ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOCHI

O.A.NO.43 OF 2011

THURSDAY, THE 23RD DAY OF FEBRUARY, 2012/4TH PHALGUNA, 1933

CORAM:

HON'BLE MR. JUSTICE A.C.ARUMUGAPERUMAL ADITYAN, MEMBER (J)

HON'BLE LT.GEN.THOMAS MATHEW, PVSM, AVSM, MEMBER (A)

EX-CADET SWATHY NAIR G.S. (NO.1165)
AGED 23 YEARS , SAISUDHA, NELLANADU P.O. ***APPLICANT***
THIRUVANANTHAPURAM, KERALA – 695 606

BY ADV. SRI. V.K. SATHYANATHAN.

versus

1. UNION OF INDIA, REPRESENTED BY ITS SECRETARY, MINISTRY OF DEFENCE, SOUTH BLOCK, NEW DELHI – 110 011.

2. THE CHIEF OF NAVAL STAFF, ***RESPONDENTS***:
INTEGRATED HEADQUARTERS,
MINISTRY OF DEFENCE (NAVY),
SENA BHAWAN, NEW DELHI – 110 011.

3. THE COMMANDING OFFICER,
INS MANDOVI (NAVAL ACADEMY), GOA – 403 109.
(PRESENTLY RE-LOCATED IN INS ZAMORIN
(NAVAL ACADEMY), EZHIMALA – 670310),

4. THE DIRECTOR, DIRECTORATE OF PAY AND ALLOWANCES,
INTEGRATED HEADQUARTERS, MINISTRY OF DEFENCE (NAVY),
D-11 WING, SENA BHAWAN, NEW DELHI 110 011.

5. THE PRINCIPAL CONTROLLER OF DEFENCE ACCOUNTS (NAVY),
VARUNA NO.1, COOPERAGE ROAD, MUMBAI – 400 039.

R1 TO R5 BY SR. PANEL COUNSEL SRI.K.M. JAMALUDEEN.

ORDER

A.C.A.Adityan, Member (J):

This application is for disability pension. According to the applicant,

he has joined as a recruit in the Indian Navy on 1.8.2006 and while he was at Naval Academy, Goa , he was manhandled by Cadet Amandeep Dhiman and in spite of his report to the competent authority, no action was taken against the said individual. On the night of 12.10.2007, Cadet Amandeep Dhiman made the applicant to roll down on steps and haunch back up on stairs, which in due course resulted in severe back pain to the applicant. The said cadet repeatedly kicked on the applicant's back when he said that he was having back pain. The applicant was not given any sort of medical treatment till next day morning. On 13.10.2007, the applicant was taken to INHS Jeevanti and after initial treatment he was transferred to INHS Asvini, wherein the injury report was made. The officers insisted the applicant to withdraw his injury report, but the applicant had refused to do so. The applicant underwent treatment for nearly 15 days, but he continued to have low back ache. On 20.4.2008, the applicant had an accident during training (fall from beams) while practicing toe touch and was admitted at M.H. Panaji and was discharged in five days. The applicant's condition has been worsoned and had urine retention. He was again hospitalised on 25.4.2008 and thereafter he was transferred to INHS Asvini in bad state with infection in bladder due to failure of catheter. The applicant was intimated that the medical officers have decided to invalided out of service due to the diseases 'Spina bifida' and 'Neurological disorder'. An

Invalidment Medical Board was constituted and was recommended to be invalided out of service and was served with Invalidment Notice No.227/08 dated 28.8.2008 (Annexure A1). The applicant was finally invalided out of naval service on 28.11.2008 vide NHQ Signal DT 311821/Oct dated 31.10.2008 (Annexure A3). The applicant's claim for ex-gratia and ex-gratia disability pension/award to the respondents were rejected on the ground that the disability is neither attributable to nor aggravated by service, as per the opinion of the Medical Board in AFMSF-16. The Commanding Officer has opined that disability is attributable to service. Along with AFMSF-16 the applicant received only one injury report initiated during October 2007, but the other injury report will substantiate that injury suffered by him is attributable to service. The injury report initiated during October 2007 makes it clear that the applicant suffered the injury due to manhandling by another cadet. It is not known why the Naval authorities have not conducted any inquiry and no action has been taken against the cadet who manhandled the applicant. The said cadet is presently serving in the Indian Navy as a Commissioned Officer. Under such circumstances, the applicant has come forward with this application challenging the opinion of the Invaliding Medical Board and also for the grant of ex-gratia and ex-gratia disability pension/award and for consequential reliefs.

2. In the common reply statement, the respondents would contend that the application is not maintainable since the relief asked for is against the provisions of Navy (Pension) Regulations 1964 read along with Government Letter dated 15th September 2003. Basing their reliance on the judgment of the Delhi High Court dated 22.8.2008 in W.P.(C) No.6959/04 filed by **Ex Naik Dilbag Singh** and also relying on the order dated 20.7.2011 in OA No.203 of 2010 of the Principal Bench of the Armed Forces Tribunal, New Delhi with title **Smt.Shakuntala Devi vs. Union of India**, the respondents would contend that since the applicant has failed to establish that the injury or fatality by the concerned military personnel bears a casual connection with military service, the application is not maintainable. According to the respondents, the applicant has failed to establish that the attack on him by another cadet is attributable to service. The Invaliding Medical Board has opined that the applicant's disease is neither attributable to nor aggravated by service and the same is constitutional in nature. The opinion of the Medical Board has been affirmed by the competent authority and hence the applicant's claim for ex-gratia and ex-gratia disability pension/award cannot be granted. As per the dictum of the Honourable Supreme Court in **C.D.A.(Pension) vs. S.Balachandran Nair**, reported in SLR 2006(1) 51, the High Court cannot direct the Government to pay disability pension and the opinion of the

Medical Board must be accepted. The above position regarding the finding of the Medical Board find mention in other cases also reported in **Union of India vs. Dhir Singh China, Colonel (Retd),** AIR 2007 SC 1197, **Union of India vs. Keshar Singh** (2007) 5 SCR 408, wherein also it was held that opinion of the Medical Board has to prevail. The Invaliding Medical Board held on the applicant on 28th August 2008 found him suffering from disabilities – (i) Neurogenic Bladder and (ii) Spina Bifida LVS. Both the disabilities were considered to be neither attributable to nor aggravated by service. The applicant's claim for ex-gratia and ex-gratia disability pension/award was rejected by the competent authority in terms of Government Letter dated 15th September 2003 (Annexure A4). The applicant on his invalidment from service was paid ₹ 80,000/- towards the maturity value of his saving element under Naval Group Insurance Scheme. It is medically opined that cases of spina bifida with enlargement of the urinary bladder, develop urinary tract infection quite commonly. In the case of the applicant, the opinion of the urologist clearly brings out that the applicant had enlargement of urinary bladder consequent upon spina bifida. Though the applicant had not brought out the reasons for his hospitalisation on 25.4.2009, it is evident from the record that the admission on this occasion was due to retention of urine in the urinary bladder which necessitated the placement of a urinary catheter. It is also medically

known that presence of urinary catheter predisposes to urinary infections. With regard to the nature of tests, it is stated that medical practices in the Armed Forces are of the highest ethical standards. The applicant's allegation that series of tests conducted on him were pain inflicting and he was mentally and emotionally shattered is patently false and the allegation is nothing short of poor attempt at malicious slander. The opinion of the Invaliding Medical Board was not challenged by the applicant so far. As per the opinion of the urologist at INHS Asvini recorded on 27th July 2008, it is clearly mentioned that when asked about medical history, the applicant revealed that he had urinary problems since childhood. Earlier also when the applicant was referred to Consultant Neurologist, the applicant had stated that he had multiple episodes of Urinary Tract Infection in childhood accompanied by bladder disturbances. So, it is clear that urinary problems of the applicant has nothing to do with the injury sustained by him. The applicant's contention that the second disease Neurological Bladder was caused due to the injury suffered during training is not medically established. Since the opinion of the Invaliding Medical Board in AFMSF 16 is to the effect that disability under which the applicant is suffering is neither attributable to nor aggravated by service, as per Navy Pension Regulations, 1964, the applicant is not entitled for the relief asked for in this application and hence the same is liable to be dismissed.

3. We heard the learned counsel appearing for the applicant, Sri.V.K.Sathyanathan and the learned Senior Panel Counsel, Sri.K.M.Jamaludeen appearing for the respondents and considered their respective submissions.

4. The point for determination is, whether the relief asked for in this case, viz., to declare the opinion of the Invalidating Medical Board that the diseases are congenital diseases is defective and to be set aside and the relief regarding grant of ex-gratia and ex-gratia disability pension/award and for consequential relief of interest etc are to be allowed as prayed for?

5. The point:- From the relief asked for in this application, viz. To set aside the opinion of the Invalidating Medical Board (AFMSF 16), this Tribunal cannot grant the same, because it has been laid down in **Secretary, Ministry of Defence & Ors vs. Damodaran A.V.(Dead) through the LRs and Ors.** 2009 (8) MLJ 1475 : (2009) 9 SCC 140, that primacy shall be attached to the opinion of the Medical Board and the same cannot be set aside by this Tribunal, unless and until the opinion is shown as prima facie illegal. The relevant observations in the said judgment runs as follows:

> "30. When an individual is found suffering from any disease or has sustained injury, he is examined by the medical experts who would not only examine him but also ascertain the nature of disease/injury and also record a decision as to whether the said personnel is to be placed in a medical category which is lower than `AYE' (fit category) and whether

temporarily or permanently. They also give a medical assessment and advice as to whether the individual is to be brought before the Release/Invalidating Medical Board.

31. The said Release/Invalidating Medical Board generally consists of three doctors and they, keeping in view the clinical profile, the date and place of onset of invaliding disease/disability and service conditions, draw a conclusion as to whether the disease/injury has a causal connection with military service or not. On the basis of the same they recommend (a) attributability, or (b) aggravation, or (c) whether connection with service.

32. The second aspect which is also examined is the extent to which the functional capacity of the individual is impaired. The same is adjudged and an assessment is made of the percentage of the disability suffered by the said personnel which is recorded so that the case of the personnel could be considered for grant of disability element of pension. Another aspect which is taken notice of at this stage is the duration for which the disability is likely to continue. The same is assessed/recommended in view of the disease being capable of being improved.

33. All the aforesaid aspects are recorded and recommended in the form of AFMSF- 16. The Invalidating Medical Board forms its opinion/recommendation on the basis of the medical report, injury report, court of enquiry proceedings, if any, charter of duties relating to peace or field area and of course, the physical examination of the individual.

34. The aforesaid provisions came to be interpreted by the various decisions rendered by this Court in which it has been consistently held that the opinion given by the doctors or the medical board shall be given weightage and primacy in the matter for ascertainment as to whether or not the injuries/illness sustained was due to or was aggravated by the military service which contributed to invalidation from the military service".

The Hon'ble Apex Court has further observed that, the question regarding payment of disability pension has also been dealt with by the Supreme

Court in **Union of India vs. Baljit Singh,** (1996) 11 SCC 315. In paragraph 6, at page 316, the Apex Court observed as follows:

> "It is seen that various criteria have been prescribed in the guidelines under the Rules as to when the disease or injury is attributable to the military service. It is seen that under Rule 173 disability pension would be computed only when disability has occurred due to a wound, injury or disease which is attributable to military service or existed before or arose during military service and has been and remains aggravated during the military service. If these conditions are satisfied, necessarily the incumbent is entitled to the disability pension. This is made amply clear from clauses (a) to (d) of para 7 which contemplates that in respect of a disease the Rules enumerated thereunder required to be observed. Clause © provides 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 were due to the circumstances of duty in military service. Unless these conditions are satisfied, it cannot be said that the sustenance of injury per se is on account of military service. The conclusion may not have been satisfactorily reached that the injury though sustained while in service, it was not on account of military service. In each case, when a disability pension is sought for and made a claim, it must be affirmatively established, as a fact, as to whether the injury sustained was due to military service or was aggravated which contributed to invalidation for the military service".

The said dictum in **A.V.Damodaran's case** has been followed in Civil Appeal No.4281/2006 dated 15th July, 2011. Under such circumstances, it is clear that due weight, primacy and credence shall be attached to the opinion of the Medical Board. Unless and until the opinion of the Invalidating Medical Board is set aside by a competent medical authority, this Tribunal cannot interfere with the same. The contention of the learned counsel for the applicant is that the onset of the diseases referred to in AFMSF 16 is due to manhandling of a co-cadet and in spite of his complaint, no action was taken by the respondents. But, to our dismay, there is absolutely no relief asked for in this application in respect of the alleged manhandling of the applicant by a co-cadet, which according to the applicant, resulted in the disability mentioned in AFMSF 16. It is left to the applicant to take appropriate steps against the culprit before the appropriate forum. We are of the considered view that it is not a reason to set aside the opinion of the Medical Board in AFMSF-16. Under such circumstances, we hold that the applicant is not entitled for the relief asked for in this application. The point is answered accordingly.

6. In fine, the application is dismissed. However, we find it a fit case to be referred to the Review Medical Board, in case the applicant approaches the respondents for constituting the same within two months from the date of application. The Review Medical Board shall also take into

consideration the onset of the disease and also the injury reports made by the applicant. Time for filing application for constituting the Review Medical Board – one month.

No costs.

Sd/-
LT. GEN. THOMAS MATHEW,
MEMBER (A)

Sd/-
JUSTICE A.C.A. ADITYAN,
MEMBER (J)

DK.

(True copy)

Prl. Private Secretary

ARMED FORCES TRIBUNAL,
REGIONAL BENCH, KOCHI.

OA No.43 of 2011

ORDER

DATED: 23.02.2012