

FORM NO. 21
(SEE RULE 102(1))
ARMED FORCES TRIBUNAL ,KOLKATA BENCH

OA 115/2018.

THIS 23RD DAY OF NOVEMBER 2023.

CORUM:

HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY.
MEMBER(JUDICIAL).

HON'BLE LT GEN SHASHANK SHEKHAR MISHRA, MEMBER
(ADMINISTRATIVE)

Mr. 04754-M Col Sanjay Mallick(Rted).

Applicant.

-versus-

1. Union of India through the Ministry of Defence,
New Delhi – 110001.
2. The Director General, Armed Forces Medical
Services, M Block, New Delhi – 110001.
3. The Controller General of Defence Accounts,
Ulan Batar Road, Delhi Cantt. 110010.
4. The DDG(Pension), Office of the Director
General, Armed Forces Medical Services, M Block,
New Delhi 110001.
- (5) IFA(Army-Q) A Wing, Sena Bhawan, New Delhi
110105.

Respondents.

Advocate for the applicant: : Applicant-in-person.

Advocate for the respondents : Mr. Ajay Chaubey, Advocate.

Date of hearing and order : 23.11.2023.

ORDER(ORAL)

Chaudhary, J.

In this application the following reliefs have been sought to be granted against the respondents.

- (a) *To direct the respondents to issue a modified pension payment order granting additional 40% of disability pension towards obstructive sleep apnoea and 30% towards primary hypertension with effect from 01 May 2015(the date of retirement being 30 April 2015);*
- (b) *To direct the respondents to round off to a total of 100% of disability pension in terms of the existing regulation of broad-banding of the disability pension;*
- (c) *To direct the respondents to credit the arrears along with the interest in a time bound manner;*
- (d) *To strike down/modify para 43 of the guide to medical officers which enshrines primary hypertension will be considered aggravated if it occurs while serving in field areas, HAA, CIOPS areas or prolonged afloat service since the corollary is being used by the respondents to the disadvantage of the pensioners and also being quoted against the statutory provisions contained in para 423 of RMSAF;*
- (e) *To direct the respondents to issue instruction so that the constituent members of competent authority, first appellate authority and second appellate authority to sit together while adjudicating the pension matters rather than floating noting from the office to the other and to make the rule absolute;*

(f) To direct the IFAs to restrict themselves to financial matters only and not to make any effort to encroach upon the opinion on medical matters and make the rule absolute; and

(g) The cost of litigation.

(h) To pass any other order/direction/instruction as deems fit and proper under the facts and circumstances of this case.

(2) Applicant was commissioned into the Army on 27.12.1982 and released on attaining the age of superannuation on 30.04.2015 after having served 32 years, 4 months and 3 days' service. He remained posted at various places, including high altitude and inclement weather conditions during his tenure with 417 Fd Amb at Sikkim. He also remained posted twice in counter-insurgency operation area in Nagaland during the period January 2011-February 2014. While in service he was placed in low medical category(LMC) on account of the disability primary hypertension he incurred upon in the year 2014. He was also found suffering from the disability obstructive sleep apnoea(OSA) and bilateral spondylolysis LV-5 with GD-1 spondylolisthesis LV5 over SV-1(ID-3).

(3) Before discharge on superannuation from service he was brought before Release Medical Board(RMB). The RMB on his examination found him suffering from the disabilities primary hypertension @ 30% and aggravated by military service, obstructive sleep apnoea @ 20% and

aggravated by military service and bilateral spondylolysis with Gd-1 spondylolisthesis LV5 over SV1 @ 20% again aggravated by military service. The composite disability he incurred upon was however assessed at 60%. The proceedings of the RMB is in annexure-A/5.

(4) The claim of the applicant for grant of disability pension processed by the respondents vide annexure A/13(colly) was forwarded to the competent authority for sanction after obtaining the approval of the Addl. Director General(PS-4)(page 89 of the paper book).

(5) Consequently the claim for grant of disability pension of applicant was processed in the department of Defence Accounts, however the same was rejected on the ground that the disabilities the applicant incurred upon in service are neither attributable to nor aggravated by military service. The reference in this behalf can be made to annexure A/15.

(6) Aggrieved by the rejection of the claim, applicant filed appeal(A/16), however, the same was rejected. The second appeal filed was also rejected. The order is in annexure A/17.

(7) The rejection of the claim for grant of disability element of disability pension has been sought to be set aside on the grounds inter

alia that irrespective of there being ample material available on record justifying the applicant having incurred upon the disabilities while in service and aggravated, thereby the same is erroneously rejected without assigning any reason.

(8) It has been canvassed that the opinion of the RMB that the disabilities incurred upon by the applicant have been aggravated by military service could not have been interfered with in any manner whatsoever, except the opinion if any obtained from the higher medical board.

(9) The respondents when put to notice have not disputed the facts of the case highlighted in the OA. The relief sought has however been sought to be rejected on the ground that the disabilities the applicant incurred upon were neither attributable to nor aggravated by military service and as such the competent authority has rightly rejected the claim as the eligibility conditions laid down in the existing rules/provisions for grant of disability element are not fulfilled.

(10) We have heard the applicant in person and learned senior panel counsel Mr Ajay Chaubey on behalf of the respondents and also gone through the records.

(11) As per the admitted case of the respondents the applicant before his release from service on superannuation was brought before Resurvey Medical Board which in its opinion has assessed the disabilities primary hypertension @ 30% and aggravated by military service, obstructive sleep apnoea @ 20% and aggravated by military service, and bilateral spondylolysis with Gd-1 spondylolisthesis LV5 over SV1 @ 20%, again aggravated by military service and the composite disability he incurred upon was assessed @ 60%.

(12) It is worth mentioning that the competent authority has recommended the claim of the applicant for the grant of disability element of the disability pension favourably to respondent no. 3. As all the three disabilities were held to be incurred upon by the applicant while in service hence aggravated by military service.

(13) The third respondent had granted the disability element to the applicant @ 20% and by rounding it off @ 50% with respect to the 3rd disability bilateral spondylolysis with Gd-1 spondylolisthesis LV5 over SV1, however had rejected the claim qua the applicant with respect to the primary hypertension and obstructive sleep apnoea, the first and 2nd disabilities, on the grounds inter alia that the same are neither attributable to nor aggravated by military service.

(14) This Bench, however, is not in agreement with the rejection of the claim of the applicant with regard to the remaining two disabilities also for the reason that in terms of Regulation 81 of the Pension Rules for the Army Part-I, 2008, unless and otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an officer who has been invalidated out of service on account of the disability either attributable to or aggravated by military service in non-battle casual cases in case the percentage thereof is 20% or more. Also that a soldier in Low Medical Category retires on superannuation or on completion of tenure is also entitled to the grant of disability element under the provisions of Regulation 37 of the Pension Regulations for the Army if he fulfills the laid down eligibility conditions as stated and also that the percentage of disability is 20% or more. There is again no dispute that an officer who is in Low Medical Category at the time of retirement/invalidment is required to appear before Release Medical Board before he is actually released from service.

(15) It is seen in the case at hand that the applicant has been held by the Release Medical Board to be a disabled person, i.e., on account of suffering from primary hypertension @ 30%, obstructive sleep apnoea @ 20% and bilateral spondylolysis with Gd-1 spondylolisthesis LV5 over

SV1 @ 20% and composite disability assessed at 60%. Not only this, all these three disabilities have been held to be aggravated by military service.

(16) Interestingly enough, the categorization medical board proceedings in annexure A/8 reveal that the applicant was placed in Low Medical Category on account of the disabilities primary hypertension with its origin on 26.07.1995, whereas the obstructive sleep apnoea on 16.02.2004. He was finally released on superannuation in the month of October 2014. He, therefore, was allowed to continue in service during all these years with the above disabilities detected long back in the year 2003 and 2004. Therefore the element of aggravation of these disabilities due to continuous service in Army should have been conceded and the disability element of the disability pension granted to him on this score also. The third respondent, however, acted illegally while rejecting the claim of the applicant on the ground that the element of aggravation or attributability could not have been conceded to. The reasons assigned by the third respondent while rejecting the claim of the applicant were neither reasonable nor plausible and rather unknown to the service jurisprudence. Such reasons even do not stand for the test of legal scrutiny for the reasons that the opinion of the Release Medical Board cannot be interfered by any authority. When the

Release Medical Board had held the disabilities primary hypertension and obstructive sleep apnoea, aggravated by military service, the third respondent could not have formed any other and further opinion in this regard.

(17) We feel that such an approach in the matter is contrary to the law laid down by Hon'ble Supreme Court in Civil Appeal No.164/1993 titled Ex Sapper Mohinder Singh and others vs. Union of India and others decided on 14.01.21993, Civil Appeal No.11485/2018 titled Madan Prasad Sinha vs. Union of India and others decided on 08.04.2019, that of a Division Bench judgment of the Punjab and Haryana High Court in Rarmesh Kumar Sharma vs. Union of India 2003 SCC(online) P&H 1654 and also of AFT Chandigarh Bench in OA 1590/2016 title Jaspal Singh Gill vs. Union of India and others decided on 23.05.2017.

(18) The applicant during the course of arguments has submitted that the PCDA(P) and for that matter any other authority could have not sat over the opinion of the Release Medical Board, an expert body, which ultimately held the disabilities incurred upon by him namely (i) primary hypertension @ 30% aggravated by military service, (ii) obstructive sleep apnoea @ 20% aggravated by military service and (iii) bilateral spondylolysis with Gd-1 spondylolisthesis LV5 over SV1 @ 20%

aggravated by military service, the composite disability assessed as 60%. The law laid down by the Apex Court in Ex. Sapper Mohinder Singh case(supra) reads as follows:

“From the above narrated facts and the stand taken by the parties before us, the controversy that falls for determination by us is in a very narrow compass viz. whether the Chief Controller of Defence Accounts(Pensions) has any jurisdiction to sit over the opinion of the experts(Medical Board) while dealing with the case of grant of disability pension in regard to the percentage of the disability pension or not. In the present case it is nowhere stated that the applicant was subjected to any higher Medical Board before the Chief Controller of Defence Accounts(Pensions) decided to decline the disability pension to the petitioner. We are unable to see as to how the accounts branch dealing with the pension can sit over the judgment of the experts in the medical line without making any reference to a detailed or higher medical board which can be constituted under the relevant instruction and rules by the Director General of Army Medical Corps.”

(19) The crux of the law laid down in the judgments cited(supra) is that an authority like Principal Controller of Defence Accounts cannot sit over the expert opinion given by a duly constituted medical board. Considering the law laid down by the Hon'ble Supreme Court and also the attending circumstances the rejection of the claim of the applicant for the grant of disability element of disability pension is neither legally

nor factually sustainable. The applicant is therefore entitled to the grant of disability element of disability pension also with respect to the disabilities namely primary hypertension @ 30% and obstructive sleep apnoea @ 20% from the day next to the date of his discharge i.e. 01.05.2015 for life. Since the disability bilateral spondylolysis with Gd-1 spondylolisthesis LV5 over SV1 is 20% and qua which the applicant has already been granted the disability element and the Release Medical Board had assessed the composite disability @ 60% in its proceedings(annexure A/5), the same is ordered to be rounded off to 75% for life from the day next to the date of discharge i.e. 01.05.2015 as per the law laid down by the Supreme Court in CA No.418/2012 Union of India and others vs. Ram Avtar(decided on 10.12.2014). The due and admissible arrears be calculated and released to the applicant within a period of three months from the date of receipt of certified copy of this order by learned Sr.P.C/OIC Legal Cell failing which shall accrue interest @ 8% per annum from the date of this order till realization of entire amount.

LT GEN SHASHANK SHEKHAR MISHRA
HON'BLE MEMBER(A)

JUSTICE DHARAM CHAND CHAUDHARY
HON'BLE MEMBER(J)