

Form No. 4
{See rule 11(1)}
ORDER SHEET
ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW
Court No.1 (E. Court)

O.A. No 313 of 2021 with M.A. No 322 of 2021

Brig Anand Kumar Tewari (Retd)
By Legal Practitioner for the Applicant

Applicant

Versus

Union of India & Others
By Legal Practitioner for Respondents

Respondents

Notes of the Registry	Orders of the Tribunal
	<p><u>13.08.2021</u> <u>Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)</u> <u>Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)</u></p> <p>1. Objection regarding maintainability of Original Application and reply filed thereon are taken on record.</p> <p>2. Heard Shri Shailendra Kumar Singh, learned counsel for the applicant and Shri Amit Jaiswal, learned counsel for the respondents.</p> <p>3. In instant Original Application the applicant, a retired Brigadier of Indian Army Education Corps, has prayed for the following reliefs:-</p> <p style="padding-left: 40px;"><i>(A). To quash and set aside the Respondent No 5 revised guidelines dated 16 Feb 2018 (Annexure A-4) to the extent it changes the criteria for converting COPE-1 to COPE-2 as the same is contrary to Army Order No 09/2011 and the promotion policy of MS Branch dated 14 Dec 2012 and being ultra vires in the eye of law.</i></p> <p style="padding-left: 40px;"><i>(B). To issue/pass an order or directions to Respondents to declassify the COPE coding awarded to the applicant from COPE-2 to COPE-1 in Fresh Re-classification Medical Board dated 16 Apr 2019 at RR Hospital without adhering to</i></p>

the directions passed by Hon'ble AFT (PB) New Delhi Order dated 19 Mar 2019 in O.A. No 1634 of 2018.

(C). To issue/pass an order or directions to respondents for promoting the applicant to the prestigious rank of MAJOR GENERAL wef due date with all consequential benefits.

(D). Any other relief as considered proper by the Hon'ble Tribunal be awarded in favour of the applicant.

(E). Cost of application be awarded in favour of the applicant, as Respondents have acted arbitrarily especially when Principal Bench of this Hon'ble Tribunal issued directions on the matter.

4. A preliminary objection regarding maintainability of Original Application has been raised by the respondents learned counsel on the premise that an earlier Original Application being O.A. No 1634 of 2018 for the same very grievance filed by the applicant in Armed Forces Tribunal, Principal Bench, New Delhi has been adjudicated upon and the judgment and order passed therein being final after a Miscellaneous application seeking clarification in the judgment and appeal filed against the judgment and order being dismissed as withdrawn by the AFT, PB, New Delhi and Hon'ble Apex Court respectively, a fresh adjudication of the same issue in the present Original Application is barred by the Principle of res judicata as provided under Section 11 of the Civil Procedure Code.

5. Learned counsel for the respondents submits that issues such as validity of AO 09/2011, Promotion Policy dated 12 December 2012 and medical interpretation of guidelines dated 16.02.2018 in awarding COPE rating raised in the instant Original Application had been directly and substantially under consideration and deliberate in the earlier O.A. filed in AFT, PB, New Delhi, and the same

being decided by the AFT, PB, New Delhi and judgment and order passed being confirmed after Appeal filed against the judgment and order being dismissed as withdrawn by the Hon'ble Apex Court, the same issue cannot be agitated again in this Bench by means of instant Original Application as the same is barred by the principle of res-judicata. He submits that AFT, PB, New Delhi had while deciding the earlier O.A. vide its judgment and order dated 19.03.2019 only reverted back the applicant's case to a duly constituted medical board to analyse the facts of the case, including symptoms, medical condition, limitations and physical capabilities and award a fresh COPE rating to applicant commensurate to his case. He submits that if being aggrieved with fresh COPE rating C2 awarded by the duly constituted medical board held under judgment and order of AFT, PB, New Delhi, applicant files a fresh subsequent Original Application challenging outcome of medical board proceedings, respondents will have no objection in it. But, as applicant has challenged the same policy letter dated 16.02.2018, which was directly and substantially in issue in the earlier O.A. and finally decided between the parties, the same being barred in view of Section 11 of the CPC, the present O.A. in its form is not maintainable and, therefore, should be dismissed as such.

6. Per contra, learned applicant's counsel submits that it is incorrect to say that issues involved in the instant Original Application were directly and substantially involved in the earlier O.A. also and being finally decided the instant O.A. is barred by the principle of res-judicata. In the instant Original Application the Fresh

Re-classification Medical Board dated 16 April 2019, being contrary to directions issued by the AFT, PB, New Delhi, has been challenged on the premise that while passing order to hold fresh medical board in the matter of applicant the Tribunal had also directed to respondents to revisit the policy letter dated 16.02.2018 regarding COPE rating. He submits that since Re-classification Medical Board has been held without revisiting the policy letter dated 16.02.2018, therefore, same being contrary to directions issued by the AFT, PB, New Delhi is not sustainable in law. He further submits that if had policy letter dated 16.02.2018 been revisited then same being contrary to AO 09/2011 and promotion policy letter dated 12 December 2012 would be ignored being unconstitutional while awarding fresh COPE rating to the applicant. Thus, in nut shell, his submission is that since Fresh Re-classification Medical Board dated 16 April 2019 has been held without revisiting policy letter dated 16.02.2018, which being contrary to AO 09/2011 and Promotion Policy letter dated 12 December 2012 is unconstitutional, its outcome giving COPE 2 rating to applicant is also unconstitutional and is liable to be quashed.

7. We have given thoughtful consideration to the submissions made herein above and gone through judgment and order dated 19 March 2019 of AFT, PB, New Delhi passed in O.A. No 1534 of 2018. We are in full agreement with learned respondents' counsel view that if an issue raised in a suit or proceeding between the same parties has been settled by a Court of law, the same being barred by res-judicata cannot be re-agitated in a subsequent Suit or Proceedings by the same parties or by their representative or any person(s) claiming through them.

8. We have gone through contents of present O.A. and also the earlier O.A. filed in AFT, PB, New Delhi and the judgment passed therein and have no hesitation to say that contents and subject matter in both applications though appear to be same but are infact different. In the earlier O.A. applicant had prayed for his promotion to the rank of Major General by granting waiver of COPE Code, whereas in the instant O.A. the outcome of fresh Re-classification Medical Board dated 16 April 2019 is under challenge saying the same being contrary to directions issued by the AFT, PB, New Delhi is bad in law. No doubt vires of Policy letter dated 16.02.2018, about which much has been said in the judgment passed in earlier O.A., is also under challenge. We have also taken note of the fact that, while directing respondents to hold Fresh Re-classification Medical Board in the matter of applicant's disability coding, the Tribunal had also concluded to revisit the policy letter dated 16.02.2018. If disability suffered with by the applicant is codified in terms of same policy letter of 16.02.2018 and policy letter is revisited later on, and the outcome of the revisit results in benefit for the applicant, then certainly this would be a matter of concern. Further, if any direction is issued by a Court of law and the same is not complied with in letter and spirit, its impact may be far reaching, which may be a matter of great concern and therefore needs fresh adjudication. With this view of matter, we find that issues raised in instant Original Application cannot be shut being barred by res-judicata rather they need adjudication.

9. In the result, preliminary objection regarding maintainability of O.A. raised by learned counsel for the respondents is not accepted and O.A. is held maintainable.

10. Accordingly, O.A. is admitted for hearing.

11. Respondents may file counter affidavit within four weeks.

Thereafter, applicant shall have two weeks time to file rejoinder affidavit.

12. List on **08.10.2021** before Registrar Court for exchange of pleadings.

13. List before this Bench on **28.10.2021** for hearing.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

(Justice Umesh Chandra Srivastava)
Member (J)

UKT/-