

AFR(SEE RULE 102(1))ARMED FORCES TRIBUNAL, KOLKATA BENCHO. A. NO.62/2014

THIS 5TH DAY OF JANUARY, 2016

CORAMHON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)

APPLICANT(S)

Subedar Rajendra Kumar Singh
Village and Post Office – Ardewa
District – Chhapra
Bihar – 841 424.

-versus-

RESPONDENT(S)

1. The Union of India,
Service through Secretary,
Ministry of Defence,
New Delhi, Pin -110 011.
2. The Chief of Army Staff (COAS)
Through Adjutant General (ADGPS)
IHQ of MoD(Army)
New Delhi - 110.011.
3. The Senior Record Officer
ASC Records
Bangalore -560 007

For the petitioner(s)

: Mr. K. Ramesh, Advocate
Ms. Archana Ramesh, Advocate
Mr. S. K. Choudhury, Advocate

For the respondent(s)

: Mr. Sauvik Nandy, Advocate

ORDER

PER HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)

1. This is an application filed under Section 14 of the Armed Forces Tribunal Act, 2007 claiming disability pension.

2. Facts of the case in brief are that the applicant Subedar Rajendra Kumar Singh (JC-641542) was enrolled in the Indian Army Services Corps as a Clerk on 17.02.1981. Thereafter he was promoted to the rank of Subedar. In view of the onset of Diabetes he was placed in low medical category P3 (Temp) with effect from 26th May, 2006 for disability "TYPE 2 DIABETES MELLITUS". On review, he was placed in permanent low medical category P2 (Permanent) with effect from 10.11.2006. Consequent to being placed in permanent low medical category, the applicant's case was reviewed and was brought before a Release Medical Board dated 24.05.2008 and was quantified @20% disability according to which he was discharged from service on 31.08.2008 being a low medical category in terms of an Army HQ Policy letter dated 12.04.2007 and was denied disability pension on the ground that the disability was neither attributable to nor aggravated by Military Service. He was granted Service Pension vide PCDA (P), Allahabad-PPO No.S/042729/2008 (ARMY) which has been revised from time to time.

3. Feeling aggrieved, the applicant submitted an appeal before the competent authority dated 23.09.2009 which was rejected on the ground that RMB has appropriately held the disability as neither attributable to nor aggravated by Military service vide letter dated 22.12.2010 and the same was conveyed to the applicant. Being dissatisfied with the rejection of first

appeal the applicant preferred second appeal on 22.02.2011 which was also rejected vide letter dated 16.10.2012 stating that Disease TYPE-2 DIABETES MELLITUS assessed 20% for life is neither attributable to nor aggravated by military service and the same was conveyed to the petitioner vide letter dated 01.11.2012. Being aggrieved over the alleged gross injustice done on the part of the Army authorities regarding grant of disability pension, the applicant had filed an Original Application No.27/2013 before the Hon'ble Armed Forces Tribunal, Regional Bench, Kolkata. The Hon'ble Bench permitted the applicant to withdraw the Original Application on the ground of multiplicity of prayers and permitted to file fresh applications for grant of promotion and disability pension separately. Hence, this Original Application has been filed for grant of disability pension.

4. In affidavit-in-opposition filed by the respondents it has been stated that JC-641542 Ex-Sub Rajendra Kumar Singh was enrolled on 17.02.1981. He was placed in low medical category P3 (Temporary) with effect from 26th May, 2006 for disability "TYPE 2 DIABETES MELLITUS". On review he was placed in permanent low medical category P2 (Permanent) with effect from 10th November, 2006. As soon as the applicant was placed in the low medical category, the applicant's case was reviewed based on the policy on management of permanent low medical category personnel issued vide IHQ of MoD (Army) letter No.B/10201/06-08/Vol-I/MP-3 (PBOR) dated 12th April, 2007. Accordingly, the applicant was brought before a Release Medical Board and discharged from service on 31st August, 2008 under AR

2008 under AR-13(3) item I (iii) read in conjunction with Army Rule 13 (2A) as per Discharge Order issued vide ASC Records (South) letter No.1814/DO/LMC/CA-3(Disch/JCOs) dated 15th March, 2008. Accordingly, he was granted Service Pension vide PCDA (Pensions), Allahabad PPO No.S/042729/2008 (ARMY), which has been revised from time to time. As per the findings of the RMB dated 24th May, 2008 conducted at 158 Base Hospital, the applicant's disability "TYPE 2 DIABETES MELLITUS" was held as neither attributable to nor aggravated by military service and not connected with service. However, percentage of disability was assessed at the rate of 20% for life.

4(i). As per para 173 of Pension Regulations for the Army, 1961, Part I, the primary condition for grant of disability pension is 'unless otherwise specifically provided a disability pension may be granted to an individual who is invalided from service on account of disability which is attributable to or aggravated by military service and is assessed at 20% or over'. Since the applicant's disability has been considered as neither attributable to nor aggravated by military service and also the disability is not connected to military service by the RMB, he is not eligible for grant of Disability Pension as per Army Regulations mentioned above.

4(ii). Disability Pension claim of the applicant was adjudicated by the competent authority in terms of IHQ of MoD (Army) letter No.B/40122/MA(P)/AG/PS-5 dated 20th July, 2006. The said claim was rejected for the reasons that disability of the applicant was held as neither attributable to nor aggravated by military service and the same was

communicated to the applicant with an advice to prefer an appeal against the decision to the Appellate Committee on First Appeals (ACFA) vide ASC Records (South) letter No.JC-641542/NS/DP dated 8th April, 2009. The applicant accordingly submitted an appeal to ACFA on 23rd September, 2009 which was rejected on the grounds that RMB has appropriately held the disability as neither attributable to nor aggravated by Military Service vide Integrated Headquarters of MoD (Army) letter No.B/40502/121/10/AG/PS-4 (Imp-II) dated 22nd December, 2010. The outcome of the first appeal was conveyed to the applicant with the advice to prefer second appeal to Chairman, Defence Minister's Appellate Committee on Pension within six months in case not satisfied with the aforesaid decision. Accordingly, the applicant preferred second appeal on 22nd February, 2011 which was also rejected by IHQ of MoD (Army) vide letter No.B/38046A/92/2011/AG/PS-4 (2nd Appeal) dated 16th October, 2012 stating that the disease "TYPE 2 DIABETES MELLITUS" assessed 20% for life is neither attributable to nor aggravated by liminary service. This disease is considered to be a metabolic disorder and has no service related causative factor. Rejection of second appeal was conveyed to the petitioner vide ASC Records (South) letter No.JC-641542/2nd APPL/DP-III 01 dated November, 2012.

4(iii). As regards Broad Banding of disability element from 20% to 50% as per Para 7.2 of Government of India, Ministry of Defence letter No.1(2)/97/D (Pen-C) dated 31st January, 2001, benefit of rounding off percentage of disablement for grant of Disability Pension is applicable to

those individuals who were invalided out of service/discharged from service on medical grounds before competition of terms of engagement on or after 01 January, 1996 and are in receipt of Disability Pension. Here, the applicant is not in receipt of Disability Pension being not entitled to Disability Pension as held by RMB. Hence, the question of broad banding/rounding off the percentage of disability pension does not arise.

5. By placing his reliance upon several pronouncements of Hon'ble Apex court Mr. K. Ramesh, Id. counsel for the applicant submitted that 'Diabetes' is an internal disease/ailment due to service conditions, dietary habits and most importantly is not constitutional in nature. The applicant had served in Tenga (Arunachal Pradesh) wherein 'Diabetes' gets aggravated due to tinned food in 505 ASC Battalion under HQ 5 Mountain Division and thus at least the applicant's ailment should have been treated as aggravated due to military service. It was further contended whenever there is any causative factors of stress and strain of military service or environmental hazardous service or dietary compulsions, diseases like the "Diabetes" certainly cannot be construed as a Metabolic Genetic Constitutional Disease and he was in SHAPE-1 category at the time of enrolment. The onset of diabetes took place only in May 2006 by which time he had already put in 25 years' of military service. Therefore, in the fitness of things the applicant deserves to be granted disability pension and since it has been quantified @20% for life it needs to be increased @50% by Board Banding system as per Govt. of India letter dated 31.01.2001, in the light of the judgment dated 12.02.2008 passed by the Hon'ble Punjab

and Haryana High Court in the case of Paramjit Singh vs. Union of India in W.P. No.67/2007.

6. Per contra Mr. Sauvik Nandy, Id. counsel for the respondents reiterated the stand taken in the affidavit-in-opposition and submitted that the applicant is getting service pension and is not entitled for disability pension as his disability is neither attributable to nor aggravated by military service and the applicant's claim has been rightly rejected by the authorities.

7. We have heard the Id. counsel for the parties and perused the records of the case. Indisputably, the applicant was enrolled in the Indian Army on 17.02.1981 and was discharged from service on 31.08.2008 being a low medical category in terms of Army HQ Policy letter dated 12.04.2007 and was denied disability pension on the ground that the disability was neither attributable to nor aggravated by military service after completing almost 25 years of military service. It is also not in dispute that at the time of his enrolment in the year 1981 he was medically and physically examined and found fit as per prescribed medical standards and was not suffering from any disease including the disease in question i.e. "TYPE 2 DIABETES MELLITUS" and at the time of discharge his disability was found @20% for life which is the bare minimum in terms of Army Regulation 173 of the Pension Regulations for the Army, 1961. The Medical Board has rejected the claim for disability pension only on the ground that the disability was not attributable to or aggravated by military service. The only question arises

on the above backdrop is whether or not the Medical Board's opinion is in itself sufficient to deny the applicant's claim for disability pension.

8. Before advertng to the facts of the case it would be appropriate to refer to Pension Regulation that governs the field. Regulation 173 reads :

“(173 Primary conditions for grant of disability pension) :

Unless otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an individual who is invalided out of service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20 per cent or over.” The question whether disability is attributable to or aggravated by military service shall be determined under the Rule in Appendix II i.e. Entitlement Rules for casualty pensionary awards 1982.”

9. For the purpose of evaluation of disabilities, two presumptions are provided under Rule 5. They read thus :

“The approach to the question of entitlement to casualty pensionary awards and evaluation of disabilities shall be based on the following presumptions:

(a) A member is presumed to have been in sound physical and mental condition upon entering service except as to physical disabilities noted or recorded at the time of entrance.

(b) In the event o his subsequently being discharged from service on medical grounds any deterioration in his health which has taken place is due to service.”.

10. Rule 14 of the Entitlement Rules stipulates how to determine whether a disease shall be deemed to have arisen in service or not. It reads thus :

“14. Diseases – In respect of diseases, the following rule will be observed –

(a) Cases in which it is established that conditions of military service did not determine or contribute to the onset of the disease but influenced the subsequent courses of the disease will fall for acceptance on the basis of aggravation.

(b) A disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service, if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service.

(c) If a disease is accepted 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."

11. Rule 9 of the Entitlement Rules mandates upon whom the burden lies to prove the entitlement conditions. The said Rule is quoted below :

"Onus of proof- 9. – The claimant shall not be called upon to prove the conditions of entitlements. He/She will receive the benefit of any reasonable doubt. This benefit will be given more liberally to the claimants in field/afloat service cases."

12. While considering the aspect of onus of proof, the Hon'ble Apex Court in the case of Dharamvir Singh vs. Union of India reported in 2013 Vol.VII SCC 316 has observed as under :-

"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. The claimant has a right to derive benefit of any reasonable doubt and is entitled for pensionary benefit more liberally."

13. The Hon'ble Apex Court in a similar case –Union of India vs. Rajbir Singh –Civil Appeal No.2904 of 2011 etc. decided on 13.02.2015 after considering Dharamvir Singh (supra) and upholding the decision of the Tribunal granting disability pension to the claimants observed :

"...The essence of the rules, as seen earlier, is that a member of the armed forces is presumed to be in sound physical and mental condition at the time of his entry into service if there is no note or record to the contrary made at the time of such entry. More importantly, in the event of his subsequent discharge from service on medical ground, any deterioration in his health is presumed to be due to military service. This necessarily implies that no sooner a member of the force is discharged on medical ground, his entitlement to claim disability pension will arise, unless of course, the employer is in a position to rebut the presumption that the disability which he suffered was neither attributable to nor aggravated by military service. ...

... Last but not the least is the fact that the provision for payment of disability pension is a beneficial provision which ought to be interpreted liberally so as to benefit those who have been sent home with a disability at times even before they completed their tenure in the armed forces. ...

...There may indeed be cases, where the disease was wholly unrelated to military service, but, in order that denial of disability pension can be justified on that ground, it must be affirmatively proved that the disease had nothing to do with such service. The burden to establish such a disconnect would lie heavily upon the employer for otherwise the rules raise a presumption that the deterioration in the health of the member of the service is on account of military service or aggravated by it. A soldier cannot be asked to prove that the disease was contracted by him on account of military service or was aggravated by the same."

14. Hon'ble Supreme Court has reiterated the same view in Civil Appeal No.11208 of 2011 decided on February 24, 2015 in the case of Union of India vs. Angad Singh Titaria (2015 SCC OnLine SC 181).

15. The Principal Bench of the Armed Forces Tribunal, New Delhi in O. A. No.171 of 2014 between Nb. Subedar Mani Kumar Martand and UOI & Ors. vide Order dated 13.01.2015 dealing with the ailment of Type 2 Diabetes Mellitus in substance has held that the disease is aggravated by military service.

16. Reverting to the facts of the case admittedly the applicant had served in Tenga (Arunachal Pradesh) wherein the Diabetes might have aggravated due to tinned food. General Guidelines for assessment of individual disabilities and their causal relationship to military service has been issued by the Ministry of Defence, Govt. of India in the year 2008. Para.26 of the said Guidelines stipulates that Type 2 Diabetes Mellitus will be conceded aggravated if onset occurs while service in Field, CI Ops, HAA and prolonged afloat service.

17. Considering the facts of the case in the light of afore-mentioned rules and regulations and principles of law settled by the Hon'ble Apex Court in its various pronouncements, we are of the considered opinion that the applicant has been wrongly denied benefit of disability pension. Moreover, no reasoned opinion has been given by the Medical Board giving out the reasons on the basis of which the Medical Board concluded that the petitioner's diseases is neither attributable to nor aggravated by military service. A mere conclusion without reason is not a valid medical opinion. Therefore, medical opinion cannot be accepted and the applicant is entitled to the relief as per the aforesaid discussion including the benefit of rounding off the disability pension in the light of the decision of the Hon'ble Supreme Court delivered in Civil Appeal No.418/2012 –Union of India vs. Ram Avtar decided on 10.12.2014.

18. For the reasons mentioned above, the O. A. is allowed. It is held that the petitioner is entitled to 20% of disability pension which is to be rounded off from 20% to 50% according to the Govt.'s decision dated 31.01.2001.

The petitioner is also entitled to arrears of the past three years along with interest @ 12% p.a. The order be implemented within three months from the date of receipt of this order. No order as to costs.

A plain copy of the order, duly countersigned by the Tribunal Officer, be furnished to both sides after observance of usual formalities.

(Lt Gen Gautam Moorthy)
Member (Administrative)

(Justice N. K. Agarwal)
Member (Judicial)