

SEE RULE 102 (1)

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

ORIGINAL APPLICATION : O.A. NO. – 118/2016

DATED : 06th JUNE, 2018

CORAM

HON'BLE DR. (MRS.) JUSTICE INDIRA SHAH, MEMBER (JUDICIAL)
HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)

APPLICANT (S) : No. 13941325 Y Ex Sepoy (NA)
Goutam Banerjee
S/O Late Preti Bhushan Banerjee
DC/86, Prayas Apartment, Second Floor
Narayantala Road (West)
PO : Deshbandhu Nagar, BAGUIHATI
KOLKATA - 700059

Versus

RESPONDENT (S) : (1) The Union of India, service through
The Defence Secretary, Ministry of Defence
South Block,
DHQ, PO, New Delhi – 110 011

(2) The Chief of the Army Staff
Through Adjutant General
Integrated HQ of MoD (Army)
South Block, DHQ, PO, New Delhi-110011

(3) The Secretary
Department of Ex-servicemen Welfare
& Pension,
Ministry of Defence, South Block
DHQ PO New Delhi - 110011

(4) The Principal Controller of Defence Accounts
(Pensions)
Drapaudi Ghat, Allahabad (UP) – PIN – 211 001

(5) The Officer-in-Charge Records
AMC Records
PIN – 900 450
C/O 56 APO

Counsel for the applicant (s) : Mr. S. K. Choudhury

Counsel for the Respondent (s) : Mr. Mukesh Kumar Gupta

ORDERPER LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)

1. This is an application filed under Section 14 of the AFT Act, 2007 assailing the non grant of Disability Pension to the applicant who was invalided out of Army after 3 years and 65 days in service. The facts of the case are that the applicant was enrolled in the Army as Sepoy (Nursing Assistant) in the Army Medical Corps on 10.01.1976 and he was invalided out from the Army Service on 15.03.1979.

2. The Ld. Counsel for the applicant states that the applicant was invalided out for "Anxiety Neurosis" and he was released in category EEE (P). His discharge book indicates that he was released Under Rule 13 (iii) on medical grounds. A certificate from the President Medical Board dated 17.04.1979 exists on records. This is set out as under :-

CERTIFICATE

(AHQ letter 72339/AG/ORG-2 dated 19/21 October, 1957)

This is to certify that No. 13941325 Name Goutam Banerjee has undermentioned disabilities and this will not interfere with performance of civil employment.

"Anxiety neurosis"

*(Command Hospital)
17 Apr 79*

*Sd/ x x x x x x x x x
Lt Col
President Medical Board*

3. The applicant's claim for Disability Pension was turned down vide AMC Records, Lucknow letter dt. 17.08.1979 (Annexure-I) as his claim was considered as Non Attributable to Military Service.

4. The Respondents in a written reply has stated that the discharge was not recorded in the Long Roll maintained by the AMC Records. Respondents have also stated that all the service records along with all medical documents have since been destroyed since the applicant was not authorized Disability Pension according to the existing policy as enunciated in DSR (Regulations for the Army) 1987 (Para 595); which is reproduced as follows : -

“595. Retention Of Pension Documents – (a) The following documents in regard to the grant of pensions and gratuities to JCOs, WOs, OR and Non-Combatants (Enrolled) will be retained by the units and formations concerned for a period of fifty years in the case of pensioner and for twenty five years in the other cases from the date of an individual becomes non-effective : -

- (i) Sheet Rolls and Service Books.*
- (ii) Register containing details of pensioners.*
- (iii) Admission and Discharge books of Military Hospitals.*
- (iv) Medical Board Proceedings.*

(b) The following documents will be filed with the sheet roll for retention : -

- (i) Sanctions by audit officers to counting of former service.*
- (ii) Enrolment Forms.*
- (iii) Primary Medical Examination Report (AFMSF-2A).*
- (iv) Service and Casualty Forms (IAF-958).*
- (v) Details of field of foreign service with orders thereon.*
- (vi) Certificates of election to come under any particular pension rules.*
- (vii) Injury reports, statements of witnesses.*

(c) Part II Orders will be treated like other pension documents and retained for twenty-five years.

(d) In addition to the documents mentioned above all important correspondence regarding pensions, gratuities will be retained for ten years.

(e) Medical documents (including constituents thereof) will be retained for a period of seven years from the date the individuals of under mentioned categories become non-effective : -

- (i) JCOs/OR/NCs(E) dismissed from service.
- (ii) Deceased JCOs/OR/NCs(E) in whose case family pension claims have been sanctioned.

Note : Such documents of JCOs/OR/NCs(E) transferred to pension establishment in medical category "A" and also of those who were discharged from service without any pensionary benefits will be retained by Record Offices upto the date on which individuals attain the age of 65 years.

5. The respondents have also confirmed that the Disability Pension Claim of the applicant was submitted to the Pension Sanctioning Authority, i.e., Principal Controller of Defence Accounts (Pensions), Allahabad for adjudication and grant of Disability Pension of the applicant. However, the PCDA (P) has rejected his claim for disability pension claim considering his disability is Not Attributable Nor Aggravated (NANA) by Military Service vide letter at R-3 (Supra). The decision of the PCDA (P) regarding the rejection also conveyed to him (Annx – R 3), and he was advised to submit an appeal against the decision of the PCDA (P) within 6 months if he was aggrieved with the decision. Accordingly, he preferred an appeal which was rejected by the Competent Authority i.e., Govt. of India, Ministry of Defence vide letter Nu. 7(573)/79/Pen-A dt 04.12.1980 (Annx-4) which stated –

"Your appeal against of disability pension has been reconsidered by the Government of India but it is regretted that they find no reasonable grounds to alter the decision already conveyed by the Controller of Defence Accounts (Pensions), Allahabad. I am further/add that no useful purpose will be served in making further representations in the matter."

6. In this case, no Medical Board Proceedings have been produced before us for perusal. There is admittedly neither any note in the Service Records of the Respondents at the time of his entry into Service nor have any reasons been recorded by the Medical Board at the time of his discharge, except for the certificate mentioned at Para 2 above.

7. Counsel for the applicant has relied upon the Judgement of Hon'ble Supreme Court of India in Dharamvir Singh Vs Union of India & Ors. on 02 July 2013 in Civil Appeal No. 4949 of 2013 (arising out of SLP (c) No. 6940 of 2010).

The relevant portion is set out as under : -

"The Learned Counsel for the applicant contended that the Entitlement Rules for casualty Pensionary Awards, 1982 have been made effective w.e.f. 1st January, 1982 and the set of rules is required to be read in conjunction with the Guide to Medical Officers (Military Pension), 1980. Referring to Rule 423 (c) it was submitted that the cause of 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. A disease which has led to an individual's discharge or death will be ordinarily be deemed to have arisen in service if no note of it was made at the time of individual's acceptance for 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 in service."

In Civil Appeal No. 2904 of 2011, Union of India & Anr Vs Rajbir Singh, the Hon'ble Supreme Court had stated –

15. *"The legal position as stated in Dharamvir Singh's case (supra), is, in our opinion, the 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 of 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 of service, the Medical Board must state the reasons for saying so. Last but not the least is the fact that the 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 presumption that he was disease-free at the time of his entry into service. That presumption continues till it is provided 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 views. 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.

16. Applying the above parameters to the cases at hand, we are of the view that each one of the respondents having been discharged from service on account of medical disease/disability, the disability must be presumed to have been arisen in the course of service which must, in the absence of any reason recorded by the Medical Board be presumed to have been to suggest that the disease which the member concerned was found to be suffering from could not have been detected at the time of his entry into service. The initial presumption that the respondents were all physically fit and free from any disease and in sound physical and mental condition at the time of their entry into service thus remains unrebutted. Since the disability has in each case been assessed at more than 20%, their claim to disability pension could not have been repudiated by the appellants.

17. In the result these appeals fail and are hereby dismissed without any order as to costs."

8. In another case in the Hon'ble Supreme Court in Sukhvinder Singh vs Union of India and Others reported as 2014 STPL (Web) 468 SC wherein the Hon'ble Supreme Court has observed at Para 6 : -

6. "We think that that it beyond cavil that a combatant soldier is liable to be invalided out of service only if his disability is 20 per cent or above and there is a further finding that he cannot discharge duties even after being placed in a lower medical category. We are indeed satisfied to note that Rule 173 Appendix-II(10) postulates and permits preferment of claims even "where a disease did not actually lead to the member's discharge from service but arose within 10 years thereafter". We, just as every other citizen of India, would be extremely disturbed if the Authorities are perceived as being impervious or unsympathetic towards member of the Armed Forces who have suffered disabilities, without receiving any form of recompense or source of sustenance, since these are inextricably germane to their source of livelihood. Learned Counsel for the respondents has failed to disclose any provision empowering the invaliding out of service of any person whose disability is below 20 per cent, Indeed, this would tantamount to dismissal of a member of the Armed Forces without recourse to a court-martial which would automatically entitle him to reinstatement. Regulation 143 envisages the "Re-Enrolment of Ex-Servicemen Medically Boarded Out", where the disability is reassessed to be below 20 per cent. It is, therefore, self contradictory to contend that the invaliding out of service of the appellant was justified despite his disability being trivial proportions having been adjudged between 6 to 10 per cent only. We shall presume, albeit fortuitously for the Respondents, that re-assessment of the appellant's disability was not required to be performed because it was found to be permanent. Otherwise, there would be facial non-compliance with Regulation 143, which is extracted below for ease of reference :-

"143. Re-Enrolment of Ex-Servicemen Medically Boarded out.-

"Ex-Servicemen, who are in receipt of disability pension, will not be accepted for re-enrollment in the army. (b) Ex-Servicemen, medically boarded out without any disability pension or those whose disability pensions have been stopped because of their disability having been re-assessed below 20 % by the Re-Survey Boards, will be eligible for re-enrolment, either in combatant or non-combatant (enrolled) capacity in the Army, provided they are re-medically boarded and declared fit by the medical authorities. If such an ex-servicemen applies for re-enrollment and claims that he is entirely free from the disability for which invalided, he will be medically examined by the Rtg MO and if he considered him fit, the applicant will be advised to apply to Officer-in-Charge, Records Office concerned, through the Recruiting Officer for getting himself re-medically boarded.

7. Further at Para 9 of the above judgement states that –

"9. 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 be 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 appears to be no provisions authorizing the discharge or invaliding out of service where the disability is below twenty per cent and seems to us to be logically so. Fourthly, as per the extant Rules/Regulations, a disability leading to invaliding out of service would attract the grant of fifty per cent disability pension”.

9. Therefore, in the instant case, it is observed that although no Medical Board Proceedings have been produced before us as they have been destroyed, there is no doubt whatsoever that the applicant was invalided out from service as the Certificate of the President Medical Board dt. 17.04.1979 exists on record (Annx-26A).

10. Hence, in view of the factual matrix on record as well as the Judgements referred to above, there is no doubt that the applicant should have been granted at least 20 % of Disability Pension since he has been invalided out of service.

11. We, therefore, direct that the applicant must be granted Disability Pension of 20 %, rounded off by 50 % from 3 years prior to filing this Original Application (O.A. No. – 118/2016).

12. Arrears are to be calculated within a period of 3 months from the date of receipt of this order, failing which 8% interest per annum will be paid to the applicant.

13. This O.A.(O.A. No. 118/2016) is accordingly allowed.

14. No order as to costs.

15. A plain copy of this order to be supplied to both the parties by the Tribunal Officer after observing all usual formalities.

(LT GEN GAUTAM MOORTHY)
MEMBER (ADMINISTRATIVE)

(JUSTICE INDIRA SHAH)
MEMBER (JUDICIAL)