

Court No. 1**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****ORIGINAL APPLICATION No. 671 of 2022**

Wednesday, this the 05th day of April 2023

“Hon’ble Mr. Justice Ravindra Nath Kakkar, Member (J)”

“Hon’ble Vice Admiral Atul Kumar Jain, Member (A)”

No. 767191-A, Ex. Sgt. Vinay Kumar Tiwari, S/o Late Shri Gulab Chand Tiwari and Presently residing at House No. 128 /148 H-1 Block, Po- Kidwai Nagar, District- Kanpur Nagar, Uttar Pradesh, Pin-208011.

..... Applicant

Ld. Counsel for the Applicant : **Shri Keshav Sharma, Advocate.**

Versus

1. Union of India, through the Secretary, Ministry of Defence, South Block, New Delhi -110011.
2. The Chief of Air Staff, Air Headquarters, Vayu Bhawan, New Delhi -110106.
3. The Directorate of Air Veterans, Air Headquarters, Subroto Park, New Delhi -110010.
4. The Principal Controller of Defence Accounts (Pension), Draupadi Ghat, Allahabad.
5. The JCDA (Air Force), Subroto Park, New Delhi -110010.

.....Respondents

Ld. Counsel for the Respondents. : **Shri R.C. Shukla,
Central Govt. Counsel**

ORDER (ORAL)

“Per Hon’ble Mr. Justice Ravindra Nath Kakkar, Member (J)”

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-
 - (a) *Declare the disabilities (i) DM Type-II as aggravated by the Military Service.*
 - (b) *Grant the disability element of pension to the Applicant @50% w.e.f. 01 September 2011 for life with all consequential benefits and*
 - (c) *To issue /pass any other orders / direction as this Hon’ble Tribunal may deem fit and proper under the circumstances of the case in favour of the applicant and render justice.*

2. Counter affidavit filed by the respondents is taken on record.

3. Briefly stated, applicant was enrolled in the Indian Air Force on 13.07.1992 and discharged on 31.08.2011 in Low Medical Category after rendering 11 years 01 month and 19 days of service. At the time of discharge from service, the Release Medical Board (RMB) held at 49 Wing Air Force on 29.08.2011 assessed his disability **‘DIABETES MELLITUS TYPE-II, (OLD)Z.09’** @ 15-19% for life and opined the disability to be neither attributable to nor aggravated (NANA) by service. The applicant’s claim for grant of disability pension was rejected vide letter dated 30.12.2011. It is in this

perspective that the applicant has preferred the present Original Application.

4. Learned Counsel for the applicant pleaded that at the time of enrolment, the applicant was found mentally and physically fit for service in the Air Force and there is no note in the service documents that he was suffering from any disease at the time of enrolment in Air Force. The disease of the applicant was contracted during the service, hence it is attributable to and aggravated by Air Force Service. Due to disability, applicant was invalided out from service prior to completion of terms of engagement. He pleaded that various Benches of Armed Forces Tribunal have granted disability pension in similar cases, as such the applicant be granted disability element of disability pension and its rounding off to 50%.

5. On the other hand, Ld. Counsel for the respondents contended that disability of the applicant @ 15-19% for life has been regarded as NANA by the RMB, as per Regulation 153 of Pension Regulations for the IAF, 1961 (Part – I) the applicant is not entitled to disability element of disability pension. He pleaded for dismissal of the Original Application

6. We have heard learned counsel of both sides and found that moot question involved in this case is whether disability element is payable to an incumbent whose disability has been considered as

neither attributable to nor aggravated by service and has been assessed less than 20%?

7. For grant of invalid pension, the relevant portions of the Pension Regulations for the Army 1961 (Part I) and Entitlement Rules for Casualty Pension Award, 1982 are reproduced below:-

(b) Para 197 of Pension Regulations for the Army 1961 (Part- 1) - (Invalid Pension/Gratuity when Admissible)

197. Invalid pension/gratuity shall be admissible in accordance with the Regulations in this chapter to:-

(a) an individual who is invalided out of service on account of a disability which is neither attributable to nor aggravated by service;

(b) an individual who is though invalided out of service on account of a disability which is attributable to or aggravated by service, but the disability is assessed less than 20% and

(c) a low medical category individual who is retired/discharged from service for lack of alternative employment compatible with his low medical category.

“(d) Entitlement Rules for Casualty Pensionary Awards, 1982

4. Invaliding from service is necessary condition for grant of a disability pension. An individual who, at the time of his release under the Release Regulation, is in a lower medical category than that in which he was recruited, will be treated as invalided from service. JCOs/ORs & equivalentents in other services who are placed permanently in a medical category other than “A” and are discharged because no alternative employment suitable to their low medical category can be provided, as well as those who having been retained in alternative employment but are

discharged before the completion of their engagement will be deemed to have been invalided out of service.

8. In view of the aforesaid discussions, we are of the considered view that provisions of Regulations 197 and 198 of the Pension Regulations for the Army 1961 (Part- 1) helps the applicant in as much as when a person is discharged in lower medical category than in which he was recruited, he would be treated to be invalided out of service. Admittedly, the applicant was recruited in a medically fit condition and was discharged in low medical category, thus, as per para 4 of Entitlement Rules, he is to be treated as invalided out of service. Since he has been considered as invalidated out of service he becomes entitled to the benefits, therefore, he is to be considered as invalided out from service.

9. The law is settled that even if disability percentage is less than 20%, it would stand rounded off to 50% (in cases after their superannuation). Further as per Guide to Medical Officers, assessment of disability percentage in Diabetes Mellitus have been framed as (i) DM Type II without target organ damage (TOD) is 20%, (ii) DM Type II on insulin without target organ damage is 30%, (iii) DM Type II with TOD 40% and above. The applicant has relied upon judgment of the Hon'ble Apex Court in the case of **Sukhvinder Singh Vs. Union of India**, reported in (2014) STPL

(WEB) 468 SC. In para 9 of the judgment Hon'ble Apex Court has held as under:-

“9. We are of the persuasion, therefore, that firstly, 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 consequence of military service. The benefit of doubt is rightly extended in favour of the member of the Armed Forces; any other conclusion would be tantamount to granting a premium to the Recruitment Medical Board for their own negligence. Secondly, the morale of the Armed Forces requires absolute and undiluted protection and if an injury leads to loss of service without any recompense, this morale would be severely undermined.....”

10. So far as disability which is shown to be assessed as less than 20-% is concerned, various Tribunals and Courts have found that the assessment of disability to the tune of 15% to 19% itself is a doubtful assessment and cannot be final for the simple reason that there is no barometer which can assess the disability percentage to the extent of 1% and therefore the percentage of disability which has been assessed as 15% to 19% may be 20% also and there may be variation of at least two percent plus also. In case of doubt as per the Pension Regulations, the benefit should always be given to the applicant. Probably because of this reason the Union of India must have issued the order dated 31.01.2001 to provide for giving the benefit of rounding off the disability pension to 50% to the persons who are having less than 50% of the disability.

11. The law on attributability of a disability has already been settled by the Hon'ble Supreme Court in the case of ***Dharamvir Singh Versus Union of India & Others***, reported in (2013) 7 Supreme Court Cases 316. In this case the Hon'ble 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)."*

12. The initial presumption that the applicant was physically fit and free from any disease and in sound physical and mental condition at the time of entering into service remains unrebutted. We are, therefore, of the considered opinion that the benefit of doubt in these circumstances should be given to the applicant in view of ***Dharamvir Singh vs Union of India & Ors*** (supra) and the disability of the applicant should be considered as aggravated by military service.

13. On the issue of rounding off of disability pension, we are of the opinion that the case is squarely covered by the decision of ***K.J.S. Buttar vs. Union of India and Others***, reported in (2011) 11 SCC 429 and Review Petition (C) No. 2688 of 2013 in Civil appeal No. 5591/2006, ***U.O.I. & Anr vs. K.J.S. Buttar*** and ***Union of India vs. Ram Avtar & Others***, (Civil Appeal No. 418 of 2012 decided on 10

December, 2014. Hence the applicant is eligible for the benefit of rounding off.

14. In the instant case the applicant was recruited in medically fit condition and was discharged in low medical category. His disability has been considered as neither attributable to nor aggravated by military service and it has been assessed as less than 20%. In view of the discussions made above, we are of the view that the applicant is entitled for the grant of disability element and Original Application deserves to be allowed.

15. In view of the above, the Original Application is **allowed**. The impugned order rejecting claim for grant of disability element is set aside. The applicant is already in receipt of service element hence respondents are directed to grant disability element of the pension @ 15% to 19% deemed to be 20% for life, which shall stand rounded off to 50% for life from the date of discharge. The entire exercise shall be completed by the respondents within four months from the date of production of a certified copy of this order, failing which the respondents shall be liable to pay interest at the rate of 8% to the applicant on the amount accrued till the date of actual payment.

16. No order as to costs.

(Vice Admiral Atul Kumar Jain)
Member (A)

Dated : 05 April, 2023

UKT/-

(Justice Ravindra Nath Kakkar)
Member (J)