

**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****ORIGINAL APPLICATION No. 345 of 2023**Friday, this the 12<sup>th</sup> day of January, 2024**“Hon’ble Mr. Justice Anil Kumar, Member (J)”****“Hon’ble Lt. Gen. Anil Puri, Member (A)”**

No. 13691903A, Ex. GDSM Birendra Upadhyay, S/o Late Badri Upadhyay, Resident of Village : Gahmar, Patti – Babu Rai, District – Ghazipur, Uttar Pradesh -232327.

**..... Applicant**

Ld. Counsel for the Applicant : **Shri Manish Kumar Rai**, Advocate

Versus

1. Union of India through Secretary, Ministry of Defence, New Delhi -110011.
2. Chief of the Army Staff, Ministry of Defence (Navy) Integrated Headquarteres, Sena Bhawan, New Delhi - 110011.
3. Officer –in-Charge, Records, Brigade of the Guards, PIN 900746, C/o 56 APO.
4. Principal Controller of Defence Accounts (Pension), Draupadi Ghat, Allahabad, Uttar Pradesh -211014.

**.....Respondents**

Ld. Counsel for the Respondents. : **Shri Ashish Kumar Singh**, 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 quash or set aside the impugned Pension Payment order No. D/010474/2002 dated 07.01.2003 to the extent applicant claim for disability pension for disabilities (i) Osteomyelitis Sternum and Chondroitin (5, 6, 7 Costal Cartilages (RT) OPTD and (iii) Generalized Seizures N-875 E -965T22(a) 349 has been rejected, passed by respondent No.4 and impugned order dated 26.09.2022 passed by respondent No.3 by which no relief was granted against First appeal of applicant, contained as Annexure I & Annexure 2 to this Original Application.*
- (b) *To issue/pass an order or directions to opposite parties for grant of disability element of pension to the applicant for disability (i) Osteomyelitis Sternum and Chondroitin (5,6,7 costal Cartilages (RT) OPTD @20% and disability (iii) Generalized Seizures N-875 E-965T22 (a)349 @20% for life and composite assessment for all disabilities @50% as assessed by RMB from the next date of his discharge i.e. from 01.03.2003, by holding disabilities as attributable to and aggravated by military service and further rounding it off to 75% by giving the benefit of rounding off.*
- (c) *To issue/pass an order or directions to opposite parties to pay arrear of disability element of pension*

*along with 12% interest from the next date of his retirement i.e. from 01.03.2003 till it is actually paid.*

- (d) *Any other relief which the Tribunal may deem fit and proper in the fact and circumstances of the case in favour of the applicant.*

2. Briefly stated facts of the case are that applicant was enrolled in the Brigade of the Guards Regiment of Indian Army on 27.10.1990 and was discharged from service on 28.02.2002 (AN) in Low Medical Category under Rule 13 (3) Item III (v) of the Army Rules, 1954 after rendering 11 years, 04 months and 05 days of service. At the time of discharge from service, the Release Medical Board (RMB) held at Military Hospital, Roorkee on 14.01.2002 assessed his disabilities (i) **'OSTEOMYELITIS STERNUM AND CHONDROITIN (5, 6,7 COSTAL CARTILAGES (RT) OPTD'** @20% as **attributable to service** (ii) **'PIVD L3, L4'** @20% as **aggravated by service** and (iii) **'GENERALIZED SEIZURES N-875 E-965T22 (A) 349'** @20% for life as neither attributable to nor aggravated by service (NANA), **composite disabilities@50% for life**. The applicant was granted disability pension for the second disability @20% with effect from 01.03.2002 vide PPO No. D/010474/2002 dated 07.01.2003 but it has not been rounded off. The respondents have not granted disability pension for the first and third disabilities. The applicant preferred First Appeal dated 16.08.2022 which too was rejected vide letter dated 26.09.2022. The applicant has preferred Original Application No. 661 of 2022

for release of his disability pension which was denied/withheld for the period of his imprisonment which was dismissed by this Tribunal. It is in this perspective that the applicant has preferred the present Original Application.

3. Ld. Counsel for the applicant pleaded that the applicant was enrolled in the Army in medically and physically fit condition. The applicant first disability was opined by RMB as attributable to service and the second disability was opined as aggravated by service. The Principal Controller of Defence Accounts (Pension), Prayagraj has no authority to overrule the opinion of the RMB. It was further pleaded that an individual is to be presumed in sound physical and mental condition upon entering service if there is no note or record to the contrary at the time of entry. 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 conditions. He relied upon the Order dated 10.01.2023 of this Tribunal in Original Application No. 732 of 2022, **Ex. Hav. Ram Singh Versus Union of India & others** and Order dated 07.07.2023 passed by Armed Forces Tribunal, Principal Bench, New Delhi in Original Application No. 829 of 2020, **Ex. LME Anand Dwivedi Versus Union of India & Others**. 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 75%.

4. On the other hand, Ld. Counsel for the respondents submitted that the applicant was granted disability pension for the second disability which was opined by the RMB as aggravated by service. He further submitted that although the applicant's first disability was opined by the RMB as attributable to service but the pension sanctioning authority i.e. Principal Controller of Defence Accounts (Pension), Prayagraj has held that the said disability is NANA, the applicant is not entitled for the disability pension for the first disability. He further contended that since the RMB has opined the third disability as NANA, the applicant is not entitled to disability pension for the said disability. After discharge from service the applicant was convicted under trial No. 358 of 1998 under Section 302/34 of IPC and was awarded sentence of life imprisonment, fine of Rs.10,000/- and in default of payment fine, to go further imprisonment for a period. The disability pension of applicant was stopped with effect from November, 2003. The applicant was released from Central Jail, Varanasi on 21.12.2016 i.e. prematurely as his Mercy Petition was accepted by the Government of Uttar Pradesh vide letter dated 13.12.2016. Thereafter, the PCDA (P), Prayagraj vide letter dated 03.08.2017 had directed to the Chief Manager, Punjab National Bank, CPPC, Lucknow to restore the disability pension of the applicant with effect from 22.12.2016 excluding the imprisonment period from 17.11.2003 to 21.12.20216 and the disability pension with effect from 22.12.2016 had been

restored. He pleaded that in the facts and circumstances, as stated above, Original Application deserves to be dismissed.

5. We have heard Ld. Counsel for the applicant as also Ld. Counsel for the respondents. We have also gone through the records and we find that the questions which need to be answered are of three folds:-

- (a) Whether the Principal Controller of Defence Accounts (Pensions), Allahabad has authority to overrule the opinion of RMB with regard to first disability?
- (b) Whether the third disability of the applicant is also attributable to or aggravated by service?
- (c) Whether the applicant is entitled for the benefit of rounding off the disability pension?

6. This is a case where the first disability of the applicant @20% for life has been held as attributable to military service by the RMB and the second disability @20% for life has been held as aggravated by military service. The Principal Controller of Defence Accounts (Pension), Prayagraj has granted disability pension for the second disability only and the opinion of the RMB with regard to first disability has been overruled by Principal Controller of Defence Accounts (Pensions), Allahabad and the first disability has been regarded as neither attributable to or aggravated by military service.

7. The issue of sanctity of the opinion of a Release Medical Board and its overruling by a higher formation is no more Res Integra. The Hon'ble Supreme Court in the case of **Ex. Sapper Mohinder Singh vs. Union of India & Others**, in Civil Appeal No.164 of 1993, decided on 14.01.1993, has made it clear that without physical medical examination of a patient, a higher formation cannot overrule the opinion of a Medical Board. Thus, in light of the observations made by the Hon'ble Apex Court in the case of **Ex Sapper Mohinder Singh vs. Union of India & Others**, we are of the considered opinion that the decision of competent authority i.e. Principal Controller of Defence Accounts (Pensions), Allahabad over ruling the opinion of RMB held on 14.01.2002 with regard to first disability is void in law. The relevant part of the aforesaid judgment is quoted below:-

*“From the above narrated facts and the stand taken by the parties before us, the controversy that falls for determination by us is in a very narrow compass viz. whether the Chief Controller of Defence Accounts (Pension) has any jurisdiction to sit over the opinion of the experts (Medical Board) while dealing with the case of grant of disability pension, in regard to the percentage of the disability pension, or not. In the present case, it is nowhere stated that the Applicant was subjected to any higher medical Board before the Chief Controller of Defence Accounts (Pension) decided to decline the disability pension to the Applicant. We are unable to see as to how the accounts branch dealing with the pension can sit over the judgment of the experts in the medical line without making any reference to a detailed or higher Medical Board which can be constituted under the relevant instructions and rules by the Director General of Army Medical Core.”*

8. Thus in light of the aforesaid judgment (supra) as well as IHQ of MoD (Army) letter dated 25.04.2011 it is clear that the disability assessed by RMB cannot be reduced/overruled by Principal Controller of Defence Accounts (Pension), Allahabad, hence the decision of Principal Controller of Defence Accounts (Pensions), Allahabad with regard to first disability is void. Hence, we are of the opinion that the first disability of the applicant should be considered as attributable to military service as has been opined by the RMB.

9. With regard to third disability i.e. '**GENERALIZED SEIZURES N-875 E-965T22 (A) 349**' on careful perusal of the documents, it has been observed that the applicant was enrolled on 27.10.1990, and the third disease applicant was found to be suffering with in medical test first started on 06.03.1995, i.e. within five years of joining the service.

10. In the above scenario, we are of the opinion that since the third disease has started in less than five years of his enrolment, hence by no stretch of imagination, it can be concluded that it has been caused by stress and strains of military service. Additionally, it is well known that mental disorders can escape detection at the time of enrolment, hence benefit of doubt cannot be given to the applicant merely on the ground that the disease could not be detected at the time of enrolment. Since there is no causal connection between the third disease and military service, we are

in agreement with the opinion of the RMB that the disease is NANA.

11. Apart from above, in similar factual background Armed Forces Tribunal, Regional Bench, Lucknow had dismissed the claim for disability pension in T.A. No. 1462/2010 vide order dated 23.05.2011, wherein the applicant was enrolled on 21.01.2000 and was discharged on 27.04.2000, as he was suffering from Schizophrenia. Said disability was assessed @ 80% for two years and it was opined by the Medical Board to be neither attributable to nor aggravated by military service. The said order has been upheld by the Hon'ble Apex Court in Civil Appeal arising out of Dy. No. 30684/2017, *Bhartendu Kumar Dwivedi Versus Union of India and Others*, decided on November 20, 2017, by dismissing Civil Appeal on delay as well as on merits.

12. Additionally, in Civil Appeal No 7672 of 2019 in ***Ex Cfn Narsingh Yadav vs Union of India &Ors***, decided on 03.10.2019, it has again been held by the Hon'ble Supreme Court that mental disorders cannot be detected at the time of recruitment and their subsequent manifestation (in this case after about three years of service) does not entitle a person for disability pension unless there are very valid reasons and strong medical evidence to dispute the opinion of Medical Board. Relevant part of the aforesaid judgment as given in para 20 is as below :-

*“20. In the present case, clause 14 (d), as amended in the year 1996 and reproduced above, would be applicable as entitlement to disability pension shall not be considered unless it is clearly established that the cause of such disease was adversely affected due to factors related to conditions of military service. Though, the provision of grant of disability pension is a beneficial provision but, mental disorder at the time of recruitment cannot normally be detected when a person behaves normally. Since there is a possibility of non-detection of mental disorder, therefore, it cannot be said that ‘Paranoid Schizophrenia (F 20.0)’ is presumed to be attributed to or aggravated by military service.*

*21. Though, the opinion of the Medical Board is subject to judicial review but the courts are not possessed of expertise to dispute such report unless there is strong medical evidence on record to dispute the opinion of the Medical Board which may warrant the constitution of the Review Medical Board. The Invaliding Medical Board has categorically held that the appellant is not fit for further service and there is no material on record to doubt the correctness of the Report of the Invaliding Medical Board.”*

13. The order passed by this Tribunal in ***Ex. Hav. Ram Singh Versus Union of India & others (Supra)*** is not applicable in the instant case as in that case the although the onset of applicant’s disability was within three years of enrolment but he was discharged from service after completion of terms of engagement.

14. The order passed by the Armed Forces Tribunal, Principal Bench, New Delhi in **Ex. LME Anand Dwivedi Versus Union of India & Others** (supra) is also not applicable in the instant case as in that case the applicant's disability was detected on 19.07.2009 after the applicant was posted onboard INS Godawari from 07.11.2005 to 20.02.2008 and after that also being posted onboard on INS Matanga.

15. In view of the above, the applicant is not entitled for the grant of disability pension for the third disability i.e. '**GENERALIZED SEIZURES N-875 E-965T22 (A) 349**'.

16. In para 17 A (a) of Chapter VII of the Guide to Medical Officer (Military Pensions), 2002 the provision for composite assessment has been mentioned which reads as under :-

***"17A. Composite Assessment***

*(a) Where there are two or more disabilities due to service, compensation will be based on the composite assessment of the degree of disablement. Generally speaking, when separate disabilities have entirely different functional effects, the composite assessment will be the arithmetical sum of their separate assessment. But where the functional effects of the disabilities overlap, the composite assessment will be reduced in proportion to the degree of overlapping. There is a tendency for some Medical Boards to reduce the composite assessment in the former group of cases. This is not correct."*

17. In view of above, since in the instant case first and second disabilities have entirely different functional effects, hence the composite assessment is to be the arithmetical sum of their

separate assessment. Accordingly, we hold that the composite assessment of first and second disabilities is @40% for life.

18. 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 10<sup>th</sup> December 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 invalided 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."*

19. 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.

20. It is also observed that claim for pension is based on continuing wrong and relief can be granted if such continuing wrong creates a continuing source of injury. In the case of **Shiv Dass vs. Union of India**, reported in 2007 (3) SLR 445, Hon'ble Apex Court has observed:

*"In the case of 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.”*

21. As such, in view of the decision of Hon'ble Supreme Court in the cases of ***Union of India and Ors vs Ram Avtar & ors (supra)*** and ***Shiv Dass (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 three preceding years from the date of filing of the Original Application.

22. In view of the above, the **Original Application No. 345 of 2023** deserves to be partly allowed, hence **partly allowed**. The impugned orders, rejecting the applicant's claim for grant of disability pension for the first disability and rounding off of second disability, are set aside. The first disability of the applicant is held as attributable to Army Service as has been opined by the RMB. The applicant is entitled to get disability pension @40% for life which would be rounded off to 50% for life w.e.f. three years preceding the date of filing of Original Application. The respondents are directed to grant disability pension to the applicant @40% for life which would stand rounded off to 50% for life w.e.f. three years

preceding the date of filing of Original Application. The date of filing of Original Application is 20.03.2023. The disability pension paid @20% to the applicant shall be adjusted from the arrears. 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.

23. No order as to costs.

24. Major Danish Farooqui, Departmental Representative for the respondents 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)**

**( Justice Anil Kumar)**  
**Member (J)**

Dated : 12 January, 2024

AKD/-