

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

B..

OA 178/2019

Ex SGT Reji M Varghese Applicant
VERSUS
Union of India and Ors. Respondents

For Applicant : Mr. Virender Singh Kadian, Advocate
For Respondents : Mr. Anil Gautam, Sr CGSC

CORAM

HON'BLE MS. JUSTICE ANU MALHOTRA, MEMBER (J)
HON'BLE LT GEN C.P. MOHANTY, MEMBER (A)

ORDER
08.02.2024

Vide our detailed order of even date, we have allowed the OA 178/2019. 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)

(LT GEN C.P. MOHANTY)
MEMBER (A)

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OA No. 178/2019

Ex Sgt Reji M Varghese

... Applicant

Versus

Union of India & Ors.

... Respondents

For Applicant : Mr. V.S, Kadian, Advocate

For Respondents : Mr. Anil Gautam, Sr. CGSC

CORAM :

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

HON'BLE LT. GEN C.P. MOHANTY, MEMBER (A)

ORDER

1. The applicant vide the present O.A 1485/2019 has made the following prayers:-

“(a) Direct respondents to quash and set aside the impugned letter No Air HQ/99798/1/771859/DAV/DP/CC dated 26.12.2018. And/or

(b) Direct respondents to grant disability element of pension to the applicant by broad banding it to in terms of Civil Appeal No. 418/2012 in UOI & Ors Vs Ram Avtar. 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 case along with cost of the application in favour of the applicant and against the respondents.”

2. The applicant Ex Sgt Reji M Varghese was enrolled in the Indian Air Force on 03.08.1995 in a fit medical category 'AYE' vide AFMSF-2A dated 18.11.1994, the applicant was placed in LMC

A4G4 (T-24) for ID - PIVD L5-S1 vide AFMSF-15 dated 30 Nov 2009. Subsequently, he was placed in LMC A4G4 (P) for ID PIVD L5-S1 vide AFMSF-15 dated 26 May 2010. The applicant gave his unwillingness for surgery dated 09 Mar 2013.

3. The applicant's Release Medical Board not solely on medical grounds was held at 7BRD, AF, vide AFMSF-16 dated 16 2 Nov 2017 which found him fit to be released in Low Medical Category A4G4 (P) for PIVD L5-S1. The RMB considered his disabilities as aggravated by service. The percentage of disablement was assessed at 6% to 10% (i.e., less than 20%) for life as he had given unwillingness for surgery. The disability qualifying element for disability pension was 10% for lifelong. The RMB was approved by Dy PMO, HQ MC, IAF dated 11 Jun 2018.

4. The applicant was discharged from the IAF on 31 August 2018 under the clause "On fulfilling the conditions of enrolment" after rendering total 23 years and 29 days of regular service. The AOC AFRO also upheld the recommendations of the RMB and rejected the disability pension claim vide letter No. RO/3305/3/Med dated 30 Oct 2018. The outcome of the same was also communicated to the applicant vide letter No. Air HQ/ 99798/ 1/ 771859/ 08/18/DAV (DP/RMB) dated 02 Nov 2018 with an option that he may prefer an

appeal to the Appellate Committee within six months from the date of receipt of letter. A Legal notice dated 15.01.2018 was issued on behalf of the applicant which was replied to by the respondents vide impugned letter No. AirHQ/99798/1/771859/DAV/DP/CC dated 26.12.2018 states to the effect:-

“3. As per Rule 153 of Pension Regulations for IAF, 1961 (Pt-I), the primary conditions for the grant of disability pension are as follows:-(a) Disability must be either attributable to or aggravated by service.

(b) Degree of disablement should be assessed at 20% or more.

5. Since, the disability is assessed less than 20% that caused non-fulfilment of the criteria 3(b) as above, therefore, it is regretted to inform you that your client is not entitled for grant of disability element as per rules mentioned above.”

The original RMB was produced by the respondents which has been perused and the copy of the same was submitted on record.

CONTENTIONS OF THE PARTIES

5. The applicant submits that in as much as he suffered from PIVD L5-S1(OLD) ICD No. M51.1, Z09.0 and the opinion of the medical board was to the effect:-

“

PART V **OPINION OF THE MEDICAL BOARD**

1. Causal Relationship of the Disability with Service Conditions or otherwise.				
Disability	Attributable to service(Y/N)	Aggravated by service(Y/N)	Not connected with service(Y/N)	Reason/Cause/Specific condition and period in service

PIVD L5-S1(OLD) ICD NO. M 51.1, Z09.0	NO	YES	NO	Disability is not due to infection, Not served in hard area, No delay in diagnosis and treatment, associated with stress and strain of service as per Para 51 Chapter VI of GMO{(Mil Pen)- 2008}.
Note: A disability "Not Connected with service" would be neither Attributable nor Aggravated by service) (This accordance with instructions contained in "Guide to Medical Officers(Mil Pension)-2002				

thus opining categorically to the effect that the disability of the applicant was aggravated by military service and was associated with stress and strain of service as per Para-51 of Chapter-VI of the GMO(MP), 2008 and had been assessed with a percentage of disablement of 20% as indicated by the RMB itself vide Para-6 of opinion of the medical board to the effect:-

“

3. What is present degree of disease/disablement as compared with a healthy person of the same age and sex?(Percentage will be expressed as Nil or as follows) 5%,10%,15% and thereafter in multiples of ten from 20% to 100%				
Disease/Disability (As numbered in Para 1 Part VI)	Percentage of disablement	Composite assessment for all disabilities (Max 100%) with duration	Disability Percentage Qualifying for Disability Pension with duration	Net Assessment Qualifying for disability Pension (Max 100%) with duration
PIVD L5-S1(OLD) ICD NO. M 51.1, Z09.0	(50% deducted from 20% of disablement due to refusal of treatment, hence 10% awarded, vide para 5.6.16 of IAP 4303 4TH Edn)	(50% deducted from 20% of disablement due to refusal of treatment, hence 10% awarded, vide para 5.6.16 of IAP 4303 4TH Edn) Life Long	10% (Ten percent) Life Long	10% (Ten percent) Life Long

”

the deduction of 50% from the initial assessment of disablement of 20% for life to 10% for life, merely because the applicant had refused treatment by way of surgery is wholly arbitrary and erroneous. Reliance was placed on behalf of the applicant on Para-5(a) to (g) of the said opinion of the medical board which is to the effect:-

"5.(a) Was the disability attributable to individuals own negligence or misconduct(if yes, in what way?) NO

(b) If not attributable, was it aggravated by negligence or misconduct? NO

(c) Has the individual refused to undergo operation/treatment? YES

If so, individual's reason will be recorded? Attached unwillingness certificate Note: In case of refusal of operation treatment a certificate from individual will be attached.

(d) Has the effect of refusal been explained to and fully understood by him/her viz. YES a reduction in, or the entire withholding of any disability pension to which he/she might otherwise be entitled? (50% deducted from 20% of disablement due to refusal of treatment, hence 10% awarded, vide para 5.6.16 of LAP 4303 4th Edn)

(e) Does the medical board consider it probable that operation/treatment would have cured the disability or reduced its percentage? YES

(f) If the reply to (c) is in affirmative, what is the probable percentage to which the Disablement could be reduced by operation/treatment. 50% of 20% of disablement.

(g) Does the medical board consider individual's refusal to submit to operation/treatment reasonable? Give reasons in support of the opinion specifying the operation/ treatment NO recommended. Since the disability condition may improve after surgery & opinion of CoI TJ Rappai Sr Adv. Surgery & Neuro Surgeon dated 01 Jul 16 also attached."

ANALYSIS

6. It was observed addressed to all the Armed Forces as issued by the Ministry of Defence to the effect vide letter no. 16036/RMB /IMB/DGAFMS/MA(Pension) dated 16.04.2019 to the effect:-

**“CLARIFICATION ON ASSESSMENT FOR CASES
OF CASES OF SPINAL DISORDERS**

- 1. It has been observed that many RMBs are reducing percentage of disability for Spinal Disorders e.g. PIVD in cases where individuals have refused to undergo surgery.*
- 2. In this context, Para 3, Chapter V, GMO 2002 clarifies that if the refusal to undergo an operation is reasonable, full disability pension normally admissible may be granted. Refusal to undergo an operation may be bald reasonable when, In the opinion of medical authorities, it is improbable that such operation would cure the disability or reduce its percentage, or if such operation, may be severe and dangerous to life. Surgeries performed for Spinal Disorders eg. PIVD have the probability to cure the disability. However, there are underlying complications Recurrence of symptoms subsequently to initial relief is also a probability, because of early onset of osteoarthritis. Therefore, the refusal of an individual to undergo surgery for Spinal Disorders e.g. PIVD stands to reason and hence should not become a reason to reduce percentage disability.*
- 3. All units under your Chain of Command may be advised accordingly.”*

7. Reliance was placed on behalf of the applicant on the order of this Tribunal dated 19.07.2023 in OA 1865/2019 in *Ex Sgt Sanjay Kumar vs. UOI & Ors.*, in which case the applicant thereof who had suffered from Prolapsed Inter Vertebral Disc assessed with a percentage of disablement of 20% for life which though opined to be

attributable to military service, the percentage of disablement had reduced to 11-14% due to refusal of that applicant to undergo surgery which reduction in the percentage of disablement was set aside and that applicant was held entitled to the grant of benefit of the disability element of pension @20% for life.

8. It is essential to advert to order dated 07.07.2022 of the AFT(RB), Lucknow in *Amrendra Kumar, CHEA(R) (Retd.) Vs. UOI & Ors.*, in which case the applicant thereby had been assessed with a percentage of disablement of 20% for life for the disability of PIVD LV 4-5 which was reduced to 14% for life and he being unwillingness for surgery was held entitled to the grant of disability element of pension observing vide Para-7 to the effect:-

"7. Considering all aspect of the case, we are of the opinion that spinal operation has not reached a level of validating and trust where success can be guaranteed for 100% recovery. On the contrary there is a lot of reservations on undertaking spinal operation. Hence, the unwillingness of the applicant for surgery (spinal operation) in our opinion is not a valid ground for reducing his disability percentage from 20% to 16% specially when one considers the complications which are associated with spinal operation. As such, we hold that the percentage of disability of the applicant is 20% for life."

9. Reliance was also placed on behalf of the applicant on the order dated 19.09.2023 in OA 739/2019 in the case of *Hav Anil Kumar Katiyar (Retd) vs. UOI & Ors.*, in which case the applicant

thereof who had suffered from PIVD L4-L5 and the disability had been assessed to be aggravated and connected with military service due to stress and strain of military service which had been assessed with a initial percentage of disablement percentage of 20% for life which had been reduced to 10% for life with it having been opined by the RMB that in the event of treatment having been conducted for the performance of the surgery, the percentage of disablement could have been reduced by operation/ treatment to 50%.

10. On a consideration thus submissions made on behalf of either side and the admitted factum of the RMB proceedings dated 03.08.2017 vide Para-5(f) in Part-V of the RMB categorically stating to the effect that the probable percentage of disablement could be reduced by operation/treatment was only 50% and the factum that the MoD itself vide letter no. 16036/RMB/IMB /DGAFMS/ MA (Pension) dated 16.04.2019 issued to all the three service HQ had itself categorically stated to the effect that there are underlying complications and recurrence of symptoms subsequently to initial relief is also a probability and thus the refusal of an individual to undergo surgery for Spinal Disorders e.g. PIVD stands to reason and hence should not become a reason to reduce percentage of disability, as held by us in OA 739/2019 in the case of *Hav Anil Kumar*

Katihar(Retd)(supra) and as also held in OA 177/2022 by the AFT (RB), Lucknow in *Amrendra Kumar, CHEA(R) (Retd.)*(supra), the refusal of the applicant to undergo surgery for the spinal disorder for PIVD stands to reason where the disability itself had been accepted by the RMB to be categorically attributable to service with an initial disablement percentage of 20%, the reduction of the percentage of disablement of 15-19% from 30% is held to be only arbitrary and erroneous.

CONCLUSION

11. The OA 178/2019 is allowed. The impugned letter no. Air HQ/99798/1/771859/DAV/DP/CC dated 26.12.2018 is set aside and the applicant is held entitled to the grant of disability element of pension in relation to the disability of **PIVD L5-S1(OLD) ICD No. M 51.1, Z09.0** assessed with a ^{an} initial assessment of disablement of 20% for life which is attributable to service in terms of the verdict of the Hon'ble Supreme Court in *UOI & Ors. vs Ramavtar* in Civil Appeal No. 418/2012 is directed to be broadbanded to 50% for life.

12. 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 the 8th day of February, 2024.

[LT. GEN C.P. MOHANTY]
MEMBER (A)

[JUSTICE ANU MALHOTRA]
MEMBER (J)

/TS/