

Court No. 1**ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW****Original Application No. 1426 of 2023**Thursday, this the 09th day of May, 2024**“Hon’ble Mr. Justice Anil Kumar, Member (J)
Hon’ble Lt. Gen. Anil Puri, Member (A)”**

No. 15812450X Ex. Sep. (MACP Hav.) Kamlesh Kumar Sharma, S/o Sri Rajendra Prasad Sharma, Resident of Village – Mircha, P.O. – Dildar Nagar, District – Ghazipur, Pin-232326 (UP).

.... Applicant

Ld. Counsel for the Applicant : **Shri K.P. Datta**, Advocate and

Versus

1. Union of India, through its Secretary, Ministry of Defence, New Delhi-110011.
2. The Chief of Army Staff, IHQ of MoD (Army), South Block, New Delhi-110001.
3. Officer-in-Charge AOC Records, PIN-900453, C/o 56 APO.
4. PCDA (P), Draupadi Ghat, Allahabad, Pin-211014 (UP).

... Respondents

Ld. Counsel for the Respondents: **Dr. Chet Narayan Singh**, Advocate
Central Government Standing Counsel.

ORDER

“Per Hon’ble Mr. Justice Anil Kumar, Member (J)”

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

- A. *To pass an order to set-aside/quash AOC Records rejection letter No. C/15812450/Dis-1 dated 21 April 2022.*
- B. *To pass an order of appropriate to the respondents to set aside the arbitrary and mechanical calculation based on which respondents reduced disability assessment from 20% to 10% since the applicant was unwilling to undergo for surgery due to uncertainty of success/cure.*
- C. *To pass an order to grant disability element @20% with the benefit of rounding off to 50% in light of order passed by Hon’ble Tribunal in similar cases from date of discharge wef 31.07.2022.*
- D. *To pass an order to grant arrears accrued along with interest @18% form date of discharge wef 31.07.2022.*
- E. *To issue/pass any other order as this Hon’ble Tribunal may deem just, fit and proper under the circumstances of the case in favour of the applicant.*
- F. *To allow this O.A. with costs.*

2. Briefly stated, applicant was enrolled in the Army Ordnance Corps of Indian Army on 07.07.2005 and was discharged on 31.07.2022 (AN) in Low Medical Category on completion of terms of engagement of service under Rule 13 (3) Item III (i) of the Army Rules, 1954. At the time of discharge from service, the Release Medical Board (RMB) held at Military Hospital, Jabalpur on 22.02.2022 assessed his disability

'BASILAR INVAGINATION WITH AAD (ICD 1 75.9)' @20% for life as neither attributable to nor aggravated (NANA) by military service, which has been reduced to 10% for life due to unwilling for surgery. The applicant's claim for grant of disability pension was rejected vide letter dated 21.04.2022. The applicant preferred First Appeal dated 16.05.2023 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 the applicant's disability has been assessed @20% as NANA by military service but its degree of disability has been reduced to 10% due to unwilling for surgery. He further 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 contracted during the service, hence it is attributable to and aggravated by Military Service. Further, the degree of disablement of cannot be reduced on the ground of unwillingness certificate given for surgery by the applicant. He pleaded that various Benches of Armed Forces Tribunal have granted disability pension in similar cases, as such the applicant be granted disability element disability pension and its rounding off to 50%.

4. On the other hand, Ld. Counsel for the respondents contended that disability of the applicant has been regarded as NANA and the degree of

disability has been reduced to @10% for life by the RMB on the ground of unwilling for surgery by the applicant, hence in terms of Regulation 53(a) of Pension Regulations for the Army, 2008 (Part-I) which provides that *“An individual released/retired/ discharged on completion of terms of engagement or on completion of service limits or on attaining the prescribed age (irrespective of his period of engagement), if found suffering from a disability attributable to or aggravated by military service and so recorded by Release Medical Board, may be granted disability element in addition to service pension or service gratuity from the date of retirement/discharge, if the accepted degree of disability is assessed at 20% or more”* the applicant is not entitled to disability element of 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 three folds:-

- (a) Whether the disability of the applicant is attributable to or aggravated by Military Service?
- (b) Whether the RMB can reduce the degree of disablement on the ground of unwilling for surgery?
- (c) Whether the applicant is entitled for the benefit of rounding off the 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)]. [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 '**BASILAR INVAGINATION WITH AAD (ICD 1 75.9)**' is neither attributable to nor aggravated (NANA) by service on the ground of congenital abnormality as per common medical knowledge as the disability is not mentioned in GMO (MP), 2008, therefore, applicant is not entitled to disability element of 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 enrolled in Indian Army on 07.07.2005 and the disability has started after more than 12 years of Army service i.e. in February, 2018. 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. In the instant case the disability has been assessed @ 20% for life by the RMB. At page 8 of the RMB proceedings, in the columns of “Percentage of disablement” the RMB endorsed that “20% - 10% = 10% (% reduced since the indl unwilling for surgery”. It was done due to unwilling certificate given by the applicant. We are of the opinion that the degree of disablement cannot be reduced by the RMB on the ground of unwilling for surgery by the applicant. Accordingly, we hold that the assessment degree of disability is @20% for life.

9. 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 January 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."*

10. Additionally, consequent upon the issue of Government of India, Ministry of Defence letter No. 17(01)/2017/D(Pen/Policy) dated 23.01.2018, Principal Controller of Defence Accounts (Pensions), Prayagraj has issued Circular No. 596 dated 09.02.2018 wherein it is provided that the cases where Armed Forces Pensioners who were retired/discharged voluntary or otherwise with disability and they were in receipt of Disability/War Injury Element as on 31.12.2015, their extent of disability/War Injury Element shall be re-computed in the manner given in the said Circular which is applicable with effect from 01.01.2016.

11. As such, in view of the decision of Hon'ble Supreme Court in the case of ***Union of India and Ors vs Ram Avtar & ors (supra)*** as well as Government of India, Ministry of Defence letter No. 17(01)/2017/D (Pen/Policy) dated 23.01.2018, we are of the considered view that benefit of rounding off of disability element of disability pension @20% for life to be rounded off to 50% for life may be extended to the applicant from the next date of his discharge.

12. In view of the above, the **Original Application No. 1426 of 2023** deserves to be allowed, hence **allowed**. The impugned order, rejecting the applicant's claim for grant of disability element of disability pension, is set aside. The disability of the applicant is held as aggravated by military service @20% for life. The applicant is entitled to get disability element @20% for life which would be rounded off to 50% for life from the next date of his discharge. The respondents are directed to grant disability element to the applicant @20% for life which would stand rounded off to 50% for life from the next date of his discharge. 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

13. No order as to costs.

(Lt. Gen. Anil Puri)
Member (A)

(Justice Anil Kumar)
Member (J)

Dated : 09 May, 2024

AKD/-