Court No.1 (List –B)
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 282 of 2015

Thursday this the 23rd day of February, 2017

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

Ex Sep Sheo Kumar Prasad
S/O Late Kamta Prasad, R/O Village and Post – Bhagwanpur,
Tehsil – Bhabua, Thana – Bhabua, District: Kaimur (Bhabua)
State – Bihar,
At present R/O H.N. M-222, L.D.A. Colony, Power House,
Ashiyana, Kanpur Road, Lucknow.

…….. Applicant

By Legal Practitioner : Shri IP Singh & Mohd. Aslam Beg, Advocate

Versus

1. Union of India, through its Secretary, Ministry of Defence (Army), West Block – 2, R.K. Puram, New Delhi

2. The Officer-in-Charge, Record Officer, 46 Air Defence Regiment, Arty Record, Nasik Road Camp, Maharashtra.

3. The Principal Controller of Defence Accounts (Pensions), Draupadi Ghat, Allahabad.

4. OIC Records Sena Chikitsa Corps Abhilesh, Army Medical Corps Records, Lucknow

……… Respondents

By Legal Practitioner : Shri Shyam Singh,
Learned Central Government Counsel,
Assisted by Maj Salen Xaxa, Departmental Representative

ORDER

"Hon'ble Air Marshal Anil Chopra, Member (A)"

1. The instant Original Application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act 2007, and he has claimed the reliefs as under:-

> *"(i) Issue an order or direction by which quash and set-aside the impugned order dated 02 March 2005 passed by OIC Records, Sena Chikitsa Corps Abhilekh Army Medical Corps Records, Lucknow – 02 contained as Annexure No. 1 to this Original Application and the Letter No c/6801240/DP dated 09 Oct 1963 in the interest of justice.*
>
> *(ii) Issue a suitable order or direction to the respondent authorities directing them to consider and allow the disability pension to the applicant including arrears of pension in the greater interest of justice.*
> *(iii)) Pass any other suitable order or direction which this Hon'ble Tribunal may deem fit and proper in the circumstances of the case.*
> *(iv) Allow the Original application with costs in favour of the applicant."*

2. The factual matrix of the case is that the applicant was enrolled in the Army on 03.06.1961 and was invalided out of service with effect from 07.05.1963 under Rule 13 III (iii) of the Army Rules, 1954 for the disease **"SCHIZOPHRENIC REACTION ANXIOUS MIND"**. Medical Board held before discharge, considered the disability of the applicant as 40% for two years and considered it as neither attributable to nor aggravated by military service. His claim for grant of disability pension was rejected by PCDA (Pension), Allahabad vide order dated 30.09.1963. The applicant preferred representation against rejection of his disability pension claim which was rejected vide letter dated 02.03.2005. Being aggrieved, the applicant has filed this Original Application.

3. The delay in filing of Original Application has been condoned vide order dated 30.09.2015.

4. Heard Shri IP Singh, Mohd. Aslam Beg, Learned Counsel for the applicant, Shri Shyam Singh, Learned Counsel for the respondents assisted by Maj Salen Xaxa, Departmental Representative and perused the record.

5. Learned Counsel for the applicant submitted that at the time of enrollment, the applicant was found mentally and physically fit for service in the Army and there is no note in the service documents that he was suffering from any disease at the time of entry in service. Learned Counsel for the applicant submitted that since the disease was contacted during the service, it is attributable to and aggravated by military service. He further submitted that various Benches of Armed Forces Tribunal have granted disability pension in similar cases, as such the applicant be granted disability pension as well as arrears thereof. Learned Counsel for the applicant also submitted that as per Government Policy dated 31.01.2001 the disability pension be rounded off to 50%.

6. **Per contra**, Learned Counsel for the respondents submitted that the applicant was enrolled in the Army on 03.06.1961 and was invalided out of service on account of disease '**SCHIZOPHRENIC REACTION ANXIOUS MIND**' with effect from 07.05.1963 after rendering 01 year, 11 months and 04 days of service. Medical Board considered the disability of the applicant as 40% for two years and it was found neither attributable to nor aggravated by military service. The applicant has not been granted disability pension, because his disability, though assessed as 40% for two years but has been considered as neither attributable to nor aggravated by military service.

Therefore, the applicant was not fulfilling the primary conditions for grant of disability pension as laid down in Para 173 of Pension Regulations for the Army, 1961 (Part –I), which clearly states that pension may be granted to an individual who is invalided out from service on account of disability, which is attributable to or aggravated by military service and is assessed at 20% or more. He further submitted that disability pension of the applicant has correctly been rejected as per laid down policy. Subsequently, Learned Counsel for the respondents conceded that as per recent judgment of Hon'ble The Apex Court, the applicant is entitled to disability pension.

7. We have examined documents on record and relevant rules of the Pension Regulations for the Army 1961 (Part I), and the provisions of Rules 4, 5, 9, 14 and 22 of the Entitlement Rules for Casualty Pension Award, 1982.

8. On the issue of attributability of disability to military service, we would like to refer to the decisions of Hon'ble The Apex Court in **Dharamvir Singh Vs. Union of India and Ors** reported in **(2013) 7 Supreme Court Cases 316,** in which Hon'ble 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 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).

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31. In the present case it is undisputed that no note of any disease has been recorded at the time of the appellant's acceptance for military service. The respondents have failed to bring on record any document to suggest that the appellant was under treatment for such a disease or by hereditary he is suffering from such disease. In the absence of any note in the service record at the time of acceptance of joining of appellant, it was incumbent on the part of the Medical Board to call for records and look into the same before coming to an opinion that the disease could not have been detected on medical examination prior to the acceptance for military service, but nothing is on record to suggest that any such record was called for by the Medical Board or looked into it and no reasons have been recorded in writing to come to the conclusion that the disability is not due to military service. In fact, non-application of mind of Medical Board is apparent from clause (d) of Para 2 of the opinion of the Medical Board, which is as follows :-

"(d) In the case of a disability under (c) the Board should state what exactly in their opinion is the cause thereof.

YES

Disability is not related to military service".

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33. In spite of the aforesaid provisions, the pension sanctioning authority failed to notice that the Medical Board had not given any reason in support of its opinion, particularly when there is no note of such disease or disability available in the service record of the appellant at the time of acceptance for military service. Without going through the aforesaid facts the Pension Sanctioning Authority mechanically passed the impugned order of rejection based on the report of the Medical Board. As per Rule 5 and 9 of the Entitlement Rules for Casualty Pensionary Awards, 1982, the appellant is entitled for presumption and benefit of presumption in his favour. In the absence of any evidence on record to show that the appellant was suffering from "Generalised Seizure (Epilepsy)" at the time of acceptance of his service, it will be presumed that the appellant was in sound physical and mental condition at the time of entering the service and deterioration in his health has taken place due to service.

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35. In view of the finding as recorded above, we have no option but to set aside the impugned order passed by the Division Bench dated 31-7-2009 in Union of India v. Dharamvir Singh and uphold the decision of the learned Single Judge dated 20-5-2004. The impugned order is set aside and accordingly the appeal is allowed. The respondents are directed to pay the appellant the benefit in terms of the order passed by the learned Single Judge in accordance with law within three months if not yet paid, else they shall be liable to pay interest as per the order passed by the learned Single Judge. No costs."

9. In another case of similar nature with regard to grant of disability pension, we would also like to recall the judgment passed in the case of **Sukhvinder Singh Vs. Union of India,** reported in (2014) STPL (WEB) 468 SC, in para 9 of the judgment Hon'ble The Apex Court has held as under:

"9. We are of the persuasion, therefore, that firstly, 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 consequence of military service. The benefit of doubt is rightly extended in favour of the member of the Armed Forces; any other conclusion would be tantamount to granting a premium to the Recruitment Medical

> *Board for their own negligence. Secondly, the morale of the Armed Forces requires absolute and undiluted protection and if an injury leads to loss of service without any recompense, this morale would be severely undermined………".*

10. In the instant case, the applicant was enrolled in the Indian Army on 03.06.1961 and he was invalided out of service on 07.05.1963 in low medical category. We have given due consideration to the rival submissions made by Learned Counsel for the parties. In the instant case, there is no note of such disease or disability in the service record of the applicant at the time of enrolment in service and respondents have not been able to produce any document to prove that the disease existed before his enrolment. In fact, medical board in their opinion at page 8, in the column 4 (i) '**that the disability exist before enrolment'** has mentioned **'NO'** and in column (ii) "**that the individual at the time of enrolment was fit for the service demanded of him in the medical category?** has mentioned **'was fit'**. In absence of any evidence on record to show that the applicant was suffering from any ailment at the time of his enrollment in service, it will be presumed that he was in sound health at the time of entering into service. Deterioration of his health has taken place due to military service, as such, the applicant is entitled to the relief as per judgments of the Hon'ble The Apex Court in the cases of **Dharamvir Singh** (supra) and **Sukhvinder Singh** (supra) and the applicant is entitled to disability pension. The applicant is a poor soldier of about 75 years age and his physical condition is deteriorated. Medical authorities should have conducted his re-assessment medical board in the year 1965 i.e. after two years of his invaliding out of service, but the same was not done.

11. On the issue of benefits of rounding off of disability pension, we recall the decision of Hon'ble The Apex Court in the case of **Union of India and others vs. Ram Avtar & others, Civil Appeal No. 418 of 2012 dated 10 December, 2014**, in which Hon'ble The Apex Court nodded in disapproval the policy of the Government of India in not granting the benefit of rounding off of disability pension to the personnel who have been invalided out of service on account of being in low medical category or who has retired on attaining the age of superannuation or completion of his tenure of engagement, if found to be suffering from some disability. In view of Policy Letter No. 1(2)/97/D (Pen-C) dated 31.01.2001 and decision of Hon'ble The Apex Court in the case of **Ram Avtar** (supra), we are of the view that the applicant is entitled to the benefit of rounding off.

12. In view of the above, we are of the view that the impugned orders dated 09.10.1963 and 02.03.2005, passed by respondents are not only unjust, illegal but also not in conformity with Rules, Regulations and Law. The impugned orders deserve to be set aside. The applicant is entitled to disability pension @ 40%. The same shall be rounded off to 50%. Since no Review Service Medical Board (RSMB) was carried out and the applicant is already 75 years old, we grant disability pension for life.

13. Thus in the result, the **Original Application No. 282 of 2015** succeeds and is allowed. The impugned orders dated 09.10.1963 and 02.03.2005 are set aside. The respondents are directed to grant disability pension to the applicant @ 40% for life starting from three years prior to filing of the Original Application i.e. 06.05.2010, which would stand rounded off to 50%.

The respondents are directed to give effect to the order within four months from the date of receipt of a certified copy of this order. In case the respondents fail to give effect to this order within the stipulated time, they will have to pay interest @ 9% on the amount accrued from due date till the date of actual payment.

14. No order as to costs.

(Air Marshal Anil Chopra)
Member (A)

(Justice D.P. Singh)
Member (J)

Dated : February, 2017
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