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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 17.09.2021

+ W.P.(C) 10401/2021

EX FLIGHT LIEUTENANT SANJIV DEWAN

..... Petitioner

Through Mr.Aditya S.Puar, Adv.

versus

UNION OF INDIA & ORS.

..... Respondents

**Through Ms.Sarika Singh, Ms.Manpreet
Kaur Bhasin, Advs. for R-1-5.**

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

The petition has been heard by way of video conferencing.

CM 32020/2021(exemption)

Allowed, subject to all just exceptions.

WP(C) 10401/2021

1. This petition has been filed by the petitioner challenging the order dated 08.10.2020 passed by the learned Armed Forces Tribunal, Special Bench, New Delhi (hereinafter referred to as 'AFT') in OA No.209/2016 filed by the petitioner dismissing the OA, and as a consequence, seeking setting aside of the Medical Board findings

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which declared the petitioner's disability to be not attributable to / not aggravated by military service and denying disability pension to the petitioner. The petitioner further prays for grant of disability pension along with arrears for the period starting from three years from the date of filing of the petition before the learned AFT.

2. It is the case of the petitioner that the petitioner, after successfully completing pre-commission training, was granted commission in the Indian Air Force in the rank of Pilot Officer. On 22.09.1977, while on duty with the 15th Squadron in Bagdogra, the petitioner, while riding to an official briefing on a motorcycle driven by his colleague Fg Offr LN Pandey met with a serious accident and suffered severe head injuries resulting in the petitioner's hospitalization.

3. On 10.05.1980, the petitioner was examined by the Additional Advisor (Psychiatry), who opined that the petitioner was permanently unfit for flying duties.

4. A Medical Board was held at Air Force Command Medical Establishment (AFCME) Bangalore which concurred with the opinion of the Additional Advisory (Psychiatry), permanently lowering the medical category of the petitioner to A4(P)G3(T), rendering him permanently unfit to fly aircraft.

5. The petitioner was thereafter brought before an Invaliding Medical Board (hereinafter referred to as 'IMB') which classified his disability to be 20% for life. On 22.12.1980, the Medical Specialist,

AFCME, by his opinion, recommended invalidment of the petitioner in category A4(P)G3(T) as per Air Force Regulations due to the injury suffered by him, that is, 'cerebral concussion'.

6. The Chief of Air Staff approved the invalidment of the petitioner on medical grounds on 30.01.1981.

7. The petitioner claimed disability pension, however, the said claim was rejected vide order of the respondents dated 09.04.1981 on the ground that the disability was neither attributable to nor aggravated by military service.

8. On 18.04.1981, the petitioner was released from the Air Force Service in low medical category and with permanent disability.

9. In 2016, the petitioner filed the abovementioned OA before the learned AFT placing reliance on the decisions of the Supreme Court, primarily the judgment dated 02.07.2013 in Civil Appeal No.4949/2013 titled *Dharamvir Singh vs. Union of India & Ors.*, claiming disability pension. The said petition, however, has been dismissed by the learned AFT by its impugned order, observing that the primary evidence as to the circumstances of the injury to the petitioner, as available in the Court of Inquiry, have already been weeded out by the respondents in normal course and in any case, the petitioner had never challenged the same till the filing of the petition before the learned AFT.

10. The learned counsel for the petitioner submits that the impugned Order passed by the learned AFT is liable to be set aside

inasmuch as the learned AFT has failed to consider that the petitioner became aware of his rights against disability pension only upon the judgment of the Supreme Court in *Dharamvir Singh* (supra). In any case, the cause of action is recurring in nature and the petitioner was claiming relief only for the period commencing 3 years before filing of the petition before the learned AFT.

11. He further submits that the accident occurred while the petitioner was on duty with the 15th Squadron in Bagdogra. The circumstances in which the accident took place, therefore, could not completely destroy the right of the petitioner to claim disability pension. He has to be deemed to be on duty at that time.

12. On the other hand, the learned counsel for the respondents, who appears on an advance notice, places reliance on the judgment dated 08.09.2020 of a Division Bench of this Court in WP(C) No.6093/2020 in *Ex Jwo Kewal Krishan Vij vs. Union of India & Ors.*, to submit that in similar circumstances, this Court has dismissed the claim for disability pension made belatedly.

13. We have considered the submissions made by the learned counsels for the parties.

14. In the present case, a few facts that emerge from the reading of the impugned order of the learned AFT and not disputed by the learned counsel for the petitioner are that it is the petitioner's own case that his claim for grant of disability pension was rejected by the respondents vide order dated 09.04.1981. The petitioner did not

challenge the said order till the filing of the petition before the learned AFT in 2016, that is, after a delay of more than 35 years. Even prior to the rejection of the claim for disability pension, the IMB had opined that the disability suffered by the petitioner is neither attributable to nor aggravated by the Air Force Service (NANA). Though, the petitioner was advised to prefer an appeal against the same, if he so desired, no appeal was filed by the petitioner. The IMB report was based on the findings of the Court of Inquiry (hereinafter referred to as 'CoI') in the accident case undertaken in 1977, that is, when the accident took place. The same stood approved by the Officer Commanding as also by the Senior Officer Administrator (SAO) at Command Headquarters.

15. On considering the above facts, the learned AFT has dismissed the OA filed by the petitioner, observing as under:

"8. When we peruse the records in detail, the following irrefutable facts about the disability of the applicant are clear to us:

(a) After about 05 years and 08 months of service in Air Force, the applicant met with a motorcycle accident, while riding as a pillion with another officer, on 22.09.1977 and suffered 'Cerebral Concussion' i.e. a kind of head injury.

(b) Despite sustained treatment of about three years, the applicant could not recover completely and kept reporting of frontal headache. The officer was finally declared unfit for air crew duties in 1980 and was advised to opt for change of branch from flying to a non-flying branch. The 'clinical details' contained in the IMB proceedings being relevant are reproduced as under:

This officer of F(P) branch is an old case of cerebral concussion effects of sustained as a result of motorcycle accident on 22.9.77. He is being periodically reviewed since then. During each review he has been complaining of frontal headache which is reduced with disprin. only. He was reviewed by Additional Adviser in Psychiatry, AHDC on 10.5.80 and he had opined that the officer is permanently unfit for aircrew duties. The medical board held on 14.5.80 at AF CME had concurred with the opinion of Addl. Adviser in Psychiatry. He was therefore placed in medical category A4(P)G3(T). Permanently unfit A1, A2 and A3 duties. The officer was asked to change his branch as he was permanently unfit for flying duties. He refused. He is, therefore, required to be invalided out of service under Para 1(d) of AFI 11/75 and Air HQ letter No.Air HQ/26490/12937/Med dtd. 15 Nov 80. Hence/ the officer is brought before an invaliding medical board. (emphasis supplied)

(c) Since the applicant had refused to opt for change of his branch, as advised, he was invalided out of service on 18.04.1981.

(d) The I00MB opined that the disability of the applicant is neither attributable to nor aggravated by military service (NANA). It is important to note that as an organizational norm while 'attributability of a disability, caused by a disease is decided by a Medical Board consisting of doctors, however, the attributability of a post- accident disability, is normally decided by a CoI based on evidence. The opinion of IMB/RMB on attributability, merely reflects the findings of the CoI in accident cases. In this case, the following remarks on 'attributability' is annotated in the IMB:

Disability caused by motorcycle accident on 22.09.77 and is considered neither attributable nor aggravated by military service vide IAF(P) 28 dated 06 Dec 77 rendered by O.C. and subsequently concurred by SOA dated 26 Dec 77.

(e) It is important to understand here that IAF (P) 28 is an official form of Indian Air Force, on which a CoI is ordered. The findings of the CoI are a part of this form IAF (P) 28. The findings of court of inquiry has been perused by the Officer Commanding (OC) of the applicant and he was in agreement with CoI findings that the applicant's injury due to the accident, is NANA. The OC's recommendation on the CoI that the injury of the applicant is NANA, has been perused and finally concurred by the Senior Officer Administration (SAO) at Command Headquarters after which the findings of CoI have attained finality on 26 Dec 77. It is also important to note that in a CoI the accident victim as well as all other relevant witnesses give their signed statements and only after evaluating the complete evidence, the CoI arrives at its findings.

(f) On an earlier query from us, the learned counsel for the respondents had submitted that the documents of the applicant and the associated CoI had been destroyed after the mandatory preservation period and that the documents in question are 43 years old and that the applicant himself has raised this issue after about 35 years of his discharge through this O.A, hence they are not in a position to comment on his belated claim that his injury is attributable to military service. He further added that as per limited records available, the injury of the applicant was NANA in the CoI findings and as per the opinion of the Officer Commanding of the applicant and the same had been concurred by SAO at Command HQ in 1977. This fact is reflected in the IMS proceedings of the applicant held on 22.12.1980.

9. After considering the above mentioned irrefutable facts, we have noticed that the only evidence produced by the applicant, in support of his claim that he was on duty when he met with the motorcycle accident, is an affidavit from his colleague, a brother officer who has already retired from service. The affidavit states that the applicant was going along with him, to attend an official briefing when he met with the accident. We, however, find it difficult to give credence to this kind of evidence due to following reasons:

(a) Once a Col has been finalized in 1977 after considering the evidence as given by all

relevant witnesses including the applicant, the findings of the Col cannot be questioned after 35 years, with additional evidence, especially so when the relevant records have already been destroyed after the expiry of the statutory period for preservation.

(b) The Officer Commanding is a father figure of all officers of the Squadron. There is no reason for us to disbelieve the judgment of the then Officer Commanding of the applicant, for recommending his injuries to be NANA, in line with the findings of CoI.

(c) The officer has never challenged or appealed against the decision of the Col in 1977 or the opinion of the IMB in 1980, hence his belated action to challenge the findings of 'NANA' after 35 years, does not inspire confidence.

(d) It is trite that the benefit of doubt cannot be extended to a Government servant for non-availability of documents after they have been destroyed after the statutory period of preservation.

10. The primary evidence related to the circumstances of injury to the applicant in a motorcycle accident as available in CoI have already been destroyed, hence the mere contention of the applicant is not conclusive to record a finding that his disability was either attributable to or aggravated by military service. The long silence of the applicant for not lodging a claim of disability pension can be said to bar the remedy, though we are not oblivious of the fact that such bar is not absolute. It would be a question of fact in each case. However, if no detailed record is available in respect of cause and nature of injury, the applicant cannot draw any adverse inference against respondents and claim his disability as being attributable to or aggravated by military service. In this regard, it would be appropriate if we refer to a Division Bench judgment of the Delhi High Court in Ex. Naik Chander Singh v. Union of India and others (CWP No.16792 of 2009 decided on 04.11.2006), wherein the claim of the petitioner was rejected for the

reason that service record of the petitioner had been destroyed after the retention period of 25 years from the date of discharge. The High Court also made reference to the order decided on 15.02.2008 in WP(C) No.6141 of 1999 (Shri Deo Prakash v. Union of India and others), wherein the Court held that if the record was destroyed, it cannot be said that there was any wrong by the respondents.”

16. We see no reason to disagree with the above findings of the learned AFT.

17. In *Ex. JWO Kewal Krishan Vij* (supra), this Court, when being confronted with similar petition filed belatedly, has negated the reliance of the petitioner therein on the judgment of the Supreme Court in *Dharmvir Singh* (supra) as an explanation for the delay, observing that though the judgment by a Court can furnish a cause of action for an appeal or other remedies there-against but cannot be a cause of action for another, unless similarly placed. The Court further held that where the petitioner challenges the finding of the Medical Board after decades of delay and after all records have been weeded out in accordance with law, he cannot equate himself with the judgment in *Dharmvir Singh* (supra).

18. This Court in *Ex. JWO Kewal Krishan Vij* (supra) further held that an order of condonation of delay is a discretionary order and in exercise of jurisdiction under Article 226 of Constitution of India, where it is found to have not been exercised illegally or perversely, the Court would not interfere with exercise of such discretion.

19. In the present case as well, as noted hereinabove, the finding of the CoI into the accident, held way back in 1977, found the injury suffered by the petitioner to be not attributable or aggravated by service. The petitioner was invalidated out of service in 1981 and disability pension was denied to him on the above ground in 1981. The petitioner has challenged these orders only in 2016, that is, after delay of more than 35 years. The respondents before the learned AFT had taken a stand that all records relating to the accident had been weeded out in the normal course. Applying the ratio of the judgment in *Ex. JWO Kewal Krishan Vij* (supra), therefore, this case calls for no interference by this Court in the impugned Order passed by the learned AFT.

20. We must herein clarify that we have proceeded to consider the petition on merit, leaving the question of law as to the maintainability of a petition under Article 226 of the Constitution of India against an order passed by the learned AFT open.

21. The petition is accordingly dismissed. There shall be no order as to costs.

The order be uploaded on the website forthwith. Copy of the order be also forwarded to the learned counsel through e-mail.

NAVIN CHAWLA, J

MANMOHAN, J

SEPTEMBER 17, 2021/RN