

IN THE ARMED FORCES TRIBUNAL
REGIONAL BENCH, GUWAHATI

OA-08 of 2017

PRESENT

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

No.4354828K Ex-Naik
Khuplian Pao
Vill-Ngathal
P.O. Churachandpur
Dist- Churachandpur, Manipur

..... Applicant

By legal practitioners for
Applicant.
Mrs.Rita Devi,
Mr.A.R.Tahbildar, Advocates

-VERSUS-

1. Union of India,
Represented by the Secretary,
Ministry of Defence,
Sena Bhawan, 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
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 Practitioner for the
Respondents
Mr. C.Baruah, CGSC

Date of Hearing : 11.09.2018

Date of Order : 27.09.2018

JUDGMENT & ORDER

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

1. This application filed by the applicant assails the action of respondents in not granting him disability pension on being discharged from service under Army Rule 13 (3) (III) (v), although he is in receipt of

service pension. He was discharged in Low Medical Category BEE (P) for "FRACTURE GREATER TROCHANTER (RT) HUMERUS". The applicant's contention is that in view of his Low Medical Category he should have been provided a sheltered appointment as per Appx "A" to ROI No.12/2001, but sheltered appointment was not recommended by the Commanding Officer and accordingly he was discharged under the extant Army Rule with disability 11 % to 14 %. However, the disability was not classified as either:-

- (a) Attributable or aggravated by Military Service,
- (b) Neither attributable nor aggravated by Military Service.

2. However, it was stated that " Injury sustained during leave or being not on military duty" vide Assam Regiment letter No.3103/4354828/06/ Pen (DP) dated 07.10.2002.

3. The applicant also states that his disability should have been classified as attributable to military service. However, due to negligence on the part of the Respondents, no Court of Inquiry was held and no Injury Report was made. This stand also reflected in his Release Medical Board proceedings at Annexure-A page 23 of the OA, wherein it has been stated that "No opinion can be given due to absence of Injury Report and Court of Inquiry Proceedings". In page No.24 in the Disability column, 'FRACTURE GREATER TROCHANTER (RT) HUMERUS' is mentioned and percentage of disablement is mentioned as '11-14 %'. The probable duration of this degree of disablement has been noted as 'permanent' and 'for life'. In addition, Composite assessment (all disabilities) is also indicated as 11 to 14 %. Page 25 of the report is the Roll of JCO/OR/NC(E) SAILORS/MWO/WO/AIRMAN proposed to be invalidated. Page 25 has the name of the applicant and at page 26 under the column "Information for Invalid/Disability Pension for which recommended", it has been stated "Both are recommended". This sanction has been accorded by the Commanding Officer, 10 Assam Regiment with the remarks "As admissible".

4. The applicant further states that rightly he should have been granted disability pension as he was not allowed to complete his terms of engagement.

5. Army Rule 13 (3) (III) (v) states :-

(a) Under 'Grounds of Discharge'

"All other classes of discharge"

(b) Under 'Competent authority to authorize discharge'

"Brigade/Sub Area Commander"

(c) Under 'Manner of Discharge'

"The Brigade or Sub-Area Commander before ordering the discharge shall, if the circumstances of the case permit give to the person whose discharge is contemplated an opportunity to show cause against the contemplated discharge."

6. From the documents available to us, it is observed that no such show cause notice was given to the applicant prior to his discharge.

7. Now, the main questions before us are the following :-

(a) Was the injury of the applicant sustained on leave or on duty ?

(b) What are the documents to authenticate this ?

(c) Was the applicant invalidated out of service or was he discharged on completion of terms of his engagement ?

(d) Is he entitled for disability element of disability pension as he is in receipt of service pension?

8. Coming to the first two points at paras 7 (a) & (b) above, with regard to the injury being sustained on leave or duty, no documents have been produced to us to confirm where and how the injury took place. However, what is not in doubt is that the applicant did sustain an injury. The medical authority in the Release Medical Board have confirmed that "No opinion can be given due to absence of Injury Report and Court of Inquiry Proceedings". To that extent, the applicant is correct in his contention that non production of Court of Inquiry or Injury Report, is the responsibility of the Respondents and onus of proof lies with them. Rule 9 of Entitlement Rules for Casualty Pensionary Awards, 1982, 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."

9. Besides, there are a catena of Judgments that affirm that even when a service personnel is on leave and he sustains an injury while on leave, he would be eligible for disability pension. They are :-

- i) *Delhi High Court in W.P.(C) 6959/2004 & CM NOs.6869/04 &10898/04, Ex-Nk Dilbag Vs Uol & Ors dtd.22.08.2008*
- ii) *Delhi High Court in the case of Mr.Jitendra Kumar Vs.Chief of Army Staff and Ors. In W.P. (C) No.19839/2005 (in W.P.(C) No.1637/2006), W.P.(C) No.9839/2005 dtd.19.10.2006*
- iii) *Supreme Court 2009 in Civil Writ Petition NO.6066 of 2007 Yadvinder Singh Virk Vs.Union of India and Ors dated 05th March, 2009,*
- iv) *Supreme Court 2008 (3) SLR 327 Nk Krishna Singh Vs.Uol and others*
- v) *Delhi High Court SET 425 Ex Sepoy Hayat Mohammed Vs. Union of India and Ors dtd. 11th January, 2007,*
- vi) *AFT, Kolkata Bench Judgment in OA 52 of 2015 Debashish Ghosh Vs. Union of India decided on 14th March, 2016,*
- vii) *This Bench Judgment in OA 30 of 2016 Baneswar Boro Vs. UOI and Others,*
- viii) *Supreme Court Civil Appeal CA 4257 of 1993 dtd.16.08.1993 Lance Dafadar Yoginder Singh Vs.Uol and Ors and*
- ix) *Sukhwinder Singh Vs. Union Of India & Ors in Civil Appeal No.5605 of 2010 dtd.25.06.2014*

10. Now, so far as question at Para 7 (c) is concerned, Rule 4 of Entitlement Rules for Casualty Pensionary Awards,1982, reads as follows:-

"4.Invalidment from Service:

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 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%".

11. It is seen from Rule 4 that the minimum percentage of disability for grant of disability pension should not be less than 20 %. The applicant was discharged with 11 to 14 % disability. In this connection, we refer to the Judgment in Sukhwinder Singh Vs. Union Of India & Ors in Civil Appeal No.5605 of 2010 dtd.25.06.2014. Para 9 of that Judgment is germane to this case.

"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 authorising the discharge or invaliding out of service where the disability is below twenty per cent and seems to us to be logically so. Fourthly, wherever a member of the Armed Forces is invalided out of service, it perforce has to be assumed that his disability was found to be above twenty per cent. Fifthly, as per the extant Rules/Regulations, a disability leading to invaliding out of service would attract the grant of fifty per cent disability pension."

12. Hence, the answer to the question posed in Para 7 (d) is in the affirmative.

13. In view of the above, we are of the opinion that the applicant should be granted disability element of disability pension @ 20 % rounded off to 50 %, 3 years prior to filing of this appeal, i.e., prior to 15th February, 2017.

14. The Original Application is accordingly disposed of.

15. No cost.

MEMBER (A)

MEMBER (J)

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