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

O.A. No. 104 of 2019
with
M.A. No. 494 of 2019

In the matter of :

Ex Rect Kundan Lal Yadav ... **Applicant**

Versus

Union of India & Ors. ... **Respondents**

For Applicant : Shri A.K. Trivedi, Advocate

For Respondents : Shri Arvind Patel, Advocate

CORAM:

HON'BLE MR. JUSTICE RAJENDRA MENON, CHAIRPERSON
HON'BLE LT GEN P.M. HARIZ, MEMBER (A)

O R D E R

Through the medium of the instant OA filed under Section 14 of the Armed Forces Tribunal Act, 2007, the applicant is seeking grant of disability pension along with broad-banding benefits from the date of his invalidment from service with arrears and interest.

2. The facts of the present case, in brief, are that the applicant was enrolled in the Indian Army on 30.04.1983. The applicant claims that he suffered from 'Spinal Muscul Atropitvy and Horn Cell Disorder' during training and

remained under treatment in the Army Hospital. Due to the said disability, the applicant was brought before the Invaliding Medical Board (IMB) and on the recommendations of the IMB, he was invalided out from service in low medical category 'EEE' on 01.01.1984. The disability of the applicant was held as neither attributable to nor aggravated by service by the IMB. The case for grant of disability pension was rejected by the PCDA (P) Allahabad vide letter dated 18.11.1998.

3. It is the case of the applicant that while attending a welfare camp organised by Ex-servicemen League for welfare of Ex Armed Forces personnel, he came to know that in view of the judgment of Hon'ble Supreme Court in *Sukhvinder Singh Vs. Union of India & Ors.*, he is entitled to disability pension and he approached the Record Office for the said relief and as advised, the applicant preferred a detailed appeal dated 31.07.2018 seeking disability pension. However, the applicant was informed that his appeal could not be processed as the records have been destroyed by burning after 25 years. Hence, the present OA.

4. Learned counsel for the applicant submitted that the applicant, at the time of joining the service, after a thorough medical examination, was declared fully fit medically and physically in medical category 'AYE' and no note was made in his medical documents that he was suffering from any disease at that time. In this regard, learned counsel contended that in absence of any note on record of the disease at the time of entrance, in the event of his subsequently being invalided out from service on medical grounds due to disease which arose during service, any deterioration in his health is to be presumed due to service. Learned counsel referred to Regulation 173 of the Pension Regulations for the Army, 1961 to state that he is entitled to disability pension as he was invalided out from service on account of the disability which arose during service and was assessed at 20% or more.

5. Learned counsel relied on the judgment of Hon'ble Supreme Court in ***Sukhvinder Singh Vs. Union of India [(2014 STPL (web) 468 SC],*** wherein the Apex Court held that where the armed forces personnel are invalided out from service due to a disability, the disability would be assumed to

be above 20% and he may be given disability pension at fifty percent. Learned counsel further placed reliance on the judgment of Punjab and Haryana High Court in ***Ex-Nk Umed Singh Vs. UOI & Ors.*** ***[C.W.P. No. 7277 of 2013]*** **decided on 14.05.2014** wherein it was held that in case of weeding out of the records, the claim of the armed forces personnel or their legal heirs would be required to be examined on the basis of available record and, therefore, the applicant may be granted disability pension on the basis of the discharge book and letter dated 18.11.1998 stating the disease and reason of discharge.

6. On the other hand, learned counsel for the respondents, stated that all the service record as well as medical records of applicant have been weeded out/destroyed by burning after expiry of its retention period in accordance with Para 595 of the Defence Service Regulations for the Army 1987, Vol-II (Revised) and only the date of enrolment as per Long Roll and date of invalidment could be made available. Apart from the above, no more information was available with them. Learned counsel further submitted that the Long Roll which is prepared before destruction of

documents is a very brief record of about half page to one page and does not have any information on the disability of the applicant as well as the opinion of medical board.

7. Learned counsel further stated that the applicant approached them after a delay of about 34 years and now it is not possible for respondents to make any comments on his nature of disease if any, or its percentage or the opinion of medical board on attributability and/or aggravation. However, the fact that he is not in receipt of disability pension indicates that his disability was considered as 'neither attributable to nor aggravated by military service' at the time of his invalidment. He submitted that the OA is liable to be dismissed on the grounds of the extraordinary delay of 34 years alone, without entering into the merits of the case. He further emphasized that his all service and medical documents had been destroyed in accordance with the rules and regulations on the subject and in the absence of the relevant medical documents and other records, it is not possible to give any meaningful response in terms of details of his disability and its attributability to military service. He pleaded for the OA to be dismissed.

8. We have heard the learned counsel for the parties and perused the available limited material on record. The only question that needs to be answered in this case is as to whether a decision can be taken on the attributability or aggravation of a disease as claimed by applicant for which medical board and other relevant medical documents have already been destroyed in accordance with law ?

9. It is an undisputed fact that there is an inordinate delay of about 34 years in approaching this Tribunal. It is also a fact that respondents have destroyed the medical documents and other relevant documents after expiry of period for retaining the records i.e. 25 years of applicant's invalidment/discharge in accordance with rules on the subject. That apart, no meaningful medical document or opinion of the Medical Board, have been produced by the applicant, to substantiate his claim. From the documents submitted by applicant in the OA it is not possible to come to any firm conclusion as to what exactly was the disease from which he was suffering at the time of his invalidment. Additionally, in the absence of medical board proceedings we are unable to know the reasons as to why the medical board

decided to declare the disease if any as neither attributable to nor aggravated by service. Therefore, we are not in a position to verify the factual details as to what was the exact nature of disability suffered by applicant, the disability percentage and the reasons for the medical board declaring the disability as neither attributable to nor aggravated by service. During the course of hearing, the learned counsel for the applicant stated that even if the records have been weeded out, the claim of disability pension cannot be rejected. We do not agree with that contention. Disability pension is not meant for every disability which a soldier has: it is meant for only that disability which is attributable to or aggravated by military service. The opinion of medical board in deciding attributability/aggravation to military service is the single most important factor in deciding eligibility to disability pension. Hence in the absence of medical board, no decision on disability pension can be taken in vacuum.

10. In this regard, it would be appropriate to refer to the judgment of the Delhi High Court in a similar case i.e. ***Shri Deo Prakash Vs. Union of India and others*** ***[W.P.(C) No.6141 of 1999]*** decided on 15.02.2008, wherein the Court

held that if the record was destroyed, it cannot be said that there was any wrong by the respondents. The entries in the Long Rolls are required to be preserved permanently. The requirement is to record date and cause of becoming non-effective, but such entries in the discharge book are not primary evidence and do not reflect medical details required for a decision on granting disability pension. The primary medical record is not available after 25 years. The primary medical evidence related to the disability and cause of discharge having been destroyed, the long rolls is not conclusive to return a finding that the discharge of the applicant was attributable to military service.

11. Thus the contentions raised by learned counsel for the applicant for grant of disability pension, in our opinion, is misconceived for the reason that the statutory provisions contained in Para 173 of the Pension Regulations for the Army is mandatory and cannot be ignored while deciding the issue. It was incumbent upon the applicant to produce the medical board's opinion to indicate that the disability was attributable to military service. It has been rightly submitted by learned counsel for the respondents that the discharge

book mentions only the reason for discharge/invalidment. It is not a substantive evidence to establish the cause of disability and the related factor of attributability to military service. Therefore, the judgments relied upon by the learned counsel for the applicant, have no relevance, so far as this case is concerned.

12. Further, even if we consider that the applicant has suffered from Spinal Muscul Atropitvy Ant Horn Cell Disorder, it would be helpful to refer to the scientific articles or reviews available in the open domain for determining whether the cause of the disease is attributable to military service or not, which suggest that the disease in question is a genetic or inherited neuromuscular disease and, therefore, the disability as indicated by the applicant cannot be held to be attributable to service. Relevant extracts of some of the articles/reviews read as under :

> **"MedLink®Neurology**
>
> ***"Spinal muscular atrophy is a neurodegenerative disorder predominantly affecting the anterior horn cells. It is an autosomal recessive disorder with deletion of exon 7 of the SMN1 gene. The clinical classification is based on highest motor milestone achieved, and severity is, in part, associated with the number of SMN2 copies, an allelic gene of SMN1 ....."***

"Cleveland Clinic

What is spinal muscular atrophy (SMA)?

Spinal muscular atrophy (SMA) is a genetic (inherited) neuromuscular disease that causes muscles to become weak and waste away. People with SMA lose a specific type of nerve cell in the spinal cord (called motor neurons) that control muscle movement. Without these motor neurons, muscles don't receive nerve signals that make muscles move. The word atrophy is a medical term that means smaller. With SMA, certain muscles become smaller and weaker due to lack of use."

13. As regards the inordinate delay, in ***C. Jacob Vs. Director of Geology and Mining' and another reported in (2008) 10 SCC 115***, the Hon'ble Supreme Court held that *"a dead or stale claim is not permitted to be revived. The person who sleeps over his right is not entitled for any indulgence"*. Further, the Hon'ble High Court of Judicature at Allahabad vide their order dated 04.08.2004 in the case of ***Inderpal Singh Vs. UoI and Others [Civil Misc. Writ Petition No. 8524 of 2000]***, had dismissed the petition holding that the petitioner himself was not interested in pursuing the matter and kept silent for 11 years. Consequently, the appeal filed by the petitioner was wholly belated and the delay could not be condoned merely because the petitioner woke up after 11

years. In the present case, had the matter been agitated in time, the applicant's case could have been considered on the basis of the documents which would have been available earlier.

14. Thus, in this case the disability pension has been denied and the applicant himself stated that the disease was considered as neither attributable to nor aggravated by military service by the medical board at the time of discharge. Therefore, after a huge delay of 34 years when the medical board proceedings have already been destroyed, it is not possible for us to come to the conclusion as to why the disability of the applicant was declared as neither attributable to nor aggravated by service. Thus it is not possible for us give any opinion in vacuum. In this context, it would be relevant to refer to the order of Hon'ble High Court of Delhi dated 08.09.2020 in ***Ex JWO Kewal Krishan Vij Vs. Union of India & Ors.*** ***[W.P. (C) No. 6093/2020]*** wherein the High Court has dealt with the issue of belated claim of disability pension after the medical records were weeded out as per the extant rules. The petitioner in that case had challenged the dismissal order passed by the Tribunal on

17.03.2020 in O.A. No. 1051 of 2018. In this regard, Para 16 of the order of the Hon'ble High Court upholding the order passed by the Tribunal reads as under :

> ***"16. As far as the contention of the counsel for the petitioner, the petitioner being entitled to equality with Dharamvir Singh supra and Ex Gunner Vasant Mokashi supra is concerned, we have already hereinabove held the petitioner to be not similarly placed as Dharamvir Singh supra. As far as the aspect of delay is concerned, no doubt in Ex-Gunner Vasant Mokashi supra, the AFT condoned the said delay confining the claim for arrears to three years preceding the filing of the petition but from a reading of the order, it appears that there was no serious opposition thereto inasmuch as there is no discussion on the said aspect. On the contrary, the petition filed by the petitioner before the AFT was opposed, by filing a reply including on the ground of delay. 'The order of condonation of delay is a discretionary order and exercise of discretion to condone the delay in one case in which there is no or not much opposition, does not form a precedent for condonation of delay in another case, though generally, same parameters have to be applied by the Court in all cases. However, in exercise of jurisdiction under Article 226 of the Constitution of India, it cannot be said that the discretion exercised by the AFT in the impugned order, to not condone the delay of 38 years, has been exercised illegally or perversely, to invite interference by this Court. The claim for disability pension cannot be equated to a claim for pay/emoluments in accordance with Rules or claim for other recurring payments which if not in accordance with law or contract can be claimed at any time. Disability pension, though payable month-***

by-month, payment thereof is dependent on a finding of disability attributable to Or aggravated by service and in the absence of a finding of disability attributable to or aggravated by service, there can be no claim for disability pension; such finding is a finding of fact and not of law or contract, claim wherefor even if highly belated can be made at any time and granted with arrears for the period within limitation; on the contrary finding, even if erroneous, of "no disability attributable to or aggravated by service" if not challenged within reasonable time attains finality and a claim for disability pension cannot be made at any time, after decades, claiming the same to be a recurring payment. The counsel for the petitioner is misapplying Tarsem Singh supra."

15. In the case here, although the applicant has filed an application for condonation of delay, but he has failed to show any cogent or sufficient cause for the huge delay of about 34 years and having no documents with him to substantiate his claim, thus in the absence of any sufficient cause, the same cannot be considered. Even the Hon'ble Supreme Court has laid down guiding principles for courts to consider while examining cases for condonation of delay by stating the *"adoption of liberal approach in condoning the delay of short duration and a stricter approach where the delay is inordinate."* and *"If a party has been thoroughly negligent in implementing its rights and remedies, it will be*

equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly." Also, *"The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed to totally unfettered free play."* Thus, the petition deserves to be dismissed on this count also.

16. In view of the aforesaid facts and circumstances and also the guidelines laid down by the Hon'ble Supreme Court and the Hon'ble High Court as referred to above, we are of the opinion that medical documents of the applicant have been destroyed after the prescribed retention period after following due process of law hence in the absence of the relevant material and documents, no decision can be taken in vacuum on attributability or aggravation of the disability without perusing the reasons based on which the disability was considered as 'Neither attributable to nor aggravated by military service' (NANA). Moreover, it is evident that no sufficient explanation for condonation of inordinate delay has been adduced and hence, condonation of delay cannot be accepted as a matter of right or equity and in the absence

thereof, as detailed hereinabove, we are not in a position to show any indulgence in the matter.

17. Accordingly, the OA as well as application for condonation of delay fail and thus stand dismissed. However, there shall be no order as to costs.

Pronounced in open Court on this 12th day of July, 2024.

[JUSTICE RAJENDRA MENON]
CHAIRPERSON

[LT GEN P.M. HARIZ]
MEMBER (A)

/ng/