

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

OA - 13 of 2018

PRESENT

HON`BLE DR. (MRS) JUSTICE INDIRA SHAH, MEMBER (J)
HON`BLE LT GEN GAUTAM MOORTHY, MEMBER (A)

No. 4350969FK Ex-Naik Chin Suan Khup
Vill- New Lamka Dorcas Veng
PO-Churachandpur
Dist-Churachandpur, Manipur

..... Applicant

By legal practitioners for
Applicant.

Mrs. Rita Devi
Mr. A.R.Tahbildar

-VERSUS-

1. **The Union of India through**
the Secretary, Ministry of Defence,
New Delhi-11.
2. **Defence Security Corps**
PIN-901277
C/O-56 APO
3. **Additional Directorate General**
Personnel Services, PS -4(d)
Adjutant General's Branch
Integrated IHQ of MOD (Army),
DHQ, PO-New Delhi
4. **The Principal Controller of Defence,**
Accounts (Pension), Allahabad
PIN-211014, Uttar Pradesh.

..... Respondents

By Legal Practitioner for the
Respondents

Mr. N. Baruah, CGSC.

Date of Hearing : 20.12.2018
Date of Judgment & order: 21.12.2018

JUDGMENT & ORDER

(Per Lt Gen Gautam Moorthy, Member (A))

1. This is the second round of litigation. The earlier Original Application (OA) No. 67/2016 which was filed before this Tribunal was disposed of vide order dated 22.03.2017 in which the applicant was allowed to file first appeal before the First Appellate Authority with a direction to the First Appellate Authority to dispose of the said appeal by a speaking order within a period of three months from the date of preferring such appeal. The First Appeal was rejected by the Appellate Committee on First Appeal (ACFA) vide letter No. B/40502/515/2017/AG/PS-4(Imp-II) dated 22.12.2017 by holding that the disability was neither attributable to nor aggravated by military service.
2. The factual matrix of the case is that the applicant was enrolled as Sepoy in the Defence Security Corps on 28.10.1985. He was placed in Low Medical Category 'NEUROSIS (MIXED ANXIETY DEPRESSION)(F-41.2) by the Release Medical Board held on 21.10.2003 with the degree of disability of 15-19% which was classified as neither attributable to nor aggravated by military service. As per the Release Medical Board dated 21.10.2003, disability was considered by the Commanding Officer as both attributable to as well as aggravated by military service. However, the percentage of disability was noted at 15-19% (Annexure-A). The application filed by the applicant in 2016 was replied by the respondents vide DSC Records letter No. Pen/DPrev/4350969 dated 15.10.2016, the relevant portion is set out as under –

WELFARE OF ESM: NON GRANTING OF DE AND ITS ROUNDING OFF

1. *Refer to your petition received through ESM Pension Grievance Cell, C/o 57 Mtn Div Sig Regt vide their letter No. 142/ESM/Pension(ii) dated 17 Jul 2016.*
2. *It is intimated that you have been discharged from DSC service on 11 Feb 1985 (AN) under rule 13(3) item III (iv) Army Rule 1954 on extreme compassionate ground at his own request.*
3. *As per Government of India, Ministry of Defence Deppt. Of Ex-Servicemen Welfare letter No. 16(5)/2008/D(Pen/Policy) dated 29 Sep 2009 LMC personnel those who were discharged from service on compassionate grounds on or after 01 Jan 2006 are eligible for grant of disability pension.*

4. *It is also intimated that your disability assessed 15-19% (less than 20%) for life by the medical board. Therefore, you are not entitled for disability pension.*

3. It is observed that the applicant has been denied the disability pension on two grounds viz- (a) he was discharged on extreme compassionate ground prior to 01.01.2006 quoting the Ministry of Defence Of Ex-Servicemen Welfare letter No. 16(5)/2008/D(Pen/Policy) dated 29 Sep 2009 and (b) that his disability was assessed at less than 20% for life by the medical board.

4. In so far as the first ground for rejection is concerned, the Ministry of Defence vide their letter No. 16(05)/2008/D(Pension/Policy) dated 19.05.2017 has now extended the benefit to those who proceeded premature/voluntary retirement event prior to 01.01.2006. Accordingly, the applicant is eligible to disability element of pension.

5. There is no denial of the fact that the applicant was discharged in Low Medical Category for his disability which was considered attributable to military service by the Commanding Officer. However, the medical authorities have stated that the disability of the applicant was neither attributable to nor aggravated by military service.

6. The respondents have stated that the applicant has been denied disability pension on the ground of not meeting the eligibility criteria and the opinion duly considered by the Release Medical Board comprising of expert Medical Specialists and not as per the Commanding Officer who is not a medical expert. It is also stated that the rejection of his disability element claim was not only on the ground of his discharge from DSC service on compassionate ground, but also on the assessment made by the Release Medical Board and the percentage of disability. Since there is dichotomy in the opinion of the Commanding Officer and medical board, the benefit of doubt should go to the applicant as the disease was that of 'NEUROSIS (MIXED ANXIETY DEPRESSION)(F-41.2)', it would be the Commanding Officer who would have referred the applicant to the medical authorities for treatment of his mental disease.

7. In ***Dharamvir Singh Vs Union of India, (2013) 7 SCC 316***, the Hon'ble Supreme Court held –

*“16 Regulation 173 of Pension Regulations for the Army, 1961 relates to the primary conditions for the grant of disability pension and reads as follows: **Regulation 173**. 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 military service in non-battle casualty and is assessed 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.

17. From a bare perusal of the Regulation aforesaid, it is clear that disability pension in normal course is to be granted to an individual (i) who is invalidated out of service on account of a disability which is attributable to or aggravated by military service and (ii) who is assessed at 20% or over disability unless otherwise it is specifically provided.

18. A 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:

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.

19. Onus of proof" is not on claimant as apparent from Rule 9, which reads as follows:

Rule 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. From a bare perusal of Rule 9 it is clear that a member, who is declared disabled from service, is not required to prove his entitlement of pension and such pensionary benefits to be given more liberally to the claimants.

20. With respect to disability due to diseases Rule 14 shall be applicable which as per the Government of India publication reads as follows:

Rule 14. DISEASE- 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 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. As per clause (b) of Rule 14 a disease which has led to an individual 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. As per clause(c) of Rule 14 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.

8. The Hon'ble Supreme Court in ***Sukhvinder Singh v. Union of India (2014) 14 SCC 364***, a detailed judgment commented upon the invalidation of a person out of service without suitable recompense. Para 6 of the judgment is reproduced below:-

6. *"We think that that it beyond cavil that a combatant soldier is liable to be invalided out of service only if his disability is 20 per cent or above and there is a further finding that he cannot discharge duties even after being placed in a lower medical category. We are indeed satisfied to note that Rule 173 Appendix-II(10) postulates and permits preferment of claims even "where a disease did not actually lead to the member's discharge from service but arose within 10 years thereafter". We, just as every other citizen of India, would be extremely disturbed if the Authorities are perceived as being impervious or unsympathetic towards member of the Armed Forces who have suffered disabilities, without receiving any form of recompense or source of sustenance, since these are inextricably germane to their source of livelihood. Learned Counsel for the respondents has failed to disclose any provision empowering the invaliding out of service of any person whose disability is below 20 per cent, Indeed, this would tantamount to dismissal of a member of the Armed Forces without recourse to a court-martial which would automatically entitle him to reinstatement. Regulation 143 envisages the "Re-Enrolment of Ex-Servicemen Medically Boarded Out", where the disability is reassessed to be below 20 per cent. It is, therefore, self contradictory to contend that the invaliding out of service of the appellant was justified despite his disability being trivial proportions having been adjudged between 6 to 10 per cent only. We shall presume, albeit fortuitously for the Respondents, that re-assessment of the appellant's disability was not required to be performed because it was found to be permanent. Otherwise, there would be facial non-compliance with Regulation 143, which is extracted below for ease of reference : -*

"143. Re-Enrolment of Ex-Servicemen Medically Boarded out.-

"Ex-Servicemen, who are in receipt of disability pension, will not be accepted for re-enrollment in the army. (b) Ex-Servicemen, medically boarded out without any disability pension or those whose disability pensions have been stopped because of their disability having been re-assessed below 20 % by the Re-Survey Boards, will be eligible for re-enrolment, either in combatant or non-combatant (enrolled) capacity in the Army, provided they are re-medically boarded and declared fit by the medical authorities. If such an ex-servicemen applies for re-enrollment and claims that he is entirely free from the

disability for which invalidated, he will be medically examined by the Rtg MO and if he considered him fit, the applicant will be advised to apply to Officer-in-Charge, Records Office concerned, through the Recruiting Officer for getting himself re-medically boarded.

Further Para 9 of the above judgement states that –

"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 the 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 and if 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, as per the extant Rules/Regulations, a disability leading to invaliding out of service would attract the grant of fifty per cent disability pension".

9. Thus in this particular case, the applicant was discharged from service with disability of below 20%. Hence, as per the ratio of the Judgments quoted, it is to be assumed that his disability should have been assessed as above 20%. Therefore, as per the existing policy, the disability attracts the grant of 50% disability pension from 20% disability as rounding off.

10. In view of above discussions, we are of the opinion that the applicant is entitled to disability pension @ 20% rounded off to 50% in conformity with the existing policy. Arrears will be restricted for three years prior to the date of filing of OA No. 67 of 2016 i.e. 07.11.2016.

11. Accordingly, the arrears be calculated and paid to the applicant within a period of 3 months from the date of receipt of the copy of this judgment failing which 8% simple interest per annum will be levied on the arrears.

12. No costs.

MEMBER (A)

MEMBER (J)