ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

T.A. No. : 03 of 2015

(Arising out of C.W.J.C. No. - 16613/2010)

DATED : THE Seventh DAY OF SEPTEMBER, 2018

CORAM : **HON'BLE DR.(MRS.) JUSTICE INDIRA SHAH, MEMBER (J)**
HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (A)

Applicant (s) : Birendra Kumar, son of Sri Parsuram Prasad,
R/O Village & P.S.- Industrial Zero Mile Barari,
District – Bhagalpur

Versus

Respondents (a)

1. The Union of India.
The Secretary,
Ministry of Defence, Govt. of India,
New Delhi

2. The Under Secretary to Govt. of India,
Ministry of Defense, Govt. of India,
New Delhi

4. The Deputy Director, DDPA-III, Air Head Quarters,
Vayu Bhawan,
New Delhi – 110106

5. The Junior Warrant Officer-cum-Incharge Pension & Welfare Wing (DP) for Air Officer Commanding,
Air Force Record Office, Subroto Park,
New Delhi-110010

6. The Commanding Officer, 42 Wing Air Force,
Mohanbari, Dibrugarh, Assam.

Ld. Counsel for the applicant : Mr. Bisikesan Pradhan, Ld. Advocate

Ld. Counsel for the Respondent (s) : Mr. Ajay Chaubey, Ld. Advocate

ORDER

PER LT GEN GAUTAM MOORTHY, HON'BLE MEMBER (A)

1. This case arising out of C.W.J.C. case No. 16613 of 2010 has been transferred to this Bench from the Hon'ble High Court of Judicature at Patna in Civil Writ jurisdiction.

2. The brief facts of the case are that the petitioner joined the Indian Air Force on 16.12.2002. He was admitted to the hospital on 2.1.2006 for viral fever which was initially detected as HIV positive and subsequently he was transferred to No. 5 Air Force Hospital, Jorhat, Assam where he remained upto 28.5.2006. He was finally medically boarded out of service on 28.5.2006 under clause "on being found medically unfit for further service in the IAF" vide discharge order No. RO/2512/1/RW (Dis) dated 10.05.06. When he was invalidated out he had rendered 3 years 164 days of total service. The Invalided Medical Board had classified his disease as neither attributable to nor aggravated by military service and assessed the disability at 60% for life.

3. The applicant then appealed to the First Appellate Committee for disability pension which rejected his appeal on 13.4.2009 and then he appealed for the second time to the Second Appellate Committee which was rejected by the Ministry of Defence on 23.6.2010 on the grounds that the onset of ID (Invaliding Disease) took place when he was posted in peace station (Mohanbari) and remained posted in peace till invalidment. Since the medial consensus of the ID was *"psychiatric disorder arising primarily due to interaction of multiple genetic vulnerabilities coupled with environmental, biological, psychological and psychosocial stresses during early childhood development or*

structural and neurochemical damage to the brain in infancy manifesting in adult life as Schizophrenia, hence it cannot be considered as attributable to military service. Also, being an episodic disability with phases of remission and relapse it could not have been detected at enrolment being quiescent" and, therefore, the Committee did not accept his appeal.

4. The issue of service personnel being invalidated out of service with classification as neither attributable to nor aggravated by military service is no longer res-integra in view of catena of judgments governing the same. In the case of **Sukhvinder Singh vs. Union of India** reported in (2014) SCC 364 the Hon'ble Supreme Court stressed upon the fact that invaliding out of service of any individual is "tantamount to dismissal of a member of the Armed Forces without recourse to a Court Martial which would automatically entitle him to reinstatement". Further in the judgment Sukhvinder (Supra) in para 11, the Hon'ble Supreme Court has held -

> *"11. We are of the persuasion, therefore, that firstly, any disability not recorded at the time of recruitment must be presumed to have been caused subsequently and unless proved to the contrary to be a consequence of military service. The benefit of doubt is rightly extended in favour of the member of the armed forces; any other conclusion would tantamount to granting a premium to the Recruitment Medical Board for their own negligence. Secondly, the morale of the armed forces requires absolute and undiluted protection and if an injury leads to loss of service without any recompense, this morale would be severely undermined. Thirdly, there appear*

to be no provisions authorizing the discharge or invaliding out of service where the disability is below twenty percent and seems to us to be logically so. Fourthly, wherever a member of the armed forces is invalided out of service, it perforce has to be assumed that his disability was found to be above twenty per cent. Fifthly, as per the extant Rules/Regulations, a disability leading to invaliding out of service would attract the grant of fifty per cent disability pension."

5. There is no doubt that the applicant was invalided out from service after 3 years, 164 days of service.

6. In Civil Appeal No. 2904/2011 in the case of Union of India and another vs. Rajbir Singh the Hon'ble Court observed as follows:-

> *"6. It is also not in dispute that the extent of disability in each one of the cases was assessed to be above 20% which is the bare minimum in terms of Regulation 173 of the Pension Regulations for the Army, 1961. The only question that arises in the above backdrop is whether the disability which each one of the respondents suffered was attributable to or aggravated by military service. 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. Whether or not that opinion is in itself sufficient to deny to the respondents the disability pension claimed by them is the only question falling for our determination. Several decisions of this Court have in the past examined similar questions in almost similar fact situations. But before we refer to those pronouncements we may briefly refer to the Pension Regulations that govern the field.*
>
> *7. The claims of the respondents for payment of pension, it is a common ground, are regulated by Pension Regulations for the Army, 1961. Regulation 173 of the said Regulations provides for grant of disability pension to persons who are invalided out of service on account of a disability which is attributable to or aggravated by military service in nonbattle casualty and is assessed at 20% or above. The regulation reads:*
>
> *"**173. Primary conditions for the grant of disability pension**: Unless otherwise specifically provided a disability pension may be granted to an individual who is invalided from service on account of a disability which is attributable to or aggravated*
> *by military service and is assessed at 20 percent or over. The question whether a disability is attributable to or aggravated by military service shall be determined under the rule in Appendix II."*
>
> *8. The above makes it manifest that only two conditions have been specified for the grant of disability pension viz.**(i)** the disability is above 20%; and **(ii)** the disability is attributable to or aggravated by military service. Whether or not the disability is*

attributable to or aggravated by military service, is in turn, to be determined under Entitlement Rules for Casualty Pensionary Awards, 1982 forming Appendix-II to the Pension Regulations. Significantly, Rule 5 of the Entitlement Rules for Casualty Pensionary Awards, 1982 also lays down the approach to be adopted while determining the entitlement to disability pension under the said Rules. Rule 5 reads as under:

> *"5. The approach to the question of entitlement to casualty pensionary awards and evaluation of disabilities shall be based on the following presumptions:*
>
> ***Prior to and during service***
> *(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 of his subsequently being discharged from service on medical grounds any deterioration in his health, which has taken place, is due to service."*

9. Equally important is Rule 9 of the Entitlement Rules (supra) which places the onus of proof upon the establishment. Rule 9 reads:

> *"**9. Onus of proof.** – 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."*

10. As regards diseases Rule 14 of the Entitlement Rules stipulates that in the case of a disease which has led to an individual's discharge or death, the disease shall be deemed to have arisen in service, if no note of it was made at the time of individual's acceptance for military service, subject to the condition that 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 same will not be deemed to have so arisen". Rule 14 may also be extracted for facility of reference.

> *"**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." (emphasis supplied)

11. From a conjoint and harmonious reading of Rules 5, 9 and 14 of Entitlement Rules (supra) the following guiding principles emerge:

***i)** 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;*

***ii)** in the event of his being discharged from service on medical grounds at any subsequent stage it must be presumed that any such deterioration in his health which has taken place is due to such military service;*

***iii)** the 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; and*

***iv)** if medical opinion holds that the disease, because of which the individual was discharged, could not have been detected on medical examination prior to acceptance of service, reasons for the same shall be stated.*

12. Reference may also be made at this stage to the guidelines set out in Chapter-II of the Guide to Medical Officers (Military Pensions), 2002 which set out the "Entitlement: General Principles", and the approach to be adopted in such cases. Paras 7, 8 and 9 of the said guidelines reads as under:

*"**7.** Evidentiary value is attached to the record of a member's condition at the commencement of service, and such record has, therefore, to be accepted unless any different conclusion has been reached due to the inaccuracy of the record in a particular case or otherwise. Accordingly, if the disease leading to member's invalidation out of service or death while in service, was not noted in a medical report at the commencement of service, the inference would be that the disease arose during the period of member's military service. It may be that the inaccuracy or incompleteness of service record on entry in service was due to a non-disclosure of the essential facts by the member e.g. pre enrolment history of an injury or disease like epilepsy, mental disorder, etc. It may also be that owing to latency or obscurity of the symptoms, a disability escaped detection on enrolment. Such lack of recognition may affect the medical categorization of the member on enrolment and/or cause him to perform duties harmful to his condition. Again, there may occasionally be*

direct evidence of the contraction of a disability, otherwise than by service. In all such cases, though the disease cannot be considered to have been caused by service, the question of aggravation by subsequent service conditions will need examination. The following are some of the diseases which ordinarily escape detection on enrolment:

(a) Certain congenital abnormalities which are latent and only discoverable on full investigations e.g. Congenital Defect of Spine, Spina bifida, Sacralisation,

(b) Certain familial and hereditary diseases e.g. Haemophilia, Congential Syphilis, Haemoglobinopathy.

(c) Certain diseases of the heart and blood vessels e.g. Coronary Atherosclerosis, Rheumatic Fever.

(d) Diseases which may be undetectable by physical examination on enrolment, unless adequate history is given at the time by the member e.g. Gastric and Duodenal Ulcers, Epilepsy, Mental Disorders, HIV Infections.

(e) Relapsing forms of mental disorders which have intervals of normality.

(f) Diseases which have periodic attacks e.g. Bronchial Asthma, Epilepsy, Csom, etc.

8. *The question whether the invalidation or death of a member has resulted from service conditions, has to be judged in the light of the record of the member's condition on enrolment as noted in service documents and of all other available evidence both direct and indirect. In addition to any documentary evidence relative to the member's condition to entering the service and during service, the member must be carefully and closely questioned on the circumstances which led to the advent of his disease, the duration, the family history, his pre-service history, etc. so that all evidence in support or against the claim is elucidated. Presidents of Medical Boards should make this their personal responsibility and ensure that opinions on attributability, aggravation or otherwise are supported by cogent reasons; the approving authority should also be satisfied that this question has been dealt with in such a way as to leave no reasonable doubt.*

9. *On the question whether any persisting deterioration has occurred, it is to be remembered that invalidation from service does not necessarily imply that the member's health has deteriorated during service. The disability may have been discovered soon after joining and the member discharged in his own interest in order to prevent deterioration. In such cases, there may even have been a temporary worsening during service, but if the treatment given before discharge was on grounds of expediency to prevent a recurrence, no lasting damage was inflicted by service and there would be no ground for admitting entitlement. Again a member may have been invalided from service because he is found so weak mentally that it is impossible to*

make him an efficient soldier. This would not mean that his condition has worsened during service, but only that it is worse than was realised on enrolment in the army. To sum up, in each case the question whether any persisting deterioration on the available evidence which will vary according to the type of the disability, the consensus of medical opinion relating to the particular condition and the clinical history."

13. In ***Dharamvir Singh's*** *case (supra) this 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)].*

***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)."*

*14. Applying the above principles this Court in **Dharamvir Singh's** case (supra) found that no note of any disease had been recorded at the time of his acceptance into military service. This Court also held that Union of India had failed to bring on record any document to suggest that Dharamvir was under treatment for the disease at the time of his recruitment or that the disease was hereditary in nature. This Court, on that basis, declared Dharamvir to be entitled to claim disability pension in the absence of any note in his service record at the time of his acceptance into military service. This Court observed:*

> *"33. In spite of the aforesaid provisions, the Pension Sanctioning Authority failed to notice that the 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 appellant at the time of acceptance for military service. Without going through the aforesaid facts the Pension Sanctioning Authority mechanically passed the impugned order of rejection based on the report of the Medical Board. As per Rules 5 and 9 of the Entitlement Rules for Casualty Pensionary Awards, 1982, the appellant is entitled for presumption and benefit of presumption in his favour. In the absence of any evidence on record to show that the appellant was suffering from "generalised seizure (epilepsy)" at the time of acceptance of his service, it will be presumed that the appellant was in sound physical and mental condition at the time of entering the service and deterioration in his health has taken place due to service."*

*15. The legal position as stated in **Dharamvir Singh's** case (supra) is, in our opinion, in tune with the Pension Regulations, the Entitlement Rules and the Guidelines issued to the Medical Officers. 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. From Rule 14(b) of the Entitlement Rules it is further clear that if the medical opinion were to hold that the disease suffered by the member of the armed forces could not have been detected prior to acceptance for service, the Medical Board must state the reasons for saying so. 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. The very fact that he was upon proper physical and other tests found fit to serve in the army should rise as indeed the rules do provide for a presumption that he was disease-free at the time of his entry into service. That presumption continues till it is proved by the employer that the disease was neither attributable to nor aggravated by military service. For the employer to say so, the least that is required is a statement of reasons supporting that view. That we feel is the true essence of the rules which ought to be kept in view all the time while dealing with cases of disability pension."

5. In O.A. - 47 of 2015 decided on 25.1.2016, this Bench in a similar case of Schizophrenia allowed the O.A. and held that the applicant is entitled to 50% disability which was to be rounded off to 75%, according to the Govt. of India Ministry of Defence letter No. 1(2)/97/I/D (Pen-C), dated 31.1.2001.

6. Accordingly, we are also of the opinion that the applicant is entitled to 60% disability pension (consisting of service element as well as disability element) which is to be rounded off to 75% with effect from three years prior to the filing of the writ petition which was filed on 23.01.2010.

7. The T.A. (T. A. No. – 03/2015) is accordingly allowed without any order as to costs.

8. This T.A. (T. A. No. – 03/2015) thus disposed of.

9. Let a plain copy of this order, duly counter signed by the Tribunal Officer, be given to the parties upon observance of requisite formalities.

10. Original Records (held if any) will be returned to the Respondents by the Tribunal Officer on proper receipt.

(LT GEN GAUTAM MOORTHY)
MEMBER (ADMINISTRATIVE)

(JUSTICE INDIRA SHAH)
MEMBER (JUDICIAL)

ss.