

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOCHI

T.A.NO.149 OF 2010

[W.P.(C) No24796 of 2009 of the Hon'ble High Court of Kerala at Ernakulam]

FRIDAY, THE 16TH DAY OF DECEMBER, 2011/25th AGRAHAYANA, 1933

CORAM:

HON'BLE MR. JUSTICE A.C.ARUMUGAPERUMAL ADITYAN, MEMBER (J)

HON'BLE LT.GEN.THOMAS MATHEW, PVSM, AVSM, MEMBER (A)

A. SALAHUDDIN, AGED 54 YEARS,
S/O. ABDUL KHADER, SIGNALMAN,
SIGNAL RECORDS (BOARDED OUT),
'EDAVILAKATHU VEEDU', IRINCHAYAM P.O.,
THIRUVANANTHAPURAM.

APPLICANT/PETITIONER:

BY ADV. SRI. B. HARISH KUMAR

versus

1. UNION OF INDIA, REPRESENTED BY ITS
SECRETARY (DEFENCE), NEW DELHI.
2. DEFENCE SECRETARY,
CENTRAL SECRETARIAT, NEW DELHI.
3. THE OFFICER IN CHARGE,
RECORDS – SIGNALS, C/O.56 APO,
JABALPUR, MADHYA PRADESH.
4. DIRECTOR GENERAL,
CONTROLLER OF DEFENCE ACCOUNTS, (PENSIONS),
ALLAHABAD, U.P.

RESPONDENTS/RESPONDENTS:

R1 TO R4 BY SR. PANEL COUNSEL SRI. S. KRISHNAMOORTHY

ORDER

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

The applicant after exhausting his statutory remedies has approached the Honourable High Court of Kerala at Ernakulam by way of filing W.P.(C)

No.24796 of 2009, and after the constitution of this Tribunal the same was transferred to this Tribunal as per Section 34 of the Armed Forces Tribunal Act, 2007 and assigned the number, T.A. No.149 of 2010.

2. The short facts of the case of the applicant is that, he had commenced his service as Signalmán under the first respondent on 31st March, 1974. While working at 683 Signal Company, Bekaneer in 1977, the applicant contacted some ailment in his left eye. The said disease was caused to the applicant while he was in the service of the Army and at that time, the applicant was discharging duties as Signalmán. In April 1977, the applicant was deputed to military exercise to Pokran in Rajasthan. The applicant was working in that station till July 1977, where he had developed severe pain in his left eye and right ear. The applicant was admitted to Military Hospital, New Delhi but the military doctors could not diagnose the cause of pain. Subsequently he was admitted to All India Medical Institute, New Delhi with effect from 10.7.1977 to 20.7.1977. They found that said ailment was contacted due to severe radiation, but the same was kept as a secret from the applicant. The applicant was again admitted in Military Hospital, Bekaneer on 5.6.1978 and transferred to Military Hospital, Delhi Cantonment on 16.6.1978 and was treated upto 21.7.1978 for the disease, "Defective Vision (EYS)". The applicant was discharged from the Hospital without curing the disease and the respondent authorities compelled him to

work and the same has aggravated the disease. Due to extreme pain and aggravated disease, the applicant was readmitted to Military Hospital, Jodhpur on 20.10.1978 and transferred to Military Hospital, Ahamedabad on 23.10.1978. The hospital authorities have not given proper treatment for defective vision of eyes. During the course of treatment in Military Hospital, Ahamedabad, the hospital authorities declared the applicant as a case of "Neurosis-300". Subsequently, the applicant was recommended to be invalided out of service in Category EEE by the Invaliding Medical Board. The applicant was boarded out of Army service on 18.4.19798 under Army Rule 13(3)(III)(iii). Aggrieved by the denial of disability pension attributable to military service, the applicant submitted an application before the first respondent. But, without conducting any enquiry or even giving him a hearing, the claim was rejected as per order dated 10.12.1979. Aggrieved by the rejection of his claim, the applicant filed an appeal before the fourth respondent on 13.12.1980 and the same was rejected as per order dated 17.2.1984, The applicant again filed a second appeal against the order dated 17.2.1984, which was also dismissed by order dated 22.2.2000. Aggrieved by the orders dated 10.12.1979, 17.2.1984 and 22.2.2000, the applicant filed O.P.No.31055 of 2000 before the Honourable High Court of Kerala, which was disposed of by the Honourable High Court on 17.6.2003 vide Ext.P1 order, after quashing the orders dated

10.12.1979, 17.2.1984 and 22.2.2000 and directing the third respondent to reconsider the matter afresh after affording an opportunity of being heard to the applicant and ordered that competent authority shall cause the examination of the applicant by a fresh medical board. In pursuance of Ext.P1 order, the applicant was admitted in Military Hospital on 27.10.2003 for Re-Survey Medical Board. The respondents without adhering to the instructions given by the Honourable High Court in O.P.No.31055 of 2000 dated 17.6.2003, directed the applicant to be present before the 2nd respondent with all supporting documents. The applicant was present as directed on 23.12.2003, but the respondent officers held that there is no necessity for conducting re-assessment of the disability by a fresh medical board. In the meantime, the third respondent issued a proceedings dated 31.12.2003 (Ext.P2) stating that the disability of the applicant has been assessed as "nil" for life and also stated that if the applicant is not satisfied with the above decision, he may prefer an appeal before the competent authority. The respondent officers again issued a proceedings dated 7.6.2004 (Ext.P3) stating that the competent authority has reconsidered the matter regarding the grant of disability pension and has decided that Neurosis of the applicant was aggravated by military service with the degree of disablement of 20% for life with effect from April 1979. Aggrieved by Exts.P2 and P3, and for a direction commanding the respondents to

re-assess the disability of the applicant on the basis of his present physical condition, the applicant moved another Writ Petition before the Honourable High Court by way of W.P.(C) No.4022 of 2005, but the said Writ Petition was dismissed on 16.6.2006 for the reason that applicant has failed to produce any orders before the court to support his claim that disability as on date has to be ascertained for grant of disability pension. Normally, the disability as on the date of discharge is relevant for deciding the disability pension. Ext.P4 is the judgment dated 16.6.2006 passed in W.P.(C) No.4022 of 2005. Aggrieved by the judgment dated 16.6.2006, the applicant preferred Review Petition No.649 of 2009 before the High Court, but the same was also dismissed. The respondents filed a statement in the Review Petition stating that in the Re-survey Medical Board held at Trivandrum on 5.11.2003 the disability of the applicant was assessed as "Nil", but taking into consideration a compassionate view, the applicant was granted disability pension based on the earlier assessment of disability of 20%, pursuant to the judgment of the Honourable High Court of Kerala in O.P.No.31055 of 2000 dated 17.6.2003 (Ext.P3). The 20% disability mentioned in Ext.P3 does not reflect the present state of disability of the applicant. The present disability percentage is nil. The Review Petition was also dismissed on 18.6.2005 (Ext.P5). Aggrieved by the orders under Exts.P4 and P5, the applicant preferred Writ Appeal No.2767 of 2007 before

the Honourable High Court. The said Writ Appeal was disposed of on 1.1.2009 directing the respondents to conduct a fresh medical board for the examination and assessment of the present physical condition of the applicant (Ext.P6). On 27.4.2009, the applicant was examined by a Medical Board consisting of specialists doctors in Psychiatry/Psychology, ENT, Eye, Skin, Medical and Surgical. The applicant was subjected to RMB on 12.5.2009 and the opinion of the specialist doctors was that the applicant is having maximum disability, but shockingly the applicant received an order dated 27.7.2009 stating that Medical Board has now recommended 20% disability pension and there is no need to issue fresh pension payment order (Ext.P7). Aggrieved by the said order under Ext.P7, the applicant has preferred this application.

3. The respondents in their joint counter, would contend that as per Ext.P2 judgment, the order dated 10th December 1979 rejecting the applicant's claim for disability pension was quashed alongwith the orders of the appellate authorities dated 17th February 1984 and 22nd February 2000 and there was a direction in the said judgment to reconsider the claim for disability pension of the applicant after giving a chance of personal hearing and there was a further direction that competent authority shall if necessary cause the examination of the applicant by a fresh medical board.

Pursuant to the said direction a Re-Survey Medical Board was conducted in Military Hospital, Trivandrum on 7.11.2003, wherein his disability was assessed at Nil and therefore, the applicant is not entitled for grant of disability pension as per Reg.173 of the Pension Regulations for the Army, 1961, Part I. The applicant was informed of the above order with an advise to prefer appeal if not satisfied with the same. It is seen from Ext.P3 order that the disability of the applicant namely "I.D. Neurosis" is aggravated by military service with degree of disablement at 20% with effect from 19.4.1979. The averment that the applicant was admitted in Army Hospital, Delhi Cantt from 5.6.1978 to 28,7.1978 is not true. He was admitted in Military Hospital, Bikaner on 5.6.1978 and transferred to Army Hospital Delhi Cantt on 16.6.1978 and was treated upto 21.7.1978 for the disease Defective Vision (Eys). The applicant was readmitted in Military Hospital, Jabalpur on 20.10.1978 and transferred to Military Hospital, Ahmedabad on 23.10.1978. During the course of treatment at Military Hospital, Ahmedabad, he was declared to be a case of 'Neurosis" and even after regular treatment, his response to treatment was not satisfactory, and therefore, recommended to be invalided out of service in category "EEE" by the Invaliding Medical Board. The applicant was invalided out of service with effect from 19.4.1979 under Army Rule 13(3)(III) (iii) having been placed in medical category "EEE" for the disease "Neurosis". It is an

admitted position that disability pension was sanctioned by the Government of India holding that his disability was aggravated by military service at 20%. The applicant is not entitled for service pension as he had not earned 15 years of service which is mandatory as per Reg.132 of the Pension Regulations for the Army, 1961, Part I. Once the Ministry of Defence has sanctioned the disability pension at 60%, then order Ext.P2 dated 31.12.2003 would be automatically ceased to be in force. The applicant is drawing disability pension which he accepted vide his application dated 29th December, 2004, in which he demanded disability certificate from Signal Records through Zila Sainik Board. The applicant was sanctioned 20% disability pension for life by the Ministry of Defence by Ext.P3 order dated 7.6.2004. Exts.P2 and P3 orders were issued after considering Ext.P1 judgment. There is no direction in Ext.P1 judgment that the applicant should be examined by a fresh medical board. The applicant was granted disability pension as per Ext.P3 order. Hence, the application is liable to be dismissed.

4. The applicant filed a reply affidavit controverting the plea raised by the respondents in the counter.

5. We heard the learned counsel appearing for the applicant,

Sri.Harishkumar and the learned Senior Panel Counsel Sri.S.Krishnamoorthy and also the learned JAG Officer, Major Varun Arora for the respondents and considered their respective submissions.

5A. Now the point for determination in this case is whether Ext.P7 is liable to be set aside for the reasons stated in the affidavit to the petition?

6. **The point:-** The applicant had a chequered history for his claim for disability pension before the Honourable High Court of Kerala for more than one occasion. As per the directions given by the High Court of Kerala, a Re-Survey Medical Board was conducted for the applicant as seen from the exhibits referred to above and the disability was also assessed by the Medical Board at 20% for life. Even under Ext.P7 it is seen that the applicant was physically examined but according to the respondents on compassionate grounds assessed the disease "Neurosis 300", under which the applicant was suffering at 20% for life. There is no dispute with regard to the fact that applicant is receiving disability pension at 20% on the basis of the medical board's assessment. Now the grievance of the applicant is that assessment of the Medical Board that the applicant is having only 20% disability of the disease Neurosis 300 is not correct. To substantiate that the assessment made by the Medical Board under Ext.P7 is not correct, the applicant has not produced any documents. But, on the

other hand, one relevant point to be considered in favour of the applicant is that while issuing Ext.P7 order, the respondents have failed to note the existing Government Order, No.1(2)/97/D/Pen(C), Government of India, Ministry of Defence, New Delhi dated 31st January, 2001, in which under paragraph 7.2 it is stated that disability percentage below 50% is to be reckoned as 50% in the following terms.

“7.2 Where an Armed Forces Personnel is invalided out under circumstances mentioned in para 4.1 above, the extend of disability or functional incapacity shall be determined in the following manner for the purpose of computing the disability element:

<u>Percentage of disability as assessed by the Invaliding Medical Board</u>	<u>Percentage to be reckoned for computing of disability element</u>
Less than 50	50
Between 50 – 75	75
Between 75 – 100	100”

Paragraph 4.1 of the said Government letter deals with pensionary benefits on death/disability in attributable/aggravated cases. The applicant comes under Category B to paragraph 4.1, which reads as follows:

“Category B. Death of disability due to causes which are accepted as attributable to or aggravated by military service as determined by the competent medical authorities. The disease contracted because of continued exposure to a hostile work environment, subject to extreme weather conditions or occupational hazards resulting in death or disability would be examples.”.

So, as per paragraph 7.2 to the Government letter referred to above, the percentage of disability in the case of the applicant which is 20% is to be enhanced/reckoned as 50% and accordingly, the applicant is entitled to disability pension reckoning the percentage of disability as 50%.

6A. With regard to the implementation of the said Government order, there is a judgment of the Supreme Court in ***K.J.S.Buttar vs. Union of India***, C.A. No.5591 of 2006, decided on 31st March, 2011. The judgment is based on the ratio decidendi of the Supreme Court in ***Union of India and Anr v. C.S.Sidhu***, (2010) 4 SCC 563, ***Union of India and Anr v. Deoki Nandan Aggarwal***, 1992 Suppl (1) SCC 323, ***State of Punjab v. Justice S.S.Dewan*** (1997) 4 SCC 569 and ***Union of India and Anr. v. S.P.S.Vains (Retd) and Ors.*** (2008) 9 SCC 125. The relevant passages in ***D.S.Nakara's*** case has also been referred to in the said judgment. The Apex Court has stated as follows:

"28. In our view, it would be arbitrary to allow such a situation to continue since the same also offends the provisions of Article 14 of the Constitution.

29. The question regarding creation of different classes within the same cadre on the basis of the doctrine of intelligible differentia having nexus with the object to be achieved, has fallen for consideration at various intervals for the High Courts as well as this Court, over the years. The said question was taken up by a Constitution Bench in ***D.S. Nakara*** where in no uncertain terms throughout the judgment it has been repeatedly observed that the date of retirement of an employee cannot form a valid criterion for classification, for if that is the

criterion those who retired by the end of the month will form a class by themselves. In the context of that case, which is similar to that of the instant case, it was held that Article 14 of the Constitution had been wholly violated, inasmuch as, the Pension Rules being statutory in character, the amended Rules, specifying a cut-off date resulted in differential and discriminatory treatment of equals in the matter of commutation of pension. It was further observed that it would have a traumatic effect on those who retired just before that date. The division which classified pensioners into two classes was held to be artificial and arbitrary and not based on any rational principle and whatever principle, if there was any, had not only no nexus to the objects sought to be achieved by amending the Pension Rules, but was counterproductive and ran counter to the very object of the pension scheme. It was ultimately held that the classification did not satisfy the test of Article 14 of the Constitution.

30. However, before we give such directions we must also observe that the submissions advanced on behalf of the Union of India cannot be accepted in view of the decision in *D.S. Nakara case*. The object sought to be achieved was not to create a class within a class, but to ensure that the benefits of pension were made available to all persons of the same class equally. To hold otherwise would cause violence to the provisions of Article 14 of the Constitution. It could not also have been the intention of the authorities to equate the pension payable to officers of two different ranks by resorting to the step-up principle envisaged in the fundamental rules in a manner where the other officers belonging to the same cadre would be receiving a higher pension.”

7. Under such circumstances we are of the opinion that even though Ext.P7 which is under challenge in this petition need not be set aside, the applicant is entitled to disability pension in accordance with G.O. NO.1(2)/97/D(Pen-C) dated 31st January 2001 referred to above. The point

is answered accordingly.

8. In fine, the case is disposed of in the following terms. The disability percentage for the applicant shall be reckoned as 50% instead of 20% and the applicant will be entitled to arrears with effect from 1.1.1996 with 9% interest per annum. For compliance, four months. No costs.

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

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

DK.

(True copy)

Prl. Private Secretary

ARMED FORCES TRIBUNAL,
REGIONAL BENCH, KOCHI.

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[WP(C) No.24796 of 2009 of the
High Court of Kerala at Ernakulam]

ORDER

DATED: 16.12.2011