Reserved
Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No 319 of 2018

Wednesday, this the 25th day of July, 2018

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

No. 2669951-M, Ex-Havildar Rajesh Bahadur Singh, son of late Shri Ram Baran Singh, resident of village and post Khajoor Gaon, Tehsil Lalganj, district Rae Bareli (UP).

…Applicant

Present: Applicant in person

Versus

1. Union of India through Ministry of Defence, South Block, New Delhi – 110011.
2. Chief of the Army Staff, Integrated Headquarter of the Ministry of Defence (Army), South Block, New Delhi – 110011.
3. Principal Controller of Defence Accounts (Pension), Draupadi Ghat, Allahabad.
4. Officer-in-Charge, Records Grenadiers, Jabalpur.

…. Respondents

Ld. Counsel for the Respondents : Shri Adesh Kumar Gupta, Central Government Counsel

ORDER

"Per Hon'ble Air Marshal BBP Sinha, Member (A)"

1. By means of the present O.A. the applicant has approached this Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007 for grant of disability pension and also to grant benefit of rounding off of disability pension.

2. Brief facts as would appear from the pleadings on record are that the applicant was enrolled as Sepoy in the Indian Army on 21.01.1978 and was posted in 13th Grenadiers Battalion (Grenadiers Regiment) On 17.04.1994, the applicant was diagnosed suffering from SUB MANDIBULAR SALIVARY GLAND CALCULUS (RT) OLD V-67 (527) and was placed in low medical category. The applicant was brought before Release Medical Board on 07.06.1996 which assessed the disability of the applicant @ 15-19 % for two years and opined the disability as 'neither attributable to nor aggravated by military service.' Retention of applicant on sheltered appointment was not recommended. Accordingly, the applicant was discharged from service on 31.08.1996 under Army Rule 13 (3) III (v) read in conjunction with Rule 13 (2A) of the Army Rules, 1954. The applicant was granted service pension by the PCDA (P) Allahabad. However, disability claim of the applicant was rejected. The statutory appeals preferred by the applicant were also rejected.

3. Feeling aggrieved by his discharge order as well as order rejecting grant of disability pension, it appears that the applicant preferred Writ Petition No. 3099 of 2003 before the High Court of Judicature at

Allahabad, Lucknow Bench, Lucknow. Said Writ Petition upon establishment of the Armed Forces Tribunal was transferred to this Tribunal and renumbered as T.A. No. 20 of 2014. The T.A. was dismissed as withdrawn vide order dated 01.04.2015 with liberty to file a fresh petition on the ground of multiplicity of reliefs. Subsequently, the applicant preferred M.A. No. 1657 of 2015 which was again dismissed by this Tribunal vide order dated 15.12.2015 on the ground that delay has not been properly explained. It appears that thereafter the applicant preferred M.A. No. 720 of 2016 (Application for condonation of delay) along with O.A. No. NIL of 2016 with prayer for a direction to the respondents to grant disability pension to the applicant. Said application for condonation of delay was rejected by this Tribunal vide order dated 05.04.2016. Order dated 05.04.2016 is excerpted below:-

> *"The present application is for condonation of delay. Earlier applicant has preferred T.A. bearing No. 20/2014 for the same relief in which the application for condonation of delay bearing No.1657 of 2015 was moved. The said application was rejected by order 15.12.2015. Now a fresh O.A. has been preferred for condonation of delay in explaining the delay caused in preferring the O.A. Once an application has been rejected for condonation of delay for the same cause of action, subsequent application as O.A. is not maintainable and is barred by constructive res judicata.*
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> *In view of the above, the present application as well as O.A. are accordingly rejected."*

4. Now the applicant has again approached this Tribunal by means of the present O.A. praying for the relief of grant of disability pension which has come up before us for adjudication.

5. We have carefully gone through the earlier orders passed by this Tribunal, record of M.A. No. 720 of 2016 as well as the record of the instant O.A.

6. It appears that the applicant had filed M.A No. 720 of 2016 (application for condonation of delay) along with O.A. The earlier Writ Petition No. 3099 of 2003 filed by the applicant before Hon'ble High Court which was transferred to this Tribunal and re-numbered as T.A. and 1657 of 2015, inter alia, claimed relief for setting aside the order of discharge of the applicant. The subsequent M.A. No. 720 of 2016 (supra) was filed for grant of disability pension. M.A. No. 720 of 2016 was rejected vide order dated 05.04.2016 on the misconception that the accompanying O.A. was filed for the relief of setting aside the order of discharge whereas it related for grant of disability pension. Thus, we are of the considered opinion that order dated 05.04.2016 passed in M.A. No. 720 of 2016 was passed on some incorrect facts under the impression that the O.A. has been filed challenging his discharge while it was for relief of disability pension. Law is settled on the point that pension is a recurring cause of action, so the application for condonation of delay could not have been rejected. But under some misconception that the applicant has challenged his discharge and earlier T.A. with the same prayer has already been dismissed, application for condonation of delay was rejected. Accordingly, O.A. claiming disability pension was also dismissed. Applicant is litigating since 2003, but even after lapse of 15 years, he could not get the relief claimed by him. In this background, to avoid further delay and in the interest of justice and for doing

substantial justice, the grievance of the applicant should be heard on merits. It is well settled principle of legal jurisprudence that no one should be put to suffer for mistake of the Court.

7. Since the issue of payment of pension involves recurring cause of action, as such, vide order dated 18.07.2018, delay in preferring the O.A. was condoned and the O.A. was admitted. The applicant, present in person, and learned counsel for the respondents submitted that the respondents have filed counter affidavit and the O.A. can be finally disposed of on the basis of pleadings and documents on record. Applicant present in person further submitted that he would not be filing rejoinder affidavit and the case may be heard and disposed of finally, as such, with the consent of the parties, we proceeded to hear the O.A. finally.

8. For adjudication of the controversy involved in the instant case, we need to address two issues; firstly, is the disability attributable to service or not; and secondly, if found to be attributable to, can the benefit of rounding off be extended to the applicant? The provisions of Pension Regulations for the Army, 1961 (Part-1) and the Entitlement Rules for Casualty Pension Award, 1982 are relevant and the same are excerpted herein below;

(a) Pension Regulations for the Army 1961 (Part I)

Para 173. "Unless otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an individual who is invalided out of service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20 percent or over.

The question whether a disability is attributable to or aggravated by military service shall be determined under the rule in Appendix II."

(b) Entitlement Rules for Casualty Pension Award, 1982

"5. *The approach to the question of entitlement to casualty pensionary awards and evaluation of disabilities shall be based on the following presumptions:-*

Prior to and During Service.

(a) 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.

(b) In the event of his subsequently being discharged from service on medical grounds any deterioration in his health which has taken place is due to service.

Onus of Proof.

9. The claimant shall not be called upon to prove the conditions of entitlement. He/she will be given more liberally to the claimants in field/afloat service cases.

Diseases

14. In respect of diseases, the following rule will be observed:-

(a) cases……

(b) a disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service, if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service.

9. The law on the point of attributability of the disability is no more RES INTEGRA in view of a catena of decisions on the subject. In the case of ***Dharamvir Singh vs. Union of India & Ors***, (2013) 7 SCC 316, on the question with regard to payment of disability pension, their Lordships of Hon'ble Supreme Court held that Army personnel shall be 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 being discharged from service on medical grounds, any deterioration in his health, which may have taken place, shall be presumed due to service conditions. In ***Dharamvir Singh's*** (supra), their Lordships further held that the onus of proof shall be on the respondents to prove that the disease from which the incumbent is suffering is neither attributable to nor aggravated by military service. Observation made by their Lordships in the case of ***Dharmvir Singh*** (supra) is reproduced as under:-

> *"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).*
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> *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)].*
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> *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).*
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> *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]*
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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)].*
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> *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*
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> *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)."*

10. The counter affidavit filed by the respondents clearly states that the Release Medical Board had considered the disability as constitutional in nature and, therefore, made it as neither attributable to nor aggravated by Military service (NANA). However, a cryptic remark like 'constitutional in nature' cannot be considered as a justification for denying attributability to Military service. We, therefore, give benefit of doubt to the applicant.Thus, in view of the above judgment and settled law on the point we are of the considered opinion that the disability of the applicant is attributable to military service.

11. On the issue of rounding off of the disability pension, we recall the case of ***Union of India and Ors vs. Ram Avtar & ors,*** Civil Appeal No. 418 of 2012 dated 10th December 2014 in which Hon'ble The Apex Court nodded in disapproval the policy of the Government of India in extending the benefit of rounding off of disability pension only to the personnel who have been invalided out of service and denied the same to personnel who, though eligible for disability pension, are proceeding on superannuation or are proceeding on discharge on completion of the tenure of

engagement. The relevant portion of the decision being relevant 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.*
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> *xxx xxx xxx*
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> *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.*
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> *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.*
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> 8. *This Court grants six weeks' time from today to the appellant(s) to comply with the orders and directions passed by us."*

12. The abovementioned decision of Hon'ble The Apex Court, when applied to the present case, leads us to the conclusion that the applicant, who was discharged out of service on account of his being in low medical category, is entitled to the benefit of rounding off. Thus, his disability @ 15-19 % will stand rounded off to 50%.

13. The Original Application No. 319 of 2018 is **allowed**. The respondents are directed to grant disability pension to the applicant @15-

19% for two years rounded off to 50% for two years. The respondents are further directed to conduct Re-survey Medical Board (RSMB) for reassessing the present medical condition of the applicant. Further claim of disability pension will be subject to the outcome of RSMB. Respondents are directed to give effect to the order within four months from the date of receipt of a certified copy of this order. Default of this time period will invite an interest @ 09% per annum.

No order as to cost.

(Air Marshal BBP Sinha)
Member (A)

(Justice SVS Rathore)
Member (J)

Dated : July 25, 2018

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