SEE RULE 102(1))

ARMED FORCES TRIBUNAL, KOLKATA BENCH

T. A. NO. 93 of 2010
(Arising out of WP No. 8656(w)/2003)

THIS 10th DAY OF MARCH, 2016

CORAM

HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)

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

APPLICANT(S) DILIP KUMAR GHOSH, S/o Late Atul Krishna Ghosh Resident at Vill. Champaberia Colony, PS. Bongaon, Dist. 24-Paraganas (North), W.B.

-versus-

RESPONDENTS

1. Union of India through Secretary, Ministry of Defence, Government of India, South Block, New Delhi.
2. Pension Control of Defence Account, Pension Cell, Allahabad – 211 001, U.P.
3. The Record Officer, Defence Security, Corps Record, Mill Road, Cannanore – 670 013.

For the Appellant(s) : Mr. Aniruddha Datta, Advocate

For the respondent(s) : Mr. S. K. Bhattacharyya, Advocate

O R D E R

PER HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)

This application has been filed by the applicant U/s 14 of the Armed Forces Tribunal Act, 2007 claiming disability pension.

2. Facts of the case, in brief, are that the applicant, Dilip Kumar Ghosh, was enrolled in the Corps of EME on 10.02.1964. On fulfilling the terms of engagement i.e. 22 years of service, the applicant was discharged from EME on 01.03.1986 with no disability under the provision of the Army Rule 13(3) item (iii)(i). Thereafter the applicant was reenrolled in the Defence Security Corps (in short DSC) on

12.02.1988. While such re-enrollment, the applicant opted to receive pension for his previous service in EME and as such, his previous period of service in EME was not counted in DSC service. The applicant attained the age of 55 years on 09.02.2001 and accordingly the applicant was to be discharged from DSC service. However, the applicant being fit for retention in service was allowed extension for two years from 10.02.2001 to 09.02.2003. But, on 22.07.2001 the applicant was put in medical category BEE (Permanent). Release Medical Board (in short RMB) held on 12.11.2001 at INSH Kalyani, Vishakapatnam recommended the applicant to be released from service in medical category S1H1A1PEE1 with 30 per cent disability for two years for disease, ECG Abnormality – V69 Inferior Wall Infraction (Silent) 412 which was held "Neither Attributable to Nor Aggravated by Military Service". Accordingly, the applicant was discharged from service on 31.01.2002. At the time of discharge, applicant's total service in DSC was 13 years 349 days.

2.1 On 29.10.2002 the applicant's claim for disability pension was rejected by PCDA(P) for the reasons that the disability was considered neither attributable to nor aggravated by military service. The appeal preferred there against was rejected on 30.09.2004, that is during the pendency of WP No. 8656(W) of 2003 before the Hon'ble Calcutta High Court. After establishment of Armed Forces Tribunal, said writ petition was transferred to this Tribunal for adjudication, which is the present T.A.

3. We have heard the counsel for the parties, perused records as well as written notes of arguments filed by both the parties.

4. From the pleadings and arguments advanced by the ld. counsel for the parties, in our opinion the following issue arises for determination.

(i) Whether a person not having any recorded disability during enrolment and his discharge / release on completion of his terms of engagement was with a disability to the extent of 30 per cent can be granted disability pension, if as per RMB his disability was

neither attributable to nor aggravated by military service without assigning specific reasons therefor ;

5. Both the ld. counsel for the parties have placed their reliance upon the judgment of the Hon'ble Supreme Court in Dharamvir Singh Vs. Union of India & Ors reported in (2013) 7 SCC 316 and Veer Pal Singh Vs. Secretary, Ministry of Defence reported in (2013) 8 SCC 83.

6. Mr. S.K. Bhattachryya, ld. counsel for the respondents would submit that discharge on medical ground was not premature but was on completion of his tenure; and was on the basis of the report of the RMB. The opinion of the RMB that the disease being neither attributable to nor aggravated by military service has to be respected and the applicant is not entitled for disability pension. In support of his contention, he has also placed reliance upon the judgement of the Hon'ble Apex Court in Secretary, MOD & Ors. Vs. A. V. Damodaran (Dead) through LRS & Ors. reported in (2009) 9 SCC 140.

7. We have perused the original records relating to RMB proceedings. Part II of it states that for the first time the applicant suffered from disability / disease i.e. ECG Abnormality V-67 Interior Wall Infraction 412 on 09.04.1993 when he was serving at Guwahati. The relevant portion of the RMB proceeding is being extracted below :

PART – II
Statement of case

Disabilities	Date of origin	Place and unit where serving at the time
ECG Abnormality V-67 Interior Wall Infraction 412	09.04.1993	136 DSC PLN attd to 222 ABOD, NARAGI, Guwhati

8. It is not in dispute that the applicant was allowed extension for two years 10.02.2001 to 09.02.2003, and was discharged on medical grounds on 31.01.2002, though after attaining the age of superannuation i.e. 55 years. The claim of the applicant was rejected on the basis of the opinion of RMB, according to which his disability was neither attributable to nor

aggravated by military service. It is also not in dispute that at the time of his enrolment / re-enrollment he was medically and physically examined and found fit as per prescribed medical standard and was not suffering from any disease including the disease in question, that is ECG Abnormality V-67 Interior Wall Infraction 412.

9. For ease of adjudication, we may refer to the Pension Regulation that governs the field. The claim of the applicant for payment of pension is regulated by Pension Regulation for the Army, 1961. Regulation 173 provides for grant of disability to persons who are invalidated out of service on the disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20 per cent or over. The relevant portion is extracted below :

> *"(173 Primary conditions for grant of disability pension) :*
>
> *Unless otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an individual who is invalided out of service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20 per cent or over." The question whether disability is attributable to or aggravated by military service shall be determined under the Rule in Appendix II i.e. Entitlement Rules for casualty pensionary awards 1982."*

10. In Pension Regulation 173 only two conditions are to be satisfied for grant of disability pension : (i) disability is to be above 20 per cent and (ii) disability is attributable to or aggravated by military service. Whether or not disability is attributable to or aggravated by military service is to be determined under the "Entitlement Rules for Casualty Pensionary Awards, 1982', as shown in Appendix-II to the Pension Regulation. Rule 5 of the Entitlement Rules for Casualty Pensionary Awards, 1982 also lays down the approach to be adopted while determining the entitlement to disability pension under the said rules. Rule 5 reads as under:

> *"Rule5 . The approach to the question of entitlement to casualty*

pensionary awards and evaluation of disabilities shall be based on the following presumptions:
PRIOR TO AND DURING SERVICE
(a)member is presumed to have been in sound physical and mental condition upon entering except as to physical disabilities noted or recorded at the time of entrance.
(b)In the event of his subsequently being discharged from service on medical grounds any deterioration in his health which has taken place is due to service."
From Rule 5 we find that a general presumption is to be drawn that a member is presumed to have been in sound physical and mental condition upon entering service except as to physical disabilities noted or recorded at the time of entrance. If a person is discharged from service on medical ground for deterioration in his health it is to be presumed that the deterioration in the health has taken place due to service.

11. Rule 14 of the Entitlement Rules stipulates how to determine whether a disease shall be deemed to have arisen in service or not. It reads thus :

"14. Diseases – In respect of diseases, the following rule will be observed –
(a) Cases in which it is established that conditions of military service did not determine or contribute to the onset of the disease but influenced the subsequent courses of the disease will fall for acceptance on the basis of aggravation.
(b) A disease which has led to an individual's discharge or death will ordinarily be deemed to have arise in service, if no note of it was made at the time of the individual's acceptance for military service. 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.

(c) If a disease is accepted as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstances of duty in military service."

12. Rule 9 of the Entitlement Rules mandates upon whom the burden lies to prove the entitlement conditions. The said Rule is quoted below :

"Onus of proof- 9. – The claimant shall not be called upon to prove the conditions of entitlements. He/She will receive the benefit of any reasonable doubt. This benefit will be given more liberally to the claimants in field/afloat service cases."

13. While considering the aspect of onus of proof, the Hon'ble Apex Court in Dharamvir Singh's case (Supra) has observed as under :-

> *"The 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. The claimant has a right to derive benefit of any reasonable doubt and is entitled for pensionary benefit more liberally."*

14. The Hon'ble Apex Court in the case of –Union of India vs. Rajbir Singh –Civil Appeal No.2904 of 2011 etc. decided on 13.02.2015 after considering Dharamvir Singh's case (supra), while upholding the decision of the Tribunal granting disability pension to the claimants observed :

> *"…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 in 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. …*
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> *… Last but not the least is the fact that the provision for payment of disability pension is a beneficial 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. …*
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> *…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."*

15. Hon'ble Supreme Court has reiterated the same view in Civil Appeal No.11208 of 2011 decided on February 24, 2015 in the case of Union of India vs. Angad Singh Titaria (2015 SCC OnLine SC 181).

16. As per Pension Regulation 179 an individual retired /discharged on completion of tenure or on completion of service limits or on completion of terms of engagement or on attaining the age of 50 years (irrespective of their period of engagement), if found suffering from a disability which

is attributable to or aggravated by military service and recorded by Service Medical Authorities, shall be deemed to have been invalided out of service and shall be granted disability pension from the date of retirement, if the accepted degree of disability is 20 per cent or more, and service element if the degree of disability is less than 20 per cent.

17. In view of the above Pension Regulation the disability pension not only payable to armed forces personnel who have been prematurely retired on medical ground but is also payable to such armed forces personnel who have been discharged / retired from service on attaining the age of superannuation on medical ground. Thus, the distinction drawn by the respondents for payment of pension on the above basis is not tenable even under Pension Regulation.

18. The rules to be followed by the Medical Board in disposal of special cases have been shown under Chapter VIII of the General Rules of Guide to Medical Officers (Military Pensions) 2002. Rule 423 deals with "Attributability to service" relevant portion of which reads as follows :

> ***"423(a)****For the purpose of determining 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 FieldService/Active Service area or under normal peace conditions. It is however, essential to establish whether the disability or death bore a casual connection with the service conditions. All evidence both direct and circumstantial will be taken into account and benefit of reasonable*
> *doubt, if any, will be given to the individual. The evidence to be accepted as reasonable doubt for the purpose of these instructions should be of a degree of cogency, which though not reaching certainty, nevertheless carries a high degree of probability. In this connection, it will be remembered that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. If the evidence is so strong against an individual as to leave only a remote possibility in his/her favour, which can be dismissed with the sentence "of course it is possible but not in the least probable" the case is proved beyond reasonable doubt. If on the other hand, the evidence be so evenly balanced as to render impracticable a determinate conclusion one*
> *way or the other, then the case would be one in which the benefit of the doubt could be given more liberally to the individual, in cases occurring in Field Service/Active Service areas.*
> ***(c).*** *The cause of a 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. Cases, in which it is established that Service conditions did not determine or contribute to the onset of the disease but influenced the subsequent course of the disease, will be regarded as aggravated by the service. 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 for Service in the Armed Forces. However, if medical opinion holds, for reasons tobe 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.

(d).*The question, whether a disability or death resulting from disease is attributable to or aggravated by service or not, will be decided as regards its medical aspects by a Medical Board or by the medical officer who signs the Death Certificate. The Medical Board/Medical Officer will specify reasons for their/his opinion. The opinion of the Medical Board/Medical Officers, in so far as it relates to the actual cause of the disability or death and the circumstances in which it originated will be regarded as final. The question whether the cause and the attendant circumstances can be accepted as attributable to/aggravated by service for the purpose of pensionary benefits will, however, be decided by the pension sanctioning authority."*

19. Therefore, as per Rule 423 following procedures are to be followed by the Medical Board.

(i) Evidence both direct and circumstantial to be taken into account by the Board and benefit of reasonable doubt, if any would go to the individual;

(ii) a disease which has led to an individual's discharge or death will ordinarily be treated to have been arisen in service, if no note of it was made at the time of individual's acceptance for service in Armed Forces.

(iii) If the medical opinion holds that the disease could not have been detected on medical examination prior to acceptance for service and the disease will not be deemed to have been arisen during military service the Board is required to state the reason for the same.

'Chapter II'of the Guide to Medical Officers (Military Pensions) 2002 relates to "Entitlement : General Principles". In the opening paragraph 1, it is made clear that the Medical Board should examine cases in the light of the etiology of the particular disease and after considering all the relevant particulars of a case, record their conclusions with reasons in support, in clear terms and in a language which the Pension Sanctioning Authority would be able to appreciate fully in determining the
question of entitlement according to the rules. Medical officers should comment on the evidence both for and against the concession of entitlement; the aforesaid paragraph reads as follows:

> ***"1.*** *Although the certificate of a properly constituted medical authority visavis the invaliding disability, or death, forms the basis of compensation payable by the government, the decision to admit or refuse entitlement is not solely a matter which can*
> *be determined finally by the medical authorities alone. It may require also the consideration of other circumstances e.g.*
> *service conditions, preand postservice history, verification of wound or injury, corroboration of statements, collecting and*

weighing the value of evidence, and in some instances, matters of military law and discipline. Accordingly, Medical Boards
should examine cases in the light of the etiology of the particular disease and after considering all the relevant particulars of a case, record their conclusions with reasons in support, in clear terms and in a language which the Pension Sanctioning Authority, a lay body, would be able to appreciate fully in determining the question of entitlement according to the rules. In expressing their opinion Medical Officers should comment on the evidence both for and against the concession of entitlement. In this connection, it is as well to remember
that a bare medical opinion without reasons in support will be of no value to the Pension Sanctioning Authority."

Paragraph 6 suggests the procedure to be followed byservice authorities if there is no note, or adequate note,in the service records on which the claim is based.

Paragraph 7 talks of evidentiary value attached to the record of a member's condition at the commencement of service, .e.g. preenrolment history of an injury, or disease like epilepsy, mental disorder etc. Further, guidelines have been laid down at paragraphs 8 and 9, as quoted below:

7. *Evidentiary value is attached to the record of a member's condition at the commencement of service, and such record has, therefore, to be accepted unless any different conclusion has been reached due to the inaccuracy of the record in a particular case or otherwise. Accordingly, if the disease leading to member's invalidation out of service or death while in service, was not noted in a medical report at the commencement of service, the inference would be that the disease arose during the period of member's military service. It may be that the inaccuracy or incompleteness of service*
record on entry in service was due to a nondisclosure of the essential facts by the member, e.g., preenrolment history of an injury or disease like epilepsy, mental disorder etc. It may also be that owing to latency or obscurity of the symptoms, a disability escaped detection on enrolment. Such lack of recognition may affect the medical categorization of the member on enrolment and/or cause him to perform duties
harmful to his condition. Again, there may occasionally be direct evidence of the contraction of a disability, otherwise than
by service. In all such cases, though the disease cannot be considered to have been caused by service, the question of aggravation by subsequent service conditions will need examination. The following are some of the diseases which ordinarily escape detection on enrolment:(a)Certain congenital abnormalities which are latent and only discoverable on full investigations, e.g. CONGENITALDEFECT OF SPINE, SPINA BIFIDA, SACRALIZATION,
(b)Certain familial and hereditary diseases, e.g., HAEMOPHILIA, CONGENTIAL SYPHILIS, HAEMOGIOBINOPATHY.
(C)Certain diseases of the heart and blood vessels, e.g., CORONORY ATHEROSCLEROSIS, RHEUMATIC FEVER.
(d)Diseases which may be undetectable by physical examination on enrolment, unless adequate history is given

at the time by the member, e.g., GASTRIC AND DUODENAL ULCERS, EPILEPSY, MENTAL DISORDERS, HIV INFECTIONS.
(e) Relapsing forms of mental disorders which have intervals of normality.
(f) Diseases which have periodic attacks e.g., BRONCHIAL ASTHMA, EPILEPSY, CSOM ETC.

8. *The question whether the invalidation or death of a member has resulted from service conditions, has to be judged in the*
light of the record of the member's condition on enrolment as noted in service documents and of all other available evidence both direct and indirect.
In addition to any documentary evidence relative to the member's condition to entering the service and during service, the member must carefully and closely questioned on the circumstances which led to the advent of his disease, the duration, the family history, his preservice history, etc. so that all evidence in support or against the claim is elucidated. Presidents of Medical Boards should make this their personal
responsibility and ensure that opinions on attributability, aggravation or otherwise are supported by cogent reasons; the
approving authority should also be satisfied that this question has been death with in such a way as to leave no reasonable doubt.
9. *On the question whether any persisting deterioration has occurred, it is to be remembered that invalidation from service*
does not necessarily imply that the member's health has deteriorated during service. The disability may have been discovered soon after joining and the member discharged in his own interest in order to prevent deterioration. In such cases, there may even have been a temporary worsening during
service, but if the treatment given before discharge was on grounds of expediency to prevent a recurrence, no lasting damage was inflicted by service and there would be no ground for admitting entitlement. Again a member may have been invalided from servicebecause he is found so weak mentally that itis impossible to make him an efficient soldier. This would not mean that his condition has worsened during service, but only that it is worse than was realized on enrolment in the army. To sum up, in each case the question whether any persisting deterioration on the available evidence which will vary according to the type of the disability, the consensus of medical opinion relating to the particular condition and the
clinical history."

20. As per above rule Medical Board is required to be given reasons in writing for coming to the finding that the disease could not have been detected on a medical examination prior to acceptance in service. Having found the same as neither raised nor answered by the Hon'ble Supreme Court in A.V.Damodaran's case (Supra) the same has been

distinguished in Daramvir Singh's case (Supra), para 28, of which is quoted below :

> *Learned counsel for the respondentUnion of India relied on decisions of this Court in* ***Om Prakash Singh vs. Union of India and others,(2010) 12 SCC 667;(2009) 9 SCC 140; (2010) 11 SCC 220, etc.*** *and submitted that this Court has already considered the effect of Rule 5, 14a and 14(a) and 14(b) and held that the same cannot be read in isolation. After perusal of the aforesaid decision we find that Rule 14(a), 14(b) and 14(c) as noticed and quoted therein are similar to Rule 14 as published by the Government of India and not Rule 14 as quoted by the respondents in their counteraffidavit. Further, we find that the question as raised in the present case that in case no note of disease or disability was made at the time of individual's acceptance for military service, the Medical Board is required to give reasons in writing for coming to the finding that the disease could not have been detected on a medical examination prior to the acceptance for service was neither raised nor answered by this Court in those cases. Those were the cases which were decided on the facts of the individual case based on the opinion of the Medical Board.*

21. The same view has been reiterated by the Hon'ble Supreme Court in Veer Pal Singh's case (Supra).

22. Considering the facts of the case and in the light of the aforementioned rules and regulations and principle of law settled by the Hon'ble Supreme Court in its various pronouncements, we are of the considered opinion that the applicant has been wrongly denied disability pension by the respondents, as no reasoned opinion has been given by the concerned medical board on the basis of which applicant's disability was considered neither attributable to nor aggravated by the military service. Thus, the question framed is answered accordingly in favour of the applicant.

23. For the reasons mentioned above, the application is allowed. It is held that the applicant is entitled to 30% of disability pension which is to be rounded off from 30% to 50% according to the Govt.'s decision dated 31.01.2001. The petitioner is also entitled to arrears of the past three years along with interest @ 12% p.a. from the date of his filing of W.P. No. 8656(W) of 2003 before the Hon'ble High Court at Calcutta. The

order be implemented within three months from the date of receipt of this order. No order as to costs.

24. Original records produced before the court be returned to the respondents on proper receipt, till such time it be kept in the save custody of the Registry.

A plain copy of the order, duly countersigned by the Tribunal Officer, be furnished to both sides after observance of usual formalities.

(Lt Gen Gautam Moorthy) Member (Administrative)	(Justice N.K. Agarwal) Member (Judicial)