

RESERVED
Court No.1

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW
(CIRCUIT BENCH AT NAINITAL)**

Original Application No. 526 of 2017

Thursday, this the 01st day of November 2018

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

Smt. Radha Devi, Widow of No. 10182899-W Ex (Now late) Sepoy Trilok Singh, resident of C/O Shri Mahesh Chandra Lohani, Near Dayanand School, Jagriti Colony, District-Pithoragarh, Pincode-262554 (Uttarakhand).

..... Applicant

Ld. Counsel for the: **Shri KKS Bisht**, Advocate
Applicant

Versus

1. Union of India, through the Secretary, Ministry of Defence, South Block, New Delhi-110011.
2. Chief of the Army Staff, Integrated Headquarter of the Ministry of Defence (Army), South Block, New Delhi-110011.
3. Officer-in-Charge Records, The Kumaon Regiment, PIN-900473, C/O 56 APO.
4. Principal Controller Defence Accounts (Pension), Draupadi Ghat, Allahabad (U.P.)-211014

..... Respondents

Ld. Counsel for the Respondents : **Dr. Shailendra Sharma Atal**
Central Govt Counsel.

ORDER**“Per Hon’ble Air Marshal BBP Sinha, Member (A)”**

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) *Issue/pass an order or direction to the respondents to quash/set-aside the arbitrary, capricious and illegal order passed by the Records, respondent No 3 vide their letter No 10182899/DP dated 17 Oct 2008 (Annexure No A-1 (ii) rejecting the disability pension claim of deceased husband of the applicant.*
- (b) *Issue/pass an order or direction to the respondents to quash/set-aside the arbitrary, capricious and illegal order passed by the Appellate Committee on First Appeals (ACFA) vide IHQ of MoD (Army) letter No B/40502/880/09/AG/PS-4 (IMP-II) dated 15 Mar 2010 (Annexure No A-1 (iv) rejecting the disability pension claim of deceased husband of the applicant.*
- (c) *Issue/pass an order or direction to the respondents to quash/set-aside the arbitrary, capricious and illegal order passed by the Second Appellate Committee on Pension (SACP) vide letter No B/38046A/164/2010/AG/PS-4 (2nd Appeal) dated 07 Nov 2014 (Annexure no A-1 (v) rejecting the disability pension claim of deceased husband of the applicant.*
- (d) *Issue/Pass an order or direction of appropriate nature to the respondents to grant arrears of disability pension, at the rate of 20% which after rounding of will be 50% disability pension, payable to her deceased husband with effect from 29 Feb 2009 (discharge date) to 12.09.2009 (date of death) along with interest at the rate of 18% per annum.*
- (e) *Issue/pass an order or direction of appropriate nature to the respondents to grant arrears of family pension with effect from 12.09.2009 (date of death) along with interest at the rate of 18% per annum till the date of actual payment of*

family pension applicable to her and thereafter family pension applicable to her for life.

(f) Issue/pass any other order or direction as this Hon'ble Tribunal may deem fit in the circumstances of the case.

(g) Allow this application with costs.

2. Brief facts of the case are that the husband of the applicant was enrolled in the Territorial Army on 01.01.2004 and discharged from service in low medical category on 28.02.2008 under Rule 14 (b) (iv) of the TA Act, 1948 before completing terms of engagement having rendered about four years of service. Prior to discharge from service, the applicant was brought before Release Medical Board (RMB) held on 17.01.2008 which assessed applicant's disability S1H1A1P2(P)E1 @ 20% for life neither attributable to nor aggravated by military service (NANA). Claim for grant of disability pension preferred by husband of the applicant was rejected on 17.10.2008 on the ground of disability being NANA. Meanwhile husband of the applicant died on 12.09.2009. The first and second appeals preferred by the applicant for grant of disability pension were rejected by the competent authority vide order dated 03.04.2010 and 12.12.2014 respectively. Hence this O.A.

3. Ld. Counsel for the applicant submitted that as per law on the subject any disability not recorded at the time of enrolment must be presumed to have been caused subsequently and unless proved contrary to be a consequence of military service. He further pleaded that the disability "ANALPLASTIC ASTROCYTOMA (RT) FRONTOPARTIENTAL

REGION (OPTD)” should be considered as aggravated by military service as it first took place after two years of service. Relying upon the Hon’ble Apex Court judgment in the case of ***Dharamvir Singh vs Union of India & Ors***, reported in (2013) 7 SCC 316, Ld. Counsel for the applicant vehemently argued that the disease of the husband of the applicant is principally due to stress and strain of military service and should be considered as aggravated by military service.

4. On the other hand, Ld. Counsel for the respondents submitted that the medical authorities regarded disability of the applicant’s husband as neither attributable to nor aggravated by military service and therefore claim for grant of disability pension has rightly been rejected by the pension sanctioning authority on the ground of disability being NANA. Ld. Counsel for the respondents further submitted that claim of disability pension by the applicant does not fall within the ambit of para 173 of Pension Regulations for the Army 1961 (Part-I) which clearly stipulates that “unless otherwise specifically provided a disability pension may be granted to an individual who is invalided out from military service on account of a disability which is attributable to or aggravated by military service and is assessed at 20% or over. In the case in hand disability in respect of husband of the applicant was regarded as neither attributable to nor aggravated by military service, hence claim for grant of disability pension has rightly been denied.

5. We have heard Ld. Counsel for the parties and perused the material placed on record.

6. The only ground before us for adjudication is- "Is the disability attributable to or aggravated by military service"? The law on attributability of a disability has already been well settled by the Hon'ble Supreme Court in the case of **Dharamvir Singh** (supra). 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 well settled position of law on attributability/aggravation we find that the pension sanctioning authority has denied attributability / aggravation to the applicant by mentioning a cryptic sentence i.e. 'Malignancy not related to service' and is therefore NANA. Thus the applicant's husband was suffering from a serious cancer and in medical terms it is well known that the cause of cancer is very difficult to establish. Since the medical board has given no meaningful explanation as to why the disease could not be detected at the time of enrolment and why they consider it as NANA, we therefore are of the considered opinion that the benefit of doubt should be given to the applicant as per the Hon'ble Supreme Court judgment of **Dharamvir Singh** (supra) and the disability of the husband of the applicant should be considered as aggravated by military service.

8. As a result of foregoing discussion, the O.A. is hereby **allowed**. The impugned orders dated 17.10.2008 (Annexure No A-1 (ii) to the O.A.), 15.03.2010 (Annexure No A-1 (iv) to the O.A.) and 07.11.2014 (Annexure No A-1 (v) to the O.A. are set aside.

9. In view of the above, we are of the view that the applicant is entitled to 20% disability pension for life rounded off to 50% disability pension for life for the period from 29.02.2008 (date of discharge of applicant's husband) till 12.09.2009 (date of death) in terms of **Union of India vs Ram Avtar & Ors**, (Civil Appeal No. 418 of 2012 decided on 10 December, 2014). Additionally the applicant as legally wedded wife shall be entitled to family pension w.e.f. 13.09.2009.

10. The respondents are 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 @ 9% per annum.

No order as to costs.

(Air Marshal BBP Sinha) **(Justice SVS Rathore)**
Member (A) **Member (J)**

Dated : November, 2018

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