

(17)

SEE RULE 102 (1)
ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA
O.A NO 73 OF 2017

DATED : THIS 06TH DAY OF FEBRUARY, 2020

CORAM

HON'BLE MR JUSTICE MOHAMMAD TAHIR, MEMBER (JUDICIAL)

HON'BLE VICE ADMIRAL P MURUGESAN, MEMBER (ADMINISTRATIVE)

APPLICANT : Col (TS) Debabrata Mishra(Retd)

Versus

RESPONDENT(S) : Union of India and Others

Counsel for the Applicant : Mr Raj Mohan Chattoraj

Counsel for the Respondent(s) : Mr Ashish Kumar Chatterjee
Major RD Sneha,
OIC Legal Cell(Army)

ORDER

By means of this Original Application filed under section 14 of the Armed Forces Tribunal Act, 2007, the applicant has prayed for directions to the respondents to grant 100% disability element of disability pension to him by setting aside the impugned rejection order dated 16.05.2016(Annexure B).

Briefly stated the facts relevant of this case for adjudication are as such that the applicant was commissioned in the Army in a fit medical condition 17.12.1983 and retired on 30.04.2016 in low medical category for the disabilities (a) **CAD-SVD-POST-POBA-TO LCX (30%)** (b) **TYPE II DIABETES MELLITUS (20%)** (c) **PRIMARY HYPER THYROIDISM (5-10%)** and (d) **PRIMARY HYPERTENSION(30%)**. Though the composite disability of the applicant was 60% but the Release Medical Board in its proceedings assessed the qualifying disability for disability pension as 30% for life(Annexure A). Accordingly, the applicant is in receipt of the disability element of disability pension@ 50% as against 30% after rounding off for life.

Learned counsel for the applicant has submitted that the percentage of the disability of the applicant has been wrongly calculated by the Administrative Authorities(ADG PS, Army HQ). The disabilities, that is, (b) TYPE II DIABETES MELLITUS and (d), PRIMARY HYPERTENSION are also the disabilities which are attributable to military service but the Army HQ(ADG PS) has not admitted these disabilities of the applicant as attributable to military service. The disability number (c), that, PRIMARY HYPERTENSION may be ignored being less than 20%(5-10%). Therefore, the applicant is entitled to the disability element of disability pension greater than the percentage as calculated by the administrative authority(Addl DG PS(Army HQ)(Annexure B).

We find force in the contention of the learned counsel for the applicant. The applicant is already in receipt of the disability element of disability pension for the disability number (a), that is, CAD-SVD-POST-POBA TO LCX @ 30% rounded off to 50% for life. So far as the disabilities, that is, TYPE II DIABETES MELLITUS and PRIMARY HYPERTENSION are concerned, these can also be assumed as attributable to military service as they did not exit at the time of entry of the applicant into service as is evident from the Release Medical Board proceedings. Therefore, by virtue of the principle laid down by the Hon'ble Supreme Court in the case of *Dharamvir Singh Vs Union of India* (2013) 7 SCC 316, the applicant is entitled to the disability element of disability pension in respect of these two disabilities (TYPE II DIABETES MELLITUS and PRIMARY HYPERTENSION) also. The relevant Paras 30, 32 and 33 of the aforesaid judgment are here as under:-

"Para 30....In the present case it is undisputed that no note of any disease has been recorded at the time of appellant's acceptance for military service. The respondents have failed to bring on record any document to suggest that the appellant was under treatment for such a disease or by hereditary he is suffering from such disease. In absence of any note in the service record at the time of acceptance of joining of appellant it was incumbent on the part of the Medical Board to call for records and look into the same before coming to an opinion that the disease could not have been detected on medical examination prior to the acceptance for military service, but nothing is on the record to suggest that any such record was called for by the Medical Board or looked into it and no reasons have been

recorded in writing to come to the conclusion that the disability is not due to military service...

Para 32....Inspite 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 'Entitlement Rules for Casualty Pensionary Awards, 1982', the appellant is entitled for presumption and benefit of presumption in his favour. In 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...

Para 33 ...As per Rule 423(a) of General Rules for the purpose of determining a question 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 field service/active service area or under normal peace conditions. "Classification of diseases" have been prescribed at Chapter IV of Annexure I; under paragraph 4 post traumatic epilepsy and other mental changes resulting from head injuries have been shown as one of the diseases affected by training, marching, prolonged standing etc. Therefore, the presumption would be that the disability of the appellant bore a causal connection with the service conditions..."

It is undisputedly proved that at the time the applicant entered into military service, the disabilities, that is, TYPE II DIABETES MELLITUS and PRIMARY HYPERTENSION did not exist. These disabilities accrued to him during the course of military service. So by virtue of the principle laid down in **Dharamvir Singh's case (Supra)**, the said disabilities can be attributed/aggravated by military service.

Now the question arises as to what should be the percentage of the disability of the applicant. In our opinion, the composite disability of the applicant comes to 59% and after being rounded off to it comes to 75% in terms of the judgment of the Hon'ble Supreme Court rendered in the case *Civil Appeal 418/2012 Union of India Vs Ram Avtar decided on 10-12-2014* .

In the result, the applicant is held entitled to the disability element of disability pension @ 75% as against 59% from the date of filing of this O.A, that is, 19.04.2017. The respondents are directed to calculate the arrears accordingly and pay the same to the applicant within a period of three months from the date of receipt of certified copy of this order by the learned counsel for the respondents/OIC Legal Cell failing which the arrears so accrued shall carry interest @ 8 percent per annum from the date of this order.

It is made clear that the amount on account of the disability element of the disability pension which the applicant has already received after filing of this O.A, shall be adjusted against the amount so arrived at.

No order as to costs.

(P MURUGESAN)
MEMBER (A)
06.02.2020/SKS

(MOHAMAMD TAHIR)
MEMBER (J)