

AFR
Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 320 of 2019

Monday, this the 18th day of January, 2021

“Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon’ble Vice Admiral Abhay Raghunath Karve, Member (A)”

Sgt Rohitash Kumar Sharma (Retd), S/o Late Shri BLN Sharma,
S-2, Shraddha Green, Pushpanjali Upvan (NH-2) Mathura –
281004.

..... Applicant

In Person : **Sgt Rohitash Kumar Sharma (Retd)**

Versus

1. Union of India, through the Secretary, Ministry of Defence, DHQ PO, New Delhi-110011.
2. The Chief of the Air Staff, Through Air Officer Personnel Integrated HQ of Ministry of Defence (Air Force) DHQ PO, New Delhi -110011.
3. The Director Air Veterans, Air Head Quarter, Subroto Park, New Delhi, Delhi-110010.
4. Principal Controller of Defence Accounts (Pension) Draupadi Ghat, Allahabad – 211014.

.....**Respondents**

Ld. Counsel for the Respondents. : **Shri Kaushik Chatterji,**
Central Govt. Counsel

ORDER

“Per Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)”

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs.

- (a) *Call for the records including the RMB proceedings as well as the findings and opinion as approved by the competent authority based on which the respondents in most illegal manner rejected the claim of the applicant in respect of disability of Obstructive Sleep Apnoea and has also rejected the Appeal filed against denial of disability pension vide their order dated 27.09.2016, 19.01.2018 received in Feb 2018 and thereafter quash all such orders.*
- (b) *Direct the respondents to process the claim of the applicant in respect of disability of Obstructive Sleep Apnea w.e.f. 01.12.2015 along with arrears with an interest @ 18% as expeditiously as possible.*
- (c) *Further, direct the respondents to extend the benefit broad banding in respect of applicant’s disability of assessed at 15-19% to make it 20% and further round it off to 50% along with the arrears of the disability pension with interest @ 12% pa to be compounded quarterly with exemplary cost from the date of retirement till date of payment.*
- (d) *Issue such other order/ direction as may be deemed appropriate in the facts and circumstances of the case.*

2. Briefly stated facts of the case are that applicant was enrolled in the Indian Air Force on 14.11.1995 and was discharged on 30.11.2015 (AN) in Low Medical Category A4G3 (Permanent) on fulfilling the conditions of his enrolment. At the time of retirement from service, the Release Medical Board (RMB) held at 151 Base Hospital, Guwahati, on 27.04.2015 assessed his disability '**SEVERE OBSTRUCTIVE SLEEP APNOEA (OLD)**' @ 15-19% for life and opined the disability to be neither attributable to nor aggravated (NANA) by service. The applicant approached the respondents for grant of disability pension but the same was rejected vide letter dated 08.07.2015. The applicant preferred First and Second Appeal which too were rejected vide letters dated 27.09.2016 and 19.01.2018 respectively. It is in this perspective that the applicant has preferred the present Original Application.

3. Applicant pleaded that at the time of enrolment, he was found mentally and physically fit for service in the Air Force and there is no note in the service documents that he was suffering from any disease at the time of enrolment in Indian Air Force. He was enrolled as Radio Fitter (Electronics & Telecommunication) trade and he was working in advance defence ground environmental system which deals with Radar and Radio equipments and such units are usually at High Altitudes or at remote places and soldiers have to work in shift duties, thus environmental condition leads to stress and strain which has affected his health badly. He submitted

that during his 20 years of service, he has served in various field/ High Altitude and counter insurgency areas of J&K, Sikkim and Assam. After training, in the year Dec 1998, he was posted at High Altitude Area i.e. Dalhousie (H.P.) located above 10,000 feet and to protect from cold large heating blowers were used. Due to high altitude there is lack of oxygen and due to use of blowers there is lack of moisture content which resulted in breathing problems. In May 2001, he was posted at Air Force Station Bhuj during earthquake on 26.01.2001 where he stayed for one year in tent as buildings were badly damaged in earthquake. On October 2006, he was posted at Air Force Station Srinagar a field area and was operated for DNS (LT). Just after operation his ward mates complained of snoring during sleeping at night due to which he was not able to sleep with other occupants. The applicant also faced problems in breathing whereupon he was allotted separate accommodation at 19 Wing, Air Force. In the last phase of his three years tenure, he started having breathing problems at High Altitude due to Nasal Blockage. He further submitted that claim for the grant of disability pension was wrongly rejected on the ground of disability percentage being less than 20% and NANA. The applicant contracted the ailment during service, hence it is attributable to and aggravated by Military Service. He pleaded that various Benches of Armed Forces Tribunal have granted disability pension in similar cases, as such the applicant be granted disability pension as well as arrears thereof, and the applicant is therefore

entitled to disability pension and its rounding off to 50%. He relied upon the judgments of Armed Forces Tribunal, Principal Bench, New Delhi, in the cases of **O.A. No 47 of 2017, Lt Gen Sandeep Singh (Retd) vs. Union of India and others**, decided on 18.04.2017 and **O.A. No 1706 of 2018, Sqn Ldr VK Thakur (Retd) vs. Union of India and others**, decided on 10.05.2019. He also relied upon the judgment of the Hon'ble Apex Court in the case of **Sukhvinder Singh vs Union of India & Ors**, Civil Appeal No. 5604 of 2010, decided on 25.06.2014 and pleaded that he is entitled to grant of disability pension and its rounding off.

4. Rebutting arguments of the applicant, Ld. Counsel for the respondents submitted that the disability pension claim of the applicant was rightly rejected because Release Medical Board has assessed the degree of disablement between 15 -19% which is less than the minimum requirement of 20% for the grant of disability pension and held the same as neither attributable nor aggravated by Air Force service, therefore, the disability pension is inadmissible to the applicant. He argued that onset of ID was first diagnosed in January 2008 while individual was serving at Srinagar (Field). He pleaded that '**SEVERE OBSTRUCTIVE SLEEP APNOEA (OLD)**' is a disability which is constitutional in nature and obesity is a frequent contributor to this condition. On perusal of Annual Medical Examination for the year 2006 and 2007, it has been found that individual was overweight and at the time of RMB,

was overweight with a BMI of 27.58 hence his disability was assessed as neither attributable to nor aggravated by air force service. However service element of pension has been granted to the applicant.

5. We have heard the applicant Sgt Rohitash Kumar Sharma (Retd) in person and Shri Kaushik Chatterji, Ld. Counsel for the respondents and perused the record. The questions which needs to be answered are of three folds:-

- (a) Whether the applicant is entitled to disability pension despite disability being less than 20% and he being discharged on completion of terms of engagement?
- (b) Whether the disability of the applicant is attributable to or aggravated by Military Service?
- (c) Whether the applicant is entitled for the benefit of rounding off the disability pension?

6. In so far as disability which is shown to be assessed as less than 20% is concerned, various Tribunals and Courts have found that the assessment of disability to the tune of 15-19% itself is a doubtful assessment and cannot be final for the simple reason that there is no barometer which can assess the disability percentage to the extent of 1% and therefore, the percentage of disability which has been assessed as 15-19% may be 20% also and there may be variation of at least two percent plus also. In case of doubt as per

the Pension Regulations, the benefit should always be given to the applicant. Probably because of this reason the Union of India must have issued the order dated 31.01.2001 to provide for giving the benefit of rounding off the disability pension to 50% to the persons who are having less than 50% of the disability.

7. We have observed that in Medical Board in the same disease in the case of **Lt Gen Sandeep Singh (Retd)** (supra) has assessed the disability as 20% whereas in the case of applicant it has been assessed as 15-19%. There could not be different yard sticks while assessing percentage of disability in the same disease.

8. Hon'ble Principal Bench in the case of **Sqn Ldr VK Thakur (Retd)**, (supra) in similar matter has considered disability of 15-19% as 20% and rounded off to 50%. Moreover, the law is settled that even if it is less than 20%, it would stand rounded off to 50% (in cases after their superannuation). The case in point relied upon by the Applicant is **Sukhvinder Singh Vs. Union of India**, reported in (2014) STPL (WEB) 468 SC. In para 9 of the judgment Hon'ble Apex Court has held as under:-

"9. We are of the persuasion, therefore, that firstly, any disability not recorded at the time of recruitment must be presumed to have been caused subsequently and unless proved to the contrary to be a consequence of military service. The benefit of doubt is rightly extended in favour of the member of the Armed Forces; any other conclusion would be tantamount to granting a premium to the Recruitment Medical Board for their own negligence. Secondly, the morale of the Armed Forces requires absolute and undiluted protection and if an injury leads to loss of service without any recompense, this morale would be severely undermined....."

9. The law on attributability of a disability has already been settled by the Hon'ble Supreme Court in the case of ***Dharamvir Singh Versus Union of India & Others***, reported in (2013) 7 Supreme Court Cases 316. In this case the Apex Court took note of the provisions of the Pensions Regulations, Entitlement Rules and the General Rules of Guidance to Medical Officers to sum up the legal position emerging from the same in the following words.

"29.1. Disability pension to be granted to an individual who is invalided 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 to or aggravated by military service to be determined under the Entitlement Rules for Casualty Pensionary Awards, 1982 of Appendix II (Regulation 173).

29.2. 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 read with Rule 14(b)].

29.3. The 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).

29.4. 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)]. [pic]

29.5. 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 [Rule 14(b)].

29.6. 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 [Rule 14(b)]; and 29.7. It is mandatory for the Medical Board to follow the guidelines laid down in Chapter II of the Guide to Medical Officers (Military Pensions), 2002 - "Entitlement: General Principles", including Paras 7, 8 and 9 as referred to above (para 27)."

10. We find that the RMB has denied attributability to the applicant only by endorsing that the disability of the applicant **'SEVERE OBSTRUCTIVE SLEEP APNOEA (OLD)'** is neither attributable to nor aggravated (NANA) by service on the ground of disability not connected with military service, constitutional disorder, therefore, applicant is not entitled to disability pension. It is an undisputed fact that the applicant was enrolled in Indian Air Force on 14.11.1995 in fully fit condition after rigorous medical examination and the disability was detected for the first time in January 2008 after more than 12 years of Air Force service. The disability of the applicant must be presumed to have arisen in the course of service which must, in the absence of any reason recorded by the Medical Board, be presumed to have been attributable to or aggravated by service. There is neither any note in the service record of the applicant at the time of his entry in the

service nor has any reason been recorded by the Release Medical Board that the disease which the applicant was found to be suffering from, could not have been detected at the time of his entry into service hence this reasoning of Release Medical Board for denying disability pension to applicant is not convincing and doesn't reflect the complete truth on the matter. The initial presumption that the applicant was physically fit and free from any disease and in sound physical and mental condition at the time of entering into service thus remains unrebutted. Noise is one of the agent for aggravation for such type of disability. Hon'ble Apex Court in such cases has considered each and every issue like contacting disease in peace area and close time association with stress and strain and has rejected the reasons of NANA given by the Medical Board. The opinion that '**SEVERE OBSTRUCTIVE SLEEP APNOEA (OLD)**' is caused by obesity and included anatomical variations resulting in airway collapse and apnoea is an good opinion, but nowhere rules out that this may not occur due to conditions of service. We are therefore of the considered opinion that the benefit of doubt in these circumstances should be given to the applicant in view of *Dharamvir Singh vs Union of India & Ors* (supra) and the disability of the applicant should be considered as aggravated by military service.

11. The law on the point of rounding off of disability pension is no more RES INTEGRA in view of Hon'ble Supreme Court

judgment in the case of ***Union of India and Ors vs Ram Avtar & ors***, Civil appeal No 418 of 2012, decided on 10th December 2014. In this Judgment the Hon'ble Apex Court nodded in disapproval of the policy of the Government of India in granting the benefit of rounding off the disability pension only to the personnel who have been invalided out of service and denying the same to the personnel who have retired on attaining the age of superannuation or on completion of their tenure of engagement. The relevant portion of the decision is excerpted below:-

“4. By the present set of appeals, the appellant (s) raise the question, whether or not, an individual, who has retired on attaining the age of superannuation or on completion of his tenure of engagement, if found to be suffering from some disability which is attributable to or aggravated by the military service, is entitled to be granted the benefit of rounding off of disability pension. The appellant(s) herein would contend that, on the basis of Circular No 1(2)/97/D (Pen-C) issued by the Ministry of Defence, Government of India, dated 31.01.2001, the aforesaid benefit is made available only to an Armed Forces Personnel who is invalidated out of service, and not to any other category of Armed Forces Personnel mentioned hereinabove.

5. We have heard Learned Counsel for the parties to the lis.

6. We do not see any error in the impugned judgment (s) and order(s) and therefore, all the appeals which pertain to the concept of rounding off of the disability pension are dismissed, with no order as to costs.

7. The dismissal of these matters will be taken note of by the High Courts as well as by the Tribunals in granting

appropriate relief to the pensioners before them, if any, who are getting or are entitled to the disability pension.

8. *This Court grants six weeks' time from today to the appellant(s) to comply with the orders and directions passed by us."*

12. The applicant has relied upon judgment in the case of **Lt Gen Sandeep Singh (Retd)** (supra) wherein for the same disability, medical board has held the disability as 20%. The applicant has also relied upon judgment in the case of **Sqn Ldr VK Thakur (Retd)**, wherein Hon'ble Principal Bench, New Delhi has held that applicant was found to be suffering from Hypertension at the time of pre-mature retirement by the RMB, the disability must be presumed to have arised in the course of service which must in the absence of any reason recorded by the Medical Board, be presumed to have been attributable to or aggravated by military service. It has also been held that there is no such barometer to test the disability to the extent of correctness upto 1%. In a case when disability is assessed between 15-19%, it can be plus minus 2%. This is the reason, Union of India have issued the order dated 31.01.2001 to provide for giving the benefit of rounding off the disability pension to 50% to the persons who are having less than 50% of the disability. We find that reasons for rejection given by the respondents are no reasons in the eye of law.

13. In view of the above, the Original Application No. 320 of 2019 deserves to be allowed, hence **allowed**. The impugned orders

dated 27.09.2016 and 19.01.2018 rejecting claim for grant of disability element are set aside. The applicant is already in receipt of service element hence respondents are directed to grant disability element of the pension @ 15-19% to the applicant, which shall stand rounded off to 50% from the date of discharge. The entire exercise shall be completed by the respondents within four months from the date of production of a certified copy of this order, failing which the respondents shall be liable to pay interest at the rate of 9% to the applicant on the amount accrued till the date of actual payment.

14. No order as to costs.

(Vice Admiral Abhay Raghunath Karve) (Justice Umesh Chandra Srivastava)
Member (A) Member (J)

Dated : 18 January, 2021

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