ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOCHI

O.A. NO. 91 OF 2017

FRIDAY, THE 25TH DAY OF AUGUST, 2017/3RD BHADRA, 1939

CORAM:

HON'BLE MR. JUSTICE BABU MATHEW P. JOSEPH, MEMBER (J)
HON'BLE VICE ADMIRAL M.P.MURALIDHARAN, AVSM & BAR, NM, MEMBER (A)

COL. VIJAYA KUMAR.B., NO. T.A. 42476N, VELAYUDHA MANDIRAM, MULLOOR P.O., VIZHINJAM, THIRUVANANTHAPURAM, KERALA – 695 521.

.... APPLICANT

BY ADV. SRI.V.K.SATHYANATHAN

Versus

- 1. UNION OF INDIA REPRESENTED BY ITS SECRETARY MINISTRY OF DEFENCE, SOUTH BLOCK, NEW DELHI.
- 2. THE CHIEF OF ARMY STAFF, COAS'S SECRETARIAT, INTEGRATED HEADQUARTERS OF MOD (ARMY), SOUTH BLOCK, NEW DELHI – 110 011.

.... RESPONDENTS

- 3. THE ADDITIONAL DIRECTOR GENERAL TA GS BRANCH, INTEGRATED HEADQUARTERS OF MOD (ARMY), L BLOCK, CHURCH ROAD, NEW DELHI – 110 001.
- 4. THE PRINCIPAL CONTROLLER OF DEFENCE ACCOUNTS (PENSIONS) OFFICE OF THE PCDA (P), DRAUPATI GHAT, ALLAHABAD, UTTARPRADESH 211 014.

BY ADV. SRI.C.B.SREEKUMAR, SENIOR PANEL COUNSEL

ORDER

VAdm M.P.MURALIDHARAN, MEMBER (A)

- 1. The Original Application has been filed by Colonel Vijaya Kumar B., No.TA 42476 N (Retd.), essentially seeking disability element of pension with the benefit of rounding off.
- 2. Sri.VK Sathyanathan, the learned counsel for the applicant, submitted that the applicant was enrolled in the Army on 28 September 1974 and was later granted Commission on 15 December 1984. The applicant's request for voluntary retirement, was approved with effect from 31 March 1999 and he was sanctioned service pension. Subsequently, the applicant was commissioned into the Territorial Army on 06 September 2000. The learned counsel submitted that at the time of joining the Territorial Army, the applicant was in medical category SHAPE1. The learned counsel further submitted that in

June 2001, the applicant developed the disability of Reflux Esophagitis Grade 'A' & Antral Gastritis. In August 2009, the applicant was detected with Primary Hypertension and in October 2009, he developed Osteoarthritis (both knees). The learned counsel further submitted that all the disabilities arose while the applicant was serving in field area in J & K.

3. The applicant superannuated from Territorial Army with effect from 31 May 2013. The Release Medical Board held at the time of superannuation, assessed him to have the disabilities of Primary Hypertension, aggravated by service at 30% for life, Reflux Esophagitis grade 'A' & Antral Gastritis, both attributable to service and assessed at 20% for life, and Osteoarthritis (both knees) aggravated by service at 20% for life with composite assessment of all his disabilities at 60% for life (Annexure A1). The learned counsel further submitted that despite the disabilities of the applicant being held as attributable to/aggravated by

military service, his claim for disability pension was rejected by the competent authority stating that the disabilities were neither attributable to, nor aggravated by military service (Annexure A2).

4. The learned counsel further submitted that the applicant thereafter, preferred a First Appeal to the respondents (Annexure A3). The First Appellate Committee considered the applicant's disabilities of Reflux Esophagitis grade 'A' & Antral Gastritis as attributable to service and the disability of Osteoarthritis (both knees) as aggravated by military service with the degree of disablement at 20% each with composite disability at 30% for life. The applicant was therefore granted disability element at 30% for life from the date of his retirement. However, the applicant's disability of Primary Hypertension was held as neither attributable to, nor aggravated by military service (Annexure A4).

- 5. The applicant therefore preferred a Second Appeal against rejection of disability element, for his disability of Primary Hypertension (Annexure A5). The Second Appellate Committee, however, rejected his appeal stating that the onset of disability was while the applicant was posted in a peace area and that the aggravation conceded by the Medical Board was not as per existing guidelines. The disability was held as neither attributable to, nor aggravated by military service in accordance with Para 43 of Guide to Medical Officers, 2002, Amendment 2008 (Annexure A6). The learned counsel contended that since the applicant was fully fit at the time of his being commissioned into the Territorial Army, any disability that arose subsequently, should be held as attributable to service in keeping with the Entitlement Rules for Casualty Pensionary Awards.
- 6. The learned counsel further contended that even though the applicant had been granted composite disability

at 30% for life for three of his other disabilities, the benefit of rounding off has been denied to him. The learned counsel contended that based on the principles enunciated by the Honourable Apex Court in Union of India & Others vs. Ram Avtar, Civil Appeal No. 418 of 2012 and connected cases, the applicant was entitled to the benefit of broadbanding. The learned counsel further submitted that this Tribunal had quashed Regulation 37 of Pension Regulations for the Army, 2008, which denies the benefit of broadbanding to those who had retired on The learned counsel therefore prayed superannuation. that the applicant's disability of Primary Hypertension be declared as aggravated by military service, as opined by the Release Medical Board and the applicant be sanctioned composite disability at 60% with the benefit of rounding off disability element to 75%.

7. The respondents in their reply statement submitted that, the applicant who sought premature

retirement from the Army subsequently, was commissioned into the Territorial Army on 06 September 2000 and superannuated from there on 31 May 2013. The respondents further submitted that the Release Medical Board, held at the time of superannuation of the applicant, had assessed him to have the disabilities of Primary Hypertension at 30% for life, Reflux Esophagitis grade 'A' & Antral Gastritis at 20% for life, and Osteoarthritis (both knees) at 20% for life with composite disability at 60% for life. The competent authority however rejected the claim of the applicant for disability pension as the disabilities were held as neither attributable to, nor aggravated by military service. Based on the appeal preferred by the First Appellate Committee considered applicant, the disabilities of Reflux Esophagitis grade 'A' & Antral Gastritis and Osteoarthritis (both knees) as attributable to/aggravated by military service with a composite disability of 30% for life. The applicant was therefore granted disability pension. The disability of Primary Hypertension, was however held as neither attributable to, nor aggravated by service. The respondents further submitted that the Second Appeal preferred by the applicant against denial of disability element of pension for the disability Primary Hypertension was also rejected by the Second Appellate Committee, holding that the disability was an idiopathic disorder with a strong genetic correlation and not attributable to service. The Appellate Committee also held that aggravation can be conceded only when the onset occurs in a field or operational area.

8. The respondents further contended that the observations and findings of the Release Medical Board are only recommendatory in nature and the final approving authority may or may not concur with the recommendations of the Release Medical Board. The respondents further submitted that the applicant was detected with high blood pressure during a medical examination while he was posted at Pune, a peace area and was treated accordingly.

The respondents further submitted that since the applicant's disability of Primary Hypertension was held as neither attributable to, nor aggravated by military service, he was not eligible for grant of disability pension for the same.

- 9. Heard rival submissions and perused records.
- 10. It is not disputed that the Release Medical Board held at the time of superannuation of the applicant from Territorial Army, assessed him to have the disabilities of Primary Hypertension at 30% for life and aggravated by service, Reflux Esophagitis grade 'A' & Antral Gastritis at 20% for life and attributable to service, and Osteoarthritis (both knees) at 20% for life and held as aggravated by service. While the composite disability was assessed at 60% for life, no disability pension was granted to the applicant as they were considered as neither attributable to, nor aggravated by military service by the sanctioning

authority (Annexure A2). Based on an appeal preferred by the applicant against rejection of his disability pension, the First Appellate Committee granted the applicant disability element of pension for the disabilities of Reflux Esophagitis grade 'A' & Antral Gastritis and Osteoarthritis (both knees) with composite disability at 30% for life. The applicant was, however, not granted the benefit of rounding off. The other disability of the applicant, namely Primary Hypertension was held by the First Appellate Committee as neither attributable to nor aggravated by military service.

11. The Second Appellate Committee upheld the decision of the First Appellate Committee and the applicant was not granted any disability element for the disability of Primary Hypertension. Since the applicant superannuated from service in May 2013, Pension Regulations for the Army, 2008, would be applicable. Regulation 37 which specifies grant of disability element for disability at the time of retirement to an officer being

relevant is reproduced below:

- "37. (a) An Officer who retires on attaining the prescribed age of retirement or on completion of tenure, if found suffering on retirement, from a disability which is either attributable to or aggravated by military service and so recorded by Release Medical Board, may be granted in addition to the retiring pension admissible, a disability element from the date of retirement if the degree of disability is accepted at 20% or more.
- (b) The disability element for 100% disability shall be at the rate laid down in Regulation 94 (b) below. For disabilities less than 100% but not less than 20%, the above rates shall be proportionately reduced. Provisions contained in Regulation 94(c) shall not be applicable for computing disability element.".
- 12. Reg 81, specifies primary conditions for grant of disability pension of which sub-section (b) amplifies the aspect of attributability/aggravation by military service and being relevant is re-produced below:

- "(b) The question whether disability is attributable to or aggravated by military service shall be determined under the Entitlement Rules for Casualty Pensionary Awards to the Armed Forces Personnel, 2008 as laid down in APPENDIX IV of these Regulations."
- 13. Regulation 94 referred to in Regulation 37 above pertains to the amount of disability pension. While Regulation 94(b) amplifies as to how disability element of disability pension is to be computed, Regulation 94(c) lays down the aspect of determining the extent of disability or functional incapacity for the purpose of computing disability element and specifies how the disability element is to be rounded off.
- 14. The above Regulations specify that for grant of disability pension to a person who retires on attaining the prescribed age of retirement like the applicant, the disability should be assessed at 20% or more and should be attributable to or aggravated by military service.

Regulation 37 also specifies that persons like the applicant are not entitled to the benefit of rounding off in accordance with regulation 94(c) as he had retired on attaining the prescribed age of retirement. The aspect of attributability or aggravation has to be decided under the Entitlement Rules for Casualty Pensionary Awards to Armed Forces Personnel, 2008. Rules relevant in deciding the issue are re-produced below:

"4. Invalidment from Service:

a) Invalidation from service with disablement caused by service factors is a condition precedent for grant of disability pension. disability element will also However, be admissible to personnel who retire or are discharged on completion of terms of engagement in low medical category on account of disability attributable to or aggravated by military service, provided the disability is accepted as not less than 20%.

.

5. Medical Test at entry stage:

The medical test at the time of entry is not exhaustive, but its scope is limited to broad

physical examination. Therefore, it may not detect some dormant diseases. Besides, certain hereditary, constitutional and congenital diseases may manifest later in life, irrespective of service conditions. The mere fact that a disease has manifested during military service does not *per se* establish attributability to or aggravation by military service.

7. Onus of proof:

Ordinarily the claimant will not be called upon to prove the condition of entitlement. However, where the claim is preferred after 15 years of discharge/retirement/invalidment/release by which time the service documents of the claimant are destroyed after the prescribed retention period, the onus to prove the entitlement would lie on the claimant.

10. Attributability:

- (a)
- (b) Diseases:

(i) For acceptance of a disease as attributable to military service, the following two conditions must be satisfied simultaneously:

- (a) that the disease has arisen during the period of military service; and,
- (b) that the disease has been caused by the conditions of employment in military service.
- (ii) Diseases due to infection arising in service other than that transmitted through sexual contact shall merit an entitlement of attributability and where the disease may have been contracted prior to enrolment or during leave, the incubation period of the disease will be taken into consideration on the basis of clinical course as determined by the competent medical authority.
- (iii) If nothing at all is known about the cause of disease and the presumption of the entitlement in favour of the claim is not rebutted, attributability should be conceded on the basis of the clinical picture and current scientific medical application.

11. Aggravation:

A disability shall be conceded aggravated by service if its onset is hastened or the subsequent course is worsened by specific conditions of military service, such as posted in places of extreme climatic conditions, environmental factors related to service conditions e.g. Fields, Operations, High Altitudes etc."

15. It is observed that the Second Appellate Committee rejected the claim of the applicant for grant of disability element for Primary Hypertension on the following grounds:-

"Perusal of the enclosed medical/service documents reveals that the onset of ID was in Pune (Peace) in Oct 2010. He was detected to have high blood pressure during PME. He was managed with antihypertensives to which he responded well. At the time of his discharge, the individual asymptomatic with good BP control on medication and life style modification and no target organ Primary Hypertension is an idiopathic damage. disorder with a strong genetic correlation and is, per se, not attributable to service. Aggravation is conceded when onset occurs while serving in Fd/CI Ops/HAA. In the instant case, the onset of the ID was in Peace area. The assessment of ID (i) @ 30% by the AMB is appropriate but the aggravation conceded is not as per existing guidelines on the subject. Hence, the ID merits being conceded as neither attributable to nor aggravated by military service (Para 43, Chap VI, GMO 2002, Amendment 2008).".

- 16. The grant of disability element to the applicant for his disability of Primary Hypertension, was rejected by the Second Appellate Committee stating that the applicant's high blood pressure was managed with medications and that hypertension is an idiopathic disorder with genetic correlation, not attributable to service. Further, as the onset of the disability was in peace area, aggravation was also not conceded, quoting Para 43 of Chapter VI, Guide to Medical Officers (Military Pensions), 2002, as amended in 2008. The said Para 43 being relevant is reproduced below:-
 - "43. Hypertension. The first consideration should be to determine whether the hypertension is primary or secondary. If secondary, entitlement considerations should be directed to the underlying disease process (e.g. Nephritis), and it is unnecessary to notify hypertension separately.

As in the case of atherosclerosis, entitlement of attributability is never appropriate, but where disablement for essential hypertension appears to have arisen or become worse in service, the question whether service compulsions have caused aggravation must be considered. However, in certain cases the disease has been reported after long and frequent spells of service in field/HAA/active operational area. Such cases can be explained by variable response exhibited by different individuals to stressful situations. Primary hypertension will be considered aggravated if it occurs while serving in Field areas, HAA, CIOPS areas or prolonged afloat service.".

17. As observed, Primary Hypertension is one of the diseases which can be aggravated by stress and strain of service as listed in the Annexure to the earlier Entitlement Rules for Casualty Pensionary Awards of 1982. The revised Entitlement Rules of 2008 has no such Annexure. Rule 10 as brought out above, states that for attributability a disease should have arisen during the period of military service and should have been caused by conditions of employment in military service. In the case of the

applicant, the disability of Primary Hypertension was observed first while he was in service and even though it was detected while he was serving in a peace station, Para 43 of the Guide to Medical Officers (Military Pensions) 2008, quoted above clearly states that entitlement of attributability is never appropriate and where essential Hypertension appears to have arisen or become worse in service, the question of whether service compulsions have caused aggravation must be considered. It further amplifies that in certain cases the disease has been reported after long and frequent spells of service in field/operational areas.

18. In the instant case, apart from spending over 24 years in the Army, the applicant had subsequently served 13 years in Territorial Army, which included nearly 04 years in field/modified field/CIOPS areas. In our view, the assessment of the Release Medical Board that the applicant's disability of Primary Hypertension was

aggravated by service, was in keeping with the Entitlement Rules for Casualty Pensionary Awards, 2008, as well as guidelines given in the Guide to Medical Officers. It is also observed that the Medical Board had clearly amplified the reason for assessing the disability as aggravated, by stating that "aggravation conceded due to stress and strain as the onset was within one year of the individual moving from field/CIOPS area".

19. At this juncture, we would also observe that the Honourable Apex Court while examining the case of Secretary, Ministry of Defence and Others vs. A.V.Damodaran (Dead) through LRs. and Others, (2009) 9 SCC 140, had held that Medical Board is an expert body and its opinion is to be given due weight, value and credence. Therefore in our view, it was incorrect on the part of the pension sanctioning authority, as well as the Appellate Committees to have overruled the findings of the Release Medical Board, that too, without a

reexamination of the applicant. It is also observed that the Honourable Apex Court while examining the case of Rajbir Singh (Supra), also considered two other cases, Civil Appeal Nos. 5840 of 2011 and 5819 of 2012, wherein the respondents (original applicants) were suffering from Hypertension and it was held that the disability must be presumed to be attributable to, or aggravated by military service in the absence of any specific reasons recorded by the Medical Board. Therefore, based on the principles enunciated by the Honourable Apex Court in Rajbir Singh (Supra), the applicant becomes eligible for disability element for his disability of Primary Hypertension at the time of his discharge from service.

20. The First Appellate Committee had granted the applicant composite disability element at 30% for life for the disabilities, Reflux Esophagitis grade 'A' & Antral Gastritis, and Osteoarthritis (both knees). With the applicant now being held eligible for disability element for

the disability of Primary Hypertension at 30%, he would be eligible for composite disability element at 60% for life in keeping with the assessment of the Release Medical Board.

- 21. As regards the benefit of rounding off of disability element of pension, while Regulation 37(b) of the Pension Regulations for the Army, 2008, denies the benefit of rounding off provided in Regulation 94(c) to Officers such as the applicant, who had retired on attaining the age of superannuation, the issue is no more res integra as this Tribunal in JADHAV MARUTI BHAU VS. UNION OF INDIA & OTHERS (O.A.No.93 of 2016), had examined the issue and struck down Regulation 37(b) in keeping with the principles enunciated by the Honourable Apex Court in Ram Avtar (supra). In our view therefore, the applicant is also eligible for the benefit of rounding off of disability element of pension.
- 22. In view of the foregoing, the Original Application is disposed of directing the respondents to sanction and

pay disability element at 30% to the applicant for his disability of Primary Hypertension, and as a consequence grant him disability element at 60% composite for life ie with effect from 01 June 2013, taking into consideration 30% already granted by the First Appellate Committee. The respondents are further directed to extent the benefit of rounding off of the disability element in accordance with law from the date of grant of disability element with effect from 01 June 2013. The respondents are also directed to issue the necessary PPO and pay the arrears due to the applicant within a period of four months from the date of receipt of copy of this order, failing which the unpaid amount will carry simple interest at the rate of 8% per annum.

- 23. There will be no order as to costs.
- 24. Issue free copy to the parties.

Sd/-VICE ADMIRAL M.P. MURALIDHARAN, JUSTICE BABU MATHEW P. JOSEPH MEMBER (A)

Sd/-MEMBER (J)

(true copy)