

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

A..

OA 182/2019 with MA 598/2019

Ex Sgt Uttam Kumar Rai

..... Applicant

VERSUS

Union of India and Ors.

..... Respondents

For Applicant : Mr. Manoj Kr Gupta, Advocate

For Respondents : Dr. Vijendra Singh Mahndiyan, Advocate

CORAM

HON'BLE MS. JUSTICE ANU MALHOTRA, MEMBER (J)

HON'BLE REAR ADMIRAL DHIREN VIG, MEMBER (A)

ORDER
23.11.2023

Vide our detailed order of even date, we have allowed the OA 182/2019. Learned counsel for the respondents 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 respondents and on perusal of our 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, 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. 182 of 2019
with
M.A. No. 598 of 2019

In the matter of :

Ex Sgt Uttam Kumar Rai

... Applicant

Versus

Union of India & Ors.

... Respondents

For Applicant : Shri Virender Singh Kadian, Advocate

For Respondents : Dr. Vijendra Singh Mahndiyan, Advocate

CORAM :

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

O R D E R

M.A. No. 598 of 2019

Vide this application, the applicant seeks condonation of 4985 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. 182 of 2019

Invoking the jurisdiction of this 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) quash and set aside the impugned letter No Air HQ/99798/1/706284/DA V/DP/CC dated 28.09.2018. And/or**
- (b) Direct respondents to consider his disability ID (ii) FRACTURE NECK OF 2ND, 3RD, 4TH METATARSAL (RT) (OLD) Z09.0 as attributable to/aggravated by military service by compositely assessing @60% all the ID (i) DEGENERATIVE DISC DISEASE L4-L5, L5-S1 (OLD) Z09.0 assessed @20% for life, ID (ii) FRACTURE NECK OF 2°, 3®, 4TM METATARSAL (RT) (OLD) Z09.0 assessed @20% for life and ID (iii) FRACTURE PATELLA (RT) (OPTD) (OLD) Z 09.0 assessed @30% for life and grant disability element of pension for all the three disabilities as well as rounding off benefits of disability element of pension with effect from date of his discharge from Air Force. And/or**
- (c) Direct respondents to pay the due arrears of disability element of pension with**

interest @12% p.a. from the date of discharge with all the consequential benefits. And/or

(d) Any other relief which the Hon'ble Tribunal may deem fit and proper in the fact and circumstances of the case along with cost of the application in favour of the applicant and against the respondents.

BRIEF FACTS

2. The applicant, having been found medically and physically fit, was enrolled in the Indian Air Force on 18.11.1996 and was discharged from service on 30.11.2016 in low medical category A4G4(P). Before the discharge, the Release Medical Board (RMB) held on 02.05.2016 assessed the applicant's disabilities (1) DEGENERATIVE DISC DISEASE L4-L5, L5-S1 (OLD) @ 20% for life, (2) FRACTURE NECK OF 2nd, 3rd, 4th METATARSAL (RT) (OLD) @ 20% for life and (3) FRACTURE PATELLA (RT) (OPTD) (OLD) @ 30% for life, compositely assessed @ 60% for life. The disabilities (1) Degenerative Disc Disease L4-L5, L5-S1 (Old) conceded as 'aggravated by military service' and (3) Fracture Patella (Rt) (Optd) (Old) held as 'attributable to military service' and both were recommended to be qualifying for disability pension for

life and the net assessment for the same was assessed @ 40% for life. The disability (ii) Fracture Neck of 2nd, 3rd, 4th Metatarsal (Rt) (Old) was held neither attributable to nor aggravated by Air Force services. Hence, the applicant was granted disability element of pension @ 40% for life for the disabilities accepted as aggravated by Air Force service.

3. Against the rejection of the second disability i.e. Fracture Neck of 2nd, 3rd, 4th Metatarsal (Rt) (Old) for grant of disability pension, the applicant the applicant sent Appeal-cum-Legal Notice dated 13.10.2018 for grant of the disability element of pension @ 60% for life treating the second disability also as attributable to/aggravated by the Air Force service as the said disability occurred due to performing the military duties. The applicant's Appeal-cum-Legal Notice was rejected by the respondents vide the impugned letter dated 28.12.2018 stating that only two disabilities i.e. Degenerative Disc Disease and Fracture Patella (Rt) were recommended as aggravated by the RMB. The applicant was advised to prefer an appeal against the same, which was apparently not filed and rather the applicant has filed the present Original Application seeking disability pension and

in the interest of justice, as the present OA is pending since institution from 21.01.2019, in accordance with Section 21(1) of the AFT Act, 2007, we take up the matter 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 has been made in the service documents of the applicant regarding any disease suffered by him at that time. The learned counsel submitted that whilst the RMB found the disabilities 'Degenerative Disc Disease L4-L5, L5-S1 (Old)' as 'aggravated by military service' and 'Fracture Patella (Rt) (Optd) (Old)' as 'attributable to military service', however, the disability 'Fracture Neck of 2nd, 3rd, 4th, Metatarsal (Rt) (Old)' as neither attributable to nor aggravated to military service, without considering the fact the said disability occurred consequent upon an accident which took place when the applicant was going by bike to collect the leave certificate and was on duty. The learned counsel, referred to Para 12 of the Entitlement Rules for Casualty Pensionary Awards, 1982 (hereinafter

referred to as 'Entitlement Rules, 1982') and the revised rules which provides that if a person move from his place of residence to place of duty or if a person move back from unit to his home place, and if some accident takes place, in that situation the disability/injury sustained is to be treated occurred 'on duty', and submitted that the disability 'Fracture Neck of 2nd, 3rd, 4th, Metatarsal (Rt) (Old)' may be treated as occurred on duty and, therefore, the applicant is entitled to the disability pension for all the three disabilities compositely assessed @ 65% for life with rounding off benefit to 75% for life.

5. The learned counsel further submitted that while denying the disability pension qua the disability 'Fracture Neck of 2nd, 3rd, 4th, Metatarsal (Rt) (Old)', the respondents/RMB failed to appreciate the provisions contemplated under Rules 5 and 14(b) of the Entitlement Rules for Casualty Pensionary Awards, 1982 (hereinafter referred to as 'Entitlement Rules, 1982'), which provide that in case of discharge from service in low medical category, if no note is on record at the time of joining of service, the deterioration in health is to be presumed due to service

conditions. The learned counsel further relied on various provisions of the Entitlement Rules, 1982 to submit that any disease contracted during service, would be presumed to be attributable to service and worsening of the same during service would be treated as aggravated by military service and onus to prove otherwise lies with the respondents only. The learned counsel placed reliance on the judgments of the Hon'ble Supreme Court in ***Dharamvir Singh Vs. Union of India and Ors. [(2013) 7 SCC 316]*** and ***Sukhvinder Singh Vs. Union of India and Ors. [2014 (4) SCC 364]***, which have been followed in number of orders of the Tribunal, wherein it was held that whenever a member 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 and the General Rules of Guidance to Medical Officers and Para 423 of the Regulations for the Medical Services of the Armed Forces, 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. It was further submitted on behalf of the applicant that the Apex Court further held that the onus of proof shall be on the respondents to prove that the disease from which the incumbent was suffering is neither attributable to nor aggravated by military service. The learned counsel further submitted that the Tribunal has already granted disability pension to many similarly situated persons.

6. *Per contra*, the learned counsel for the respondents submitted that the applicant is not entitled to the relief claimed since the RMB, being an expert body, found the disability 'Fracture Neck of 2nd, 3rd, 4th, Metatarsal (Rt) (Old)' as 'Neither Attributable to Nor Aggravated by Military Service'. The learned counsel submitted that for the other two disabilities i.e. Degenerative Disc Disease L-4-L5, L5-S1 and Fracture Patella (Rt) Optd, the applicant has already

been granted disability element of disability pension from 01.12.2016, the date of discharge being 30.11.2016 vide PPO No. 08/141B/DP/21086/2017 dated 30.06.2018. The learned counsel further submitted that on 12.08.2007, the applicant was purported to have met with an accident while coming to his unit to collect leave certificate and the injury report dated 14.05.2007, duly signed by the applicant, clearly mentioned that the injury was not sustained while performing of Air Force duty and, therefore, conducting of a Court of Inquiry was dispensed with and the injury was opined as NANA. The learned counsel further submitted that no causal connection between the disability 'Fracture Neck of 2nd, 3rd, 4th, Metatarsal (Rt) (Old)' and the military service was established. The learned counsel submitted that the RMB rightly considered the said disability of the applicant as NANA and thus he is not entitled to disability pension in respect of 'Fracture Neck of 2nd, 3rd, 4th, Metatarsal (Rt) (Old)'. Therefore, the learned counsel for the respondents prays for dismissal of the OA.

ANALYSIS

7. We have heard the learned counsel for the parties and have gone through the records produced before us.

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8. In the instant case, it is an admitted position that the RMB has assessed the applicant's disabilities i.e. (1) Degenerative Disc Disease L4-L5, L5-S1 @ 20% for life, (2) Fracture Neck of 2nd, 3rd, 4th Metatarsal (Rt) (Old) @ 20% for life and (3) Fracture Patella (Rt) Optd @ 30% for life and the same were compositely assessed @ 60% for life. It is also not in dispute that as the RMB found the disabilities (1) Degenerative Disc Disease L4-L5, L5-S1 (Old) as 'aggravated by military service' due to stress and strain of service and (3) Fracture Patella (Rt) (Optd) (Old) as 'attributable to military service' as per approved injury report dated 29.10.2001 and the disability (2) Fracture Neck of 2nd, 3rd, 4th Metatarsal (Rt) (Old) as NANA as per the injury report dated 14.09.2007 and the applicant was granted disability element of pension with regard to the two disabilities (1) and (3) above by compositely assessing them @ 40% for life from the date of discharge. Hence, the issue in this case which is to be determined now is as to whether there is causal connection between the disability (2) Fracture Neck of 2nd, 3rd, 4th Metatarsal (Rt) (Old) and the military service so as to hold that such disability is either attributable to or aggravated by military service and

whether the applicant is entitled to the grant of disability element of pension for all the three disabilities @ 60% for life or not ?

9. As stated by the applicant in the OA, the disability in question i.e. Fracture Neck of 2nd, 3rd, 4th Metatarsal (Rt) (Old) occurred as a consequence of the injury sustained by him in an accident that took place when the applicant was going by a bike to collect the leave certificates and was on duty as per Para 12 of the Entitlement Rules, 1982 and also the revised rules. However, with regard to deciding the causal connection between the injury resulted into the disability in question and the military service, it would be pertinent to refer to the judgment passed by the Hon'ble Supreme Court in the case of **Secretary, Govt. of India Vs. Dharambir Singh [2019 Latest Caselaw 851 SC]** decided on 20.09.2019, which lays down as under :

"(10) In view of the provisions reproduced above, we find that the following questions arise for consideration:

(i) xxx

(ii) Whether the injury or death caused even if, the armed forces personnel is on duty, has to have some causal connection with military service so as to hold that such injury or death is either attributable to or aggravated by military service?

(iii) xxx

Answer to Question No.1

(11) to (14) xxx

xxx

Answer to Question No.2

(15) The 1982 Rules give expansive definition to the expression 'duty' being undertaken by the personnel of the Armed Forces. It includes the period when Armed Forces personnel is proceeding from his leave station or returning to duty from his leave station. It includes even an accident which occurs when a man is not strictly on duty provided that it involved risk which was definitely enhanced in kind or degree by the nature, conditions, obligations or incidents of his service and that the same was not a risk common to human existence in modern conditions in India. However, as per Regulation 423 of the Medical Regulations, such injury has to have causal connection with military service or such injury is aggravated by military service.

(16) In Regulation 423(a) of the Medical Regulations, it has been specifically mentioned that it is immaterial whether the cause giving rise to the disability or death occurred in an area declared to be a field service or active service area or under normal peace conditions, will be deemed to be duty. Regulation 423(a) mandates that it is essential to establish whether the disability or death bore a causal connection with the service conditions. All evidence, both direct and circumstantial, will be taken into account and benefit of reasonable doubt, if any, will be given to individual. For the sake of repetition, the said clause reads as under:

"(a) For the purpose of determining whether the cause of a disability or death is or is not attributable to service, it is immaterial whether the cause giving rise to the disability or death occurred in an area declared to be a field service/active service area or under normal peace conditions. It is, however, essential to establish whether the disability or death bore a causal connection with the service conditions..."

(17) Clause (b) of Regulation 423 of the Medical Regulations presumes that disability or death resulting from wound or injury, will be regarded as attributable to service if the wound or injury was sustained during actual performance of 'duty' in Armed Forces. This is in contradiction to "deemed to be duty" as per Rule 12(f) of 1982 Rules, as the Rule is when a man is not strictly on duty. However, the injuries which are self-inflicting or due to individual's own serious negligence or misconduct even in the cases of active duty, are not to be conceded unless, it is established that service factors were responsible for such action.

(18) and (19) xxx xxx

(20) In view of Regulation 423 clauses (a), (b) and (d), there has to be causal connection between the injury or death caused by the military service. The determining factor is a causal connection between the accident and the military duties. The injury or death must be

connected with military service howsoever remote it may be. The injury or death must be intervention of armed service and not an accident which could be attributed to risk common to human beings. When a person is going on a scooter to purchase house hold articles, such activity, even remotely has no causal connection with the military service."

[Emphasis supplied]

10. Further, the RMB had assessed the disability (2) Fracture Neck of 2nd, 3rd, 4th Metatarsal (Rt) (Old) as NANA in view of the injury report dated 14.09.2007. On perusal of the injury report titled Report of Accidental and Self-Inflicted Injuries – Officers dated 14.09.2007, we find that in the statement made by the applicant and signed by him just above the Injury report, he has stated to the effect that that the accident occurred while he was coming from his residence to the unit for collection of his leave certificate.

"I, 790647-A Cpl U.K. Rdo Fit of IBRDAF, met with an accident on 12 Aug 07 while coming from my residence (Sant Nagar) to unit (IBRD) for collection of my leave certificate.

***Sd/-
(UK Rai)
Cpl"***

----- x -----

Further, the attributability certificate dated June, 2016 in case of disablement due to injury also mentions the fact that the applicant sustained the injury 'Fracture Neck of 2nd, 3rd, 4th Metatarsal (Rt)(Old)' while coming to unit for collection of

his leave certificate. The attributability certificate given by Commanding Officer dated June, 2016 in case of disablement due to injury is reproduced as below :

"The injury sustained by Ser. No. 790647-A Rank SGT Name UTTAM KUMAR RAI Trade : RADIO FITTER Unit: 47 SQUADRON AF for dis (2) FRACTURE NECK OF 2ND, 3RD, 4TH METATARSAL (RT) (OLD) injury sustained on (Date) 12 Aug 2007, due to (cause of injury) bike accident between Sant Nagar and 9 BRD at Pune, while coming to unit for collection of his leave certificate, is declared as not attributable nor aggravated to Military Service, for dis (3) FRACTURE PATELLA (RT) (OPTD) (OLD) injury sustained on (Date) 25 Apr 2000, due to (cause of injury) bike accident at Jaunpur (U.P.) while coming back from Sick Leave, is declared as attributable to Military Service, in terms of Rule 9 (d) of the Entitlement Rules to Casualty Pensionary Awards to Armed Forces Personnel, 2008 as amended. This declaration is, however, subject to approval of the Competent Authority as mentioned in Govt of India, Ministry of Defence letter No. 1(2)/ 2002/D (Pen-C) dated 01 Sep 2005, as amended.

Dated : 08 June 2016

**Sd/-
(S. Banerjee)
Wing Commander
Commanding Officer"**

11. Whilst the injury has not been attributed to the military service, however, it is pertinent to mention here that the leave certificate is an official document which a person is required to carry with him while proceeding on leave. The respondents have also not refuted the fact of applicant that he was going to collect the leave certificate. It has also been verified from the records and also from the injury report that the applicant was indeed proceeding to his unit to collect the leave certificate which was a bonafide military duty performed

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by him and hence the injury report has erred in declaring the said injury as not attributable to military service. It is pertinent to note that the applicant could not have proceeded on leave without collecting the said document and, therefore, we are of the view that the injury of the applicant ought to have been assessed as attributable to military service.

12. In view of the foregoing, we hold that injury sustained by the applicant while going by bike to the unit to collect the leave certificate is attributable to military service and thus there is nexus between the disability and the military service.

CONCLUSION

13. Therefore, the OA 182 of 2019 is allowed. The applicant is entitled to the disability element of pension with regard to the disability 'Fracture Neck of 2nd, 3rd, 4th Metatarsal (Rt) (Old)'. The applicant is already in receipt of the disability element with regard to other two disabilities i.e. 'Degenerative Disc Disease L4-L5, L5-S1 (Old)' and 'Fracture Patella (Rt) (Optd) (Old) @ 40% for life. Now, the applicant is entitled to the disability element of pension with regard to all the three disabilities i.e. 'Degenerative Disc Disease L4-L5, L5-S1 (Old)' @ 20% for life, 'Fracture Neck of 2nd, 3rd, 4th

Metatarsal (Rt) (Old)' @ 20% for life and 'Fracture Patella (Rt) (Optd) (Old) @ 30% for life; compositely assessed by the RMB @ 60% for life, which is directed to be rounded off to 75% for life from the date of discharge. Accordingly, the respondents are directed to grant the disability element of pension to the applicant @ 75% for life, after adjusting the disability element of disability pension already paid to the applicant.

14. Accordingly, the respondents are directed to calculate, sanction and issue necessary PPO to the applicant within three months from the date of receipt of copy of this order, *failing which*, the applicant shall be entitled to interest @ 6% per annum till the date of payment.

15. There is no order as to costs.

Pronounced in open Court on this 23rd day of November, 2023.

[REAR ADMIRAL DHIREN VIG]
MEMBER (A)

[JUSTICE ANU MALHOTRA]
MEMBER (J)

/ng/