

Court No.1**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****Original Application No. 211 of 2019**Tuesday, this the 23rd day of March, 2021**Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)**
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)IC-41849K Colonel Gyan Prakash Shrivastava, Signals,
1 M.P. Artillery Regiment NCC Jabalpur (M.P.) Pin-482001,
since retired and now resident of 6/221 Vipul Khand, Gomti
Nagar, Lucknow- 226010.

.....Applicant

Ld. Counsel for : **Shri Thakur Balaram Ji Srivastava,**
Applicant **Advocate**

Versus

1. Union of India through the Defence Secretary, Ministry of Defence, (Army) DHQ PO, South Block, New Delhi 110011 and three others, namely:-
2. Chief of the Army Staff, Integrated Head Quarters, Ministry of Defence (Army), South Block, DHQ PO, New Delhi- 110011.
3. The Adjutant General, (ADG PS-4), Integrated Headquarters, MoD (Army) Sena Bhawan DHQ PO, New Delhi - 110011.
4. The Director General Armed Forces Medical Services, MoD (Army), Sena Bhawan, DHQ PO, New Delhi – 110011.

.....Respondents

Ld. Counsel for the : **Shri Amit Jaiswal,**
Respondents **Central Govt Counsel**

ORDER

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

1. This Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 whereby the applicant has claimed the following reliefs:-

(a) That the order of the Disability pension Sanctioning Authority as given in annexure ‘A-2’ and ‘A-1’ be cancelled with immediate effect.

(b) The Combined two disability attributed and aggravated due to military service in respect of the applicant as given to the extent of 50% in the RMB proceedings be raised to the total disability to the extent of 60% to be rounded to 75% in accordance with rules, as the ailments on account of the two disabilities that is PRODUCING RADICULOPATHY (L) caused due to cervical spondylitis and of Diabetes militates Type-II both jointly and severely are life threatening disabilities effecting physical and psychological well being of the applicant for the rest of his life.

(c) That a delay of more than five years in sanctioning of the Disability pension to the applicant be compensated by award of cost of the avoidable litigation to the extent of Rs. 10000/-.

(d) That an interest of 18% per annum simple rate of interest on the arrears of disability monthly pension to the applicant be awarded from August 2013 till date.

(e) That the applicant be given 75% of Disability pension per month together with dearness relief as

announced by the Opposite party from time to time to the pensioners, for his life with effect from August 2013.

(f) That any other order as deemed fit and proper be passed in the matter.

2. The undisputed factual matrix on record is that the applicant was commissioned in Indian Army on 17.12.1983 and was retired from service on 01.08.2013 in low medical category P3 (Permanent) on completion of terms of engagement. At the time of retirement Release Medical Board held at Military Hospital Jabalpur on 05.06.2013 assessed disabilities (a) **“DM TYPE-II”** @ 30% for life and (b) **“PIVD C5-6 PRODUCING RADICULOPATHY (L)”** @ 30% for life and combined assessment for all disabilities @ 50% for life. Medical Board considered disability (a) **“DM TTPE-II”** as neither attributable to nor aggravated by the military service and considered disability (b) **“PIVD C5-6 PRODUCING RADICULOPATHY (L)”** as not attributable but aggravated by service due to stress of military service. The applicant was granted service pension from the date of retirement. Claim of the applicant for the grant of disability pension was rejected by the respondents vide letter dated 02.01.2015 being not attributable but aggravated by military service. Applicant preferred first and second appeal for grant of disability pension but the same were also rejected vide letters dated 12.08.2016

and 08.01.2019. Being aggrieved, the applicant has approached this Tribunal for the grant of disability pension.

3. Learned counsel for the applicant submitted that since the applicant was commissioned in the army in medically fit condition and, thereafter, he has been retired from service in Low Medical Category with disabilities (a) **“DM TYPE-II”** and (b) **“PIVD C5-6 PRODUCING RADICULOPATHY (L)”** both @ 50% for life. He pleaded for the disabilities of the applicant to be considered as a result of stress and strain of military service and consider as attributable to and aggravated by military service. He pleaded that various Benches of the Armed Forces Tribunal have granted disability pension in similar cases, as such, the applicant is also entitled to disability pension and its rounding off to 75%.

4. Learned counsel for the respondents has not disputed that applicant suffered both disabilities to the extent of 50% for life, but submitted that competent authority while rejecting the claim of the applicant has viewed that disabilities were assessed @ 50% for life but disabilities qualifying for disability pension has been assessed as NIL for life and disability was found as not attributable but aggravated by military service, therefore, in terms of Para 173 of the Pension Regulations for the Army, 1961 (Part-I), the claim of the applicant for the grant of disability pension has correctly been rejected.

5. We have heard learned counsel for the parties and perused the record.

6. The question before us for consideration is simple and straight whether disability of applicant is attributable to or aggravated by military service?

7. The law on attributability of a disability has already been settled by the Hon'ble Supreme Court in the case of ***Dharamvir Singh vs. Union of India & Ors*** (supra). 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)."

8. Thus, considering all issues we have noted that Release Medical Board had not given any reason in support of its opinion, particularly when there is no note of such disease or disability available in the service record of the applicant at the time of acceptance for Military service. In absence of any evidence on record to show that the applicant was suffering from disease at the time of acceptance of his service and the fact that the applicant had put in over 26 years of service when for the first time the disease was detected in the year 2006, it will be presumed that the applicant was in sound physical and mental condition at the time of entering the service and deterioration in his health has taken place due to military service. Hence in the circumstances of the case, we are inclined to give the benefit of doubt as per the law settled on this matter vide Hon'ble Apex Court decision in the case of **Dharamvir Singh** (Supra). Therefore, we consider the diseases of the applicant i.e. (a) "**DM TYPE-II**" and (b) "**PIVD**

C5-6 PRODUCING RADICULOPATHY (L)” as aggravated by military service.

9. On the issue of rounding off of disability element, we are of the opinion that the case is squarely covered by the decision of **K.J.S. Buttar vs. Union of India and Others**, reported in (2011) 11 SCC 429 and Review Petition (C) No. 2688 of 2013 in Civil appeal No. 5591/2006, **U.O.I. & Anr vs. K.J.S. Buttar and Union of India vs. Ram Avtar & Others**, (Civil Appeal No. 418 of 2012 decided on 10 December, 2014. Hence the applicant is eligible for the benefit of rounding off also.

10. It may also be 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, para-9, 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.”

11. As observed in the preceding paragraphs, delay in filing the O.A. has been condoned by this Tribunal, 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 element @ 50% for life to be rounded off to 75% for life may be extended to the applicant from three preceding years from the date of filing of the O.A.

12. In view of the above the Original Application deserves to be allowed.

13. Accordingly O.A. is **allowed**. The impugned orders rejecting the claim for grant of disability pension passed by the respondents are set aside. The disabilities assessed @ 50% for life are to be considered as aggravated by military service. The respondents are directed to grant disability element to the applicant from three years prior to filing of Original Application @ 50% for life which would stand rounded off to 75% for life. Date of filing of O.A. is 11.03.2019. 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. In case the respondents fail to give effect to this order within the stipulated time, they will have to pay interest @ 8% on the amount accrued from due date till the date of actual payment.

14. No order as to costs.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated : 23 March, 2021

UKT/-