COURT NO. 1, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

D.

OA 549/2019

Col Krishan Chand (Retd.) ... Applicant
Versus
Union of India & Ors. ... Respondents

For Applicant : Mr. S. Jaidwal, Advocate
For Respondents : Mr. Shyam Narayan, Advocate

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

ORDER
20.10.2023

Vide our orders of even date, we have dismissed the OA. Faced with the situation, learned counsel for the applicant makes an oral prayer for grant of leave to appeal under Section 31 of the Armed Forces Tribunal Act, 2007, to the Hon'ble Supreme Court. We find no question of law much less any question of law of general public importance involved in the matter to grant leave to appeal. Hence, the prayer for grant of leave to appeal is declined.

[JUSTICE RAJENDRA MENON]
CHAIRPERSON

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

Ps

COURT NO. 1, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

O.A. No. 549 of 2019

In the matter of :

Col Krishan Chand (Retd) ... **Applicant**

Versus

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

For Applicant : Shri Shakti Chand Jaidwal, Advocate

For Respondents : Shri Shyam Narayan, Advocate

CORAM :

HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON
HON'BLE LT GEN P.M. HARIZ, MEMBER (A)

O R D E R

The applicant, having been found medically and physically fit, was commissioned in the Indian Army on 15.12.1976. On superannuation, the applicant retired from service on 30.04.2006 in low medical category $S_1H_2A_1P_1E_1$. The Release Medical Board (RMB) was conducted before his retirement in October, 2005, which assessed the applicant's disability 'SENSORI NEURAL HEARING LOSS (RT) EAR @ 11-14% for life and the same was held as 'aggravated by military service'.

2. Initial claim of the applicant for grant of disability pension was processed to the competent authority for

adjudication. The competent authority rejected the said claim vide letter dated 12.09.2017. Against this, the applicant preferred his first appeal dated 04.04.2017 which was rejected by the competent authority vide letter dated 04.04.2018 on the ground that the disability was assessed at less than 20%. The applicant preferred his second appeal dated 09.05.2018 to the Second Appellate Committee of Pension (SACP). The SACP, based on the service/medical documents and in view of the relevant rules/instructions on the subject, rejected the same vide a detailed order. Aggrieved by the same, the applicant has filed the present OA.

3. Learned counsel for the applicant submitted that the applicant, at the time of joining the Army, was declared mentally and physically fully fit and was placed in medical category and no note was made that he was suffering from any disease at that time. It is submitted by the learned counsel that during his service tenure, the applicant was posted to various places including difficult postings in HAA; that due to exposure to loud noise during firing of weapons over a period of time, in September, 2005, the applicant

started suffering from giddiness and humming sound in his right ear which was later diagnosed as 'Sensori Neural Hearing Loss (Rt) Ear' and because of this disability, at the time of retirement, the applicant was placed in low medical category. Learned counsel referred to Para 20(6) of Chapter VI of the Guide to Medical Officers (Military Pensions), 2002, Amendment 2008 (hereinafter referred to as 'GMO (MP) 2008' which provides that a minimum percentage for hearing loss has to be assessed @ 20% and contended that the RMB committed grave error in assessing the disability at less than 20% just to deny him disability pension despite the fact that the disability was held as aggravated by military service.

4. Learned counsel placed reliance on the judgments of the Hon'ble Supreme Court in the case of ***Dharamvir Singh Vs. Union of India and Ors. (2013) 7 SCC 316*** and ***Union of India & Ors. Vs. Rajbir Singh [(2013) 7 SCC 316]***, 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 due to service conditions. The Apex Court further held that the onus of proof shall be on the respondents to prove that the disease from which the incumbent is suffering is neither attributable to nor aggravated by military service.

5. *Per contra*, learned counsel for the respondents contended that the applicant is not entitled to the relief claimed on the basis of the opinion of the RMB, which is an expert body and since the disability suffered by the applicant does not fulfil the primary conditions given in Para 53 of the Pension Regulations for the Air Force, 1961 for the grant of disability pension as although disability in question has been conceded as 'aggravated by service', but the same was

assessed at less than 20% (11-14%). Learned counsel, therefore, prayed that the OA has no merit and the same may be dismissed.

4. We have heard the learned counsel for the parties and have perused the records.

5. It is undisputed case that the disability 'Sensori Neural Hearing Loss (Rt) Ear' has been conceded as 'aggravated by military service' due to 'exposure to loud noise firing' but the same was assessed @ less than 20% (11-14%).

6. As regards the disability Sensori Neural Hearing Loss (Rt) Ear, it would be pertinent to refer to Para 20 Chapter-VII of the GMO (MP), 2008 in which the basis of assessment of hearing loss has been provided and the same reads as under:

> ***"20. Hearing Loss. Hearing loss refers to impairment of hearing, the degree of which may vary from mild to total hearing loss.***
>
> ***Assessment of hearing loss :***
>
> ***(a) Screening for hearing loss should be carried out with free field hearing tests, namely Conversational Voice Tests, (CV) and Forced Whisper Test (FW) using Phonetically Word List. If any subject scores less than 610 cms in CV/FW Test, he should be subjected to assessment for a hearing loss using pure tone audiometry.***
>
> ***Assessment should be based on the grade attained using both ears together, the percentage assessment appropriate to the grade thus attained is given below:***

Grade	Degree of hearing attained	Assessment for both Ears used together
1.	Total deafness	100%
2.	Shout not beyond 3 feet	80%
3.	Conversational voice not over 1 Foot	60%
4.	Conversational voice not over 3 Feet	40%
5.	Conversational voice not over 10 Feet	
	(a) Unilateral total deafness	40%
	(b) Otherwise	20%

A case in which the right ear attained grade 4, the left ear grade 2 should be assessed as follows :

Disability for grade 4	***40%***
Disability for grade 2	***80%***

Total mean disability = (40 + 80)/2 = 60%

7. However, in light of variation and disparity in the recommendations of the medical board on the entitlement as well as assessment of sensory neural hearing loss during the release medical board/invaliding medical boards, the office of the DGAFMS, Ministry of Defence, New Delhi, vide its letter No.16036/RMB/IMB/DGAFMS/MA(Pens)/02 dated 14.06.2019 issued clarification to the effect the provisions laid down in the Guide to Medical Officers, which are reproduced below:

Tele: 23093442

Regd/ SDS
Office of the DGAFMS
Ministry of Defence
'M' Block, DHQ PO,
New Delhi- 110001

16036/RMB/IMB/DGAFMS/MA (Pens)/02 *14th June, 2019*

DGMS (Army)/ DG-5A
DGMS (Navy)/ Capt (MS)-H
DGMS (Air)/DMS (MB)

TEMPLATE FOR DETAILED JUSTIFICATION REGARDING THE BOARD'S RECOMMENDATIONS ON THE ENTITLEMENT/ ASSSESSMENT IN SENSORY NEURAL HEARING LOSS (SNHL) CASES DURING CONDUCT OF RMB/IMB

1. Ref revised AFMSF- 16 (Ver 2019) issued by this Dte Gen.

2. It has been observed that there is a wide variation and disparity in the recommendations of the medical board on the entitlement as well as assessment of cases of Sensory Neural Hearing Loss (SNHL) during the Release Medical Board (RMB)/ Invaliding Medical Boards (IMB).

3. Since these boards are quasi legal in nature a template (Annexure 'A') for the medical officers conducting the RMB/IMB is issued herewith to bring uniformity in detailed justification regarding board's recommendations on the entitlement in SNHL cases.

4. This has the approval of the DGAFMS.

Sd/-
(Poonam Raj)
Col
Col AFMS (Pens)
For Brig

AFMS(Pens)

Encl: As above

ENTITLEMENT FOR CASES OF SENSORINEURAL HEARING LOSS

SNHL is conceded as attributable to service in cases of service related trauma (including acoustic trauma due to blasts or physical trauma like fracture temporal bone) or infection. Aggravation is conceded in individuals exposed to loud noises like gunfire (arty/ small arms), bomb and missile blasts, aircraft engines and engine rooms onboard ships etc. Service personnel are exposed intermittently to loud noise in the form of small arms gunfire and arty firing. This results in chronic noise induced hearing damage which presents and progresses insidiously. Long term occupational exposure to loud noises cannot be ruled out as all service personnel irrespective of trade/ Regt/Corps are exposed to

loud noises of small arms firing during services. Worsening of hearing may take place progressively over many years rather than always being an acute event following exposure. The disability is therefore always to be conceded as being aggravated by service. In terms of Para 23, Chapter VI, GMO 2002 amendment 2008 unless is attributable following trauma or infection as specified above.

ASSESSMENT FOR CASES OF SENSORINEURAL HEARING LOSS

Reference Para 20, Chap VII, GMO 2002 amendment 2008 which is currently in vogue, assessment is still decided based on the Conversational Voice (CV) (unaided) as recorded during free field testing. If the CV is found to be less than 600 cm, a Pure Tone Audiometry should be carried out, however the assessment is still based on the CV. Hearing should be tested individually in both ears and assessed separately, however final assessment of disablement is an average of the separate assessment of the individual years.

Grades of assessment for individual ears are as follows:

Grade	Degree for Hearing attained	Assessment
1	Shout not beyond 3 feet (indl can hear only a loud sound upto 3 feet/100 cm and nothing beyond)	80%
2	Conversational voice not over 1 foot (indl can hear CV upto 1 foot/30 cm and not beyond)	60%
3	Conversational voice not over 3 feet (indl can hear CV upto 3 feet/100 cm and not beyond)	40%
4	Conversational voice not over 10 feet (indl can hear CV upto 10 feet/300 cm and not beyond)	20%
5	Unilateral total deafness	40%

Examples of calculation of final assessment of disablement are:

1. *Lt ear assessed at Grade 2 (60%) and Rt ear assessed at Grade 4 (20%)*

Final assessment would be = (60%+20%)/ 2= 40%

2. *Lt ear assessed at Grade 5 (40%) and Rt ear has normal hearing.*

Final assessment would be = (40%+0%)/ 2= 20%.

All cases of bilateral total deafness should be assessed at 100%.

If the mean assessment of the two ears is less than 20% (CV better than 300 cm in both ears) then the assessment should be given as 5%, 10% or 15% depending on the degree of hearing loss.

10. On a careful reading of the above, we observe that the guidelines for the assessment of the percentage of hearing loss provided for in the GMO (MP), 2008 as well as in the aforesaid letter, is provided in respect of assessment of individual ears, followed by calculation of the hearing loss computing the disability of both the ears. Therefore, it is a clear fact that an assessment of hearing loss in one ear, if 20%, with the assessment in other ear being 0% or 10%, the assessment as per the mean calculation would result in total disablement of 10% or 15%, which is well below the requisite of 20% and at this point, we are of the clear opinion that the claim of the applicant that the assessment of hearing loss cannot be less than 20% is wholly misconceived.

11. In the RMB proceedings, the medical examination in Part-II clause 6(a) regarding Hearing, the CV parameters are given for Right Ear as **'500 Cms'** and for Left Ear as **'600 Cms'**. Therefore, in view of assessment method as envisaged in the

letter dated 14.06.2019, if the CV is better than 300 cm in both ears, then the assessment should be made as 5%, 10% or 15% depending on the degree of hearing loss.

12. With regard to the issue relating to entitlement of disability pension when the assessment of disability by the RMB is less than 20% i.e. @ 11-14% for life, 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 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."

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

14. The Hon'ble Supreme Court in its judgement in the case of ***Secretary, Ministry of Defence & Others Vs. Damodaran A.V. (dead) through LRs. & Others [(2009) 9 SCC 140]***, clearly laid down 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."

15. In view of the aforesaid judicial pronouncements and parameters referred to above, we conclude that since the disability of the applicant does not meet one of the necessary twin criteria for being eligible for getting disability element of pension as the RMB assessed the disability at less than 20% (11-14% for life), he is not entitled to the disability element and consequently not entitled to disability element of pension. Accordingly, the OA stands dismissed.

16. There is no order as to costs.

Pronounced in open Court on this 9th day of October, 2023.

[JUSTICE RAJENDRA MENON]
CHAIRPERSON

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

/ng/