A F R

(SEE RULE 102 (1))
ARMED FORCES TRIBUNAL, KOLKATA BENCH
OA NO. 36/2014

THIS 5TH DAY OF APRIL, 2016

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

APPLICANT(S)

Ex-No. 1568528 Ex-Rect. Amit Kumar
S/o Arvind Kumar Singh
R/o Village – Mamrejpur (Koari)
P.O. – Asoi Via Bhagwanpur
P.S. - Sarai
Dist. – Vaishali
Biharl – 844114.

-versus-

RESPONDENT(S)

1. The Union of India, service through the Secretary
Min of Defence, Government of India,
Ministry of Defence, Sena Bhawan,
Defence Headquarters, Army Headquarters,
New Delhi - 110105

2. The Chief of Army Staff
Sena Bhawan
Integrated HQ of MoD (Army)
Defence Headquarters Post Office
New Delhi - 110011.

3. Adjutant General,
Integrated HQ, MoD (Army)
DHQ PO New Delhi – 110011

4. Chief Record Officer for OIC Records
Signal Abhilekh Karyalaya
Signal Records,
P.O. Bag No. 5
Jabalpur, Pin – 482001.

5. Army Group Insurance Fund, AGI Bhawan
Rao Tula Ram Marg
Post Bag No. 14, P.O. Vasant Vihar
New Delhi - 110057

6. The Secretary
Department of Ex-Servicemen Welfare & Pension
Ministry of Defence, South Block
New Delhi – 110 011.

7. Principal Controller of Defence Accounts (Pension)
Draupadi Ghat
Allahabad – 211014
(U.P.)

For the petitioner (s) **Miss Manika Roy, Advocate**

For the respondents **Mr. Anup Kumar Biswas, Advocate (Resp 1-4, 6 & 7)**

Mr. Rajib Mukherjee (Resp No. 5).

ORDER

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

1. This is an application filed under Section 14 of Armed Forces Tribunal Act, 2007 (in short, AFT Act 2007) in substance praying for grant of disability pension. The facts are as under :-

(a) The applicant was enrolled in the Corps of Signals on 04.04 2003. In 2004 he was admitted in Command Hospital Pune and was invalided out of service on 02.05.2005 under Army Rule 13(3)III(iii) in Low Medical Category 'EEE' for disability "MOOD DISORDER MANIA WITH PSYCHOTIC SYMPTOMS" (F 30.2) after 2 years and 28 days of service. Percentage of disability was assessed at 10 to 14% for a period of 5 years and the disability was neither attributable nor aggravated to military service. While invaliding him out the opinion of the Classified Specialist in Psychiatry was as under :-

> *"This young soldier had a major psychiatric illness, which is known to be recurring in nature. If retained in service, he has to be put in Low Medical Category for a minimum 4 years. Considering the early onset, the severity of the illness, chances of recurrence is high and in that case, he may not be able to serve as a fit soldier at all. This will grossly impair in his performing the primary duties of a soldier as he will not be allowed to handle fire arms/ammunition. He is thus recommended to be invalided out from service in medical category 'EEE' by the duly Constituted Invalidity Medical Board".*

2. Accordingly he was invalided out of service on 02.05.2005. The disability pension claim in respect of the applicant was submitted to PCDA (P) Allahabad, on 17.02.2006. However, the PCDA (P) Allahabad after adjudicating the claim have rejected the disability pension on the plea

that the disability has been opined as neither attributable to nor aggravated by military service with degree of disablement at 11-14% and being constitutional in nature.

3. The applicant submitted an appeal against it on 14.11.2006 which was considered by the Appellate Committee on First Appeals (ACFA) and after adjudicating the Appeal within the Rules and Regulations, rejected it on the same ground. This was communicated to the applicant by Integrated HQ MoD (Army) vide letter No. B/40502/58/07/AG/PS-3 (Imp-II) dated 16.10.2007 with an advice to prefer second appeal which the applicant submitted on 19.02.2008 before the Appellate Committee on Second Appeals. This appeal had also been rejected on the plea stating that the Invaliding Disease was detected on 20.12.2004 in a peace station and the disability was neither attributable to nor aggravated by Military Service. This was communicated to the applicant on 23.05.2009.

4. Subsequently, the applicant had filed CWJC No. 2118/2010 before Hon'ble Patna High Court which was disposed off with directions to the respondents that the grievances of the applicant be considered in accordance with law by the Competent Authority and speaking order to this effect was issued on 31.01.2011. The relevant operative part of the order is reproduced as under :-

> *"5. Pursuance to the order of the Hon'ble High Court, your case has again been considered by the competent authority and it has been decided that since your grievance had already been considered by the first and second appellate authorities and found no merit in the case as your disability is neither attributable to nor aggravated by military service and same was constitutional in nature and not related to service. You are not eligible for grant of Disability Pension and AGI disability benefit.*
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> *6. AND IN PURSUANCE THEREOF, the court order dated 21 Apr 2010 passed by the Hon'ble High Court of Judicature at Patna in CWJC 2118/2010 stands complied with."*

5. The respondents have further stated that the medical test at the time of enrolment is not exhaustive. But its scope is limited to broad physical examination. Therefore, it may not

detect some dormant disease, besides certain heredity, constitutional and congenital diseases may manifest later in life, irrespective of service conditions. The respondents have also brought out the mere fact that a disease has manifested during military service does not per se establish attributability or aggravation by military service. The respondents have relied upon the Hon'ble Supreme Court in Civil appeal No. 154/1991 Union of India Vs. Ex Sapper Mohinder Singh have held that opinion expressed by Medical Board being an expert body which physically examined the individual to be given due weightage, value and credence.

6. On the other hand, ld. counsel for the applicant has stated that the issue is no more res integra in view of catena of judgements of the Hon'ble Supreme Court and other Benches. While hearing the petition, Col Jyoti Prakash, Senior Advisor Psychiatry, Command Hospital, Eastern Command, Kolkata appeared before this Bench on 13.08.2015 alongwith a copy of amendment to Chapter VI and VII – Guide to Medical Officers (Military Pensions) issued by the Ministry of Defence. While assisting the Tribunal, it was admitted by Col Jyoti Prakash that no DNA test was done. It was also stated by Col Jyoti Prakash that this 'Disorder Mania with Psychiatric Symptoms' is a disease which results from a complex interplay of endogenous (genetic/biological) and exogenous (environmental, psychosocial as well as physical) factors. He also submitted that the percentage of disability has been assessed as per the norms and guidelines of the Ministry of Defence and individual assessment of the disease by the members of the Medical Board. He did not have any satisfactory reply to a question put by this Bench as to why a person having less than 20% disability has been invalided out of service more so when he may not be entitled to any disability benefits. Subsequently on 22.09.2015 Col S.K. Kar, President Medical Board, Command Hospital (Eastern Command) appeared before this Bench and stated that vide amendment in 2008, Chapter 7 to GMO 2002 Guide to Military Officer (Military Pension) 2002, the minimum disability which can be awarded for psychiatric patient is 40% and therefore, stated that if the applicant went for re-assessment then his disability can be assessed according to the latest guidelines. The Bench, therefore, directed the respondents to arrange re-assessment of the disability of the applicant.

7. Subsequently, the applicant was re-examined by Medical Board on 15.10.2015 and his disablement for the same ailment was assessed at 40% for life.

8. The law with regard to entitlement and payment of disability pension to armed forces personnel is no more res integra. Pension Regulations for the Army Part I 1961, Para 173 deals with conditions for grant of disability pension is reproduced as under :-

Primary conditions for the grant of disability Pension

173. Unless otherwise specifically provided a disability pension consisting of service 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.

9. Para 7 and 7.1 of of Govt of India, Mod letter No. 1 (2)/97/1/D (Pen – C) dated 31.01.2001 deals with disability pension on invalidment is reproduced as under :-

7. **Disability Pension on Invalidment:**

7.1 Where an Armed Forces Personnel is invalided out of service under circumstances mentioned in category 'B' & 'C' of Para 4.1 above which is accepted as attributable to or aggravated by Military Service, he/she shall be entitled to disability pension consisting of service element and disability element as follows:-

(i) Service Element :-

(i) ***<u>Commissioned Officers:</u>*** *xxxxxxxxxx*

(ii) ***<u>PBOR:</u>*** *Service element will be determined as follows :-*

Length of actual Qualifying service rendered (without weightage)	***Entitlement of Service Element***
15 years or more (20 years or more in the case of NCs(E)	*Equal to normal service pension relevant to the length of qualifying service actually rendered plus weightage of service as given in Para 5 and 6 of Ministry's letter dated 03 Feb 98 ibid.*
Less than 15 years (20 years in case of NCs(E)	*Equal to service pension as determined as per Para 6.2(b) of Ministry's letter dated 03 Feb 98 but it shall in no case be less than 2/3rd of the minimum service pension admissible to the rank/pay group.*

<u>Note :</u> The existing provisions in the case of PBOR regarding grant of service element equal to minimum service pension appropriate to the rank and pay group in case where service is less that 15 years (20 years in the case of NCs(E) and the disability is sustained in flying/Parachute jumping duty or while being carried on duty in an aircraft under proper authority shall continue.

(ii) *(a) Disability Element :- The rates of Disability element for 100% disability for various ranks shall be as follows:-*

Rank	***Amount p.m.***
i) Commissioned Officers and Honorary Commissioned Officers of the three services, MNS, TA and DSC	*Rs. 2600/-*
ii) Junior Commissioned Officers and equivalent ranks of the three services, TA and DSC.	*Rs. 1900/-*
iii) Other ranks of the three services, TA and DSC.	*Rs. 1550/-*

(b) Disability lower than 100% shall be reduced with reference to percentage as laid down in Para 7.2 below. Provided that where permanent disability is not less than 60%, the disability pension (i.e. total of service element plus disability element) shall not be less than 60% of the reckonable emoluments last drawn.

7.2. Where an Armed Forces Personnel is invalided out under circumstances mentioned in Para 4.1 above, the extent of disability or functional incapacity shall be determined in the following manner for the purposes of computing the disability element :-

Percentage of disability as assessed by Invaliding medical board	***Percentage to be reckoned for Computing of disability element***
Less than 50	*50*
Between 50 and 75	*75*
Between 75 and 100	*100*

10. While considering the aspect of onus of proof, the Hon'ble Apex Court in Dharamvir Singh's case (Supra) 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."*

11. The Hon'ble Apex Court in the case of **Union of India vs. Rajbir Singh** -Civil Appeal No.2904 of 2011 etc. decided on 13.02.2015 after considering Dharamvir Singh's case (supra), while 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. …*
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> *… 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."*

12. The 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).

13. The rules to be followed by the Medical Board in disposal of special cases have been shown under Chapter VIII of the General Rules of Guide to Medical Officers (Military Pensions)

2002. Rule 423 deals with "Attributability to service", relevant portion of which reads as follows :

> ***"423(a)****For the purpose of determining whether the cause of a disability or death resulting from disease is or is not attributable to service, it is immaterial whether the cause giving rise to the disability or death occurred in an area declared to be a FieldService/Active Service area or under normal peace conditions. It is however, essential to establish whether the disability or death bore a casual connection with the service conditions. All evidence both direct and circumstantial will be taken into account and benefit of reasonable doubt, if any, will be given to the individual. The evidence to be accepted as reasonable doubt for the purpose of these instructions should be of a degree of cogency, which though not reaching certainty, nevertheless carries a high degree of probability. In this connection, it will be remembered that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. If the evidence is so strong against an individual as to leave only a remote possibility in his/her favour, which can be dismissed with the sentence "of course it is possible but not in the least probable" the case is proved beyond reasonable doubt. If on the other hand, the evidence be so evenly balanced as to render impracticable a determinate conclusion one way or the other, then the case would be one in which the benefit of the doubt could be given more liberally to the individual, in cases occurring in Field Service/Active Service areas.*
>
> ***(c)****. The cause of a disability or death resulting from a disease will be regarded as attributable to Service when it is established that the disease arose during Service and the conditions and circumstances of duty in the Armed Forces determined and contributed to the onset of the disease. Cases, in which it is established that Service conditions did not determine or contribute to the onset of the disease but influenced the subsequent course of the disease, will be regarded as aggravated by the service. 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 acceptancefor Service in the Armed Forces. 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.*
>
> ***(d).****The question, whether a disability or death resulting from disease is attributable to or aggravated by service or not, will be decided as regards its medical aspects by a Medical Board or by the medical officer who signs the Death Certificate. The Medical Board/Medical Officer will specify reasons for their/his opinion. The opinion of the Medical Board/Medical Officers, in so far as it relates to the actual cause of the disability or death and the circumstances in which it originated will be regarded as final. The question whether the cause and the attendant circumstances can be accepted as attributable to/aggravated by service for the purpose of pensionary benefits will, however, be decided by the pension sanctioning authority."*

14. Therefore, as per Rule 423 following procedures are to be followed by the Medical Board.

> *(i) Evidence both direct and circumstantial to be taken into account by the Board and benefit of reasonable doubt, if any would go to the individual;*
>
> *(ii) a disease which has led to an individual's discharge or death will ordinarily be treated to have been arisen in service, if no note of it was made at the time of individual's acceptance for service in Armed Forces.*

(iii) If the medical opinion holds that the disease could not have been detected on medical examination prior to acceptance for service and the disease will not be deemed to have been arisen during military service the Board is required to state the reason for the same.

'Chapter II'of the Guide to Medical Officers (Military Pensions) 2002 relates to "Entitlement : General Principles". In the opening paragraph 1, it is made clear that the Medical Board should examine cases in the light of the etiology of the particular disease and after considering all the relevant particulars of a case, record their conclusions with reasons in support, in clear terms and in a language which the Pension Sanctioning Authority would be able to appreciate fully in determining the

question of entitlement according to the rules. Medical officers should comment on the evidence both for and against the concession of entitlement; the aforesaid paragraph reads as follows:

> *"1. Although the certificate of a properly constituted medical authority visavis the invaliding disability, or death, forms the basis of compensation payable by the government, the decision to admit or refuse entitlement is not solely a matter which can be determined finally by the medical authorities alone. It may require also the consideration of other circumstances e.g. service conditions, pre and post service history, verification of wound or injury, corroboration of statements, collecting and weighing the value of evidence, and in some instances, matters of military law and discipline. Accordingly, Medical Boards should examine cases in the light of the etiology of the particular disease and considering all the relevant particulars of a case, record their conclusions with reasons in support, in clear terms and in a language which the Pension Sanctioning Authority, a lay body, would be able to appreciate fully in determining the question of entitlement according to the rules. In expressing their opinion Medical Officers should comment on the evidence both for and against the concession of entitlement. In this connection, it is as well to remember that a bare medical opinion without reasons in support will be of no value to the Pension Sanctioning Authority."*

Paragraph 6 suggests the procedure to be followed by service authorities if there is no note, or adequate note, in the service records on which the claim is based.

Paragraph 7 talks of evidentiary value attached to the record of a member's condition at the commencement of service, .e.g. pre-enrolment history of an injury, or disease like epilepsy, mental disorder etc. Further, guidelines have been laid down at paragraphs 8 and 9, as quoted below:

> *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 nondisclosure 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. CONGENITALDEFECT OF SPINE, SPINA BIFIDA, SACRALIZATION,

(b)Certain familial and hereditary diseases, e.g., HAEMOPHILIA, CONGENTIAL SYPHILIS, HAEMOGIOBINOPATHY.

C)Certain diseases of the heart and blood vessels, e.g., CORONORY 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 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 death 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 itis 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 realized 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."

15. In view of the above, the disability due to which the applicant was boarded out of service is to be considered as attributable to and aggravated by military service.

16. Thus in our considered opinion the applicant is entitled for grant of disability pension.

17. The applicant is praying for grant of disability pension with effect from 02.05.2005 for which, according to us, he is entitled to, inasmuch as, the applicant is running from pillar to post since inception.

18. No other points have been raised by the applicant nor any other relief has been pressed during the course of argument.

19. For the reasons mentioned above, the application is allowed in part without any order as to costs. The applicant is entitled for grant of disability pension with effect from 02.05.2005 by rounding off disability from 40% to 50% in view of Govt. of India, MoD circular dated 31.01.2001. The applicant is also entitled for arrears of disability pension with interest at the rate of 6% per annum. The entire exercise has to be completed by the respondents within a period of three months from the date of receipt of a copy of this order.

20. The application thus stands disposed of.

21. Let a plain copy of this order, duly countersigned by the Tribunal Officer, be furnished to the parties upon observing requisite formalities.

(Lt Gen Gautam Moorthy)
Member (Administrative)

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

ad/ss