

**IN THE ARMED FORCES TRIBUNAL
REGIONAL BENCH, GUWAHATI.**

OA 40/2017

Ex-Hav ST Journalson Anal

.....**Applicant.**
By legal practitioners
for Applicant.
Mrs. Rita Devi,
Mr. AR Tahbildar.

-Versus-

1. Union of India,
Represented by the Secretary,
Ministry of Defence,
Sena Bhawan, New Delhi-11.
2. Records, The Kumaon Regiment,
PIN – 900473,
C/o 56 APO.
3. Additional Directorate General,
Personnel Services, PS-4(d),
Adjutant General's Branch,
IHQ of MoD (Army), DHQ, P.O. New Delhi.
4. The Principal Controller of Defence,
Accounts (Pension), Allahabad, Pin 211014,
Uttar Pradesh.

....**Respondents**
By legal practitioners
for Respondents.
Mr. C.Barua, CGSC.

PRESENT

HON'BLE DR. (MRS) JUSTICE INDIRA SHAH, MEMBER (J)
HON'BLE LT GEN C.A.KRISHNAN, MEMBER (A)

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ORDER

23.02.2018

Per Lt Gen C.A.Krishnan, Member, (A).

This is an application under Section 14 of the Armed Forces Act, 2007 filed by Ex-Hav Journalson Anal claiming disability pension.

2. The applicant was enrolled in the Indian Army as Sepoy on 17.10.94. He was discharged from service on 31.10.2015 under Rule 13(3), Item I(iii)(v) of the Army Rules, 1954 after completion of 21 years of service. He is in receipt of service pension.

3. Learned Counsel for the applicant submitted that the applicant was enrolled in the Army on 17.10.94 after thorough medical examination and finding him fit in all respects and in due course he was promoted to the rank of Havildar. During his 21 years of service in the Army he served in peace area as well as in many field areas, including high altitude and counter insurgency areas. He sustained injury on 26.8.2010 while on active operational duty in counter insurgency area in Nagaland. Due to continuous service in operational areas and in training activities the injury got aggravated and he was placed in low medical category with effect from 31.01.2012 at Command Hospital, Kolkata. The Medical Board declared one of the disability, namely " Avulsion Fracture Tibia Tuberosity left" not aggravated or attributable to military service in the absence of Injury Report, while finding the second disability, i.e. "Prolapsed Disc LV-4/5" aggravated by service. Due to his being in low medical category he was subsequently brought before the Release Medical Board. The Release Medical Board on 4.8.2015 assessed his disability due to "Prolapsed Intervertebral Disc L-4/5 (M 51.4)" @ 20% and

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"Avulsion Fracture Tibia Tuberosity left" @ 20% for life and composite assessment for both to be at 40%, but considered it as neither attributable to nor aggravated by service. His appeal dated 24.10.2016 for grant of disability pension was rejected vide Records Kumaon Reiment letter No. 14702995/DP dated 11 Nov 2016.

4. The learned Counsel for the applicant also submitted that since the applicant was fit at the time of his joining service, any subsequent disability should be held as attributable to or aggravated by military service in accordance with the principles enunciated by the Hon'ble Apex Court in Dharamvir Singh Vs. U.O.I. & Ors. ((2013) 7 SCC 316). The Medical Advisor (Pensions) at PCDA(P) without conducting any medical examination could not have declared that the disability of the applicant was a constitutional disorder and not related to

military service. The learned Counsel, therefore, prayed that the applicant be granted disability element of pension with the benefit of rounding off.

5. Learned Central Govt. Standing Counsel while not disputing the fact that the individual was discharged from service with invaliding disease "Prolapsed Disc LV-4/5" and "Avulsion Fracture Tibia Tuberosity left" which were assessed by the Medical Board at 40% disability, submitted that the competent Medical authority has declared the applicant's disability not attributable to nor aggravated by the military service. The applicant, therefore, is not entitled to disability element of the pension. However, he has been granted service pension.

6. Heard the rival submissions and perused the records.

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7. It is not disputed that the applicant was found to be medically fit in all respects at the time of his enrolment into the army on 17.10.94. It is also not disputed that he was discharged from service under Rule 13(3), Item I(iii)(v) of the Army Rules, 1954 and the Medical Board held at Command Hospital, Kolkata on 31.01.2012 assessed disability due to "Avulsion Fracture Tibia Tuberosity left" to be 40% and aggravated by military service. Release Medical Board, however, assessed him to have composite disability 40% which was held as neither attributable to nor aggravated by military service. The applicant was discharged from service on 31.10.2015.

8. The issue in hand is covered in the Hon'ble Supreme Court judgment of 13 Feb 2015 in Union of India & Anr Vs. Rajbir Singh, Civil Appeal No. 2904 of 2011 where the Hon'ble Supreme Court recalled their judgment dated 02.07.2013 in Dharamvir Singh Vs. Union of India & Ors. In OA 4949 of 2013 which held:

"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

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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."

9. In view of the above judgments of the Hon`ble Supreme Court and a catena of AFT judgments the issue is no more 'res integra'. Applying the above parameters to the case in hand, we are of the view that the applicant having been discharged from service

on account of medical disability, the disability must be presumed to have been arisen in the course of service in the absence of any reason recorded by the Medical Board and attributable to or aggravated by military service. There is neither any note in the service record of the applicant at the time of his entry into the service nor is there any reason recorded by the Medical Board to suggest that the disability which the person concerned was found to be suffering from could not have been detected at the time of his entry into the service. The initial presumption that the applicant was physically fit and free from any disease and in sound health, both physically and mentally, at the time of his entry into the service, therefore, remains unrebutted. Considering these facts and since the disability has been assessed at 40%, his claim to the disability pension cannot be repudiated by the respondents.

10. In view of the above reasons and the judgment of the Hon`ble Supreme Court holding that the concept of rounding off of disability pension is applicable to all persons who are eligible for disability pension, this OA deserves to be allowed. Therefore, it is held that the petitioner shall be entitled to disability pension and the benefits of rounding off with effect from his date of discharge.

11. In sum, the application is allowed. The respondents are directed to grant the applicant disability pension @ 40% broad banded to 50% with effect from the date of discharge, i.e. 01. 11.2015 within a period of three months from today, failing which, the applicant shall be entitled to 9% interest on arrears.

12. Learned Counsel appearing for the respondents has made an oral prayer to grant leave to appeal to Hon`ble Supreme Court under Section 31 of the AFT Act, 2007. Since the order does not involve any Point of law having general public importance, the prayer for leave to appeal to the Hon`ble Supreme Court stands rejected.

13. With this direction, the OA stands disposed of.

MEMBER (A)

MEMBER(J)

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