

RESERVED**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW****TRANSFERRED APPLICATION No. 02 of 2017**Thursday, this the 03rd day of January 2019**“Hon’ble Mr. Justice S.V.S. Rathore, Member (J)
Hon’ble Air Marshal BBP Sinha, Member (A)”**

- 1/1. Usha Devi widow of deceased Anil Kumar
 - 1/2. Sohan Kumar son of deceased Anil Kumar
 - 1/3. Mohan Kumar son of deceased Anil Kumar
 - 1/4. Rohan Kumar son of deceased Anil Kumar
 - 1/5. Komal daughter of deceased Anil Kumar
- (All residents of Village-Maharauli, Post-Karvi Nagar, Distt-Ghaziabad (UP).

..... Petitioners

Ld. Counsel for the : **Mohd Fareed Ahmad**, Advocate.
Petitioners

Versus

1. Union of India, through Ministry of Defence, Govt of India, New Delhi.
2. Record Officer, E.M.E. Records, Secunderabad-500021 (A.P.).
3. The Controller of Defence Accounts (Pension), Allahabad, through its Deputy Director (Pension).

.....Respondents

Ld. Counsel for the
Respondents.: **Dr. Chet Narain Singh**,
Central Govt. Standing Counsel

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

1. Aggrieved by denial to grant disability pension, the original Petitioner Anil Kumar Singh approached the Hon’ble High Court of Judicature at Allahabad by preferring Civil Misc. Writ Petition No. 34670 of 1997. Upon establishment of the Armed Forces Tribunal, said Writ Petition was transferred to this Tribunal vide order dated 25.11.2016 under Section 34 of the Armed Forces Tribunal Act, 2007 and renumbered as T.A. No. 02 of 2017.

2. By means of this T.A., the following prayers were made:-

(i) *Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 17th May, 1994 (Annexure-IV) to this petition.*

(ii) *Issue a writ, order or direction in the nature of mandamus commanding the Respondent to declare that petitioner entitled for the grant of ‘disability pension’ and to issue necessary order for payment of such pension from 31st of October, 1992, the day from which the petitioner was discharged from service.*

(iii) *Issue any other writ, order or direction which this Hon’ble Court may deem just and proper.*

(iv) *Award the costs of this petition to the petitioner.*

3. Before proceeding further, it may be mentioned that during pendency of the petition at the Hon’ble High Court, the original Petitioner (Anil Kumar Singh) died on 07.02.2003 leaving behind his wife Smt Usha Devi, three sons (Sohan Kumar, Mohan Kumar and Rohan Kumar) and daughter Miss Komal as legal heirs of the deceased Army

person. Application for substitution was moved by a legal representative and by order dated 12.11.2018 of this Tribunal, they (legal heirs) were substituted and arrayed as petitioner Nos 1/1 to 1/5 in the T.A.

4. The facts of the case are that the original petitioner (i.e. the deceased soldier) was enrolled in the Indian Army on 14.08.1985 and was discharged from service on 31.10.1992 after rendering 07 years, 02 months and 17 days of service in terms of Rule 13 (3) III (v) of Army Rules 1954. At the time, the petitioner was discharged from service, he was in low medical category 'C' (permt) for the disability termed as 'Renal Calculus Bilateral (Optd)-592'. The disability of the deceased Army person was assessed @ 30% for two years neither attributable to nor aggravated by military service (NANA). Disability pension claim preferred to CDA (P), Allahabad was rejected vide order dated 03.03.1993 on the ground of NANA. Thereafter against rejection of disability pension claim the petitioner preferred first appeal dated 15.07.1993 to the Appellate Authority which was rejected vide order dated 17.05.1994. Hence this T.A.

5. Ld. Counsel for the petitioners submitted that during Army service the deceased Army person suffered from Renal Calculus Bilateral and he was operated several times

for the said disease. Finally the deceased Army person was discharged from service on the recommendation of a duly constituted Release Medical Board (RMB) held on 19.08.1992 which opined his disability @ 30% for two years and NANA. Ld. Counsel for the petitioners further submitted that the deceased Army person was enrolled in the Army in medically and physically fit condition and there was no note in his service documents with regard to suffering from any disease prior to enrolment, therefore any disability suffered by the deceased Army person after joining the service should be attributable to military service and the deceased Army person is entitled to grant of disability pension. In this connection, Ld. Counsel for the petitioners has relied upon the judgment of Hon'ble Apex Court in the case of ***Dharamvir Singh vs Union of India & Ors***, reported in (2013) AIR SCW 4236 and pleaded that the petitioners are entitled to disability pension.

6. On the other hand, Ld. Counsel for the respondents submitted that the deceased Army person was discharged from service on 31.10.1992 because of his unwillingness to continue in alternative appointment on being placed in low medical category. Ld. Counsel for the respondents further submitted that since the RMB recommended the disability as NANA therefore the pension sanctioning authority has

rightly rejected claim for disability pension. He contended that the appeal preferred to the Appellate Authority was also rightly rejected being the disability as NANA.

7. We have heard Ld. Counsel for the petitioners as also Ld. Counsel for the respondents. We have also gone through the RMB. The question before us is simple and straight i.e.-is the disability of of the deceased Army person attributable to or aggravated by military service?

8. The law on attributability of a disability has already been settled by the Hon'ble Supreme Court in the case of ***Dharamvir Singh vs. Union of India & Ors*** (supra). In this case the Hon'ble 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)."

9. In view of the settled position of law on attributability, we find that the RMB has denied attributability/aggravation factor to the deceased Army person only by endorsing a cryptic sentence that the disability is a constitutional disorder and is not connected with service. We may add that in medical literature renal stone disease is a multifactorial disorder but Constitutional, environmental and genetic factors may play a major role in the development of stones. Although important advances have been made in understanding the pathophysiology of stone formation,

none of the factors have provided a satisfactory explanation to prove the process and causes of formation of stones in renal region. As per endorsement in the RMB we find that the disease was initially detected on 03.03.1987 i.e. close to about two years of service since his enrolment. Additionally during his training of six months and subsequent service of one year plus he was not suffering from this disease at all. Thus considering all the issues involved and the fact that the applicant underwent multiple operations in military hospital for this disease, we would like to give the benefit of doubt to the deceased soldier and we are of the considered opinion that the disease is to be considered as aggravated by military service. It is pertinent to mention that the RMB had granted the disability element @ 30% for two years and according to rule the RSMB should have been conducted after two years from the date of discharge, but since the original petitioner has expired, RSMB cannot be conducted at this stage.

10. In view of the above, we are of the considered opinion that the deceased Army person is held entitled to 30% disability for two years from the date of discharge. Therefore he is entitled to disability pension @ 30% after his discharge w.e.f. 01.11.1992 for two years.

11. As a result of foregoing discussion, the O.A. is **allowed**. The deceased soldier shall be entitled to disability pension @ 30% for two years after his discharge i.e. up to 30.10.1994 and his subsequent entitlement to disability pension in terms of service element shall be as per the law set by Hon'ble Apex Court judgment in the case of **Shiv Das vs Union of India & Ors**, reported in 2007 (3) SLR 445 which lays down that the benefits of pension shall be applicable three years prior to filing of the petition. In the instant case since the deceased soldier had filed the petition in the Hon'ble High Court of Allahabad on 12.10.1997, therefore he is entitled to receive service element w.e.f. 12.10.1994 onwards till his death and thereafter the petitioners as legal heirs of the deceased soldier shall be entitled to family pension with all consequential benefits. The respondents are 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)

Dated: January, 2019

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