

(SEE RULE 102 (1))
ARMED FORCES TRIBUNAL, KOLKATA BENCH
O.A. No. 113/2013

THIS 7TH DAY OF AUG, 2015

CORAM

HON'BLE JUSTICE DEVI PRASAD SINGH, MEMBER (JUDICIAL)

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

APPLICANT(S)

Ex Nb Sub (Clk) Sachidanand Singh
Village Telari
P.O. Rupou
Teh. Nawada
Dist. Nawada
Bihar-805107

Versus

RESPONDENT(S)

1. **The Union of India**
Through Secretary
Ministry of Defence
South Block, D.H.Q. P.O.
New Delhi- 110001
2. **The Chief of the Army Staff**
Through Adjutant General
Integrated HQ of MOD (Army)
South Block, D.H.Q. P.O.
New Delhi- 110001
3. **The Director General Regiment of Artillery**
Integrated HQ of Mod (Army)
Sena Bhavan, D.H.Q. P.O.
New Delhi – 110011
4. **The Officer in Charge**
Artillery Records
Pin-908802
C/O 56 APO
5. **The Commanding Officer**
Artillery Records
Nasik Road Camp 422102.

For the petitioner (s)

Mr. S. K. Choudhury, Advocate

For the respondents

Mr. Sauvik Nandy, Advocate

O R D E R

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

1. This is an application under Section 14 of the Armed Forces Tribunal Act, 2007 (in short 'the Act') for grant of disability pension under the provisions of Regulations 173 of the Pension Regulations for the Army, Part I (1961).
2. The applicant was enrolled as a clerk in the Regiment of Artillery on 14.03.1983 and was discharged from service on 31.03.2007 being placed in medical category lower than SHAPE-I i.e.S₁H₁A₁P₂(Permanent) E₂(Permanent) due to disability of perforating injury right eye and not upto the prescribed military physical standard under Item I(III)(C) of the table annexed to Army Rule 13(3). He was brought before the Release Medical Board held at Military Hospital, Devlali on 17.11.2006 for two disabilities, that is Perforating Injury Right Eye (optd) and Primary Hypertension and both the disabilities were assessed as 30% each with a composite disability of 60 % for life. Both the disabilities were held as neither attributable to nor aggravated by military service.
3. Under the Government of India, Ministry of Defence letter No. 1(2)/2002/D(Pen-C) dated 01.09.2005 as amended vide their letter of even No. dated 31.05.2006, the competent authority considered the case carefully and upheld the decision of the Release Medical Board due to the disabilities not being connected with military service and held the net disability assessed as 'Nil'. This matter was communicated to the applicant vide Arty Records letter No. JC-266593F/DP-65204/Pen-2 dated 07.11.2007 with an advice to prefer an appeal against the decision of the competent authority at the Appellate Committee on First Appeals (ACFA) within six months from the date of receipt of the said letter, if he was not satisfied with the decision of the competent authority.
4. Accordingly, the applicant preferred an appeal No. JC-266593F/DIS-PEN/02/SN dated 25.12.2007 which was forwarded to IHQ of MoD (PS-4)(Imp-II) vide Artillery Records letter No. JC-266593F/Appeal/8656/Pen-2(D) dated 07.02.2008. The IHQ of MoD(Army) duly considered the service/medical documents and turned down the appeal as no reasonable grounds had been found to alter the decision already conveyed. The above decision was communicated to the applicant directly by the Government of India, Ministry of Defence vide their letter No.

B/40502/71/08/AG-PS-4(Imp-II) dated 04.09.2008 with an advice to prefer an appeal against the decision of the Appellate Committee on First Appeals, at the Defence Minister's Appellate Committee on Pension (DMACP) within six months from the date of receipt of the said letter, if he was not satisfied.

5. Thereafter, the applicant preferred a second appeal No. JC-266593F/Dis-Pen/SN/12/2008 dated 25.12.2008 which was forwarded to the Government of India, Ministry of Defence (Pen A & AC) vide Artillery Records letter No. JC-266593F/Appeal-8656(II)/Pen-2(D) dated 23.01.2009. The Government of India, Ministry of Defence duly considering the service/medical documents turned down the appeal due to the following reasons:-

“The Committee has, observed the onset of invaliding disease (IDs)(i) ‘Perforating injury Rt eye (Optd)’ was resulted from injury sustained by you on 12th May, 2004 during annual leave, when you were injured accidentally at home. After onset of injury, you were treated at military hospital and later provided treatment at super speciality centre ‘Shankar Netralaya Chennai’ unfortunately your vision could not be restored. After onset, you served in peace station only till release. Injury Report and Court of Inquiry have also held the IDs as neither attributable to nor aggravated by military service. ID(ii) ‘Primary Hypertension’ is an idiopathic life style disease. It was detected on 13th July, 2005 in peace, during routine annual medical examination, even though you were asymptomatic. You were treated in time and BP remained under control at release. No target organ damage took place. Your duties did not involve severe/exceptional stress. At the onset you were over weight with higher cholesterol values. Hence, the Committee has considered your both the IDs as neither attributable to nor aggravated by military service and has not accepted your appeal.”

6. The applicant in his OA assailed the above decision i.e. the second appeal against the rejection of the disability pension. He has stated that he had served in high altitude/field areas from October, 1987 to January, 1989, June 2001 to June, 2002 and July 2002 to February, 2004. He stated that he sustained accidental perforating injury right eye at home while on bona fide balance of annual leave on 12.05.2004 and was treated at Command Hospital, Kolkata and Shankar Netralaya Chennai but unfortunately the vision could not be restored. The Court of Inquiry for the purpose of investigating into the circumstances while he was on balance of annual

leave held that the severe injury was sustained by the applicant due to circumstances beyond his control and that the applicant is not to be blamed for the incident. However, according to the applicant, the Court of Inquiry erroneously declared that the injury sustained by him as neither attributable to military service nor aggravated by military service. This was ratified by the Commandant, Arty Centre, Nasik.

7. The applicant also stated that the primary hypertension was detected during routine annual medical examination on 13.07.2005 and he was placed in permanent low medical category P2(Permanent). He stated that the primary hypertension was caused due to stress and strain while in service in field area, high altitude area, operational deployment as also due to prolonged hours of work even in a peace station which is inherent in the clerical trade that he belonged to. Besides, the applicant had given his willingness to continue in alternative employment on being placed in permanent low medical category on 05.08.2006 and that Colonel Records of Arty Records gave certificate on 30.08.2006 that the applicant was capable of performing basic military duties. The applicant states that despite this, he was issued with a show cause notice (SCN) No. 1095/Show Cause/LA-II on 24.10.2006 for termination of his service which he replied on 26.10.2006 requesting that he be retained in service and be provided a sheltered appointment as his younger son is mentally retarded and requires constant support and continuous treatment. Despite this the Medical Board which was held at Devlali held that both the disabilities assessed at 30% each with a composite disability of 60% for life and released the applicant in medical category P2(Permt), E2(Permt). He was declared to be in good bodily health and commutation of pension was recommended for acceptance.

8. However, the applicant reiterated that the medical authorities had erroneously declared his disabilities as neither attributable to nor aggravated by military service. He was then discharged from service despite giving his willingness to continue, being placed in medical category lower than SHAPE 1 and not upto the prescribed military physical standard under item I(III)(c) of the table annexed to Army Rule 13(3) read in conjunction with Army Rule 13(2A) and transferred to pension establishment on 01.04.2007. The request of the applicant for sheltered appointment was declined by the Artillery Records. He was also declared unfit for the Defence Service Corps (DSC) being P2(Permt). He was also informed by the Artillery Records

vide their letter No JC-266593/DP-65204/Pen-2 dated 07.11.2007 that he was not entitled to disability pension in terms of Regulation 173 of Pension Regulations for the Army, 1961 Part I. Both the appeals of the applicant, the first and second one were rejected.

9. Being aggrieved by the injustice meted out to him, the applicant has filed this application (OA). He has prayed for a relief on the ground that it is a settled principle of law and cannot be disputed before the Court that a soldier on annual leave is subject to the Army Act and can be recalled at any time as the leave is at the discretion of the authorities concerned. Thus the impugned order is ultra vires, arbitrary, unjust and illegal and violates Article 14, 16 and 21 of the Constitution of India. He pleaded that a person on annual leave is deemed to be on duty and there must be an apparent nexus between the normal living of a person subject to military law while on leave and the injuries suffered by him. Thus non-grant of disability pension merely because the applicant was on annual leave when he suffered the injury and consequent loss of vision is illegal arbitrary and made with non-application of mind.

10. He has stressed that both the disabilities bore not only a casual connection but a strong connection with service conditions and thus he is entitled to disability pension as per Para 423(a) of Regulations for the Medical Services of the Armed Forces, 1983 wherein it has been provided that 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 acceptance in 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. He has also averred that as per Para 4 of Appendix II to Pension Regulations for the Army (Entitlement Rules for Casualty Pensionary Awards, 1982) invaliding from service is a necessary condition for grant of disability pension. He stated that an individual who at the time of release under the Release Regulations, is in lower medical category than that in which he was recruited, will be treated as invalidated from service, as also JCOs/ORs and equivalents in other services who are placed permanently in a medical category other than 'A' and are discharged because no alternative or sheltered appointment can be provided, as well as those who having been retained in alternative employment but are discharged before completion of their engagement will be deemed to have

been invalidated out of service. The applicant also drew our attention to Annexure III to Appendix II, Classification of Diseases, Para B Serial 2 of Pension Regulations for the Army 1961 wherein it has been declared that Hypertension (BP) is affected by stress and strain and thus the same is attributable to and aggravated by military service.

11. In their reply, the respondents brought out that the case of Perforating Injury Right Eye (Optd) was declared by the Court of Inquiry as neither attributable to nor aggravated by military service. Further, the percentage of disability was assessed at 30%. Similarly the disease of Primary Hypertension (BP) was also not attributable to nor aggravated by military service although the percentage of disability in this case was also assessed at 30%. Further, while rejecting the second appeal, the Government of India stated that Perforating Injury Right Eye (Optd) resulted from injury sustained by the applicant on 12.05.2004 during annual leave when the applicant was injured accidentally at home.

12. The learned counsel for the applicant vehemently argued that his client was sleeping on the terrace of his house when a storm broke out and plunged his house and the area in darkness. While his client was coming down from the terrace to escape from the storm, his loose clothing got stuck and while trying to extricate himself, a nail in the wall pierced his right eye. Subsequently, despite treatment in Command Hospital, Kolkata and Shankar Netralaya, Chennai, his vision in the right eye could not be restored. He further states that the applicant was on duty being on annual leave and drawing his pay and allowances during the period.

13. We have held in one judgement/order dated 25.06.2015 passed in OA No. 73/2011 (Smt. Fool Jahan Ara vs Union of India & Ors.) that we must differentiate between the words 'service' and 'duty'. A person in service may not be on duty like in case he is on leave or hospitalized, etc. but the person shall be deemed to be in service in case he or she is on duty or assigned some work by the Establishment to which he or she owes allegiance. The Hon'ble Supreme Court in a case reported in AIR 1980 SC 648 p. 649, page 987 – Judicial Dictionary 14th Edition – Coal Mines Provident Fund Commissioner vs Ramesh Chander Jha has observed that serve means to 'perform function, do what is required'. The word 'service' means necessarily something more than being merely subject to the orders of the government or control of the government.

14. The learned counsel for the applicant has annexed a number of judgements in which disability pension was granted to individuals while sustaining injury on annual leave. In these cases what is germane is that they have had some casual connection between the activity the individual was performing and the injury sustained. There appears no reason to hold that the applicant who was going down the stairs in darkness to avoid the storm and thus injured himself in the process, be entitled to disability pension because he happened to be in service on annual leave on that date. Otherwise also it is a well settled proposition of law that the court or tribunal may not issue an order or direction which may be contrary to any statutory mandate.

15. In another case Sukhdev vs Union of India, the Hon'ble Punjab & Haryana High Court relying upon judgement of Full Bench of Punjab & Haryana High Court (supra), Union of India vs Khushwant Singh, held that any accident remotely connected and inconsistent with military service such as when a person – returned from hospital or during a normal activity, would not be taken as disability attributable to military service. However, a Full Bench Judgement of the Hon'ble Delhi High Court in the case of Nk Dilbagh Singh vs Union of India and others while summarizing the decision based on an Apex Court judgement held, to reproduce from para 10 of the judgement as under :-

*“24. To sum up our analysis, the foremost feature, consistently highlighted by the Hon'ble Supreme Court, is that it requires to be established that the injury or fatality suffered by the concerned military personnel **bears a casual connection with military service**. Secondly, if this obligation exists so far as discharge from the Armed Forces on the opinion of Medical Board, the obligation and the responsibility for a fortiori exists so far as injuries and fatalities suffered during casual leave are concerned. Thirdly, as a natural corollary it is irrelevant whether the concerned personnel was on casual or annual leave at the time or at the place when and where the incident transpired. This is so because it is the casual connection which alone is relevant. Fourthly, since travel to and fro the place of posting may not appear to everyone as an incident of military service, specific provision has been incorporated in the Pension Regulations to bring such travel within the entitlement for disability pension if an injury is sustained in this duration. Fifthly, the Supreme Court has simply given effect to this Rule and has not laid down*

in any decision that each and every injury sustained while availing of casual leave would entitle the victim to claim Disability Pension. Sixthly, provisions treating casual leave as on duty would be relevant for deciding questions pertaining to pay or to the right of the authorities to curtail or cancel the leave. Such like provisions have been averred to by the Supreme Court only to buttress their conclusion that travel to and fro the place of posting is an incident of military service. Lastly, injury or death resulting from an activity not connected with military service would not justify and sustain a claim for disability pension. This is so, regardless of whether the injury or death has occurred at the place of posting or during working hours. This is because attributability to military service is a factor which is required to be established.”

16. In this case, however, the case relied upon by the applicant does not seem to be applicable under the facts and circumstances indicated.

17. In view of the above, the injury caused to the applicant while on annual leave in his house does not seem to be a case for payment of disability pension and it has been rightly held that the same is neither attributable to nor aggravated by military service.

18. In so far as the individual's suffering from hypertension is concerned, the same was discovered in the year 2005 (13.07.2005) and the Medical Board authorities labeled it as idiopathic in nature. The definition of idiopathic as seen in medicine.net.com is quoted as under:-

“Idiopathic – an unknown cause.”

19. Any disease for unknown reason may be termed as idiopathic in nature. The liberal meaning of the definition ‘idiopathic’ could give the benefit of doubt to the applicant as it cannot be conclusively proved that the disease had not occurred during the course of military service, since it was discovered during the term of employment of the applicant when he was examined in Military Hospital, Devlali during the routine Annual Medical Examination. Besides the nature of work of the applicant being a clerk cannot strictly speaking show that military service led to its cause. As may be seen that the individual was born in the year 1964 and the disease was discovered in the year 2005 when he was 41 years old. The medical authorities opined that he is

an asymptomatic patient of hypertension (CAD). He was advised to reduce 7 kg being overweight, to be on low salt diet and to walk 5 km per day along with medication.

20. In the Dharamvir Singh case, the Hon'ble Supreme Court held while considering the disability pension that if a person at the time of entry into service was in sound mental and physical health and no entry of any disability exists in his record, then any disability occurring to the individual would be deemed to have occurred in service and would be attributed to and aggravated by military service and therefore such a person would be entitled to disability pension if it is 20 per cent or more. Thus in the absence of any note thereof, the burden of proof shall be upon the employer and the benefit of doubt must be in favour of the employee. After considering the different provisions, rules and regulations, observations made by the Hon'ble Supreme Court under para 28 of the judgement in the case of Dharamvir Singh vs Union of India is reproduced as under:-

“(i) Disability pension to be granted to an individual who is invalidated from service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20% or over. The question whether a disability is attributable to or aggravated by military service to be determined under “Entitlement Rules for Casualty Pensionary Awards, 1982” of Appendix II (Regulation 173).

(ii) A member is to be presumed in sound physical and mental condition upon entering service if there is no note of record at the time of entrance. In the event of his subsequently being discharged from service on medical grounds any deterioration in his health is to be presumed due to service {Rule 5 r/w Rule 14(b)}.

(iii) 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. A claimant has a right to derive benefit of any reasonable doubt and is entitled for pensionary benefit more liberally (Rule 9).

(iv) If a disease is accepted to have been as having arisen in service, it must also be established that the condition of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstance of duty in military service {Rule 14(c)}.

(v) *If no note of any disability or disease was made at the time of individual's acceptance for military service, a disease which has led to an individual's discharge or death will be deemed to have arisen in service {14(b)}.*

(vi) *If medical opinion holds that the disease could not have been detected on medical examination prior to the acceptance for service and that disease will not be deemed to have arisen during service, the Medical Board is required to state the reasons {Rule 14(b)} ; and*

(vii) *It is mandatory for the Medical Board to follow the guidelines laid down in Chapter II of the 'Guide to Medical (Military Pension), 2002 – "Entitlement: General Principles", including paragraph 7, 8 and 9 as referred to above."*

21. Once Their Lordships of the Hon'ble Supreme Court themselves have interpreted in the case of Dharamvir Singh (supra) then it is not open for the Tribunal or any Court or Authority to form a different opinion than what has been expressed by the Supreme Court in the case of Dharamvir Singh vs Union of India & Ors. Under the facts and circumstances that the disease of hypertension (BP) has been labeled as **idiopathic** in nature by the Medical Board and that since "the claimant has a right to derive the benefit of any reasonable doubt", a liberal view may be taken and it may be held that the applicant's disease was aggravated by the service and in consequence thereof he suffered from primary hypertension of 30% disability which held him permanent low medical category and thus not being able to fulfill the conditions of extended service and having to retire at 24 years of service itself. Annexure III to Appendix II of Pension Regulations for the Army, classification of Diseases clearly indicates that BP is a disease affected by stress and strain. This is reproduced as under :-

"Classification of Diseases

A. Diseases Affected by Climatic Conditions.

XXXXXXXX

B. Diseases Affected by Stress and Strain.

1. *Psychosis and psychoneurosis*
2. **Hypertension (BP)**
3. *Pulmonary Tuberculosis*
4. *Pulmonary Tuberculosis with pleural effusion.*
5. *Tuberculosis (Non-pulmonary).*
6. *Mitral Stenosis*
7. *Pericarditis and adherent pericardium*
8. *Endocarditis*
9. *Sub-acute bacterial endo-carditis, including infective endocartis*
10. *Myocarditis (acute and chronic).*
11. *Valcular disease.*
12. *Myocardial infarction, and other forms of IHD.*
13. *Cerebral haemorrhage and cerebral infarction.*
14. *Peptic Ulcer.*

C. Diseases Affected by Dietary Compulsions.

XXXXXXXX

D. Diseases Affected by Training, Marching, Prolonged Standing etc.

XXXXX

E. Environmental Diseases

XXXXX

F. Diseases Affected by Altitude

XXXXX

G. Diseases Affected by Service in submarines and in Diving

XXXXX

H. Diseases Affected by Serving in Flying Duties

XXXXXX

J. Diseases not normally Affected by Service

XXXXXX”

Appropriate compensation in the form of disability pension is a sine qua non for military service and a little omission for disability pension merely on the grounds of the opinion of the medical board would be a set back to the applicant and other similarly placed persons.

22. The Hon'ble Apex Court in **Dharamvir Singh vs Union of India**, AIR 2013 SC 2840 and **Veer Pal Singh vs Secretary, Ministry of Defence**, AIR 2013 SC 2827 has dealt with the issue of payment of disability pension to the armed forces personnel. In Veer Pal Singh's case (supra), it is held by the Hon'ble Supreme Court that the opinion of the medical board "deserves respect but not worship." In appropriate cases, judicial review of medical opinion is permissible. Hence, the applicant seems to be entitled to disability pension.

23. In view of the above, the respondents are directed to consider the applicant's plea for grant of disability pension for Primary Hypertension with effect from the date of his retirement i.e. from 01.04.2007 (date of discharge) and pass an appropriate, reasoned and speaking order keeping in view the observations made in the body of the present order expeditiously, say within a period of four months from the date of communication of this order and also communicate that order to this Tribunal as well.

24. Cost made easy.

25. The original records submitted by the respondents be returned to them with proper acknowledgement.

26. A plain copy of the order duly countersigned by the Tribunal Officer be given to the parties upon observance of all usual formalities.

(LT GEN GAUTAM MOORTHY)
Member (Administrative)

(JUSTICE DEVI PRASAD SINGH)
Member (Judicial)