

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

OA - 50 of 2017

PRESENT

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

No. 4352495K Ex-Sep Chinkhan Khup
S/o Kamkhojan
Vill-Phungchong Road
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. **Records The Assam Regiment**
PIN-(ARMY)-900332
C/O 99 APO
3. **Additional Directorate General**
Personnel Services, PS -4(d)
Adjutant General's Branch
Integrated HQ of MOD (Army),
PO-New Delhi
4. **The Principal Controller of Defence,**
Accounts (Pension), Allahabad
PIN-211014, Uttar Pradesh.

..... Respondents

By Legal Practitioner for the
Respondents

Brig.N.Deka (Retd.) CGSC.

Date of Hearing : 11.06.2018
Date of Judgment & order: 11.06.2018

JUDGMENT & ORDER

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

1. This case has been filed under Section 14 & 15 of the AFT Act, 2007 assailing the denial of the disability element of pension to the applicant.

2. The brief facts of the case are that the applicant was enrolled in the Indian Army on 23.02.1980 and was discharged from service on 26.02.1987 under Army Rule 13(3)(III)(v) after rendering 07 years, 03 days of service before completion of term of his engagement. At the time of his discharge, he was under Low Medical Category (LMC) BEE(P) with disability of Spinal Bifida S1 with low backache and assessed at 15-19% vide Release Medical Board Proceedings (AFMS 16) dated 10.12.1986. Copy of the Medical Board proceeding which is attached clearly indicates in Para 3 that the disability did not exist prior to entering in service and that has been aggravated by military service. However, the percentage of disablement was below 20% i.e. 15-19% and was for the duration of two years.

3. Heard Mr. A.R. Tahbildar learned counsel appearing for the applicant and Ms. N. Das assisted by Capt. Akash Vashishta, OIC Legal Cell, AFT Guwahati appearing for the respondents.

4. Learned counsel for the applicant has stated that PCDA (P) Allahabad while re-assessing the applicant's disability as 11-14%, rejected his claim for disability, but granted service element pension to the applicant for life. Learned counsel also stated that the applicant was not called for the Re-survey Medical Board after completion of the period of 2 years. The applicant then submitted an application on 29.05.2016 to The Records, The Assam Regiment for grant of disability pension with rounding off benefit. Learned counsel has also quoted the Rule 4 (a) of the Entitlement Rules, 2008 for Casualty Pensionary Awards to the Armed Forces Personnel which is reproduced below –

"4 Invalidation from service:

a) Invalidation from service with disablement caused by service factor is a condition precedent for grant of disability pension. However, disability element will also be admissible to personnel who retire or are discharged on completion of terms of engagement in low medical category on account of disability attributable to or aggravated by military service, provided the disability is accepted as not less than 20%."

5. The learned counsel for the applicant has further stated that the reason the applicant was denied disability pension despite being invalidated out from service was because of his disability which was first

assessed as 15-19% by the Release Medical Board which was further downgraded to 11-19% by PCDA (P), Allahabad in a very casual manner. He has further stated that being aggrieved by non-grant of disability pension along with rounding off benefit, the applicant first approached this Tribunal with OA-63 of 2016, wherein the Tribunal after hearing the parties has directed the applicant to file an application against the decision before the appropriate authority who shall consider the appeal on merit within 3 months and shall not reject the same on the ground of limitation. Hence in compliance of the order, the applicant filed an appeal on 07.12.2016, but till date no response has been received by him.

6. The learned counsel for the respondents on the other hand, has stated that earlier the claim of his disability pension was rejected by PCDA (P), Allahabad vide their Memo No. G3/89/2103/VII CDR298 dated 05.05.1987. However, they granted him service element of pension for life from the date of his discharge from service. Learned counsel has also stated that The Records, The Assam Regiment vide letter dated 19.06.1987 advised the applicant to prefer an appeal against the decision of the PCDA (P), Allahabad within a stipulated period of 6 months. But the applicant failed to do so. Learned counsel has produced a letter dated 21.07.2017 (Annexure-R6) whereby the office of DGAFMS has accorded sanction of holding of Review Medical Board. However, the Army Hospital (R&R) has not held the Review Medical Board, but referred the case to the Office of DGAFMS for scrutiny which in turn, returned all medical documents to The Records, The Assam Regiment on 17.10.2017 through Army Hospital (R&R). The office of Records The Assam Regiment has again written to Office of PCDA (P) on 07.11.2017 to return the copy of the RMB proceeding dated 05.11.1986 for carrying out the reassessment of disability of the individual at the earliest. But nothing has been received as yet from the office of the PCDA (P).

7. In the instant case, we have seen that the soldier who had suffered injury classified as attributable to military service and was invalided out of service with 7 years and 3 days because of the injury was not granted any disability pension on specious ground of his disability being less than 20%.

8. 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 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 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.

9. 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 invalided, 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.

9. 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”.

10. Thus in this particular case, the applicant was invalided out of 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 leading to invaliding out of service attracts the grant of 50% disability pension from 20% disability. Again the PCDA (P) in reducing the disability which was already less than 20% (15-19%) to 11-14% without examining the applicant also proves its arbitrariness on the part of the Defence Accounts Officials. The Armed Forces Tribunal (Regional Bench) Kolkata in OA No. 105 of 2013 in the case of ***Ex-Rect Khageswar Nayak vs. Union of India and 5others*** on 23.7.2014 has ruled as under :

“From the above facts it appears that that PCD(P) or CDA has acted as a superior authority to the Medical Board and overruled the Medical Board’s opinion at its sweet will without even bothering to disclose any reason for such decision. This is absolutely illegal and unjustified.”

11. Before parting with the case, we are constrained to observe the lackadaisical approach of the respondents in dealing with a case that cries out for justice. In OA 63 of 2016, this Bench vide order dated 29.11.2016 had directed the applicant to file an application which he did on 07.12.2016. This application was to have been considered on merit within three months. We however, note that regrettably despite the passage of over 18 months, the respondents are simply passing the buck from one office to another and thus compelled the applicant to enter into a fresh round of litigation. This attitude smacks of indifference, insensitivity and insouciance towards a suffering ex-serviceman besides a complete disdain for the orders of the AFT. We are however, not levying any costs at this stage as it will only further delay payment of the applicant’s dues.

12. In view of above discussions, we are of the opinion that the applicant is entitled to disability pension from the date of his invaliding out of service i.e. 26.02.1987 upto 31.12.1995 @ 20% and from 01.01.1996 onwards the disability has to be rounded off to 50% in conformity with the existing policy.

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

14. No costs.

MEMBER (A)

MEMBER (J)

Kalita