ARMED FORCES TRIBUNAL, CHANDIGARH
REGIONAL BENCH AT CHANDIMANDIR

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OA 249 of 2013

Chanan Singh …… Petitioner(s)
Vs
Union of India and others …… Respondent(s)

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For the Petitioner (s) : Mr. Navdeep Singh, Advocate.
For the Respondent(s) : Mr Rajesh Sehgal, CGC.

Coram: Justice Vinod Kumar Ahuja, Judicial Member.
Air Marshal (Retd) SC Mukul, Administrative Member.

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ORDER
05.02.2014

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1. Briefly stated the facts of the case as alleged by the petitioner are that he was enrolled in the regular Indian Army on 07.05.1963 in medical category SHAPE-1 and was invalided out on 23.10.1978 in permanent low medical category. The petitioner alleged that he was invalided out of service due to acute hearing loss on account of **Otosclerosis** after developing a reaction to an overdose of an injection given by a Nursing Assistant of the Army Medical Corps. Later he became a case of a failed surgical operation by military doctors in a Military Hospital after which his condition deteriorated further.

2. It was also alleged by the petitioner that it is officially recorded in the record that a prosthesis fitted by the Military Hospital surgically in his ear had slipped due to a botched surgery and then leading to a second surgery through which the prosthesis was recovered. Therefore, the observation by the Medical Board that this disability is neither attributable to nor aggravated by service is incorrect.

3. He further alleged that after 10 years of service on 17.11.1973 the petitioner was officially to be inoculated against Typhoid by the respondents and was called to the Medical Inspection Room for a TAB Vaccine. However, he was given an overdose by the concerned Nursing Assistant and he developed very high fever and also blockage of his nostrils and ears.

4. The next morning he was found to have been inflicted with hearing loss and stiffness in both ears. These all facts are recorded in the medical papers Annexure A-1. It was further alleged that even an action was initiated against the Nursing Assistant for the said incident.

5. It was further alleged that it was recorded that the petitioner was not to be posted to a field or cold area but he was still posted to Jammu & Kashmir including in snow clad environment. He further alleged that due to the overdose leading to gross hearing loss his medical category was downgraded and he was ultimately declared a case of **Bilateral otosclerosis and Gross Hearing Defect.** He further alleged that he was operated in the left ear but the operation was not successful and a prosthesis was implanted in his ears. Another surgery was performed to remove the complication which was not successful and his deafness increased further. His Tonsils were also removed and the said operation was also not successful. It was further alleged that as per Annexure A-3 it was specifically recorded by the medical authorities that the operations performed on him had failed.

6. It was further alleged that in spite of the above facts the Invaliding Medical Board was carried out who simply recorded Yes/No but did not give the full reasons as is provided by the Medical Board itself and they observed that it was a constitutional disease without going into history or the material on record dealing with the disability.

7. Thus, it was alleged that in view of the law laid down in various decisions the findings of the Medical Board are not sustainable and their finding that it is non-service related is illegal and the rejection of his claim for disability pension is liable to be set aside and he is entitled to the full arrears, costs etc.

8. In reply the respondents pleaded that the petitioner had rendered 15 years 5 months 17 days service in the Army. The Release Medical Board had opined his disability '**OTOSCLEROSIS BILATERAL'** as neither attributable to nor aggravated and nor connected with military service as per Annexure R-1. The percentage of disability of petitioner was assessed at 40% for two years only and

once it has been held that this was neither attributable to nor aggravated by services, his claim for disability pension was not sustainable, which was rightly rejected vide letter dated 27.12.1979 as per Annexure R-2. The petitioner had the remedy to file a second appeal which was not filed. It was further alleged that the petitioner had approached on 22.02.2011 after a gap of 29 years for re-considering his case and the case of the petitioner is covered by the judgment of Hon'ble the Supreme Court in the case of **Secy. Ministry of Defence Vs. A.V. Damodaran, 2009(9) SCC 140, decided on 20.08.2009** and as such the application is liable to be rejected.

9. We have heard the learned counsel for the parties and have gone through the record of the case.

10. We may make a brief reference to the documentary evidence on record. Annexure A-1 is the observations of the Medical Board, which reads as under:-

> "13(a) Principal disability — 14. Date and place of origin
>
> BILATERAL OTOSCIEROSIS GROSS HEARING DEFECT (LT) EAR. — 17 Nov 73 at POONA
>
> xx xx xx
>
> 16. Present condition:-
>
> Impairment of hearing – 17 Nov 1973 both ears.
> This individual was completely alright before 17 Nov 1973. When he was given one inj TAB in unit MI Room. The same evening he developed fever and blockage of Nostril & ears. Next morning he found his hearing has much gone down & there was tinnitus in both ears. With same treatment in MI Room his nose cleared and hearing improved."

11. The observations made in Annexure A-3 by the Medical Board are as under:-

> "NAME: CHANAN SINGH No. 1524638 RANK: HAV
> UNIT: 235 IWT OP Coy CAL 35
> DAIG: OTOSCIEROSIS BILATERAL (386)
>
> SUMMARY OF OPINION OF LT.COL T.K.DAS CHOWDHURY CLASSIFIED SPECIALIST (OTOLOGY) CH (EC) CAC DATED 24. DECN.
>
> A case of Bilateral Otosclerosis since Nov 1973. Tonsillectomy was done in Pune in DEC 73. He was operated in left ear (Staepedectomy) in Feb 77. Hearing did not improve and both the prosthesis slipped and a second operation was done

and prosthesis removed. He is in low medical category since 4 Jan 1977. Now he reported for review.
Present condition: Deafness both ears with tinnitus left ear.
O/E General & Systematic- NAD Nose – NAD
Throat-Tonsil removed. Ears: Both membranes are intact.
Rinne - Negative both sides
Wehers - Indifferent ABC – Normal
HearingCV- RT 3 bt, LT – short only.
Since operation in one ear has failed, operation in the other ear is not contemplated.
Recommended Category, CEE permanent.
Not to be posted in field or hilly area.

Sd/- (English)
T.R.DAS CHOWDHORY
CLASSIFIED SPECIALIST (OTOLOGY)

In view of the above individual is brought before medical board.

Sd/- (English)
S.K.RAY CHOWDHURY
(MAJ AMC)"

12. The observations made by the Release Medical Board (Annexure-4) are as under:-

"Field/Operational Overseas Service: Giving dates and places

From	To	Place
Oct 64	May 66	High Altitude
Mar 69	Jun 71	-do-
Jun 71	Apr 72	O P area
Sep 74	Aug 76	J & K Area

xx xx

2. Particulars of the disease: OTOSCLEROSIS Bilateral

xx xx

I got TAB Injection on 17 Nov 73 - - - due that I was Conflacted by - - -.

xx xx

The Board should state fully the reasons in regard to each disability on which its opinion is based:

Disability	A	B	C
OSTOSCLEROSIS BILATERAL	NO	NO	YES

xx xx

(d) In the case of a disability under C, the Board should state what exactly in their opinion is the cause thereof:-
It is by constitutional disease, manifested while in military service.

xx xx

4. What is present degree of disablement ---

Disability	Percentage	Probable Duration	Composite assessment
OSTOSCLEROSIS BILATERAL	40%	Two years	40%.

In various columns it was also recorded "NA"

13. Rules 20 and 21 of Entitlement Rules for Casualty Pensionary Awards, 1982 read as under:-

" 20. **Conditions of Unknown A etiology :** There are a number of medical conditions which are of unknown a etiology. In dealing with such conditions, the following guiding principles are laid down:-

(a) If nothing at all is known about the cause of the disease, and presumption of the entitlement in favour of the claimant is not rebutted, attributability should be conceded.

(b) xx xx xx

Delay in Diagnosis/ Adverse Effects of Treatment

21. The question as to whether, through the exigencies of service, the diagnosis and/ or treatment of the wound, injury or disease was delayed, faulty or otherwise unsatisfactory, including the adverse/unforeseen effects of treatment, shall also be considered. The entitlement for any ill-effects arising as a complication from such factors shall be conceded as attributable."

14. Rule 7 of Old Entitlement Rules, 1950 reads as under:-

"7. In respect of diseases, the following rules will be observed:-

(a) Cases, in which it is established that conditions of military service did not determine or contribute to the onset of the disease but influenced the subsequent course of the disease, will fall for acceptance on the basis of aggravation.

(b) A disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to acceptance for service the disease will not be deemed to have arisen during service.

(c) If a disease is accepted 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.

(d) Xx xx xx"

15. Rule 8 of the said Rules provides for unforeseen effects of service in medical treatment, which reads as under:-

> (a) Where unforeseen complications arise as a result of treatment (including operative treatment) given for the purpose of rendering a member fit for service duties, any disablement resulting will normally be accepted as attributable to service.
> xx xx xx"

16. Rule 6(a) and other provisions of New Entitlement Rules, 1982 read as under:-

> "6. Disablement or death shall be accepted as due to military service provided it is certified by appropriate medical authority that :-
> (a) The disablement is due to a wound, injury or disease which
> (i) is attributable to military service, or
> (ii) existed before or arose during military service and has been and remains aggravated thereby. This will also include the precipitating/hastening of the onset of a disability.
> (b) xx xx xx"

17. Under heading `**Diseases'** Rule 14 of the Old Rules reads as under:-

> "14. In respect of diseases, the following rule will be observed:-
> (a) xx xx xx
> (b) A disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service, if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service.
> (c) xx xx xx"

18. To substantiate his submissions, learned counsel for the petitioner had relied upon the decision of Hon'ble the Supreme Court in the case of **Dharamvir Singh Vs. Union of India and others, 2013 STPL(Web) 498 SC,** Civil Appeal No. 4949 of 2013 (arising out of SLP© No. 6940 of 2010)- Decided on 2-7-2013, wherein in Paras No. 30, 32 and 33 it was held as under:-

> "30. In the present case it is undisputed that no note of any disease has been recorded at the time of appellant's acceptance for military service. The respondents have failed to bring on record any document to suggest that the appellant was

under treatment for such a disease or by hereditary he is suffering from such disease. In absence of any note in the service record at the time of acceptance of joining of appellant it was incumbent on the part of the Medical Board to call for records and look into the same before coming to an opinion that the disease could not have been detected on medical examination prior to the acceptance for military service, but nothing is on the record to suggest that any such record was called for by the Medical Board or looked into it and no reasons have been recorded in writing to come to the conclusion that the disability is not due to military service. In fact, non-application of mind of Medical Board is apparent from Clause (d) of paragraph 2 of the opinion of the Medical Board, which is as follows:-

"(d) In the case of a disability under C the board should state what exactly in their opinion is the cause thereof .YES Disability is not related to mil service."

"32. In spite of the aforesaid provisions, the Pension Sanctioning Authority failed to notice that the Medical Board had not given any reason in support of its opinion, particularly when there is no note of such disease or disability available in the service record of the appellant at the time of acceptance for military service. Without going through the aforesaid facts the Pension Sanctioning Authority mechanically passed the impugned order of rejection based on the report of the Medical Board. As per Rules 5 and 9 of `Entitlement rules for Casualty Pensionary Awards, 1982', the appellant is entitled for presumption and benefit of presumption in his favour. In absence of any evidence on record to show that the appellant was suffering from "Generalized seizure (Epilepsy)" at the time of acceptance of his service, it will be presumed that the appellant was in sound physical and mental condition at the time of entering the service and deterioration in his health has taken place due to service.

33. As per Rule 423(a) of General Rules for the purpose of determining a question whether the cause of a disability or death resulting from disease is or is not attributable to service, it is immaterial whether the cause giving rise to the disability or death occurred in an area declared to be a field service/active service area or under normal peace condition. "Classification of diseases" have been prescribed at Chapter IV of Annexure I; under paragraph 4 post traumatic epilepsy and other mental changes resulting from head injuries have been shown as one of the diseases affected by training, marching, prolonged standings etc. Therefore, the presumption would be that the disability of the appellant bore a casual connection with the service conditions."

19. Reliance was also placed upon the decision of the Principal Bench of Armed Forces Tribunal, New Delhi in the case of

Nakhat Bharti etc. etc. Vs. Union of India and others, TA Nos. 5 of 2009, 106 of 2009 and 36 of 2009, decided on 28.10.2009 wherein a reference was also made to the decision of the Supreme Court in **A.V. Damodaran's** case (supra) relied upon by learned counsel for the respondents. The observations made in Paras No. 20 to 22 are relevant and are being reproduced below:-

> "20. In a recent judgment, decided by the Hon'ble Supreme Court on 20th August, 2009 in Civil Appeal No. 5678 of 2009 titled *'Secr., Ministry of Defence & Ors. Vs. Damodaran A.V. (D) thr. Lrs. & Ors.',* Lordships have taken into consideration all the judgments and after review of the same, their Lordships held that we shall abide by the recommendation of the medical board, but, unfortunately attention of the Lordships were not invited to Regulation 423(c) (supra), where there is a presumption in favour of the service personnel that when he is accepted in service he was presumed to be physically and mentally fit. This presumption was rebutted only when the medical board writes that why this disease was not detectable at the initial stage, for which medical board has to provide cogent reason. This aspect was not adverted in all the cases before their lordships. It is only after referring to the earlier decisions of the Supreme Court, it held that they will abide by the opinion of the medical board. Their Lordships observed that with reference to the earlier judgment in the case of *`Union of India & Ors. V. Keshar Singh [2007 (12) SCC 675]* that:
>
> > "….. This Court has held that if a disease is accepted 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 are due to the circumstances of duty in military service. This Court relied on Medical Board's opinion to the effect that the illness suffered by the respondent was not attributable to military service. This Court while setting aside the judgments of the learned Single Judge and the Division Bench held that the respondent was not entitled to disability pension."
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> Their Lordships further held in para 17 that:
>
> > "….. I am of the considered view that the Medical Board is an expert body and its opinion is entitled to be given due weight, value and credence. In the instant case, the Medical Board has clearly opined that the disability of late Shri A.V.Damodaran was neither attributable not aggravated by the military service."
>
> 21. Therefore, the decisions of the Apex Court are to the effect that normally the opinion given by the medical board should be accepted. There is no dispute that the

> medical board is a competent body and the judgment of competent body has to be accepted unless it is proved contrary by any other cogent reason. But the question is the interpretation of the provisions of Rule 14(b) of Entitlement Rules for Casualty Pensionary Award, 1982, Regulation No. 423(c) of Regulations for Medical Services for Armed Forces, 1983 (supra) clearly contemplates that there is a presumption in regard to fitness in favour of the army personnel, physically and mentally when they are accepted in defence service. The presumption is rebuttable for a reason given by the medical board that why the disease could not be detected when the incumbent was accepted in service. This is mandate to the medical board to provide cogent reason for it and not cryptic, slipshod or vague reason by covering expression 'not applicable' or 'constitutional'. This aspect was not brought to the notice of their Lordships and their Lordships, as a general proposition accepted that normally the recommendation of the medical board should be accepted."

20. It is clear from above discussion of the law that the provisions mandate the presumption in favour of the Army Personnel only. In case there was no observation made at the time of entry of the petitioner that he was suffering from any such disease, the presumption is that he sustained it during service only. Reasons have to be recorded by the Medical Board as to why the disease in question is not attributable to military service and in case no reasons are recorded as in the present case, the presumption is in favour of the petitioner only.

21. A detailed reading of the observations made by the Release Medical Board clearly shows that there was no entry in the record of the petitioner having this disease and no reasons have been recorded as to how the disease was not sustained by the petitioner while in service. The disease in question may be hereditary in nature but it stands aggravated by the posting to high altitude and the conditions of service. In spite of the fact having been recorded that the petitioner should not be posted in hard area or high altitude, he was yet made to serve for the period specified above in the hard area and that aggravated the disease in question. It has been clearly recorded in the record referred to above that the petitioner complained of defect of diminution of his hearing abilities after he was given injection on 17.11.1973. He also served in the high altitude after he sustained this

injury from September, 1974 to August, 1976 and as such the injury in question can be presumed to have increased during service.

22. All the facts as alleged by the petitioner that he sustained the disease and that his operations failed, find corroboration from the record produced and referred to (Annexures A-1 to A-3) by the petitioner. There is nothing to rebut the presumption in favour of the petitioner that he sustained the disease/injury while in service which was also aggravated during service and the petitioner was, therefore, entitled to disability pension as per rules. We find no cogent reasons for the respondents to have rejected the just claim of the petitioner which should have been allowed and as such the impugned order rejecting the disability pension is set aside.

23. The petitioner had approached the Court after a considerable lapse of time, but according to law his claim cannot be rejected because of the delay as per the judgment of Hon'ble High Court of Punjab and Haryana in **Joginder singh Vs. Union of India and others, CWP No. 14274 of 2013, decided on 31.01.2013,** where the cause of action had arisen in the year 1990 and the applicant approached the Tribunal after 20 years. The dismissal order on the ground of delay was set aside.

24. Reliance was also placed on the decision of the Hon'ble Delhi High Court in **Ram Niwas Bedharak Vs. Union of India and another, W.P.(C) No. 4817 of 2011, decided on 13.07.2011**, wherein it has observed that a delayed service related claim cannot be rejected which claim is based on a continuing wrong and the relief can be granted if there is a long delay in seeking remedy with reference to the date on which the continuing wrong commenced. Thus, it was held in the above case that the restriction can be that the order directing payment of arrears relating to 16 years was not justified and the relief can be restricted to only three years from the date of writ petition.

25. In view of the above discussion, the claim of the petitioner for disability pension is allowed and the impugned order is set aside. However, the arrears would be restricted to three years prior to the filing of the petition. The amount shall be assessed and it shall be payable to him along with interest at the rate of 10 per cent per annum till today for the period of three years prior to filing of the

petition. In case the amount is not paid to him along with interest within a period of four months from today, the amount shall be payable to him along with interest till date of payment. The petition is accordingly allowed.

(Justice Vinod Kumar Ahuja)

(Air Marshal (Retd) SC Mukul)

05.02.2014
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Whether the judgment for reference is to be put on Internet? Yes/ No