

Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 801 of 2023

Wednesday, this the 06th day of November, 2024

“Hon’ble Mr. Justice Anil Kumar, Member (J)
Hon’ble Vice Admiral Atul Kumar Jain, Member (A)”

Himanshu Shekhar Tiwari (No. 127174H Ex.LMA III), Son of Shri Prahlad Tiwari, Permanent Resident of Village – Baghauli, Post Office – Bansdih Road, District – Ballia, U.P.

Presently Residing at :- House No. 6A/833, Vrindavan Yojna, Raibareli Road, Lucknow -226029.

..... Applicant

Ld. Counsel for the : **Shri Yashpal Singh**, Advocate.
 Applicant

Versus

1. Union of India, through Secretary, Ministry of Defence, South Block, New Delhi -110011.
2. Officer Incharge, Records, Bureau of Sailors, Cheetah Camp, Mankhurd, Mumbai -400088.
3. Principal Controller of Defence Accounts (Navy), Colaba, Mumbai -400001.
4. Principal Controller of Defence Accounts (Pension), Draupdi Ghat, Prayagraj -273008.
5. Release Medical Board held at INHS Asvini, Colaba, Mumbai through its President.

.....**Respondents**

Ld. Counsel for the : **Shri Rajiv Pandey**, Advocate
 Respondents. Central Govt. Standing Counsel

ORDER

“Per Hon’ble Mr. Justice Anil Kumar, 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) *Issue/pass an order setting aside the recommendations of Release Medical Board dated 25.08.2014 to the extent of holding the applicant’s disability as neither attributable to nor aggravated by Naval Service, and order of rejection of his claim for disability element of pension as orally intimated on 29.05.2023 by the Office of Principal Controller of Defence Accounts, after summoning the relevant original records.*
- (b) *Issue/pass an order directing the respondents to consider case of the applicant for grant of disability pension and provide the same with effect from 01.03.2015, i.e. the next date of discharge, including arrears with interests, and also the benefit of rounding off and other consequential benefits of ex-serviceman.*
- (c) *Issue /pass any other order or direction as this Hon’ble Tribunal may deem fit in the circumstances of the case.*
- (d) *Allow this Original Application with cost.*

2. Briefly stated, applicant was enrolled in the Indian Navy on 06.02.2000 and was discharged on 28.02.2015 in Low Medical Category after completion of terms of engagement after rendering 15 years & 23 days of qualifying service. The applicant was granted Service Pension. Before discharge from service, the

Release Medical Board (RMB) held at Asvini, Mumbai on 25.08.2014 assessed his disability '**GENERALISED SEIZURES ICD G40.3, Z09.0**' @ 20% 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. 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 Navy and there is no note in the service documents that he was suffering from any disease at the time of enrolment in Navy. The disease of the applicant was contracted during the service, hence it is attributable to and aggravated by Naval Service. He pleaded that various Benches of Armed Forces Tribunal have granted disability element of disability pension in similar cases, as such the applicant be granted disability element of disability pension and its rounding off to 50%.

4. On the other hand, Ld. Counsel for the respondents contended that disability of the applicant @ 20% for life has been regarded as NANA by the RMB, hence in terms of Regulation 105-B of the Navy (Pension) Regulations, 1964, wherein it is stipulated that the disability should be either attributable to or aggravated by the Naval Service and minimum assessment for the disability is mandatorily required to be 20% or more, the applicant is not

entitled to disability element of disability pension. He further submitted that the Original Application is not maintainable as the applicant has not availed the alternative remedy by filing First and Second Appeals. He pleaded for dismissal of the Original Application.

5. We have heard Ld. Counsel for the applicant as also Ld. Counsel for the respondents. The respondents ought to have raised the objection with regard to maintainability of the Original Application with regard to filing of First and Second Appeal before admission of the Original Application. At this stage the Original Application cannot be dismissed on the ground that the applicant has not availed the alternative remedy by filing First and Second Appeals as it is not mandatory to file First and Second Appeal before filing of Original Application as Section 21 of the Armed Forces Tribunal Act, 2007 provides that the Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant had availed of the remedies available to him under Army Act, Navy Act and Air Force Act. In the instant case the Original Application has already been admitted vide order dated 01.08.2023.

6. We have gone through the Release Medical Board proceedings as well as the records and we find that the questions which need to be answered are two folds:-

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

7. 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)."

8. 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 “**GENERALISED SEIZURES ICD G40.3, Z09.0**’ is neither attributable to nor aggravated (NANA) by service on the ground of idiopathic illness having no bearing on service, therefore, applicant is not entitled to disability element of disability pension. However, considering the facts and circumstances of the case, we are of the opinion that this reasoning of Release Medical Board for denying disability pension to applicant is cryptic, not convincing and doesn’t reflect the

complete truth on the matter. Although the applicant's disability is a mental disorder, but considering the facts that that the applicant was enrolled in Indian Navy on 06.02.2000, the disability has started after about six years of Navy service i.e. in February 2006 and he was discharged from service on 28.02.2015 on completion of terms of engagement we are of the 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 Naval service.

9. 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."*

10. Additionally, consequent upon the issue of Government of India, Ministry of Defence letter No. 17(01)/2017/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.

11. 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.”

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

13. In view of the above, the **Original Application No. 801 of 2023** deserves to be partly allowed, hence **partly allowed**. The

impugned order, rejecting the applicant's claim for grant of disability element of disability pension, is set aside. The disability of the applicant is held as aggravated by Naval Service. 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 06.07.2023. 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

14. No order as to costs.

**(Vice Admiral Atul Kumar Jain)
Member (A)**

**(Justice Anil Kumar)
Member (J)**

Dated : 06 November, 2024

AKD/-