

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

APPLICATION NO. O.A. 38 OF 2016

DATED :THIS *Eight* DAY OF MARCH, 2019

CORAM

HON'BLE DR. (MRS.) JUSTICE INDIRA SHAH, MEMBER (JUDICIAL)

HON'BLE LT GEN GAUTAM MOORTHY, PVSM, AVSM, ADC, MEMBER (ADMINISTRATIVE)

APPLICANT (S) : IC-19307
Capt Biplabendra Chanda (Retd)
Son of Late Nagendra Nath Chanda
Residing at
23/A, Sankaritolla Street,
P. S. Muchipara,
Kolkata – 700 014

Versus

RESPONDENT(S) (1) Union of India, service through
The Secretary, Ministry of Defence,
Army Head Quarter, South Block,
New Delhi – 110 011

(2) Commander,
Head Quarter, Kolkata Sub-Area,
Alipore, Kolkata 700027

(3) Army Commander,
Head Quarters, Eastern Command,
Fort William,
Kolkata 700 001

(4) Chief of Army Staff,
Army Head Quarter, DHQ PO
New Delhi – 110 011

(5) Additional Director General
(Personnel Service),
Integrated Headquarter, Army,
Ministry of Defence,
Adjutant General Branch,
New Delhi – 110 011

Counsel for the Applicant(s) : Mr. Subrata Ghosh, Ld. Advocate
Mr. Subhash Chandra Basu, Ld. Advocate

Counsel for the Respondent(s) : Mr. Amitava Ghosh, Ld. Advocate

ORDER

PER LT GEN GAUTAM MOORTHY, PVSM, AVSM, VSM, ADC, MEMBER (ADMINISTRATIVE)

1. This O. A. has been filed by the applicant, retired officer of the Indian Army, for disability pension.
2. The O. A. was filed along with an M. A. for condonation of delay of 34 years. The M. A. was disposed of by condoning the delay, vide our order dated 9 December 2016. Subsequently, after hearing both sides, this Bench on 04.09.2018 had directed the applicant to appear before duly constituted Medical Board to be conducted by Command Hospital, Eastern Command, Kolkata to ascertain the disablement of the applicant for 'FRACTURE SACRUM V-67' that he was suffering from on the date he proceeded on premature retirement i.e. 18.05.1982 for which at that time the Release Medical Board has assessed the disablement of the officer at 20% for two years.
3. At that time when he proceeded on premature retirement as per certificate signed by Brig Commandant ASC School on 31 May 1975 at Bareilly, *"the injuries occurred in peace area and is attributable to military service"*.
4. The Respondents while contesting the claim, have admitted in their affidavit-in-opposition in Para 6 i.e. the Release Medical Board has assessed the disability of the officer as 'attributable to military service' with degree of disablement at 20%, and that the case for grant of disability pension was not processed as the officer had retired prematurely as per the policy in vogue then.
5. The respondents have stated that subsequently as per Government of India, Ministry of Defence letter No. 16 (5)/2008/D dated 29.09.2009, disability pension is entitled to those who become non-effective on or after 01.01.2006 on account of premature retirement.
6. Subsequently, the cut off date of 01.01.1996 has been held as ultra vires and as of today there is no embargo that service personnel who proceeded on premature retirement prior to 01.01.2996 from being eligible for disability pension.
7. In order to adjudicate the case further, it was necessary for the Bench to get a fresh medical opinion on the aspect of disability of the applicant for the disablement of 'FRACTURE SACRUM V-67' only, and hence vide our order of 04.09.2018, he was asked to report to the Sr Registrar, Command Hospital, Eastern Command.

8. After having reported, Medical Board was ordered by Command Hospital, Eastern Command, Kolkata. Medical Board proceedings have been placed before the Bench in which a clear opinion about the assessment of disablement has been rendered. Relevant paras 6, 8 and 10 are set out as under:

"6. Variation in disability (ies) since previous board.

(a) Has the condition of the pensionable disability(ies) since the last board improved or deteriorated?

The clinical condition has not changed from previous medical board as per specialist opinion."

8. (a) Assessment of disablement

Disabilities	Whole disablement		Part disablement due to non-service factors	Worsenig due to natural progress of the disability	Net assessment properly referable to service	Duration of assessment
	Separate Assessment	Combined Assessment				
1	2	3	4	5	6	7
FRACTURE SACRUM V-67	20% (Twenty Percent for Life)	20% (Twenty percent for life)	NIL	NIL	20% (Twenty percent for life)	20% (Twenty percent for life)
Intervening period to assessed as per previous award of %age.						

Sd/

(Ankur Mishra)
Capt
Member-2

Sd/

(Shiva D)
Capt
Member-1

Sd/

(SD Singh)
Col
President Med Board
for Commandant

10. Further remarks of medical board.

(The board should have given further remarks they consider it necessary to offer and can also continue their answers to the proceeding queries, grouped under the appropriate headings)

His condition has not changed as per opinion of Lt Col Shambhu Singh, CI Spl (Ortho) of Comd Hosp (EC), Kolkata dated 03 Jan 2018."

Hence there is nothing further to be ascertained.

9. In this regard we may refer to this Bench Order dt 19.12.2017 in cause title OA 164/2017 along with MA 129/2017. Para 11 of the order is set out below:

"11. Subsequently, Larger Bench of the Armed Forces Tribunal also hearing bunch of cases on similar matter in O. A. No. 1439 of 2016 and five others has passed order on 01.12.2017 to this effect wherein the 'three years' clause restriction has been done away with. Relevant extract of the order are set out as under :

"After having fully discussed the issue involved before us and to set the controversy a rest vis-a-vis arrears of broad banding of the disability/ war injury element of disability pension on the ground of delay in filing application by the individual/applicant(s), we conclude thus:

- (i) *Armed Forces personnel who have been invalided/superannuated/completed terms of service/discharged under normal circumstances with disability, pre or post 01.01.1996, (including the applicants) will be entitled to broad banding of disability/war injury element. Armed Forces personnel who retired pre 01.01.1996 will be entitled to the arrear of broad banding with effect from 01.01.1996 and in the case of those who retired on or after 01.01.1996 will be entitled to arrears with effect from the date of their retirement.*
- (ii) *Armed Forces personnel who were premature retirees/proceeded on premature discharge with disability will be entitled to broad banding of disability/war injury element of pension with effect from either 01.01.2006 or the date of their retirement. There will, however, be no restriction of date for premature retirees to be eligible for disability/war injury benefits since the earlier restriction on pre 01.01.2006 premature retirees has been struck down.*
- (iii) *In all cases at (i) and (ii) preceding, there will be no restriction of three years on arrears and arrears will be paid according to eligibility (as stated preceding).*

The other salient conclusions are :

- (a) *Restriction of arrears can be applied to applicant(s) wherein he is not held entitled to disability/war injury element of pension, and such entitlement only gets established post adjudication by AFT/Courts; however, exception apart where the vested right of an individual is held to be denied the issue will be decided by AFT Benches, on its own facts.*
- (b) *All premature/voluntary retirees will remain eligible only for disability / war injury element of pension, their service element will need to be earned independently, based on years of service rendered and held as qualified for service pension.*

Following the ratio of the judgment rendered in Davinder Singh case as well as Larger Bench order dated 01.01.2016 and five others (Supra) we allow arrears with effect from 01.01.1996. The respondents are, therefore, directed to make payment of the arrears with effect from 01.01.1996 within four months from today, in default thereof, the arrears shall carry interest @ 8 per cent per annum till the date of actual payment is made.

10. The applicant is, therefore, entitled to disability pension consisting of service element as well as disability element at the rate 20% rounded off to 50% from a period of three years prior to filing of this O. A., i.e. 11 March 2016.

11. The pension as well as the arrears will be paid to him within three months of the receipt of this order failing which an interest of 8% on the arrears will be levied.

12. Thus, the O. A. No. 38 of 2016 is hereby disposed of.

13. No order as to cost.

14. The respondents had made a prayer at the time of reserving the judgment that if they receive an adverse order in this case, they may be permitted to appeal u/s 31 of the AFT Act to the Hon'ble Supreme Court. As there is no point of law of General Public importance, the appeal is not allowed.

15. Let a plain copy of this Order duly counter-signed by the Tribunal Officer be supplied to the parties after observance of usual formalities.

(LT GEN GAUTAM MOORTHY)
MEMBER (ADMINISTRATIVE)
UG

(JUSTICE INDIRA SHAH)
MEMBER (JUDICIAL)