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

C..

OA 43/2020

Ex Hav Pankaj Kumar Kaushik ..... Applicant
VERSUS
Union of India and Ors. ..... Respondents

For Applicant : None
For Respondents : Mr. K K Tyagi, 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 43/2020. 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)

POOJA

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

OA No. 43/2020

Ex Hav Pankaj Kumar Kaushik ... **Applicant**

Versus

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

For Applicant : Mr. Virender Singh Kadian, Advocate

For Respondents : Mr. K K Tyagi, Advocate

CORAM :

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

O R D E R

Invoking the jurisdiction of this Tribunal; under Section 14, the applicant has filed this application and the reliefs claimed in Para 8 read as under:

> ***(a)*** ***Quash and set aside the impugned letters No. B/38046A/466/2018/AG/PS-4(2nd appeal(dated 03.09.2019 And/or***
>
> ***(b)*** ***Direct respondents to treat the disability ID IMMUNE SURVEILLANCE Primary Hypertension as attributable to / aggravated by military service and grant disability element of pension to the applicant with benefits of rounding off/ broad banding of the disability element. And/or***

(c) ***Direct respondents to pay the due arrears of disability element of pension with interest @ 12% p.a. from the date of retirement with all the consequential benefits.***

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

BRIEF FACTS

2. The applicant was enrolled in the Indian Army on 29.12.1993 and discharged from the service on 31.12.2017 on fulfilling of his terms of engagement of service in Low Medical Category under Rule 13(3) of Army Rules, 1954, after completion of 24 years and 02 days of service. At the time of release from service, the applicant was in low medical category P3(P). The Release Medical Board (RMB) held on 24.10.2017 assessed his disabilities(i) Immune Surveillance assessed @ 40% for life and (ii) Primary Hypertension assessed @ 30% for life compositely assessed @ 58% for life, but opined the disability to be neither attributable to nor aggravated (NANA) by military service.

while the net qualifying element for disability pension was recorded as Nil for life.

3. On adjudication, the Competent Authority rejected the claim for disability pension vide letter no. 14620307/DP-4/Pen dated 21 Oct 2017 with an advice that he may prefer an appeal against the rejection of his disability element of disability pension to the appellate Committee within six months from the date of receipt of the letter.

4. The applicant submitted the First Appeal dated 17.11.2017 which was rejected by Competent Authority on First Appeal and the same was communicated to the applicant vide letter No. B/40502/137/2018/AG/PS-4 dated 24 July, 2018. Thereafter, the applicant submitted a Second Appeal dated 14.09.2018 against rejection of the claim for disability pension to the Competent Authority, the said appeal was rejected vide letter no B/38046A/466/2018/AG/PS-4(2nd Appeal) dated 03.09.2019, aggrieved by the response of the respondents, the applicant has filed the instant OA.

CONTENTION OF THE PARTIES

5. The learned counsel for the applicant submitted that the applicant joined the Indian Army on 29.12.1993 and was discharged from the service on 31.12.2017 after completion of 24 years and 02 days of service in the Indian Army.

6. The learned counsel for the applicant submitted that he was subjected to a thorough medical examination conducted by the medical board at the time of his entry into service and was found medically fit to join the service in the Indian Army and was posted to various places in different environmental conditions.

7. The learned counsel for the applicant submitted that the disability of IMMUNE SURVEILLANCE was detected in April 2008 while the applicant was in the active service and was posted to Ahmadabad and the applicant's disability occurred during performance of military duties which is mentioned in the Medical Board Proceedings, hence the disability of the applicant is required to be treated as attributable to and aggravated by military service. The learned counsel for the applicant submitted that the disease occurred due to accidental infection by documented blood transfusions,

invasive procedures, instrumentation in a service hair cutting or other infections while performing various type of duties in service or while travelling during service tenure.

8. The learned counsel for the applicant placing reliance on the verdict of the Hon'ble Supreme Court in ***Dharamvir Singh Vs. UOI & Ors*** [2013 (7) SCC 36], submitted that no note of any disability was recorded in the service documents of the applicant at the time of the entry into the service, and that he served in the Air Force at various places in different environmental and service conditions in his prolonged service and thus thereby, any disability that arose during his service has to be deemed to be attributable to or aggravated by military service. The learned counsel for the applicant also placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***Sukhvinder Singh Vs. Union Of India &Ors***, dated 25.06.2014 reported in 2014 STPL (Web) 468 SC, to contend to similar effect.

9. The applicant has also placed reliance on the verdicts of the Hon'ble Supreme Court in:-

- ***Union of India and another v. Rajbir Singh, (Civil Appeal No.2904 of 2011),***

- ***Union of India & Ors Vs Dharamvir Singh (Civil Appeal No. 4949 of 2013)(2013) 7 SCC 316,***
- ***Sukhvinder Singh*** *Vs* ***Union of India & Ors*** **vide judgment dated 25.06.2014 reported in 2014 STPL(Web) 468SC,**

to contend to the effect that, the Release Medical Board has not recorded a categorical opinion that the disease of the applicant could not have been detected on medical examination at the time of enrolment and in the absence of any such finding of the Medical Board, the disease would be deemed to have arisen in service.

10. Per contra, the learned counsel for the respondents submitted that there should be causal connection between the disability and the bonafide military duty. The learned counsel for the respondent further submits that the applicant was placed in low medical category P3(P) due to low medical category S1H1A1P3(P)E1 for the disability "Immune Surveillance" and that the RMB considered the disability of the applicant as neither attributable to nor aggravated by service since the disability was detected in April 2008 at Ahmedabad and no causal connection could be established

in terms of Para 2 of Chapter VI of GMO 2008 (Military Pension).

11. The learned counsel for the respondents further submitted that the applicant was has not fulfilled the condition for the grant of the same as laid down in Para 179 of Pension Regulation for the Army, 1961 (Part-I) and the claim for the grant of disability pension was rejected.

12. The learned counsel for the respondents further submitted that after careful examination , the competent authority rejected the appeal of the applicant with an opinion that *" The ID is a result of viral infection caused by HIV Type-I and II, acquired through homo and heterosexual means, sharing of IV needles among drug abusers or blood transfusion and also by sharing of tooth brush. In the instant case, no causal connection between the service related factors and exposure to HIV could be elicited. He was managed appropriately for the ID at service hospitals following initial presentation. Hence the ID is conceded to be neither attributable to nor aggravated by service in terms of Para 1 Chapter VI of the Guide to Medical Officers, (Military Pension), 2002 amendment 2008".*

ANALYSIS

13. In so far as the disability of Immune Surveillance is concerned, it is a fact that the occurrence of the disease in the applicant, was first noticed in April, 2008, after a span of approximately 15 years of military service. There are several reasons for occurrence of the disability 'Immune Surveillance' listed in Para 1 of Chapter VI of the Guide to Medical Officer (Military Pension), 2008, and the respondents have not been able to prove the exact cause of the disability which are covered in Para1 of Chapter VI of the Guide to Medical Officers (Military Pension), 2008 for which the benefit of doubt ought to be accorded in favour of the applicant.

14. To this effect, reliance is placed on ***Dharamvir Vs. Union of India***, Civil Appeal No. 4949 of 2013, wherein it was observed as under :-

> *16. Regulation 173 of Pension Regulations for the Army, 1961 relates to the primary conditions for the grant of disability pension and reads as follows:*
>
> > ***"Regulation 173**. Unless otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an individual who*

is invalidated out of service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed 20 per cent or over The question whether a disability is attributable to or aggravated by military service shall be determined under the rule in Appendix II."

17. From a bare perusal of the Regulation aforesaid, it is clear that disability pension in normal course is to be granted to an individual (i) who is invalidated out of service on account of a disability which is attributable to or aggravated by military service and (ii) who is assessed at 20% or over disability unless otherwise it is specifically provided.

18. A disability is 'attributable to or aggravated by military service' to be determined under the "Entitlement Rules for Casualty Pensionary Awards, 1982', as shown in Appendix II.

Rule 5 relates to approach to the Entitlement Rules for Casualty Pensionary Awards, 1982 based on presumption as shown hereunder:

"Rule5 . The approach to the question of entitlement to casualty pensionary awards and evaluation of disabilities shall be based on the *following presumptions:*

PRIOR TO AND DURING SERVICE

(a)member is presumed to have been in sound physical and mental condition upon entering except as to physical disabilities noted or recorded at the time of entrance.

(b)In the event of his subsequently being discharged from service on medical grounds any deterioration in his health which has taken place is due to service."

From Rule 5 we find that a general presumption is to be drawn that a member is 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. If a person is discharged from service on medical ground for deterioration in his health it is to be presumed that the deterioration in the health has taken place due to service.

19. "Onus of proof" is not on claimant as apparent from Rule 9, which 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."

From a bare perusal of Rule 9 it is clear that a member, who is declared disabled from service, is not required to prove his entitlement of pension and such pensionary benefits to be given more liberally to the claimants.

20. With respect to disability due to diseases Rule 14 shall be applicable which as per the Government of India publication reads as follows:

> *Rule 14. DISEASE- In respect of diseases, the following rule will be observed:-*
>
> *(a) Cases in which it is established that conditions of Military Service did not determine or contribute to the onset of the disease but influenced the subsequent courses of the disease will fall for acceptance on the basis of aggravation.*
>
> *(b) A disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service, if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service.*
>
> *(c) If a disease is accepted 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.

As per clause (b) of Rule 14 a disease which has led to an individual discharge or death will ordinarily be deemed to have arisen in service, if no note of it was made at the time of the individual's acceptance for military service.

As per clause(c) of Rule 14 if a disease is accepted 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."

15. Reliance is placed on Para 7 of the Entitlement Rules for Casualty Pensionary Awards, 2008, which is in *pari materia* to Para 9 of the Entitlement Rules for Casualty Pensionary Awards to Armed Forces Personnel, 1982, and reads as under:-

"7. Onus of proof :

Ordinarily the claimant will not be called upon to prove the condition of entitlement. However, where the claim is preferred after 15 years of discharge/retirement/invalidment/release by which time the service document of the claimant are

destroyed after the prescribed retention period, the onus to prove would lie on to the claimant".

16. Reliance is also placed on the verdict of the Supreme Court in the case of ***Sukhvinder Singh Vs. Union of India*** (2014 STPL (WEB) 468 SC) decided on 25.06.2014, wherein it was observed as under :

> "....
>
> ***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.

...."

17. The applicant has served in the Indian Army for 24 years and the disability of Immune Surveillance occurred in 2008 after 15 years of service. There is no note of any disability at the time of enrolment in the Armed Forces. It has thus to be presumed that the said disability occurred during military service and the benefit of doubt, for considering the attributability for the said disability, is accorded in favour of the applicant and hence the disability of Immune Surveillance is held to be attributable to military service.

18. Insofar as the second disability of Primary Hypertension is concerned, the consistent view taken by this Tribunal on the disability of Primary Hypertension is based

on the law laid down by the Hon'ble Supreme Court in the case of ***Dharamvir Singh v. Union of India and others*** (2013) 7 SCC 316, the Entitlement Rules for Casualty Pensionary Awards, 1982, and observations in para-28 of the said verdict to the effect:-

> ***"28. A conjoint reading of various provisions, reproduced above, makes it clear that:***
>
> ***(i) Disability pension to be granted to an individual who is invalidated from service on account of a disability which is attributable to or aggravated by military service in nonbattle casualty and is assessed at 20% or over. The question whether a disability is attributable or aggravated by military service to be determined under "Entitlement Rules for Casualty Pensionary Awards, 1982" of AppendixII (Regulation 173).***
>
> ***(ii) 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 r/w Rule 14(b)].***
>
> ***(iii) Onus of proof is not on the claimant (employee), the corollary is that onus of proof that the condition for nonentitlement 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).***
> ***(iv) 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)].***

(v) 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. [14(b)].

(vi) 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. [14(b)]; and

(vii) It is mandatory for the Medical Board to follow the guidelines laid down in ChapterII of the "Guide to Medical (Military Pension), 2002 – "Entitlement : General Principles", including paragraph 7,8 and 9 as referred to above."

Further as per amendment to Chapter VI of the 'Guide to Medical Officers (Military Pension), 2008 at para-43, it is provided as under:-

"43. <u>Hypertension</u> – The first consideration should be to determine whether the hypertension is primary or secondary. If (e.g. Nephritis), and it is unnecessary to notify hypertension separately.

As in the case of atherosclerosis, entitlement of attributability is never appropriate, but where disablement for essential hypertension appears to have arisen or become worse in service, the question whether service compulsions have caused aggravation must be

considered. However, in certain cases the disease has been reported after long and frequent spells of service in field/HAA/active operational area. Such cases can be explained by variable response exhibited by different individuals to stressful situations. Primary hypertension will be considered aggravated if it occurs while serving in Field areas, HAA, CIOPS areas or prolonged afloat service."

19. It has, already been observed by this Tribunal in a catena of cases that peace stations have their own pressure of rigorous military training and associated stress and strain of the service. It may also be taken into consideration that most of the personnel of the armed forces have to work in the stressful and hostile environment, difficult weather conditions and under strict disciplinary norms.

20. The 'Entitlement Rules for Casualty Pensionary Awards, to the Armed Forces Personnel 2008, which take effect from 01.01.2008 provide vide Paras 6,7,10,11 thereof as under:-

"6. Causal connection:

For award of disability pension/special family pension, a causal connection between disability or death and military service has to be established by appropriate authorities.

7. Onus of proof:

Ordinarily the claimant will not be called upon to prove the condition of entitlement. However, where the claim is preferred after 15 years of discharge/retirement/ invalidment/ release by which time the service documents of the claimant are destroyed after the prescribed retention period, the ouns to prove the entitlement would lie on the claimant.

10. Attributability:

(a) Injuries:

In respect of accidents or injuries, the following rules shall be observed:

- ***i) Injuries sustained when the individual is 'on duty', as defined, shall be treated as attributable to military service, (provided a nexus between injury and military service is established).***
- ***ii) In cases of self-inflicted injuries white 'on duty', attributability shall not be conceded unless it is established that service factors were responsible for such action.***

(b) Disease:

(i) For acceptance of a disease as attributable to military service, the following two conditions must be satisfied simultaneously:-

(a) that the disease has arisen during the period of military service, and

(b) that the disease has been caused by the conditions of employment in military service.

(ii) Disease due to infection arising in service other than that transmitted through sexual contact shall merit an entitlement of attributability and where the disease may have been contacted prior to enrolment or during leave, the incubation period of the disease will be taken into consideration on the basis of clinical courses as determined by the competent medical authority.

(iii) If nothing at all is known about the cause of disease and the presumption of the entitlement in favour of the claimant is not rebutted, attributability should be conceded on the basis of the clinical picture and current scientific medical application.

(iv) when the diagnosis and/or treatment of a disease was faulty, unsatisfactory or delayed due to exigencies of service, disability caused due to any adverse effects arising as a complication shall be conceded as attributable.

11. Aggravation:

A disability shall be conceded aggravated by service if its onset is hastened or the subsequent course is worsened by specific conditions of military service, such as posted in places of extreme climatic conditions, environmental factors related to service conditions e.g. Fields, Operations, High Altitude etc."

Thus, the ratio of the verdicts in ***Dharamvir Singh Vs. Union Of India &Ors*** (Civil Appeal No. 4949/2013); (2013 7

SCC 316, ***Sukhvinder Singh Vs. Union Of India &Ors***, dated 25.06.2014 reported in 2014 STPL (Web) 468 SC, ***UOI &Ors. Vs. Rajbir Singh*** (2015) 12 SCC 264 and ***UOI & Ors. Vs. Manjeet Singh*** dated 12.05.2015, Civil Appeal no. 4357-4358 of 2015, as laid down by the Hon'ble Supreme Court are the fulcrum of these rules as well.

Furthermore, Regulation 423 of the Regulations for the Medical Services of the Armed Forces 2010 which relates to 'Attributability to Service' provides as under:-

> ***"423. (a). For the purpose of determining whether the cause of a disability or death resulting from disease is or 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 Area/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. All evidences both direct and circumstantial will be taken into account and benefit of reasonable doubt, if any, will be given to the individual. The evidence to be accepted as reasonable doubt for the purpose of these instructions should be of a degree of cogency, which though not reaching certainty, nevertheless carries a high degree of probability. In this connection, it will be remembered that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. If the evidence is so strong against***

an individual as to leave only a remote possibility in his/her favor, which can be dismissed with the sentence "of course it is possible but not in the least probable" the case is proved beyond reasonable doubt. If on the other hand, the evidence be so evenly balanced as to render impracticable a determinate conclusion one way or the other, then the case would be one in which the benefit of the doubt could be given more liberally to the individual, in case occurring in Field Service/Active Service areas.

(b). Decision regarding attributability of a disability or death resulting from wound or injury will be taken by the authority next to the Commanding officer which in no case shall be lower than a Brigadier/Sub Area Commander or equivalent. In case of injuries which were self-inflicted or due to an individual's own serious negligence or misconduct, the Board will also comment how far the disablement resulted from self-infliction, negligence or misconduct.

(c). The cause of a disability or death resulting from a disease will be regarded as attributable to Service when it is established that the disease arose during Service and the conditions and circumstances of duty in the Armed Forces determined and contributed to the onset of the disease. Cases, in which it is established that Service conditions did not determine or contribute to the onset of the disease but influenced the subsequent course of the disease, will be regarded as aggravated by the service. A disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in Service

if no note of it was made at the time of the individual's acceptance for Service in the Armed Forces. However, if medical opinion holds, for reasons to be stated that the disease could not have been detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service.

(d). The question, whether a disability or death resulting from disease is attributable to or aggravated by service or not, will be decided as regards its medical aspects by a Medical Board or by the medical officer who signs the Death Certificate. The Medical Board/Medical Officer will specify reasons for their/his opinion. The opinion of the Medical Board/Medical Officer, in so far as it relates to the actual causes of the disability or death and the circumstances in which it originated will be regarded as final. The question whether the cause and the attendant circumstances can be accepted as attributable to/aggravated by service for the purpose of pensionary benefits will, however, be decided by the pension sanctioning authority.

(e). To assist the medical officer who signs the Death certificate or the Medical Board in the case of an invalid, the CO unit will furnish a report on :

(i) AFMSF – 16 (Version – 2002) in all cases

(ii) IAFY – 2006 in all cases of injuries.

(f). In cases where award of disability pension or reassessment of disabilities is

concerned, a Medical Board is always necessary and the certificate of a single medical officer will not be accepted except in case of stations where it is not possible or feasible to assemble a regular Medical Board for such purposes. The certificate of a single medical officer in the latter case will be furnished on a Medical Board form and countersigned by the Col (Med) Div/MG (Med) Area/Corps/Comd (Army) and equivalent in Navy and Air Force."

(emphasis supplied),

has not been obliterated.

21. The applicant has served in the Indian Army for 24 years and the disability of Primary Hypertension occurred in 2017 after 24 years of service. The accumulated stress and strain of such a service cannot be overlooked and hence the disability of Primary Hypertension ought to be attributable to military service.

CONCLUSION

22. In view of the aforesaid judicial pronouncements and the parameters referred to above, the applicant is entitled to the grant of the disability element of pension in respect of the disabilities (i) 'Immune Surveillance' assessed @ 40% for life and (ii) 'Primary Hypertension' assessed @ 30% for life which

were compositely assessed @ 58% for life. Accordingly, we allow this application holding that the applicant is entitled to the disability element of pension @ 58% rounded off to 75% for life with effect from the date of his discharge in terms of the judicial pronouncement of the Hon'ble Supreme Court in the case of ***Union of India Vs. Ram Avtar*** (Civil Appeal No. 418/2012), decided on 10.12.2014.

23. The respondents are thus directed to calculate, sanction and issue the necessary PPO to the applicant within a period of three months from the date of receipt of copy of this order and the amount of arrears shall be paid by the respondents, failing which the applicant will be entitled for interest @6% p.a. from the date of receipt of copy of the order by the respondents.

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

[REAR ADMIRAL DHIREN VIG]
MEMBER (A)

[JUSTICE ANU MALHOTRA]
MEMBER(J)

/pooja/