

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOCHI

O.A No. 38 OF 2011

FRIDAY, THE 4TH DAY OF APRIL, 2014/14TH CHAITHRA, 1936

CORAM:

HON'BLE MR. JUSTICE SHRIKANT TRIPATHI, MEMBER (J)

HON'BLE VICE ADMIRAL M.P.MURALIDHARAN, AVSM & BAR, NM, MEMBER(A)

APPLICANT:-

**EX SPR.V.P.THANKACHAN,
AGED 61 YEARS, (ARMY NO.1354891),
L.T.BHAVAN, KULAKADA PO., KOTTARAKKARA,
KOLLAM – 691 521, KERALA.**

BY ADV. SRI. MILLU DANDAPANI.

versus

RESPONDENTS:

- 1. UNION OF INDIA, REPRESENTED BY
SECRETARY, MINISTRY OF DEFENCE,
NEW DELHI-11.**
- 2. CHIEF OF THE ARMY STAFF,
INTEGRATED HEADQUARTERS OF MOD (ARMY),
DHQ P.O., NEW DELHI-11.**
- 3. PCDA (P), ALLAHABAD,
DRAUPADI GARH,
ALLAHABAD, U.P. – 211 014.**
- 4. RECORD OFFICER, MEG RECORDS,
BANGALORE – 42.**

BY ADV.SRI. TOJAN J.VATHIKULAM, CENTRAL GOVT. COUNSEL.

ORDER

Shrikant Tripathi, Member (J):

1. Heard the counsel for the parties and perused the record.

2. The instant matter has been received on remand from the Hon'ble High Court of Kerala vide its order dated 15th January 2014 in O.P.(AFT)No.01 of 2014(Z).

3. As per the record, The applicant, Ex Sapper, V.P.Thankachan, No.1354891 claims disability pension with effect from the date of his discharge. He was enrolled in the Indian Army on 31st July 1971. During the service he developed a psychic problem, so he was examined by the Invaliding Medical Board which diagnosed that he was suffering from the disability Neurosis (Anxiety) and assessed the same at 40% for life. He was accordingly medically boarded out of the service on 7th of December 1980. As the applicant had rendered only 9 years and 98 days service, he was found ineligible for the service pension because the minimum requisite qualified service to earn service pension was 15 years at

that point of time. The applicant, however, set up a claim for the disability pension but the same was turned down by the respondents. We had earlier considered the case on merit and rendered the final order dated 11th December 2012 dismissing the O.A., mainly on the ground that the original service record as also the medical documents including the proceedings of the Medical Board were not available as the same had been weeded out, so in absence of such documents no relief could be granted to the applicant merely on the basis of long roll, which was maintained in the concerned record office. It was further found that the pension sanctioning authority as also the Appellate Authority declined to sanction disability pension to the applicant on the ground that the aforesaid disability was neither attributable to nor aggravated by the military service.

4. Keeping in view the submission of the learned counsel for the applicant it was made open to the applicant to make a request for constitution of a fresh Re-assessment Medical Board for assessing his condition. The Bench further directed that if any such request was made the same would be given due consideration in accordance with law. Against the order of this Bench, the applicant filed the aforesaid Original Petition before the Hon'ble High Court of Kerala at Ernakulam which disposed of the matter vide the order

dated 15th January 2014 with the direction to reconsider the matter in the light of certain documents searched out by the applicant after the final order rendered by this Bench. Accordingly, the applicant appeared and filed certain new documents vide M.A.No.115 of 2014. We considered today all those new documents thoroughly with the assistance of the Legal Officer of the respondents.

5. What is clear from the perusal of the aforesaid records is that the applicant was invalided out of service due to the aforesaid disability, which he sustained during the service. There is no material at all to show that the disability had occurred to him even prior to joining the Army service nor there was any adverse note to that effect in the official record prepared at the time of his enrollment. Therefore, the applicant's case was liable to be given due consideration according to the principles explained and settled by the Apex Court in the matter of **Veer Pal Singh v. Secretary, Ministry of Defence (2013) 8 SCC 83**). In that case, the Apex Court propounded the following principles:-

“10. Although, the courts are extremely loath to interfere with the opinion of the experts, there is nothing like exclusion of judicial review of the decision taken on the basis of such opinion. What needs to be emphasised

is that the opinion of the experts deserves respect and not worship and the courts and other judicial/quasi-judicial forums entrusted with the task of deciding the disputes relating to premature release/discharge from the army cannot, in each and every case, refuse to examine the record of the Medical Board for determining whether or not the conclusion reached by it is legally sustainable”.

6. Even in the matter of **Dharamvir Singh v. Union of India and others ((2013) 7 SCC 316)**, the Apex Court, inter alia, gave much stress on recording of reasons by the medical Board if the individual was medically fit at the time of his enrollment and no note of any disability or disease was made at the time of his acceptance for the Military service. The Apex Court further held that a disease or disability which led to an individual's discharge will be deemed to have arisen in service. The various guidelines laid down by the Apex Court have been summarised in paragraph 29 of the judgment, which may reproduced as follows:

“29. A conjoint reading of various provisions, reproduced above, makes it clear that:

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)].

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).".

7. The aforesaid decisions have thus settled the legal position with regard to the relevancy of the opinion of the Medical Board. The guidelines laid down in paragraph 29 of the decision of the Apex Court in **Dharamvir Singh** (supra) are required to be observed by the respondents while considering a case for the claim of disability pension. While doing so, the opinion of the Medical Board, no doubt, is required to be given due respect, but it should not be worshiped as held by the Apex Court in the matter of **Veer Pal Singh** (supra).

8. It is also significant to state that the applicant, after his discharge from the Army, moved a petition for grant of disability pension. The concerned record office forwarded the claim to the CDA(Pension), Allahabad vide letter No.Pen (D)/1354891/3/CDA (pensions) dated 28th January, 1981 (Annexure- A6) annexing therewith the relevant documents and other details. It appears that the CDA (P) raised certain queries vide letter No.G3/81/1254/IV dated 31st March 1981, which were replied by the Record Office in

the month of December 1981 vide letter No.Ben(D)/ 1354891/ CDA(pensions),(Annexure -A7) Para 2 to 5 of the letter being relevant are re-produced as follows:-

"2. The above named OR was invalided out of service wef 08 Dec 80 under the provisions of Army Head Quarters letter No.A/16097/AG/PS2(c) dated 01 Aug 79. The disability pension claim of the OR submitted to you earlier under this office letter No.Pen(D)/1354891/3 dated 28 Jan 81, was returned unactioned vide your letter under reference, for want of concurrence of Ministry of Finance (Defence).

3. It is now learnt from Army Head Quarters vide their letter No.A/16097/AG/PS2(c) dated 22 Oct/02 Nov 81 (a copy of which has also been endorsed to you, that their even letter No.dated 01 Aug 79, bears the concurrence of Ministry of Finance (Defence).

4. In view of the above, the disability pension claim of the OR is now re-submitted along with the following Service/Medical documents for early sanction of the disability pension claim.

- (a) AFMSF-16 (Invaliding Medical Board Proceedings) dated 08 Nov 80-1
- (b)AFMSF-2A (Primary Medical Board Examination Report) -1
- (c)AFMSF-15 (Medical Board Proceedings)-1
- (d)AFMSF-18 (Medical Examination Report)-1
- (e) AFMSF-01 (Report on cases proposed for invaliding)-1
- (f) IAFF -3013(Fd conduct Sheet)-1
- (g) IAFF-958 (Service and Casualty form)-1
- (h) Invalid Gratuity claim – 1
- (j) Dcr Gratuity Claim -1
- (k) LPC Bearing machine No.606706 dated 05 Dec 80 -1
- (l) IAFK-1162 (Enrolment Form)-1
- (m)IAFK-1155 (Sheet Roll) -1

5. The following medical documents in respect of the above named OR, relating to the treatment had at the undermentioned hospitals during his service are forwarded herewith as per details given below:-

<u>Name of hospital where underwent treatment together with period</u>	<u>Details of medical logs</u>	
At MH Dinapur from 28 May 77 to 07 Jun 77	AFMSF -11	-1
	AFMSF -7A	-2
	AFMSF -8B	-1

**At BH Delhi from 08 Jun 77
to 07 Jun 77**

**AFMSF -11 -1
AFMSF -7A -1
AFMSF -8B -1**

It is requested that Service Element of pension, as admissible be sanctioned to individual at an early date pending finalization of the disability pension claim. "

It is not clear as to what decision was taken ultimately on the aforesaid correspondences. It is true that the claim for the disability pension was denied vide Letter 3253/Gen(D)/93 dated 11 Dec 1010 (Annexure -A10). But that letter does not disclose any reason as to why the disability pension was not payable to the applicant.

9. The respondents have set up the case that the applicant had expressed his unwillingness to continue either in the same service or on any alternative employment, so he was discharged from the service and as such he was not entitled to the disability pension. But this statement does not appear to be correct in view of the fact that as per the certificate of service Annexure-11 the discharge was made on medical ground and not the ground of applicant's unwillingness. In our view, the disability pension could not be denied only on the ground that the applicant himself opted for his discharge or showed his unwillingness to any other employment. This proposition of law has been laid down by the Division Bench of Delhi High Court in the case of **Mahavir Singh Narwal vs. Union of India [2004 (74) DRJ 661]**.

10. In view of the fact that the applicant was medically fit at the time of his enrollment and no adverse note was recorded regarding the disability at that time and he suffered the disability during the service, so reasons were required to be recorded for declining the disability pension to the applicant. But no such reason was recorded.

11. In view of the fact that the Original documents are not available, it is very difficult for the respondents to give proper consideration to the applicant's request, so a fresh Re-assessment Medical Board is required to be convened to assess the disability of the applicant .

12. In view of the aforesaid, the Original Application is disposed of with the direction to the respondents to reconsider the applicant's case after getting him re-examined by a Re-assessment Medical Board to be convened by the appropriate authority of the respondent No.1 in accordance with the Rules, after giving due information well in advance to the applicant. The respondents are further directed to take appropriate decision and pass a reasoned order within four months from the date of receipt of a copy of this order and communicate the same to the applicant.

13. There will be no order as to costs.

14. Issue free copy of the order to both side

Sd/-
VICE ADMIRAL M.P. MURALIDHARAN,
MEMBER (A)

Sd/-
JUSTICE SHRIKANT TRIPATHI,
MEMBER (J)

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(True copy)