

RESERVED
Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 539 of 2018

Monday, this the 30th day of September, 2019

“Hon’ble Mr. Justice Virender Singh, Chairperson
Hon’ble Air Marshal B.B.P. Sinha, Member (A)”

No. 6384055W Hawaldar Clerk Lallan Tiwari, Son of Late Sri Purushottam Tiwari, Resident of Village Lautehi Bazar, Post Laxmipur (Rudrapur), District Deoria, U.P. – 274202, presently residing at 62M, Abhishek Nagar, Shivpur, Kunaghat, Gorakhpur-273008.

..... Applicant

Ld. Counsel for the: **Shri Veer Raghav Chaubey**, Advocate.
Applicant

Versus

1. Union of India through Secretary, Ministry of Defence, Government of India, South Block, New Delhi-110011.
2. Record Office, A.S.C., Supply, Southern, Bangaluru.
3. Office of the PCDAP, Drowpadi Ghat, Allahabad.
4. A.S.C. Records (South), Bangluru, C/o 56 APO-560007.

.....**Respondents**

Ld. Counsel for the
Respondents.

: **Dr. S.N. Pandey**,
Central Govt. Counsel

ORDER

“Per Hon’ble Air Marshal B.B.P. Sinha, Member (A)”

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs.

- (i) *This Hon’ble Tribunal may kindly be pleased to direct the respondents to grant the 30% to 50% disability pension.*
- (ii) *This Hon’ble Tribunal may granted to disability pension w.e.f. 30.06.2011.*
- (iii) *Pass any other order or direction which this Hon’ble Tribunal may deem fit and proper under the circumstances of the case.*

2. Briefly stated facts of the case are that the applicant was enrolled in the Indian Army on 29.06.1987 and was discharged on 30.06.2011 in Low Medical Category on fulfilling the conditions of his enrolment. At the time of retirement from service, the Release Medical Board (RMB) held at Military Hospital, Shillong on 24.02.2011 assessed his disability ‘**ACUTE MYOCARDIAL INFRACTION (AWI) 23.8 CORONARY ARTERY DISEASE (AMI)**’ @ 30% for life and opined the disability to be neither attributable to nor aggravated (NANA) by service. The applicant approached the respondents for grant of disability pension and its rounding off but of no avail. 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 Army and there is no note in the service documents that he was suffering from any disease at the time of enrolment in Army. The disease of the applicant was contacted during the service, hence it is attributable to and aggravated by Military Service. He pleaded that various Benches of Armed Forces Tribunal have granted disability pension in similar cases, as such the applicant be granted disability pension as well as arrears thereof, as such the applicant is entitled to disability pension and its rounding off to 50%.

4. On the other hand, Ld. Counsel for the respondents contended that disability of the applicant @30% for life has been regarded as NANA by the RMB, hence applicant is not entitled to disability pension. He pleaded for dismissal of the Original Application.

5. We have heard Ld. Counsel for the applicant as also Ld. Counsel for the respondents. We have also gone through the Release Medical Board proceedings as well as the records. The question which needs to be answered is whether the disability of the applicant is attributable to or aggravated by Military Service?

6. 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)."

7. 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 '**ACUTE MYOCARDIAL INFRACTION (AWI) 23.8 CORONARY ARTERY DISEASE (AMI)**' is not connected with service. This one line curt statement of RMB denying attributability is neither convincing nor does it reflect the complete truth on this matter. The applicant was enrolled in Indian Army on 29.06.1987 and the disability has started after more than sixteen years of Army service i.e. in the year 2004. We are therefore of the considered opinion that the benefit of doubt in these circumstances should be given to the applicant in view of the law settled by Hon'ble Supreme Court in the case of ***Dharamvir Singh vs Union of India & Ors*** (supra) and the disability of the applicant should be considered as aggravated by military service. Additionally the applicant will also be eligible for the benefit of rounding off of disability pension from 30% to 50% for life w.e.f. date of discharge, in terms 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).

8. 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.”

9. As such, in view of the decision of Hon'ble Supreme Court in the case of **Shiv Dass (supra)**, we are of the considered view that arrears of disability element will be restricted to three preceding years before the date of filing of the Original Application.

10. In view of the above, the Original Application No. 539 of 2018 is **partly allowed**. The disability '**ACUTE MYOCARDIAL INFRACTION (AWI) 23.8 CORONARY ARTERY DISEASE (AMI)**' @30% for life of the applicant is to be considered as aggravated by military service. The respondents are directed to grant disability element to the applicant @30% for life which would stand rounded off to 50% for life w.e.f. the date of discharge. However, the arrears of disability element will be restricted to three years preceding the

date of filing this Original Application. The date of filing this Original Application is 10.05.2018. 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 till actual payment.

No order as to costs.

(Air Marshal B.B.P. Sinha)
Member (A)

(Justice Virender Singh)
Chairperson

Dated: September, 2019

AKD/-