

**COURT No.1
ARMED FORCES TRIBUNAL
PRINCIPAL BENCH: NEW DELHI**

**OA 542/2019
with
MA 1112/2019**

Ex Hav Hari Kishan (Deceased) Applicant
Through LR Kamla Devi (wife)
Versus
Union of India and Ors. Respondents

For Applicant : Mr. A K Trivedi, Advocate
For Respondents : Ms. Shyam Narayan, Advocate

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**HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON
HON'BLE LT GEN C.P. MOHANTY, MEMBER (A)**

ORDER

Invoking the jurisdiction of this Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007, the applicant has filed this OA and has made the following prayers:

"(a) Declare the whole action of PCDA(P) Allahabad for assessing the disability of the applicant below 20% wef 11.09.1999 as illegal, unjust and arbitrary and also against the spirit of GOI order dated 31/01/2001 and judicial pronouncement on the subject.

(b) Direct the respondents to pass an order for continuance of disability element of pension wef 11/09/1999 @ 50% and issue necessary PPO to the applicant at the earliest keeping in view the GOI orders on the subject and also Judicial pronouncement on the subject and the applicant may be entitled for disability element of pension @50% wef 11.09.1999 for life alongwith arrears of pension with interest @ 18% p.a.

(c) Any other relief as may be deemed just and proper in the facts and circumstances of the case.

(d) Award Cost."

2. The applicant was enrolled in the Indian Army on 13.03.1979. The applicant while serving with 4 RAJPUT located in Jammu and Kashmir Area, was admitted at Military Hospital, Chandigarh on 15.01.1992 and was diagnosed with a disability of "PULMONARY TUBERCULOSIS". Thereafter, the applicant's medical category was downgraded and he was placed in Low Medical Category CEE (Temporary) for the period of six months w.e.f. 26.09.1992. Thereafter, on three occasions, the applicant underwent the Medical Re-categorisation Board. The Medical Re-categorisation Boards were held on 28.03.1993, 25.09.1993 and 28.03.1994. The applicant after having been downgraded to Low Medical Category BEE (Permanent) was retained in service by the unit for next two years against Sheltered Employment. Subsequently, the employment was withdrawn by the Unit (4 RAJPUT) due to non-availability of Sheltered Appointment in the Unit and, accordingly, disposal order dated 23.06.1994 (Annexure R-4) was issued by Records The Rajput Regiment. Thereafter, the Release Medical Board dated 19.08.1994 (Annexure R-5) held that the disability of the applicant, i.e., "PULMONARY TUBERCULOSIS" was considered as "Aggravated by Military Service" and the composite assessment was made @ 30% for two years by the competent medical

authorities. Thereafter, on 30.11.1994, the applicant was discharged from service in permanent Low Medical Category BEE (Permanent).

3. The claim of the disability pension in respect of the applicant was processed to PCDA (P), Allahabad vide Records The Rajput Regiment vide letter dated 08.02.1995. Consequently, the PCDA (P), Allahabad notified the disability element of disability pension from 01.12.1994 to 09.08.1996 vide PPO No.DE/002149/1995 dated 07.08.1995 (Annexure R-6) and service pension also stands notified vide PPO No.S/030206/1994 dated 23.09.1994 (Annexure R-7). Thereafter, the applicant was brought before the Re-survey Medical Board (RSMB) held on 30.06.1996 (Annexure R-9) and the assessment of degree of the disability of "PULMONARY TUBERCULOSIS" was assessed @ 20% for five years, the period of assessment was from 01.02.1994 to 09.08.1996 and the continuation of the disability element of disability pension was from 10.08.1996 to 10.09.1999. Thereafter, again on 01.09.1999 (Annexure R-10), the RSMB of the applicant was held and the composite assessment of the disability of "PULMONARY TUBERCULOSIS" was assessed @ Nil% w.e.f. 02.08.1999. Records The Rajput Regiment vide letter dated 09.12.1996 processed the pension claim in respect of the applicant to PCDA (P), Allahabad.

The PCDA (P), Allahabad vide letter dated 22.05.2000 (Annexure R-11) rejected the disability element claim and the same was communicated to the applicant by Records The Rajput Regiment vide letter dated 30.05.2000 (Annexure R-12) with an advice, if he is aggrieved by the said rejection, he may submit an appeal before 20.11.2000. However, the applicant did not prefer any appeal. Thereafter, again on 11.08.2003 (Annexure R-13), the applicant was again brought before the Re-view Medical Board and the composite assessment of the disability of "PULMONARY TUBERCULOSIS" was assessed @ 11-14% (i.e., less than 20%) for life long. Accordingly, Records The Rajput Regiment vide letter dated 10.03.2004 (Annexure R-14) informed the applicant that his disability had been assessed as less than 20% (i.e., 11-14%) by the RSMB on 10.06.2003, therefore, he is not entitled for disability element of disability pension.

4. Thereafter, the applicant submitted an application for grant of benefits of broad banding w.e.f. 01.01.1996. Records The Rajput Regiment vide letter dated 23.11.2015 processed the case with PCDA (P), Allahabad for grant of the benefit of broad banding w.e.f. 01.01.1996 to 10.09.1999 and the PCDA (P) notified the requisite PPO bearing No.DE/CORR/10106/2016 dated 11.03.2016

(Annexure R-15). Thereafter, the applicant served a legal notice dated 02.11.2017 (Annexure R-16) and the same was replied by Records The Rajput Regiment vide their letter dated 23.11.2017 (Annexure R-18). Aggrieved by the rejections, the applicant has approached this Tribunal.

5. It is the contention of the applicant that the Release Medical Board opined that the disease is aggravated by military service and assessed the ID @ 30% for two years. Subsequently, his disability was re-assessed by subsequent medical boards but was not granted disability element of pension and the same needs to be continued.

6. On the other hand, the respondents submit that the disability of the applicant was re-assessed post his retirement, and that the first RSMB assessed the ID @ 20% for five years w.e.f 10.08.1996. Subsequently, his disability was assessed by second RSMB @ Nil% and third RSMB assessed the disability @ 11-14% (i.e., less than 20%) w.e.f. 02.08.2004 for life.

7. It is further submitted by the respondents that while the disability pension granted to the applicant was discontinued w.e.f. 11.09.1999 with the disability being assessed at less than 20% and, therefore, the applicant is not entitled for Disability Element in terms of Para 173 of the Pension Regulations for the

Army, 1961 (Part I) and, accordingly, the payment of disability pension was stopped.

8. We have heard learned counsel for the parties and perused the material placed on record. We have also gone through Release Medical Board dated 19.08.1994 and subsequent Re-assessment Medical Boards as well as the rejection order of disability pension claim. Now, the limited question for consideration is whether the applicant is entitled for the grant of disability pension for the period, wherein RSMB has assessed his disability at less than 20%, which is minimum benchmark for grant of disability pension as per Para 173 of the Pension Regulations for the Army, 1961 (Part I).

9. On an analysis of medical literature, we find that as per the report of World Health Organization, and American Lung Association, the disability of the applicant is now curable with time and regular medication. It is important to note that the RSMB has itself assessed the disability @ 11-14% for life, which is clear evidence that the disability has healed with time, and in absence of any contrary medical record, we find no reason to dispute the finding recorded by the Medical Board, and that the applicant is not entitled to disability pension for a disability which has been assessed at less than 20%.

10. With regard to the issue of admissibility of disability pension when the disability was assessed at less than 20%, the Hon'ble Supreme Court in its judgment in the case of **Union of India & Ors.** Vs. **Wing Commander S.P. Rathore** [Civil Appeal No.10870/2018] decided on 11.12.2019, has 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%.

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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."

11. The Hon'ble Supreme Court in its judgment in the case of **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%."

12. The Hon'ble Supreme Court in its judgment 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/invalidating 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."

13. In the light of the above considerations, we conclude that since the disability of the applicant does not meet the eligibility criteria of being eligible for getting disability pension as the RSMB assessed the disability @ less than 20% (11-14%). the applicant is not entitled to the disability element and consequently not entitled to disability element of pension. Accordingly, both OA and MA stand dismissed on the ground of delay and merit.

14. No order as to costs.

15. Pending miscellaneous application(s), if any, stands closed.

Pronounced in open Court on this 6th day of January, 2025.

**(JUSTICE RAJENDRA MENON)
CHAIRPERSON**

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

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