

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

O.A. No. 903 of 2019

In the matter of :

Col Ashwin Dev (Retd)

... Applicant

Versus

Union of India & Ors.

... Respondents

For Applicant : Shri V.S. Kadian, Advocate

For Respondents : Ms. Barkha Babbar, Advocate

CORAM :

HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON
HON'BLE REAR ADMIRAL DHIREN VIG, MEMBER (A)

ORDER

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.

13102/IC-43582Y/SIGS/MP-6(C)/19/2019/1st

Appeal/AG/PS-4(Imp-II) dated 19.03.2019, And/or

(b) Direct respondents to treat the disability of the

applicant as attributable to or aggravated by military service and grant him disability element of pension,

and benefit of rounding off/broad banding @ 50%,

And/or

- (c) Direct respondents to pay the due arrears of disability element of pension from the date of his discharge with interest @ 12% p.a. with all the consequential benefits. And/or
- (d) Any other relief which the Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."

BRIEF FACTS

2. The applicant, having been found medically and physically fit, was commissioned in the Indian Army on 14.12.1985 and retired from service w.e.f. 30.11.2018 after completion of 32 years, 11 months and 15 days of service. Before his retirement, the applicant was brought before the Release Medical Board (RMB) held on 16.05.2018, which assessed the applicant's disability ID 'SEVERE CONDUCTIVE HEARING LOSS (RT) EAR @20% for life, and the same was considered as neither attributable to nor aggravated by military service (NANA). The net assessment qualifying for disability pension with duration is 'Nil'.

3. The initial claim of the applicant for grant of disability pension was rejected by the respondents vide letter No. 13102/IC-43582Y/Sigs/MP-6(C)/480/2018/AG/PS-4

(Imp-I) dated 25.09.2018. Faced with this rejection, the applicant preferred first appeal dated 29.11.2018 which was rejected by the respondents vide letter No. 13102/IC-43582Y/ SIGS/MP-6(C)/19/2019/1st Appeal/AG/PS-4 (Imp-II) dated 19.03.2019 and the applicant was informed that in case he was not satisfied with the decision, he may prefer an appeal to the Second Appellate Committee on Pension within six months from the date of receipt of that letter. However, aggrieved by the same, the applicant has filed the present OA praying for the grant of disability element of pension. In the interest of justice in accordance with Section 21(1) of the AFT Act, we take up the 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 has been made in the service documents of the applicant that he was suffering from any disease at the time of entry into the service, and any disability detected during the service has to be deemed to be attributable to military service. The learned

counsel further submitted that the applicant had suffered with the disability of hearing loss during range firing practice which is regular exercise in the Army and the applicant was present during various Missile Trial being officer in charge communication and there were blasts during such exercise which affected the hearing capacity of the ears and the regular performance of firing duties and exercises which create loud sound during blasts at range etc., caused aggravation of the disability further.

5. The learned counsel for the applicant placed reliance on the verdict of the Hon'ble Supreme Court in **Dharamvir Singh Vs. Union of India & Ors. [2013 (7) SCC 316]**, which was followed in subsequent judgments of the Apex Court in **Union of India & Anr. Vs. Rajbir Singh [2015 (2) SCALE 371]** and **Sukhvinder Singh Vs. Union of India & Ors. [2014 STPL (Web) 468 SC]**, wherein the Hon'ble Apex 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 disability 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.

6. The learned counsel referred to Rules 5 and 14(b) of the Entitlement Rules, 1982 to submit that the deterioration of health is to be presumed to be due to service conditions; Rule 19 thereof to contend that if the worsening of a condition persists till the time of discharge, aggravation is to be accepted and also referred to various rules and regulations in support of the case of the applicant. Learned counsel, therefore, prayed that the disability in question may be held as attributable to and

aggravated by military service and that the disability pension may be granted to the applicant.

7. *Per contra*, the learned counsel for the respondents contended that the applicant is not entitled to the relief claimed since the RMB, being an Expert Body, found the disability as "Neither Attributable to Nor Aggravated by Military Service" as the same occurred in peace station and that the applicant was managed promptly and appropriately. The learned counsel submitted that since the applicant's disability does not fulfil one of the twin conditions in terms of Regulation 81 of the Pension Regulations for the Army, 1961 (Part-I) (amendment 2008) as the same was assessed as neither attributable to nor aggravated by military service, the applicant is not entitled to disability pension and, therefore, the OA may be dismissed.

ANALYSIS

8. We have heard the learned counsel for the parties and have perused the record produced before us.

9. It is an undisputed fact that at the time of joining the service on 14.12.1985, the applicant was found medically

and physically fit and the present disability had occurred on 16.03.2005 during service and that at the time of retirement, the applicant was placed in low medical category H2(Perm).

10. The law on the issue of attributability of a disability is already settled by the Hon'ble Supreme Court in the case of **Dharamvir Singh Vs. Union of India [(2013) 7 SCC 316]**, which has been followed in subsequent decisions of the Hon'ble Supreme Court and in a catena of orders of this Tribunal, wherein the Apex Court had considered the question with regard to the grant of disability element of pension and after taking note of the provisions of the Pension Regulations, Entitlement Rules for Casualty Pensionary Awards, 1982 and the General Rules of Guide to Medical Officers (Military Pensions), 2002 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. The guidelines laid down vide the verdict in *Dharamavir Singh (supra)* are as under:-

"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 non-battle 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 Appendix-II (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 non-entitlement 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 Chapter-II of the "Guide to Medical (Military Pension), 2002 - "Entitlement : General Principles", including paragraph 7, 8 and 9 as referred to above."

11. The Hon'ble Supreme Court in the case of Union of India & Ors. Vs. Rajbir Singh [2015 (2) SCALE 371]

decided on 13.02.2015, after taking note of its judgement in the case of *Dharamvir Singh (supra)* upheld the decision of this Tribunal granting disability pension and observed as under :

"15. Last but not the least is the fact that the provision for payment of disability pension is a beneficial provision which ought to be interpreted liberally so as to benefit those who have been sent home with a disability at times even before they completed their tenure in the armed forces. There may indeed be cases, where the disease was wholly unrelated to military service, but, in order that denial of disability pension can be justified on

that ground, it must be affirmatively proved that the disease had nothing to do with such service....."

12. 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.

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 onus 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 while '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. [(2013) 7 SCC 316]**, **Sukhvinder Singh Vs. Union of India & Ors. [2014 STPL (Web) 468 SC]** and **Union of India Vs. Rajbir Singh [(2015) 12 SCC 264]**, as laid down by the Hon'ble Supreme Court are the fulcrum of these rules as well.

13. 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 favour, 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.

14. It is pertinent to refer to Para 23 of the Guide to Medical Officers (Military Pensions), 2008 regarding deafness, which provides as under :

"23. Deafness. In the great majority cases of ear disease it is necessary to investigate the condition of hearing and to ascertain whether the deafness if present is due to involvement of sensory neural apparatus or conduction apparatus. The common causes of conductive deafness are wax, Otitis media and Otosclerosis.

Sensory neural deafness is either due to disease of cochlea or auditory fibres in the 8th nerve and its connection in the brain stem. Here both air and bone conduction is affected and is frequently associated with tinnitus.

The common causes are:

- (a) Infection.
Viral infection e.g. mumps, influenza.
Cerebrospinal fever.
TB meningitis.
Labrynthitis complicating otitis media (commonest cause of SN deafness).
Ramsay Hunt Syndrome (Herpes-Zoster Oticus).
- (b) Toxic Drugs and Chemicals
Tobacco, alcohol (rarely).
Quinine, streptomycin, kanamycin, neomycin, vancomycin, Lead, arsenic.
- (c) Degenerative diseases e.g. Multiple sclerosis.
- (d) Injury.
- (e) Tumours e.g. Acoustic neuroma
- (f) Meniere's disease. (affecting cochlear apparatus).
- (g) Senile deafness due to involvement of cochlear apparatus

Caisson workers, divers, airmen and mountaineers and persons posted in HAA are liable to develop deafness due to labrynthine injury (hemorrhage, thrombosis or embolism) resulting from sudden compression/ decompression and hypercoagulable state.

Medical opinion would hold that nerve deafness could be due to service only when it is as a result of an attributable service injury or outcome of infection contracted during service.

However, those working in close proximity of gun fire (small arms, grenade, arty guns, bomb blast, and tanks) and in constant exposure to blast of loud noises such as working with aero engines, riveters, factory workers run the risk of labrynthine

deafness. In these cases intensity of continuity, duration and 21 distance of sound nuisance should be considered before conceding aggravation.

15. At the time of the onset of the said disability the applicant was posted at Jodhpur where the applicant was involved in testing missiles, range firings and bomb blasts practices. The applicant was present during various Missile Trials being an officer in charge of communication and thus it is safe to say that due to the service conditions mentioned as above, due to the loud noise produced during such missile firing trials he suffered the present disability and that the regular performance of firing duties and exercises involving blasts at range which produces loud noise, the disability was further worsened. The disability of hearing loss (Rt) Ear of the applicant therefore is conceded to be attributable to and aggravated by military service.

16. Therefore, in view of our analysis and judicial pronouncements, the OA 903/2019 is allowed. The respondents are directed to grant the disability element of disability pension to the applicant for the disability i.e. 'Severe Conductive Hearing Loss (RT) Ear @ 20% for life which is directed to be rounded off to 50% for life from the

date of discharge in terms of the judgment of the Hon'ble Supreme Court in the case of **Ram Avtar** (supra).

17. 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.

18. There is no order as to costs.

Pronounced in open Court on this 7th day of October, 2024.

[JUSTICE RAJENDRA MENON]
CHAIRPERSON

[REAR ADMIRAL DHIREN VIG]
MEMBER (A)

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