ARMED FORCES TRIBUNAL
REGIONAL BENCH
GUWAHATI
(Through Video-conferencing)

OA 55 of 2019 WITH MA 37 of 2019

Ex-Hav R Thumgaland ... Applicant
Versus
Union of India & Ors. ... Respondent

For applicant : Mr. A R Tahbildar, Advocate
For the Respondents: Ms. Deepanjali Bora, Advocate

CORAM:
HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON
HON'BLE LT GEN PM HARIZ, MEMBER(A)

O R D E R

1. This application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 by the applicant, a retired Havildar of the Army, who is aggrieved by the rejection of his claim for disability pension along with rounding off benefits by Records The Kumaon Regiment vide letter no. B/38046A/79/2016/AG/PS-4 dated 03.11.2016.

2. The applicant was enrolled in the Army on 09.06.1992 as sepoy. The applicant was discharged on his own request from the Army on 01.10.2012 after 20 years and 03 months of service being placed in low medical category P3 (P) due to disability SCHWANNOMA C2 RT-OPTD under Army Rule 13 (3) III (v). Release

medical board of the applicant was held on 06.09.2012 which considered the disability as neither attributable to nor aggravated by military service and also not connected to service due to the fact that disability was considered as being constitutional in nature being a neoplastic disease, with net assessment @ Nil for life. It was intimated to the applicant vide letter no. 14702802/DP dated 26.12.2012 **(Annexure B).** Subsequently, the applicant preferred first appeal against rejection of disability element but the same was rejected by IHQ of MoD (Army) by letter dated 05.01.2015 stating that the invaliding disability is a tumour which is not attributable to military service. Hence, ID is held as neither attributable nor aggravated by military service in terms of Para 12, Chap VI of GMO amendment 2008. Thereafter, the applicant preferred second appeal against rejection of order dated 05.01.2015 **(Annexure F)** but the same was also rejected vide MoD letter dated 03.11.2016 **(Annexure F)** on similar grounds. Hence, this OA.

3. Learned Counsel for the applicant submitted that, as per **Regulation 173** of the Pension Regulations for the Army, 1961 is that unless otherwise specifically provided a disability may be granted to an individual who are invalided out of service on account of disability which is attributable to or aggravated by military and

disability is assessed at 20% or over. He further submitted that as per Rule 5 of the Entitlement Rules for Causality Pensionary Awards, 1982 a member is presumed to have been in sound physical and mental condition upon entering service except to physical disabilities noted or recorded at the time of entrance. In this case, the applicant was in sound physical and mental health at the time of entry into service and no note of any disease was recorded at the time of entry into service. The onset of the disease was only in October 2011, (after nineteen years from date of enrolment) while the applicant was in service, due to stress and strain related to military service. Moreover, Rule 9 of the aforesaid Rule puts the burden to disapprove the correlation of the disability with the service with the authorities and categorically prescribes that 'benefit of doubt is to be given to the claimant. Therefore, that the release medical board had illegally and arbitrarily held the disease as neither attributable to nor aggravated by military service. Moreover, it was also submitted that the disability is permanent in nature. The authorities had no jurisdiction to deny the disability pension with rounding off benefits. Therefore, needs intervention of this Hon'ble Tribunal.

4. The respondents, in their counter affidavit, justified their action in denying disability element of pension to the applicant as

the disability of the applicant was assessed by the RMB @ Nil for life as the competent medical authorities considered the disease as "neither attributable to nor aggravated by military service" with assessment of disability being less than 20% i.e. Nil for life. Moreover, the first appeal and the second appeal preferred by the appellant have been rejected by the competent authorities stating that the invaliding disability is a tumour which is not attributable to military service. Hence, ID is held as neither attributable nor aggravated by military service in terms of Para 12, Chap VI of GMO amendment 2008.

5. Further, learned counsel for the respondents had submitted that as per **Regulation 53(a)** of the Pension Regulations for the Army 2008, the primary condition for grant of disability pension is that- *"An individual released/retired/discharged on completion of term of engagement or on completion of service limits or on attaining the prescribed age (irrespective of his period of engagement), if found suffering from a disability attributable to or aggravated by military service and so recorded by Release Medical Board, may be granted disability element in addition to service pension or service gratuity from the date of retirement/discharge, if the accepted degree of disability is assessed at 20 percent or more."*

In the present case the disability of the applicant was assessed at Nil for life by the duly constituted release medical board and the disease as "neither attributable to nor aggravated by military service". The O.A is, therefore, liable to be dismissed with costs.

6. Having heard the rival submissions and perused the records, including the RMB proceedings, the question that falls for our consideration is, whether the applicant is entitled to disability pension when the RMB assessed his disability SCHWANNOMA C2 RT-OPTD at Nil for life?

7. Looking to the question arising in this O.A, we do not think it necessary to narrate the factual aspects again. We are in agreement that various criteria have been prescribed in the guidelines under the Regulations as to when the disease or injury is attributable to military service. **Since, the applicant was discharged on 01.10.2012, he will be governed by Pension Regulations for the Army 2008 and Entitlement Rules for Casualty Pensionary Awards to the Armed Forces Personnel 2008.** It is seen from **Regulation 53(a)** of the Pension Regulations for the Army 2008 that disability pension would be computed only when disability has occurred due to disease which is attributable to military service or is aggravated during the military service and so recorded

by release medical board and assessed at 20 % or more. Further, **Para 4 of the Entitlement Rules for Casualty Pensionary Awards to the Armed Forces Personnel 2008 states that-***(a) Invalidation from service with disablement caused by service factors is a condition precedent for grant of disability pension. However, disability element will also be admissible in 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%.* If these conditions are satisfied, necessarily the incumbent is entitled to disability pension. Moreover, "**Para 5 of the Entitlement Rules for Casualty Pensionary Awards to the Armed Forces Personnel 2008 states that- The medical test at the time of entry is not exhaustive, but its scope is limited to broad physical examination. Therefore, it may not detect some dormant disease. Besides, certain hereditary constitutional and congenital diseases may manifest later in life, irrespective of service conditions. The mere fact that a disease has manifested during military service does not per se establish attributability to or aggravation by military service".**

8. **In the case at hand, the disability of the applicant is Schwannoma which is a tumour of the peripheral nervous system or nerve root. Schwannomas usually develop in otherwise healthy people for unknown reasons. In some cases, a Schwannoma is caused by a genetic disorder such as neurofibromatosis 2 (NF2), Schwannomatosis, or Carney complex. People with these genetic disorders usually have more than one Schwannoma.** The disability was held to be constitutional being a neoplastic disease and not connected to military service assessed at Nil for life, as such he is not entitled to disability element of disability pension. This view is strengthened by the decisions of the Hon'ble Supreme Court, which we would now refer to in the following paragraphs.

9. In the case of *Secretary, MoD and others vs A.V Damodaran and others* (2009) 9 SCC 140, the Hon'ble Supreme Court has brought out the following principles with regard to primacy of medical opinion:

> *8. When an individual is found suffering from any disease or has sustained injury, he is examined by the medical experts who would not only examine him but also ascertain the nature of disease/injury and also record a decision as to whether the said personnel is to be placed*

in a medical category which is lower than 'AYE' (fit category) and whether temporarily or permanently. They also give a medical assessment and advice as to whether the individual is to be brought before the release/ invalidating medical board. The said release/invaliding medical board generally consists of three doctors and they, keeping in view the clinical profile, the date and place of onset of invaliding disease/disability and service conditions, draws a conclusion as to whether the disease/injury has a causal connection with military service or not. On the basis of the same they recommend (a) attributability, or (b) aggravation, or (c) whether connection with service. The second aspect which is also examined is the extent to which the functional capacity of the individual is impaired. The same is adjudged and an assessment is made of the percentage of the disability suffered by the said personnel which is recorded so that the case of the personnel could be considered for grant of disability element of pension. Another aspect which is taken notice of at this stage is the duration for which the disability is likely to continue. The same is assessed/ recommended in view of the disease being capable of being improved. All the aforesaid aspects are recorded and recommended in the form of AFMSF- 16. The Invalidating Medical Board forms its opinion/ recommendation on the basis of the medical report, injury report, court of enquiry proceedings, if any,

charter of duties relating to peace or field area and of course, the physical examination of the individual.

9. The aforesaid provisions came to be interpreted by the various decisions rendered by this Court in which it has been consistently held that the opinion given by the doctors or the medical board shall be given weightage and primacy in the matter for ascertainment as to whether or not the injuries/illness sustained was due to or was aggravated by the military service which contributed to invalidation from the military service.

10. In the case of *Bachan Prasad v. Union of India* (C.A No. 2259 of 2012 dated 04.09.2019), the Hon'ble Supreme Court has held that an individual is not entitled to disability element if the disability is less than 20%. The relevant paragraph of the said decision is reproduced as under:

After examining the material on record and appreciating the submissions made on behalf of the parties, we are unable to agree with the submissions made by the learned Additional Solicitor General that the disability of the appellant is not attributable to Air Force Service. The appellant worked in the Air Force for a period of 30 years. He was working as a flight Engineer and was travelling on non-pressurized aircrafts. Therefore, it cannot be said that his health problem is not attributable to Air Force service. However, we cannot

find fault with the opinion of the Medical Board that the disability is less than 20%. The appellant is not entitled for disability element, as his disability is less than 20%.

11. In *Union of India and others v. Wing Commander S.P Rathore* (C.A No. 10870 of 2018 decided on 11.12.2019), the Hon'ble Supreme Court has held that that disability element is not admissible if the disability is less than 20%, and that the question of rounding off would not apply if the disability is less than 20%.

12. In the case of the applicant, since the disability of the applicant does not meet the criteria of being more than 20% and not aggravated by military service, he is not eligible for grant of disability element of disability pension. Accordingly, the O.A fails and is dismissed.

13. No order as to costs.

Pronounced in open Court on this 15th day of May, 2023.

(JUSTICE RAJENDRA MENON)
CHAIRPERSON

(LT GEN P.M HARIZ)
MEMBER (A)

Ashok