

(1998) 09 DEL CK 0020
In the Delhi High Court
Case No : C.W. No. 501 of 1998

Alexander Mathew (Maj.)

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 24-09-1998

Acts Referred:

Citation : (1998) 09 DEL CK 0020

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : Mr. N.L.Bareja, for the Appellant; Ms. Rekha Palli, for the Respondent

Judgement

K. Ramamoorthy, J.—The Petitioner who was discharged from service on 07.04.1994 had been granted service pension. The disability pension has not been granted. That is why he has filed the present writ petition claiming disability pension. According to the petitioner, the Medical Board which examined him in 1992 had given the opinion that the "due to stress and strain of Fd/Operational services", which is found at page 44. The Medical Board examined him again in September 1993 and the opinion of the Medical Board and the opinion of the Commandant are found in page 60 of the type set. At page 60 in column no 3(c), it is stated as under:

3(c) In respect of each disability shown as aggravated under B, the Board should state fully:

(I) The specific condition and period in service which aggravated the disability.

The stress & Stain of military service.

(II) Whether the effects of such aggravation still persist.

(III) If the answer (II) is the affirmative, whether effect of aggravation will persist for a material period.

Yes.

2. At page 66 in the Medical examination report in Column 5 it is stated as under:

5. Any other information you will give about your health:

The disease got aggravated due to stress and strain of Fd/Operational services.

3. The Commandant had expressed the opinion that at page 72 which is in the following:

Do you consider the disability/death aggravated by service (Give reason):

Yes

The officer most of his service, spent Fd/Op areas in diverse terrain and climate like Nagaland/Manipur, J&K, Sri Lanka and Rajasthan deserts which affected his health adversely. The disease has aggravated due to stress and strain of Fd/Op services.

4. On 28.03.1995, the Government of India, Ministry of defense, passed the following order:

No. 2(104)/94/L (PEN-C)

Government of India

Ministry of defense

To

The Chief of the Army Staff,

New Delhi.

Sub: Claim to disability pension in respect of Maj.

Alexander Mathew (IC-41825) (Retd.).

Sir,

I am directed to say that it has been decided that the above mentioned officer who had been found suffering from the disability viz. ID Rheumatoid Arthritis at the time of invalidment out of service is not entitled to disability pension as the ID is considered to be neither attributable to nor aggravated by his military service since the disease is constitutional in nature.

The claimant may, if he so desires, prefer an appeal against the decision taken on the disability within 6 months from the date of receipt of this letter by him. The appeal may be addressed to the Under Secretary, L(Pen-A), Room No. 207, Sena Bhavan, New Delhi.

Yours faithfully,

Sd/-

(N.N. Mathur)

5. There was an appeal and in the appeal the order was passed on 03.04.1997. The order reads as under:

No. 7(1580)/95/D (Pen-A & AC)

Government of India

Ministry of defense

New Delhi, the 3rd April 1997

Major (Retd.) Alexander Mathew

Plavila Putten Veedu,

Thalachira (P.C),

Kottarakkara (Telu.)

Kollam (Distt.)

Kerala - 691 546.

Sub: Appeal against rejection of disability pension in respect of Major (Retd.) Alexander Mathew (No.IC-41825) of Army.

Sir,

I am directed to refer to your appeal dated 04.07.1995 on the above subject and to inform you that the same has been carefully considered by the First Appeal Committee.

You were invalided out of service on account of Invaliding disease (ID) - Rheumatoid Arthritis. The disability on account of which you were invalided out of service is a constitutional disease. On perusal of your service/medical documents, the Appellate Medical Authority has found that the onset of ID was in Dec 1990 in peace area. You were admitted for ID in Jan 1992 and was placed in low medical category. You served in low medical category with periodic review and treatment but despite thereby you had rapid progression of ID necessitating your invalidment in April 1994. During initial examination you gave family history of ID (mother). There is no evidence of undue physical stress or strain or exposure to extreme cold prior to onset of ID or thereafter which may cause aggravation. Medical Authorities as neither attributable to nor aggravated by duties of Military Service, you are not entitled to disability pension under the Rules.

It is, Therefore, regretted that your request cannot be acceded to.

6. The learned counsel for the petitioner Mr. N.L. Bareja, submitted that the Doctors who had examined the petitioner had given the opinion after examining the petitioner that the ailment was due to the military service and it was also aggravated due to military service. The learned counsel submitted that

government of India and the appellate authority cannot overrule the opinion of the Medical Board without examination of the petitioner by another set of competent Doctors and on the basis of material available before them apart from the opinion of the Medical Board which was in September 1993. The learned counsel for the petitioner submitted that the Appellate Authority had also acted without any material on record. The learned counsel submitted to differ from the opinion of the Medical Board, the Government and the Appellate Authority should have other material to come to a different conclusion. The learned counsel Mr. Bareja, relied upon the Judgment of this court in CW. No.2054 of 1994 dated 10.03.1994 (Ex. Gdr. Subash Chander Vs. Union of India and ors). The learned counsel for the petitioner submitted that Clause 7(b) Appendix II of the Regulations, it is stated:

7(b) A disease which had led to an individual's discharge or death will ordinarily be deemed to have arisen in service, if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to acceptance for service the disease will not be deemed to have arisen during service.

7. There is absolutely nothing on record to show that the petitioner had any such ailment at the time when he entered the service. Learned counsel for the petitioner also dealt with the assumption of the government that the petitioner had a family history of such an ailment. According to the learned counsel for the petitioner, Mr. N.L. Bareja, there is absolutely no material and the mother of the petitioner had also filed affidavit to this effect.

8. The learned counsel for the petitioner relied upon the judgment of this court in Raghbir Singh Vs. U.O.I. and Another, and the judgment of this court in CW No. 2420/94 (Cpt. Randhir Singh Gurra Vs. Union of India and ors.) decided on 25.07.1997.

9. In the counter affidavit the stand taken is that the family history of the petitioner showed that the petitioner was prone to such an ailment and that was constitutional and it was not due to military service nor was the disease aggravated by the military service. It is stated:

In reply to paras 13 and 14, it is submitted that as per regulation 48 of PRA Part 1, 1961 an officer is entitled to disability pension if he is retired from military service on account of his disability which is considered attributable to or aggravated by military service and is assessed at 20% or more. The question whether a disability is attributable to or aggravated by mil service is determined under the rule contained in Apex II to PRAP Pt.1 1961. These rules have been amended during 1983 known as Revised Entitled Rules, 1982. As per para 17 & 27(c) of the RER 1982 recommendation of RMB/IMB are recommendatory in nature and can be reviewed/revised by appropriate medical authority i.e. DDG(Pens) who is higher appropriate Medical authority i.e. DDG(Pens) who is

higher medical authority in the office of DGAFMS. In this case, IMB has recommend the ID as aggravated by stress and strain of military service and disability recommended at 50% for one year, however, Pension sanctioning Authority on advise of JDAFMS i.e higher medical authority in the office of DGAFMS who exercised their power conferred upon them under para 17 & 27(c) of RER 1982 viewed ID as neither attributable to nor aggravated by military service and disability pension to the officer for ID was Therefore not recommended. Detailed reason for rejecting disability pension claim are given in comments to para 3 and 4.

10. Learned counsel for the respondents Ms. Rekha Palli relied upon the judgment of the Supreme Court in Union of India and another Vs. Baljit Singh 1996 (22) S 315.

11. The learned counsel for the petitioner submitted that the Doctor who had examined the petitioner and who constituted the Medical Board after examination the petitioner had come to the conclusion that the ailment was due to military service and was aggravated. In the decision in Subhash Chander Vs. Union of India & Ors. (CW No. 2054/94) decided by Hon"ble Mr. Justice Anil Dev Singh dealing with Regulation 173 applicable to the other personnel other than the officers held:

In Union of India and others Vs. Bodan Lal Yadav 1994 (1) S.L.R. 390 it was held by the Punjab and Haryana High Court that Regulation 173 of the Pension Regulations read with paragraph 423(c) of Regulations for the Medical Services of the Armed Forces, 1962 show that the cause of disability which leads to the person concerned being discharged from service will be deemed to have arisen in service, if, no note of it was made at the time of his entry in the armed forces or unless a note was recorded at a subsequent date that the disease in question was such as could not have been detected by medical examination before he had joined service. Allowing the writ petition the Division Bench of the Punjab & Haryana High Court observed that there was no material on record to show that the writ petitioner was found to have been suffering from the disease at the time of his entry into service nor was there any note in his medical examination at the time of discharge to the effect that he was suffering from this ailment at the time of his entry into service or that it could not be detected at that time.

12. The Learned Judge had referred to the case taking the same view as under:

To the similar effect are the following judgments of the Punjab and Haryana High Court:

1. Ex. Hav. Sinder Pal Singh Vs. UOI and another 1991(5) SLR 459.
2. Bodan Lal Yadav, Ex.Singnalman No. 6279466 Vs. Union of India through Secretary, Ministry of defense, New Delhi and ors 1992 (3) SLR 758.
3. Ex. Hav/Clk Wishwa Nath Vs. Union of India and others. 1991 (5) SLR 476.

4. Roshan Lal Vs. Union of India and others 1992 (3) SLR 662.

13. The Learned Judge directed the payment of disability pension. With great respect I agree with the view taken by the learned Judge. In Raghbir Singh Vs. U.O.I. and Another, , the Division Bench of this Court dealing with the claim of disability pension by a soldier. The argument on behalf of the respondents before the Division Bench that the DA was the final authority to decide the disability pension and that cannot be interfered with this. Dealing with this point the Division Bench held:

Learned counsel for the respondents has attempted to scuttle the merits of the petitioner's claim by contending that DA is the final Authority to decide the disability pension and as such the DA has rightly disallowed the disability pension to the petitioner. Now the question is " Can the DA override the medical opinion of the invalidating Medical Board". The Apex Court had an occasion to consider the said question in Ex. Sapper Mohinder Singh Vs. Union of India Civil Appeal No. 164/93 (arising out of SLP No. 4233/92) decided on 6.2.1995 and it was held that the opinion given by the invalidating Medical Board with regard to the assessment of disability of an incumbent should be respected until a fresh Medical Board examines the incumbent and comes to a different conclusion. Similar view has also been taken by Division Bench of this Court in Civil Writ Petition No. 2811/93 decided on 6.2.1995. Consequently, we are of the opinion that under the rules, the DA has no power to override the medical opinion of the invalidating Medical Board. If the Competent Authority is not satisfied with the medical opinion of the invalidating Medical Board, it may refer the case of the incumbent for re-examination by a properly constituted Medical Board for re-assessment of the disability. Thus the impugned order of the DA (P) is liable to be quashed and set aside. There is no other ground on which claim for disability pension can be denied.

14. In Capt. Randhir Singh Gurra Vs. Union of India CW No. 2420 of 1994 decided on 25.07.1997. The Division Bench consisting of Hon'ble Mr. Justice Devinder Gupta and myself dealt with the scope of Rule 7. It was held:

As per the medical report the petitioner had no past history of the stated ailment. Even there is no history of mental illness in the family though parents of the petitioner were stated to be alive. Petitioner's personal history as recorded states that he was enrolled in September, 1980 and married in 1989. His habits are stated to be clean. The stated illness was detected only in January, 1990. The opinion states:

OPINION:

This 28 years old Corporal had a Schizophrenic breakdown in early Jan 90 whose illness had a gradual onset, manifesting in social withdrawal, pre-occupation with self, lack of confidence, initiative and drive, emotional instability, depressed mood with active suicidal ruminations, lack of insight and impaired judgment. He has poor motivation towards service dur to a week ago. he has been treated

intensively for over a year, but the response to treatment has been very poor. Keeping him in service is going to be a liability to State, hence recommended invalidment from service in category "EEE" (psychological)."

In the light of presumption as is required to be raised under sub-rule (b) of Rule 7 while agreeing with the medical opinion and affirming petitioner's discharge due to non availability of alternative employment suitable to the petitioner's low medical category, the Commanding Officer in Form AFMSF 16 against Column 21 thereof recommended petitioner's case for sanction of invalid pension. Neither in the counter affidavit, nor in the order of second respondent which is under challenge, is it stated that any note was made at the time of petitioner's acceptance in Air Force service that he was suffering from ailment in question. There is also no medical opinion by the Medical Board that the disease could not have been detected on medical examination prior to the petitioner's acceptance for service. Rather the medical opinion is otherwise.

Supreme Court in Ex. Sapper Mohinder Singh Vs. Union of India (Civil Appeal No. 164 of 1993 - decided on 14.01.1993) observed that assessment of disability pension at a particular rate by medical board must be respected by the Chief Controller of defense, Accounts (Pension) until a fresh medical board examines an individual again and comes to a different conclusion.

Instead of raising the presumption as is required to be raised under sub-rule (b) of Rule 7 the Controller of defense Accounts in the impugned annexure P-2 dated 12.01.1993 required the petitioner to substantiate his claim that why the petitioner felt that the disability was connected with the Air Force Service. The disease in question is psychotic condition characterised by withdrawal from reality and accompanied by highly variable affective, behavioural and intellectual disturbances and onset of such condition due to the effect of stress and strain cannot be ruled out. When it is the case of the parties that the onset of disease was during the course of service, there was no reason with the Controller of defense Accounts not to accept the recommendation of the Commanding Officer which was in consonance with presumption which is to be raised. It ought to have been accepted and for that reason the impugned order is liable to be quashed and set aside.

15. Union of India and another Vs. Baljit Singh In 1996 (11) S 315 the Supreme Court dealt with Regulation 173 with reference to non-commissioned officer. That is a case where disability pension was claimed on the basis of injury sustained by the individual. The Supreme Court dealing with this claim of disability pension observed:

He further contends that as per the medical report the injury was sustained by him while he was in service and that, Therefore, it has been presumed that it was during service and accordingly must be attributable to military service. On a consideration of the rules, we think that the contention of Shri Malhotra merits acceptance. It is seen that various criteria have been prescribed in the guidelines

under the Rules as to when the disease or injury is attributable to the military service. It is seen that under Rule 173 disability pension would be computed only when disability has occurred due to a wound, injury or disease which is attributable to military service or existed before or arose during military service and has been and remains aggravated during the military service. If these conditions are satisfied, necessarily the incumbent is entitled to the disability pension. This is made amply clear from clauses (a) to (d) of para 7 which contemplates that in respect of a disease the Rules enumerated there under require to be observed. Clause (c) provides that if a disease is accepted as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstances of duty in military service. Unless these conditions are satisfied, it cannot be said that the sustenance of injury per se is on account of military service. The conclusion may not have been satisfactorily reached that the injury though sustained while in service, it was not on account of military service. In each case, when a disability pension is sought for and made a claim, it must be affirmatively established, as a fact, as to whether the injury sustained was due to military service or was aggravated which contributed to invalidation for the military service. Accordingly, we are of the view that the High Court was not totally correct in reaching that conclusion. However, having regard to the facts and circumstances of this case, we do not think that it is an appropriate case for interference.

16. The ratio laid down by the Supreme Court is not at all applicable to the facts of this case. When the medical Board had given a categorical opinion, it is not open to the Government and the appellate authority to take a different view without any material to prove contra. The learned counsel for the respondents Ms. Rekha Palli submitted that the Government and the appellate authority had the powers to over-rule the opinion of the medical board. In law there is difference between the jurisdiction to pass order and the exercise of the power. The learned counsel for the petitioner Mr. N.L. Bareja does not dispute the existence of the power. The learned counsel for the petitioner only challenged the way in which the power had been exercised. I am of the view, that the view taken by the Government and the appellate authority is not rational. There is no opinion on record to show as required in clause 7B that the disease could not have been detected on medical examination prior to acceptance for service.

Therefore, the order of the Government dated 28.03.1995 and the order in appeal passed on 03.04.1997 are liable to be set aside and they are quashed. Accordingly, the writ petition is allowed. The respondents are directed to pay to the petitioner disability pension in accordance with rules and regulations including arrears and the payment shall be made on or before 31.12.1998. There shall be no order as to costs.