

RESERVED
Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 189 of 2019

Tuesday, this the 26th day of March, 2019

“Hon’ble Mr. Justice S.V.S. Rathore, Member (J)
Hon’ble Air Marshal B.B.P. Sinha, Member (A)”

Prabhaker Tiwari (No. 731397 L Ex Sgt), Son of Ram Kewal Tiwari, resident of Village Bhujawan Tiwari Ka Pura, Post Office Piyarepur, Tehsil Akbarpur, District Ambedkar Nagar, Uttar Pradesh-224151.

..... Applicant

Ld. Counsel for the : **Shri Yashpal Singh**, Advocate.
Applicant

Versus

1. Union of India through Secretary, Ministry of Defence, South Block, New Delhi.
2. Appellate Committee on First Appeals through its Chairman, Air Headquarters (JDPA- III), Vayu Bhawan, New Delhi-110011.
3. Air Officer Commanding, Air Force Record Office, Subroto Park, New Delhi-110010.
4. Principal Controller of Defence Accounts (Pensions), Draupadi Ghat, Allahabad.

.....**Respondents**

Ld. Counsel for the : **Shri Amit Jaiswal**,
Respondents. Central Govt. Counsel

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

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs.

- (a) *Issue/pass an order or direction setting aside the recommendation of the Release Medical Board dated 14.12.2007 to the extent of holding the disability of the applicant as ‘not connected with service’, letters/orders dated 08.02.2008 and 11.08.2008 rejecting the claim of the applicant for disability pension (Annexure No. 1, 2 and 3 to the Original Application), after summoning the relevant original records.*
- (b) *Issue/pass an order directing the respondents to consider case of the applicant for grant of disability pension and provide the same from the date of discharge including arrears with interest; and also the benefit of rounding off and other consequential benefits of ex-serviceman.*
- (c) *issue/pass any other order or direction as this Hon’ble Tribunal may deem fit in the circumstances of the case.*
- (d) *allow this Original Application with cost.*

2. Briefly stated facts of the case are that the applicant was enrolled in the Indian Air Force on 30.03.1988 and was discharged on 31.03.2008 in Low Medical Category on fulfilling the conditions of his enrolment. At the time of retirement from service, the

Release Medical Board (RMB) held at 408 Air Force Station, Hakimpet on 14.12.2007 assessed his disabilities '**(a) STROKE IN YOUNG (RT) HEMIPARESIS SUPERIOR SAGITAL SINUS THROMBOSIS ICD NO. I-64.0' @30% and (b) 'PRIMARY HYPERTENSION ICD NO I-10.0 @30%, Composite @ 60% for life** but opined the disability to be neither attributable to nor aggravated (NANA) by service (Reason - hypertension is constitutional in nature and Hemiparesis occurred simultaneously along with Hypertension, also not employed on duties involving high stress and strain). The applicant's claim for disability pension and its rounding off was rejected vide order dated 08.02.2008. The applicant's First Appeal dated 19.04.2008 was also rejected by the respondents vide order dated 11.08.2008. It is in this perspective that the applicant has preferred the present Original Application.

3. Learned Counsel for the applicant pleaded that at the time of enrolment, the applicant was found mentally and physically fit for service in the Air Force and there is no note in the service documents that he was suffering from any disease at the time of enrolment in Air Force. The diseases of the applicant was contacted during the service, hence it is attributable to and aggravated by Military Service. He pleaded 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. He further submitted that in similar cases,

Hon'ble Apex Court and various Benches of the Armed Forces Tribunals have granted disability pension, as such the applicant is entitled to disability pension and its rounding off to 75%.

4. On the other hand, Ld. Counsel for the respondents contended that applicant's both disabilities, composite @60% for life have been regarded as NANA by the RMB, hence applicant is not entitled to disability pension. He further pleaded that since applicant was discharged from service after completing his terms of engagement with effect from 31.03.2008 and RMB found his disabilities to be NANA, hence his claim for grant of disability pension was correctly rejected. He pleaded for dismissal of the Original Application.

5. We have heard Ld. Counsel for the applicant as also Ld. Counsel for the respondents. We have also gone through the Release Medical Board proceedings as well as the records. The questions which need to be answered are of two fold :-

- (a) Whether the disabilities of the applicant are attributable to or aggravated by Military Service?
- (b) Whether the applicant is entitled for the benefit of rounding off of his disability pension?

6. The law on attributability of a disability has already been settled by the Hon'ble Supreme Court in the case of ***Dharamvir Singh Versus Union of India & Others***, reported in (2013) 7

Supreme Court Cases 316. 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 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)."

7. Thus in light of the settled position of law on attributability, we find that the RMB has denied attributability to the applicant only by endorsing **that the disabilities** '(a) **STROKE IN YOUNG (RT) HEMIPARETIC SUPERIOR SAGITAL SINUS THROMBOSIS ICD NO. I-64.0**' and (b) '**PRIMARY HYPERTENSION ICD NO I-10.0**' are constitutional in nature and that the applicant was not employed on duties involving high stress and strain. We are not convinced with this reasoning of RMB and find it inadequate. The applicant was enrolled in Indian Air Force on 30.03.1988 and the disabilities were for the first time detected in the year 2007 i.e. after more than 18 years of Air Force service. Additionally the applicant was fully fit before he had this attack of a stroke. We are therefore of the considered opinion that the benefit of doubt in these circumstances should be given to the applicant in view of the law settled on this matter by ***Dharamvir Singh vs Union of India & Ors*** (supra) and the disability of the applicant should be considered as aggravated by military service.

8. 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 10th 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 invalidated 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."*

9. 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."

10. As such, in view of the decision of Hon'ble Supreme Court in the case of **Shiv Dass (supra)**, we are of the considered view that benefit of rounding off of disability pension @ 60% for life to be rounded off to 75% for life may be extended to the applicant from three preceding years from the date of filing of the Original Application.

11. In view of the above, the **Original Application No. 189 of 2019** deserves to be partly allowed, hence **partly allowed**. The impugned orders dated 08.02.2008 and 11.08.2008, enclosed as Annexure Nos. 2 and 3 of the Original Application, are set aside. The respondents are directed to grant disability element of pension to the applicant @60% for life which would stand rounded off to 75% for life w.e.f. three years preceding the date of filing this O.A. The date of filing this Original Application is 12.09.2018. 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 till actual payment.

No order as to costs.

(Air Marshal B.B.P. Sinha)
Member (A)

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

Dated: March, 2019
AKD/-