

Court No. 1**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****Original Application No. 253 of 2019****Tuesday, this the 20th day of July, 2021****Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)**
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

No. 669200-A Sgt Dinesh Kumar Saxena (Retd), S/o Sri (Late) Prem Narain Saxena, R/O: H.N. 1/731, Sector – 1, Vikas Nagar, Kursi Road, Lucknow-226020 (UP).

.... Applicant

Ld. Counsel for the: **Shri Pankaj Kumar Shukla**, Advocate.
Applicant

Versus

1. Union of India through Secretary, Ministry of defence (Air Force), South Block, New Delhi.
2. Chief of Air Staff, Air HQrs Vayu Bhawan, New Delhi-110106.
3. Director, Directorate of Air Veterans, Air Headquarters, Subroto Park New Delhi-110010.
4. Jt CDA (AF), C/O AFCAO, Subroto Park, New Delhi-110010.
5. PCDA (P) (Air Force), Draupadighat, Allahabad-211014.

... Respondents

Ld. Counsel for the **Shri Shyam Singh**, Advocate
Respondents.

ORDER (Oral)

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

(a) *To quash or set aside the Respondent No. 3 letter dated 20.06.2018 & 23.06.2003 (Annexure A-1 & A-2 respectively of O.A).*

(b) *To issue order or directions to the respondents to grant disability pension to the applicant for the disability he had, with effect from 01.05.2001 (Date of discharge: 30.04.2001) with all consequential benefits including rounding off benefit from 20% to 50% in terms of Govt of India letter dated 31.01.2001 and Judgment passed by Hon'ble Apex Court in case of Ram Avatar Vs UOI & Others.*

(c) *Any other relief as considered power by Hon'ble Tribunal in favour of the applicant.*

2. Brief facts of the case giving rise to this application are that the applicant was enrolled in the Indian Air Force on 13.04.1981 and was discharged from service on 30.04.2001 after completion of more than twenty years of service in low medical category “**BEE**” (**PERM**). Prior to discharge, he was brought before Release Medical Board (RMB) in which he was found to be suffering from ‘**OSTEO ARTHRITIS BOTH KNEES (Old) V-67, 715**’ @ 20% for five years neither attributable to nor aggravated by Air Force services. Disability element pension claim of applicant was rejected vide order dated 23.06.2003 with an advice to prefer first appeal to the Appellate Authority. Thereafter, applicant’s first appeal, which was preferred belatedly, was not considered being time barred and intimated to applicant vide letter dated 20.06.2018. This O.A. has been filed for grant of disability element of pension.

3. Ld. Counsel for the applicant submitted that applicant was enrolled in the Indian Air Force in medically and physically fit condition and there was no note in his service documents with regard to suffering from any disease/disability prior to enrolment in the Air Force. His further

submission is that though applicant's RMB conducted on 23.11.2000 has opined the aforesaid disability as neither attributable to service nor aggravated by Air Force service but as per applicant he feels that this disability is due to stress and strain related to rigors of Air Force service. He concluded by pleading for grant of disability element of pension to applicant.

4. On the other hand, Ld. Counsel for the respondents submitted in para 7 of counter affidavit that since applicant's disability has been considered by RMB as neither attributable to nor aggravated by military service, therefore, he is not entitled to disability element of pension. His further contention is that since applicant has preferred first appeal after expiry of stipulated period, his appeal was not considered as it was filed belatedly i.e. more than 14 years from the date of rejection. Therefore, his disability element of pension claim has rightly been denied by the respondents on the ground of disability being constitutional in nature and not connected with military service. He further asserted that applicant is not eligible for grant of disability element in terms of para 153 of Pension Regulations for the Air Force, 1961 (Part-I) which envisages that disability element is applicable to those personnel who have been invalided out of service being in low medical category where sheltered appointment is not available. He pleaded for dismissal of O.A.

5. Heard Ld. Counsel for the parties and perused the material placed on record.

6. We have gone through the RMB and found that applicant's disability '**OSTEO ARTHRITIS BOTH KNEES (Old) V-67, 715**)' has been

assessed as neither attributable to nor aggravated by military service @ 20% for 5 years. The law on attributability of a disability has already been well settled by the Hon'ble Supreme Court in the case of ***Dharamvir Singh Vs. Union of India and Ors***, (2013) 7 SCC 213. In this case 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 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)."

7. In view of the settled position of law on attributability/aggravation, we find that the RMB has denied attributability/aggravation to the applicant only by endorsing that the disability of applicant is constitutional in nature which is cryptic as it has nowhere been mentioned as to why this disease/disability is constitutional in nature. 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, therefore, shall be rightly 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 more than 18 years of service, it should be deemed to be aggravated by military service. We are, therefore, of the considered opinion that the benefit of doubt should be given to the applicant as per the Hon'ble Supreme Court judgment of **Dharamvir Singh** (supra) and the disability of the applicant should be considered as aggravated by military service. Applicant's disability element of pension is rounded off from 20% to 50% in terms of Hon'ble Apex Court judgment of **Union of**

India & Ors vs Ram Avtar, Civil Appeal No 418 of 2012 decided on 10.12.2014.

8. Thus in the result, the Original Application succeeds and is **partly allowed**. The impugned orders are set aside. The respondents are directed to grant disability element of pension to the applicant @ 20% rounded off to 50% for five years w.e.f. his date of discharge i.e. 01.05.2001. The respondents are also directed to hold Re-survey Medical Board (RSMB) of the applicant to assess his further entitlement to disability element of pension within 03 months from today. The whole exercise shall be completed within four months from the date of receipt of a certified copy of this order.

9. Default will invite interest @ 9% per annum.

10. No order as to costs.

11. Pending applications, if any, disposed off.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated :20 July 2021
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