SEE RULE 102 (1)

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

ORIGINAL APPLICATION : O. A. NO. – 118/2017

DATED : The Thirteenth DAY OF NOVEMBER, 2018

CORAM

HON'BLE DR. (MRS.) JUSTICE INDIRA SHAH, MEMBER (JUDICIAL)
HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)

APPLICANT (S) : No. 15824554L Ex-RectManas Kumar Pandua
Village – Kamargan, PO – Guagadia, Dist – Bhadrak
ODISHA (PIN – 756 124)

Versus

RESPONDENT (S) :

(1) The Union of India, service through
The Defence Secretary, Ministry of Defence
South Block,
DHQ, PO, New Delhi – 110 011

(2) The Chief of the Army Staff
Through Adjutant General
IHQ of MoD (Army), South Block
DHQ, PO, New Delhi – 110 011

(3) The Secretary
Department of Ex-Servicemen Welfare & Pensions
Ministry of Defence, South Block
DHQ, PO, New Delhi – 110 011

(4) The Officer-in-Charge
Army Ordnance Corps Records
PIN – 900 453
c/o 56 APO

(5) The Managing Director
Army Group Insurance Fund
AGI Bhawan, Rao Tula Ram Marg,
PO Bag No. – 14
PO – VasantVihar
New Delhi – 110 057

(6) Principal Controller of Defence Accounts (Pensions)
DhapaudiGhat, Allahabad (UP) – 211 014

Counsel for the applicant (s) : Maj Gen (Dr.) SK Choudhury, VSM (Retd)

Counsel for the Respondent (s) : Mr. Satyendra Agrawal

ORDER

PER LT GEN GAUTAM MOORTHY, PVSM, AVSM, VSM, ADC, MEMBER (ADMINISTRATIVE)

1. This case has been filed Under Section 14 of Armed Forces Tribunal Act, 2007 (in short The Act) assailing the non-grant of disability pension to the applicant who has been invalided out of service.

2. In brief, the applicant was enrolled in the Army Ordnance Corps on 29th March, 2015. While undergoing the second leg of his training at the College of Materials Management, Jabalpur, he was detected with having contracted the disease **'CHRONIC MYELOID LEUKEMIA'** in March, 2016 at Military Hospital, Jabalpur. He was subsequently transferred from Military Hospital, Jabalpur to Army Hospital (R&R), Delhi and after due medication and treatment he was declared medically unfit for further retention and was invalided out of service by the Invalidating Medical Board (IMB) held at Military Hospital, Jabalpur on 15 July, 2016. The IMB opined that the applicant was suffering from "CHRONIC MYELOID LEUKEMIA". He was placed in Low Medical Category S1H1A1P5E1 and the disability was assessed at 40 % for life. The applicant was finally invalided out of service on 19th September, 2016. The disease was classified as "Neither Attributable Nor Aggravated" by Military Service. The reasons / cause / specific condition was noted in Invalidment Medical Board Proceedings (AFMSF-16 (Ver. 2006). In the opinion of the Medical Board ***"Malignancy due to congenital chromosome abnormality confirmed by the presence of BCR – ABL translocation (ph chromosome) as mentioned in Spl Opinion (Para 12, Chapter VI, GMO, 2008).***

3. Under the question ***"Did the disabilityexist before entering the service ?"*** the Medical Board has opined that it ***"could be".***

4. Under the question ***"In case the disability existed at the time of entry, is it possible that it could not be detected during the routine medical examination carried out at the time of entry?"*** The Medical Board has opined ***"Yes, as blood examination was not a part of routine examination at the time of recruitment."***

5. Also under the question, ***"Whether the disability was attributable or aggravated by negligence or misconduct of the individual?"*** the answer was ***"NO.".***

6. Extracts of **Guide to Medical Officers Amendments to Chapter VI, 2008** indicates that –

> *"Myopathies are generally idiopathic diseases. However, aggravation may be examined if the individual did not get the benefit of immediate attention and sheltered appointment.*
>
> *9. **Cancer**. Precise cause of cancer is unknown. There is adequate material both of scientific and statistical nature which brings into light the causative factors like radiation, chemicals, and viral infections."*

7. The applicant then filed an RTI application and obtained his Medical Documents on 24 Mar 17. The AOC Records subsequently on 26th November, 2016 issued a letter to the applicant rejecting his claim for Disability Pension stating that the Competent Authority has decided that the applicant is not entitled to Disability Pension as the Invalidment Medical Board (IMB) found the disease of the applicant as "Neither Attributable Nor Aggravated" by Military Service. The applicant then submitted his first appeal to the Appellate Committee on First Appeal (ACFA) on 19th December, 2016.

8. Per-contra, Respondents 1-4 have stated that while there is no dispute regarding the facts of the case, in view of the permanent nature of the disability and restriction of employability as per existing rules and fitness standard, the applicant is unfit for recruitment as a serving solider and, hence, recommended him to invalidated boarded out as a Low Medical Category S1H1A1P5E1.

9. The Respondent Nos. 1-4 have confirmed that the applicant had submitted an appeal to the Appellate Committee to ACFA which is still under consideration and hence at the outset itself, the respondents have objected to the filing of an appeal before this Bench on the grounds of filing under Section 21 of the AFT Act, 2007, which is set out as under : -

CHAPTER IV

PROCEDURE

21. Application not to be admitted unless other remedies exhausted. *– (1) The Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant had availed of the remedies available to him under the Army Act, 1950 (46 of 1950) or the Navy Act, 1957 (62 of 1957) or the Air Force Act, 1950 (45 of 1950), as the case may be, and respective rules and regulations made there under.*

(2) For the purposes of Sub-section (1), a person shall be deemed to have availed of all the remedies available to him under the Army Act, 1950 (46 of 1950) or the Navy Act, 1957 (62 of 1957) or the Air Force Act, 1950 (45 of 1950), and respective rules and regulations –

(a) if a final order has been made by the Central Government or other authority or officer or other persons competent to pass such order under the said Acts, rules and regulations, rejecting any petition preferred or representation made by such person;

(b) where no final order has been made by the Central Government or other authority or officer or other persons competent to pass such order with regard to the petitions preferred or representation made by such person, if a period of six months from the date on which such petition was preferred or representation was made has expired.

10. The Respondents 1-4 have also stated that Medical Board at the time of entry is not exhaustive and its scope is limited to physical examination only. Therefore, it was possible that this disease was not detected at time of entry of the individual during the recruitment process. Also, the respondents stated that casual connection between disability or death and military service has to be established by appropriate authorities. Hence, the applicant is not entitled to Disability Pension. In their defence, they have cited **2018 SCC OnLine AFT 3885, No.13999863-X Rect Raj Kumar Singh vs. UoI&Ors, in which appeal filed by the applicant against the order of AFT, Regional Bench, Lucknow in OA 676 of 2017 decided on May 17, 2018.** Paras 8 and 9 of the same is reproduced below : -

> *8. We have given our anxious consideration to the pleadings from both sides during hearing and the facts on record. Seizure is a disease which cannot be detected at the time of initial enrolment and considering that the first attack had occurred exactly within one month of enrolment and second attack had occurred three days after the first attack, we cannot give benefit of doubt to the applicant due to his limited exposure of one month to military environment and training and we are of the view that the medical opinion that the disease is constitutional in nature and is neither attributable to nor aggravated by military service, is correct.*
>
> *9. Accordingly, this O.A. has no force and is dismissed, while leaving the parties to bear their own costs.*

11. The respondent No. 5, the Managing Director, Army Group Insurance Fund, have in their affidavit, stated that they have already paid the admissible disability benefit under the AGIF Scheme to the applicant and that the maturity benefit will be paid immediately on receipt of claim documents from the applicant / Army Ordnance Corps Records. Additionally, additional interest accrued would also be released on receipt of PAN No. / Form 15 G for the applicant, which is yet to be received.

12. Therefore, it appears to us that there is no dispute in so far the Respondent No. 5 (i.e., AGIF) is concerned and on submission of documents by the applicant / AOC Records, consequential benefits will be granted to the applicant.

13. Counsel for the applicant has drawn our attention to **Paras 4 & 9 of the Entitlement Rules of Casualty Pensionary Awards to Armed Forces Personnel 2008.** Paras 4 & 9 are reproduced below : -

> *4. Invaliding from service is a necessary condition for grant of disability pension. An individual who, at the time of his release under the Release Regulations, is in a lower medical category than that in which was recruited will be treated as invalidated from service. JCO/OR and equivalents in other services who are placed permanently in a medical category other than 'A' and are discharged because no alternative employment suitable to their low medical category can be provided, as well as those who having been retained in alternative employment but are discharged before the completion of their engagement will be deemed to have been invalidated out of service.*
>
> ***Onus of Proof***
>
> *9. The claimant shall not be called upon to prove the conditions of entitlements. He/she receive the benefit of any reasonable doubt. This benefit will be given more liberally to the claimants in field / afloat service cases.*

14. Counsel for the applicant has also cited a number of judgments to strengthen his claim.

15. In **Sukhvinder Singh v. Union of India 2014 STPL (Web), 468 SC** it has been held that –

> *"Para 9. We are of the persuasion, therefore, that firstly, any disability not recorded at the time of recruitment must be presumed to have been caused subsequently and unless proved to be contrary, to be a consequence of military service. The benefit of doubt is rightly extended in favour of the member of the Armed Forces; any other conclusion would be tantamount to granting a premium to the Recruitment Medical Board for their own negligence. Secondly, the morale of the Armed Forces requires absolute and undiluted protection of an injury leads to loss of service without any recompense, this morale would be severely undermined. Thirdly, there*

appears to be no provisions authorizing the discharge or invaliding out of service where the disability is below twenty per cent and seems to us to be logically so. Fourthly, wherever a member of the Armed Forces is invalided out of service, it perforce has to be assumed that his disability was found to be above twenty per cent. Fifthly, as per the extant Rules / Regulations, a disability leading to invaliding out of service would attract the grant of fifty percent disability pension."

16. The land mark judgment **in Dharamvir Singh v. Union of India** (Supra) was reiterated by the Hon'ble Supreme Court by its judgment dated 13 **February, 2015, in Union of India &Anr. V. Rajbir Singh, Civil Appeal No. 2904 of 2011**. In the latter judgment, the Hon'ble Supreme Court has held that –

"Last but not the least the fact that the provision for payment of disability pension is a beneficiary 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 tenure in the Armed Forces."

17. In**Union of India &Anr. V. Rajbir Singh (Supra),** theHon'ble Supreme Court has also held that –

"Applying the above parameters to the cases at hand, we are of the view that each one of the respondents having been discharged from service on account of medical disease / disability, the disability must be presumed to have been arisen in the course of service which must, in the absence of any reason recorded by the Medical Board, be presumed to have been attributable to or aggravated by military service. There is admittedly neither any note in the service records of the respondents at the time of their entry into service nor have any reasons have been recorded by the Medical Board to suggest that the disease which the member concerned was found to be suffering from could not have been detected at the time of his entry into service. The initial presumption that the respondents were all physically fit and free from any disease and in sound physical and mental condition at the time of their entry into service does remain unrebutted. Since, the disability has in each case been assessed at more than 20 %, their claim to disability pension could not have been repudiated by the appellants."

18. At the outset, we take note of the fact that although the applicant submitted his First Appeal against the decision not to grant him Disability Pension on 19 Dec 2016, the Respondents have not replied although about one year and ten months have elapsed. Hence, we are entertaining his appeal despite objections from the respondents which we have overruled. We have also gone through all the judgments supplied by both the parties as well the facts of the case. There is no doubt in our mind that the applicant was invalided out of service after one year and six month of service while under was undergoing his second leg of training at College of Materials Management at Jabalpur.

19. In this connection, **paras 173 & 173 A of Pension Regulations for the Army Part – I (1961)** are reproduced below : -

Primary conditions for the grant of Disability Pension.

173. *Unless otherwise specifically provide 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 disability which is attributable to or aggravated by military service is non-battle casualty and is assessed at 20 per cent or over.*

The question whether a disability is attributable to or aggravated by military service shall be determined under the rule in Appendix II.

GOVERNMENT OF INDIA ORDER

GOIO NO. 1 XXXXXXXXXXXXXXXXXXX

4.1. For determining the pensionary benefits for death or disability under different circumstances due to attributably aggravates causes, the cases will be broadly categorized as follows : -

Category A :*Death or disability due to natural causes neither attributable to nor aggravated by military service as determined by the competent medical authorities, chronic ailments like heart and renal diseases, prolonged illness, accidents while not on duty.*

Category B :*XXXXXXXXXXXXX.*

Category C :*XXXXXXXXXXXXX.*

Category D :XXXXXXXXXXXX.

Category E : XXXXXXXXXXXX.

4.2. Cases covered under category 'A' would be dealt with in accordance with the provisions contained in the Ministry of Defence letter No. 1(6)/98/D (Pen/Services) dated 3.2.98 and cases under category 'B' to 'E' will be dealt with under the provisions of this letter.

Individuals discharged on account of their being permanently in low medical category

173-A. *Individuals who are placed in lower medical category other than 'E') permanently and who are discharged because no alternative employment in their own trade / category suitable to their low medical category could be provided or who are unwilling to accept the alternative employment are discharged before completion of their engagement, shall be deemed to have been invalided from service for the purpose of entitlement rules laid down in Appendix II to these Regulations.*

NOTE : The above provision shall also apply to individuals who are placed in a low medical category while on extended service and are discharged on that account before the completion of the period of their extension.

20. **In Rajbir Singh &OrsvsUoI (supra)**, the Hon'ble Supreme Court has with respect to Para 173 & 173 A, observed:-

> ***8.*** *The above makes it manifest that only two conditions have been specified for the grant of disability pension viz.* ***(i)*** *the disability is above 20%; and* ***(ii)*** *the disability is attributable to or aggravated by military service. Whether or not the disability is attributable to or aggravated by military service, is in turn, to be determined under Entitlement Rules for Casualty Pensionary Awards, 1982 forming Appendix-II to the Pension Regulations. Significantly, 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:*
>
> *"5. 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) 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.*
>
> *(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."*
>
> ***9.*** *Equally important is Rule 9 of the Entitlement Rules (supra) which places the onus of proof upon the establishment. Rule 9 reads:*

*"**9. Onus of proof.** – 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."*

***10**. As regards diseases Rule 14 of the Entitlement Rules stipulates that in the case of a disease which has led to an individual's discharge or death, the disease shall be deemed to have arisen in service, if no note of it was made at the time of individual's acceptance for military service, subject to the condition that 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 same will not be deemed to have so arisen". Rule 14 may also be extracted for facility of reference.*

*"**14. Diseases.**-In respect of diseases, the following rules 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 arisen 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."

***11**. From a conjoint and harmonious reading of Rules 5, 9 and 14 of Entitlement Rules (supra) the following guiding principles emerge:*

***i)** 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;*

***ii)** in the event of his being discharged from service on medical grounds at any subsequent stage it must be presumed that any such deterioration in his health which has taken place is due to such military service;*

***iii)** the 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 military service; and*

iv) *if medical opinion holds that the disease, because of which the individual was discharged, could not have been detected on medical examination prior to acceptance of service, reasons for the same shall be stated.*

12. *Reference may also be made at this stage to the guidelines set out in Chapter-II of the Guide to Medical Officers (Military Pensions), 2002 which set out the "Entitlement: General principles", and the approach to be adopted in such cases.* ***Paras 7, 8 and 9*** *of the said guidelines reads as under:*

*"**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 non-disclosure of the essential facts by the member e.g. pre-enrolment 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. Congenital Defect of Spine, Spina bifida, Sacralisation,
(b) Certain familial and hereditary diseases e.g. Haemophilia, Congential Syphilis, Haemoglobinopathy.
(c) Certain diseases of the heart and blood vessels e.g. Coronary 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 be carefully and closely questioned on the circumstances which led to the advent of his disease, the duration, the family history, his pre-service 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 dealt 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 service because he is found so weak mentally that it is 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 realised 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."*

13. *In* ***Dharamvir Singh's*** *case (supra) this Court took note of the provisions of the Pensions Regulations, Entitlement Rules and the General Rules of Guidance to Medical Officers to sum up the legal position emerging from the same in the following words:*

*"**29.1.** Disability pension to be granted to an individual who is invalided 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 the Entitlement Rules for Casualty Pensionary Awards, 1982 of Appendix II (Regulation 173).*

29.2. *A member is to be presumed in sound physical and mental condition upon entering service if there is no note or 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 read with Rule 14(b)].*

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

29.4. *If a disease is accepted to have been 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 [Rule 14(c)].*
> ***29.5.*** *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 [Rule 14(b)].*
> ***29.6.*** *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*
> ***29.7.*** *It is mandatory for the Medical Board to follow the guidelines laid down in Chapter II of the Guide to Medical Officers (Military Pensions), 2002 — "Entitlement: General Principles", including Paras 7, 8 and 9 as referred to above (para 27)."*

14. *Applying the above principles this Court in* ***Dharamvir Singh's*** *case (supra) found that no note of any disease had been recorded at the time of his acceptance into military service. This Court also held that Union of India had failed to bring on record any document to suggest that Dharamvir was under treatment for the disease at the time of his recruitment or that the disease was hereditary in nature. This Court, on that basis, declared Dharamvir to be entitled to claim disability pension in the absence of any note in his service record at the time of his acceptance into military service. This Court observed:*

> *"33. In spite 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 the Entitlement Rules for Casualty Pensionary Awards, 1982, the appellant is entitled for presumption and benefit of presumption in his favour. In the 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."*

15. *The legal position as stated in* ***Dharamvir Singh's*** *case (supra) is, in our opinion, in tune with the Pension Regulations, the Entitlement Rules and the Guidelines issued to the Medical Officers. 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. From Rule 14(b) of the Entitlement Rules it is further clear that if the medical opinion were to hold that the disease suffered by the member of the armed forces could not have been detected prior to acceptance for service, the Medical Board must state the reasons for saying so. 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. The very fact that he was upon proper physical and other tests found fit to serve in the army should rise as indeed the rules do provide for a presumption that he was disease-free at the time of his entry into service. That presumption continues till it is proved by the employer that the disease was neither attributable to nor aggravated by military service. For the employer to say so, the least that is required is a statement of reasons supporting that view. That we feel is the true essence of the rules which ought to be kept in view all the time while dealing with cases of disability pension.

21. Further in Armed Forces Tribunal, Chandigarh Regional Bench at Chandimandir in OA 886 of 2016,SmtSwarnLata SharmaVs Union of India and others, the Bench, in a case wherein the applicant's husband died of "METASTATIC GASTROINTESTINAL STROMAL TUMOR ILEUM" (cancer), while allowing the OA, ruled:-

3. The present O.A. has been filed by the applicant as the respondents have denied grant of Special Family Pension to her on the ground that the disability/ disease of her late husband was neither attributable to, nor aggravated by service being 'constitutional' in nature as per Annexure A11 even though, otherwise, the claim is squarely covered under the Entitlement Rules and the judgments (Annexures A-1 to A-7) in the following cases:- (i) Civil Appeal No.4949/2013, Dharamvir Singh vs. Union of India, decided on 02.07.2013; (ii) Civil Appeal No.2337 of 2019, Union of India vs. Chander Pal, decided on 18.09.2013; (iii) Civil Appeal No.5605 of 2011, Sukhvinder Singh vs. Union of India, decided on 25.06.2014; (iv) Civil Appeal No.2904 of 2011, Union of India vs. Rajbir Singh, decided on 13.02.2015; (v) Civil Appeal No.11208 of 2011, Union of India vs. Angad Singh Titaria, decided on 24.02.2015; (vi) Civil Appeal Nos.4357-4358 of 2015(arising out of SLP © No.13732-13733 of 2014), Union of India vs. Manjeet Singh, decided on 12.05.2015; and, (vii) WP(C) 5900/2013, SnehLata vs. Union of India, decided on 11.11.2014.

4. Admitted case of the respondents in the written statement is that the husband of the applicant died while in service due to "METASTATIC GIST ILLEUM" and the name of the applicant has been recorded as the 'next of kin' of the late member of the Armed Forces who has been granted ordinary Family Pension as the cause of death of her husband has been held as neither attributable to, nor aggravated by service. The appeals made by her against non-grant of Special Family Pension stand rejected.

5. Heard the learned counsel for the parties and perused the record.

6. Besides the plea that the case is fully covered by the judgments relied upon in the O.A., learned counsel for the applicant canvassed that the claim also deserves to be allowed in view of sub-clause (a) of Rule 20 and Rule 21 of Entitlement Rules for Casualty Pensionary Awards, 1982, which are reproduced below:-

> "20. Conditions of Unknown Aetiology: There are a number of medical conditions which are of unknown aetiology. In dealing with such conditions, the following guiding principles are laid down:- (a)If nothing at all is known about the cause of the disease and presumption of the entitlement in favour of the claimant is not rebutted, attributability should be conceded. (b) xxxxxxxxx. "
>
> "21. The question as to whether, through the exigencies of service, the diagnosis and/ or treatment of the wound, injury or disease was delayed, faulty or otherwise unsatisfactory, including the adverse/ unforeseen effects of treatment, shall also be considered. The entitlement for any ill-effects arising as a complication from such factors shall be conceded as attributable." The learned counsel also referred to clause (f) under Para 9 of the Guide to Medical Officers (Military Pension), 2002, in which it is provided that "Stress and strain of services is something unique and has now been documented in initiating certain cancers in human beings." with the exception given in Para 12 of the Medical Guide in case of tobacco related cancers in smokers and tobacco users, cancers due to congenital chromosomal abnormalities e.g. CML where Ph chromosome is identified which is not the case herein.

7. Still further, reference is made by the learned counsel for the applicant to Para 7 of the judgment of the Delhi High Court in the case of SnehLata (supra), which is reproduced below:-

> "7. The medical report which has been produced by the respondent during the course of the hearing in the present matter is an opinion given by the medical officer taking a view that the son of the petitioner had a case of "malignant mesotheuoma" and the said disease is not attributable to and aggravated by the military service. We find that the said Medical Officer has not given any reasons as to how the said disease cannot be held to be attributable to and or aggravated by the military service considered the fact that there was no note of any kind of such disability at the time of his entering into the Army. We also find non applicability of Clause 12 of the Chapter VI, Guide to Medical Officers, 2002 and the Amendments of 2008, which primarily deals with the type of cancers due to the consumption of tobacco and from the medical documents placed on record by the respondent, the case of the petitioner's son is not of that kind."

8. Addressing arguments on the above lines the learned counsel stressed that the claim of the applicant for Special Family Pension deserves to be allowed on the following grounds:- (a) Attributability in the type of cancer, suffered by late husband of the applicant and due to which he succumbed, is to be conceded; (b)The surgeries performed in this case are admitted and so its ill-effects; (c) Despite ill health and being in Low Medical Category, late husband of the applicant served for long seven years, hence, aggravation due to service has to be admitted; and, (d)The case is squarely covered by DharamvirSingh"s case (supra) as well as the other cases relied upon in the O.A.

9. On the other side, learned counsel for respondents argued that applicant's husband was never posted in high altitude area for duty. The plea that the cancer suffered by him was contracted and was attributable to his parasailing and paragliding jobs is also not tenable as such activities form part of adventurous sports and not the duty. He suffered a constitutional disease, neither attributable to, nor aggravated by service. Hence the claim for Special Family Pension has rightly been rejected and the applicant has correctly been granted Ordinary Family Pension.

10. We have given due thought and consideration to the rival contentions of both sides and feel convinced with the contentions raised by the learned counsel for the applicant. The reliance placed by the applicant on the judgment of the Hon'ble Supreme Court in Dharamvir Singh's case (supra) as well as the other cases, is found fully valid and justified. The principles laid down in that decision, which need no elaboration, stand reiterated by the Apex Court in Union of India &anr. vs. Rajbir Singh (Civil Appeal Nos. 2904 of 2011 etc.) decided on 13.02.2015; Union of India &Ors. vs. Angad Singh Titaria, Civil Appeal No.11208 of 2011, decided on 24.02.2015 followed by Union of India vs. Manjeet Singh, Civil Appeal Nos. 4357-4358 of 2015 (arising out of SLP(Civil) No.13732-13733/2014), decided on 12.05.2015. As per the observations made by the Apex Court in Rajbir Singh's case (supra) the legal position as stated in Dharamvir Singh's case (supra) is in tune with the Pension Regulations, the Entitlement Rules and the Guidelines issued to the Medical Officers.

11. We, therefore, allow the present O.A. The impugned letters as well as the impugned part of the attributability certificate, is hereby quashed and set aside and considering that the death of applicant"s husband is attributable to and aggravated by service, a direction is issued to the respondents to grant Special Family Pension to the applicant w.e.f. 21.03.2013 in lieu of the ordinary Family Pension, already granted to her from the said date.

21. In this instant case, the Invalidating Medical Board have not conclusively and authoritatively stated that the applicant was suffering from the disease at the time of recruitment. Besides, even if the disease was dormant within his body and not detected at the time of recruitment, the stress and strain of military training that he underwent in the first leg of Basic Military Training at the AOC Centre as a recruit, would have certainly aggravated the disease and led to its manifestation

during his second leg of training. *"Stress and strain of services is something unique and has now been documented in initiating certain cancers in human beings."* Clause (f) under Para 9 of the Guide to Medical Officers (Military Pension), 2002 states this.

22. This this Bench too believes that the benefit of the doubt must be given to the applicant especially in the light of the above cited judgments and the rationale adopted by the Hon'ble Supreme Court, Hon'ble Delhi Court and that of the Chandigarh Bench of the AFT. After all, invaliding out of service albeit, within a short duration of 18 months of service without any recompense whatsoever will have a deleterious effect on the morale of soldiers. Insofar as the judgment of the Hon'ble Supreme Court cited by the respondents is concerned (supra), we are of the opinion that the ratio is not the same as that pertains to a disease that is episodic in nature (seizures) and not one that is progressive such as cancer.

23. In view of the aforesaid discussions, this Original Application (O.A. No. – 118/2017), is allowed.

24. The applicant is entitled to 40 % of disability pension which will be rounded off to 50 % from the date following the date he was invalided out of service iefrom19 Sep 2016.

25. Arrears are to be calculated by the Respondents and are to be paid to the applicant within a period of three months from the date of receipt of this order, failing which the same will carry a simple interest of 8% per annum.

26. No order as to costs.

27. Let a plain copy of this order be supplied to both the parties by the Tribunal Officer upon observance of all usual formalities.

(LT GEN GAUTAM MOORTHY)
MEMBER (ADMINISTRATIVE)

(JUSTICE INDIRA SHAH)
MEMBER (JUDICIAL)

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