

RESERVED
Court No.1

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

Original Application No 255 of 2018

Thursday, this the 25th day of October 2018

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

No. 5844373-K Lance Naik Manoj Kumar Thakur, S/O Lal Babu Thakur, Resident of Village & Post-Mishravalya Tehsil-Motihari, District-East Champaran (Bihar) presently residing at House No. 164, Mohala-Vinayakpur, Rajeev Nagar, Post Office-Kanpur University, District Kanpur (U.P.)

..... Applicant

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

Versus

1. Union of India, through Secretary, Ministry of Defence, South Block, New Delhi-110011.
2. The Chief of Army Staff, Sena Bhawan, New Delhi PIN-110011.
3. Senior Record Officer, Bihar Regiment Record Office, PIN-908765, C/O 56 A.P.O.
4. P.C.D.A (Pension) G3 (RA Section) Draupadi Ghat, Allahabad.

.....Respondents

Ld. Counsel for the :**Shri D.K. Pandey**
Respondents 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:-

- (i) *To quash the impugned order dated 28.03.2004 passed by the OP No.4 after summoning the same from the respondent.*
- (ii) *To pass an order or direction commanding the respondents to grant the disability pension of the applicant from the date of discharge i.e. 01.11.2003.*
- (iii) *To pass an order or direction commanding the respondents to pay the arrear of the disability pension from the date of discharge along with the interest @ 12% per annum till actual realization of the aforesaid amount.*
- (iv) *To pass an order or direction commanding the respondents to grant the benefits of rounding off his disability pension to the tune of 50% in term of Govt. Of India letter date 31.01.2001 and various judgements of Apex Court as well as this Hon’ble Tribunal.*
- (v) *To pass an order which this Hon’ble Tribunal deems fit and just under the facts and circumstances of the case, in favour of the applicant.*
- (vi) *Allow the Original application with exemplary cost.*

2. Brief facts of the case are that the applicant was enrolled in the Indian Army on 15.02.1988 and discharged from service after rendering 15 years, 08 months and 16 days of service on 31.10.2003 (AN). The medical record shows that the disease first took place in October 1994 when the applicant was posted in Somalia (UN Mission) and he was placed in lower medical category than S1H1A1P1E1. Though the applicant was willing to serve further in low medical category but on

account of non availability of sheltered appointment in the unit, he was not permitted by the Commanding Officer (CO) to continue in service vide order dated 12.03.2003. Prior to discharge from service, the applicant was brought before Release Medical Board (RMB) held at Base Hospital, Delhi Cantt on 22.08.2003 which placed the applicant in low medical category B(permt) due to disability '**Hypermetropic Ambiyopia Right Eye 342**' with disability element @ 30% for life neither attributable to nor aggravated (NANA) by military service. Disability pension claim preferred by the applicant was rejected by PCDA (P), Allahabad vide order dated 28.03.2004.

3. Ld. Counsel for the applicant submitted that the applicant took active part in UN Mission (Somalia) and Kargil War in 1995 and 1999 respectively. The applicant was awarded '**Vishisht Seva Medal (VSM)**' for his distinguished services rendered in the Army. Ld. Counsel for the applicant placed reliance on the judgment of Hon'ble Apex Court in the case of '**Dharamvir Singh vs Union of India & Ors**' reported in (2013) 7 SCC 316 and submitted that the disability of the applicant should be held attributable to and aggravated by military service as the incident took place while the applicant was serving in a mission abroad.

4. On the other hand, Ld. Counsel for the respondents conceded that the medical board has assessed applicant's disability @ 30% for life but submitted that the applicant is not

entitled to grant of disability pension as the medical board has opined applicant's disability as NANA. He further submitted that PCDA (P) Allahabad has rightly rejected disability pension claim of the applicant on the ground of disability being NANA.

5. Heard the Ld. Counsel for the parties and perused the material placed on record. We have also gone through the medical papers and RMB held on record. 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*** (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. Apart from above, we have given our anxious considerations and we find that the RMB has denied attributability to the applicant but on careful perusal of the medical records annexed to the O.A. it clearly establishes that the applicant had sustained injury by a branch in a foreign land i.e. Somalia during UN Mission causing disability in his right eye during the year 1994.

8. We fail to understand as to why the injury sustained by the applicant on active service in a foreign country on UN

Mission was not regarded as attributable to military service by the RMB held at the time of discharge?

9. The RMB in the opinion column has endorsed a cryptic sentence viz. 'Idio Pathic not related to military service'. In medical terms Idiopathic means cause of disease not known. Thus if the cause of a disease is not known thereafter presuming it to be not connected to service is not being fair particularly so when the disability started in a foreign country on duty. Thus to deny attributability to a soldier who was fully fit since his enrolment and the problem started only in October 1994 when the applicant was injured while performing duty in UN Mission i.e. after about 06 years of his service. In this connection, summary and opinion dated 05.09.1995 given by Maj S Agrawal, Graded Specialist (Ophthalmology), 151 Base Hospital is relevant and the same is excerpted hereunder:-

"24 year old serving soldier c/o diminished vision RE of 1 yr duration. The diminution was noticed when he sustained a trivial injury RE by a branch. He had ocular congestion which subsided without medication. No retractive correction taken so far. No info other ocular ailment or any septic illness."

10. Thus, denial of attributability on the unsubstantiated ground that the disease has no relation with service conditions goes against fair play and principles of natural justice. We are, therefore, 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 attributable to military service.

11. In view of the above the applicant is held entitled to 30% disability element for life which shall stand rounded off to 50% disability element for life in terms of **Union of India vs. Ram Avtar & Others**, (Civil Appeal No. 418 of 2012 decided on 10 December, 2014.

12. As a result of foregoing discussion, the O.A. is **allowed**. The impugned order dated 28.03.2004 is set aside. The applicant shall be entitled to disability element @ 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 08.03.2018. 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)

Dated : October, 2018

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(Justice SVS Rathore)
Member (J)