

FROM NO. 21

(SEE RULE 102(1))

ARMED FORCES TRIBUNAL , REGIONAL BENCH, KOLKATA

APPLICATION NO : O. A NO. 47 OF 2012

ON THIS 24th DAY OF JULY, 2013

CORAM

HON'BLE JUSTICE RAGHUNATH RAY , MEMBER (JUDICIAL)

HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

Sankar Kumar Majumdar.
Son of Late Bholanath Mazumdar.
Resident of H.25. Dum Dum Estate.
Jessore Road.
Kolkata – 700 028..

.....Applicant

-VS-

1. Union of India through
The Secretary ,
Ministry of Defence,
South Block,
New Delhi.
2. The Director General,
Ministry of Defence,
(Pension Grievance Cell),
Room No. 306, A-Wing,
Sena Bhavan,
New Delhi – 110 001.
3. The Officer-in-Charge,
Sena Chikitsa Corps Abhilekh,
Army Medical Corps,
Lucknow – 2.

..... Respondents.

For the petitioner : Mr. Timir Kanti Biswas. Advocate.

For the respondents : Mr. Dipak Kumar Mukherjee. Advocate.

ORDER

Per HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

The applicant is an ex-soldier who was enrolled in the Army Medical Corps (AMC) in the trade of a nursing assistant on 23.03.1978 and was invalidated out of service on medical ground with diagnosis "congenital shortening of left femur" on 02.12.1983. The ibid disability was considered not attributable to and not aggravated by military service with disablement percentage as 11 to 14 %. Therefore, as per the provisions of Pension Regulation 173 of Pension Regulations for the Army, Part I (1961), as amended, the applicant was granted no disability pension. Being aggrieved with such award, he has filed this Original Application (OA) praying for grant of disability pension in his favour.

2. The matter in brief is that the applicant was enrolled in Army Medical Corps (AMC) on 23.03.1978 and was invalidated out of service on 02.12.1983 on account of 'congenital shortening of left femur' after rendering 5 years 8 months and 9 days of service. The Invalidment Medical Board (IMB) was held at Base Hospital, Delhi Cantt. On 05.11.1983 and the disability was viewed as neither attributable to nor aggravated by military service and was assessed at less than 20 % (11 – 14%) of disablement by a duly constituted Medical Board.

3. Although, the AMC. Records submitted a disability claim to the PCDA(P) on 28.01.1984, the same was rejected by PCDA(P), Allahabad on 31.03.1984 on the grounds that

the disability was neither attributable nor aggravated by military service. The said decision was communicated to the applicant by AMC Records Office vide their letter dated 03.05.1984. Upon receipt of the said letter, the applicant filed an appeal on 06.06.1984 against the rejection of his disability pension claim. This was reconsidered by MoD but rejected with direction that "no reasonable ground have been found to alter the decision already conveyed by the CDA(P), Allahabad". As submitted by the respondents, the rejection order was communicated to the applicant. Not satisfied with such rejection order, the applicant filed a petition to redress his grievances before the DG, Army Medical Service (Pension Grievance Cell) on 03.12.2004 (annexure A-3). Such petition was disposed of by AMC, Records on 30.08.2007 (Annexure A-5) rejecting the claim for disability pension made in the form of a complaint petition by the applicant (Annexure A-5), which is the impugned order and the applicant has sought to quash this order and grant of disability pension in his favour as contained in the prayer portion of his OA.

4. The respondents have countered the statement made by the applicant in his OA through a counter affidavit filed on 23.11.2012. While agreeing with the facts of the case, they have relied on the invalidment medical board proceedings and the opinion endorsed therein by the expert specialists and the board of officers duly constituted for the purpose. As per the ibid medical board proceedings (Annexure R-1), which was submitted in original before this Tribunal by the respondents, the applicant was invalidated out of service for a disorder for "congenital shortening of left femur" as has been the opinion in para 3 of the said Invalidment Medical Board. This Invalidment Medical Board was held in the Base Hospital on 05.11.1983. It is observed from the opinion of Brigadier AS Chahal, Consultant, Surgery & Orthopaedics that the

applicant had been complaining of pain in left limb and had developed limp since the last two years. He opined that it was a case of left lower limb being short by 1.5 cm. The disability was considered to be congenital. Based on such opinion of the specialists the Medical Board proceedings in Part III of the ibid board proceedings have considered this disability to be neither attributable nor aggravated by military service. Instead, the Board considered it as not connected with service. The Medical Board have also endorsed that it was a congenital disorder and had existed before entering the service. The ibid endorsements have been made in internal page 3, Part III of Invalidment Medical Board proceedings in respect of the applicant. However, the percentage of disablement awarded to the applicant was 11 to 14%. The ibid Medical Board proceedings were finally approved by the higher medical authorities at HQ, Delhi Area on 12.11.1984. The Medical Board had placed him in Category EEE having found him unfit for military service.

5. The contention of the respondents is that the opinion of the Invalidment Medical Board is that of an expert and by a duly constituted Board which have been approved by the competent authorities. Therefore, the respondents cannot go beyond the recommendations of the Medical Board. The respondents further bring to our notice the provisions of Regular 173 of Pension Regulations for the Army Part I which stipulates that "unless otherwise specifically provided, a disability pension consisting of service element and disability element may be granted to an individual who is invalidated out of service on account of a disability which is attributable to or aggravated by the military service in non-battle casualty and is assessed at 20% or over", whereas in the instant case the disability of the applicant was viewed by a duly constituted medical board as neither attributable to nor aggravated by military service with disability

percentage being less than 20%. Therefore, the respondents emphasized that the applicant shall not be entitled to any disability pension under the provisions of the *ibid* Rule.

6. Moreover the applicant was offered opportunity to represent against rejection of disability pension which he did apply by an appeal before the MoD, Government of India that was rejected by MoD letter dated 20.03.1986 (Annexure R-5). A petition by the applicant on the same issue was submitted by him on 03.12.2004 (Annexure A-3) which was also rejected with reasons vide AMC Records letter of 30.08.2007 (Annexure A-5).

7. The learned counsel for the applicant in his oral submission emphasized on the fact that the applicant, when initially enrolled on 23.03.1978, was fully fit and no such disability or congenital disorder was detected then. It was discovered much later after a gap of nearly five years. Moreover, the respondents have given no reason as to why such a congenital disorder, if at all was present, could not be discovered during the preliminary medical examination at the time of initial enrolment and during subsequent annual medical check examinations to which every soldier is subjected to including the applicant. Therefore, Mr. Biswas submits that such disability had to be either attributable to or at least aggravated by military service condition. He further added that it was quite likely that such a defect could have precipitated and manifested in army because of strenuous service conditions that the applicant faced. Mr. Biswas perused the original medical board proceedings in the presence of the Court. He is of the view that every soldier who is invalidated out of service should be deemed to have been for a disability which is on account of service. While emphasizing on the issue that such defect was not detected while he was enrolled, he draws our attention to para 5(a) and (b) of Entitlement Rules for Casualty

Pensionary Awards, 1982 (Appendix II to Pension Regulations for Army, 1961 – Revised). It is quoted below:-

“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.”

8. He further draws our attention to para 9 of the *ibid* entitlement rules which is as under:-

“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. ”*

9. Mr. Biswas concludes his oral submission by submitting that the respondents at no stage could explain as to why the congenital disorder could not be detected at the time of the enrolment. Under such circumstances, learned counsel for the applicant is of the view that benefit of doubt should be given to the claimant, in this case, the applicant, and disability pension be sanctioned. As regards the percentage of disability, the learned counsel, during his

oral submission, tried to make a case to show that in case the defect was so serious that it did not allow him to continue in service then in that case the percentage of disablement could not have been as low as 11-14% and in any case it ought to have been more than 20%.

10. Mr. Mukherjee, learned counsel for the respondents contests the points raised by the learned counsel for the applicant which he has not averred in the body of the OA that was filed by him. Moreover, he submits that a congenital disorder of the type that the applicant was having, which is shortening of left lower limb by 1.5 cm. could have easily been unnoticed at the time of preliminary medical examination. That does not mean that such a structural defect can go unnoticed always. He could not have been allowed to continue in service carrying such a disorder which was a case of medical rejection at the outset. Therefore, he expresses his entire reliance on the opinion of the Medical Board and the provisions of Pension Rules 173 as quoted above to base in his argument that this matter should be dismissed for having no merit.

11. We have considered the affidavits and annexures submitted by both sides and we have heard the arguments put forward by the learned counsel. We have also gone through the original Medical Board records including the Invalidment Medical Board proceedings as submitted by the respondents. We are of the view that the opinion of the Invalidment Medical Board is quite in order and the applicant has no cogent reason to challenge its opinion. In view of the facts stated above, the opinion of the Medical Board that disability of 'congenital shortening of left femur' was indeed not attributable to nor aggravated by military serviced. It was a congenital disorder and would have been present from the time of enrolment. However, it is surprising that

such a deformity could have gone unnoticed by the Medical Officer who conducted the applicant's preliminary medical examination at the time of his enrolment in March, 1978.

12. We also observe from the records that the authorities have made no efforts to justify as to how this obvious deformity/disability was allowed to go unnoticed at the time of preliminary medical examination and later during periodic routine medical examination. The Invalidment Medical Board should have gone into the details before merely concluding that the disability existed before entering into the service (Para 1 of Part 3 – internal page 3 of the Invalidment Medical Board proceedings). The Medical Board must abide by the instructions contained in the Entitlement Rules as quoted above and justify their opinion in detail rather than being cryptic in a manner as if they are just filling up a form and as if there was no need for them to elaborate the reasons for their remarks. We also observe that if such a defect was indeed observed at the time of recruitment, this applicant would have been rejected then and there and the public money would not have been spent in his training and further service by retaining him for nearly six years while carrying on with such a deformity/disability since recruitment. This aspect should be enquired into by DGAFMS with instructions from respondent No. 1 and the responsibility be pinpointed. The authorities must take action as deemed appropriate so that such obvious disability/deformity does not go unnoticed during enrolment in future.

13. There does not, however, appear to be any incident or disease within his service that could have resulted in such a deformity of shortening of a part of the lower limb. There is, therefore, no material evidence to suggest that the said disability/deformity could have been on account of the service condition. We are inclined to agree to the opinion of the IMB.

14. The respondents have acted upon the provisions of Regulation 173 of Pension Regulations for the Army Part I (1961) and cannot be faulted for rejecting the claim for disability pension by the applicant. We are of the view that the respondents have acted well within the rules and therefore there appears no merit in the case. The case is dismissed for lack of merit. However, the respondent No. 1 shall take appropriate action in the light of our observations made *ibid* with regard to the careless conduct of the recruiting medical officer who failed to detect such obvious deformity/disability at the time of enrolment.

15. In view of the discussions made above, this OA is dismissed for lack of merit. No cost. The original records submitted by the respondents be returned to them under proper receipt.

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 K P D Samanta)
Member (Administrative)

(Justice Raghunath Ray)
Member (Judicial)