehemently argued that the disability of the applicant is principally due to stress and strain of military service as the disability was suffered by the applicant when he had completed about four years of service and should be considered as aggravated by military service.

4. On the other hand, Ld. Counsel for the respondents submitted that disability of the applicant has been assessed as NANA by the RMB hence PCDA (P), Allahabad had rejected the claim for grant of disability pension as also the appeal was rejected on the same ground. He further contended that in the instant case the duly constituted medical board opined applicant's disability 'Peripheral Vascular Disease Left Foot' due to the etiology of PVD as constitutional in nature. Ld. Counsel for the respondents has further relied upon the Hon'ble Apex Court judgment in the case of **UOI & Ors vs. Damodaran AV**, in SLP (c) No 23727 of 2008 and submitted that the medical board is an expert body and its opinion is to be given due weight, value and credence. He further stressed that since the medical board has conceded the disability as NANA and constitutional in nature, therefore the applicant is not entitled to disability pension. He pleaded for dismissal of the O.A.

5. We have heard Ld. Counsel for the applicant as also Ld. Counsel for the respondents. We have also gone through the RMB and rejection orders of disability pension claim as well as appeal. For adjudication of the controversy involved in the instant case, we need to address three issues; firstly, is the discharge of the applicant a case of discharge or invalidation?; secondly, is the disability attributable to or aggravated by military service or not? and thirdly, if found to be attributable to or aggravated by military service, can the benefit of rounding off be extended to the applicant?

6. For the purpose of first question as to whether the discharge of the applicant by Release Medical Board is a case of discharge or invalidation, in this context, it is clear that the applicant was medically boarded out from service before completion of his terms of engagement in low medical category and was, thus, discharged from service. In this regard, Rule 4 of the Entitlement Rules for Casualty Pensionary Awards, 1982 defines invalidation as follows:

“Invaliding from service is a necessary condition for grant of a disability pension. An individual, who, at the time of his release under the Release Regulations, is in a lower medical category than that in which he was recruited will be treated as invalided from service. JCOs/Ors and equivalent in other services who are placed permanently in a medical category other than ‘A’ and are discharged because no alternative employment suitable to their low medical category can be provided, as well as those who having been retained in alternative employment but are discharged before the completion of their engagement will be deemed to have been invalided out of service.”

7. Thus, in light of above definition, it is clear that the applicant was in low medical category as compared the one when he was enrolled and hence his discharge is to be deemed as invalidation out of service.

8. So far as attributability or aggravation effect of disability are concerned, the provisions of Pension Regulations for the Army, 1961 (Part-I) and the Entitlement Rules for Casualty Pension Award, 1982 are relevant and the same are excerpted herein below;

“(a) **Pension Regulations for the Army 1961 (Part I)**

Para 173. *Unless otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an individual who is invalided out of service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20 percent or over.*

The question whether a disability is attributable to or aggravated by military service shall be determined under the rule in Appendix II.”

(b) **Entitlement Rules for Casualty Pension Award, 1982**

5. *The approach to the question of entitlement to casualty pensionary awards and evaluation of disabilities shall be based on the following presumptions:-*

Prior to and During Service.

(a) *A member is presumed to have been in sound physical and mental condition upon entering service except as to physical disabilities noted or recorded at the time of entrance.*

(b) *In the event of his subsequently being discharged from service on medical grounds any deterioration in his health which has taken place is due to service.*

Onus of Proof.

9. *The claimant shall not be called upon to prove the conditions of entitlement. He/she will be given more liberally to the claimants in field/afloat service cases.*

Diseases

14. In respect of diseases, the following rule will be observed:-

(a) cases.....

(b) a disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service, if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service."

9. Additionally, the law on the point of attributability of the disability is no more RES INTEGRA. On the question of attributability of disability to military service, we would like to refer to the judgment and order of Hon'ble the Apex Court in the case of **Dharamvir Singh vs Union of India & Ors** reported in (2013) 7 SCC 316. The relevant portion of the aforesaid judgment, for convenience sake, is reproduced as under:-

"29.1. Disability pension to be granted to an individual who is invalidated 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)."

10. Thirdly, since the policy with regard to rounding off of disability pension came into existence w.e.f. 01.01.1996 and the applicant was discharged from service w.e.f. 15.06.1970, he is not entitled to rounding off of disability pension from the date of his discharge.

11. From the above mentioned Rule on disability pension and ratio of law emerging out of Hon'ble Apex Court's judgment (supra), it is clear that once a person has been recruited in a fit medical category, the benefit of doubt will lean in his favour unless cogent reasons are given by the Medical Board as to why the disease could not be detected at the time of enrolment. In this particular case, we find that the applicant was placed in low medical category due to his disability 'Peripheral Vascular Disease (Left) Foot'. The applicant has worked with the respondents for more than five years with this disability

in low medical category and the only reason given in medical board for denial of disability pension is that it is constitutional in nature hence NANA. On the point of refusal of the applicant to undergo operative treatment as mentioned in the RMB and averred by Ld. Counsel for the respondents, it is intriguing to note that on one hand the Surgical Specialist in his opinion has mentioned that the applicant has refused to undergo operative treatment but on the other hand the Medical Specialist, who conducted the RMB, at page 4 of the medical board proceedings expressed his views that 'operation therapy can afford only temp relief' and there is no certificate on record with regard to refusal of operative treatment by the applicant, therefore the applicant cannot be held blame worthy on this count. Additionally no meaningful reason as to why the disease could not be detected at the time of his enrolment, is mentioned either in the medical board proceedings or in the counter affidavit. Thus considering all issues involved in this case, we are of the following considered opinion:

- (a) The applicant's discharge vide Release Medical Board held on 16.01.1970 is to be treated as invalidation in terms of Rule 4 of the Entitlement Rules (supra).

(b) Since the applicant has worked as a soldier for more than five years with the respondents in low medical category and has been discharged (now deemed invalidation) with effect from 15.06.1970 due to permanent low medical category 'CEE' therefore the benefit of doubt will lean towards the applicant and his disability is to be considered as 'aggravated by military service'.

12. It is trite law that 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 consequences of military service. The benefit of doubt should rightly be extended in favour of the applicant. In the instant case since the applicant was found to be suffering from disability when he had put in 04 years of service, it should be deemed to be aggravated by military service.

13. As a result of foregoing discussion, the O.A. is **allowed.**

14. In view of the above, we are of the view that the applicant is held entitled to 20% disability pension for one year i.e. w.e.f. 15.06.1970. The respondents are directed to conduct Re-Survey Medical Board (RSMB) for re-assessing the present medical condition of the

applicant. Future entitlement to disability element of disability pension shall be subject to the outcome of RSMB. 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 @ 9% per annum.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

(Justice SVS Rathore)
Member (J)

Dated: January, 2019
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