FORM NO – 21
(See Rule 102 (1)

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

APPLICATION NO : OA 09 OF 2012

THIS 30TH DAY OF SEPTEMBER, 2013

CORAM : Hon'ble Mr. Justice Raghunath Ray, Member (Judicial)
Hon'ble Lt. Gen. K.P.D. Samanta, Member (Administrative)

Indramani Swain aged about 52 years,
Ex Army Service No. 1450956-M,
Trade Craftsman, No. 323 Signal Regt.
C/o 99 APO – Permanent resident of
Vill. PO/PS – Erasama, Kujang, Dist.
Jagatsinghpur (Odisha),
Now residing at Qr. No. M/Q-41, Southbalanda
Colliery, P.S. Talcher, Dist. Angul, Odisha

..... Applicant

-VS -

1. Union of India, service through the Secretary,
Ministry of Defence, New Delhi- 110 011

2. Chief of Army Staff,
Army Headquarters, New Delhi-110 011

3. The Chief Records Officer,(OIC Records),
EME, secundeerabad-21
(A.P)

4. The CDA (Pension), Allahabad,

5. The Commanding Officer, No. 323,
Sig. Regt. C/o 99 APO

..... Respondents

For the applicant : Mr. Bhaskar Chandra Behera, Advocate

For the respondents : Mr. Sandip Kumar Bhattacharyya, Advocate

O R D E R

Per Lt. Gen. K.P.D,Samanta, MEMBER (Administrative)

In this O.A. filed under Section 14 of the AFT Act, 2007, the applicant has prayed for a direction upon the respondents to grant him disability pension with effect from 03.06.1980.

2. The applicant was enrolled in the Corps of EME in the Army as a Sepoy (Cfn) on 13.05.1972 and was posted at different places where he worked with efficiency and sincerity. At the relevant point of time, he was posted in field area and was attached to the Armory of the unit. According to the applicant, while performing parade, he fell down on the ground and sustained injury on his right arm above palm level and also some aberrations on his face. He was treated in the MI room of the unit since the injury was minor in nature. However, according to the applicant, such minor injury subsequently affected his nervous system for which he had suffered occasional loss of memory. Nervous system of the right arm above palm level continued to deteriorate. The applicant was referred to the 158 Base Hospital where he was medically examined and diagnosed as suffering from *Nurogenic Muscular Atrophy,* for which he was ultimately declared unfit for further service. Accordingly, he was boarded out of service on medical ground with effect from 03.06.1980 by a duly constituted Invalidating Medical Board (IMB). He was placed in permanent low medical category of CEE. According to the applicant, he was never informed about the percentage of his disability. The applicant submitted representations in the year 1984 and 1989 with request to consider his claim for disability pension as he was discharged from service under medical category CEE(Permanent) and his disability arose while in service. When the applicant did not receive any response from the respondents, he approached the Hon'ble High Court of Orissa by filing a writ petition

(OJC WP(C)/17283/2010). The said writ petition was disposed of by the Hon'ble High Court at the initial stage by order dated 02.11.2010 with a direction to the applicant to file a fresh representation to OP No.2, i.e. Chief of Army Staff and said respondent was asked to consider and dispose of the said representation by a speaking order. Accordingly, the applicant filed a fresh representation on 11.11.2010 and the concerned respondent disposed of the said representation by issuing a speaking order dated 23.11.2013 (Annex. 8) whereby it was held that the applicant was invalidated out of service on 02.06.1980 for suffering from the disease of *Nurogenic Muscular Atrophy (RT) (348) V.67,* which was opined by the medical board as neither attributable to nor aggravated by military service being constitutional in origin and as such, he was not entitled to disability pension as per relevant Pension Regulations for the Army.

3. The applicant has challenged this speaking order on the grounds that when he joined army service in May, 1972 he was found medically fit and was subjected to various rigorous training. Thereafter the applicant had been performing various duties including guard duties even in inclement weather and handling armaments and arms. There was no report of any medical deficiency all through. It is his case that from the time he was enrolled till he sustained injury while performing parade, there was no adverse medical report against him. The applicant contends that the disease of *Nurogenic Muscular Atrophy* developed only after the said injury that he sustained by way of falling on the ground while performing routine parade in the unit while in field area. Although this injury was a minor one and he was treated in the MI Room of the unit, it subsequently developed into the invalidating disease. The applicant further contends that the finding of the PCDA/medical board was unjust, unfair and biased because according to the applicant, he suffered the ibid disease while in service and,

therefore, it could not be said that the said disease was not attributable to nor aggravated by the military service as held by the medical board for denying him disability pension.

4. The application has been contested by the respondents by filing a written reply affidavit. It is stated that the applicant was enrolled in the Army on 13.05.1972 and was invalidated out of service on 02.06.1980 being medically unfit for further service u/r 13(3)(III)(iii) of the Army Rules on account of disability of *Nurogenic Muscular Atrophy*. The Invalidating Medical Board (IMB) opined that his disability was neither attributable to nor aggravated by military service. The said IMB has further stated that the disability was constitutional in origin and assessed the percentage of disablement as 30% for two years. According to the respondents, in terms of Reg.173 of the Pension Regulations for the Army, 1961 Volume I (Revised), the claim of the applicant for grant of disability pension could not be considered as he did not fulfill the dual conditions laid down therein. It is further stated that the rejection of the claim of the applicant for disability pension was communicated to him on 31.10.1980 with advice to prefer an appeal within six months. However, the applicant did not prefer any such appeal; but submitted an application for convening a re-survey medical board in February 1984. Since the applicant was not in receipt of any disability pension, question of placing him before the re-survey medical board did not arise. Thereafter, the applicant again submitted a representation on 11.01.1989 for grant of disability pension after a lapse of more than nine years. However, the respondents replied to the said representation by way of rejecting it by an order dated 18.02.1989 which was also communicated to the applicant. Subsequently, the applicant filed a mercy petition on 25.03.1989 which was considered but rejected by an order dated 06.05.1989. Thereafter, after a long lapse of more than 20 years he filed a writ

petition before the Hon'ble Orissa High Court that was disposed of by directing the applicant to file a fresh representation with the authorities, which he did. Accordingly, the respondent authorities considered his representation in compliance with the order of the Hon'ble Orissa High Court and issued a speaking order on 13.11.2011 rejecting the claim. The speaking order was communicated to the applicant on 26.11.2011(Annex.8). The respondents have categorically stated that although the applicant has submitted that the onset of the disease was due to an injury which he sustained during the course of his service, but there is nothing to substantiate such contention in his sheet-roll or in the proceedings of the IMB. The applicant has also not placed any document in support of his contention.

5. The respondents have also relied on some decisions of the Hon'ble Supreme Court (viz. **Secretary, Ministry of Defence & Ors –vs- Late Sep Damodaran AV through LR,** (2009) 9 SCC 140, **Union of India –vs- Baljit Singh**, (1996)11 SCC 315 **Union of India –vs- Sapper Mohinder Singh**, Civil Appeal No. 164/1991 decided on 14.1.1993) to contend that the opinion of the Medical Board is to be treated as final and cannot be challenged. Since in this case, the Medical Board has opined that the disease of the applicant was neither attributable to nor aggravated by the military service, he was not entitled to any disability pension, as claimed, in view of rule position. However, he was paid AGI maturity benefit of Rs. 900/- and Invalid Gratuity/DCRG of Rs. 3848.15p.

6. We have heard Ld. Advocates of both sides and have gone through the various documents placed on record. Ld. Advocate for the respondents has produced before us the original Medical Board proceedings as also the sheet-roll in respect of the applicant which have been perused by us.

7. Mr. Bhaskar Chandra Behera, Ld. Advocate for the applicant has argued with much vehemence that the applicant was enrolled in the Army in 1972. At that point of time, he was in sound health and in the medical examination that was held at the time of enrolment, there was neither any indication nor any note was made about any kind of illness. After enrolment, he underwent rigorous training and had been posted in different parts of the country including in field areas. It was only when the applicant was posted in a field area, he suffered a minor injury in his right hand above palm region after he fell down while performing a routine parade. Although at that point of time the injury sustained by the applicant in his right hand was found to be minor, subsequently such minor problem had developed into a major one resulting in neurological problems including memory loss etc., for which he was treated in military hospital on some occasions. But it was never diagnosed by the doctors that he was suffering from the ibid disease. It was on the last occasion in 1978-79 when he was again hospitalized in military hospital and then at Command Hospital, Kolkata that it was found that he was suffering from the ibid disease. Accordingly, he was placed before the Invalidating Medical Board which opined that his medical category was CEE (Permanent) and he was unfit for further service. Therefore, he was invalidated out of service before completion of his terms of engagement as per conditions of service. Since the applicant has rendered only eight years of service, he did not get any service pension. Unfortunately, the Medical Board held that the disease with which the applicant was suffering was neither attributable to nor aggravated by the military service although the percentage of disability was 30%. According to the Ld. Advocate for the applicant, since the disease arose from the injury that the applicant had sustained while in service which gradually got aggravated, it must be held that the said disease was attributable to and aggravated by

the military service. However, the Medical Board without proper application of mind and most arbitrarily held that the same was constitutional in nature and was not attributable to nor aggravated by the military service. Ld. Advocate for the applicant has very strongly called in question such medical opinion and contended that how a constitutional disease could not be detected for all these years when the applicant was treated for his injury or other ailment on some occasions by the competent medical officers in military hospitals. His contention is that the disease has its onset due to the said injury and, therefore, it must be held that it is attributable to and aggravated by the service. So, the applicant is entitled to disability pension @ 30% from the date of his discharge from service on being invalidated, which has been illegally denied to him. He concluded his argument by submitting that the facts and circumstances of the case suggest that this Tribunal should interfere and issue appropriate direction to the respondents to grant him disability pension as per rules.

8. Mr. Bhattacharyya, Ld. Advocate for the respondents at the outset has contended that the applicant was invalidated out of service in 1980 and he has come before this Tribunal in 2012. Therefore, the application is hopelessly barred by limitation.

9. Mr. Bhattacharyya, Ld. Advocate for the respondents has further submitted that since the applicant has approached the Court belatedly, in the meantime all necessary documents have been destroyed in terms of the relevant rules; the applicant cannot inure any benefit of non-availability of necessary records. Ld. Advocate has referred to Para.7 of the speaking order at Annex.8 and submitted that it has been clearly mentioned therein that neither any documents are available nor any entry relating to any injury sustained/accident occurred during service was found recorded in his service record. In such circumstances, the application is liable to be dismissed.

Mr. Bhattacharyya has also contended, by referring to the medical board proceedings that have been produced by the respondents, that in the history of case, it is recorded by the medical board that a fracture wound was there. But the applicant never stated where he sustained such fracture – whether it is during service or while on leave or elsewhere and whether such fracture has any casual connection with his service. The applicant has only averred in the application that he fell down while performing parade and a minor injury was sustained in his right hand above palm region. There is no mention of any fracture. In such circumstances, the applicant cannot claim that the ibid disease had developed due to the injury. Moreover, the medical board never stated that the disease could arise due to such minor injury. He has relied on rule 7A and rule 3 of Appendix II to Pension Regulations and corresponding rule 8 of Entitlement Rules to the Casualty Pensionary Awards, 1982 and submitted that the applicant having failed to establish any casual connection with conditions of service to his invalidating disease, he is not entitled to any disability pension as claimed.

10. We have considered the rival contentions carefully. We have also gone through the medical proceedings minutely.

11. Before we proceed with the matter on merit, we would like to consider the point of limitation, as raised by the ld. adv. for the respondents. It is contended by Mr. Bhattacharyya, ld. adv. for the respondents that the applicant was invalidated out of service in 1980 and his claim for disability pension was rejected at that point of time and such rejection order was communicated to him. So, his cause of action arose in 1980 whereas he has approached this Tribunal only in 2012. There is no explanation for such delay and on this ground itself; the application is liable to be rejected. However, Ld. Advocate for the applicant has rebutted this contention by stating that the applicant had submitted representations before the authorities in 1984 and also in

1989 but did not get any fruitful result. Therefore, he had approached the Hon'ble High Court, Orissa by filing a writ petition which was disposed of on 02.11.2010 by directing the applicant to file a fresh representation which he did and the said representation was ultimately rejected by the respondents by issuing the impugned speaking order dated 23.11.2011. Therefore, his cause of action arose from date when the speaking order was passed and communicated to the applicant and, thus, the question of limitation does not arise at all.

12. Although, the ld. adv. for the respondents has submitted that all the representations filed by the applicant were considered and rejected and such rejection orders were also communicated to the applicant, no copy of such rejection order is annexed with the reply nor the applicant has produced the same. However, from the original records, we find that, in fact, the rejection orders were indeed communicated to the applicant at the relevant point of time. Therefore, it is obvious that the cause of action arose to the applicant when his claim was rejected initially in 1980. It is well settled proposition of law that repeated representations will not extend the period of limitation. However, it is an admitted fact that the applicant moved the Hon'ble Orissa High Court in the year 2010 and the Hon'ble High Court also entertained the writ petition and disposed of the same with certain directions and the respondents also complied with the said direction. Therefore, it is presumed that the Hon'ble High Court condoned the delay. Under such circumstances, it is not now open to the respondents to raise the question of limitation before this Tribunal because we agree with the view of the ld. adv. for the applicant that the fresh cause of action arose when the speaking order was issued and communicated to the applicant on 23.11.11 by the respondents in compliance with the order of the Hon'ble High Court and the instant application was filed within two months thereafter in January 2012. That apart, in

pension matters, the cause of action continues to arise every month when such pension is denied. In this context the decision of the Hon'ble Apex Court in the cases of **Union of India –vs- Tarsem Singh** reported in 2009 (1) AISLJ page 371 {2008 (8) SCC 648} and **Shiv Dass –vs- UOI** AIR 2007 SC 1330 may be referred to. In view of the legal position stated above, we are not inclined to reject the application on the ground of limitation, as contended by the ld. adv. for the respondents.

13. Now, coming to the merit of the case, we find that so far as the facts are concerned there is not much dispute. It is admitted that the applicant was enrolled in the Indian Army as a Sepoy (Cfn) on 13.05.1972 and served at various places including field areas. It is also admitted that he was subsequently placed in medical category CEE at the first instance temporarily and then on permanent basis; and was ultimately invalidated out of service with effect from 03.06.1980 at the age of about 28 years through an Invalidating Medical Board. Thus, he had rendered only eight years of colour service and was not entitled to get any service pension. At the time of discharge, the applicant was placed before the Invalidating Medical Board, which opined that he was suffering from *Nurogenic Muscular Atrophy*, which was held to be not attributable to nor aggravated by the military service and the percentage of disability was assessed at 30% for two years. Since the disability was neither attributable nor aggravated by the service he was also not granted any disability pension in terms of Regulation 173 of Pension Regulations for the Army, 1961.

14. Ld. Counsel for the respondents, Mr. Bhattacharyya, by citing the decision of the Hon'ble Supreme Court in **Damodaran case (Supra)**, has argued that the opinion of the Medical Board should be honoured and given due primacy, therefore, this Tribunal ought not to interfere with the same. However, our attention is drawn to a very recent decision of the Hon'ble Supreme Court in the case of **Veer Pal Singh –**

vs- Secy, Min. of Defence & Ors, AIR 2013 SC 2827 where considering the earlier decision of Apex Court in **Damodaran** case (supra), it has been held that the medical opinion is ordinarily not to be interfered with but there is nothing like exclusion of judicial review of the decision taken based on such opinion. It is observed that opinion of medical experts deserves to be respected but not worshipped. In appropriate case the Court can interfere by way of judicial review and examine the record of the medical board for determining whether or not the conclusion reached by it is legally sustainable (vide para 11 of the judgement).

15. In view of the legal position enunciated by the Hon'ble Apex Court, there is no bar in scrutinizing the Medical Board proceedings in order to examine the contention raised by the side of the applicant that it was arbitrary and unfair inasmuch as it did not take into consideration the factual position that the applicant sustained injury while on duty which had ultimately and gradually resulted in the ibid disability.

16. We find that the Invalidating Medical Board proceeding was held in May, 1980 at the Base Hospital, Secunderabad. In Part III of the said proceedings, against Col.1, it has been recorded that the ibid disability did not exist at the time of entering into the service. We have also gone through primary medical examination report held at the time of enrolment, which is available with the record. It is seen that the applicant was found to be fit in all respects. The invalidating disability was stated to be *Neurogenic Muscular Atrophy.* It has been opined that the disability was constitutional in nature. It was considered to be neither attributable to nor aggravated by military service; the percentage of disablement was recorded to be 30% for two years. The applicant was recommended to be invalidated out of service in medical category CEE (P). However, in Para.21 of Part IV of the said proceedings it appears that the Commanding Officer of the applicant has recommended for grant of disability

pension as the disability was considered attributable. From the summary of the case attached to Part II of the said proceedings, it appears that the applicant was earlier hospitalized from 16.12.1978 to 06.02.1979 when the ibid disability was first detected. His other conditions of health were stated to be normal and there was no family history of such illness. In Col. I of the said Part II, the origin was stated to be from 16.12.1978. In the said part, the history of illness has also been recorded wherein it is stated that – "This individual, an old case of *Nurogenic Muscular Atrophy* right upper limb complaints of weakness of right hand since Nov 1979 **with history of fracture at wrist joint level**....".

17. Ld. adv. for the respondents has emphasized on the aspect of 'fracture' and contended that the applicant has only stated in his petition that he had a fall resulting in minor injury in his palm region of right hand. There was no mention of any fracture. However, we find from medical examination report of April 1980 available with the record that against Sl. No. 2 in response to the question whether the individual was suffering from any disease, it has been recorded as under :-

(I) Fracture dislocation wrist (RT) 1975 at Jabalpur – treated in MI Room

(II) Neurogenic Atrophy Arm (RT) 1975 158 MH

18. This is a contemporaneous document available with the respondents' own record and therefore, can safely be relied upon. It is, therefore, not correct that there is no record of any fracture in the applicant's record. In the same report, in part A, the commanding Officer of 323 Sig Regt, has opined against Sl. No. 13 that the "**disability is attributable to Military Service**". This recommendation is dated 12 Apr 1980 i.e. prior to the date of holding of IMB.

19. The disease of *Muscular Atrophy*, as is understood by a common person, is some kind of wasting or loss of muscle tissue resulting either from disease

(*Neurogenic Atrophy*) or lack of use (disuse atrophy). In *Neurogenic Atrophy*, the nerve supply to the muscle can be interrupted or compromised by compression, injury or disease within the nerve cells resulting in temporary or permanent nerve deficit.

20. Thus, it is seen that injury could also have been a cause for such disease; and it is always not constitutional or congenital in origin. When the history of wrist injury/fracture was noted by the Medical Board, the possibility of this being the origin should also have been considered by the medical board instead of simply saying that it was constitutional disease, that too, without giving any reason. The medical board has also not given any reason as to why such disability was not attributable to service when the commanding officer has specifically stated that it was attributable to military service. It has also not been explained as to why such disease could not be detected at the time of enrolment or thereafter whenever the applicant was treated in hospital, especially because no note was made at the time of enrolment. As per Entitlement Rules for Casualty Pensionary Awards, 1982 as available at Appendix II to the Pension Regulations clearly provides in Reg. 9 that "**onus of proof does not lie on the claimant to prove the conditions of entitlements and he will receive the benefit of any reasonable doubt. This benefit will be given more liberally to the claimants in field/afloat service cases**".

21. In a recent decision in the case of **Dharamvir Singh –vs- UOI & Ors**, AIR 2013 SC 2840, the Hon'ble Apex Court has delved in details into various rules and regulations including Entitlement Rules, 1982 governing the grant of disability pension to military personnel as also the guidelines to Medical Officers. The Apex Court has held in no uncertain term that "***It is mandatory for the Medical board to follow the guidelines laid down in Chapter II of the "Guide to Medical (Military***

Pension), 2002 – Entitlement : General Principles" ..... *(vide para 24 of the judgement)(bolding for emphasis)*

21. After explaining Rule 423 of Guide to Medical Officers (Military Pensions) 2002, which deals with attributability aspect, it has been observed by the Apex Court in para 25 of the ibid judgement :-

> *"25. Therefore, as per rule 423 following procedures to be followed by the Medical Board :*
>
> *(i) Evidence both direct and circumstantial to be taken into account by the Board and benefit of reasonable doubt, if any would go to the individual;*
>
> *(ii) a disease which has led to an individual's discharge or death will ordinarily be treated to have arisen in service, if no note of it was made at the time of individual's acceptance for service in Armed Forces.*
>
> *(iii) If the medical opinion holds that the disease could not have been detected on medical examination prior to acceptance for service and the disease will not be deemed to have been arisen during military service, the Board is required to state the reason for the same ... ".*

22. In the case before us, we find that the medical board has neither taken into consideration the incident of injury/fracture in the right hand above palm region sustained by the applicant while on duty in field area, nor the recommendation of the commanding officer, who clearly opined that the ibid disease was attributable to service. The medical board has not also given any reason for its opinion that the disability was constitutional although the fact remains that the cause of the disease may result from injury or fracture. It is also to be noted that the disease affected the right hand wrist region of the applicant where he sustained the injury. If it was a

constitutional disease, it may affect any other parts of the body. When the particular area of the right hand where the injury was suffered is affected, it gives reasonable doubt that the same may have occurred due to the injury. But the medical board did not look into this aspect and simply stated that "it is a disease of constitutional origin." It appears that the medical board has recorded its opinion in a mechanical and casual manner without proper application of mind and without consulting the records and earlier medical opinion as also ignoring the opinion of the commanding officer, whose recommendation in such cases is vital. In that view of the matter, we are of the considered opinion that the "benefit of doubt" under rule 9 of Entitlement Rules has to be given to the applicant and it has to be held that the ibid disability of the applicant, which has arisen during the course of service and gradually aggravated resulting in his invalidating out of service, is attributable to and/or aggravated by service. Since the percentage of the disability is 30%, in terms of Reg. 173 of Pension Regulations, the applicant is entitled to disability pension.

24. However, we have already noted that the applicant has approached the court of law long 20 years after his discharge, therefore, by following the ratio in **Shiv Dass's** case (supra), we are of the view that payment of disability pension shall be restricted to three years prior to the filing of the wit petition before the Hon'ble High Court in 2010 i.e. from 1.1.2007. Since it is a case of invalidment without any sheltered appointment, the applicant is also entitled to rounding off benefit as per extant rules.

25. In the result, the original application stands allowed on contest by issuing the following directions:-

(a) The applicant be treated to have been invalidated out of service on account of disability which is attributable to and aggravated by military service and; thus, is held entitled to get disability pension at the rate of 30% with effect

from 1.1.2007 till the time another re-survey medical board alters the percentage of disablement.

(b) The award of disability pension shall include all consequential benefits like rounding off to 50% and entitlement of service element of pension as per extant rules as applicable to those who are invalidated out of service with an attributable disability. Consequently, all orders issued by the respondents rejecting such disability pension are hereby set aside.

(c) The applicant shall be placed before a re-survey medical board within 90 days from this date to assess the percentage of disability permanently.

(d) Payment of disability pension as ordered in para (a) above shall commence within 60 days from date and shall continue till the decision of the Re-survey medical board is available. The arrears arising out of the above order shall be disbursed within 90 days from the date of this order.

(e) No costs.

26. The departmental records be returned to the respondents on proper receipt.

27. Let a plain copy of this order duly countersigned by the Tribunal officer be furnished to both sides on observance of due formalities.

(LT. GEN. K.P.D.SAMANTA)
MEMBER(ADMINISTRATIVE)

(JUSTICE RAGHUNATH RAY)
MEMBER (JUDICIAL)