SEE RULE 102(1))

ARMED FORCES TRIBUNAL, KOLKATA BENCH

O. A. NO.20/2015

THIS 11th DAY OF MARCH, 2016

CORAM

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

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

APPLICANT(S) Basudev Barman
S/o Late Kalipada Barman
Village & PO, Bethuadahari
P.S. Nikshipara, The - Krishnagar
Dist.- Nadia (West Bengal).

-versus-

RESPONDENT(S)

1. The Union of India,
represented through Secretary,
Ministry of Defence, (D/AG), South Block
New Delhi, Pin -110 011.
2. Chief of Army Staff Integrated, HQ
Ministry of Defence (Army),
South Block
New Delhi - 110.011.
3. Officer-in-charge,
Defence Security, Corps Records
Pin – 901-277, C/o 56 APO
4. The Commanding Officer
340, DSCP-1, att to 10 Wing Air Force
PIN 900 650, C/o. 99 APO

For the petitioner(s) : Mr. S. C. Hajra, Advocate

For the respondent(s) : Mr. B. K. DAS, 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, Basudev Barman, was enrolled in the Army Corps of ASC (MT) on 28.03.1983. The applicant was discharged from ASC on 31.03.2000 under the provision of the Army Rule 13(3) item (iii)(i) after rendering 17 years 04 days of qualifying service. He was granted service pension for life. Thereafter the applicant was reenrolled in the Defence Security Corps (in short DSC) on 06.09.2001 on contractual terms of engagement for 10 years subject to fulfillment of eligibility criteria as per policy letter dated 05.12.1981 issued by the Ministry of Defence. While serving as such, the applicant was placed in permanent low medical category P3 (Permt) with effect from 27.01.2011 for the disease Generalized Seizure Disorder (Old). He was discharged from DSC service on 30.09.2011 after rendering 10 years and 25 days of service. Prior to his discharge he was assessed by a duly constituted Release Medical Board (in short RMB) for his aforementioned disease and it was opined by the RMB that the disease was "Neither Attributable to Nor Aggravated by Military Service" with 20% of disability. Being dissatisfied for not granting disability pension, the applicant preferred first appeal, which was rejected by the Appellate Committee on 08.06.2012. He preferred second appeal, which was also rejected on 05.09.2013. Being aggrieved thereby the applicant filed instant application.

3. The respondents have contested the case by filing affidavit-in-opposition. They have contended that during service, the applicant was placed in permanent low medical category P3(permanent) with effect from 27.01.2011 for the diagnosis Generalised Seizure Disorder. Accordingly, he was discharged from DSC service with effect from 30.09.2011 under Army Rule 13(3) & Item III(i) after rendering 10 years and 25 days qualifying service in DSC for which he was paid Service Gratuity and Retirement Gratuity to the tune of Rs.1,87,550/- and 93,775/- respectively. Prior to his discharge, the applicant was brought before a duly constituted RMB, which assessed applicant's disability i.e.

Generalisd Seizure Disrder as neither attributable to nor aggravated by military service with "nil" disability. His claim for grant of disability pension was adjudicated and rejected by the respondents authority based on the findings of RMB. The applicant's first and second appeal against the rejection of his disability pension claim were also rejected by the appellate committee. The ID is a disease of central nervous system. The onset of the ID on February 2010 was in peace station and he continued in service in peace station till his release from service. In the absence of history of head injury or infection like tuberculosis, RMB has appropriately held the disability as neither attributable to nor aggravated by military service. It has been argued by the ld. counsel for the respondents that the claim of the applicant for grant of disability pension has been rightly rejected and the application being devoid of merit deserves to be dismissed.

4. We have heard the counsel for the parties, perused records including the RMB proceedings.

5. As per respondents' affidavit-in-opposition, the applicant was discharged on medical ground with "nil" percentage of disability whereas on perusal of the RMB proceedings (Annexure-5) filed by the respondents themselves, we find that at the time of discharge applicant's disability was 20 per cent. The aforesaid fact mentioned by the respondents in their affidavit-in-opposition is, therefore, not correct. The relevant part of the RMB proceedings (annexure R2) filed by the respondents is reproduce hereunder :

6. Dose is present degree of disablement as compared with a healthy person of the same age and sex? (percentage will be expressed as Nil or as follows) 1-5%, 6-10%, 11-14%, 15-19% and thereafter in multiples of ten from 20% to 100%.				
Disability (As numbered in Question I Part IV	Percentage of disablement	Composite assessment for all disabilities with duration (Max 100%)	Disability qualifying for disability pension with duration	Net assessment qualifying disability pension (Max 100%) with duration.
(a) Generalised Seizure Disorder	20% (Twenty per cent)	20% (Twenty per cent)	NIL	NIL
(Old) ICD : Z 09.0		For life	For life	For life

6. It is not in dispute that the applicant was reenrolled in the Defence Security Corps on 06.09.2001 on contractual terms of engagement for 10 years. However, he was discharged on medical grounds on 31.09.2011. 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" with 20%. 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.

7. 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 pension 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."*

8. 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 to be "Attributable to or Aggravated by Military Service". Whether or not disability is "Attributable to or Aggravated by Military Service" to be determined under the "Entitlement Rules for Casualty Pensionary Awards, 1982', as shown in Appendix-II. Rule 5 relates to approach to the Entitlement Rules for Casualty Pensionary Awards, 1982 based on presumption as shown hereunder:

"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.

9. 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."

10. 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."

11. While considering the aspect of onus of proof, the Hon'ble Apex Court in the case of Dharamvir Singh vs. Union of India reported in 2013 Vol.VII SCC 316 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."*

12. The Hon'ble Apex Court in a similar case –Union of India vs. Rajbir Singh –Civil Appeal No.2904 of 2011 etc. decided on 13.02.2015 after considering Dharamvir Singh (supra) and 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. …*
>
> *… 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. …*
>
> *…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."*

13. 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).

14. 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. In view of the above Pension Regulation it is clear as crystal that disability pension is payable not only to armed forces personnel who has been prematurely retired on medical grounds but also to those armed forces personnel who have been discharged on attaining the age of superannuation, but on medical grounds and no distinction can be drawn on the basis of premature discharge or after completion of tenure.

15. 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. In Dharamvir Singh's case (Supra) the Hon'ble Apex Court observed in para 34 of its judgement as under :

> *"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 casual connection with the service conditions."*

16. In view of the above the findings "Neither attributable to nor aggravated by military service" recorded by the RMB without assigning

specific reasons therefor is not sustainable in the law; and rejection of applicant's claim for grant of disability pension based on above ground is not correct. The applicant is, therefore, entitled for grant of disability pension. As per the Government circular dated 31.01.2001 the applicant is also entitled for rounding off benefit from 20% to 50% and not 100% as claimed by the applicant.

17. For the foregoing, the application is allowed in part. The applicant is entitled for disability pension considering his disability as 50 per cent by giving him rounding off benefit. The applicant is also entitled to arrears for the past three years along with interest @ 12 per cent per annum from the date of filing of this application. The order be implemented within three months from the date of receipt of this order. No order as to costs.

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)