

RESERVED
COURT NO 2
(Ser No. 10)

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

Original Application No. 174 of 2022

Friday, this the 03rd day of March, 2023

Hon'ble Mr. Justice Anil Kumar, Member (J)
Hon'ble Maj Gen Sanjay Singh, Member (A)

Smt Rekha Devi, W/o No 13634707 Late Gdsm Ashok Kumar Mahkey, R/o Vill-Samanpur, PO-Sikarpur, Distt-Bulandshahr (UP).

.... Applicant

Ld. Counsel for the: **Shri KK Misra**, Advocate.
Applicant

Versus

1. Union of India, through its Secretary, Min of Defence, New Delhi.
2. Chief of Army Staff, Army HQs, New Delhi.
3. Officer-in-Charge Records, Brigade of Guards, PIN No 900746, C/o 56 APO.
4. PCDA (P), Allahabad

... Respondents

Ld. Counsel for the **Dr. Shailendra Sharma Atal**, Advocate
Respondents

ORDER

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:-

(a) To quash AG's Branch, Army HQs, New Delhi letter No B/38046/70/2008/AG-PS-4 (Imp-I) dt 27 Feb 2009 and addl Dte Gen, AG's Branch, AHQ, New Delhi letter No B/38046A/172/2015/AG PS-4(2nd Appeal) dt 20 May 2016 (Annexures A-6 & A-7 to this O.A.) and direct the respondents to grant special family pension to the applicant as per her entitlement, along with its arrears with interest.

(b) Any other relief which the Hon'ble Tribunal may think just and roper may be granted to the applicant.

(c) Cost of the case may be awarded in favour of the applicant.

(d) To grant Ex-gratia compensation of Rs 10,00,000/- (Rupees ten lac only).

2. Counter and rejoinder affidavits filed by the parties are taken on record.

3. Brief facts of the case are that the applicant's husband was enrolled in the Brigade of the Guards Regiment on 25.10.1994. While serving with 11 Guards he was admitted in 172 Military Hospital, Gurdaspur where during the course of investigation he was found to be suffering from 'Constipation Altered Bowl Habits and Bleeding per Rectum'. He was transferred to Command Hospital (Western Command), Chandigarh and diagnosed to have 'Adeno Carcinoma Rectum'. He was

transferred to Army Hospital (Research and Referral), New Delhi for surgery of 'Anterior Rectal Resection'. After surgery, he was sent to Command Hospital (Southern Command), Pune for Adjuvant Chemotherapy and Radiotherapy. On being transferred from Command Hospital (Southern Command), Pune to Base Hospital, Delhi Cantt he died enroute on 10.11.2000. After death his wife was granted Ordinary Family Pension vide PPO No F/NA/5709/2021 dated 23.10.2001. Claim for grant of Special Family Pension was rejected vide letter dated 09.10.2001 with an advice to prefer appeal. Accordingly, applicant preferred first appeal dated 22.12.2007 which was rejected vide order dated 27.02.2009 on the ground that since death in respect of applicant's husband has no relation to military duty, applicant is not entitled to Special Family Pension. After rejection of first appeal, applicant preferred second appeal dated 15.05.2015 which too was rejected vide order dated 20.05.2016 stating that the disease with which applicant's husband was suffering was neither attributable to nor aggravated by military service. It is in this perspective that this O.A. has been filed for grant of Special Family Pension.

4. Learned counsel for the applicant submitted that at the time of enrolment applicant's husband was thoroughly examined by a medical board and he was found absolutely fit in

all respects and the Carcinoma occurred and aggravated by military service.

5. Further submission of learned counsel for the applicant is that since applicant's husband died enroute while shifting from one hospital to other, his death should be regarded as attributable to military duty and in these circumstances applicant is entitled to Special Family Pension. His further submission is that certificate issued to next of kin (IAFY-1940) clearly shows that death in respect of her husband was regarded as attributable to military service (Annexure A-3).

6. Learned counsel for the applicant has orally submitted that Pension Regulations for the Army, 1961 provides that Special Family Pension may be granted to the family of an officer if his/her death was due to or hastened by a wound, injury or disease which was attributable to military service or the aggravated by military service of a wound, injury or disease which existed before or arose during the military service. He submitted that disease 'Adeno Carcinoma Rectum' occurred to applicant's husband while in service therefore, she is entitled to Special Family Pension. Relying orally upon order dated 12.05.2017 passed by AFT, Chandimandir in O.A. No. 915 of 2015 in the case of **Smt Kamla Devi vs Union of India & Ors**, learned counsel for the applicant pleaded that applicant be

also granted Special Family Pension on the basis of aforesaid pronouncement.

7. Per contra, learned counsel for the respondents submitted that applicant's husband, while serving with 11 Guards, was admitted in 172 Military Hospital, Gurdaspur where he was found to be suffering from 'Constipation Altered Bowl Habits and bleeding per Rectum'. It was further submitted that he was transferred to Command Hospital, Chandigarh and further transferred to Army Hospital (Research and Referral), New Delhi for surgery of 'Anterior Rectal Resection'. He further submitted that after surgery he was transferred to Command Hospital, Pune for Adjuvant Chemotherapy and Radiotherapy.

8. Learned counsel for the respondents further submitted that applicant's husband died enroute while he was being transferred from Command Hospital, Pune to Base Hospital, Delhi Cantt. It was further submitted that AFMSF-81 (death certificate) dated 27.11.2000 issued by the hospital authorities showed the cause of death as 'unknown'. He further submitted that since applicant's husband died on 10.11.2000 due to disease 'Adeno Carcinoma Rectum' which is neither attributable to nor aggravated by military service as assessed by the pension sanctioning and adjudicating authority i.e. PCDA (P) Allahabad and IHQ of MoD (Army) vide letters dated 21.09.2001 and 20.05.2016 respectively, applicant is not entitled to Special

Family Pension in terms of Para 213 of Pension Regulations for the Army, 1961 (Part-I). He pleaded for dismissal of O.A.

9. Heard Shri KK Misra, learned counsel for the applicant and Dr. Shailendra Sharma Atal, learned counsel for the respondents and perused the material placed on record.

10. We find that applicant's husband was suffering from 'Anterior Rectal Resection' which was developed while he was serving with 11 Guard. He was provided treatment in 172 Military Hospital, Gurdaspur from where he was shifted to Command Hospital, Chandigarh. During the course of his treatment he was shifted to Army Hospital (Research and Referral), New Delhi and thereafter to Command Hospital, Pune for chemotherapy and radiology. He died on 10.11.2000 while shifting from Command Hospital, Pune to Base Hospital, Delhi Cantt. After her husband's death she was granted Ordinary Family Pension in addition to other applicable dues. Her claim for grant of Special Family Pension and first and second appeals were rejected on the ground that death in respect of applicant's husband was neither attributable to nor aggravated by military service.

11. During the course of hearing contention of learned counsel for the applicant that the Hon'ble Apex Court in its judgment in the case of ***Dharamvir Singh vs Union of India & Ors***, (civil

appeal No 4949 of 2013, reported in 2013 AIR SCW 4236, has observed that the assessment of any disability as attributable to or aggravated by military service is to be determined under the Entitlement Rules for Casualty Pensionary Awards, 1982, as shown in Appendix II, Govt of India, MoD letter No 1(1) 81 D (Pen-C) dated 20.06.1986, and General Rules of Guide to Medical Officers (Military Pensions) 2002, is sustainable on the following points:-

"(i) 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 or aggravated by military service to be determined under "Entitlement Rules for Casualty Pensionary Awards, 1982" of Appendix-II (Regulation 173).

(ii) 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.

(iii) 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.

(iv) 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.

(v) 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.

(vi) 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.

12. Also, on attributability of service, Para 423 (a), (b) and (c) of Regulations for the Medical Services of Armed Forces, 1983 is relevant which for convenience sake is reproduced as under:-

“(a) For the purpose of determining whether the cause of a disability or death is or is not attributable to service, it is immaterial whether the cause giving rise to the disability or death occurred in an area declared to be a field service/active service area or under normal peace conditions. It is, however, essential to establish whether the disability or death bore a causal connection with the service conditions. All evidence both direct and circumstantial will be taken into account and benefit of reasonable doubt, if any, will be given to the individual. The evidence to be accepted as reasonable doubt, for the purpose of these instructions, should be of a degree of cogency, which though not reaching certainty, nevertheless carries a high degree of probability. In this connection, it will be remembered that proof beyond reasonable doubt does not mean proof beyond a show of doubt. If the evidence is so strong against the individual as to leave only a remote possibility in his favour, which can be dismissed with the sentence ‘of course it is possible but not in the least probable’ the case is proved beyond reasonable doubt. If on the other hand the evidence is so evenly balanced so as to render impracticable a determinate conclusion one way or the other, then the case would be one in which the benefit of the doubt could be given more liberally to the individual, in cases occurring in Field Service/Active Service areas.

(b) The cause of a disability or death resulting from wound or injury will be regarded as attributable to service if the wound/injury was sustained during the actual performance of ‘duty’ in Armed Forces. In case of injuries, which were self-inflicted or due to an individual’s own serious negligence or misconduct, the board will also comment how far the disablement resulted from self-infliction, negligence or misconduct.

(c) The cause of disability or death resulting from a disease will be regarded as attributable to service when it is established that the disease arose during service and the conditions and circumstances of duty in the Armed Forces determined and contributed to the onset of the disease. Cases in which it is established that service

conditions did not determine or contribute to the onset of the disease but influenced the subsequent course of the disease, will be regarded as aggravated by the service. A disease, which has led to an individual's discharge or death, will ordinarily be deemed to have arisen in service if no note of it was made at the time of the individual's acceptance for service in the Armed Forces. However, if medical opinion holds, for reasons to be stated that the disease could not have been detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service."

13. In the case in hand, we find that husband of applicant died enroute while he was being transferred from Command Hosital, Pune to Base Hospital, Delhi Cantt on 10.11.2000. We also find that if a person enters into service in a medically fit condition, a presumption can be drawn that he had no disease at the time of enrolment. Further, if the medical or military authority certifies that a disease is not attributable to nor aggravated by military service, then such opinion should also express cogent reasons for holding so, which in this case has not been done. Therefore, in the absence of such reasons, the disability/disease must be assessed as attributable to/aggravated by military service, and applicant should be entitled to Special Family Pension.

14. We also observe that **Annexure-II placed on record clearly specifies at serial number 12 that the disability/death of the applicant was attributable to military service.** For convenience sake, extract of para 12 of Annexure-II is reproduced as under:-

"12. Do you consider the disability/death is attributable to service?"

Yes, during OP VIJAY”.

15. Further, we also observe that learned counsel for the applicant has made reliance on order dated 12.09.2018 passed in the case of **Smt Kamla Devi** (supra). In regard to this we find that the case in hand is identical to the aforesaid case, therefore applicant should be entitled to Special Family Pension.

16. We also observe that husband of the applicant was suffering from 'Anterior Rectal Resection' and para 10 (a) (ii) (aa) of Guide to Medical Officers, 2002 refers to cancer of the urinary bladder, which disease is not covered under above guidelines. Thus, the opinion of the PCDA (P), Allahabad and adjudicating authority at Army Headquarters that the aforesaid disease was not attributable to military service, is incorrect on the ground that applicant's husband died due to 'Anterior Rectal Resection' on 10.11.2000 while being transported from Command Hospital, Pune to Base Hospital, Delhi Cantt post surgery, chemotherapy and radiology.

17. We find that there are catena of judgments of the Tribunals/High Courts/Supreme Courts to support her claim on the point of attributability, therefore, death of her husband was attributable to military service, enabling her to grant of Special family Pension.

18. From the aforesaid, an inference may be drawn that since applicant's husband suffered with 'Anterior Rectal Resection' while in service and he died on active service, she is entitled for grant of Special Family Pension.

19. Respondents' contention, that opinion of pension sanctioning authority and appellate authority are not in favour of applicant, is on unfounded grounds as with regard to non attributability no reason has been assigned by the authorities who adjudicated and rejected claim for grant of Special Family Pension.

20. Additionally, we find more support from the judgment of the Division Bench of Delhi High Court in the case of **Smt Reshma Devi vs Union of India & Ors**, Writ Petition No SC/121/2019 decided on 11.12.2019 wherein the fact and circumstances are similar to the case in hand. There is no medical opinion as to when actually the cancer started developing in the body and when it was detected and spread. However, we are of the view that in view of posting of applicant's husband while serving in different parts of the country, he may have developed the cancer due to the service conditions and it can very well be presumed from the Rules and Regulations that a presumption can be drawn that the disease had developed while in service or its detection and treatment

delayed because of service conditions, aggravating the circumstances.

21. In view of the above, the O.A. is allowed and she (NOK of the deceased soldier) is entitled to Special Family Pension.

22. The respondents are directed to calculate and grant Special Family Pension to applicant from three years preceding the date of filing of the present O.A. which was filed on 07.02.2022.

23. The respondents are further directed to pay the aforesaid amount within a period of four months from today. Default will invite interest @ 8% p.a.

24. No order as to costs.

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

(Maj Gen Sanjay Singh)
Member (A)

Dated : 03.03.2023
rathore

(Justice Anil Kumar)
Member (J)