

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

Court No.1 (E. Court)

O.A. No. 547 of 2019 with M.A. No. 871 of 2019

Ex Sgt Rakesh Pandey
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>02.03.2021</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 Virat Anand Singh, learned counsel for the applicant and Dr Shailendra Sharma Atal, learned counsel for the respondents.</p> <p style="text-align: center;"><u>M.A. No. 871 of 2019</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 elementary 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 elementary 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 16.10.2019.</p> <p style="text-align: center;"><u>O.A. No. 547 of 2019</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) To quash and set-aside/quash the finding of medical board and Appellate authority refusing th consider disability element for ‘FIRST DISABLITY-PRYMARY HYPERTENSION’ and grant disability element</p>

After COUMPUNDING afresh with rounding-off benefit since date of discharge.

(b) To pass such other order(s) which their Lordship may deem fit and proper in the existing facts and circumstances of the case.

(c) Allow this application with cost of rupees 50,000/-.

9. Brief facts of the case giving rise to this application are that applicant was enrolled in the Indian Air Force on 18.09.1987 and after having served for more than 20 years, he was discharged from service in low medical category 'A4G4(P)' on 30.09.2007. Prior to discharge from service, applicant was brought before Release Medical Board (RMB) on 11.01.2007 which assessed the applicant to be suffering from (i) 'PRIMARY HYPERTENSION (Old) Icd No. I 10.0, Z-09.0' @ 30% for life (ii) 'FRACTURE ACETABULAM WITH CENTRALDISLOCATION OF HIP(Lt) (Old) ICD No. 573Z-09.0 V22' @ 30% for life (iii) '**FRACTURE NECK OF FEMURE (Lt)** (OLD) ICD No.572 Z-09.5' @ 30% for life (iv) PIVD L4-5, L5-5, (old) ICD No M-51.0 @ 20% and composite assessment for Disabilities No. (i) to (iv) @ 70% for life. Disabilities No. (ii) to (iv) attributable to by military due to applicant's injuries as per Injury Reports dated 20.06.2001 and 25.09.2003 held on record. Applicant is already in receipt of Rs 930/- per month @ 40% rounded off to 50% alongwith arrears @ 10% wef 01.01.2016 for life for the disabilities No. (ii), (iii) & (iv) vide Corr P.P.O. No. 8/14/B/0480/08/2000 dated 17.0.2000, but first disability was ignored despite the medical board compositically recommended 70/% for life. Disability element Claim/Representation/Appeal preferred by applicant was rejected vide order dated 14.03.2019 due to delay submission of claim only. Thereafter, applicant filled this O.A. for grant of disability element.

10. Learned counsel for the applicant submitted that the applicant was enrolled in the India Air Force 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 element. Learned counsel for the applicant further submitted that disability element 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 disease is due to stress and strain related rigors of military service, these should be considered either attributable to or aggravated by military service. He pleaded for disability element 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 element. His further submission is that the competent authority has

rightly rejected applicant's disability element 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 element 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 Elements 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 element 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 Elementary 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 elementary 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 Elements), 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 20 years of service respectively, it should be 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. In view of the above the applicant is held entitled to 70% disability element for life which shall stand rounded off to 75% 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. Apropos above, applicant is held entitled to rounding off of disability element w.e.f. his date of discharge but due to law of limitations as held in Hon'ble Apex Court judgment in the case of **Shiv Dass vs Union of India & Ors**, reported in 2007 (3) SLR 445, applicant is entitled to arrears of rounding off of disability element three years prior to filing of this O.A. This O.A. was filed on 14.10.2019..

16. As a result of foregoing discussion, the O.A. is **allowed**. The impugned order dated 14.03.2019 is set aside. The applicant shall be granted disability element with effect from his date of date of discharge i.e. 31.10.2018. The respondents are directed to pay 75% disability element alongwith arrears within four months from today.

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

18. No order as to costs.

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

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

