

COURT No.2  
ARMED FORCES TRIBUNAL  
PRINCIPAL BENCH: NEW DELHI

E.

OA 2348/2019 with MA 3241/2019

Wg Cdr Divesh Rai Auplish (Retd) ..... Applicant  
VERSUS  
Union of India and Ors. .... Respondents

For Applicant : Mr. Baljeet Singh, Advocate  
For Respondents : Mr. Harish V Shankar, Advocate

CORAM

HON'BLE MS. JUSTICE ANU MALHOTRA, MEMBER (J)  
HON'BLE REAR ADMIRAL DHIREN VIG, MEMBER (A)

ORDER  
13.12.2023

Vide our detailed order of even date we have dismissed the OA 2348/2019. Learned counsel for the applicant makes an oral prayer for grant of leave to appeal in terms of Section 31(1) of the Armed Forces Tribunal Act, 2007 to assail the order before the Hon'ble Supreme Court.

After hearing learned counsel for the applicant and on perusal of order, in our considered view, there appears to be no point of law much less any point of law of general public importance involved in the order to grant leave to appeal. Therefore, the prayer for grant of leave to appeal stands declined.

(JUSTICE ANU MALHOTRA)  
MEMBER (J)

(REAR ADMIRAL DHIREN VIG)  
MEMBER (A)

**COURT NO. 2, ARMED FORCES TRIBUNAL**  
**PRINCIPAL BENCH, NEW DELHI**

**O.A. No. 2348 of 2019**  
**with**  
**M.A. No. 3241 of 2019**

**In the matter of :**

**Wg Cdr Divesh Rai Auplish (Retd) ... Applicant**

**Versus**

**Union of India & Ors. ... Respondents**

**For Applicant : Shri Rakesh Kumar Singh, Advocate**

**For Respondents : Shri Prabodh Kumar, Advocate**

**CORAM:**

**HON'BLE Ms. JUSTICE ANU MALHOTRA, MEMBER (J)**  
**HON'BLE REAR ADMIRAL DHIREN VIG, MEMBER (A)**

**ORDER**

**M.A. No. 3241 of 2019**

Vide this application, the applicant seeks condonation of 4643 days' delay in filing the OA. In view of the law laid down by the Hon'ble Supreme Court in the case of **Deokinandan Prasad Vs. State of Bihar [AIR 1971 SC 1409]** and in **Union of India & Ors. Vs. Tarsem Singh [2009 (1) AISLJ 371]**, delay in filing the OA is condoned.

MA stands disposed of.

**O.A. No. 2348 of 2019**

Invoking the jurisdiction of the Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007 (hereinafter referred to as 'AFT Act'), the applicant has filed this OA and the reliefs claimed in Para 8 read as under :

- (a) To set aside the impugned letter No. Air HQ/99797/4167/Dis/O/DAV-1(B) dated 04.10.2019 passed by the respondents.**
- (b) To direct the respondents to grant disability element of pension @ 20% (by treating his disability @ 20% instead of @ 15-19%), with effect from the date of retirement for life as his disability has already been conceded as attributable to Air Force service.**
- (c) To direct the respondents to grant the benefit of rounding off of disability element of pension of the applicant @ 50% (20% to be rounded off to 50%) with effect from date of retirement with all consequential benefits.**

- (d) *To direct the respondents to pay the due arrears of disability pension with interest @ 12% p.a. with effect from the date of retirement till actual payment.*
- (e) *To pass such further order or orders, direction/Directions as this Hon'ble Tribunal may deem fit and proper in accordance with law.*

### **BRIEF FACTS**

2. The applicant, having been found medically and physically fit after thorough medical examination, was commissioned in the Indian Air Force on 23.12.1983 and he retired from service on 31.03.2004 being in low medical category A2G2(P). The Release Medical Board (RMB) held on 26.02.2004 assessed the applicant's disability 'COMPRESSION FRACTURE DV 5, 8 & 9' assessed @ 15-19% for life and the same has been held 'attributable to Air Force service'. However, the applicant was denied the disability pension.

3. Aggrieved by the non-grant of disability pension, the applicant made a representation dated 15.01.2019 seeking a Review Medical Board to grant him disability pension. A Reassessment/Review Medical Board (RAMB) was conducted on 28.06.2019, which found the applicant to be suffering from the disability 'Compression Fracture DV 5, 8 & 9' and assessed @ 15-19% for life and held the same as attributable to Air Force Service. The claim of the applicant for grant of disability pension was rejected by the respondents vide letter dated 01.08.2019. The applicant preferred the appeal dated 26.08.2019 against the RMB's opinion. The said appeal was rejected by the respondents vide letter dated 04.10.2019 accepting the findings of the RMB as final. Aggrieved by the decision of the respondents, the applicant has filed the instant OA. In the interest of justice, in accordance with Section 21(1) of the AFT Act, 2007, we take up the present OA for consideration.

#### **CONTENTIONS OF THE PARTIES**

4. The learned counsel for the applicant submitted that the applicant, at the time of joining the service, was declared

fully fit medically and physically and no note was made in his medical record that the applicant was suffering from any disease at that time. The learned counsel submitted that the onset of the disability has been recorded as 13.02.1992 while the applicant was posted at 18 Sqn AF, Hindon and during ejection from MiG-23 UB fighter aircraft while flying a training mission, he sustained compression fracture of DV 8 & DV 9 vertebrae. The learned counsel submitted that again on 20.07.1995, while the applicant was posted at TACDE, Air Force Station, Jamnagar, the applicant suffered yet another aircraft ejection injury from MiG-27ML fighter aircraft resulting in compression fracture DV 5 vertebra; and because of the compression fracture of total three vertebrae i.e. DV 5, 8 & 9, the applicant's medical category was downgraded to A2G2(P) and the same made him unfit to fly ejection seat aircraft and he converted on transport aircraft (AN-32).

5. The learned counsel for the applicant submitted that the RMB failed to consider the fact that the applicant is symptomatic with upper back ache getting aggravated due to

prolonged standing, lifting heavy weight and in cold weather with occasional paraesthesia left lower limbs. The learned counsel further submitted that while denying the disability pension, the respondents failed to appreciate the provisions contemplated under the relevant rules and regulations and the Entitlement Rules, which provide that the person who, at the time of his release is in a lower medical category than that in which he was recruited, on superannuation will be treated as invalided out of service.

6. The learned counsel placed reliance on various judgments of the Hon'ble Supreme Court including ***Dharamvir Singh Vs. Union of India and Ors. [(2013) 7 SCC 316]***, which has been considered and taken note of by the Hon'ble Apex Court in many judgments, wherein the Hon'ble Supreme Court had considered the question with regard to grant of disability pension and after taking note of the provisions of the Pension Regulations, Entitlement Rules, it was held by the Hon'ble Supreme Court that an Army personnel shall be 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 and in the event of his being discharged from service on medical grounds, any deterioration in his health, which may have taken place, shall be presumed to be due to service conditions. The learned counsel for the applicant has also placed reliance on Para 32 of Chapter VII of the Guide to Medical Officers (Military Pensions), 2002, amendment 2008 (hereinafter referred to as 'GMO (MP) 2008') and submitted that in the light of these provisions, the respondents have committed an error in assessing the spinal disability of the applicant at less than 20%. The learned counsel further submitted that the Tribunal has already granted disability pension to many similarly situated persons.

7. Although no counter affidavit has been filed by the respondents, however, at the time of the hearing, the learned counsel for the respondents submitted that the applicant is not entitled to the relief claimed since the RMB and RAMB, being an Expert Body, assessed the disability @ 15-19% for life while accepting the same as being 'attributable by Air Force Service' for the reasons mentioned therein. The



learned counsel submitted that as the applicant's disability does not fulfil one of the twin conditions in terms of Regulation 153 of the Pension Regulations for the Air Force, 1961 (Part-I) of being assessed at less than 20%, the applicant is not entitled to disability pension and, therefore, the OA deserved to be dismissed.

### **ANALYSIS**

8. We have heard the learned counsel for the parties and have gone through the records produced before us. We find that, as the disability suffered by the applicant has been accepted as 'attributable to Air Force service' but assessed @ less than 20%, the issue which needs to be considered is as to whether the applicant is entitled to the grant of the disability element of pension or not.

9. It is an undisputed fact that at the time of joining the Indian Air Force on 23.12.1983, the applicant was found medically and physically fit. It is also not in dispute that the disability of compression fracture of DV 5, 8 and 9 vertebrae occurred during ejections from MiG-23 UB and MiG-27 ML fighter aircraft on different dates and, therefore, the same

was accepted as 'attributable to Air Force service' by the RMB and also the RAMB. However, with regard to the assessment of the disability at less than 20%, there is a scheme for assessment of the spinal deformity given in Para 32 Chapter VII of the GMO (MP) 2008, which has been relied upon by the learned counsel for the applicant and reads as under :

***"Assessment of Spinal Deformity.***

***32. It is a common sequelae to fracture vertebrae, caries spine and ankylosing spondylitis.***

- |                   |   |                      |
|-------------------|---|----------------------|
| <b><i>(a)</i></b> | <b><i>Flexion, extension, lateral flexion Deformity.</i></b>                                | <b><i>20-40%</i></b> |
| <b><i>(b)</i></b> | <b><i>Stiff spine</i></b>   | <b><i>50%</i></b>    |
| <b><i>(c)</i></b> | <b><i>Still spine with restriction of chest Expansion (e.g. ankylosing spondylitis)</i></b> | <b><i>60-80%</i></b> |

10. From the above, it is clear that in this Para 32 of the GMO (MP), 2008, the assessment scheme has been laid down in respect of the spinal deformity. In the present case, although the disability of the applicant has been conceded as being attributable to the Air Force service, however, on going through the RAMB held on 28.06.2019, we find that the condition of the applicant was static with no change from the finding of the RMB. As per the Summary and Opinion, attached to the RAMB, given by the Department

of Neurosurgery dated 18.06.2019 at the time of Reassessment/Review medical board with regard to the disability of the applicant being a case of Compression Fracture DV5, DV8, and DV9, we find that during the neurological examination, it was recorded categorically to the effect :- **Local examination Spine – no tenderness or deformity.** The Summary and Opinion reads as under :

**DEPARTMENT OF NEUROSUREGERY**

**SUMMARY AND OPINION**

**RANK-WG CDR (RETD) NAME : DIVESH RAI AUPLISH UNIT-**

**R/OAHQ AGE/SEX-56/M**

**DIAGNOSIS : COMPRESSION FRACTURE DV5, DV8, DV9 (RMB)**

**Date : 18/06/2019**

**56 yrs old ret'd officer, a case of compression fracture DV5, DV8 and DV9 has been admitted to this centre with sanction for holding review medical board vide letter AIR HQ/99797/GEN/DS/O/DAV, 1(B) dt 30 Apr 2019 and letter No. 1701/rev MB/Pen/2019 dt 23 May 2019 from AH (R&R).**

**The officer an old case of compression fracture DV5, DV8 and DV9. The officer had first ejection injury on 13 Feb 1992 with compression fracture D8 D9 and was downgraded to cat A4G4 and was subsequently upgraded to A1G1 on 13 July 1993. The officer sustained second ejection injury on 20 July 1995 as compression fracture DV5 and subsequently downgraded to A4G4 from SHAPE-1 and was upgraded to A2G2(P) on 02 May 1996 and was made fit to fly transport aircraft only. He continued in this category till his release in 2004.**

**He was released in category A2G2 (Permanent) for the above disability vide release board on 17 Feb 2004 with 15-19% disability and attributable to the service for life time. The RMB opinion was opined at Army Hospital Delhi Cantt by orthopaedic surgeon on 17 Feb 2004. As per the opinion there was no spinal deformity and no neurological deficit. XRay DL Spine was suggested of wedge compression fracture DV5, 8 and DV9. The RMB was carried out on 16 Feb 2004 and was released in existing category of A2G2 (P).**

*Presently, the patient is asymptomatic with upper back ache getting aggravated on prolong standing, lifting heavy weight and in cold weather with occasional paraesthesia left lower limbs. The symptoms are more or less same as at the time of release medical board.*

GENERAL EXAMINATION : Within normal limits

**NEUROLOGICAL EXAMINATION**

*Higher mental functions - normal*

*Speech normal*

*Granal nerves Normal*

*Local examination - Spine - no tenderness or deformity*

**Motor examination :**

*Power 5/5 Bilateral lower and upper limbs in all the muscle groups.*

*Tone normal DTJ 24..... in all the muscle groups.*

*Plantars - Bilateral flexors*

*Sensory Examination - Normal*

**INVESTIGATIONS :**

*X Ray DL Spine (25636) dt 10 Jun 2019 at AH (RR). Compression fracture DV5, DV8 and DV9.*

*NCCT Dorsolumbar spine (2651/16/19) dt 10 Jun 2019. Vertebral compression fracture with loss of height DV5, DV8 and DV9. Posterior elements are normal. Disc spaces are maintained. No evidence of retropulsion of the fragments in the spine canal.*

*MRI Dorsolumbar spine (4511-2019) dt 12 Jun 2019 at AH (R & R). Ant wedging of DV5 and DV8 with no marrow edema, retropulsion or spinal narrowing.*

*NCV dt 14 Jun 2019. Normal study.*

*At present the patient has no significant local deformity or neurological deficit clinically Radiologically there is no spinal and canal compromise or significant neurological compression. The condition of the patient had remained static since the last medical board with no deterioration in the clinicoradiological status."*

From a perusal of the above summary and opinion, it is clear that there is no spinal deformity and no neurological deficit in the case of the applicant. Therefore, the above guidelines for assessment of the disability relied upon by the applicant are not applicable to the present case.

11. As per the Regulation 153 of the Pension Regulations for the Air Force, 1961, the disability pension is granted to the person who fulfills the following twin criteria of eligibility :

- (i) Disability must be either attributable to or aggravated by service.
- (ii) Degree of disablement should be assessed at 20% or more.

In the instant case, although the disability of the applicant was assessed by the RMB as 'attributable to Air Force service', but the same has been assessed @ less than 20% (15-19%). With regard to the issue relating to entitlement of disability pension when the assessment of a disability by the RMB is less than 20% (15-19%), we may refer to the judgment dated 11.12.2019 of the Hon'ble Supreme Court in ***Union of India & Ors. Vs. Wing Commander S.P. Rathore [Civil Appeal No. 10870/2018]***, wherein it was held that the 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%. If a person is not

entitled to the disability pension, there would be no question of rounding off. Relevant paras of the said judgment read as under :

***"1. The short question involved in this appeal filed by the Union of India is whether disability pension is at all payable in case of an Air Force Officer who superannuated from service in the natural course and whose disability is less than 20%.***

xxx

xxx

xxx

***8. This Court in Ram Avtar (supra), while approving the judgment of the Armed Forces Tribunal only held that the principle of rounding off as envisaged in Para 7.2 referred to herein above would be applicable even to those who superannuated under Para 8.2. The Court did not deal with the issue of entitlement to disability pension under the Regulations of Para 8.2.***

***9. As pointed out above, both Regulation 37(a) and Para 8.2 clearly provide that the disability element is not admissible if the disability is less than 20%. In that view of the matter, the question of rounding off would not apply if the disability is less than 20%. If a person is not entitled to the disability pension, there would be no question of rounding off.***

***10. The Armed Forces Tribunal ('AFT'), in our opinion, put the cart before the horse. It applied the principles of rounding off without determining whether the petitioner/ applicant before it would be entitled to disability pension at all.***

***11. In view of the provisions referred to above, we are clearly of the view that the original petitioner/applicant before the AFT is not entitled to disability pension. Therefore, the question of applying the provisions of Para 7.2 would not arise in his case. In this view of the matter, we set aside the order of the AFT and consequently, the original application filed by the Respondent before the AFT shall stand dismissed.***

***The appeal is allowed accordingly."***

12. The Hon'ble Supreme Court in its judgment dated 04.09.2019 rendered in the case of **Bachchan Prasad Vs. Union of India & Ors. [Civil Appeal No. 2259 of 2012]** also held that an individual is not entitled to the disability element if the disability is less than 20%. Relevant portions of the said judgment read 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%."*

13. In light of the above considerations, we conclude that since the disability of the applicant does not meet one of the twin criteria in terms of Regulation 153 of the Pension Regulations for the Air Force, 1961 (Part-I) for being eligible for the grant of the disability element of disability pension as the RMB and the RAMB assessed the disability of the applicant at less than 20% (15-19%), he is not entitled to the grant of the disability element of pension.





**CONCLUSION**

14. In view of the foregoing, OA 2348 of 2019 stands dismissed being devoid of merit.

15. There is no order as to costs.

Pronounced in open Court on this 13<sup>th</sup> day of December, 2023. <sup>7</sup>

  
[REAR ADMIRAL DHIREN VIG]  
MEMBER (A)

  
[JUSTICE ANU MALHOTRA]  
MEMBER (J)

/ng/