

Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 87 of 2022

Wednesday, this the 22nd day of March, 2023

**“Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon’ble Vice Admiral Atul Kumar Jain, Member (A)”**

No. 6384616A Ex. Hav. Durgesh Kumar Mishra, S/o Late Surendra Mishra, Resident of E-1/790 Vinay Khand-1, Gomti Nagar, District Lucknow, Pin-226010 (UP).

..... **Applicant**

Ld. Counsel for : **Shri K.P. Datta**, Advocate.
the applicant

Versus

1. Union of India through its Secretary, Integrated HQs of MoD (Army), New Delhi-110011.
2. The Chief of Army Staff, COAS Sectt., Integrated HQs of MoD (Army), New Delhi-110001.
3. The Officer-in-Charge, ASC Records (South), Bangalore, Pin-560007 (Karnataka).
4. The PCDA (P), Draupadi Ghat, Allahabad, Pin-211014 (UP).

.....**Respondents**

Ld. Counsel for the: **Shri Adesh Kumar Gupta**, Advocate
Respondents. Central Govt Counsel.

ORDER

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

- A. *To issue/pass an order or direction to set-aside/quash rejection order passed by ASC Records (South) Bangalore vide their letter No. 6384616A/Disb/Pen/DP-III dated 09 Nov 2021.*
- B. *To issue/pass an order or directions to the respondents to grant the applicant disability element of disability pension @50% and benefits of Rounding off/Broad banding @50% to @75% along with arrears and interest @18% p.a. on arrears from the date of discharge wef 31.08.2007 in light of Judgment of Hon'ble Apex court, Orders of Hon'ble AFT pass in similar cases and Govt of India Policy letters.*
- C. *To issue/pass any other order or direction as this Hon'ble Tribunal may deem just, fit and proper under the circumstances of the case in favour of the applicant.*

2. The brief facts of the case are that the applicant was enrolled in the Indian Army on 21.09.1987 and was discharged from service on 31.08.2007 in Low Medical Category being unwilling to continue in service before completion of terms of engagement on the rank of Havildar under Rule 13 (3) Item III (v) of the Army Rules, 1954 read in conjunction with Rule 13(2A) of the Army Rules, 1954. At the time of discharge, Release Medical Board (RMB) held at Military Hospital, Bhuj (Gujarat) on 31.08.2007 assessed his disability '**SCHIZO AFFECTIVE DISORDER**' @NIL for life and opined the disability to be neither attributable to nor aggravated by military service. However, as

per the Original Application, the degree of disability was assessed @50% as aggravated by military service by the RMB. Applicant's claim for grant of disability element of disability pension was rejected vide letter dated 08.09.2007. The applicant preferred Petition dated 26.07.2021 which too was rejected vide letter dated 15.09.2021. The applicant preferred another petition dated 17.10.2021 which too was rejected 09.11.2021. The applicant also raised grievance dated 04.12.2021 which too was rejected vide letter dated 30.12.2021. It is in this perspective that the applicant has preferred the present Original Application.

3. Learned Counsel for the applicant pleaded that at the time of enrolment, the applicant was found mentally and physically fit for service in the Army and there is no note in the service documents that he was suffering from any disease at the time of enrolment in Army. The disease of the applicant was contracted during the service, hence it is attributable to and aggravated by Military Service. He further submitted initially the RMB has assessed the applicant's disability @50% for life as aggravated by service. In support thereof he has produced the copy of Abstract of Records of AFMSF 16 of the Release Medical Board. Ld. Counsel for the applicant has relied upon the Hon'ble Apex Court judgment in the case of **Sukhwinder Singh vs Union of India & Ors**, reported in (2014) STPL (WEB) 468 SC and contended that since applicant's services were cut short and he

was discharged from service prior to completion of terms of engagement as Havildar, therefore his discharge from service should be a deemed invalidation as held in the case of **Sukhwinder Singh** (supra) and applicant deserves to be granted disability element of disability pension with its rounding off.

4. On the other hand, Ld. Counsel for the respondents submitted that as the disability of applicant has been assessed @NIL for life i.e. below 20%, he is not entitled to disability element of pension in terms of para 173 of Pension Regulations for the Army, 1961 (Part – I) and his claim was rightly denied by the respondents being disability below 20% (NIL for life), he is not entitled for grant of disability element of disability pension. He pleaded for dismissal of the Original Application.

5. We have heard learned counsel for the parties and perused the material placed on record.

6. For adjudication of the controversy involved in the instant case, we need to address only two issues; firstly, is the discharge of applicant a case of normal discharge or invalidation? and secondly is applicant is entitled to disability element of pension being disability below 20% attributable to military service.

7. For the purpose of first question as to whether the discharge of the applicant by Release Medical Board is a case of discharge or invalidation. In this context, it is clear that the applicant was

discharged from service on his own request on compassionate grounds before completion of his terms of engagement in low medical category. In this regard, Rule 4 of the Entitlement Rules for Casualty Pensionary Awards, 1982 defines invalidation as follows:

“Invaliding from service is a necessary condition for grant of a disability pension. An individual, who, at the time of his release under the Release Regulations, is in a lower medical category than that in which he was recruited will be treated as invalided from service. JCOs/ORs and equivalent 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. Thus, in light of above definition, it is clear that the applicant was in low medical category as compared the one when he was enrolled and hence his discharge is to be deemed as invalidation out of service.

9. The law on this point is very clear as reported in (2014) STPL (WEB) 468, **Sukhwinder Singh vs Union of India & Ors.** Para 9 of the aforesaid judgment being relevant is reproduced 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. Thirdly, there appears to be no provisions

authorising the discharge or invaliding out of service where the disability is below twenty percent and seems to us to be logically so. Fourthly, whenever a member of the Armed Forces is invalided out of service, it perforce has to be assumed that his disability was found to be above twenty per cent. Fifthly, as per the extant Rules/Regulations, a disability leading to invaliding out of service would attract the grant of fifty per cent disability pension."

10. From the above mentioned Rule on disability pension and ratio of law emerging out of above Hon'ble Apex Court's judgment, it is clear that once a person has been recruited in a fit medical category, the benefit of doubt will lean in his favour unless cogent reasons are given by the Medical Board as to why the disease could not be detected at the time of enrolment. In this case, we find that the applicant was placed in low medical category due to his disability contracted in service, we are of the considered opinion that the benefit of doubt in these circumstances should be given to the applicant, and the disability of the applicant should be considered as aggravated by military service. The aforesaid law also makes clear that in case of invalidation the disability percentage is presumed to above 20% irrespective of the disability percentage assessed by RMB/IMB.

11. In view of the above, we are of the considered opinion that applicant's discharge vide Release Medical Board held on 13.08.2007 is to be treated as invalidation in terms of Rule 4 of the Entitlement Rules (supra).

12. On perusal of record, we find in the copy of Abstract of Records of AFMMSF 16 produced by the applicant that the

degree of disability was assessed @50%, constitutional disorder, aggravated by military service. We have also perused the original RMB proceedings, which has been produced by the respondents and we find that there are manipulations by using whitener on the places of degree of disablement and its aggravation, which creates doubt about its genuineness. Since the applicant was invalided out from service before completion of terms of engagement on the rank of Havildar, we are of the opinion that if the degree of disablement of Nil assessed by the RMB, even then it shall be presumed above @20% as aggravated by military service.

13. Additionally, consequent upon the issue of Government of India, Ministry of Defence letter No. 17(01)/2017(01)/D(Pen/Policy) dated 23.01.2018, Principal Controller of Defence Accounts (Pensions), Prayagraj has issued Circular No. 596 dated 09.02.2018 wherein it is provided that the cases where Armed Forces Pensioners who were retired/discharged voluntary or otherwise with disability and they were in receipt of Disability/War Injury Element as on 31.12.2015, their extent of disability/War Injury Element shall be re-computed in the manner given in the said Circular which is applicable with effect from 01.01.2016.

14. It is also observed that claim for pension is based on continuing wrong and relief can be granted if such continuing

wrong creates a continuing source of injury. In the case of **Shiv Dass vs. Union of India**, reported in 2007 (3) SLR 445, Hon'ble Apex Court has observed:

"In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition. It would depend upon the fact of each case. If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years. The High Court did not examine whether on merit appellant had a case. If on merits it would have found that there was no scope for interference, it would have dismissed the writ petition on that score alone."

15. As such, in view of the decision of Hon'ble Supreme Court in the case of **Shiv Dass and Sukhwinder Singh vs Union of India & Ors.** (supra) as well as Government of India, Ministry of Defence letter No. 17(01)/2017(01)/D(Pen/Policy) dated 23.01.2018, we are of the considered view that benefit of rounding off of disability element of pension above @20% for life to be rounded off to 50% for life may be extended to the applicant with effect from three preceding years from the date of filing of the Original Application.

16. In view of the above, the **Original Application No. 87 of 2022** to be allowed, hence allowed. The impugned orders, rejecting the applicant's claim for grant of disability element of disability pension, are set aside. The disability of the applicant is

held above @20% for life. The applicant is entitled to get disability element @20% for life which would be rounded off to 50% for life w.e.f. three years preceding the date of filing of Original Application. The respondents are directed to grant disability element to the applicant @20% for life which would stand rounded off to 50% for life w.e.f. three years preceding the date of filing of Original Application. The date of filing of Original Application is 08.02.2022. The respondents are further directed to give effect to this order within a period of four months from the date of receipt of a certified copy of this order. Default will invite interest @ 8% per annum till the actual payment

17. No order as to costs.

(Vice Admiral Atul Kumar Jain)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated: 22 March, 2023
AKD/-