

RESERVED

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

ORIGINAL APPLICATION No. 458 of 2021

Wednesday, this the 13th day of July, 2022

Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

Hav Gar Singh Bhadoriya (No. 2998937F) S/o Shri Malkhan Singh Bhadoriya, R/o House No. 251-B, P Block, Phase II, Shatabdi Puram, Gwalior (M.P.)-474020.

Learned counsel for the : **Shri U.K.S. Chauhan**, Advocate
Applicant

Versus

1. Union of India, through the Secretary, Ministry of Defence, Govt of India, New Delhi-110011.
2. The Chief of Army Staff, Army Headquarters. DHQ, PO New Delhi-110011.
3. The Commanding Officer, 16 RAJPUT, Pin-912116, C/o 56 APO.
4. The Officer In Charge (OIC), Records, The Rajput Regiment, Pin-900427, C/o 56 APO.

.....Respondents

Learned counsel for the : **Dr. Shailendra Sharma Atal**, Advocate
Respondents. Sr. Central Govt. Counsel

ORDER

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

(i) The impugned order vide ANNEXURE A-1 may kindly be quashed as the same is arbitrary, illegal and against the true spirit of equality and justice and also not being in public interest.

(ii) This Hon'ble Tribunal may be pleased to direct the respondents to reinstate the applicant in service with back wages and all the service benefits including promotion.

(iii) Suitable cost may please be awarded by this Hon'ble Tribunal to the applicant.

(iv) Any other just and proper relief warranting under the facts and circumstances of the case as deemed fit by this Hon'ble Tribunal may also be given to the applicant to meet both the ends of justice.

2. Briefly, the facts necessary for adjudication of this case are that the applicant was enrolled in the Army on 05.02.1999. While serving with 16 Rajput Regiment, on 10.10.2012 during induction to Chaman Post from Saila Base Theatre, the applicant slipped down while climbing to the post and injured his lower back. The applicant reported to 153 General Hospital (GH) where he was diagnosed as a case of Grade-II Spondylolisthesis LV4 over LV5 (Optd) (M-43.1). He was downgraded to medical category S1H1A1P3(temp)E1 for a period of six months w.e.f. 18.06.2013 and his next categorization medical board was fixed on 01.12.2013. Earlier when the applicant was injured, a Court of Inquiry was held on 21.09.2013 which declared the injury sustained by the applicant as attributable to military service in field/high altitude

area. Thereafter, the applicant underwent four re-categorization medical boards at different military hospitals in which he remained in S1H1A1P2E1 medical category. The applicant was provided sheltered appointment w.e.f. the date he was placed in low medical category. Applicant was serving in field area where he was issued a Show Cause Notice dated 11.01.2021 to show cause as to why he should not be discharged from service due to non-availability of suitable sheltered appointment in the unit. On receipt of reply from the applicant he was discharged from service w.e.f. 01.10.2021 (FN) under Rule 13 (3) III (iii) (a) (i) of the Army Rules, 1954. Applicant's grievance is that being in low medical category P2 (permt) he was serving in Field Area (J&K) and was discharging his duties to the entire satisfaction of his superior officers without any complaint but even then he was discharged from service without application of mind and also that he had qualified for promotion cadre to the rank of Naib Subedar. In his reply to Show Cause Notice, applicant made a request for further retention in service but it was not considered by the Commanding Officer and ultimately he was discharged from service.

3. Learned counsel for the applicant pleaded that the applicant was enrolled in the Army on 05.02.1999. While serving as Naik, he was downgraded to Low Medical Category SHAPE-2 on 18.06.2013 for the disability 'Grade-II Spondylolisthesis LV4 Over LV5 (Optd) (M-43.1) and he

remained in this medical category upto his date of discharge. Despite serving in low medical category he was performing all assigned duties even in the sheltered appointments and also underwent promotion cadre for the rank of Naib Subedar which he qualified on 23.09.2020. His last Review Medical Board was held on 31.10.2020 in which he was again recommended to be in medical category SHAPE-2 (permanent) w.e.f. 31.10.2020 to 31.10.2022. As per Regulation 163 of Regulations for the Army, the applicant as a Havildar is entitled for 24 years of service. He was discharged from service on 30.09.2021 (AN) prior to completion of terms of engagement. Respondent No 4 has passed the discharge order dated 30.03.2021 without getting opinion of the RMB (which was held in September, 2021) which is illegal and ultra-vires of the statutory rules. He pleaded that while issuing discharge order, the respondents have not followed provisions of Regulation 163 of the Regulations for the Army, 1987 which provides that retirement of Havildar is compulsory on completion of 24 years of pensionable service. The applicant has wrongly been discharged from service before completion of terms of engagement of 24 years of service contrary to rules and regulations. He pleaded that as per Rule 13 of the Army Rules 1954, IMB/RMB is a mandatory condition precedent for passing of discharge order on medical grounds and the respondents have violated mandatory condition. He pleaded that due to premature discharge, the applicant was debarred from getting next promotion for which he had already

qualified the promotion cadre and he has been denied his right of promotion to the rank of Naib Subedar and pension of 26 years of service. Learned counsel for the applicant submitted that various Armed Forces Tribunals have granted relief in the same matter and pleaded that the O.A. be allowed in favour of the applicant.

4. Per contra, learned counsel for the respondents rebutting the submissions of the learned counsel for the applicant pleaded that the applicant was enrolled in the Army on 05.02.1999. He further submitted that due to disability Grade-II Spondylolisthesis LV4 over LV5 (Optd) (M-43.1) he was serving in a sheltered appointment. The applicant was retained in a sheltered appointment from the year 2013 to enable him to complete minimum pensionable service. He further submitted that since no further sheltered appointment was available in the unit, being located in field area, his discharge order was issued in accordance with Army HQ policy letter dated 30.09.2010 and he was discharged from service under Rule 13 (3) Item III (iii) (a) (i) of Army Rule 1954 in low medical Category. He submitted that though the applicant was willing to continue in service but it was not recommended by the Commanding Officer (CO) as sheltered appointment was not available in the unit. A Show Cause Notice dated 11.01.2021 was issued to the applicant to show cause as to why he should not be discharged from service in terms of Army Headquarters letter dated 30.09.2010 applicable to personnel being placed in SHAPE-2/3

medical category. In reply to Show Cause Notice he expressed his willingness to continue his service. The competent authority informed the applicant that unit was not in a position to provide either a sheltered appointment or allow his further retention in service due to operational requirement of the unit being a fighting formation and due to prevailing circumstances in the unit. The applicant was discharged vide order dated 30.03.2021.

5. Learned counsel for the respondents further pleaded that "under the provisions contained in the amended Army Rule 13, if no sheltered appointment is available in the unit or the individual is surplus to the organization, he may be discharged from service". In the instant case, the discharge of the applicant was recommended by the CO as no suitable sheltered appointment commensurate to his disability was available, hence discharge of the applicant is in order. He further submitted that it is compulsory for every person in low medical category to undergo Release Medical Board (RMB) before release/discharge from service. The minimum period of qualifying service for earning pension is 15 years. In the instant case, the applicant was placed in low medical category in the year 2013, at which time he was holding the rank of Naik. He was given a sheltered appointment and permitted to undergo promotion cadre from Naik to Havildar which he qualified and was promoted to the rank of Havildar in due course of time. The learned counsel further submitted that the applicant was

discharged from service on account of non availability of sheltered appointment in the unit which is in order. Learned counsel for the respondents further pleaded that under the provisions of para 2 of Army Order 46/1980, the continued employment of permanent low medical category personnel, is subject to the availability of suitable alternative appointment commensurate with their medical category and also to the proviso that their continuation in a sheltered appointment can be justified in the public interest and that their retention will not exceed the sanctioned strength of the Regiment/Corps. When such an appointment is not available or when their retention is either not considered necessary in the interest of the service or it exceeds the sanctioned strength of the Regiment/Corps, they will be discharged irrespective of the service put in by them. In the instant case, there was no sheltered appointment available in the Regiment/Corps. Keeping in view the requirement of war efficiency of the unit and non availability of sheltered appointment commensurate with applicant's disability, he was discharged from service. He pleaded that the applicant was discharged from service as per stipulated rules and no illegality was done hence this Original Application deserves to be dismissed being devoid of merit.

6. Heard Shri UKS Chauhan, learned counsel for the applicant and Dr. Shailendra Sharma Atal, learned counsel for the respondents and perused the rules on the subject.

7. The prevailing provisions of the policy on the subject in the Army permit a low medical category soldier in SHAPE-2 (permanent) medical category to be promoted up to the rank of Subedar Major, however, there is also a provision to discharge soldiers in SHAPE-2 (permanent) medical category on grounds of non availability of sheltered appointment. We find that having parallel provisions of promotion as well as discharge for same medical category i.e. SHAPE-2 increases the scope of arbitrariness and subjectivity. Hence we frame the following questions:-

(a) Whether denying a sheltered appointment to SHAPE-2 (permanent) medical category Army personnel before expiry of their term of engagement for that rank, is fair and just?

(b) Whether the decision to terminate the service of the applicant as a Havildar in SHAPE-2 (permanent) medical category was done with due application of mind or was it done in an arbitrary and mechanical manner?

9. After hearing the counsels and perusing the records, we find that the applicant was initially placed in low medical category in the year 2012 when he slipped down while climbing in a high altitude field area on 10.10.2012 and thereafter he remained in low medical category SHAPE-2 (permanent) throughout until his discharge from service in 2021 (i.e. nearly nine years).

10. Consequent to decision of the Hon'ble Apex Court in the case of ***Union of India & Ors Vs Rajpal Singh***, (2009) 1 SCC 216, the provisions of Army Rule 13- 1 (ii) (a) was modified and the new provision is reproduced as under:-

Ground of discharge	Competent authority to authorize discharge	Manner of discharge
I.(ii)(a) Having been found to be in permanent low medical category SHAPE 2/3 by a medical board and when:- (i) No sheltered appointment is available in the unit, or (ii) Is surplus to the organization.	Commanding Officer	The individual will be discharged from service on the recommendation of Release Medical Board.

11. From the aforesaid it is clear that as per new provisions a person in low medical category in SHAPE-2 or SHAPE-3 can be discharged from service on the recommendation of Release Medical Board provided two conditions are met i.e. there is no sheltered appointment available in unit or if the individual is surplus to the organization.

12. Army Order No 46/80 pertaining to disposal of permanent low medical category personnel is very clear on the subject. Sub Para (a) and (b) of para 2 of Army Order 46/80 reads as under:-

"(a) The employment of permanent low medical category personnel, at all times, is subject to the availability of suitable alternative appointments commensurate with their medical category and also to

the proviso that this can be justified in the public interest, and that their retention will not exceed the sanctioned strength of the regiment/corps. When such an appointment is not available or when their retention is either not considered necessary in the interest of the service or it exceeds the sanctioned strength of the regiment/corps, they will be discharged irrespective of the service put in by them.

(b) Ordinarily, permanent low medical category personnel will be retained in service till completion of 15 years service in the case of JCOs and 10 years in the case of OR (including NCOs). However, such personnel may continue to be retained in service beyond the above period until they become due for discharge in the normal manner subject to their willingness and the fulfillment of the stipulation laid in Sub Para (a) above."

13. Army Order 46/80 elaborately specifies low medical category personnel for further retention in service and discharge as under:-

"3. (a) NCOs will be discharged on completion of the retiring service limits appropriate to ranks as opposed to the extended limits laid down in AO 13/77. However, their retention beyond the contractual period of engagement will be regulated under the provisions of Paras 144 to 147 of Regulations for the Army 1962.

(b) JCOs will be discharged on completion of the normal retiring service limits as opposed to the extended limits laid down in AO 13/77.

14. Thus, from the aforesaid it is obvious that Army personnel being placed in low medical category may be permitted to serve upto their full term of engagement. We also find that in the Army SHAPE-2 (permanent) medical category is a promotable category and a person may be promoted up to the rank of Subedar Major in this medical category. Thus we have a situation wherein a person in low medical category SHAPE-2 can either be promoted or can also be discharged on the grounds of non availability of sheltered appointment. We are aware that the Army is a fighting force and physical fitness is of

paramount importance for high operational efficiency of the Army. It is precisely for this reason that soldiers in Armed Forces are not protected by "THE PERSONS WITH DISABILITIES ACT 1995". We find that SHAPE-2 (permanent) medical category is a category which has minimum limitations and a soldier can, by and large, discharge his duty reasonably well in this medical category as compared to other categories which are lower than SHAPE-2 (permanent). We are also aware that minor injuries or non threatening diseases of a soldier can also result in his medical category being lowered to SHAPE-2. We understand that if a soldier is always in fear of losing his job on account of low medical category, he cannot put in his best. Hence to strike a balance between the interests of the organization and the motivational requirements of a soldier Army Order 03/2001 and Army Order 46/80 have been issued. However, if the Army as a organization has decided not only to keep permanent low medical category personnel of SHAPE-2 (permanent) in service but also to promote them up to the rank of Subdear Major, then the question arises as to what should be the checks and balances against arbitrariness and subjectivity against the misuse of another parallel provision in Army wherein a soldier in permanent low medical category of SHAPE-2 (permanent) can be discharged on the ground of non availability of sheltered appointment. In regard to this para 3 (b) of Army Order 46/80 clearly lays down that normally a low medical category SHAPE-2 person shall be permitted to

complete his terms of engagement as laid down in Army Order 13/77.

15. The applicant being placed in SHAPE-2 medical category has qualified promotion cadre for the post of Naib Subedar and we are also aware that the promotion to the rank of JCO is based on availability of vacancies vis-a-vis minimum laid down performance threshold and seniority as decided by DPC. Hence in this scenario the possibility of easing out SHAPE-2 (permanent) personnel on the ground of non availability of sheltered appointment for giving promotion to someone else due to subjectivity and arbitrariness cannot be ruled out. This is particularly so because there is no clear laid down criteria as to how many low medical category personnel can be retained by a Regiment/Corps except that it should not exceed total authorized strength. There are nine persons of different units who were ordered to be discharged from service vide letter dated 30.03.2021 but the percentage of low medical category personnel in the units of each of these nine personnel of various battalions of the Rajput Regiment has not been mentioned. This leaves scope to suspect the vice of arbitrariness in the discharge of these personnel, including the applicant, because we are not sure if the prescribed upper limit of number of low medical category personnel was crossed or whether because of them the unit/corps had surplus personnel. Right to work is linked to right to livelihood as per Article 21 of the Constitution of India, therefore, when parallel provisions

are existing in the Army to give promotion as well as discharge of a soldier in low medical category in SHAPE-2 (permanent) then the principles of fair play and natural justice demands that there should be very valid reason for discharge and that reasonable checks and balances must be in place before a person who is in SHAPE-2 medical category, and who has not completed his term of engagement in that rank, is discharged due to non availability of sheltered appointment. In the instant case the applicant has not completed his term of engagement in the rank of Havildar and moreover he was qualified and eligible for promotion to the rank of Naib Subedar. Besides due to non submission of appropriate data we are not clear whether the number of low medical category personnel in sheltered appointment in the unit had crossed the prescribed limit (that is if at all such a figure was prescribed). Nor are we clear whether because of low medical category personnel the unit/corps had surplus manpower.

16. While perusing the O.A. and counter affidavit we find that the applicant's service record shows that he has served in different parts of the country mostly in field area/high altitude area. In reply dated 18.01.2021 of the Show Cause Notice we observe that the applicant was performing duties as Company Havildar Major (CHM), which appointment we have been informed involves physical work also, in addition to man management. In his reply to the Show Cause Notice the applicant expressed his willingness to continue in service till

completion of term of engagement, but his plea was not acceded and he was discharged from service.

17. Reliance has been placed by learned counsel for the applicant on O.A. No 128 of 2019, **Ex Risaldar Harbans Singh vs Union of India & Ors**, decided by this Bench on 06.12.2019 which is in favour of the applicant. In addition to this AFT, RB, Jabalpur has also passed order in O.A. No 07 of 2017, **Naib Subedar Sabu Ram Beniwal vs UOI & Ors**, as under wherein the Regional Bench has held that:

"24. We are of the considered opinion that the decision to terminate the service of a JCO / OR without completion of statutory tenure has to be based on the principle of balance and sound reasoning and the procedure laid down has to be scrupulously followed to enable fairness to the affected person. No doubt in the Army physical fitness is of paramount importance for high operational efficiency but the aspect of morale & motivation is equally critical. If soldiers are witness to such arbitrary termination of service of their colleagues in the unit, their morale & motivation is surely going to be detrimentally affected. It can usher in unwanted practices. This too can affect operational efficiency. Loss of a job entails loss of livelihood especially in case of GD soldiers like the applicant who is sent out with hardly any skill sets to seek alternate employment, at a time when their responsibilities are peaking and pension remains their only source of sustenance. Should a Junior Commissioned Officer who has spent a lifetime in the service of the Nation be run roughshod over his job, at the twilight of his career? It will only add to the existing stress in the society. A truncated period of service means a truncated pension which may not be adequate to make both ends meet for the premature pensioner. We would conclude by giving out a summary of the observations of Hon'ble Supreme Court in AK Kraipak & Ors vs UoI & Ors. 1969 (2) SCC 262 :-

"Under our Constitution the rule of law pervades over the entire field of administration and every organ of the State is regulated by the rule of law. In a welfare State it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner."

18. The applicant was running in 22 years of service. He had passed promotion cadre for promotion to the rank of Naib Subedar. Therefore, we feel that withdrawing sheltered appointment just prior to his DPC for the next rank, deprived him of a possible promotional avenue and is hit by Article 21 of the Constitution of India. The impugned order suffers from substantial arbitrariness and is not sustainable being not aligned with the procedure prescribed in law.

19. In order to provide a level playing field and to ensure fairness and justice to both the applicant and the respondents, we feel it proper that the applicant ought to be given a chance to be considered for promotion to Naib Subedar in the DPC held in 2021 or thereafter, which opportunity was abruptly cut short rather unfairly. To be just as fair to the respondents we allow his consideration for such a DPC only after 'notional' re-instatement into service. If after consideration in the DPC he is found merit worthy for promotion to the rank of Naib Subedar then he will be notionally promoted to this rank and allowed notional service till completion of term of engagement of a Naib Subedar. No back wages shall be payable to him for the notional period of re-instatement. However, he shall be entitled for pension of Naib Subedar (if so promoted) assuming that he served till the term of engagement of a Naib Subedar, with all consequential benefits of such service (DA, annual increment+MSP+grade pay).

20. As a result of discussions hereinabove, the O.A. deserves to be partially allowed; hence **partially allowed**. Impugned order of discharge dated 30.03.2021 passed by the respondents is quashed. The applicant shall be notionally re-instated in service in the last rank held. He will be considered for promotion to the rank of Naib Subedar by next DPC and if promoted he shall notionally serve till he completes his term of engagement in that rank. He shall not be entitled to back wages for the period of notional service. He will be entitled to the pension of Naib Subedar (if promoted) with benefits of (DA+annual increment+MSP+grade pay). On the contrary if he is not found fit for promotion by DPC he shall be considered discharged on the date he was anyhow already discharged i.e. 30.09.2021.

21. This order is to be implemented within four months from the date of this order. Default will carry a penalty of 8% per annum.

22. No order as to costs.

23. Miscellaneous applications, pending if any, shall stand disposed of.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

Dated: 13.07.2022

rathore

(Justice Umesh Chandra Srivastava)
Member (J)