

Court No. 1**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****ORIGINAL APPLICATION No. 249 of 2021**Friday, this the 26th day of November, 2021**“Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon’ble Vice Admiral Abhay Raghunath Karve, Member (A)”**

No. 764880G Ex. Sgt. Adarsh Kumar Tiwari, S/o Shiv Sahay Tiwari, R/o 53/3, Jagadeesh Puram, Near Tripula, P.O. – Rae Bareli, District – Rae Bareli, Pin-229001 (UP).

..... ApplicantLd. Counsel for the Applicant : **Shri Shailendra Kr. Singh**, Advocate.
holding brief of
Shri Om Prakash Kushwaha, Advocate

Versus

1. Union of India, through its Secretary, Ministry of Defence, New Delhi-110011.
2. The Chief of Air Staff, Air Headquarters, New Delhi.
3. Air Headquarters, Directorate of Air Veterans, Subroto Park, New Delhi-110010.
4. Office of the Joint CDA (AF), New Delhi.

.....RespondentsLd. Counsel for the Respondents. : **Shri Pushpendra Mishra**, 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 :-

- A. *To issue/pass an order or directions to set aside/quash the Dte of Air Veterans, Air HQs, Subroto Park, New Delhi-110010 rejection letter No. Air HA/99798/1/764880/11/17/DAV/(DP/RMB) dated 09.02.2018.*
- B. *To issue/pass an order or directions to the respondents to grant disability element of disability pension to the applicant, based on relevant Ruling and Judgment passed in similar cases time to time from the date of discharge wef 30.11.2017, with @18% interest on arrears, and benefit of Rounding of/Broad banding of disability pension @20% to @50% wef 30.11.2017 for life, along with arrears and interest @18% from the date of discharge in terms of Govt. of India letter dated 31.01.2001, and Ministry of Defence, Department of Ex-Servicemen Welfare (Pension/Legal) letter dated 18.04.2016.*
- C. *To issue/pass an order/directions to the respondents to decide the First Appeal of the applicant submitted on 10.03.2021.*
- D. *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.*
- E. *To allow this application with costs.*

2. Briefly stated, applicant was enrolled in the Indian Air Force on 17.11.1997 and was discharged on 30.11.2017 in Low Medical Category on fulfilling the conditions of his enrolment. At the time of discharge from service, the Release Medical Board (RMB) held at Air Force Station, Kanpur on 23.01.2017 assessed his disability

'IMMUNE SURVEILLANCE (OLD) B 20.3' @ 20% for life and opined the disability to be neither attributable to nor aggravated (NANA) by service. The applicant's claim for grant of disability pension was rejected vide letter dated 26.05.2017 which was communicated to the applicant vide letter dated 09.02.2018. The applicant preferred First Appeal dated 10.03.2021 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 Air Force and there is no note in the service documents that he was suffering from any disease at the time of enrolment in Air Force. The disease of the applicant was contracted during the service, hence it is attributable to and aggravated by Air Force 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 applicant is also entitled to disability pension and its rounding off to 50%.

4. On the other hand, Ld. Counsel for the respondents contended that the applicant initially placed in Low Medical Category for ID – Immune Surveillance vide AFMSF-15 dated 16.08.2007 while serving at 408 Air Force Station applicant has detected to have ibid disability during evaluation of Herpes Zoster

at Military Hospital, Secunderabad in August, 2006. He further contended that disability of the applicant @20% 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 and we find that the questions which need to be answered are of two folds:-

- (a) Whether the disability of the applicant is attributable to or aggravated by Air Force Service?
- (b) Whether the applicant is entitled for the benefit of rounding off the 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)]. [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 '**IMMUNE SURVEILLANCE (OLD) B 20.3**' is neither attributable to nor aggravated (NANA) by service on the ground that there is no evidence to establish a causal relationship between service related factors and exposure to HIV or otherwise, 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 pension to applicant is not convincing and doesn't reflect the complete truth on the matter. The applicant was enrolled in Indian Air Force on 17.11.1997 and the disability has started after more than nine years of Air Force service i.e. on 18.06.2007. Further, while serving at 408 Air Force Station applicant has detected to have said disability during evaluation of Herpes Zoster at Military Hospital, Secunderabad in August, 2006. 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 Air Force service.

8. The law on the point of rounding off of disability pension is no more RES INTEGRA in view 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).

In this Judgment the Hon'ble Apex Court nodded in disapproval of the policy of the Government of India in granting the benefit of rounding off of disability pension only to the personnel who have been invalidated out of service and denying the same to the personnel who have retired on attaining the age of superannuation or on completion of their tenure of engagement. The relevant portion of the decision 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.

5. We have heard Learned Counsel for the parties to the lis.

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.

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.

8. *This Court grants six weeks' time from today to the appellant(s) to comply with the orders and directions passed by us.*

9. 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."

10. 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 benefit of rounding off of disability pension @ 20% for life to be rounded off to 50% for life may be extended to the applicant from three preceding years from the date of filing of the Original Application.

11. In view of the above, the **Original Application No. 249 of 2021** deserves to be allowed, hence **allowed**. The impugned orders dated 26.05.2017 and 09.02.2018, rejecting the applicant's claim for grant of disability element of disability pension, are set

aside. The disability of the applicant is held as aggravated by Air Force Service. The applicant is entitled to get disability element @20% for life which would be rounded off to 50% for life w.e.f. three years preceding the date of filing of Original Application. The respondents are directed to grant disability element to the applicant @20% for life which would stand rounded off to 50% for life w.e.f. three years preceding the date of filing of Original Application. The date of filing of Original Application is 30.04.2021. The respondents are further 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 @ 8% per annum till the actual payment

12. No order as to costs.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated : 26 November, 2021

AKD/-