

(2011) 09 DEL CK 0460
In the Delhi High Court
Case No : Writ Petition (C) 3828 of 2010

Ex. Gnr. Naresh Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 19-09-2011

Acts Referred:

Entitlement Rules for Casualty Pensionary Awards, 1982 — Rule 14
Pension Regulations, 1961 — Regulation 173, 423

Citation : (2012) 1 ILR Delhi 156

Hon'ble Judges : Sunil Gaur, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : S.R. Kalkal, for the Appellant; Sumeet Pushkarna and Jitendera Kumar and Arvind, Clerk from ARTY. Record, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—Serving in the Indian Army is No. child's play. It requires a body and mind of steel. Notwithstanding medical fitness to be a condition for securing every public employment, its importance is of greater value when employment is sought in the Indian Army and thus nobody is enrolled or commissioned in the Indian Army without being subjected to a rigorous physical fitness test as also medical fitness and only the best in body and mind are inducted in the Army. This is the preamble statement of learned Counsel for the Petitioner.

2. The Petitioner was enrolled in the Indian Army as combatant soldier and was attached to the regiment of Artillery at Bikaner on 18.3.2005 and needless to state, before his enrolment was subjected to a physical endurance test as also a medical examination which he successfully cleared i.e. he was declared physically and medically fit for being a member of an Armed Force.

3. He had hardly served for about a year and 8 months, when he was detected with abnormal behaviour and his utterances showed that he was having hallucinations. He claimed that he was in communication with the soul of a dead

friend. He became argumentative and in spite of counseling his behaviour did not change. He was sent on leave for 20 days and on return showed No. improvement and one day threatened to run away from the quarter guard with his rifle. The day next he threw his identity card at the Subedar Major and at a Sainik Samellan he demanded to be sent back for recruit training. It was obvious that the superior officers found that the Petitioner was having a psychiatric problem and thus he was produced before a Psychiatrist before whom Petitioner admitted that his father had taken him to a Civil Psychiatrist and he was given medication. The Petitioner was hospitalized and his behaviour was observed in the ward. It was noticed that Petitioner used to wander aimlessly, slept poorly and claimed that his body and mind were controlled by the soul of his dead friend. He responded to treatment but was opined to be a vulnerable person. It be highlighted that Petitioner was admitted in the Army Hospital on 1.11.2006 and brought before an Invaliding Medical Board on 9.1.2007 where he was assessed as a case of Schizophrenia and percentage of disability assessed was 30% for life. It was opined that the disability was neither attributable to nor aggravated by military services.

4. Accordingly, the Petitioner was discharged from service with effect from 04.02.2007 i.e. after he had served for 1 year, 10 months and 14 days.

5. The Petitioner applied for disability pension on the ground of being placed in low medical category resulting in his being invalidated from service, which claim was rejected on 6.7.2007 on the ground that the disability was neither attributable to nor aggravated by military service.

6. Petitioner claims to have filed an appeal followed by a legal notice to which he received a reply of being entitled to No. disability pension and thus Petitioner claims that he was compelled to take recourse to a legal remedy.

7. Petitioner filed Writ Petition (C) No. 719/2008 in this Court which was disposed of vide order dated 20.08.2008 with the direction that the Petitioner be produced before an Appeal Medical Board to assess his disability and cause thereof. Accordingly, Appeal Medical Board was constituted which assessed the disability of the Petitioner to be 30% for life and it opined that since the Petitioner was posted to a peace station, the disability was neither attributable nor aggravated by military service. It was opined that the disability could not be detected at the time of enrolment as it was asymptomatic at the time. Aggrieved by the opinion of the Appeal Medical Board the Petitioner filed WP(C) No. 856/2009 before this Court which was transferred for adjudication to the Armed Forces Tribunal since the subject matter of claim fell within the jurisdiction of the said Tribunal.

8. Vide order dated 28.10.2009, the Armed Forces Tribunal dismissed Petitioner's claim to be paid disability pension. Instant petition lays a challenge to the decision of the Tribunal wherein the Tribunal has concurred with the opinion of the Appeal Medical Board. It may be noted that various petitions of different persons were decided by the same order, some of whom have been

granted relief and the Petitioner has been denied relief. Qua the Petitioner the discussion is to be found in paragraph 12 to 18 of the impugned decision.

9. In a nut shell, the Tribunal has highlighted that Schizophrenia was detected for the first time in May 2006 i.e. just after 1 year of Petitioner having served and that though the exact cause of Schizophrenia was not known, it was important to note that the Petitioner had served in a peace station and during his service had never encountered any hostile situation which could trigger Schizophrenia. The Tribunal thus opined that it could not be said that Schizophrenia from which Petitioner suffered was attributable to or aggravated by service. The Tribunal duly considered Rule 14 (b) of the Entitlement Rules of 1982 and Regulation 173 of the Pension Regulations 1961 pertaining to the Army and we would be dealing with the submissions with reference to the Rules and Regulations relied upon by the Petitioner.

10. The case of the Petitioner rests on the sole argument that at the time of his enrolment in the Indian Army No. disability was detected during his medical examination. The Petitioner relies upon Clause 5 and 6 of the Entitlement Rules under the caption Entitlement Rules for Casualty Pensionary Awards 1982, which reads as under:

5. The approach to the question of entitlement to casualty pensionary awards and evaluation of disabilities shall be based on the following presumptions:

Prior to and during service

(a) A member is presumed to have been in sound physical and mental condition upon entering service except as to physical disabilities noted or recorded at the time of entrance.

(b) In the event of his subsequently being discharged from service on medical grounds any deterioration in his health which has taken place in due to service.

6. Disablement or death shall be accepted as due to military service provided it is certified by appropriate medical authority that:

(a) the disablement is due to a wound, injury or disease which-

(i) is attributable to military service, or

(ii) existed before or arose during military service and has been and remains aggravated thereby. This will also include the participating/hastening of the onset of a disability.

(b) The death was due to or hastened by-

(i) a wound, injury or disease which was attributable to military service; or

(ii) the aggravation by military service of a wound injury or disease which existed before or arose during military service.

11. We highlight that the argument is that vide para (a) of Clause 5, a member i.e. a force personnel is presumed to be in sound physical and mental condition upon entering service except those which are recorded at the time of entry and by virtue of Clause (b) it has to be presumed that deterioration in health is due to service.

12. We proceed our discussion by highlighting that issue of disability pension is to be discussed with reference to Regulation 173 of Army Pension Regulation 1961 (Part-1) which reads as under:

173. Unless otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an individual who is invalided out of service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20 per cent or over.

The question whether a disability is attributable to or aggravated by military service shall be determined under the rule in Appendix II.

13. Thus, it is clear that disability pension has to be sanctioned if an individual is invalided out of service on account of disability assessed at 20% or above but is attributable to or aggravated by military service. The claim of the Petitioner can now be well understood. Since the Medical Board has assessed his disability to be more than 20% and the exact cause of Schizophrenia which disabled the Petitioner has not been detected, he would be entitled to the benefit of the presumption as per Clause (a) of Clause 5 under the caption "Entitlement Rules for Casualty Pensionary Awards 1982".

14. Learned counsel for the Respondent relied upon the decision of the Supreme Court reported as 2005 (4) SCT 607 Controller of Defence Accounts (Pension) & Ors. v. S.Balachandran Nair to urge that the Supreme Court has categorically held that unless there is a positive finding that the disablement is due to or aggravated by military service, No. claim for disability pension can be raised.

15. As is to be noted hereinabove claim for disability pension is sustainable under Regulation 173 of the Army Pension Regulations 1961, which has been extracted hereinabove in para 12 above and relevant would it be to highlight that the second para of the Regulation highlights that the question whether a disability is attributable to or aggravated by military service shall be determined under the Rule in Appendix II. The said Appendix II has been noted by the Supreme Court in the aforementioned decision and it reads as under:

2. Disablement or death shall be accepted as due to military service provided it is certified that-

(a) The disablement is due to wound, injury or disease which-

(i) is attributable to military service; or

(ii) existed before or arose during military service and has been and remains

aggravated thereby:

(b) the death was due to or hastened by-

(i) a wound, injury or disease which was attributable to military service, or

(ii) the aggravation by military service of a wound, injury or disease which existed before or arose during military service.

Note: The Rule also covers cases of death after discharge/invaliding from service.

3. There must be a casual connect ion between disablement or death and military service for attributability or aggravation to be conceded.

4. In deciding on the issue of entitlement all the evidence, both direct circumstantial, will be taken into account and the benefit or reasonable doubt will be given to the claimant. This benefit will be given more liberally to the claimant in field service case.

16. What would be attributable to service in relation to disability, being the subject matter of Regulation 423 of the Pension Regulations, the Supreme Court noted the same in its decision and we reproduce the same. It reads as under:

423. Attributability to Service:

(a) For the purpose of determining whether the cause of a disability or death is or is not attributable to service, it is immaterial whether the cause giving rise to the disability or death occurred in an area declared to be a Field Service/Active Service area or under normal peace conditions. It is, however, essential to establish whether the disability or death bore a causal connection with the service conditions. All evidence both direct and circumstantial, will be taken into account and benefit of reasonable doubt, if any, will be given to the individual. The evidence to be accepted as reasonable doubt, for the purpose of these instructions should be of a degree of cogency, which though not reaching certainty, nevertheless carry the high degree of probability. In this connection, it will be remembered that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. If the evidence is so strong against an individual as to leave only a remote possibility in his favour, which can be dismissed with the sentence "of course it is possible but not in the least probable" the case is proved beyond reasonable doubt. If on the other hand, the evidence be so evenly balanced as to render impracticable a determinate conclusion one way or the other, then the case would be one in which the benefit of doubt could be given more liberally to the individual, in cases occurring in Field Service/Active Service areas.

(b) The cause of a disability or death resulting from wound or injury, will be regarded as attributable to service if the wound/injury was sustained during the actual performance of "duty" in armed forces. In case of injuries which were self inflicted or duty to an individual"s own serious negligence or misconduct, the Board will also comment how far the disability resulted from self-infliction,

negligence or misconduct.

(c) The cause of a disability or death resulting from a disease will be regarded as attributable to service when it is established that the disease arose during service and the conditions and circumstances of duty in the armed forces determined and contributed to the onset of the disease. Cases, in which it is established that service conditions did not determine or contribute to the onset of the disease but influenced the subsequent course of the disease, will be regarded as aggravated by the service. A disease which has 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 service in the armed forces. 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.

(d) The question, whether a disability or death is attributable to or aggravated by service or not, will be decided as regards its medical aspects by a medical board or by the medical officer who signs the death certificate. The medical board/medical officer will specify reasons for their/his opinion. The opinion of the medical board/medical officer, in so far as it relates to the actual cause of the disability or death and the circumstances in which it originated will be regarded as final. The question whether the cause and the attendant circumstances can be attributed to service will, however, be decided by the pension sanctioning authority.

(e) To assist the medical officer who signs the death certificate or the medical board in the case of an invalid, the C.O. unit will furnish a report on:

(i) AFMS F-81 in all cases other than those due to injuries.

(i) IAFY-2006 in all cases of injuries other than battle injuries.

(f) In cases where award of disability pension or reassessment of disabilities is concerned, a medical board is always necessary and the certificate of a single medical officer will not be accepted except in case of stations where it is not possible or feasible to assemble a regular medical board for such purposes. The certificate of a single medical officer in the latter case will be furnished on a medical board form and countersigned by the ADMS (Army)/DMS (Navy)/DMS (Air).

17. In a nut shell the Supreme Court brought out, with reference to Clause (c) of Regulation 423, that if the Medical Board holds that the disease could not have been detected on medical examination prior to acceptance of service, the disease will not be deemed to have arisen during service. Further, with reference to Appendix II, the Supreme Court opined that disablement shall be treated as attributable to military service if Clause (a) or (b) i.e. the situations contemplated therein existed.

18. Thus, to put it plain and simple, as per the decision of the Supreme Court, if the cause of the disablement was not capable of being detected on medical examination at the time of enrolment it would not be treated as deemed to have arisen due to service.

19. Mr. S.R.Kalkal learned Counsel for the Petitioner urges that the Respondents misled the Supreme Court by not drawing their attention that with effect from 22.11.1983, on the subject of disability pension, the Entitlement Rules called "Entitlement Rules for Casualty Pensionary Awards 1982" had come into force and the same had superseded Appendix II to the Pension Regulation 173 with retrospective date 1.1.1982.

20. Indeed we find that the submission of Sh.S.R.Kalkal is correct. It appears that for reasons unknown, neither party drew the attention of the Supreme Court to the "Entitlement Rules for Casualty Pensionary Awards 1982" which certainly, vide para (a) of Clause 5 casts the onus against the Army Authorities.

21. But we find that the Entitlement Rules notified on 22.11.1983, having retrospective effect from 1.1.1982, provide vide Clause 14(b) thereof, as under:

14. (b) If medical authority holds, for reasons to be stated, that the disease although present at the time of enrolment could not have been detected on medical examination prior to acceptance for service, the disease, will not be deemed to have arisen during service. In case where it is established that the conditions of military service did not contribute to the onset of adversely affect the course of disease, entitlement for casualty pensionary award will not be conceded, even if the disease has arisen during service.

22. It be highlighted by us that the language of Clause 14(b) of the Entitlement Rules relied upon by Sh.S.R.Kalkal is parimateria with Clause (c) of Pension Regulations 423 which was considered by the Supreme Court.

23. The position therefore would be that if the claim has to be considered under the Entitlement Rules for Casualty Pensionary Awards 1982" the presumption under para (a) of Clause 5 thereof has to be raised qua such disabilities which are capable of being detected at the time of enrolment and as per para (b) of Clause 14 a disease which could not have been detected on medical examination at the time of enrolment would not be deemed to have arisen during service. Harmoniously reading the two, the presumption under para (a) of Clause 5 would relate to such diseases which are capable of being detected during medical examination at the time of enrolment and those diseases which are not capable of being so detected would not result in any such presumption being raised.

24. Thus, notwithstanding that the Supreme Court was misled into considering Appendix II to Pension Regulation 173 which has since been replaced by the Entitlement Rules for Casualty Pensionary Awards 1982, the position with respect to such diseases which are opined to be incapable of being detected at the time of enrolment would be the same as per the decision of the Supreme Court in

S.Balachandra Nair's case (supra).

25. Now, it is extremely difficult to detect a mental disorder which is not permanent. A bipolar mood disorder or Schizophrenia does not render a person insane or mad. The moods fluctuate from time to time and it may happen that at the time of enrolment the person is in the positive state of mind and thus the negative phase is not detected.

26. On the facts of the instant case it assumes importance to note that the Petitioner was enrolled on 18.3.2005 and he was admitted at the Army Hospital on 1.11.2006 and prior thereto his abnormal behaviour was detected while he was serving. His abnormal behaviour was detected within a year of his joining and having not worked in a disturbed area and always posted in a peace area, No. incident took place when he was in service which could have triggered Schizophrenia. The small time gap between service being joined and abnormal behaviour being detected cannot be lightly brushed aside. It is not the case of the Petitioner that something happened while in service which made him a patient of Schizophrenia. As noted by us, the argument was advanced on the strength of para (a) of clause 5 of the Entitlement Rules for Casualty Pensionary Awards 1982 and learned Counsel was at pains to urge that the benefit of the presumption envisaged by said para would mean that unless there was proof that the Schizophrenia suffered by the Petitioner was not attributable to military service, he had the benefit of the presumption that it was. The argument has ignored para (b) of Clause 14 of the Entitlement Rules for Casualty Pensionary Awards 1982 and the opinion of the Appeal Medical Board which observed that the disability "could not be detected at the time of enrolment as it was asymptomatic at the time". Thus we regretfully dismiss the writ petition but refrain from imposing costs.