

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOCHI

O.A.No.76 of 2011

THURSDAY, THE 15TH DAY OF DECEMBER, 2011/24TH AGRAHAYANA, 1933

CORAM:

HON'BLE MR. JUSTICE A.C.ARUMUGHAPERUMAL ADITYAN, MEMBER (J)
HON'BLE LT. GEN. THOMAS MATHEW, PVSM, AVSM, MEMBER (A)

EX ACP NAIK SREEKUMAR. K, AGED 46 YEARS
(ARMY No.15301156 'p') OF MADRAS ENGINEER
GROUP OF INDIAN ARMY, "PARVATIBHAVAN",
KODAVILAKAM, PARASSALA P.O.
THIRUVANANTHAPURAM, KERALA – 695 502.

APPLICANT

BY ADV. SRI.V.K.SATHYANATHAN.

VERSUS

1. UNION OF INDIA, REP. BY ITS SECRETARY,
MINISTRY OF DEFENCE,
SOUTH BLOCK, NEW DELHI.
2. THE ADDL. DIRECTOR GENERAL
PERSONNEL SERVICES - (PS-4)
ADJUTANT GENERAL'S BRANCH,
INTEGRATED HEAD QUARTERS OF MINISTRY OF DEFENCE
(ARMY),
DHQ P.O., NEW DELHI – 110 001.
3. THE DIRECTOR GENERAL OF ARMED FORCES
MEDICAL SERVICES (ARMY),
OFFICE OF THE DIRECTOR GENERAL OF MEDICAL
SERVICES (ARMY), INTEGRATED HEAD QUARTERS (ARMY), NEW
DELHI.
4. THE SENIOR RECORD OFFICER
RECORDS THE MADRAS ENGINEER GROUP
POST BAG No.1, WELLINGTYON (NILGIRIS)
T.N. - 643 231.
5. PRINCIPAL CONTROLLER OF DEFENCE ACCOUNTS (pENSIONS),
OFFICE OF THE PCDA (p),
DRAUPADI GHAT,
ALLAHABAD, U.P.

RESPONDENTS

BY ADV. SRI.P.J.PHILIP, CENTRAL GOVT. COUNSEL

ORDER

A.C.A. Adityan, Member (J)

This application is for grant of disability pension.

2. The averments in the application, in brief, sans irrelevant particulars, are as follows:-

The applicant had enrolled in the Indian Army on 14/2/1986 and after serving for more than 20 years he was invalided out of service on 1/3/2006. The opinion of the Medical Board is to the effect that the disease under which the applicant was suffering is neither attributable to nor aggravated by military service. On that score he was also not considered for promotion. During 1992 while on leave he suffered severe stomach pain and had reported to Military Hospital, Thiruvananthapuram, which in turn, had referred him to INHS Sanjivani at Kochi, where he underwent an operation for "Prolapsed Rectum" and was placed to Low Medical Category. Later, he was upgraded. While he was posted at 811 ONGC, Baroda he suffered a massive heart attack while on duty and was admitted in Military Hospital at Baroda, from where he was transferred to Baroda Medical College Hospital and subsequently to Ahammedabad Medical College Hospital. Further he was transferred to INHS Asvini, Bombay. After his condition was improved and he recovered from the illness he

was sent on sick leave from INHS Asvini and after his sick leave he was referred to Military Hospital (CTC), Pune where he underwent a coronary angiogram. During 2002 while he was on leave, the applicant suffered massive stomach pain and again admitted in Thiruvananthapuram Medical College Hospital where he underwent a major surgery "Exploratory Laparotomy + Right Hemicolectomy" for "Caecal Perforation and peritonitis". Annexure A-2 is the opinion of the classified specialist given at INHS Asvini. One Dr.Jagannayakulu, Surgeon Commander has opined that the disability of the heart disease is aggravated by the service conditions. The applicant was invalidated out of service with effect from 1/3/2006. Before invalidment the applicant was subjected to Invalid/Release Medical Board at INHS Asvini during June 2005. The applicant has applied for disability pension, but the same was rejected by the 4th respondent on the ground that the disability is neither attributable to nor aggravated by military service, vide letter No.15301156/Pen(D)/60 dated 26-6-2007. The applicant had preferred the first appeal dated 30/7/2007 before the Appellate Committee. But the first Appellate Committee has also rejected the claim of the applicant for disability pension vide letter No.1531156/Pen(D)/53 dated 18/5/2010 along with IHQ MoD (Army) letter No.B/40502/8730/07/AG/PS-4 (IMP-II) dated 10/3/2008 (Annexure A-6 and A-7 respectively). Aggrieved by the rejection of the disability pension by ACFA applicant had preferred an appeal dated 25/9/2010 which was forwarded to the Hon'ble Defence

Minister's Appellate Committee vide letter dated 25/9/2010 (Annexure A-8). Even after the expiry of 6 months there was no reply from the Defence Minister's Appellate Committee. The copy of AFMSF - 16 was not furnished to the applicant, but he got the same under the provisions of Right to Information Act, 2005, from where the applicant could infer that the Medical Board has opined that the disease he suffered is neither attributable to nor aggravated by the service conditions. Hence the application for disability pension challenging the impugned orders under Exts.A3 and A7.

3. The respondents in the common reply statement would admit that the applicant was enrolled in the Army on 14 February 1986 and was discharged on medical ground with effect from 1/3/2006 under Rule 13 (3) item III (i) of Army Rule 1954 and he was granted service pension from 1/3/2006 vide Pension Payment Order No.S/049782/2005 (Annexure - R2). According to the respondents, the applicant being in Low Medical Category was brought before the duly constituted Release Medical Board on 4/7/2005 at Military Hospital, Baroda which had recommended the applicant to be released from service in medical category S1H1A1P3E1 (Permanent) with composite assessment of 60% disability for life due to diagnosis: (i) "Coronary artery disease" (ii) "Dyslipidemia" (iii) "Caecae Perforation (OPTD) acute Small Gut Volvulus (OPTD)". The Medical Board which physically examined the

applicant had opined that the disability of the applicant is neither attributable to nor aggravated by military service and not connected with service, but the same is constitutional in nature (AFMSF 16 Annexure-R3). The applicant was appointed as Paid Acting Lance Naik with effect from 5th July 1994. He was not entitled to get promotion in the Army. Against the opinion of the Medical Board the applicant had preferred first appeal before the Appellate Committee and thereafter second appeal before the Defence Minister's Appellate Committee on Pension. The first appeal was dismissed. The second appeal is pending. As per Rule 173 of Pension Regulations for the Army Part-I (1961) since the opinion of the Medical Board in respect of the disability under which the applicant is suffering is neither attributable to nor aggravated by military service the applicant is not entitled for disability pension. The respondents would state that the second appeal dated 25th September 2010 preferred by the applicant against the rejection of disability pension claim is now under active consideration of the competent authority, i.e., Government of India, Ministry of Defence, New Delhi. Therefore, the Original Application filed by the applicant is premature and on that ground also the application is liable to be dismissed.

4. We heard the learned counsel appearing for the applicant as well as the learned Central Government Counsel, Sri.P.J.Philip and Major Varun Arora, learned JAG Officer for the respondents,

considered the respective submissions and went through the relevant documents like AFMSF -15 and AFMSF-16.

5. The points for consideration are:

- 1) Whether the applicant has approached this Tribunal without exhausting the statutory remedy available to him and on that ground the application is liable to be dismissed as per S.21 of the Armed Forces Tribunal Act, 2007?
- 2) Whether the applicant is entitled to the grant of disability pension?

6. Point No.1:- It is the admitted case of the applicant that the second appeal preferred by the applicant before the 1st respondent is pending from September 2010 and that this application is filed on 18/7/2011, i.e., after an expiry of 6 months from the date of filing of the second appeal before the 1st respondent. So, as per S.21(2)(b) of the Armed Forces Tribunal Act, 2007 it cannot be contended that the application is premature and is hit by S.21 of the Armed Forces Act, 2007. Point No.1 is answered accordingly.

7. Point No.2:- We went through the original of AFMSF-15 and AFMSF-16, wherein the opinion of the expert who had physically examined the applicant is as follows:-

“Disability 30 (thirty) percent. Not attributable but aggravated by service.”

At part 5 of AFMSF-16 in the opinion of the Medical Board, there is a correction seen in the column “Aggravated by service” and also in the reason given for the disease “coronary artery disease” whitener has been used. The reason was also over written with. In AFMSF-15 dated 31/7/2002 at Military Hospital, Trivandrum the opinion of the Board finds a place in Part (ii) of the said document, wherein the opinion of the Board is as follows:-

“1. Was the disability contracted in service? - “Yes”.

At column No.3 for the query, “Is it directly attributable to condition of service? - The opinion of the Board is “Yes”. At column 4 for the query, “If so, by what specific conditions? - The opinion given by the Board of Doctors is that “Infection Contracted in Service”.

8. When the expert Doctor in AFMSF-16 has opined that the disability in medical parlance is assessed as 30% and not attributable, but aggravated by service, why the Board while forming their opinion as to the attributability and aggravatedness of the disease have taken a different view and endorsed that the disease is not attributable to nor aggravated by service is not explained. There is absolutely no reasoning given in the opinion of the Medical Board (AFMSF-16) for having taken a different opinion to that of the opinion given by the Medical Expert, Dr.H.Jagannayakulu, Surgeon Commander, Classified

Specialist of the Medicine and Cardiology. So, under such circumstances, we are of the opinion that the opinion of the Medical Board (AFMSF-16) cannot be accepted in toto and that the applicant is to be examined once again by the Review Medical Board. Point No.2 is answered accordingly.

In fine, the impugned orders, Annexure-3 and Annexure-7 are set aside and the respondents are directed to constitute a Review Medical Board at INHS Sanjivani at Kochi within 3 months and to examine the applicant afresh and to give its opinion, taking into consideration the opinion of the Classified Specialist as found in AFMSF-15 and AFMSF-16 referred to above. No costs.

Sd/-
LT.GEN.THOMAS MATHEW
MEMBER (A)

Sd/-
JUSTICE A.C.A.ADITYAN
MEMBER (J)

mds/

(True copy)

Private Secretary