

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW**Original Application No 552 of 2021**Monday, this the 21st day of March, 2022**Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)**
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)No. 4275762-X Ex Hav Ram Prasad Singh
S/o Late Shri Ramniwash Singh
R/o C/o Shri Birendra Kumar Mishra
Vill – Hari Om Nagar, Gali No. 6, PO – Manas Nagar,
Thana – Krishna Nagar, Distt – Lucknow – 226023 (U.P.)

..... Applicant

Ld. Counsel for the Applicant : **Shri Pankaj Kumar Shukla**, Advocate

Versus

1. The Union of India, through Secretary, Ministry of Defence (Army), South Block, New Delhi.
2. Chief of Army Staff, IHQ of MoD (Army), South Block, New Delhi-110011.
3. OIC Records, The Bihar Regiment, PIN – 908765, C/o 56 APO.
4. PCDA (Pension), Draupadi Ghat, Allahabad-211104 (UP).

..... Respondents

Ld. Counsel for the Respondents : **Shri Arun Kumar Sahu**,
Central Govt Counsel.**ORDER (Oral)**

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

“(A). To quash or set aside the Respondents Certificate 17.11.2016 (Annexure A-1 of OA).

(B). To issue order or directions to the respondents to grant disability pension @ 100% for life to the applicant for the disability he had, with effect from 08.07.2018 (Date of discharge: 07.07.2018) with all consequential benefits including

rounding off if any in terms of Govt of India letter dated 31 Jan 2001 and judgment passed by Hon'ble Apex Court in case of Ram Avtar vs. UOI & Others.

(C). Any other relief as considered proper by the Hon'ble Tribunal be awarded in favour of the applicant.”

2. The undisputed facts, as averred by the learned counsel for both the parties, are that applicant was enrolled in the Indian Army on 28.02.1997 in medically fit condition and was invalided out from service with effect from 07.07.2018 in low medical category after rendering more than 21 years of service. The Invaliding Medical Board (IMB) assessed applicant's first disability “GUN SHOT BACK WITH FRACTURE DV7-8 WITH PARAPLEGIA” @ 100% for life + CAA as NANA and his second disability “MYOSITIS OSSIFICANSE LT HIP WITH FRACTURE DISTAL 1/3 SHAFT OF FEMUR (LT)” was assessed @ 30% for life as attributable to service. The applicant's claim for first disability which was assessed @ 100% + CAA was rejected by the respondents being NANA, however, applicant was granted 30% disability element rounded off to 50% for life for his second disability vide PPO dated 23.08.2019. The applicant represented his case for grant of 100% disability element vide letter dated 28.02.2021 which was rejected by the respondents. Being aggrieved, the applicant has filed the present Original Application.

3. Learned counsel for the applicant submitted that applicant was enrolled in the Army on 28.02.1997. On 09.10.2014, the applicant while returning to his unit for resuming duties after availing leave, he was shot by anti-social elements near Arrah Railway Station. He

sustained injury resulting in disability “GUN SHOT BACK WITH FRACTURE DV7-8 WITH PARAPLAGIA”. A Court of Inquiry was held in the unit and injury of the applicant was considered as attributable to service by the Commanding Officer of the Unit. On 07.03.2016, the applicant sustained another injury at MH Kirkee while performing exercise for TRAUMATIC PARAPLEGIA resulting in second disability “MYOSITIS OSSIFICANSE LT HIP WITH FRACTURE DISTAL 1/3 SHAFT OF FEMUR (LT)”. The Invaliding Medical Board (IMB) assessed applicant’s first disability “GUN SHOT BACK WITH FRACTURE DV7-8 WITH PARAPLEGIA” @ 100% for life + CAA as not attributable to service and his second disability “MYOSITIS OSSIFICANSE LT HIP WITH FRACTURE DISTAL 1/3 SHAFT OF FEMUR (LT)” was assessed @ 30% for life as attributable to service. The applicant was invalidated out from service 07.07.2018. The applicant’s claim for first disability which was assessed @ 100% + CAA was rejected by the respondents being NANA, however, applicant was granted 30% disability element rounded off to 50% for life for his second disability vide PPO dated 23.08.2019. The applicant represented his case for grant of 100% disability element vide letter dated 28.02.2021 but no response received from the respondents.

4. Learned counsel for the applicant placed reliance on the judgments of the Hon’ble Apex Court in ***Dharamvir Singh vs. Union of India***, Civil Appeal No. 4949/2013, decided on 02.07.2013 and ***Sukhvinder Singh vs. Union of India & Ors***, reported in (2014) STPL (WEB) 468 SCC and AFT (RB) Lucknow judgment in O.A. No.

443 of 2019, ***Ex Nk (ACP Hav) Pandu Kumar Reddy vs. Union of India & Ors***, decided on 19.02.2021 and pleaded for grant of 100% disability element and CAA to the applicant w.e.f. 08.07.2018 in view of aforesaid judgments.

5. While filing counter affidavit, the respondents have not disputed that applicant suffered disability to the extent of 100% + CAA for life for his first disability "GUN SHOT BACK WITH FRACTURE DV7-8 WITH PARAPLEGIA", considered as NANA and 30% disability for life for his second disability "MYOSITIS OSSIFICANSE LT HIP WITH FRACTURE DISTAL 1/3 SHAFT OF FEMUR (LT)" considered as attributable to military service. The applicant has been granted disability element @ 30% duly rounded off to 50% for life for his second disability vide PPO dated 23.08.2019.

6. Learned counsel for the respondents further submitted that as far as first disability of Gun Shot Wound is concerned, in this regard, a Court of Inquiry was conducted by the Commanding Officer of the Unit (12 BIHAR) and injury sustained by the applicant was considered as attributable to military service as the applicant was returning from leave to join duty at the time of incident but the then Commander of 59 Mountain Brigade had issued a non attributable certificate dated 17.11.2016 stating that injury sustained by the applicant is declared as not attributable to military service as per Para 9(f) of Appendix to Govt. of India, Ministry of Defence letter dated 18.01.2009 and therefore, applicant was not granted disability element @ 100% for life for his first disability.

7. Learned counsel for the respondents also submitted that applicant submitted a representation dated 28.02.2021 for grant of 100% disability pension which was suitably replied by Records, The Bihar Regiment vide letter dated 21.06.2021. As per para 12 (a)(i) of Entitlement Rules for Casualty Pensionary Awards to Armed Forces Personnel, 2008, "the decision regarding attributability/aggravation in respect of injury cases in invalidment/retirement or discharge would be taken by OIC Records for the purpose of casualty pensionary awards". Since first disability of the applicant was considered as NANA, hence, applicant is not entitled for disability element with regard to his first disability @ 100% for life. The applicant has correctly been granted 50% disability element for life alongwith rounding off benefit vide PPO No. 171201901032. He pleaded for dismissal of O.A.

8. We have perused the record and also gone through the IMB. The question before us is whether first disability suffered by the applicant is also attributable to or aggravated by military service?

9. 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)."

10. We have noted that the applicant sustained Gun Shot injury while he was returning from leave to join duty at his unit. A Court of Inquiry was conducted by the Commanding Officer of the unit and injury sustained by the applicant was considered as attributable to military service but the Commander, 59 Mountain Brigade had issued a non attributable certificate to the applicant. The applicant has been invalided out of service after 21 years of service. His IMB has opined his first disability of Gun Shot injury @ 100% + CAA for life as NANA

and second disability as attributable to military service. Hence, the applicant is in receipt of 30% disability element rounded off to 50% for life for his second disability as per PPO. We have also noted that since the applicant was returning from leave to join duty at his unit, hence, this is to be treated on duty and therefore, injury sustained by the applicant has correctly been considered as attributable to military service by the Commanding Officer of the unit. The IMB has assessed first disability of the applicant @ 100% + CAA for life but considered it as NANA. However, in view of recommendations of the Commanding Officer of the unit and the applicant being on duty, we would like to give benefit of doubt to the applicant and consider his first disability "GUN SHOT BACK WITH FRACTURE DV7-8 WITH PARAPLEGIA" as attributable to military service.

11. To consider as to what acts are covered by the term 'duty' we may like to make reference to Entitlement Rules Appendix II of Clause 12 which defines the word duty, which for convenience sake may be reproduced as under:

"DUTY: 12. A person subject to the disciplinary code of the Armed Forces is on "duty":- (a) When performing an official task or a task, failure to do which would constitute an offence triable under the disciplinary code applicable to him.

(b) When moving from one place of duty to another place of duty irrespective of the mode of movement.

(c) During the period of participation in recreation and other unit activities organised or permitted by Service Authorities and during the period of travelling in a body or singly by a prescribed or organised route.

Note:1

*(a) Personnel of the Armed Forces participating in
(i) Local/national / international sports tournaments as member of service teams, or,*

(ii) *Mountaineering expeditions / gliding organised by service authorities, with the approval of Service Hqrs. will be deemed to be "on duty" for purposes of these rules.*

(b) Personnel of the Armed Forces participating in the above named sports tournaments or in privately organised mountaineering expeditions or indulging in gliding as a hobby in their individual capacity, will not be deemed to be „on duty“ for purposes of these rules, even though prior permission of the competent service authorities may have been obtained by them.

(c) Injuries sustained by the personnel of the Armed Forces in impromptu games and sports outside parade hours, which are organised by, or disability arising from such injuries, will continue to be regarded as having occurred while „on duty“ for purposes of these rules.

Note: 2

The personnel of the Armed Forces deputed for training at courses conducted by the Himalayan Mountaineering Institute, Darjeeling shall be treated on par with personnel attending other authorised professional courses or exercises for the Defence Services for the purpose of the grant of disability family pension on account of disability/death sustained during the courses.

(d) When proceeding from his leave station or returning to duty from his leave station, provided entitled to travel at public expenses i.e. on railway warrants, on concessional voucher, on cash TA (irrespective of whether railway warrant/cash TA is admitted for the whole journey or for a portion only), in government transport or when road mileage is paid/payable for the journey.

(e) When journeying by a reasonable route from one's quarter to and back from the appointed place of duty, under organised arrangements or by a private conveyance when a person is entitled to use service transport but that transport is not available.

(f) An accident which occurs when a man is not strictly on duty" as defined may also be attributable to service, provided that it involved risk which was definitely enhanced in kind or degree by the nature, conditions, obligations or incidents of his service and that the same was not a risk common to human existence in modern conditions in India. Thus for instance, where a person is killed or injured by another party by reason of belonging to the Armed Forces, he shall be deemed „on duty“ at the relevant time. This benefit will be given more liberally to the claimant in cases occurring on active service as defined in the Army/Navy/Air Force Act."

12. Additionally, the Hon'ble Apex Court in **Madan Singh Shekhawat vs Union of India & Ors** in Writ Petition No.4004/91

decided on 17 August 1999 has held that the period while proceeding on leave or returning from leave to join duty shall be counted as duty.

13. We also observe that applicant was 100% disable as recommended by the IMB that his first disability is assessed @ 100% + CAA for life. Therefore, the applicant shall also be granted Constant Attendance Allowance (CAA) in addition to disability pension in accordance with the rules/instructions issued by the Govt. from time to time. As per para 35(a) of the Amendment to Chapter VI & VII of Guide to Medical Officers (Military Pension) 2002, Govt. of India, Ministry of Defence letter No. 1(2) 2013-D (Pen/Pol) dated 27.04.2015 and PCDA (P) Allahabad Circular No. 543 dated 27.05.2015, applicant is entitled to Constant Attendance Allowance.

14. Resultantly, the O.A. deserves to be allowed, hence allowed. The impugned orders passed by the respondents are set aside. Since, the disability element @ 50% for life has already being granted to the applicant from the date of his invalidment from service, the applicant is now granted 100% disability element for life + Constant Attendance Allowance from the date of invalidment from service. However, due to law of limitations settled by the Hon'ble Supreme Court in the case of **Shiv Dass v. Union of India and others** (2007 (3) SLR 445), the arrears of balance 50% of disability element (total 100%) and Constant Attendance Allowance will be restricted to three years preceding the date of filing of the instant O.A. The date of filing of this O.A is 20.09.2021. The respondents are directed to give effect to this order within four months from the date of receipt of a copy of

this order. Default will invite interest @ 8% per annum till actual payment.

15. No order as to costs.

16. Pending Misc. Application(s), if any, shall be treated to have been disposed off.

(Vice Admiral Abhay Raghunath Karve) (Justice Umesh Chandra Srivastava)
Member (A) Member (J)

Dated: March, 2022

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