

RESERVED
Court No. 1

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

Original Application No. 591 of 2017

Thursday, this the 28th day of March, 2019

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

Ex Sep Onkar Nath Shukla
S/o Late Jagan Nath Shukla
E/o Vill & Post – Chandanpur
Dist – Unnao (UP)

.....Applicant

Ld. Counsel for : **Shri V. P. Pandey,**
the Applicant **Advocate**

Versus

1. Union of India,
through the Secretary,
Ministry of Defence, 101 South Block,
New Delhi - 110011.
2. Chief of the Army Staff,
South Block,
New Delhi -110011.
3. Officer-in-Charge Records,
Rajput Regiment
Fatehgarh (UP) PIN 209601.
4. PCDA (Pension),
Draupadi Ghat,
Allahabad (U.P.).

.....Respondents

Ld. Counsel for the : **Shri Shyam Singh,**
Respondents **Ld. Counsel for Central Govt.**

ORDER

“Per Hon’ble Mr. Justice S.V.S. Rathore, Member (J)”

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:-

- “(I) To set aside/quash the impugned order dated 08.11.1993 after summoning the copy of rejection order and rejection of appeal order dated 08.04.1996.*
- (II) To issue order or direction to respondents to grant disability pension to the applicant from the date of his discharged.*
- (III) Any other relief as considered proper by this Hon’ble Tribunal be awarded in favour of the applicant.*
- (IV) Cost of the appeal be awarded to the applicant.”*

2. The undisputed facts, as averred by the learned counsel for both the parties are that the applicant was enrolled in the Indian Army on 14.08.1980 in medically fit condition and was discharged from service with effect from 30.04.1993 under Army rule 13 (3) III (v) in low medical category ‘BEE’ (P) after rendering 12 years, 08 months and 18 days of service. The Invaliding Medical Board (IMB) held before discharge considered the disability for **“NON HODGKIN LYMPHOMA I/IIB TONSIL (RT)”** as neither attributable to nor aggravated by military service and assessed it @ 50% for two years. The case for disability pension was rejected by the PCDA (P) Allahabad vide letter dated 08.11.1993 and his appeal was also rejected by the competent authority vide order dated 08.04.1996. However, the applicant has been granted service element @ 375/- p.m. vide PCDA (P) Allahabad PPO No. D/002150/1993.

3. Learned counsel for the applicant submitted that since the applicant was enrolled in medically fit condition thereafter he has been discharged in Low Medical Category, as such, his disability should be considered as attributable to and aggravated by military service in view of decision of Hon'ble Supreme Court in case of **Sep Sukhvinder Singh vs. Union of India & others** and he should be granted disability element.

4. While filing counter affidavit, the respondents have not disputed that the applicant suffered disability to the extent of 50% for two years but submitted that the disability due to the disease of "**NON HODGKIN LYMPHOMA I/IIB TONSIL (RT)**" was considered as neither attributable to nor aggravated by military service, as such, in terms of Para 173 of Pension Regulations for the Army 1961, Part-I, his disability pension claim has correctly been rejected. However, learned counsel for the respondents submitted that service element @ 375/- per month is being paid to the applicant.

5. We have heard Ld. Counsel for the applicant as also Ld. Counsel for the respondents. We have also gone through the IMB. The question before us is simple and straight i.e.-is the disability suffered by the applicant attributable to or aggravated by military service?

6. The law on attributability of a disability has already been settled by the Hon'ble Supreme Court in the case of **Dharamvir Singh vs. Union of India & Ors** 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. We have noted that the applicant is suffering from cancer and he has been invalided out of service with 12 years & 08 months of service. His IMB has opined his disability @ 50% for two years to be

NANA. Hence, the applicant is in receipt of invalid pension i.e. only restricted service element. We have also noted that the only reason given by IMB to declare his disability as NANA is very brief and cryptic i.e. “Not connected with service”. We fail to understand as to how a disease i.e. cancer which has developed after about 09 years of service can be certified as not connected with service when there are so many equipment in Army which can pose radiation hazard and enhance the risk of radiation and cancer. Thus we would like to give benefit of doubt to the applicant and consider his disability “**NON HODGKIN LYMPHOMA I/IIB TONSIL (RT)**” as aggravated by military service.

8. Since the medical board has assessed the disability as 50% for two years, as such keeping in view the judgment of *Veer Pal Singh vs Ministry of Defence*, reported in (2013) 8 SCC 83, we feel that the case of the applicant should be recommended for Re-survey Medical Board to reassess further entitlement of disability element, if any.

9. In view of the above the Original Application deserves to be allowed.

10. Accordingly the O.A. is **allowed**. The impugned orders passed by the respondents are set aside. The respondents are directed to grant disability pension to the applicant @ 50% for two years from the date of his discharge i.e. 30.04.1993. However, due to law of limitations, the applicant will not be entitled to arrears of disability element during this two years period. Arrears of service element, if any, will be restricted to three years prior to filing of this Original Application.

The date of filing of Original Application is 03.08.2017. The respondents are further directed to refer the applicant's case to Re-survey Medical Board for deciding his further entitlement of disability element. 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. 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.

11. No order as to cost.

(Air Marshal BBP Sinha)
Member (A)

Dated: March, 2019
SB

(Justice SVS Rathore)
Member (J)