

Form No. 4
{See rule 11(1)}
ORDER SHEET
ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Court No.1 (E. Court)

O.A. No. 38 of 2020 with M.A. No. 36 of 2020

Ex Sub (Hony Capt) Paramhans Yadava
By Legal Practitioner for the Applicant

Applicant

Versus

Union of India & Others
By Legal Practitioner for Respondents

Respondents

Notes of the Registry	Orders of the Tribunal
	<p><u>19.02.2021</u> <u>Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)</u> <u>Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)</u></p> <p>1. Heard Shri Manoj Kumar Awasthi, learned counsel for the applicant and Shri Shyam Singh, learned counsel for the respondents.</p> <p style="text-align: center;"><u>M.A. No. 36 of 2020</u></p> <p>2. The Original Application has been filed with delay of 07 months and 08 days.</p> <p>3. Submission of learned counsel for the applicant is that it is a pensionary matter in which bar of limitation is not applicable. His further submission is that delay in filing Original Application is not deliberate, but on account of reasons stated in affidavit filed in support of application.</p> <p>4. Per contra, learned counsel for the respondents submits that explanation of delay offered by the applicant is not sufficient as delay has not been satisfactorily explained on day to day basis.</p> <p>5. Considering that in pensionary matters bar of limitation is not applicable and grounds shown for delay are genuine and sufficient, delay deserves to be condoned.</p> <p>6. Accordingly, delay is condoned.</p> <p>7. The O.A. has already been admitted and registered vide order dated 14.01.2020.</p> <p style="text-align: center;"><u>O.A. No. 38 of 2020</u></p> <p>8. 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:-</p> <p style="padding-left: 40px;">“(a) Issue/pass an order or direction to set-aside/quash the order no. 30.11.2018, passed by respondents no. 3.</p>

(b) Issue/pass an order or directions to the respondents to grant disability pension @ 40% with effect from date of discharge i.e. 30.11.2018.

(c) To issue pass an order or directions to respondents to grant benefit of Rounding off Disability Pension @ 40% to 50% for life to the applicant and pay due arrears including consequential benefits with interest @ 12% p.a. till final payment is made in light of Hon'ble Apex Court judgments and letter dated 31.01.2001.

(d) Any other relief which the Hon'ble Tribunal may deem fit and proper in the fact and circumstance of the case is also granted alongwith cost of the OA.

9. Brief facts of the case giving rise to this application are that applicant is in receipt of service pension from Army. He was re-enrolled in the the Defence Security Corps (DSC) on 31.10.2013 and after having served for more than 05 years, he was discharged from service in low medical category 'S1H1A1P(P)2E1' on 31.10.2018. Prior to discharge from service, applicant was brought before Release Medical Board (RMB) on 12.09.2018 which assessed applicant's disabilities (i) 'OBESITY (E-66)' @ nil for life, (ii) 'PRIMARY HYPERTENSION (1-10)' @ 30% for life and (iii) 'IMPAIRED FASTING GLUCOSE (R-73)' @ 6-10% for life (composite assessment for all disabilities @ 40% for life neither attributable to nor aggravated by military (NANA). Disability pension claim preferred by applicant was rejected vide order dated 30.11.2018. Thereafter, applicant preferred first appeal for grant disability pension on 10.01.2019, which was decided and rejected by the respondents vide order dated 16.07.2019 with an advice to prefer second appeal within six months but the applicant has not filed second appeal. Applicant has filed this O.A. for grant of disability pension.

10. Learned counsel for the applicant submitted that the applicant was enrolled in the Army in medically and physically fit condition and there is no note in his service documents with regard to suffering from any disease prior to enrolment, therefore, any disability suffered by the applicant after joining the service should be considered as attributable to or aggravated by military service and the applicant should be entitled to disability pension. Learned counsel for the applicant further submitted that disability pension claim of the applicant has been rejected in a cavalier manner without assigning any meaningful reason. Further submission of learned counsel for the applicant is that since the aforesaid diseases are due to stress and strain related rigors of military service, these should be considered as either attributable to or aggravated by military service. He pleaded for disability pension to be granted to applicant.

11. On the other hand, learned counsel for the respondents submitted that since RMB has declared the applicant's disability as NANA, he is not entitled to disability pension. His further submission is that the competent authority has rightly rejected applicant's disability pension claim on the ground of disability being originated in peace area and being not related to military service, therefore, O.A. deserves to be dismissed.

12. Heard learned counsel for the parties and perused the material placed on record. We have also gone through the RMB and the rejection order of disability pension claim. The question before us is simple and straight i.e. – is the disability of applicant attributable to or aggravated by military service?

13. 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)."

14. 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 arose in peace area and the said disability having no close time association with stress/strain of service in Fd/HAA/CI Ops. We feel that such a discrimination between peace posting and a posting to Field/High Altitude Area/Counter Insurgency Operations amounts to saying that there is no stress and strain of military service in peace area, which is not the absolute truth. 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 02 years of service in DSC after completing 30 years of service in the Army for which he is receiving service pension, the disease is 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.

15. The applicant has claimed disability pension. We are clear that disability pension consists two elements i.e. service element and disability element. Since the applicant has not completed minimum pensionable service of 15 years to earn service pension as stipulated in Pensions Regulations for the Army, 1961 (Part-I), therefore, he is not entitled to service element. It is further made clear that the applicant would have been entitled to service element of disability pension if he was invalided out of service. In the instant case, since the applicant, being placed in low medical category by RMB, was discharged from service, he is not entitled to service element of disability pension.

16. In view of the above the applicant is held entitled to 40% disability element for life which shall stand rounded off to 50% disability element for life with effect from the date of his discharge in terms of **Union of India vs. Ram Avtar & Others**, (Civil Appeal No. 418 of 2012 decided on 10 December, 2014.

17. As a result of foregoing discussion, the O.A. is **partly allowed**. The impugned order dated 30.11.2018 is set aside. The applicant shall be granted disability element only (not disability pension) with effect from his date of discharge i.e. 31.10.2018. The respondents are directed to pay 50% disability element along with arrears within four months from today.

18. Default will invite interest @ 8% p.a.

19. No order as to costs.

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

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)