(2020) 02 AFT CK 0005

In the Armed Forces Tribunal

Case No : Original Application No. 1032 Of 2018

Harmeet Singh — APPELLANT

Vs

Union Of India And Others — RESPONDENT

Date of Decision : 05-02-2020

Acts Referred:

Citation : (2020) 02 AFT CK 0005

Hon'ble Judges : Sunita Gupta, J;B.B.P. Sinha, Member (A)

Bench : Division Bench

Advocate : V.S. Kadian, Barkha Babbar

Final Decision : Disposed Of

Judgement

1. The instant 0.A has been filed by the applicant against the decision of the Special Review Medical Board (SRMB) proceedings dated 10.05.2018

vide which the applicant has been denied tenanting of Command Stream and has been declared fit only for Staff/ERE/Instructional appointment.

2. Brief facts of the case necessary for deciding the issues raised in this 0.A are:

The applicant was commissioned in the Indian Army on 09.12.2000 and posted to 15 Grenadier Regiment. He is stated to have tenanted various

instructional/staff/ERE appointments and participated in various operations on Line of Control, Counter Insurgency Operations in field and high-altitude

area in Jammu and Kashmir and North Eastern Sector. For his exemplary performance in Counter Insurgency (CI) Operations, he was awarded Sena

Medal. During July 2016, he was appointed as Second-in-Command of 15 Grenadiers. On being empanelled in No. 3 Selection Board for promotion to

the rank of Colonel, the applicant was appointed as Commanding Officer on 22.12.2016. However, on 13.01.2017, while serving in super high altitude

area at LAC, Doklam Sector in Sikkim, situated at a height of over 16000 feet, the applicant had symptoms associated with the disease ""Cerebral

Venous Sinus Thrombosis"" (CVT) due to high altitude effect. In a simple language, this disease i.e. CVT can be described as presence of blood clot in

the dural venous sinuses, which drain blood from the brain. After necessary investigation and treatment, the applicant was placed in low medical

category for the disease CVT on 27.03.2017, his appointment as commanding officer was ceased and accordingly, he was posted to Grenadiers

Regimental Centre, Jabalpur (MP). Thereafter, in September 2017, on review of his medical category, he was upgraded to S1H1A1P2(T-24)/E1.

Subsequently, on conduct of Re-Categorization Medical Board in March 2018, he was upgraded to a permanent low medical category i.e.

S1H1A1P2(P)E1 with COPE-2 of low medical category for employability restrictions, in that he was declared fit for all military activities but unfit for

high altitude area (9000-15000 ft.) to prevent further aggravation. On 13.04.2018, the applicant addressed a D.0 letter to the Colonel of Regiment and

MS Branch (MS-2) for posting him to a criteria appointment. On receipt of the same, the respondents have considered the applicant for Special

Review Medical Board (SRMB) for posting to a suitable appointment. The result of SRMB was declassified on 10.05.2018. On 16.05.2018, the

applicant was intimated, vide letter dated 16.05.2018, that he had been declared fit for only Staff/ERE/Instructional appointment and not for command

stream. Being aggrieved, the instant 0.A has been filed, seeking the following relief: Quash and set aside the impugned Special Review Medical Board

proceedings dated 10.05.2018 and D.0 letter dated 16.05.2018 and to declare the applicant for tenanting him for Command Stream.

3. Mr. Kadian, learned counsel for the applicant, at the outset, contended that the action of the respondents in denying command assignment to the

applicant, even after fulfilling the eligibility criteria, is illegal and violative of the principles of natural justice. He also submitted that at the time when

the applicant was promoted to the rank of Colonel (Selection Grade) and assumed the command of Infantry Battalion on 22.12.2016, he was in the

medical category of Shape-1. It was thereafter that while serving in super high altitude area, the applicant was placed in the low medical category

S1H1A1P3 (T-24)E1 for 'Cerebral Venous Sinus Thrombosis' on 27.03.2017. In March 2018, the applicant was upgraded to the permanent category

of S1H1A1P2(P)E1 with Cope-2 and was declared fit for all military activities, but unfit for high altitude area (9000-15000 ft.) to prevent further

aggravation. Therefore, there is no justification on the part of the respondents in denying him to tenant the Command Stream. He clarified that without

tenanting command stream, the applicant being a bright officer, will not be considered for promotion to Brigadier and has no further career prospects

as per extant policy.

4. Learned counsel for the applicant further submitted that the applicant was screened by the SRMB and declared fit only for Staff/ERE/Instructional

appointment, which is against the policy letter dated 18.09.2012 issued by the IHQ MoD (Army), Para 11 of which clearly stipulates that all eligible

officers will be considered by SRMB only once and no review SRMB will be held even if there is a change of employability restrictions by subsequent

medical board. Further, as per Para 8(a) of the policy letter dated 31.03.2015 issued by the IHQ MoD (Army), in case the officer is medically

downgraded to any of the above classification while he is tenanting a criteria/part criteria appointment, his removal/continuation in the appointment will

be decided as per the procedure laid down in MS Branch letter dated 02.09.2011, which entails consideration of incumbent's willingness, medical

opinion and recommendations of the commander in chain. Since the decision on the stream for his employment in the current rank would be inherent in

the above process, a separate SRMB screening would not be required. Therefore, in the case of the applicant, when he was downgraded to the low

medical category (P2) while holding the rank of Colonel, the SRMB was not required to be conducted.

5. Before concluding his arguments, Mr. Kadian, learned counsel for the applicant submitted that the applicant should not have been discriminated in

consideration for command assignment when his junior having the same disability had been cleared for command assignment on his promotion to

Colonel by his SRMB, which is evident from Annexure A9. In support of this contention, learned counsel placed reliance on the decision inI nder Pal

Yadav and others v. Union of India and others(1985) 2 SCC 648.

6. In the counter affidavit filed on behalf of the respondents, a preliminary objection had been raised by Ms. Barkha Babbar, learned counsel for the

respondents. According to her, when an alternative and equally efficacious

departmental remedy is open to the applicant, he should have pursued that

remedy first and cannot be permitted to invoke the jurisdiction of this Tribunal, contrary to the law enacted by the Parliament. Refuting the allegation

of the respondents, learned counsel for the applicant vehemently contended that the instant 0.A cannot be thrown away merely on the ground of

availability of alternative remedy. However we have noted that on 07.02.2019, when the instant 0.A came up for consideration, it was submitted by

the learned counsel for the applicant that the applicant had filed a statutory complaint on 18.01.2019, wherein he had requested to quash the result of

SRMB in his respect, being in contravention to Para 8(a) of MS Branch policy letter dated 31.03.2015. Thereafter, this Tribunal directed the

respondents to dispose of the statutory complaint dated 18.01.2019 filed by the applicant within a stipulated period. The Central Government, vide

order dated 07.06.2019, rejected the statutory complaint of the applicant, stating that the applicant had been declared 'FIT (Staff/ERE/Instr)' on

account of his medical condition as assessed by the SRMB.

7. Learned counsel for the respondents further brought out that the applicant had to be removed from command within three months of taking over,

due to his having become LMC on account of ""Cerebral Venous Sinus Thrombosis"". Accordingly, as per the provisions of para 8 (a) of the policy

letter as annexed in Annexure A3 of the OA, the applicant was posted out from his command appointment. Additionally, three months of command

exposure cannot be accepted as 'Adequately Exercised' (AE). Thus, after the officer's application to regain command i.e. a criteria appointment in

LMC of Shape 2, he had to be brought before a SRMB as per the provisions of Para 8(b) of the extant policy letter. She stated that it is evident from

Annexure A5 that the applicant is in the permanent low medical category P2 with effect from 15.03.2018 for Cerebral Venous Sinus Thrombosis with

employment restriction COPE-2. She further submitted that the decision about his employability in LMC was taken by a duly constituted SRMB,

where both medical and surgical specialists were in attendance. She clarified that a decision by the SRMB is not based on the precedence of earlier

decisions taken by previous SRMBs. She claimed that the policy on removal/ continuance in criteria appointment on becoming low medical category is

applied uniformly to all officers and, therefore, there is no question of any

discrimination. She, therefore, prayed for the dismissal of the instant 0.A

with costs.

8. Having heard the learned counsel for both the parties and perused the relevant documents made available, the following questions arise for our

consideration:

(i) Whether there is violation of Para 8(a) of the MS Branch policy letter dated 31.03.205 by convening of second SRMB for the applicant?

(ii) Whether there is any injustice or discrimination on the part of the respondents in denying command stream to the applicant being placed in low

medical category for Cerebral Venous Sinus Thrombosis visa-vis another officer with same disability?

9. Learned counsel for the applicant stated that the action of the respondents in denying command stream to the applicant by conducting a SRMB is in

violation of Para 8(a) of the policy letter on the subject dated 31.03.2015. On the other hand, learned counsel forthe respondents submitted that the

removal of the applicant from command due to low medical category was based on the MS Branch letter dated 02.09.2011 as referred in para 8(a) of

the policy letter dated 31.03.2015. For being placed in command again, post his medical re-categorisation board on 15.03.2018, the applicant was

required to be screened again by an SRMB as per Para 8(b) of the SRMB policy letter dated 31.03.2015. He further stated that in the case of

applicant, the provisions in Para 8(a) are to be read in conjunction with Para 8(b) and not in isolation. Thus, in order to answer the aforesaid questions,

we think it necessary to reproduce Para 8(a) and Para 8(b) of the said policy dated 31.03.2015, which read as under:

8. Officer Medically Downgraded While Holding the Rank of Colonel. An officer promoted to the rank of Colonel without SRMB may get

downgraded to medical classification S1H1A2P1E1 or S1H1A1P2E1 (less dental) or S1H2A1P1E2, with employment restriction of COPE-2 while

holding the said rank. Management of such officers will be as covered below:

(a) In case the officer is medically downgraded to any of the above classifications while he is tenanting a Criteria/Part Criteria

appointment, his removal/continuation in the appointment will be decided as per procedure laid down in MS Branch letter No 04548/MS

Policy dated 02 Sep 2011, which entails consideration of incumbent's willingness,

medical opinion and recommendations of the commanders

in chain. Since the decision on the stream for his employment in the current rank would be inherent in the above process, a separate SRMB

screening would not be required. Subsequently, if the officer is empanelled by No. 2 Selection Board, he will be screened by SRMB, if

eligible, to decide upon his promotion and employment in the rank of Brigadier.

(b) In case the officer is tenanting a Non Criteria appointment post completion of his AE, there would be no immediate requirement to grant

him a consideration by SRMB. However, if the officer is subsequently required to be placed on a Criteria/part Criteria appointment in the

rank of Colonel, due to any reason, he would then be screened by SRMB to decide upon hiS suitability to tenant such appointments. Later,

in case officer is empanelled by Na 2 Selection Board, he will again be screened by SRMB, if eligible, to decide upon his promotion and

employment in the rank of Brigadier.

When we look at the sequence of events in light of the aforesaid provisions of Para 8(a) and 8(b), we feel that the applicant was placed in the criteria

appointment of a commanding officer when he was fully fit and in Shape-1. However, since he developed symptoms of CVT in less than a month

after taking over the command, therefore, it was a mandatory requirement for treatment to remove him from high altitude area. Hence the

respondents cannot be faulted for removing the applicant from command due to the disease CVT and the consequent [MC, resulting in posting out of

applicant to Jabalpur (MP) after about three months of command appointment. However, we have noted that 'Adequately Exercised' (AE) is an

important term in the policy dated 31.03.2015 and is figuring in Para 7 as well as in Para 8(b) of the policy letter. Once this term 'AE' is understood,

the interpretation of Para 8(a) and Para 8(b) falls in place. It is, therefore, important to note here that Para 7 of this policy letter states that ""An officer

promoted through SRMB for staff/ERE/Instructional stream in the rank of Colonel will not be eligible for consideration by No 2 Selection Board by

virtue of not having been Adequately Exercised (AE)"". Thus, in view of these clarifications inherent in the policy, it is now clear that the applicant

developed the disease CVT, in less than one month of his command appointment and had to be removed from command in about three months, hence

he cannot be considered as an adequately exercised officer.

Therefore, in this situation, since the applicant had specifically applied for criteria appointment after becoming LMC i.e. Shape-2 (P), therefore we

cannot fault the respondents for recommending the applicant's case to be considered by SRMB as per PARA 8(b) of above-quoted policy letter.

Hence, as far as first question is concerned, we are of the opinion that the respondents cannot be faulted for convening SRMB of the applicant under

Para 8(b) of the policy letter dated 31.05.2019.

10. As far as the second question is concerned i.e. whether there is any injustice or discrimination on the part of the respondents in denying command

stream to the applicant after being placed in low medical category for 'Cerebral Venous Sinus Thrombosis' vis-a-vis another officer with same

disability, we have tried to understand the role and constitution of SRMB for LMC officers. We have also tried to understand the allegation of

discrimination by the applicant, wherein he is claiming that another similarly placed officer of same Arm with same disease has been cleared for

command stream by his SRMB. To understand this issue, we have gone into the details of the constitution of SRMB and the relevant policy letters on

the subject and the following facts about SRMB are clear to us:

(a) The original MS branch policy letter on SRMB in 2012, has following provisions:

(i) SRMB is applicable for promotion to the rank of Colonel for officers in Low medical Category (LMC). Consideration Zone of SRMB is primarily

restricted up to LMC officers with SHAPE 2(P) with over all cope coding of COPE-2.

(ii) SRMB has to primarily decide two things i.e. (a) Whether the promotion will be in organisational interest; and (b) Identify their employment in the

select rank of Colonel.

(iii) The SRMB consists of 08 members i.e. Chairman - 01 Lt Gen Members - 04 Maj Gens Secretary - Dy MS(B) Advisors 01 Medical specialist and

01 surgical specialist

(iv) The SRMB is required to peruse following documents about the concerned officer:

Special report by IO and RO on the performance of officer, in present medical category Employability certificate (by Medical Board) in terms of

Para67 (b) of Regs for Army Latest medical Board Proceedings.

(v) The SRMB can award any of the three gradings i.e. (a) Fit for command stream i.e. fit for all appointments; (b) Fit for Staff/ERE/Instructional i.e.

unfit for Command; and (c) Unfit for physical promotion to select rank of Colonel

(vi) The SRMB proceedings are required to be approved by Military Secretary. However, if SRMB alters the recommendation of No3/No2 Selection

Board, then Board proceedings will have to be approved by COAS/MOD as applicable.

(b) The SRMB policy as mentioned above was revised vide MS branch policy letter dated 31.03.2015. This revision has primarily extended the SRMB

policy up to the rank of Brigadier (No 2 Selection Board). However, it also includes certain additional clarifications concerning Colonels, including

removal from command due to LMC and dealing with medically downgraded Colonels for posting back to criteria appointments.

11. If we look at the role and composition of the SRMB, it is amply clear that 80% inputs required for decision making in SRMB are of medical nature

and thus it is primarily based on medical condition that employability/stream for a Colonel/Brigadier has to be decided. We have also noted that other

than the medical aspects, the next most important aspect that was considered by the SRMB is the special report by 10 and RO, which is primarily

about the physical condition and employability of the officer. In the final analysis, we have noted that the recommendations of SRMB have far

reaching consequences and denial of command stream to a Colonel rank officer amounts to permanently closing the gates for his future promotion.

12. While it is entirely for the Army to decide its policy as to who is fit for command stream and how officers are to be selected for the same,

however, Tribunals have no option but to examine the policy and its implementation when allegations of discrimination and subjectivity in implementing

this policy are made.

13. In the present case, the specific allegation of the applicant is that in a span of less than six months between two SRMBs, while one RSMB had

cleared another similarly placed officer in the same arm, with same disease, same low medical category but having higher employment restrictions

than applicant for command stream, however the applicant's SRMB, has unjustly

denied him the command stream and thus put a full stop to his

further promotion and career progression. The applicant has stated that his right to equal opportunities guaranteed under Article 14 of Constitution of

India has been violated. He submitted that since he was in Shape-1 and already a Colonel and had become LMC within three months after taking over

command of a unit on promotion, therefore, the SRMB should have been more considerate towards him as compared to another Lt Colonel rank

officer who had been cleared for promotion as a fresh case with 36 in/do being in low medical category and having higher employability restrictions

than him.

14. In view of the above mentioned allegations by the applicant, we have thoroughly examined original SRMBs of both the officers and found the

following facts:

(a) That both officers i.e. applicant and Lt Col Prashant Anand Agarvval were suffering from same high altitude related disease i.e. ""Cerebral Venous

Sinus Thrombosis"" (CVT). In simple language, this disease can be described as a blood clot in the dural venous sinuses which drain blood from the

brain;

(b) The onset of the disease was in January 2017 in the case of the applicant and in the case of Lt Col PA Agarvval, it was in October 2016;

(c) In the Medical Board proceedings, the specialist in Medicine and Neurology, who has done clinical assessment, given his opinion and

recommended employment restrictions for both the officers is one and the same officer i.e. Col Amit Sareen. His recommendations as accepted by

medical board for both officers are as follows:

(i) Both the officers have been recommended LMC P2(P) for CVT.

(ii) The applicant has no employability restriction except 'not to be posted to HAA'

(iii) However, the other similarly placed officer i.e.

Lt Col PA Agarwal has following employment restrictions i.e. 'unfit for HAA/field/ ECC/CI Ops'. FCC in this opinion stands for extreme cold climate.

15. In the above back drop, when we look at the comparative datum of both the officers, we find that as per the opinion of the specialist Medical

officer, who incidentally happens to be same for both the officers, the employability of the applicant in LMC is far superior to Lt Col PA Agarwal.

Hence we have tried to understand as to why SRMB has recommended Lt. Col Agarwal for Command stream and not recommended the same for

the applicant. However, we find that there is nothing in the SRMB of both these officers which can throw any light on this issue. We, however, find

that in reply to the statutory complaint by the applicant and in the reply affidavit by the respondents, following stand has been taken by them:

(a) The SRMB considers many aspects such as circumstances of onset, the medication, the likely effect of stress of command on the officer's

disability, etc. while arriving at its decision. The factors will be peculiar to each case even though the disability and medical restrictions may be same.

(b) The Board is empowered to take its decision based on their individual experience and judgement. Two different SRMBs may view two similar

cases in a different manner.

(c) The board examines each case on its own merits without prejudice to the decision of earlier SRMBs on similar disabilities/restrictions.

(d) The fitness of a CO is a must and the inability of a CO to move with the unit adversely affects the combat potential of a unit. Four COs of infantry

battalions were removed from January 2017 to June 2018 due to medical reasons.

(e) The SRMBs prior to May 2018 have taken a liberal view of medical restrictions and graded the officer fit to command, Lt Col PA Agarvval is a

case in point.

16. Thus, in view of the above mentioned clarification by the respondents, we have tried to understand the situation. The gist of their stand on the

matter is that the commanding officers have to be fully fit for command and for those Lt Colonels who have been promoted to the rank of Colonel, but

are in low medical category of Shape-2 (P) and are COPE-2 on employability will have to be considered by SRMB for command stream. Even

Colonels who are medically down and need to be given criteria appointments in command stream will have to be considered for the same by SRMB.

The SRMB is having the required expertise to take its decision but it will not be bound by the decisions of previous SRMBs as each SRMB is an

independent entity. Further, they have admitted that SRMBs have been lenient in the past, i.e. before May 2018 and, therefore, Lt Col PA Agarwal

has been recommended for Command stream in November 2017, but later the

applicant has not been recommended despite having same disease and

better employability.

17. The above mentioned clarifications by the respondents have surprised us. The SRMBs may be different but the Indian Army is one. Additionally,

as per the policy, the SRMBs are required to be approved by MS in Army HQ hence variations in SRMBs have to be regulated appropriately. It also

appears that there is an admission by the respondents that SRMBs are empowered to take a decision as per their collective judgement and hence

based on individual perceptions, they can, at times, become lenient, and at other times can become strict. However, when we tried to understand this

issue of lenient and strict SRMB, we have found that there are only two policy letters on the subject, one in 2012 and the other in 2015, hence how

does an SRMB becomes lenient or strict pre/post May 2018 without any fresh policy guideline is not clear. We feel this issue is serious and involves

both organisational interest as well as moral and trust of middle level officers in the system of SRMB. Thus, giving command to an officer who is not

medically fit to command is as wrong as depriving another officer of an opportunity to command for reasons which are not clear to the environment,

because fair play and transparency are corner stones of a fighting force.

18. Considering the issue in totality, we are of the opinion that the subject matter of RSMB is a serious matter for both i.e. the Army as an

organisation and for middle level officers aspiring for career progression hence it is important that SRMBs are done in a fair, transparent and

consistent manner and Army as an organisation has a responsibility to ensure this however in this particular case we regret to note that it cannot be

said so.

19. While it is entirely the prerogative of the Army to decide the criteria on who should command, however, transparency and fair play in

implementing the methodology must be ensured. We find that each SRMB consists of by and large of fresh and new members, hence the possibility of

aberrations and variations in outcome cannot be ruled out and hence the respondents have taken a stand of lenient and stricter SRMBs in the past. If

we look at this particular case, both the officers are fully fit, but while deployed at super high altitude of over 16000 ft., get a blood clot in their brain, a

medical condition called CVT, leading to medical complications like severe

headache, abnormal vision, weakness, etc. Medically the blood clotting

process varies between individuals, hence some individuals, though otherwise fully fit, may be a little bit more prone to clotting at higher altitudes. Even

otherwise, in the biting cold of sub-zero temperatures at high altitudes, besides other causes, like an injury or an inflammation, even dehydration can

trigger the clotting which is medically known as ""Cerebral Venous Sinus Thrombosis"" (CVT). The general line of treatment for this condition is

immediate evacuation out of high altitude area to plains, and administration of anti-coagulants to dissolve the clot. Once the clot gets fully dissolved and

medicines are stopped, the individual becomes fully fit, however, as a precaution against re-occurrence, such individuals are declared unfit for high

altitude and maintained in Shape-2(P). This is the case of the applicant. However, depending on the severity of initial clot and the degree of

subsequent recovery, additional employment restrictions like unfit for HAA/field/ ECC/CI Ops can also be given. This is the case of Lt Colonel PA

Agarwal, whereby he has got all four employment restrictions. Thus, in this situation, an SRMB clearing Lt Col PA Agarwal for command, when he

had severe employment restrictions and another SRMB declaring the applicant unfit for command when he was having only one restriction of

employment i.e. HAA, calls for serious introspection by Army, especially in view of the fact that the applicant appears to be a good officer for the

organisation as he has been awarded Sena Medal for gallantry in CI ops in J&K in 2007 and after promotion to the rank of Colonel was posted as a

commanding officer for about three months, till he had to be removed and posted out for his treatment of CVT. Additionally, with the existing policy

and concept of conducting SRMBs, there is no assurance that such incidents/ aberrations will not take place in future also.

20. Considering all issues, including the organisational interest and the morale of middle level officers, we are of the view that unless the JO or the RO

in their special report makes any adverse remark on employability, the matter primarily remains a medical issue based on medical board's opinion

which has examined the person concerned. The medical officers present in the SRMB can only offer a clarification but they do not have the mandate

to change the basic findings of the Medical Board. Thus, to bring consistency in the conduct of SRMBs, the opinion of previous SRMBs for same arm

and same appointment and same disability along with related employment restrictions, should be considered by fresh SRMBs before arriving at their

decision. However, at this stage, we are refraining from passing any order on this issue and leave it to the internal analysis and internal mechanism of

Army, to fine tune and correct its system of conducting SRMBs so that organisational interest as well as consistency along with transparency prevails.

21. In view of our observations made herein above, we set aside the SRMB of the applicant conducted in May 2018. The respondents are directed to

conduct a fresh SRMB in the light of our observations. The fresh SRMB is to be conducted within three months of receipt of this order.

22. The 0.A thus stands allowed and is accordingly disposed of. No order as to costs.

Pronounced in open Court on this the 5th day of February 2020.

