

**COURT NO. 1, ARMED FORCES TRIBUNAL**  
**PRINCIPAL BENCH, NEW DELHI**

**OA 3971/2023 with MA 5228/2023**

**Ex Nk Vijay Kumar**

**... Applicant**

**Versus**

**Union of India & Ors.**

**... Respondents**

**For Applicant : Mr. Ved Prakash, Advocate**

**For Respondents : Mr. K K Tyagi, Sr CGSC**

**CORAM :**

**HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON**  
**HON'BLE REAR ADMIRAL DHIREN VIG, MEMBER (A)**

**ORDER**

**MA 5228/2023**

This is an application filed under section 22(2) of the Armed Forces Tribunal Act, 2007 seeking condonation of delay of 510 days in filing the present OA. In view of the judgments of the Hon'ble Supreme Court in the matter of ***UoI & Ors Vs Tarsem Singh*** 2009(1)AISLJ 371 and in ***Ex Sep Chain Singh Vs Union of India & Ors*** (Civil Appeal No. 30073/2017 and the reasons mentioned, the MA 5228/2023 is allowed and the delay of 510 days in filing the OA 3971/2023 is thus condoned. The MA is disposed of accordingly.

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OA 3971/2023

Ex Nk Vijay Kumar

2. **OA 3971/2023**

Invoking the jurisdiction of this Tribunal; under Section 14, of the Armed Forces Tribunal Act, 2007 the applicant has filed this application and the reliefs claimed in Para 8 read as under:

- (a) ***Direct respondents to grant disability element of pension to the applicant duly rounded off to 50% w.e.f. his date of discharge.***
- (b) ***Direct respondents to pay the due arrears of disability element of pension with interest @ 12% p.a from the date of retirement with all the consequential benefits.***
- (c) ***Any other relief which the Hon'ble Tribunal may deem fit and proper in the fact and circumstances of the case along with cost of the application in favour of the applicant and against the respondents.***

**BRIEF FACTS**

3. The applicant was enrolled in Indian Army on 25.06.2005. The applicant, thereafter, was discharged from service on 31.01.2022 in low medical category S1H1A1P2(P)E1 due to non availability of shelter appointment under item III (iii) (a) (i) to Rule 13(3) of Army Rules, 1954. The Release Medical Board held on 18.11.2021 opined that the applicant was found to be suffering from PIVD L4-L5, L5-S1 (M51). The said disability was assessed 20% for life, however the net

assessment qualifying for disability pension was assessed as 10% for life and the net disability was held as 'Aggravated by military service'. The assessment was reduced from 20% to 10% for life due to the fact that the applicant refused to undergo surgery for the said disability.

4. The applicant's initial claim for the grant of the disability element of pension was rejected as the disability percentage was assessed at less than 20% and the decision was communicated to the applicant vide letter No. 14680652X/DP-4/Pen dated 08.02.2022.

5. The applicant, thereafter, submitted a Legal Notice cum-Representation dated 18.01.2023 to the respondents seeking grant of disability pension, and the same was replied to vide EME Records letter no. 14680652/LN/Court Case Cell dated 30.05.2023. The applicant also filed first appeal dated 23.01.2023 which according to the applicant has not yet been replied. Aggrieved by the same, the applicant has filed the instant O.A.

## CONTENTIONS OF THE PARTIES

6. The learned counsel for the applicant submitted that the applicant was released from service in the year 2022 and the RMB assessed the disability of PIVD at 20% which was reduced to 10% for life. The learned counsel for the applicant further submitted that the disability of the applicant was considered to be aggravated by service by the RMB.

7. The learned counsel for the applicant placed reliance on the verdict of Hon'ble Supreme Court of India in the case of **Union of India & Ors. Vs Mahavir Singh Narwal** (SLP No. 24171/2004) decided on 08.01.2008 at upholding the decision of High Court of Delhi in CWP 2967/1981 in **Mahavir Singh Narwal vs UoI** (2005(I) AISLJ 133) wherein the Hon'ble Apex Court adjudicated the aspect that a person who is in low medical category than the one he was recruited shall be treated as invalided out of service for granting disability pension.

8. The learned counsel further placed reliance on the DGMS letter no 16036/RMB/IMB/DGMS/MA(Pension) dated

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16.04.2019 which provides that refusal to surgery for Spinal Disorder i.e PIVD cases stands to reason and hence should not become a reason for reducing disability percentage.

9. Per contra, the learned counsel for the respondents submitted that the RMB considered the disability of the applicant to be 20% and held it to be 'aggravated by military service.' However, as the applicant refused to undergo the surgery as advised, the assessment for the said disability was reduced to 10% for life as per the policy in vogue.

10. The learned counsel for the respondents further relied upon para 173 of the Pension Regulations for the Army 1961 (Part-I) and Para 81 of Pension Regulations for the Army 2008 (Part-I) which stipulate that the primary condition for the grant of disability pension is granted when the personnel is invalidated out from service on account of disability which is attributable to or aggravated by military service and is assessed at 20% or more. However, since, the applicant does not fulfill one of the twin conditions required for the grant of

disability pension, the applicant is not entitled to the disability pension.

### **ANALYSIS**

11. On the careful perusal of the material available on record and also the submissions made on behalf of the parties, since, the disability of the applicant was considered to be 'aggravated by military service'; hence, the applicant fulfils one of twin conditions of para 81 of Pension Regulations for the Army 2008 (Part-I) for the grant of disability pension. However, the reduction of percentage from 20% to 10% in relation to the said disability does not hold ground as there is a failure on the part of respondents and medical authority to supply any cogent reason for the said reduction of the percentage. Mere refusal to undergo surgery cannot be accepted as reasonable justification for reducing the percentage of the disability in absence of any reason about the assessment of improvement in the medical condition of the applicant after the treatment. The RMB assessed the disability of the applicant i.e PIVD as 'aggravated by military service' due to physical stress and

strain of service and based on nature and course of disability as per Para 51 (d), Chapter VI of Guide to Medical Officer (Military Pension) 2002 amendment 2008. Despite this, the percentage of disablement was reduced from 20% to 10% for the reason that the applicant refused to undergo the surgery in relation thereto. The RMB proceedings further indicate to the effect that it was stated therein in Para-2(a) to (h) to the effect:-

- “2.(a) Was the disease/disability attributable to the individual’s own negligence or misconduct? No**
- (b) If not attributable, was it aggravated by negligence or misconduct? If so, in what way and to what percentage of the total disablement? No**
- (c) Has the individual refused to undergo operation/treatment? If so, individual’s reasons will be recorded? Yes**
- Note:- In cases of refusal of operation/treatment a certificate from the individual will be attached.**
- (d) Has the effect of refusal been explained to and fully understood by him/her, viz a reduction in, or the entire withholding of any disability pension to which he/she might otherwise be entitled? Yes**
- (e) Does the Medical Board consider it probable that the operation/treatment would have cured the disease/disability or reduced its percentage? Yes**
- (f) If the reply to (e) is in affirmative, what is the probable percentage to which the**

- disease/disablement could be reduced by operation/treatment? 10%*
- (g) *Does the Medical Board consider individual's refusal to submit to operation/treatment reasonable? Give reason in support of the opinion specifying the operation/treatment-recommended.*  
No
- (h) *Does the individual claim to be suffering from any other disease/injury apart from those listed in Para 3 of Part-II No."*

12. The RMB had itself stated that even if the surgery had been performed, it could have probably reduced the disability percentage by 10%, therefore, even after the surgery, the said disability would be cured marginally only.

13. Reliance is also placed on the DGAFMS, MoD letter vide 16036/RMB/IMB/DGAFMS/MA (Pension) dated 16.04.2019 wherein it is clarified that "*Refusal to undergo surgery for spinal disorder e.g. PIVD stands to reason and hence should not become a reason to reduce percentage of the disability.*" In spite of clear guidelines issued by the respondents themselves that in cases of PIVD, the refusal for surgery will not entail any reduction in the percentage of the disability, the respondents

in the instant case have reduced the disability from 20% to 10% which is not tenable.

14. Further, reliance is placed on the order dated 02.05.2023 of this Tribunal in OA 205/2019 in **Ex LME Pramod Yadav vs. Union of India & Ors.** and on the order dated 07.07.2022 in OA 177/2022 of the AFT, Regional Bench, Lucknow in the case of **Amrendra Kumar, CHEA ® (Retd.) vs. Union of India & Ors.** which reads as under:-

*"7. Considering all aspect of the case, we are of the opinion that spinal operation has not reached a level of validating and trust where success can be guaranteed for 100% recovery. On the contrary there is a lot of reservations on undertaking spinal operation. Hence, the unwillingness of the applicant for surgery (spinal operation) in our opinion is not a valid ground for reducing his disability percentage from 20% to 16% specially when one considers the complications which are associated with spinal operation. As such, we hold that the percentage of disability of the applicant is 20% for life".-*

### CONCLUSION

15. Applying the above parameters to the case in hand, we are of the view that the applicant has been discharged from service in low medical category on account of the disability PIVD, which is assessed as 'aggravated by military service' and

the initial percentage of disablement of 20% disability holds good.

16. Therefore, in view of our analysis, OA 3971/2023 is allowed and the respondents are directed to grant the benefit of disability element of pension @ 20% (for PIVD) for life which is directed to be rounded off to 50% for life in view of judgment of Hon'ble Apex Court in **Union of India vs. Ram Avtar (supra)** from the date of discharge i.e. 31.01.2022. The arrears shall be disbursed to the applicant within three months of receipt of this order failing which it shall earn interest @ 6% p.a. till the actual date of payment.

Pronounced in the open Court on this <sup>Hu</sup> 8 day of August, 2024.

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(JUSTICE RAJENDRA MENON)  
CHAIRPERSON

(REAR ADMIRAL DHIREN VIG)  
MEMBER (A)

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