

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

ORIGINAL APPLICATION No. 709 of 2021

Tuesday, this the 06th day of September, 2022

**“Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon’ble Vice Admiral Abhay Raghunath Karve, Member (A)”**

IC-29087 P Col. P.R. Kathuria, S/o B.L. Kathuria, R/o 14, Govind Nagar Race Course, Dehradun, Uttarakhand.

..... **Applicant**

Ld. Counsel for the Applicant : **Shri Kishore Rai**, Advocate.

Versus

1. Union of India, Ministry of Defence through its Secretary, South Block, New Delhi-110011.
2. P.C.D.A. (P), Allahabad, Uttar Pradesh.
3. Addl. Dte. Gen. Personnel Services, Adjutant General’s Branch, IHQ of MoD (Army), Room No. 11, Plot No. 108 (West), Brassey Avenue, Church Road, New Delhi-110001.
4. Chief of the Army Staff, Integrated Headquarters of Ministry of Defence (Army), South Block, New Delhi-110011.

.....**Respondents**

Ld. Counsel for the Respondents. : **Shri Rajesh Sharma**, Advocate
Central Govt. Counsel

ORDER

“Per Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)”

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

- “i. A direction to quash the order dated 05.07.2021 passed by respondent No. 3) contained as Annexure No. 6 to this original application or to*
- ii. A direction to grant disability pension to the applicant from the date of his retirement i.e. 31.08.1994 along with rounding of to the tune of 50% in respect of the disability Severe Sensory Neural Deafness Rt Ear conceded the disability as attributable to or aggravated by military service.*
- iii. To summon the entire records of the applicant pertaining to computation of his disability pension.*
- iv. Any other relief to which the applicant is found entitled may also very kindly be granted to the applicant.”*

2. Briefly stated, applicant was commissioned in Indian Army on 12.01.1969, granted permanent commission on 12.01.1974 and prematurely retired on 31.08.1994 in Low Medical Category. At the time of retirement from service, the Release Medical Board (RMB) held at Army Hospital, Delhi Cantt. on 12.08.1994 assessed his disability ‘**SEVERE SENSORY NEURAL DEAFNESS RT EAR 389 V-67**’ @ 20% for two years but opined the disability to be neither attributable to nor aggravated (NANA) by military service. Applicant claim for the grant of disability pension was rejected vide letter dated 07.02.2019. The applicant preferred First Appeal which too was rejected vide letter dated 21.08.2019. The applicant preferred Second Appeal which too was rejected vide letter dated 05.07.2021. The applicant also preferred petition dated 27.09.2021 which too was rejected vide letter dated 04.12.2021. 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 commission, the applicant was found mentally and physically fit for service in the Indian Army and there is no note in the service documents that he was suffering from any disease at the time of commission in Army. The disease of the applicant was contracted during the service, hence it is attributable to and aggravated by Military Service. He further submitted that in similar cases, Hon'ble Apex Court and various Benches of the Armed Forces Tribunals have granted disability pension, 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 i.e. '**SEVERE SENSORY NEURAL DEAFNESS RT EAR 389 V-67**' has been regarded as NANA @20% for two years by RMB. However, since the disability was opined by RMB to be neither attributable to nor aggravated by military service and applicant was prematurely retired, hence as per Regulations 48 and 53 of Pension Regulations for the Army, 1961 (Part – I) and Para 37, Chapter VI, Guide to Medical Officers, 1980 the applicant's claim for grant of disability pension has been rightly rejected by the respondents. 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 and we find that the questions which need to be answered are of three folds :-

- (a) Whether the disability of applicant is attributable to or aggravated by military service?
- (b) Whether the applicant is entitled to disability element of disability pension being a case of prematurely retired?
- (c) Whether the applicant is entitled for the benefit of rounding off of his disability element of disability pension?

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)].
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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 '**SEVERE SENSORY NEURAL DEAFNESS RT EAR 389 V-67**' is neither attributable to nor aggravated (NANA) by service on the ground of sudden onset while service in Assam in CI Operation (RHINO), therefore, applicant is not entitled to 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 element of disability pension to applicant is cryptic, not convincing and doesn't reflect the complete truth on the matter. The applicant

was commissioned in Indian Army on 12.01.1969 and the disability has started after more than 12 years of Army service i.e. in December, 1991. We are therefore of the considered 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 military service.

8. Government of India, Ministry of Defence letter No.16(5)/2008/D(Pen/Policy) dated 29.09.2009 stipulates that *“In pursuance of Government decision on the recommendations of the Sixth Central Pay Commission vide Para 5.1.69 of their Report, President is pleased to decide that Armed Forces personnel who are retained in service despite disability, which is accepted as attributable to or aggravated by Military Service and have foregone lump-sum compensation in lieu of that disability, may be given disability element/war injury element at the time of their retirement/discharge whether voluntarily or otherwise in addition to Retiring/Service Pension or Retiring/Service Gratuity.”* In view of aforesaid letter, the applicant is entitled for grant of disability element of disability pension even if he has been retired on his own request on compassionate grounds.

9. As for as the benefit of Broad Banding is concerned, since benefit of broad banding has been extended w.e.f. 01.01.1996, hence, prima facie the applicant is not entitled to broad banding for period in question i.e. two years from 31.08.1994.

10. Since the applicant's RMB was valid for two years w.e.f. 31.08.1994, hence, the respondents will now have to conduct a fresh RSMB for him to decide his future eligibility to disability pension.

11. In view of the above, the **Original Application No. 709 of 2021** deserves to be allowed, hence, **allowed**. The impugned orders, rejecting the applicant's claim for the grant of disability element of disability pension, are set aside. The disability of the applicant is held as aggravated by military service. The applicant is entitled to get disability element of disability pension @20% for two years from the next date of his retirement. The respondents are directed to grant disability element of disability pension to the applicant @20% for two years from the next date of his retirement. The respondents are further directed to conduct a Re-Survey Medical Board for the applicant to assess his further entitlement of disability pension. Respondents are further directed to give effect to the order within four months from the date of receipt of a certified copy of this order failing which the respondents shall have to pay interest @ 8% per annum till the date of actual payment.

12. No order as to costs.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated : 06 September, 2022

AKD/-