

E. Court)

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

TRANSFERRED APPLICATION No. 23 OF 2022

Wednesday, this the 30th day of November, 2022

**“Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon’ble Vice Admiral Abhay Raghunath Karve, Member (A)”**

704960-R JWO Dilip Kumar Pandey, Retd, presently residing at
H. No. 136, Vayu Vihar, Patholi, District-Agra (U.P.).

..... Petitioner

Ld. Counsel for the : **Shri Raj Kumar Mishra**, Advocate.
Petitioner

Versus

1. Union of India, through Secretary, Min of Def, Room No 101A, South Block, DHQ, PO-New Delhi-110011.
2. The Chief of Air Staff, Air Headquarters (Vayu Bhawan), Rafi Marg, New Delhi-110011.
3. The Directorate of Air Veterans, Air Headquarters, AFRO Building, Subroto Park, New Delhi-110010.
4. The Joint CDA, Air Force, Subroto Park, Delhi Cantt, New Delhi-110010.

.....Respondents

Ld. Counsel for the : **Shri Devesh Kumar Mishra** , Advocate
Respondents. Central Govt. Counsel

ORDER (Oral)

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

- (a) To quash and set aside the impugned order dated 25 Oct 2018 to the extent this order deny the grant of disability pension to the petitioner.
- (b) To direct the respondents to grant the disability pension @ 50% broad-banded to 75% along with arrears and interest @ 10% p.a. w.e.f. date of discharge, by treating disease as attributable to and aggravated by military service.
- (c) To pass such further order or orders/directions as this Hon'ble Tribunal may deem fit and proper in accordance with law.

2. Briefly stated, petitioner was enrolled in the Indian Air Force on 01.04.1987 and was discharged from service on 31.03.2019 in Low Medical Category A4G4 (P) on fulfilling the conditions of his enrolment. At the time of discharge from service, the Release Medical Board (RMB) held at ATS, Belagavi on 11.05.2018 assessed his medical disabilities (i)

Obesity (old) ICD No E 66.9, Z 09.0 @ 1-5% for life, (ii)
Dyslipidemia (old) ICD No E-78.1, Z 09.8 @ 1-5% for life, (iii)
Primary Hypertension (old) ICD No I-10.0, Z 09.8 @ 30% for life
and (iv) Primary Hypothyroidism (old) ICD No E-20.09 Z-09.8 @
15-10% for life neither attributable to nor aggravated by military
service. The petitioner's claim for grant of disability element of
pension was rejected vide letter dated 25.10.2018. Aggrieved,
he preferred first appeal dated 31.12.2019 which too was
rejected vide order dated 24.12.2020 hence this O.A.

3. Learned Counsel for the petitioner pleaded that at the time
of enrolment, the petitioner 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 petitioner 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
element of pension in similar cases, as such the petitioner be
granted disability element of pension as well as arrears thereof,

as petitioner is also entitled to disability element of pension and its rounding off to 75%.

4. On the other hand, Ld. Counsel for the respondents contended that disabilities of the petitioner @ 50% for life have been regarded as NANA by the RMB, hence petitioner is not entitled to disability pension. He pleaded for dismissal of the Original Application.

5. Heard Shri Raj Kumar Mishra, learned Counsel for the petitioner and Shri Devesh Kumar Mishra, learned counsel for the respondents and perused the record as well as Release Medical Board (RMB) proceedings and we find that the questions which need to be answered are of two folds:-

(a) Whether the disabilities of the petitioner are attributable to or aggravated by Air Force Service?

(b) Whether the petitioner 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 Hon'ble 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 petitioner only by endorsing that the disabilities (i) Obesity (old) ICD No E 66.9, Z 09.0 @ 1-5% for life, (ii) Dyslipidemia (old) ICD No E-78.1, Z 09.8 @ 1-5% for life, (iii) Primary Hypertension (old) ICD No I-10.0, Z 09.8 @ 30% for life and (iv) Primary Hypothyroidism (old) ICD No E-20.09 Z-09.8 @ 15-10% for life are neither attributable to nor aggravated by military service on the ground of onset of disabilities due to (i) obesity is due to dietary

indiscipline and lack of exercise vide Para 6.2.5 (e) of IAP-4303 (4) edition, (ii) individual was diagnosed to have dyslipidemia (old) while serving in peace area at Barrackpore w.e.f. 01.10.2015. It is a life style disorder due to lack of exercises and indiscipline dietary habits, hence not connected with service, (iii) onset in peace area and (iv) It is auto immunological disorder and there is no evidence of any association with service conditions such as worry, stress and strain. However, considering the facts and circumstances of the case, we are of the considered opinion that this reasoning of Release Medical Board for denying disability element of pension to petitioner is not convincing and doesn't reflect the complete truth on the matter. Peace Stations have their own pressure of rigorous Air Force training and associated stress and strain of Air Force service. The petitioner was enrolled in Indian Air Force on 01.04.1987 and disabilities of the petitioner started on (i) 29.10.2015, (ii) on 02.03.2016, (iii) 12.06.2016 and (iv) 27.01.2018 respectively i.e. after completion of approx 28 years service in the IAF.

8. As per Para 5 of Entitlement Rules, 2008, the mere fact that a disease has manifested during the military service does not per se establish attributability to or aggravation by the military service. The medical test at the time of entry is not exhaustive, but its scope is limited to the broad physical examination. Therefore, it may not detect some dormant disease. Besides, certain hereditary constitutional and congenital diseases may manifest later in life, irrespective of the service conditions. The petitioner was first detected to be suffering from Obesity w.e.f. 12.11.2015 while serving at Air Force Station, Barrackpore. His weight was 100 kgs and he was advised to reduce weight gradually by diet control and regular exercise. He was also issued letter of caution in which he was advised to strictly follow the instructions of medical officer to reduce his weight and other parameters to the required standard, but we find that after four years of medical officer's advice his body weight was found 115 kgs when he reported for RMB in May, 2018. Therefore, in our opinion disabilities (i) obesity and (ii) dyslipidemia (which is the root cause of obesity)

cannot be treated to be attributable to or aggravated by military service and disabilities (iii) Primary hypertension @ 30% for life and (iv) Primary Hypothyroidism @ 15-19% for life are considered as aggravated by military service with composite disability @ 40% for life.

9. We are, therefore, of the considered opinion that in these circumstances the benefit of doubt should be given to the petitioner in view of ***Dharamvir Singh vs Union of India & Ors*** (supra), and the disabilities (iii) and (iv) of the petitioner should be considered as aggravated by Air Force service.

10. 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.”

11. 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.”

12. In view of the above, we are of the considered view that benefit of rounding off of disability element of pension @ 40% for life to be rounded off to 50% for life may be extended to the petitioner from three preceding years from the date of filing of the Original Application.

13. In view of the above, the Transferred Application No. 23 of 2022 deserves to be partly allowed, hence **partly allowed**. The

impugned order dated 25.10.2018 annexed as Annexure No. 1 (colly) with Original Application, and order 24.12.2020 rejecting first appeal of the petitioner are set aside. The disabilities No (iii) and (iv) of the petitioner are held as aggravated by Air Force Service. The petitioner is entitled to get disability element @ 40% 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 petitioner @ 40% 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

14. No order as to costs.

15. Miscellaneous application(s), pending if any, stand disposed of.

(Vice Admiral Abhay Raghunath Karve) (Justice Umesh Chandra Srivastava)
Member (A) Member (J)

Dated : 30.11.2022

rathore