

Court No. 1

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

Original Application No 1005 of 2022

Tuesday, this the 21st day of March, 2023

Hon'ble Mr. Justice Ravindra Nath Kakkar, Member (J)
Hon'ble Vice Admiral Atul Kumar Jain, Member (A)

672552-S MWO Dinesh Kumar Dwivedi S/o Sri Shivswaroop Dwivedi, R/o - Village & PO – Sidhaon, District – Fatehpur (UP) - 212663.

..... Applicant

Applicant Shri Dinesh Kumar Dwivedi in person

Versus

1. Union of India, through Principal Secretary, Ministry of Defence, South Block, New Delhi.
2. The Chief of the Air Staff, Air Headquarters, Vayu Bhawan, Rafi Marg, New Delhi.
3. The Directorate of Air Veteran, Air Headquarters (SP), AFRO Building, Subroto Park, New Delhi – 110010.
4. The Joint Controller of Defence Accounts (Air Force), AFRO Building, Subroto Park, New Delhi- 110010.

..... Respondents

Ld. Counsel for the Respondents : **Mrs. Kavita Mishra,**
Central Govt. Counsel.

ORDER (ORAL)

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

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 issue /pass an order or direction of appropriate nature to the respondents to set aside/ quash the impugned order dated 15.11.2021 (Annexure 1 (colly)).

(b) To issue / pass an order or direction of appropriate nature to the respondents directing to grant disability pension from the date of discharge i.e. 31.03.2021.

(c) To issue/pass an order or direction to the respondents to round off the disability pension from 40% for life to 50% for life.

(d) To issue / pass any other order or direction as this Hon’ble Tribunal may deem fit in the circumstances of the case.

(e) Allow this application with exemplary costs.”

2. The facts of the case, in brief, are that applicant was enrolled in the Indian Air Force on 10.01.1981 and was discharged from service on 31.03.2021 in low medical category after serving more than 40 years of service. The Release Medical Board (RMB) assessed his disabilities (i) “**DIMORPHIC ANAEMIA (OLD)**” @ 15% for life, (ii) “**PRIMARY HYPERTENSION (Old)**” @ 30% for life and the composite assessment for these disabilities were assessed @ 40% for life and opined that all the disabilities of the applicant were neither attributable to nor aggravated by military service (NANA). The applicant’s claim for grant of disability pension was rejected by the respondents vide order dated 15.11.2021. Thereafter, applicant submitted an appeal dated 30.12.2021 which has not been replied by the respondents and his appeal dated 30.12.2021 is still pending with the respondents. Being denied by disability pension, the instant Original Application has been filed.

3. Applicant submitted that he was medically fit when he was enrolled in the service and any disability not recorded at the time of enrolment should be presumed to have been caused subsequently. The action of the respondents in not granting disability pension to him is illegal. In this regard, he relied on the decision of the Hon’ble Supreme Court in the case of ***Dharamvir Singh vs. Union of India and others***, (2013) AIR SCW 4236 and ***Sukhvinder Singh vs.***

Union of India & Others (2014 STPL (Web) 468 SC and submitted that for the purpose of determining attributability of the disease to military service, what is material is whether the disability was detected during the initial pre-commissioning medical tests and if no disability was detected at that time, then it is to be presumed that the disabilities arose while in service, therefore, the disabilities of the applicant are to be considered as aggravated by service and he is entitled to get disability pension @ 40% rounded of to 50%.

4. On the other hand, learned counsel for the respondents has filed the Counter Affidavit and submitted that though the RMB had assessed the disabilities of the applicant (i) @15%, and (ii) @30% for life but it opined that the disabilities are NANA. As such, under the provisions of Rule 153 of Pension Regulations for Indian Air Force 1961 (Part 1), his claim for disability pension has rightly been rejected by the respondents. He submitted that the instant Original Application does not have any merit and the same is to be dismissed.

5. We have heard the applicant as also Ld. Counsel for the respondents. We have also gone through the Release Medical Board proceedings as well as the records and we find that the questions which need to be answered are of two folds:-

- (a) Whether the disabilities of the applicant are attributable to or aggravated by Air Force Service?
- (b) Whether the applicant is entitled for the benefit of rounding off the disability pension?

6. 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 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)."

7. In view of the settled position of law on attributability, we find that the RMB has denied attributability to the applicant only by endorsing that the disability is neither attributable to nor aggravated (NANA) by service on the ground of onset of disability is constitutional in nature and due to dietary deficiency. Onset ID was on Sep 2016 in Field Area Srinagar. No close time association with stress and strain/HAA/CI Ops service therefore, applicant is not entitled to disability element. However, considering the facts and

circumstances of the case, we are of the opinion that this reasoning of Release Medical Board for denying disability element to applicant is not convincing and doesn't reflect the complete truth on the matter. Peace Stations have their own pressure of rigorous Air Force training and associated stress and strain of Air Force service. The applicant was enrolled in Indian Air Force on 10.01.1981 and the disability has started after more than 35 years of Air Force service i.e. in the year 2016. 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 Air Force service.

8. The law on the point of rounding off of disability pension is no more RES INTEGRA in view of Hon'ble Supreme Court judgment in the case of ***Union of India and Ors vs Ram Avtar & ors*** (Civil appeal No 418 of 2012 decided on 10th December 2014). In this Judgment the Hon'ble Apex Court nodded in disapproval of the policy of the Government of India in granting the benefit of rounding off of disability pension only to the personnel who have been invalided out of service and denying the same to the personnel who have retired on attaining the age of superannuation or on completion

of their tenure of engagement. The relevant portion of the decision is excerpted below:-

“4. By the present set of appeals, the appellant (s) raise the question, whether or not, an individual, who has retired on attaining the age of superannuation or on completion of his tenure of engagement, if found to be suffering from some disability which is attributable to or aggravated by the military service, is entitled to be granted the benefit of rounding off of disability pension. The appellant(s) herein would contend that, on the basis of Circular No 1(2)/97/D (Pen-C) issued by the Ministry of Defence, Government of India, dated 31.01.2001, the aforesaid benefit is made available only to an Armed Forces Personnel who is invalidated out of service, and not to any other category of Armed Forces Personnel mentioned hereinabove.

5. We have heard Learned Counsel for the parties to the lis.

6. We do not see any error in the impugned judgment (s) and order(s) and therefore, all the appeals which pertain to the concept of rounding off of the disability pension are dismissed, with no order as to costs.

7. The dismissal of these matters will be taken note of by the High Courts as well as by the Tribunals in granting appropriate relief to the pensioners before them, if any, who are getting or are entitled to the disability pension.

8. This Court grants six weeks' time from today to the appellant(s) to comply with the orders and directions passed by us.”

9. 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.”

10. As such, in view of the decision of Hon'ble Supreme Court in the case of **Shiv Dass (supra)**, we are of the considered view that benefit of rounding off of disability pension @ 40% for life to be rounded off to 50% for life may be extended to the applicant from the date of discharge.

11. In view of the above, the Original Application No. 1005 of 2022 deserves to be allowed, hence **allowed**. The impugned order passed by the respondents rejecting the claim for grant of disability element is set aside. The disability of the applicant is held as aggravated by Air Force Service. The applicant is entitled to get disability element @ 40% for life which would be rounded off to 50% for life from the next date of his discharge. The respondents are directed to grant

disability element to the applicant @ 40% for life which would stand rounded off to 50% for life from the next date of his discharge. 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 date of actual payment.

12. No order as to costs.

(Vice Admiral Atul Kumar Jain)
Member (A)

(Justice Ravindra Nath Kakkar)
Member (J)

Dated: 21 March, 2023
UKT/-