

RESERVED
Court No.1

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

Original Application No. 225 of 2018

Wednesday, this the 17th day of October 2018

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

No. 1072352K, Ex DFR Rakesh Kumar, S/O Late Harishchandra, R/O Nimaicha, Post-Asoha, Tehsil-Purwa, Distt-Unnao, U.P.

..... Applicant

Ld. Counsel for the Applicant: **Shri PK Shukla** Advocate

Versus

1. Union of India through Secretary Ministry of Defence (Army), South Block, New Delhi-110010.
2. Chief of the Army Staff, IHQ MOD (Army) South Block, New Delhi.
3. The Director (PS-4), General Branch, IHQ MoD (Army), DHQ, Post Office, New Delhi-110011.
4. OIC Records, Armoured Corps Records, Pin-900476, C/o 56 APO.
5. PCDA (Pension), Draupadi Ghat, Allahabad.

..... Respondents

Ld. Counsel for the :**Shri Ashish Kumar Singh**
Respondents Central Govt Counsel.

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

1. This 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) *To issue/pass an order or directions to set aside the order dated 27.11.2003 passed by respondents and decide the First Appeal dated 22.03.2017 regarding Grant of Disability Element of pension in light of Hon’ble Apex Court judgment and Government letter dated 31.01.2001.*
- (b) *To issue/pass an order or directions to the respondents to Grant of Disability element of Pension to the applicant and rounding off the disability pension from 20% to 50% from the date of discharge i.e. 31.07.2003.*
- (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.*
- (d) *To allow this original application with costs.*

2. Brief facts of the case are that the applicant was enrolled in the Indian Army (Armoured Corps) on 29.09.1982 and in due course of time he was promoted to the rank of Dafadar (Dfr). The applicant was discharged from service on 31.07.2003 having rendered more than 20 years of service in low medical category S1H1A1P2(Permt)E1 for ‘**CNS [INV SEIZURE (OLD) 345’]** under Rule 13 (3) III (v) read in conjunction with sub rule 2A of the Army Rules, 1954. It was in the year

1999 that the disease of the applicant was first detected on 25.01.1999 while the applicant was posted in Jammu. Prior to discharge from service the applicant was brought before Release Medical Board (RMB) which assessed his disability @ 20% for life neither attributable to nor aggravated by military service (NANA). Disability pension claim preferred by the applicant was rejected by CDA (P), Allahabad vide order dated 27.11.2003 on the ground that the disease by which the applicant suffered is constitutional in nature and NANA. Appeal preferred by the applicant against rejection of disability pension claim has been rejected on grounds of being time barred.

3. Ld. Counsel for the applicant submitted that the applicant was found fit in all respects at the time of enrolment in the Army and there was no note in his primary service documents with regard to any disease. Therefore whatever the disease with which the applicant suffered during service is attributable to military service. Ld. Counsel for the applicant further submitted that claim for grant of disability pension was rejected by PCDA (P), Allahabad and the disability percentage has been reduced from 20% to 19% as intimated by Record Office letter dated 19.12.2003 whereas they have no authority to change the disability percentage without carrying out applicant's physical examination. Ld. Counsel for the

applicant drew our attention to Entitlement Rules for Casualty Awards, 1982 which provides that a member is presumed to have been in sound physical and mental condition upon entering service except as to physical disabilities noted or recorded at the time of entrance and in the event of his subsequently being discharged from service on medical grounds, any deterioration in his health which took place is entirely due to stress and strain of military service. He also submitted that the disease first started after 17 years of military service hence it should be considered as attributable to and aggravated by military service. Relying upon the Hon'ble Apex Court judgment in the case of ***Union of India & ors vs Ram Avtar***, (Civil Appeal No. 418 of 2012 decided on 10th December 2014), Ld. Counsel for the applicant has submitted that the applicant is entitled to the benefit of rounding off to 50%.

4. On the other hand, Ld. Counsel for the respondents submitted that the applicant was provided sheltered appointment on account of his retention in low medical category BEE (P) with effect from 12.02.2000 in terms of AO 46/80. He further submitted that by means of re-categorisation medical board, the applicant was again placed in medical category BEE (P) with effect from 12.02.2002 but the applicant could not be provided

sheltered appointment due to the Regiment being deployed in operational duties and non availability of sheltered appointment in the unit. Accordingly after service of show cause notice dated 15.01.2003 to the applicant, he was discharged from service being placed in medical category lower than 'AYE' and not meeting the prescribed military standard. After issue of show cause notice the applicant had requested for retention in service in low medical category but the same was not accepted by the authority concerned and after holding RMB the applicant was discharged from service. Ld. Counsel further submitted that as per RMB opinion the disability of the applicant is assessed as 20% & NANA. Accordingly, PCDA (P) Allahabad has rejected the disability pension claim of the applicant on grounds of the disability being NANA. He pleaded for the O.A. to be rejected.

5. Heard the Ld. Counsel for the parties and perused the material placed on record. We have also gone through the Release Medical Board (RMB) held on record. We find the respondents in their counter affidavit have nowhere taken a stand that PCDA (P) has reduced the disability percentage of RMB from 20% to less than 19%. We have also gone through the Records letter of 19.12.2003 as attached in O.A. and find that by reading this letter it cannot be concluded that the disability of the

applicant @ 20% as recommended by RMB has been reduced by PCDA (P) Allahabad. The moot question before us therefore is simple and straight forward 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*** 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 Medical Board has denied attributability to the applicant only by endorsing a cryptic sentence in the RMB i.e. 'disability not connected with military service'. We do not find this cryptic remark adequate to deny attributability to a soldier who was fully fit since his enrolment and the disease in question has started in 1999 i.e. in the 17th years of his service when he was posted in Jammu & Kashmir. Seizures are known to be caused by many factors including head injury and infections. Many times the cause of seizure remains unknown. 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 vs Union of India & Ors*** (supra) and the disability of the applicant should be considered as aggravated by military service.

8. In view of the above the applicant is held entitled to 20% disablement for life which will stand rounded off to 50% disablement for life in terms of ***Union of India vs. Ram Avtar & Others***, (Civil Appeal No. 418 of 2012 decided on 10 December, 2014).

9. As a result of foregoing discussion, the O.A. is **allowed**. The impugned order dated 27.11.2003 (**Annexure No 1 to the O.A.**) is set aside. The applicant shall be entitled to disability element @ 20% for life rounded off to 50% for life w.e.f. three years prior to the date of filing of the present application. The date of filing of present application is 04.12.2017. 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)
Member (A)

(Justice SVS Rathore)
Member (J)

Dated : October, 2018
gsr