

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

Original Application No. 379 of 2021

Thursday, this the 07th day of July, 2022

Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

Smt Sarswati Devi widow of late Nb/Sub, JC No-539517K
Digember Singh Kholia, R/o Village-Baste Nera, PO-Siltham,
Distt-Pithoragarh (UK).

.... Applicant

Ld. Counsel for the: **Shri Parijaat Belaura**, Advocate.
Applicant

Versus

1. Union of India, through Secretary, Ministry of Defence,
New Delhi.
2. Chief of Army staff, Army Headquarters, Ministry of
Defence, Government of India, South Block, New Delhi-
110011.
3. Officer-in-Charge, Records, Kumaon Regt, C/o 56 APO.
4. The Principal Controller of Defence Account (Pension),
Draupadi Ghat, Allahabad (U.P)

... Respondents

Ld. Counsel for the : **Shri Somesh 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 set aside order dated 07.05.2008.

(b) To grant Special Family Pension w.e.f. 14.01.2006.

(c) To pay difference of arrear of Special Family Pension along with 12% w.e.f. 04.01.2006 till it is actually paid.

(d) Any other suitable relief this Hon'ble Court deems fit and proper may also be granted.

2. Brief facts of the case are that the applicant's husband was enrolled in the Indian Army on 03.05.1980 and he died on 13.01.2006 while in active service due to 'Carcinoma Lung with Metastasis to Brain and Liver'. Death of her husband was considered as neither attributable to nor aggravated by military service (NANA) by the medical authority as per AFMSF-93 dated 16.05.2006. Consequent to death of her husband she was paid her entitled dues as applicable to NOK. She is in receipt of Ordinary Family Pension vide PPO No F/NA/010656/2006 dated 15.01.2007. Vide letter dated 19.10.2006 it was conveyed to her that she is not entitled to Special Family Pension. However, when she represented the matter to higher authorities it was rejected vide order dated 07.05.2008. It is in this perspective that this O.A. has been filed for grant of Special Family Pension.

3. Submission of learned counsel for the applicant is that since applicant's husband died in harness on 13.01.2006, therefore, she is entitled to Special Family Pension. His further submission is that Pension Regulations for the Army, 1961 provides that Special Family Pension may be granted to the family of an officer if his/her death was due to or hastened by a wound, injury or disease which was attributable to military service or the aggravation by military service of a wound, injury or disease which existed before or arose during the military service. He submitted that disease 'Carcinoma Lung with Metastasis to Brain and Liver' occurred to applicant's husband while in service therefore, she is entitled to Special Family Pension. Relying upon order dated 30.11.2021 passed by this Tribunal in O.A. No. 71 of 2020 in the case of **Smt Vitana Devi vs Union of India & Ors** and order dated 12.09.2018 passed by AFT, Principal Bench, New Delhi in O.A. No. 303 of 2016 in the case of **Smt Ranjana Kumari vs Union of India & Ors**, learned counsel for the applicant pleaded that the applicant be also granted Special Family Pension on the basis of aforesaid pronouncements.

4. On the other hand, submission of learned counsel for the respondents is that the medical authorities have considered applicant's death as NANA due to disease 'Carcinoma Lung with Metastasis to Brain and Liver' being not related to military

service, Special Family Pension in this case is not entitled to applicant in terms of Regulation 213 of the Pension Regulations for the Army, 1961 (Part-I). His further submission is that applicant is only entitled to Ordinary Family Pension which she is already in receipt of vide PPO dated 15.01.2007. He pleaded for dismissal of O.A.

5. We have heard Shri Parijaat Belaura, learned counsel for the applicant and Shri Somesh Singh, learned counsel for the respondents and perused the material placed on record.

6. We find that applicant's husband was suffering from 'Carcinoma Lung with Metastasis to Brain and Liver' and while undergoing treatment he expired on 14.05.2006. After her husband's death she was granted Ordinary Family Pension in addition to other applicable dues. Her claim for grant of Special Family Pension was rejected on the grounds of NANA.

7. Contention of learned counsel for the applicant that the Hon'ble Apex Court in its judgment in the case of ***Dharamvir Singh vs Union of India & Ors***, (civil appeal No 4949 of 2013, reported in 2013 AIR SCW 4236, has observed that the assessment of any disability as attributable to or aggravated by military service is to be determined under the Entitlement Rules for Casualty Pensionary Awards, 1982, as shown in Appendix II, Govt of India, MoD letter No 1(1) 81 D(Pen-C) dated

20.06.1986, and General Rules of Guide to Medical Officers

(Military Pensions) 2002 is sustainable on following points:-

"(i) 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 or aggravated by military service to be determined under "Entitlement Rules for Casualty Pensionary Awards, 1982" of Appendix-II (Regulation 173).

(ii) 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 r/w Rule 14(b)].

(iii) 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).

(iv) 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)].

(v) 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. [14(b)].

(vi) 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. [14(b)].

8. Also, on attributability of service, para 423 (a), (b) and (c) of Regulations for the Medical Services of Armed Forces, 1983 is relevant which for convenience sake is reproduced as under:-

"(a) For the purpose of determining whether the cause of a disability or death is or is not attributable to service, it is immaterial whether the cause giving rise to the disability or death occurred in an area declared to be a field service/active service area or under normal peace conditions. It is, however, essential to establish whether the disability or death

bore a causal connection with the service conditions. All evidence both direct and circumstantial will be taken into account and benefit of reasonable doubt, if any, will be given to the individual. The evidence to be accepted as reasonable doubt, for the purpose of these instructions, should be of a degree of cogency, which though not reaching certainty, nevertheless carries a high degree of probability. In this connection, it will be remembered that proof beyond reasonable doubt does not mean proof beyond a show of doubt. If the evidence is so strong against the individual as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt. If on the other hand the evidence is so evenly balanced so as to render impracticable a determinate conclusion one way or the other, then the case would be one in which the benefit of the doubt could be given more liberally to the individual, in cases occurring in Field Service/Active Service areas.

(b) The cause of a disability or death resulting from a wound or injury will be regarded as attributable to service if the wound/injury was sustained during the actual performance of 'duty' in Armed Forces. In case of injuries, which were self-inflicted or due to an individual's own serious negligence or misconduct, the board will also comment how far the disablement resulted from self-infliction, negligence or misconduct.

(c) The cause of disability or death resulting from a disease will be regarded as attributable to service when it is established that the disease arose during service and the conditions and circumstances of duty in the Armed Forces determined and contributed to the onset of the disease. Cases in which it is established that service conditions did not determine or contribute to the onset of the disease but influenced the subsequent course of the disease, will be regarded as aggravated by the service. 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 service in the Armed Forces. 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. In the case in hand, we find that husband of the applicant entered into service in a medically fit condition, thus a presumption can be drawn that he had no disease at the time of enrolment. Further, if the medical or military authority certifies

that a disease is neither attributable to nor aggravated by military service, then such opinion should also express cogent reasons for holding so, which in this case has not been done. Therefore, in the absence of such reasons, the disability/disease must be assessed as attributable to/aggravated by military service, and applicant should be entitled to Special Family Pension.

10. Further, we also observe that learned counsel for the applicant has made reliance on order dated 30.11.2021 passed by this Tribunal in O.A. No. 71 of 2020 in the case of **Smt Vitana Devi vs Union of India & Ors** and order dated 12.09.2018 passed by AFT, Principal Bench, New Delhi in O.A. No. 303 of 2016 in the case of **Smt Ranjana Kumari vs Union of India & Ors**, we find that the case in hand is covered with the aforesaid cases, therefore applicant should be entitled to Special Family Pension.

11. Further, the applicant's husband died due to 'Carcinoma Lung with Metastasis to Brain and Liver' during active service in military hospital, therefore, the disease/disability ought to have been declared either attributable to or aggravated by military service and applicant should be entitled to Special Family Pension.

12. We find that there are catena of judgments of the Tribunals/High Courts/Supreme Court to support her claim on the point of attributability, therefore, death of her husband is deemed to be attributable to military service, enabling her to grant of Special Family Pension.

13. From the aforesaid, we find that applicant's husband suffered with 'Carcinoma Lung with Metastasis to Brain and Liver' while in service and thereafter death on active service which also makes applicant entitled for grant of Special Family Pension.

14. Respondents' contention that medical opinion is not in favour of the applicant is on unfounded grounds as with regard to non attributability no reason has been assigned by the medical officer while endorsing the term 'not attributable to military service'.

15. Additionally, we find more support from the judgment of the Division Bench of Delhi High Court in the case of **Smt Reshma Devi vs Union of India & Ors**, Writ Petition No SC/121/2019 decided on 11.12.2019 wherein the fact and circumstances are similar to the case in hand. There is no medical opinion as to when actually the cancer started developing in the body and when it was detected and spread. However, we are of the view that in view of posting of

applicant's husband in different parts of the country, he may have developed the cancer due to the service conditions and it can very well be presumed on the basis of the Rules and Regulations that a presumption can be drawn that the disease had developed while in service.

16. In view of the above, we conclude that the death of applicant's husband was attributable to military service in active service and applicant is entitled to Special Family Pension.

17. The respondents are directed to calculate and grant Special Family Pension to applicant from three years preceding the date of filing of the present O.A. which was filed on 15.07.2021.

18. The respondents are further directed to pay the aforesaid amount within a period of three months from today. Default will invite interest @ 8% p.a.

19. O.A. is **allowed** accordingly.

20. No order as to costs.

21. Pending applications, if any, are disposed off.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated : 07.07.2022
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