
(2010) 07 DEL CK 0068

In the Delhi High Court

Case No : Writ Petition (C) No. 1252 of 2010

Kamlesh Kumar Kamal

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 30-07-2010

Acts Referred:

Citation : (2010) 07 DEL CK 0068

Hon'ble Judges : J.R. Midha, J;Gita Mittal, J

Bench : Division Bench

Advocate : Nishit Kush and Kuldeep Singh, for the Appellant; Shawana Bari, for B.V. Niren, Naresh Kaushik and Aditi Gupta for Respondent No. 2 and Anagha, for AIIMS, for the Respondent

Final Decision : Allowed

Judgement

Gita Mittal, J.—The present writ petition raises a very important issue with regard to the manner in which medical boards are to be constituted and conducted by the Central Police Organisation. In order to appreciate the issue, it becomes necessary to notice a few essential facts.

2. The petitioner contended that he was declared unfit for appointment to the post of Assistant Commandant (Direct Entry) in the Central Police Forces for the following reasons:

1. Anxiety with tachy cardia and tremor of both hands.

2. Rt. Hilar Lymphodenopathy on X-Ray chest P/A View

3. These reasons have been communicated by a letter dated 14th June, 2008 which also informed the petitioner that he was entitled to seek a review medical examination against the findings of the medical examination after obtaining necessary "medical certificate from a specialist medical practitioner of concerned field".

4. A review medical board of the petitioner was conducted on 22nd of

September, 2008 which communicated the following reason for unfitness of the petitioner for appointment:

Rt. Hilar Limphadenopathy on X-Ray chest P/A View

5. The petitioner placed reliance on certain examinations conducted upon him in civilian hospitals which found the petitioner fit for appointment. The submission on behalf of the petitioner was that neither the original, nor the review board consisted of specialists in the concerned field and that he has been wrongly declared medically unfit.

6. On 10th March, 2010, pursuant to our directions, the respondents had produced the original record relating to the petitioner. On 17th of March, 2010 we had found and recorded that even though two x-rays relating to the petitioner were available on the record, no report of the radiologist or any other specialist, who would be the competent expert to read and give an opinion or record findings on the x-rays were available.

7. The original record of the medical examination was available with the respondents. Further time was sought to produce the details of the review medical board which had examined the petitioner.

In the above background, on 17th March, 2010, we had deemed it to be in the interests of justice to make the following directions without prejudice to the rights and contentions of all parties:

We accordingly direct the petitioner as well as authorized representative of the respondent to appear with all records before the Commandant of the Research & Referral Hospital, Delhi Cantt on 23rd March, 2010 at 11 a.m. The Commandant shall constitute a board of three experts in the concerned specialities. The Board so constituted would fix a date and time for the petitioner's examination and tests. In case any testing is required, the petitioner shall bear all costs whereof. The report of this Board shall be placed before us in sealed cover before the next date of hearing.

8. On 5th May, 2010, a report received from the Army Hospital (R&R), Delhi Cantt. was placed before us. This report stated that pursuant to our order dated 17th March, 2010, a Board consisting of two Senior Advisors (Medicine & Respiratory Medicine) and one Classified Specialist (Radiologist & Imaging) was convened. The proceedings of the Board of officers conducted on 25th March, 2010 had been placed before us. This Board had opined that the petitioner did not have Rt Hilar Lymphadenopathy. The findings of the Board were based inter alia on a radiological examination which has also been placed before us.

9. Time was sought by parties to examine this report. The report of the board constituted by the commandant of the R&R Hospital was favourably considered by the respondents and on 20th May, 2010, learned Counsel for the respondent had handed over a copy of a letter dated 7th May, 2010 whereby the Union Public Service Commission had been requested to release the result of the

petitioner keeping in view his medical fitness as certified by the medical examination conducted by the Army Hospital, R&R.

10. In this background, we were informed on 2nd June, 2010 that the petitioner had been declared successful in the selection process for appointment to the post of Assistant Commandant (Direct Entry) into the CRPF. It is an admitted position before us that the petitioner stands duly appointed and has since joined duties with the respondents. The grievance of the petitioner in the writ petition therefore, appears to be satisfied.

11. Before parting with the case, however, we are compelled to observe the manner in which the medical examination of persons seeking first appointment by the respondents has been conducted.

12. Mr. B.V. Niren, learned standing counsel for the respondent Nos. 1 & 3 has placed reliance on the Office Memorandum No. 5(1)-E. V. (B)/63 dated 30th March, 1963. So far as the appropriate medical authority for conducting the medical examination of persons seeking appointment is concerned, the same reads as follows:

Appropriate medical authority for conducting the medical examination - The examining medical authority will be

1. For appointment to a Gazetted post - A Medical Board consisting of three Group 'A' Medical Officers of the status of specialists, namely, a Physician, a Surgeon and an Ophthalmologist. When a woman candidate is to be examined by a Medical Board, there should be on the Board a woman Doctor possessing a medical qualification in one of the first, second or Part-II of the Third Schedule, to the Indian Medical Council Act, 1956 (102 of 1956). As far as possible, the members of the Board should be comparable in status to each other and not ordinarily be officers immediately subordinate to one another.

2. For appointment to a non-Gazetted (other than Group 'D') post - In the case of male candidates, a Civil Surgeon or a District Medical Officer or a Medical Officer of equivalent status.

In the case of female candidate appointed to a post (i) in Delhi, the Assistant Surgeon, Grade I (Woman), under the Central Government Health Scheme, and (ii) in any other place, a registered female medical practitioner possessing a medical qualification included in one of the Schedules to the Indian Medical Council Act, 1956 (102 of 1956), Indian Medical Central Act, 1970 and Homoeopathy Central Council Act, 1973.

3. For appointment to a Group 'D' post - In the case of male candidate, the Authorised Medical Attendant possessing a medical qualification included in one of the schedules to the Indian Medical Council Act, 1956 (102 of 1956) and when there is no such Authorized Medical Attendant, a Government Medical Officer of the nearest dispensary or hospital possessing such qualification.

In the case of female candidate appointed to a post (i) in Delhi, the Assistant Surgeon, Grade I (Woman) under the Central Government Health Scheme and (ii) in any other place a registered female medical practitioner possessing a medical qualification included in one of the schedules to the Indian Medical Council Act, 1956 (102 of 1956), Indian Medical Central Act, 1970 and Homoeopathy Central Council Act, 1973. (SR4)

NOTE. - Medical certificates issued by Honorary Medical Officers are acceptable for the purpose of appointments to non-gazetted posts under the Central Government, provided that such certificates are acceptable for the same purpose in respect of its own employees by the Government of the State in which the candidate is appointed under the Central Government or in which his medical examination is arranged.

13. So far as the remedy available to a person, who is aggrieved by the finding based on such medical examination is concerned, reliance has been placed on the Government Instruction, M.H., O.M. No. F.7(1)-27/51-M. II, dated the 18th January, 1952; F.7(1)-10/53-M. II, dated the 1st May, 1953 and 27th March, 1953; F.5-35/55-M.II, dated the 13th December, 1955; F 5(II)-45/56-M. II dated the 26th October, 1956 and 17th November, 1956; F. 5(II) (Pt. II)-12/57-M.II, dated the 17th December, 1957 and O.M. No. 14025/54/86-MS, dated the 19th January, 1989 which prescribes the method of laying a challenge to the findings of the medical authorities. The relevant extract thereof, reads as follows:

Appeals against the findings of Medical Authority - In cases where a Government servant or a candidate for Government service is declared unfit for retention in Government service or for appointment in the Government service by an individual Medical Officer/Medical Board, as the case may be, the grounds for rejection may be communicated to him in broad terms without giving minute details regarding the defects pointed out by the Medical Officer/Medical Board. Cases, where the grounds of rejection have not been clearly stated by the Medical Board in their report, may be referred to the Health Ministry for advice.

Ordinarily there should be no right of appeal from the findings of a Civil Surgeon or an Authorized Medical Attendant, but that, if Government are satisfied on the evidence placed before them by the candidate concerned of the possibility of an error of judgment in the decision of the Civil Surgeon or the Authorized Medical Attendant, it will be open to them to allow re-examination by another Civil Surgeon or a Specialist or by a Medical Board, as may be considered necessary.

14. Much water has flown under the bridge since 30th of March, 1963 when the directions in this office memorandum were made. Medical knowledge and expertise has also attained the highest standards in this country. The categorization of experts and specializations has also acquired minute categorizations of super speciality in specified disciplines in the field of medicine and surgery.

15. We also find that an appeal against the findings of the medical authority is

entertained only if the same is accompanied by a medical certificate produced by a candidate or a government employee. Our attention has been drawn to the manner in which the certification by the expert has to be effectuated as prescribed by the respondents. The petitioner has filed the same on record as annexure A-3. It is pointed out that the respondents have prescribed form No. CPF/AC (Direct Entry)/5 as the format in which the certificate is issued by the medical board while finding a person unfit for appointment. Para 2 of this format informs the candidates of the manner in which an appeal can be preferred against the finding of the medical board which reads as follows:-

In case he/she prefers to file an appeal against the findings of medical examination, he/she is advised to apply for review medical examination in the enclosed Form No. CPF/AC(DE)/5 along with demand draft for Rs. 100/- in favour of DIG (Admn), DTE. GENL., CRPF, payable at SBI CGO Complex, Lodhi Road, New Delhi (Code-7837). After obtaining necessary medical certificate from a Specialist Medical Practitioner of concerned field as per performa in Form No. CPF/AC (Direct Entry)5 attached, to reach to the addressee within a period of 15 days i.e. positively by 06/07/2008 failing which his/her candidature for the post of Assistant Commandant (Direct Entry) shall be treated as cancelled without any further notice.

The government, if satisfied on evidence placed before them of the possibility of an error of judgment in the decision of the medical board, civil surgeon or the medical officer, has examined him in the first instance shall allow re-examination. The certification has to be by a medical practitioner concerned.

16. The requirement of certification of medical fitness by "Specialist Medical Practitioner of the concerned field" therefore shows that the respondents are conscious that so far as review/appeal of the findings of the medical board is concerned, the same has to be only by experts/specialists in the concerned field. As against this, placing reliance on the Office Memorandum issued between the period of 1952 to 1989, the respondents have prescribed the review/appellate medical board for re-examination of the petitioner by another civil surgeon or a specialist or a medical board as may be considered necessary.

17. It needs no elaboration that the impact of a declaration of medical unfitness of a person for appointment or continuation of engagement by the service is far reaching. The same may impact not only the immediate prospects to which a person is seeking engagement/employment or continuation of his employment, but may also impact his future candidature for employment and engagement in other areas as well. Valuable rights of such persons are thus effected by finding of such medical boards and therefore, such examination deserves serious attention before a person is certified as medically unfit. For instance, certification of a person, as colour blind in the armed or the paramilitary forces; or an ear and sinus problem for a flyer; or an opinion of varicose veins for a soldier would bring a complete end to their career.

18. Our experience has shown that in case after case, these appeals/reviews are treated casually without having regard to the rights of the individuals involved. Review/appellate medical boards are constituted consisting of civil surgeon or persons having no expertise at all in the specialisation or the medical field involved. We have had cases where an ophthalmologist has declared a person medically unfit on ground of disability relating to medicine or such like area. It certainly cannot be contended or held that an ophthalmologist would have the training or expertise to find a person medically unfit on account of an ailment which would fall within the expertise and medical knowledge of an expert in medicine or in a surgical area.

19. We also find that the respondents have taken the same position when they have mandated that an appeal/review petition has to be accompanied by a medical certificate from a specialist medical practitioner of the concerned field. It is apparent therefrom that it is the understanding of the respondents themselves that only a specialist medical practitioner of the "concerned field" would have the medical and technical knowledge, expertise and ability to certify a person as medically fit or unfit or suffering from a particular disease or disability rendering him fit or unfit for employment or continuation of employment. We are unable to comprehend as to how a doctor not trained in the field can give a certification for existence of a condition for which he does not have specialisation or training. It is also unfortunate that the respondents and authorities accept such certification without consideration of the opinion of a specialist of the concerned field which is enclosed by the candidate. What is surprising is that such board constituted by the respondents has no additional material to differ with the petitioner's specialists. We may note that medical science is not a definite science. In the given facts, there may be differential views possible. However, it is trite that such views would require to be of the concerned experts.

20. In this behalf, we find that in a pronouncement reported at (131) 2006 DLT 170 (DB) Anish Barla v. Union Public Service Commission, this Court has occasion to consider the same issue. The observations of the court made as back as on 14th March, 2006 on this issue shed valuable light on this aspect of the matter and deserve to be considered in extenso. The same read as follows:

4. It may be mentioned by us that the above order has been passed by us on the basis of the statement made by the counsel appearing for the petitioner that the petitioner is now free from the aforesaid skin disease, and upon our noting with anguish from the record of the respondent that although the petitioner was held unfit for appointment on the ground of inveterate skin disease, none of the members of the Medical Board who had thus disqualified the petitioner had any experience in dermatology. This is, to say the least, most unfortunate and we record our disapproval of the manner in "which the case of the petitioner has been dealt with by the respondent. We hope that the respondent will desist from committing such mistakes in the future and will bestow earnest consideration to such like cases since the very right to life and livelihood of a person may be

adversely affected by the same.

21. Despite the pronouncement in *Anish Barla v. UPSC* 131 (2006) DLT 170 (DB) as back as on 14th March, 2006, the same issue has been raised again before this Court. We find another decision of this Court rendered on 4th December, 2009 in W.P.(C) No. 7993/2009 *Dhananjay Kr. v. CRPF and Anr.* Even though in this case, the court did not substitute its opinion with that of the experts declaring the petitioner unfit, the observations of the Court in the manner in which the boards are to be constituted and to conduct proceedings are relevant. The same may usefully be extracted and read as follows:

10. Issues of fitness levels are a matter of policy and therefore would be outside the domain of court interference unless a challenge is made on the ground that the desired fitness is arbitrary, in that the same has no connection with the job to be performed. For example, a person who has lost two fingers of a hand may be sufficiently disabled to be a member of a Armed Force on account of the disability to handle a fire arm, but would be suffering no disability if required to be employed as a singer.

11. We note that there is no challenge made in the writ petition to the physical standard required to be achieved as desired by the respondent.

12. In the matter of expert opinion, the court cannot substitute its opinion with that of the expert. The only jurisdiction which a court would have would be to ensure that the opinion on the subject is given by an expert in the field and that the expert concerned has given his opinion based on standards accepted by the experts in the field.

22. A similar issue as in the present case arose for consideration in W.P. (C) No. 13685/2009 *Birendra Singh v. UOI and Ors.* The judgment was rendered on 4th May, 2010 by the Bench of which one of us (Gita Mittal, J) was a member. This Court had noticed the prior judgment of *Anish Barla* (supra) and so far as the constitution and conduct of the medical board and the review medical board was concerned, it was observed as follows:

24. At this stage, it becomes necessary to notice an extremely distressing factor. An able soldier with the CISF has been declared as medically unfit. The fitness standard in relation to the amputation of a little toe obviously would have required an assessment by Orthopaedic experts. The perusal of the record of the medical examination conducted on 8.6.2009 and the counter affidavit would show that the petitioner has been certified as unfit by the Chief Medical Officer at the NHCC, Saket, New Delhi-17. Such a Chief Medical Officer does not appear to be possessing any training as an orthopaedic expert.

25. So far as the position of the Review Medical Board which had conducted the petitioner's medical examination on 19.8.2009 is concerned, we find that according to the counter affidavit the Board consisted of a medical specialist, surgical specialist and an ophthalmologist who examined the petitioner and after

considering all the reports and physical examination, declared him unfit due to amputation of little toe of left foot. It is clearly evident that the Board which had re-examined the petitioner and certified him as unfit also did not consist of any expert of orthopaedics, the concerned speciality.

26. We find that this Court had the occasion to consider a similar medical examination of a candidate by a board which did not consist a specialist of the discipline which was involved. In the decision in *Anish Barla v. Union Public Services Commission* reported at 2006 VIII AD (Delhi) 622 appointment to the post of Assistant Commandant Group A in the Central Police Forces was involved. The petitioner had been rejected by the respondents on grounds of medical unfitness. The petitioner had assailed the rejection inter alia on the ground of the petitioner having been declared fit by a dermatologist of a recognized hospital of Delhi and that he had wrongly been declared medically unfit by a Board which did not include a specialist of the required field. Observations in para 4 of the judgment deserve to be considered in extenso which reads as follows:

4. It may be mentioned by us that the above order has been passed by us on the basis of the statement made by the counsel appearing for the petitioner that the petitioner is now free from the aforesaid skin disease, and upon our noting with anguish from the record of the respondent that although the petitioner was held unfit for appointment on the ground of inveterate skin disease, none of the members of the Medical Board who had thus disqualified the petitioner had any experience in dermatology. This is, to say the least, most unfortunate and we record our disapproval of the manner in which the case of the petitioner has been dealt with by the respondent. We hope that the respondent will desist from committing such mistakes in the future and will bestow earnest consideration to such like cases since the very right to life and livelihood of a person may be adversely affected by the same.

27. It is apparent that despite this pronouncement made on 14.3.2006, the respondents have not paid any heed to the composition of the Board which examines the fitness of the candidates. It also shows that the respondents have not at all given any heed to the material facts of the case which have certainly a bearing on the fitness of the petitioner. Mere amputation of the little toe of the left foot by itself may not necessarily render a candidate unfit for appointment to a particular post. Further the impact of declaring him as medically unfit may render him unfit for continuation in the post which he was occupying at the time of his medical examination.

28. The respondents accept the fact that the petitioner was certified as being in Shape I category for the year 2007, 2008 and 2009.

29. It may be noted that amputation of a part of a body may not in all cases be necessarily sufficient to create a disability for appointment to a post. The very fact that a candidate seeking appointment is required to undergo a medical examination, manifests the intention that there has to be an assessment of the

person's capabilities and fitness from the medical point of view. Different individuals have different capabilities. One person may have the capability to overcome the deficit, if any, created by such an amputation of the toe, while another person may not be able to do so. For this reason, it is essential that the fitness of a person is assessed only by experts of the specialty concerned. The respondents shall ensure that medical boards which are constituted in future for examining medical fitness of candidates, consist of members of the specialty concerned.

23. We emphasise that courts do not possess medical expertise. On a question relating to the medical science it is the views of the medical experts which binds the courts. It, however, needs no elaboration that such binding view has to be of the experts in the medical specialisation concerned.

24. The issue which has been raised in all the above cases as well as the present case is extremely imperative. Apart from the rights of the individuals who are medically examined, there is a large element of not only public interest but of national interest as well in as much as the personnel who are being evaluated with regard to medical fitness, are required to perform stringent and difficult duties not only within the borders of the country but in extremities of climate at remote places at the far off borders. Therefore, while cases relating to persons being wrongly declared as unfit have been brought to our notice, at the same time, the possibility of persons being wrongly declared as fit cannot be ruled out. It is, therefore, essential that wherever, there is any kind of a doubt with regard to the medical fitness of any person, the respondents must react promptly keeping in view the medical status and the discipline which may be involved.

25. As in the present case, on several occasions we have found that a board of experts constituted under our orders, has differed in their reports with the certification of medical unfitness of a candidate by a review/appeal medical board which did not include a specialist. This fact by itself manifests that the respondents and authorities need to take a re-look at the policy framed almost four decades ago (thirty seven years ago to be precise in 1973). Having regard to the importance of the matter, we would have expected and appreciated a suo moto examination of the same by respondents, especially in the light of the aforesaid observations. But unfortunately, it has not happened.

26. The instructions and guidelines which are issued by the respondents are required to keep pace with not only the social developments but with developments in technology and in medical science as well as availability of superior diagnostic techniques as well as specialties and specialists in various discipline and specialties in medicine.

The issue is urgent, but the matter relates to policy and administrative instructions. Our jurisdiction is limited. However, inasmuch as our previous observations and orders have made not a wit of a difference in the constitution of a medical board, we are compelled to issue the following directions.

27. In view of the above, the respondents are directed to ensure that the review/appellate medical board(s) which are constituted, shall include an expert of the medical specialty which is involved. In case such an expert is not available at the place where the candidate is being examined, the candidate will be informed of the same and shall be required to report to a medical board which shall be arranged at the closest available formation of the force/service concerned. In case such candidate is unwilling for any reason to report for a medical examination at such place for medical examination, it shall be open for the respondents to reject the review/appeal.

28. We also direct the respondents to examine the office memorandums, instructions and guidelines covering conduct of medical examination, review and appellate medical boards in matters relating to appointment of personnel to the forces. The respondents shall examine the matter especially from the requirement of appropriate composition of the authority/board to conduct the examination/appellate/review medical examination in the context of the presence of concerned specialist in the field who examines the applicant and gives an opinion. Whereever needed, the respondents may prescribe the costs and testing and travel etc which may be insisted on account of want of the specialist at the place of testing.

29. The issues which have been raised in the present case as well as the aforementioned judicial precedents relate to different services including the combined central para-military force and combined police force. Similar issues have arisen before us in cases relating to defence personnel as well. We consequently direct the Registry to ensure service of the present directions upon the heads of all the Central Police Organisation and the Central Para-military forces as well as on the Chiefs of the Army, Air Force and Navy staff to ensure compliance with our directions.

An additional copy of this order be given by the Registry to Capt. Rahul Soni who represents the Army in this Court. Capt. Soni shall ensure that the copy of the order is served upon all the forces.

30. The policies/guidelines/instructions which may be framed and issued by the respondents shall be placed on the record of the present case, in any case within a period of six months from today.

This writ petition and application are allowed in the above terms.

List before the court for reporting compliance on 3rd February, 2011.

Dasti to parties.