

Unreportable
IN THE HIGH COURT OF DELHI AT NEW DELHI
+WP(C) No.11693/2005

Date of Decision: 22.01.2008

#Ex. Nb. Sub. Juthar Singh
!

.....Petitioner
Through: Mr. A.K. Trivedi, Adv.

Versus

\$Union of India & Others
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.....Respondents
Through Mr.Sewa Ram, Adv.
for respondent Nos.1 to 4.

CORAM :-

***THE HON'BLE MR.JUSTICE A.K.SIKRI**
THE HON'BLE MR. JUSTICE J.M. MALIK

- 1.Whether Reporters of Local papers may be allowed to see the Judgment?
- 2.To be referred to the Reporter or not?
- 3.Whether the judgment should be reported in the Digest?

A.K. SIKRI, J. (Oral)

:

- 1.The petitioner was enrolled in Army on 4.8.1979 and was promoted upto the rank of Naib Subedar. After about 19 and a half years of service, he was invalidated on medical ground under Army Rule 13(3)III(iii) of the Army Rules with effect from 17.1.1999. The petitioner wants that he be granted

disability pension. It is alleged in the petition that the petitioner was recommended for grant of disability element along with service element but the claim was dismissed by CCDA(P), Allahabad on 22.3.2000. His grievance is that the copy thereof was not supplied to the petitioner and only communication given to him by Record Officer to this effect was letter dated 9.4.2000. He was not supplied with the medical proceedings and findings of the Invaliding Medical Board in order to make an effective representation. Even in the absence of the said proceedings, he preferred appeal on 26.4.2000, which was rejected by the First Appellate Authority vide orders dated 30.8.2001. After this rejection, the petitioner has preferred present petition.

2. The respondents have filed the counter affidavit refuting the aforesaid allegations. It is, inter alia, stated that the Invaliding Board did not recommend his case for payment of disability pension as it was of the opinion that the disease was neither attributable to the military nor was it aggravated by the military service. The petitioner was suffering from agitated depression and that was the reason for boarding him out of service.

3. The respondents have, along with the counter affidavit, produced record relating to proceedings of the medical board. We find that Part III of the proceedings, which deals with 'Opinion of the Medical Board' against the column as to whether the disability, namely, 'Agitated Depression' was aggravated due to military service or not, initially, remarks noted were 'Yes', which is scored out subsequently and word 'No' is substituted. Similar consequential changes are made in other columns. In column 2(d) wherein the Board has to give its opinion when the disease is not connected with the military service, it is mentioned "Probably Genetic Factors", though earlier it was mentioned 'N.A.', which is scored out. It is clear from the reading of this part that in the first blush opinion of the medical board was that the disease is aggravated due to military service, which is changed subsequently and after deleting the earlier entries, they are substituted by the negative entries. It also appears that it is initialled by only one person, namely, President of the Medical Board. In these circumstances, learned counsel for the petitioner submits that such a change of mind of the Medical Board should not be accepted and in support of this submission, he refers to the judgment of a Division Bench of

this Court passed in WP(C) No.4260/1993 entitled Ex. Hawaldar Shri Chand Yadav Vs. Union of India and Others decided on 27.4.2006 where the fact situation was almost identical and this Court had made following observations:-

“(6) The records of the proceedings of the medical board have been placed before us. We have gone through the said records very carefully. On perusal of the said records we find that at one stage the concerned officers who had signed the said records of the proceedings of the Medical Board has recorded their satisfaction that the disability of the petitioner was aggravated due to stress and strain of service. However, it appears that some one struck out the same and wrote 'Not Applicable'. Reasons why the same is not applicable are not spelt out in the endorsement made. Similarly, as against the column whether disability existed before entering service, at one stage it was written as 'Yes', which was later on scored out and was made 'No' subsequently. There are number of over writings in the said form. It further appears that the aforesaid act of changing the entries made is also without the signatures of all the three members of the Board, and there is only one initial appearing thereon without indicating as to who has put in his initials.

(7) xxxxx

(8) The petitioner was working in the field area when he fell ill. It is an admitted fact that the petitioner was medically fit at the time of his enrolment in the Army. The scored out portion of the

medical records reveal that the Release Medical Board was satisfied that the disability of the petitioner was aggravated due to stress and strain of military service. No explanation has been given by the respondents as to why the said portion was scored out. It is also clear from the impugned order dated 17th December, 1992 that the appellate medical authority has only perused the petitioner's medical service document and has not examined the petitioner physically to have primacy over the Release Medical Board's opinion."

4. It is clear from the above that in the said case when the

Division Bench found that the petitioner therein was working in the field area when he fell ill and he was medically fit at the time of enrolment in the Army, it went by the initial opinion of the medical board, which was scored out and opined that the Release Medical Board was satisfied that the disability of the petitioner was aggravated due to stress and strain of military service and no explanation has been given by the respondents as to why the said portion was scored out.

5. In the present case also we find that in the counter affidavit, no explanation is given as to why the said portion is scored out and substituted by a contrary opinion. No doubt, it is signed by the President of the Medical Board, but the other members have not signed the same. That apart, the cause

for changing the opinion as given, that too on giving a second thought, is "Probably Genetic Factors". Obviously, this shows that even after change of mind the Medical Board was not very categorical in its finding as to whether the cause of disease was genetic or it was aggravated due to military service. Without commenting much, it would be suffice to state that the very nature of the disease, namely, 'Agitated Depression' may suggest that it might have been aggravated by the military service, if not attributable, though it is possible that such a disease can even be attributable to the military service. However, having regard to the medical board's own opinion initially formed and no definite opinion expressed while changing the initial opinion, we are of the view that keeping in view the mandate of the aforesaid judgment in the case of Ex. Hawaldar Shri Chand Yadav Vs. Union of India and Others (supra), the petitioner be granted disability pension.

6. At this stage, learned counsel for the respondents states that the petitioner has not availed the remedy of second appeal. No doubt, normally a person should approach this Court after availing the statutory remedies. However, that is not an absolute bar in exercising the extraordinary jurisdiction of

this Court under Article 226 of the Constitution. It is a self-restraint power which the court exercises when provision for alternate remedy is relegated. However, in the present case there are certain factors because of which we would not like to relegate the petitioner to avail the alternate remedy of second appeal, namely, it is a case of disability pension; the writ petition was filed in the year 2005 and has been pending consideration for almost 2½ years in this Court; the petitioner has exhausted remedy of first appeal and above all, as we have found that the case of the petitioner is squarely covered by the aforesaid judgment, having regard to all these factors, which we take into consideration cumulatively, we are of the opinion that this writ petition be decided on merits rather than forcing the petitioner to avail the remedy of second appeal in the peculiar facts and circumstances of this case, as stated above.

7. However, while holding that the petitioner is entitled to disability pension, in so far as the arrears of pension are concerned, the respondents shall pay the same with effect from July 2002. Rule is made absolute. The writ petition is allowed in the aforesaid terms directing the respondents to pay the disability element of pension from the aforesaid date

within three months from today. The petition shall also be entitled to continue to get the disability element of pension in future as well. It would be open to the respondents to direct the petitioner to appear before the review Medical Board to assess his present disability for the purpose of fixation of quantum of disability pension.

(A.K. SIKRI)
JUDGE

January 22, 2008
HP.

(J.M. MALIK)
JUDGE