

Court No. 1**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****ORIGINAL APPLICATION No. 131 of 2021**Wednesday, this the 29th day of September, 2021**“Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon’ble Vice Admiral Abhay Raghunath Karve, Member (A)”**

Sub. Maj. Narayan Singh Khadwa, JC-188569W, S/o Shri Chatar Singh, Permanent R/o : Ward No. 02, Vijaypur, Hathibarkala, P.P. – Anarwala (Garhi), Dehradun (U.K.)-248003, and ordinarily residing at C/o Shri Deepak Kumar Kushwaha, Mohalla : Vijay Nagar, Near Mahakali Inter College, Neelmatha, Lucknow (U.P.)-226002.

..... Applicant

Ld. Counsel for the Applicant : **Shri Vijay Kumar Pandey**, Advocate and
Shri Girish Tiwari, Advocate

Versus

1. Union of India, through Secretary, Ministry of Defence, South Block, R.K. Puram, New Delhi.
2. Chief of the Army Staff Sectt., IHQ of MoD (Army), Room No. 194 (C), South Block, New Delhi-110011.
3. Addl. Dte. Gen. Pers. Services-4 (Imp-II), Adjutant General’s Branch, Integrated HQ of MoD (Army), Kashmir House, DHQ Post, New Delhi.
4. Officer-in-Charge, Defence Security Corps Records, PIN : 901277, C/o 56 APO.
5. Principal Controller of Defence Accounts (P), Draupadi Ghat, Allahabad (U.P.)-211014.

.....**Respondents**

Ld. Counsel for the Respondents. : **Shri Vishwesh Kumar**, 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) *That this Hon’ble Tribunal may kindly be pleased to quash the impugned rejection orders dated 07.08.2019, 07.12.2017, 26.10.2005 and 06.10.2005 passed by the opposite party No. 4, 4, 4 and 5, as contained in annexure no. 1, 2, 3 & 4 to this original application, and direct the opposite parties to pay the disability pension @50% for life to the applicant w.e.f. 31.03.2005, to actual date of payment and also onwards, and provide the interest on the aforesaid delayed amount of disability pension with 18% p.a. since due date to actual date of payment.*
- (ii) *That this Hon’ble Tribunal may kindly be awarded the cost of Rs.20,20,000/- (Rupees Twenty Lac and Twenty Thousand only) to the applicant against the opposite parties.*
- (iii) *That this Hon’ble Tribunal may be pleased to pass any other order or direction which this Hon’ble Tribunal may deem just and proper be passed in favour of the applicant.*

2. Briefly stated, applicant was enrolled in the Gorkha Rifles of Indian Army on 31.07.1968 and was discharged on 31.07.1996. The applicant was re-enrolled in Defence Security Corps (DSC) on 26.11.1998 and was invalided out from DSC service on 31.03.2005 in Low Medical Category under Rule 13 (3) Item I (3) (a) of the

Army Rules, 1954. At the time of discharge from service, the Invaliding Medical Board (IMB) held assessed his disability '**DIABETES MELLITUS TYPE-II**' @ 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 06.10.2005. The applicant preferred various representations which too were rejected vide letters dated 07.08.2019, 07.12.2017 and 26.10.2005. 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 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 disability of the applicant @ 20% for life has been regarded as NANA by the IMB, 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 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 Military 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, as per Counter Affidavit, IMB has denied attributability to the applicant only by endorsing that the disability '**DIABETES MELLITUS TYPE-II**' is neither attributable to nor aggravated

(NANA) by service, 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 Invaliding 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 Army on 31.07.1968 and in DSC on 26.11.1998 and the disability has started after more than 28 years of Army and DSC service. 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. 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 invalided 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. 131 of 2021** deserves to be allowed, hence **allowed**. The impugned order dated 07.08.2019, 07.12.2017, 26.10.2005 and 06.10.2005, annexed as Annexure Nos. 1, 2, 3 and 4 with Original Application, are set aside. The disability of the applicant is held as aggravated by Army/DSC Service. The applicant is entitled to get disability pension @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 pension 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 16.02.2021. 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 : 29 September, 2021

AKD/-