

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

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>05.08.2022</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 style="text-align: center;">Heard Shri Shailendra Kumar Singh, learned counsel for the applicant and Shri Amit Jaiswal, learned counsel for the respondents.</p> <p><u>M.A. No. 322 of 2021</u></p> <p style="text-align: center;">The Original Application has been filed with delay of 04 months and 28 days.</p> <p style="text-align: center;">Submission of learned counsel for the applicant is that delay in filing Original Application is not deliberate, but on account of reasons stated in affidavit filed in support of application.</p> <p style="text-align: center;">Per contra, learned counsel for the respondents submits that cause shown by the applicant is not sufficient.</p> <p style="text-align: center;">Considering that grounds stated in affidavit filed in support of delay condonation application are genuine and sufficient, delay is liable to be condoned.</p> <p style="text-align: center;">Accordingly, delay in filing of application is condoned. Application stands decided accordingly.</p> <p style="text-align: center;"><u>O.A. No. 313 of 2021</u></p> <p style="text-align: center;">It is a fit case for adjudication.</p> <p style="text-align: center;">Heard.</p> <p style="text-align: center;">Order is reserved.</p> <p style="text-align: center;">(Vice Admiral Abhay Raghunath Karve) Member (A)</p> <p style="text-align: center;">(Justice Umesh Chandra Srivastava) Member (J)</p> <p>rathore</p>

COURT No.1
RESERVED

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 313 of 2021

Tuesday, this the 13th day of September, 2022

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

IC -44934-X Brigadier Anand Kumar Tewari (Retd) S/o Shri Daya Shabnkar Tewari Prmanent resident of House No. 227/12/2 Rajrooppur, Dist-Allahabad (U.P) -2110011 and Presently residing at House No. 1E 203, AWHO, Gurjinder Vihar, Greater Noida, Dist-Gautam Budh Nagar (U.P)-201310.

..... Applicant

Ld. Counsel for the: **Shri Shailendra Kumar Singh**, Advocate.
Applicant

Versus

1. Union of India, through the Secretary, Govt of India, Ministry of Defence, South Block, New Delhi-110 001.
2. Chief of the Army Staff, IHQ of MoD (Army), New Delhi-110011.
3. Military Secretary, Military Secretary’s Branch IHQ of MoD (Army) New Delhi-110011.
4. DGAFMS, Ministry of Defence, ‘M’ Block, New Delhi-110001.
5. DGMS (Army), IHQ of MoD (Army), Adjutant General’s Branch ‘L’ Block, New Delhi-110001.

.....Respondents

Ld. Counsel for the
Respondents.

: **Shri Amit Jaiswal**, Advocate
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 :-

- (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 policy of MS Branch dated 14 Dec 2012 and being ultra vires in the eye of law.*
- (B) *To issue/pass as order or directions to Respondents to declassify the COPE coding awarded to the applicant from COPE-2 to COPE-1 in fresh Reclassification Medical Board dated 16 Apr 2019 at RR Hospital without adhering to the directions passed by Hon'ble AFT (PB) New Delhi Order dated 19 Mar 2019 in O.A. No. 1634/2018.*
- (C) *To issue/pass an order or directions to Respondents for promoting the applicant to the prestigious rank of MAJOR GENERAL w.e.f. due date with all consequential benefits.*
- (D) *Any other relief as considered proper by the Hon'ble Tribunal be awarded in favour of the applicants.*
- (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.*

2. Brief facts of the case are that the applicant was commissioned in Army Educational Corps (AEC) on 13.06.1987. During the course of his service he was promoted to the rank of Brigadier. Earlier, in January 1999 while posted at Sikkim he was first diagnosed to be suffering

from 'Essential Hypertension' which was later converted into 'Primary Hypertension' and his medical category was downgraded to P2 (Permanent). Later in the year 2011 COPE coding system was introduced to guide employability of Army Officers. On 14.12.2012 respondents issued a policy vide which officers in low medical category P2 (Permanent) having COPE Coding as COPE-2 were made ineligible for promotion to the rank of Brigadier and above. In February 2016 the applicant was promoted to the rank of Brigadier being placed in COPE-1 medical category. The respondents on 16.02.2018 issued guidelines with respect to COPE coding for officers suffering from Hypertension.

3. On 24.05.2018 the applicant was approved by No 1 Selection Board for promotion to the rank of Major General for vacancy arising on 01.10.2018. Since the applicant was placed in low medical category his re-categorization medical board was held on 19.07.2018 as per which he was placed in medical category P2 (Permanent) with COPE-2 which made him ineligible for promotion to the rank of Major General. On receipt of medical board proceedings, applicant submitted appeal dated 28.08.2018 for conversion of COPE-2 to COPE-1. During pendency of said appeal, respondents issued letter dated 18.09.2018 for scheduling of fresh Selection Board in December, 2018 for the rank of Major General in AEC.

Applicant, despite being approved and considering that he may not be promoted to the next rank, filed O.A. No. 1634 of 2018 before the Hon'ble AFT, PB, New Delhi which was disposed of vide order dated 19.03.2019 mentioning that applicant has no case on merits and respondents to reconsider his case for COPE rating. In appeal medical board dated 11.10.2018 applicant was again placed in COPE-2 medical category. Thereafter, applicant filed M.A. No. 1130 of 2019 inreg O.A. No. 1634 of 2018 before the Hon'ble AFT, PB, New Delhi for clarification of judgment dated 19.03.2019 which was dismissed vide order dated 09.04.2021 as the fresh medical board was in progress. Order dated 19.03.2019 passed by Hon'ble AFT, PB, New Delhi was challenged by filing Civil Appeal Diary No 22537 of 2019 in the Hon'ble Supreme Court but the same was dismissed as withdrawn vide order dated 12.07.2019. Applicant superannuated on 31.08.2020 and filed this O.A. to set aside guidelines dated 16.02.2018, change COPE-2 to COPE-1 and promote him to the rank of Major General.

4. Learned counsel for the applicant submitted that the applicant is a commissioned officer of the Indian Army who while posted in High Altitude Area (Sikkim) developed 'Essential Hypertension' in the year 1999 and the same was later converted into 'Primary Hypertension'. He was

downgraded to low medical category P2 (Permanent). He further submitted that consequent to issue of Army Order 09/2011, respondent No 3 issued policy letter dated 14.12.2012 with an aim to classify low medical category officers with COPE Coding. As per this policy officers having COPE-2 coding were made ineligible for promotion to the rank of Colonel and above.

5. Learned counsel for the applicant further submitted that the applicant was promoted to the rank of Brigadier even after he was placed in low medical category P2 (Permanent) with COPE-1. It was further submitted that prior to his re-classification medical board he was placed in COPE-1 and had only one drug per day but when his re-classification medical board was held on 19.07.2018 his COPE coding was changed to COPE-2 and in appeal medical board dated 11.10.2018 this COPE Coding remained the same which made him ineligible for further promotion. It was further submitted that the Hon'ble AFT, PB, New Delhi while disposing the O.A. No 1634 of 2018 has categorically mentioned in its order dated 19.03.2019 that guidelines dated 16.02.2018 need revisit but despite that the respondents have not made any effort to modify the same. He submitted that applicant's review medical board dated 19.07.2018 and appeal medical board dated 11.10.2018 putting the applicant in COPE-2 require reconsideration by a

duly constituted medical board which would analyse the facts of the case including symptoms, medical condition, limitations and physical capability of the applicant to award COPE-1 rating.

6. Further submission of learned counsel for the applicant is that during July, 2019 the applicant was posted out from Delhi and came to know that his junior was promoted to the rank of Major General despite the matter being subjudice and on 31.08.2020 he was released from service on superannuation in the rank of Brigadier without being promoted to the rank of Major General despite fulfilling all requisite promotion criteria as per para 2 of Appendix 'B' to Para 11 of letter dated 14.12.2012. It was further submitted that the Hon'ble AFT, PB, New Delhi is unconvinced with the policy of respondents on COPE system, the case needs to be adjudicated by this Hon'ble Tribunal to meet the ends of justice. Learned counsel for the applicant has relied upon judgment dated 13.01.1981 of the Hon'ble Supreme Court in the case reported in AIR 1981, SC 746, **Francis Coralie Mullin vs Administrator, Union Territory of Delhi** and **Associated Cement Companies Ltd vs PN Sharma**, AIR 1965 SC 1595.

7. Per contra, learned counsel for the respondents submitted that the applicant is a 1987 batch AEC officer. He was empanelled for promotion to the rank of Major General by

No 1 Selection Board held in April 2018 for the vacancy arising on 01.10.2018. However, he could not be promoted to the next rank due to his being in low medical category (non promotable category). He further submitted that the applicant is suffering from hypertension since 1999 and he was awarded COPE-1 rating for the said disability. It was further submitted that consequent to promulgation of policy letter dated 16.02.2018 on hypertension the applicant was graded COPE-2 and became ineligible for further promotion. It was further submitted that the applicant filed O.A. No 1634 of 2018 before the Hon'ble AFT, PB, New Delhi wherein he challenged the legal validity of the Army Order 09/2011, the promotion policy dated 14.12.2012 and the rationality and the medical interpretation of the guidelines dated 16.02.2018 in awarding COPE-2 grading to the applicant. In the said O.A. it was pleaded to promote the applicant to the rank of Major General by waiving COPE rating as it has no affect on his functioning in the appointment tenable by a Major General in AEC.

8. Learned counsel for the respondents further submitted that the aforesaid O.A. was disposed of vide order dated 19.03.2019 with directions to hold fresh medical board to analyse the facts of the case and thereafter award a fresh COPE rating commensurate with applicant's disability. It was further directed by the Hon'ble Tribunal that the applicant had

no case on merits. The applicant then filed M.A. No. 1130 of 2019 inreg O.A. No 1634 of 2018 for clarification of judgment dated 19.03.2019 contending that fresh medical board so constituted should reconsider his case for COPE rating keeping in view of his medical board held in July, 2018 and October, 2018 and also while conducting the fresh medical board policy letter dated 16.02.2018 should be revisited. The aforesaid M.A. was dismissed vide order dated 09.04.2019 as medical board was in progress.

9. Learned counsel for the respondents further submitted that in compliance of order dated 19.03.2019 fresh reclassification board proceedings were conducted and finalised on 03.05.2019 in which his medical category P2 (permanent) was maintained with COPE-2. It was further submitted that order dated 19.03.2019 was challenged in the Hon'ble Supreme Court but it was dismissed as withdrawn vide order dated 12.07.2019, hence the matter attained finality. He pleaded for dismissal of O.A. on the ground that the applicant was placed in COPE-2 rating (non promotable medical category) in final medical board proceedings dated 03.05.2019, he is ineligible to be promoted to the rank of Major General.

10. Heard Shri Shailendra Kumar Singh, learned counsel for the applicant and Shri Amit Jaiswal, learned counsel for the respondents.

11. It is undisputed fact of the parties that the applicant is a 1987 batch AEC officer, who was promoted to the rank of Brigadier in February, 2016. In the year 1999 while posted in High Altitude Area (HAA) the applicant was diagnosed to be suffering from 'Essential Hypertension' and was medically downgraded and later the disease was converted as 'Primary Hypertension' in medical category P2 (Permanent). He was managed with daily single dose medicine.

12. The applicant was empanelled for promotion to the rank of Major General by No 1 Selection Board held in April, 2018, the result of which was declassified on 24.05.2018 for the vacancy arising on 01.10.2018. The applicant being placed in low medical category was awarded COPE-I rating for the aforesaid disability in terms of policy letter dated 14.12.2012. In the year 2018, DGMS (Army) issued policy letter dated 16.02.2018 on hypertension and based on above policy he was graded COPE-2 rating in re-categorization medical board dated 19.07.2018, which is a non promotable medical category. Being aggrieved with new cope coding he submitted an appeal dated 28.08.2018 for conversion of his COPE coding from COPE-2 to COPE-1 to make him eligible for promotion to

the rank of Major General. During pendency of this appeal the applicant filed O.A. No 1634 of 2018 in Hon'ble AFT, PB, New Delhi which was decided vide order dated 19.03.2019 with the observation that the applicant has no case on merits. For convenience sake, para 37 to 39 being operative portion of the aforesaid order are reproduced as under:-

"37. Having given our thoughtful consideration on the guidelines for hypertension of 16.02.2018, we, however, are not entirely convinced on its application on the facts of the present case, particularly with regard to the rationale when it warrants award of COPE-2 instead of COPE-1. No medical rationale or opinion is found in the review medical board proceedings of 19.07.2018 and the appeal medical board proceedings dated 11.10.2018 justifying grant of COPE-2, particularly when the applicant, who is P2(P), has made out a legitimate case for only a COPE-1 in his case as referred to hereinabove. This, we feel, can only be done through a reconsideration of medical opinion with adequate rationale or otherwise for an award of COPE-2 to the facts of this case as we have already observed in para 30 herein above. Therefore, to meet the ends of justice and medical propriety, the present case deserved to be reverted back to a duly constituted medical board, which would analyse the facts of the case, including symptoms, medical condition, limitations and physical capability and thereafter award a fresh COPE rating commensurate with the case of the applicant.

38. Having tested the case of the applicant on the various regulations of the 1987 Regulations, Army Orders, various policies and guidelines on the subject, the net result surfaces is that the applicant has no case on merits except for a direction for reconsideration of COPE rating as enumerated above. Ordered accordingly. Given the urgency of the case, this exercise shall be carried out within a period of three weeks from the date of receipt of a copy of this order, which shall be provided to Col Ajeen Kumar, OIC (Legal) by the Registry without delay.

39. Before wrapping up the case on hand, we will not be hesitant in observing that the guidelines for hypertension issued vide letter dated 16.02.2018 need a revisit so as to avoid any ambiguity in future."

13. From the aforesaid verdict we find that every aspect has been dealt with by Hon'ble AFT, PB, New Delhi with respect to

putting applicant in COPE-2 except the guidelines dated 16.02.2018 which are said to be revisited. Further, the Hon'ble Tribunal specifically directed that the applicant has no case on merits except for a direction for reconsideration of COPE rating.

14. We also find that the applicant underwent four medical boards/classification medical boards within a short span of ten months and his medical classification was assessed as COPE-2 by the appeal medical board which is a non promotable category as per policy letter dated 14.12.2012 and guidelines dated 16.02.2018 related to hypertension. M.A. No 1130 of 2019 inreg O.A. No. 1634 of 2019 was dismissed on the ground that holding of fresh medical board was in progress at R & R Hospital, Delhi Cantt.

15. Cope Coding is awarded by the medical board which is a guide to MS Branch in finding suitable employment for low medical category officers. It specifies the employability restrictions for climate/terrain, degree of medical observations, physical limitations and exclusive restrictions specific to disease. The guidelines for COPE coding in case of hypertension were prepared by a Board of Officers, vetted by the user environment and inputs were obtained based on which the guidelines for COPE coding of hypertension were promulgated by DGMS letter dated 16.02.2018. Applicant has

contended that as per order dated 19.03.2019 policy dated 16.02.2018 requires revisiting. In this regard the respondents have submitted that upon due deliberations the competent authority has revisited the policy and found it comprehensive and expressed views that it does not require any amendment. We find that the requirement is of strict implementation of the policy by the specialists and the medical boards and the award of COPE-2 matrix to the applicant seems to be justified in view of his medical disability 'Hypertension'. We are further of the view that the applicant has no right to claim promotion being in non promotable medical category.

16. During the course of hearing, learned counsel for the applicant has relied upon order dated 07.01.2022 passed by this Tribunal in O.A. No. 619 of 2021, **Brigadier Javed Iqbal vs UOI & Ors.** We have gone through the case and we find that the applicant in that case was awarded COPE-1 grading in appeal medical board whereas the applicant in the instant case has been awarded COPE-2 grading in appeal medical board. Further, being in COPE-2 his case for higher promotion was processed up to the level of Chief of Defence Staff (CDS) and Defence Minister and he was approved for higher post knowing well that he was in COPE-2. Hence the applicant cannot claim parity with **Brig Javed Iqbal** (supra).

17. In view of what has been discussed herein above, we find that the applicant could not be promoted to the higher rank only because he was placed in non-promotable medical category i.e. COPE-2 on account of suffering from 'Primary Hypertension'.

18. Accordingly, O.A. is **dismissed** being devoid of merits.

19. No order as to costs.

20. Miscellaneous applications, pending if any, stand disposed of.

(Vice Admiral Abhay Raghunath Karve)
Member (A)

Dated:13.09.2022
rathore

(Justice Umesh Chandra Srivastava)
Member (J)