

Court No. 1
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Transferred Application No. 38 of 2011

Friday, this the 09th day of March, 2018

Hon'ble Mr. Justice S.V.S. Rathore, Member (J)

Hon'ble Lt Gen Gyan Bhushan, Member (A)

Ashwani Kumar, Son of Shri Krishna Chandra, Resident of Village Keshav Pur,
Post Office Har Karanpur Tehsil Musafirkhana District Sultanpur.

.....**Petitioner**

By Legal Practitioner:

Shri PN Chaturvedi,

Learned Counsel for the petitioner.

Versus

1. Union of India through Secretary, Ministry of Defence,
New Delhi.
2. The Chief of Army Staff, New Delhi.
3. G.O.C. in C (General Officer Commanding in Chief),
Headquarter Amanji Area, Nasik Road, Camp, Mumbai Cantt.
(Maharashtra).
4. Lt Colonel, O.C.,R.R. & D. Bty/ADA Centre, Nasik Road,
Camp, Mumbai Cantt. (Maharashtra).
5. C.R.O. Army Air Defence Records, Nasik Record Camp,
Mumbai Cantt (Maharashtra).
6. O.I.C. Legal Cell, C/o Headquarter, Lucknow Sub Area,
Lucknow.
7. Command Hospital (C.C.) Lucknow through its Head
of Medicine & Neurology Department.

..... **Respondents**

By Legal Practitioner:

Dr Shailendra Sharma Atal,
Learned Standing Counsel for the
Central Government assisted by
Major Piyush Thakran,
Departmental Representative.

ORDER

Per Justice S.V.S. Rathore, Member (J).

1. Initially the petitioner had preferred Writ Petition bearing No. 10628 of 2006 in the Hon'ble High Court of Judicature at Allahabad, Lucknow Bench, Lucknow which has been transferred to this Tribunal and renumbered as T.A. No. 38 of 2011 in pursuance of the provisions contained in Section 34 of the Armed Forces Tribunal Act, 2007 and now processed for hearing after exchange of affidavits.

2. As per the writ petition, the petitioner had made the following prayers :

*“(1) Issue a writ, order or direction in the nature of certiorari thereby quashing the impugned orders dated 6-3-2006 issued/passed by the Lt. Col. Central Adjutant for Commandant on behalf of the Chief of Army Staff, New Delhi i.e. opposite party No.2 and the order dated 31-1-2005 issued/passed by the Lt. Col. O.C. i.e. opposite party No.4 as contained in **Annexure No.1 and 2** respectively to this writ petition.*

(2) issue a writ, order or direction in the nature of mandamus thereby commanding the opposite parties to allow the petitioner to join his duties.

(3) Issue any other order or direction, which this Hon'ble Court may deem fit and proper, may also be passed.

(4) Allow the writ petition with cost.”

3. In brief, the facts necessary for the purpose of the instant T.A, may be summarised as under :

4. The petitioner was recruited in the Army on 11th October 2004 at A.D. Arty Centre Nasik Road Camp as Technical Soldier having Army No. 15787168Y. At the time of recruitment, the petitioner was found medically fit and upto 24.10.2004 i.e. for a period of 13 days he performed his training. On 25.10.2004, the petitioner fell ill and he was taken to MI Room but due to absence of Doctor there, he was admitted at MH Dev Lali, where Dr. S.Karki reported that the petitioner was suffering from Epilepsy with Epileptic Syndrome. A CT Scan of the petitioner was advised. Since the facility of CT Scan was not available at MH Dev Lali, therefore, the CT Scan was done on 27.10.2004 at Raps, Imaging & Diagnostic Centre Pvt Ltd, Artillery Centre Road, New Jain Mandir Behind Anuradha Theatre, Nasik Road and in the said report, no Epilepsy was found by the Doctor. However, his diagnosis was as following - Impression – “An ill defined enhancing nodular lesion with perifocal edema in right frontal region. Possibility of granulomalous lesion like tuberculoma/neurocystic erosion”. This report was prepared by the Dr. Hemant Borse. Thereafter on 1.11.2004, the petitioner was sent to INHS Asvini where too medical check up of the petitioner was conducted and it was reported that the petitioner was suffering from right

frontal Granuloma and on that basis, he was kept in P-5 category and was declared absolutely medically unfit for Army service and he was sent back to his native place on 31.01.2005. It is pleaded in the writ petition that thereafter the petitioner again got himself treated at Central Command Hospital, Lucknow, which took place 07.07.2005 and on 08.12.2005, where Lt Col Dr AK Pandey declared the petitioner fully fit. It is pertinent to mention here that there is no such medical report or certificate on record issued by Lt Col A.K.Pandey. In the report on record, Lt Col A.K.Pandey has advised to come again for check up after six months. The petitioner again got his CT Scan done at “Raps Imaging and Diagnostic Centre Pvt Ltd” on 19.12.2005 at the abovementioned Centre and Dr Umesh More declared the petitioner free from right frontal Granuloma and after perusing the said report, Col Dr PK Sinha, Senior Advisor, Medical & Neurology Com. Hospital, Lucknow declared the petitioner fully fit to resume his duty. In Para 8 of the writ petition, it was pleaded that the diseases from which the petitioner is said to have been suffering does not come within the degree of Permanent Disability in as much as the permanent disability is such a disease which is not curable. If the respondents could have taken care for proper medical treatment, then the disease could have been cured. Thereafter the petitioner preferred representation annexing all the documents with the prayer to constitute a Medical Board for fresh medical examination of the petitioner and thereafter to send the petitioner for training, but the said representation was rejected on the ground that the petitioner was medically unfit. The averments of the petitioner is that the said representation was decided without considering the volumes of documents filed by the petitioner. However, there is no medical report on record issued by any doctor or medical board, wherein the petitioner has been declared completely fit.

5. It is stated that the respondents have miserably failed to consider the difference between permanent disability and temporary disability, since the disease from which the petitioner was suffering at the relevant time, was curable one, therefore, the recruitment of the petitioner ought not to have been cancelled.

6. In the counter affidavit, it has been pleaded on behalf of the respondents that the petitioner was enrolled in the Army on 11th October 2004. During training on 25th October 2004, merely 13 days after his enrolment, he was found to be suffering from “Solitary Seizure Disorder (Right) Frontal Granuloma”, consequent to an attack of Epilepsy. The Invaliding Medical Board, after physically examining the petitioner, has opined that the petitioner is suffering from “Rt Frontal Granuloma G-403” which is neither attributable to nor

aggravated by military service with 20% disability for two years. The Invaliding Medical Board has opined that the disability existed before recruitment and the individual might have been hiding the same at the time of his enrolment in the Army. Based on the recommendations of duly Constituted Medical Board, the petitioner was invalided out of service w.e.f. 31st January 2005 (Afternoon) under Army Rule 13 (3)(IV) and Struck of Strength from the Army w.e.f. 1st February 2005.

7. The Disability Pension claim alongwith supporting documents in respect of the petitioner was forwarded to PCDA (P), Allahabad for adjudication being competent Pension Sanctioning Authority, but the claim of the petitioner was adjudicated in consultation with Medical Advisor (Pension) attached to their office and decided that his disability viz. "Frontal Granucoma" due to which he was invalided out of service is neither attributable to nor aggravated by military service as the disability was constitutional in nature and not related to the service. This decision of the PCDA (P) Allahabad was communicated to the petitioner on 23rd December 2005. Instead of preferring an appeal against the decision of the PCDA (P), Allahabad, the petitioner has forwarded a petition dated 15th January 2006 to the Chief of the Army Staff for re-medical examination and for reinstatement in service, which has been duly rejected.

8. The submission of the learned counsel for the petitioner is that at the time of enrolment, the petitioner was found to be fully medically fit and the disability, if any, must be deemed to have been caused during service and it has to be treated as attributable to and aggravated by military service. Therefore, the denial of disability pension to the petitioner was absolutely against the settled legal position.

9. On the contrary, it has been argued on behalf of the respondents that at the time of medical examination for the purpose of enrolment, a routine medical examination is conducted and in such medical examination, the disease with which the petitioner was suffering, cannot be detected. For detection of such disease with which the petitioner was suffering, several specialised tests are required under the medical science. Column 3 of the proforma of the medical examination, reads as under- "*In case of disability existed at the time of entry, is it possible that it could not be detected during the routine medical examination carried out at the time of the entry.*" In reply to this question, the Medical Board has reported "Yes", individual may be hiding history of Epilepsy. Thus, from the rival pleadings, it is clear that the disease with which the petitioner was suffering,

was detected only after 13 days of his recruitment and thereafter the petitioner was invalidated out from service with 20% disability for two years.

10. Now the only question that arises for our consideration is whether the disease with which the petitioner was suffering, could have been detected at the time of routine check up, which took place at the time of enrolment or it was of such a nature, for which specialised tests are required. It is also to be considered whether the disease with which the petitioner was suffering, could have developed during military training, which was only for 13 days. The disease as per the pleadings, with which the petitioner was suffering, was “Solitary Seizure Disorder (Right) Frontal Granuloma”,

11. Thus, it is clear from the pleadings that the petitioner after 13 days of his training, suffered a Seizure stroke for which he was admitted in the hospital and only after specialised tests, he was diagnosed that he was suffering from “Solitary Seizure Disorder (Right) Frontal Granuloma”. Thus, it is clear that the Seizure stroke was the result of such Right Frontal Granuloma, with which the petitioner was suffering.

12. Learned counsel for the petitioner has vehemently argued that subsequently he got himself medically examined at Command Hospital, Lucknow, where he was declared fit by Lt Col A.K.Pandey and later by Col P.K.Sinha. We have examined the documents filed by the petitioner. The report given by Col P.K.Sinha shows that CT Scan was done on 19.12.2005 where he was found suffering from Mega Cisterna Magma. However, the petitioner requested for his review in Neurology OPD. Therefore, he was sent to Neurology OPD, where he was medically examined by Dr P.K.Sinha, who has advised some medicines to the petitioner and has nowhere mentioned that he is physically fit.

13. Learned counsel for the petitioner submits that Dr. P.K.Sinha has written ‘No Seizure’, but actually it is the finding of 27.10.2004, where in the CT Scan, multiple Seizures were found. He has nowhere written that the petitioner does not suffer from any Seizure or recommended that he is absolutely fit to join duty. The submission of the learned counsel for the petitioner on this point is not supported by any documentary evidence. In CT Scan, it was reported that the petitioner was suffering from Mega Cisterna Magma. We have studied this term from the net and what comes out is that a mega-cisterna magma, is a controversial entity among experts. In general however, the term is applied to non-pathological prominence (usually exceeding 10 mm in antenatal imaging) of the retro-cerebellar CSF space

and not associated with cerebellar abnormalities. There is a normal vermis and normal cerebellar hemispheres.

14. At the time of invaliding out, the Invaliding Medical Board has also reported "Solitary Seizure Disorder (Right) Frontal Granuloma". We also searched net to find out as to what Granuloma means. Granuloma is an inflammation found in many diseases. It is a collection of immune cells known as histiocytes (macrophages). Granuloma forms when the immune system attempts to wall off substances it perceives as foreign but is unable to eliminate. Such substances include infectious organisms including bacteria and fungi, as well as other materials such as keratin and suture fragments. In medical practice, doctors occasionally use the term "granuloma" loosely to mean "a small nodule". Since a small nodule can represent anything from a harmless nevus to a malignant tumor, this usage of the term is not very specific. Similarly, radiologists often use the term granuloma when they see a calcified nodule on X-ray or CT scan of the chest. They make this assumption since granulomas usually contain calcium, although the cells that form a granuloma are too tiny to be seen by a radiologist. The most accurate use of the term "granuloma" requires a pathologist to examine surgically removed and specially colored (stained) tissue under a microscope.

15. After going through the above-mentioned study of the disease, with which the petitioner was suffering, it is clear from the pleadings that at the time of enrolment, the petitioner was found fit by the Medical Board, but we cannot ignore the ground reality that at the time of enrolment, it is only a routine physical check up. It has been pleaded by the petitioner himself in the O.A. that during his training, when he fell ill then he was treated at M.H. Dev Lali. Since the facility of CT Scan was not available, therefore, he was sent to some private Diagnostic Centre. Thus, it is clear that the disease, with which the petitioner was suffering, could not have been detected, unless and until specialised tests are conducted on the petitioner. Apart from it, the disease which was found in these specialised tests, was not of such a nature, which could have been erupted within very little period of 13 days. It has been observed by the Medical Board that the petitioner must have hid his disease. Therefore, keeping in view the nature of disease, with which the petitioner was suffering and the fact that such disease could have been detected only by specialised tests and could not have been developed within a very small period of 13 days, we do not find any substance in this O.A. A person, who was suffering from such a disease, cannot be treated to be medically fit for a service like Army, where physical fitness of highest order is required. Therefore, we do not find any illegality or irregularity in the order of discharge of

the petitioner. That apart it is nowhere the case of the petitioner that he was not suffering with such disease. His challenge is that the disease was curable. However, such defence is not substantiated with any medical opinion or report.

16. The submission of learned counsel for the petitioner is that in pursuance of the judgment of Hon'ble Apex Court in the case of **Dharamvir Singh versus Union of India and others**, reported in (2013) 7 SCC 316, a presumption is raised in favour of the petitioner that he sustained the disability during army service. To appreciate this submission, it would be relevant to quote para 27 of the said judgment, which is as under: -

“27. Para 7 talks of evidentiary value attached to the record of a member's condition at the commencement of service, .e.g. pre-enrolment history of an injury, or disease like epilepsy, mental disorder etc. Further, guidelines have been laid down at paragraphs 8 and 9, as quoted below:

“7. Evidentiary value is attached to the record of a member's condition at the commencement of service, and such record has, therefore, to be accepted unless any different conclusion has been reached due to the inaccuracy of the record in a particular case or otherwise. Accordingly, if the disease leading to member's invalidation out of service or death while in service, was not noted in a medical report at the commencement of service, the inference would be that the disease arose during the period of member's military service. It may be that the inaccuracy or incompleteness of service record on entry in service was due to a non-disclosure of the essential facts by the member, e.g., pre-enrolment history of an injury or disease like epilepsy, mental disorder etc. It may also be that owing to latency or obscurity of the symptoms, a disability escaped detection on enrolment. Such lack of recognition may affect the medical categorization of the member on enrolment and/or cause him to perform duties harmful to his condition. Again, there may occasionally be direct evidence of the contraction of a disability, otherwise than by service. In all such cases, though the disease cannot be considered to have been caused by service, the question of aggravation by subsequent service conditions will need examination.

The following are some of the diseases which ordinarily escape detection on enrolment:-

(a) Certain congenital abnormalities which are latent and only discoverable on full investigations, e.g. Congenital Defect of spine, Spina bifida, Sacralization,

(b) Certain familial and hereditary diseases, e.g., Haemophilia, Congenital Syphilis, Haemoglobinopathy.

(C) Certain diseases of the heart and blood vessels, e.g., Coronary Atherosclerosis, Rheumatic fever.

(d) Diseases which may be undetectable by physical examination on enrolment, unless adequate history is given at the

time by the member, e.g., Gastric and Duodenal Ulcers, Epilepsy, Mental Disorders, HIV Infections.

(e) Relapsing forms of mental disorders which have intervals of normality.

(f) Diseases which have periodic attacks e.g., Bronchial Asthma, Epilepsy, Csom etc.

8. *The question whether the invalidation or death of a member has resulted from service conditions, has to be judged in the light of the record of the member's condition on enrolment as noted in service documents and of all other available evidence both direct and indirect.*

In addition to any documentary evidence relative to the member's condition to entering the service and during service, the member must carefully and closely questioned on the circumstances which led to the advent of his disease, the duration, the family history, his pre-service history, etc. so that all evidence in support or against the claim is elucidated. Presidents of Medical Boards should make this their personal responsibility and ensure that opinions on attributability, aggravation or otherwise are supported by cogent reasons; the approving authority should also be satisfied that this question has been death with in such a way as to leave no reasonable doubt.

9. *On the question whether any persisting deterioration has occurred, it is to be remembered that invalidation from service does not necessarily imply that the member's health has deteriorated during service. The disability may have been discovered soon after joining and the member discharged in his own interest in order to prevent deterioration. In such cases, there may even have been a temporary worsening during service, but if the treatment given before discharge was on grounds of expediency to prevent a recurrence, no lasting damage was inflicted by service and there would be no ground for admitting entitlement. Again a member may have been invalided from service because he is found so weak mentally that it is impossible to make him an efficient soldier. This would not mean that his condition has worsened during service, but only that it is worse than was realized on enrolment in the army. To sum up, in each case the question whether any persisting deterioration on the available evidence which will vary according to the type of the disability, the consensus of medical opinion relating to the particular condition and the clinical history."*

17. It is evident that the Hon'ble Apex Court in the case of **Dharamvir Singh** (supra) has given the list of diseases which cannot be detected at the time of recruitment but the said list gives only illustrations and is not exhaustive. It is true that as per the pronouncement of Hon'ble Apex Court in the case of **Dharamvir Singh** (supra), a presumption is raised in favour of the petitioner, but the said presumption is rebuttable.

18. At this stage, we would like to mention that the guidelines as quoted in Paragraph 27 of the judgment of the Hon'ble Apex Court in the case of **Dharamvir Singh** (supra) have been reiterated in the case of **Ex Gnr Laxmanram Poonia (Dead) through legal representative vs. Union of India & others**, (2017 (4) SCC 697).

19. Learned counsel for the respondents submits that as per the admitted facts of the case, the service of the petitioner was only for 13 days and when the petitioner fell ill, he was sent to Military Hospital, Dev Lali but since there was no facility of CT Scan in the said hospital, CT Scan of the petitioner was done at Raps Imaging and Diagnostic Centre Pvt Ltd. According to him, the disease with which the petitioner was suffering was of such a nature that it could not have been detected without specialised tests, such as CT Scan or MRI. He has argued that the petitioner had granuloma in his right frontal region and it could not have been detected in routine check up conducted at the time of recruitment/enrolment, therefore, he is not entitled to the benefit of the aforesaid presumption in the peculiar facts of the present case.

20. We have studied the disease of granuloma. The general cause of development of granuloma is the infection, which creates it. It is nowhere the case of the petitioner that he suffered any infection during service period. It is also nowhere stated that because of training, the petitioner had suffered any infection which resulted in granuloma. We could not find any authority to establish that the stress of training, that too only for a very short period of 13 days would result in granuloma.

21. We are conscious of the fact that the Hon'ble Supreme Court had allowed the said appeal of **Laxmanram Poonia** (supra) and had granted disability pension, but the facts were quite different because in that case, the length of service of the applicant was about four years, while the petitioner was diagnosed this disease only after 13 days of military training. A perusal of the aforesaid judgment shows that the disease in brain is of such nature, which could not be detected at the time of enrolment. The petitioner was suffering with the disease in brain and was having a Granuloma in his Right Frontal region.

22. It is true that the provision of disability pension are out come of the welfare legislation, but in the name of welfare legislation, the same cannot be stretched to such an extent, so as to give benefit to the persons, who are not entitled for it. True that a welfare legislation expects a liberal view by the Court. But it is equally true that such liberal approach has to be adopted with regard to

those person, who comes within the legal frame to get that relief and it does not mean to extend the benefit of such welfare provision to a person, who does not come within the purview of the said legislation, as in the instant case. The disease with which the petitioner was suffering, was of such a nature that could not have been detected at the time of enrolment during a routine check up. It was detected only after 13 days of service, hence it cannot be treated to have been neither attributable to nor aggravated by military service. Thus, the petitioner is not entitled to the case laws on the point as the fact situation is entirely different.

23. Accordingly, this Transferred Application is devoid of merit, deserves to be dismissed and is hereby **dismissed**.

No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

(Justice S.V.S.Rathore)
Member (J)

Dated: March , 2018.

PKG/LN

Form No. 4

**{See rule 11(1)}
ORDER SHEET**

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Court No.1**T.A.No. 38 of 2011****Ashwani Kumar**

By Legal Practitioner for the Petitioner

Petitioner

Versus

Union of India & Others

By Legal Practitioner for Respondents

Respondents

Notes of the Registry	Orders of the Tribunal
	<p data-bbox="488 1190 678 1231"><u>09.03.2018</u></p> <p data-bbox="488 1274 1317 1314"><u>Hon'ble Mr. Justice S.V.S. Rathore, Member (J)</u></p> <p data-bbox="488 1317 1252 1357"><u>Hon'ble Lt Gen Gyan Bhushan, Member (A)</u></p> <p data-bbox="488 1427 1549 1526">T.A.No. 38 of 2011, Ashwani Kumar vs. Union of India and others is dismissed.</p> <p data-bbox="583 1553 1511 1593">For order, see our judgment passed on separate sheets.</p> <p data-bbox="509 1725 927 1809">(Lt Gen Gyan Bhushan) Member (A)</p> <p data-bbox="1109 1725 1531 1809">(Justice S.V.S. Rathore) Member (J)</p> <p data-bbox="488 1852 516 1870">LN/</p>