

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW**Original Application No 355 of 2021**Friday, this the 6th day of May, 2022**Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)**
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)Ex Sgt Birendra Kumar Gupta (Service No. 775755-L)
S/o Shri Tapeshwar Sah
R/o C/o Sudhir Kumar Pandey
SA3/66DK 2 Shantipuram Colony Azamgarh Road Chotalalpur
Pandeypur, Varanashi (UP) -221102

..... Applicant

Ld. Counsel for the Applicant: **Shri Shiv Kant Pandey,**
Shri Amit Pandey &
Ms. Nisha Pandey, Advocate

Versus

1. Union of India, through Defence Secretary, Ministry of Defence, Govt. of India, South Block, New Delhi-110011.
2. The Chief of Air Staff, Air Headquarters, Vayu Bhawan, Rafi Marg, New Delhi – 110106.
3. Deouty Controller Defence Account (Air Force) Subroto Park New Delhi-110010.
4. The Director Air Veterans (AV-III Appeal) Air HQ AFRO Building Subroto Park, New Delhi – 110010.
5. The Director, Directorate of Air Veterans, Air HQ Subroto Park, New Delhi – 110010.

..... Respondents

Ld. Counsel for the Respondents : **Shri Yogesh Kesarwani,**
Central Govt Counsel**ORDER**

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:-

- “i. This Hon’ble Tribunal may graciously be pleased to set aside the RMB dated 24.09.2015 (Annexure – I to this OA), to the extent whereby disability pension has been denied to applicant.
- ii. This Hon’ble Tribunal may graciously be pleased to set aside letter No. Air HQ/99798/I/775755/07/16/DAV(DP/RMB) dated 10.01.2017 issued by Respondent No. 5 (Annexure-2 to this OA).
- iii. This Hon’ble Tribunal may graciously be pleased to grant disability pension to applicant for life @ 50% wef 01.08.2016.
- iv. This Hon’ble Tribunal may graciously be pleased to direct Dy CDA Subroto Park, New Delhi – Respondent No. 3 to issue the PPO for disability, granting disability pension from 01.08.2016 and for life @ 50% of disability.
- v. This Hon’ble Tribunal may graciously be pleased to direct the Respondents to pay arrears of disability pension, which accrued since 01.08.2016 and till date of actual payment of disability pension.
- vi. This Hon’ble Tribunal may grant any other and further relief to applicant as it deem fit, just and proper in the facts and circumstances of the case.
- vii. This Hon’ble Tribunal may award the cost of petition to applicant.”

2. Briefly stated facts of the case are that the applicant was enrolled in the Air Force on 16.07.1996 and was discharged from service on 31.07.2016 in low medical category after rendering more than 20 years of service. The Release Medical Board (RMB) assessed his disability “**TYPE-II DIABETES MELLITUS (OLD)**” @ 20% for life and opined the disability as neither attributable to nor

aggravated by military service. The disability pension claim of the applicant was rejected by the respondents vide order dated 03.01.2017. The applicant submitted first appeal dated 04.01.2021 which is pending with the respondents for decision. It is in this perspective that the applicant has preferred the present O.A.

3. Learned Counsel for the applicant submitted that at the time of enrolment, the applicant was found mentally and physically fit for service in the Indian Air Force and there is no note in the service documents that he was suffering from any disease at the time of enrolment. The disease of the applicant was contracted during the service, hence it is attributable to and aggravated by Military Service. He submitted that the act of overruling the recommendations of RMB by higher competent authority was wrong and should be set aside. He placed reliance on the judgment of the Hon'ble Apex Court in the case of ***Dharamvir Singh vs. UOI & Ors***, (2013) STPL (Web) 498 SC and ***Sukhvinder Singh vs. Union of India***, reported in (2014) 14 SCC 364 and pleaded that applicant be granted disability pension @ 20% duly rounded off to 50% in view of ***Union of India vs. Ram Avtar***, decided on 10.12.2014 and Govt. of India letter dated 31.01.2001.

4. On the other hand, Ld. Counsel for the respondents contended that disability of the applicant i.e. "**TYPE-II DIABETES MELLITUS (OLD)**" has been assessed as 20% for life by RMB as neither attributable to nor aggravated by military service and not connected with service. Hence, as per Rule 153 of Pension Regulations for the

Air Force, 1961 (Part-1), applicant is not entitled for disability pension. He pleaded for dismissal of the O.A.

5. Heard learned counsel for the parties and perused the material placed on record. We have also gone through the RMB and the rejection order of disability pension claim. The question before us is simple and straight i.e. – is the disability of applicant attributable to or aggravated by military service?

6. The law on attributability of a disability has already been well settled by the Hon'ble Supreme Court in the case of ***Dharamvir Singh Vs. Union of India and Ors***, (2013) 7 SCC 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/aggravation, we find that the RMB has denied attributability/aggravation to applicant for the reason by declaring the disease as NANA is that 'applicant was not posted to HAA/Ops Locations/Field Area at the time of onset of the disability, hence, neither attributable to nor aggravated by the service'. However, on further scrutiny, we have observed that disability was initially detected in the year 2015 after about 19 years of service. We are, therefore, of the considered opinion that the reasons given in RMB for declaring disease as NANA is very brief and cryptic in nature and do not adequately explain the denial of attributability. We don't agree with the view that there is no stress and strain of service in military stations located in peace areas. Hence, we are inclined to give benefit of doubt in favour of the applicant as per the Hon'ble Supreme Court judgment of **Dharamvir Singh** (supra) and his disability should be considered as aggravated by military service.

8. In view of the above, applicant is held entitled to 20% disability element for life from the date of discharge from service. The applicant will also be eligible for the benefit of rounding off of disability element

from 20% to 50% for life in terms of the decision of Hon'ble Supreme Court in ***Union of India and others v. Ram Avtar*** (Civil Appeal No 418 of 2012 dated 10.12.2014).

9. As a result of foregoing discussion, the O.A. is **allowed**. The impugned order is set aside. The disability of the applicant is to be considered as aggravated by military service. The applicant is entitled to disability element of pension @ 20% for life duly rounded off to 50% for life from the date of discharge from service. The respondents are directed to grant disability element @ 50% for life from the date of discharge 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 disability element 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 07.07.2021. The respondents are directed to give effect to this order within a period of four months from the date of receipt of certified copy of the order. Default will invite interest @ 8% per annum till actual payment.

10. No order as to costs.

11. Pending Misc. Application(s), if any, shall stand disposed of.

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

Dated: May, 2022

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