Form No. 4
{See rule 11(1)}
ORDER SHEET
ARMED FORCES TRIBUNAL, REGIONAL BENCH, GUWAHATI
(Sl. No. 7)

O.A. No. 27 of 2021 with M.A. No. 15 of 2021

Ex. Hav. Khaineimang Applicant
By Legal Practitioner for the Applicant : Shri A.R. Tahbildar, Advocate

Versus

Union of India & Others Respondents
By Legal Practitioner for Respondents : Shri P. Sharma, Advocate

Notes of the Registry	Orders of the Tribunal
	06.04.2023 **Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)** **Hon'ble Air Marshal Balakrishnan Suresh, Member (A)** **M.A. No. 15 of 2021** Heard Shri A.R. Tahbildar, Ld. Counsel for the applicant and Shri P. Sharma, Ld. Counsel for the respondents. This application has been filed for condoning delay of 03 months and 22 days in filing Original Application for the grant of disability pension to the applicant. It is submitted by the Ld. Counsel for the applicant that delay in filing the Original Application is not intentional, but for the reasons stated in the affidavit filed in support of delay condonation application. The Ld. Counsel for the respondents has vehemently opposed the prayer. Upon hearing submissions of Ld. Counsel of both sides we find that cause shown is sufficient. Accordingly, delay is **condoned**. Delay condonation application stands disposed of. **O.A. No. 27 of 2021** Heard Shri A.R. Tahbildar, Ld. Counsel for the applicant and Shri P. Sharma, Ld. Counsel for the respondents. Original Application is **partly allowed for the first disability i.e. Primary Hypertension**. For orders, see our order passed on separate sheets. Misc. Application(s), pending if any, shall be treated to have been disposed of. **(Air Marshal Balakrishnan Suresh)** **Member (A)** **(Justice Umesh Chandra Srivastava)** **Member (J)** AKD/MC/-

ARMED FORCES TRIBUNAL, REGIONAL BENCH, GUWAHATI

ORIGINAL APPLICATION No. 27 of 2021

Thursday, this the 6th day of April, 2023

"Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Air Marshal Balakrishnan Suresh, Member (A)"

No. 4367547M Ex. Hav. Khaineimang

.....Applicant

Ld. Counsel for the Applicant : **Shri A.R. Tahbildar,** Advocate

Versus

Union of India & Others. **.....Respondents**

Ld. Counsel for the Respondents. : **Shri P. Sharma ,** Advocate
Central Govt. Counsel

ORDER

"Per Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)"

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs :-

(i) *To quash and set aside the impugned order No. B/38046A/115/2020/AG/PS-4(2nd Appeal) dated 04.02.2021 rejecting the applicant's claim for disability element of pension on discharge from service in low medical category.*

(ii) *To pay disability element of pension considering his disability as 40% for life w.e.f. the date of his discharge from service along with rounding off benefit of his disability element with arrear and*

(iii) *To pass such other or further order(s) as deem fit and proper.*

2. Briefly stated, applicant was enrolled in the Indian Army on 16.01.1999 and discharged on 30.06.2018 on Low Medical Category under Rule 13 (3) Item III (iii) (a) (i) of the Army Rules, 1954. At the time of discharge from service, the Release Medical Board (RMB) held at Base Hospital, Delhi Cantt. on 30.05.2018 assessed his disabilities (i) Primary Hypertension @30% for life (ii) Dyslipidemia @1-5% for life and (iii) Obesity @1-5% for life, composite disabilities @40% for life and opined the disabilities to be neither attributable to nor aggravated (NANA) by service. The applicant's claim for grant of disability pension was rejected vide letter dated 03.10.2018. The applicant preferred First Appeal which too was rejected vide letter dated 12.07.2019. The

applicant preferred Second Appeal which was rejected vide letter dated 04.02.2021. It is in this perspective that the applicant has preferred the present Original Application.

3. Learned Counsel for the applicant pleaded that at the time of enrolment, the applicant was found mentally and physically fit for service in the Army and there is no note in the service documents that he was suffering from any disease at the time of enrolment in Army. The diseases of the applicant were contracted during the service, hence they are attributable to and aggravated by Military Service. He pleaded that various Benches of Armed Forces Tribunal have granted disability pension in similar cases, as such the applicant be granted disability pension and its rounding off to 50%.

4. On the other hand, Ld. Counsel for the respondents contended that composite disabilities of the applicant @ 40% for life have been regarded as NANA by the RMB, hence as per Regulation 53(a) of the Pension Regulations for the Army, 2008 (Part-I) the applicant is not entitled to disability element of

disability pension. He pleaded for dismissal of the Original Application.

5. We have heard Ld. Counsel for the applicant as also Ld. Counsel for the respondents. We have also gone through the Release Medical Board proceedings as well as the records and we find that the questions which need to be answered are of two folds:-

(a) Whether the disabilities of the applicant are attributable to or aggravated by Military Service?

(b) Whether the applicant is entitled for the benefit of rounding off the disability element of disability pension?

6. The law on attributability of a disability has already been settled by the Hon'ble Supreme Court in the case of ***Dharamvir Singh Versus Union of India & Others,*** reported in (2013) 7 Supreme Court Cases 316. In this case the Apex 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).*
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> *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)].*
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> *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).*
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> *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)]. [pic]*

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)."

7. In view of the settled position of law on attributability, we find that the RMB has denied attributability to the applicant only by endorsing that the first disability **'Primary Hypertension'** is neither attributable to nor aggravated (NANA) by service on the ground of onset of disability on 26.07.2007 while posted in Peace location (Lucknow), therefore, applicant is not entitled to disability element of disability pension. However, considering the facts and circumstances of the case, we are of the opinion that this reasoning of Release Medical Board for denying disability element of disability pension to applicant is not convincing and doesn't reflect the complete truth on the matter. Peace Stations

have their own pressure of rigorous military training and associated stress and strain of military service. The applicant was enrolled in Indian Army on 16.01.1999 and the first disability has started after about 22 years of Army service i.e. on 28.07.2007. We are therefore of the considered opinion that the benefit of doubt in these circumstances should be given to the applicant in view of ***Dharamvir Singh vs Union of India & Ors*** (supra), and the first disability of the applicant should be considered as aggravated by military service. However, with regard to second and third disabilities we are agree with the opinion of the RMB as NANA as these occurred due to dietary indiscretion and metabolic and life style disease.

8. The law on the point of rounding off of disability pension is no more RES INTEGRA in view of Hon'ble Supreme Court judgment in the case of ***Union of India and Ors vs Ram Avtar & ors*** (Civil appeal No 418 of 2012 decided on 10th December 2014). In this Judgment the Hon'ble Apex Court nodded in disapproval of the policy of the Government of India in granting the benefit of rounding off of disability pension only to the personnel who have been invalided out of service and denying

the same to the personnel who have retired on attaining the age of superannuation or on completion of their tenure of engagement. The relevant portion of the decision is excerpted below:-

> *"4. By the present set of appeals, the appellant (s) raise the question, whether or not, an individual, who has retired on attaining the age of superannuation or on completion of his tenure of engagement, if found to be suffering from some disability which is attributable to or aggravated by the military service, is entitled to be granted the benefit of rounding off of disability pension. The appellant(s) herein would contend that, on the basis of Circular No 1(2)/97/D (Pen-C) issued by the Ministry of Defence, Government of India, dated 31.01.2001, the aforesaid benefit is made available only to an Armed Forces Personnel who is invalidated out of service, and not to any other category of Armed Forces Personnel mentioned hereinabove.*
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> *5. We have heard Learned Counsel for the parties to the lis.*
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> *6. We do not see any error in the impugned judgment (s) and order(s) and therefore, all the appeals which pertain to the concept of rounding off of the disability pension are dismissed, with no order as to costs.*
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> *7. The dismissal of these matters will be taken note of by the High Courts as well as by the Tribunals in granting appropriate relief to the pensioners before them, if any, who are getting or are entitled to the disability pension.*

8. *This Court grants six weeks' time from today to the appellant(s) to comply with the orders and directions passed by us."*

9. Additionally, consequent upon the issue of Government of India, Ministry of Defence letter No. 17(01)/2017(01)/D(Pen/Policy) dated 23.01.2018, Principal Controller of Defence Accounts (Pensions), Prayagraj has issued Circular No. 596 dated 09.02.2018 wherein it is provided that the cases where Armed Forces Pensioners who were retired/discharged voluntary or otherwise with disability and they were in receipt of Disability/War Injury Element as on 31.12.2015, their extent of disability/War Injury Element shall be re-computed in the manner given in the said Circular which is applicable with effect from 01.01.2016.

10. It is also observed that claim for pension is based on continuing wrong and relief can be granted if such continuing wrong creates a continuing source of injury. In the case of ***Shiv Dass vs. Union of India***, reported in 2007 (3) SLR 445, Hon'ble Apex Court has observed:

> *"In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition. It would depend upon the fact of each case. If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years. The High Court did not examine whether on merit appellant had a case. If on merits it would have found that there was no scope for interference, it would have dismissed the writ petition on that score alone."*

11. As such, in view of the decision of Hon'ble Supreme Court in the case of ***Shiv Dass (Supra) & Union of India and Ors vs Ram Avtar & ors (supra)*** as well as Government of India, Ministry of Defence letter No. 17(01)/2017(01)/D(Pen/Policy) dated 23.01.2018, we are of the considered view that benefit of rounding off of disability element of pension @ 30% for life to be rounded off to 50% for life may be extended to the applicant from three preceding years from the date of filing of the Original Application.

12. In view of the above, the **Original Application No. 27 of 2021** deserves to be allowed, hence **allowed**. The impugned orders, rejecting the applicant's claim for grant of disability element of disability pension for the first disability, are set aside.

The first disability of the applicant is held as aggravated by Army Service. The applicant is entitled to get disability element @30% for life which would be rounded off to 50% for life w.e.f three years preceding the date of filing of Original Application. The respondents are directed to grant disability element to the applicant @30% for life which would stand rounded off to 50% for life w.e.f. three years preceding the date of filing of Original Application. The date of filing of Original Application is 26.11.2021. The respondents are further directed to give effect to this order within a period of four months from the date of receipt of a certified copy of this order. Default will invite interest @ 8% per annum till the actual payment.

13. No order as to costs.

(Air Marshal Balakrishnan Suresh)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

Dated : 06 April, 2023

AKD/Kalita/-