
(2003) 07 P&H CK 0063
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 5991 of 2003

Kulwinder Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 22-07-2003

Acts Referred:

Army Rules, 1954 — Rule 13(3), 8

Citation : (2003) 135 PLR 367

Hon'ble Judges : S.S. Nijjar, J; S.S. Grewal, J

Bench : Division Bench

Advocate : S.K. Rattan, for the Appellant; Gurpreet Singh, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Nijjar, J.—The petitioner appeared before the Recruiting Officer on 16.10.2000. He successfully completed the physical test on 17.10.2000. He was medically examined and was declared fit for enrollment in the Army. On 22.10.2000, the petitioner was given the eligibility card for a candidate to appear in Common Entrance Examination/Aptitude Test. On 10.11.2000, he was declared successful in the Entrance Examination. Fresh medical examination of the petitioner was held on 11.1.2001 and he was again found medically fit. He was sent to Armoured Corps Centre at Ahmednagar for training as G.D. Sepoy on 11.1.2001. He was again medically examined by respondent No. 4 on 13.1.2001 and found to be medically fit. The petitioner then attended basic training w.e.f. 13.1.2001 to 12.2.2001. The grievance of the petitioner is that he was mercilessly slapped, seven times on the left side of the face over the left ear on 7.2.2001 around 9 a.m. in the Parade Ground by the Platoons Incharge of the Training Centre. He was slapped because he had not made shave by NK (LD) Rajesh Kumar Yadav of 7th Cavalry. The incident took place in the presence of other Instructors, namely, Dafedar Ajit Singh, LD Lalan Kumar and LD Ramesh Kumar of 13 Wing. After the incident, the petitioner started to experience pain in the left ear. The petitioner was, however, again declared "fit" in the medical

examination conducted in the Training Centre on 13.2.2001. On 22.3.2001, the petitioner was referred to Command Hospital, Pune for treatment. He remained in the Hospital for ten days w.e.f. 23.3.2001 till 3.4.2001. He narrated the incident to Dr. Col. Devinder Chakara, ENT Specialist. On 3.4.2001, the petitioner was discharged from the Hospital and sent back to Training Centre declaring him ""unfit". The petitioner was thereafter referred to Military Hospital, Ahmednagar where he remained from 11.4.2001 to 11.5.2001. Release Medical Board of the petitioner was held in the Hospital. The Medical Board declared 20% disability of the petitioner. On 22.6.2001, the petitioner was invalided from military service on medical ground having 20 per cent disability. Respondent No.3-OIC Records, the Records, Armoured Corps, Ahmednagar forwarded the disability pension case of the petitioner to respondent No.2-Chief Controller of Defence Accounts (P), Allahabad (UP), By letter dated 18.4.2002, respondent No.2 rejected the claim of the petitioner for disability pension on account of the following reasons:-

"(i) Neither attributable to/not aggravated by military service.

(ii) Constitutional in nature and not related to service.

(iii) Attributable to aggravated by military service by assessed at less than 20% for life from 25.6.2001." (CROSSED OUT)

2. On the basis of the letter, respondent No. 3 has informed the petitioner by letter dated 13.5.2002 that the petitioner had been sanctioned a sum of Rs. 1,7457- and Rs.NIL on account of his invalid death-cum-retirement gratuity respectively. The petitioner was informed that he has the remedy of appeal against the aforesaid decision within a period of six months from 18.4.2002. In paragraph 13 of the petition, the petitioner has stated that he has submitted an appeal on 4.10.2002 vide Annexure P-3. The petition is, however, silent as to whether any decision has been taken on the same. No prayer is made in the writ petition also for a direction to the respondents to decide the appeal. The respondents in the written statement have categorically stated that the petitioner has not submitted any appeal as claimed in the petition. The petitioner has not cared to file any replication controverting the statement made by the respondents. Therefore, we proceed on the basis that the petitioner has not cared to avail the alternative remedy of appeal as provided under the rules.

3. Learned counsel for the petitioner has submitted that the disability is clearly attributable to military service. His left ear was damaged when he was slapped seven times by the Platoons Incharge during the training session. The petitioner had been medically examined on a number of occasions and was found to be medically fit at every stage, till the Release Medical Board certified that he was suffering from 20% disability on 22.6.2001.

4. Learned counsel for the petitioner relies on Appendix II attached to Pension Regulations for the Army, 1961 which are as under:-

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

Prior to and during service.- (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 is due to service.

ONUS OF PROOF

9. The claimant shall not be called upon to prove the conditions of entitlements. He/she will receive the benefit of any reasonable doubt. This benefit will be given more liberally to the claimants in field/of lot service cases."

5. Learned counsel for the petitioner submits that since no note of any illness was made at the time of his entry into service, the presumption arises that at the relevant time, he was in a sound physical and mental condition. Unless the authorities can prove it to be contrary, the benefit of reasonable doubt has to be given to the petitioner to hold that the disability has taken place due to Army service. In support of the aforesaid proposition, the learned counsel has relied on a number of decisions of this Court to substantiate his claim for the grant of disability pension, which are as under:-

(1) Palwinder Singh v. Union of India 2000(4) SCT 591.

(2) Satpal Singh v. Union of India 2000(4) SCT 202.

(3) Ex-Subedar Graja Singh v. Union of India 2000(1) SCT 840.

(4) Dalbir Singh v. Union of India 2000(1) SCT 392.

6. The respondents have controverted the claim of the petitioner. It is stated that the petitioner was invalided out of service in low medical category "SIH5AIP1EI" on 25.6.2001 under Army Rule 13(3) Item IV after serving six months and 16 days service as he was diagnosed as a case of "CHRONIC SUPPURATIVE OTITIS MEDIA (BIL) (hereinafter referred to as "CSOMC BIL"), The diagnosis was made during the second medical examination and the Board found him to be "unfit" to continue in training. The Invaliding Medical Board was held at Military Hospital, Ahmednagar on 29.5.2001. The report was approved by DDMS, HO M & G Area Bombay on 5.6.2001. On the basis of the medical opinion, it was declared that the petitioner was "unfit" to continue in training. According to the Medical Board, the disability viz. CHRONIC SUPPURATIVE OTITIS MEDIA (BIL) 382 existed prior to enrollment and was not detected by the Recruiting Medical Officer. The disability is not connected with the Army Service. The Invaliding Medical Board has given a categorical opinion that disability was not attributable to nor aggravated by military service. The percentage of disability was assessed at 15-19% (less than 20%). The disability pension claim of the petitioner was processed to respondent No.2 and adjudicated in consultation with the Medical

Advisor (Pension). It was held that the Invalidity of the petitioner was not related to military service and was constitutional in nature. The petitioner was accordingly informed that his claim for invaliding pension was rejected. The petitioner was still undergoing training when the disease was detected. The same could not have possibly developed during the short period of six months. According to the opinion of the Invaliding Medical Board, the petitioner had a complaint of foul smelling purulent discharge from both ears since childhood. At the time of examination there was also no injury to the ear,

7. Mr. Gurpreet Singh, learned counsel appearing for the respondents has submitted that the opinion by the Medical Board has to be respected unless there is a fresh re-examination by a subsequent Board which comes to a different conclusion. In support of this submission, the learned counsel has relied on a judgment of the Supreme Court in Civil appeal No.164 of 1993 arising out of SLP(C) No.4233 of 1993 (Ex. Sapper Mohinder Singh v. Union of India) decided on 14.1.1993. In that case the petitioner was initially allowed disability pension at the rate of 100% which was later reduced from time to time. Ultimately, in 1989, the Medical Board after examining him reduced the disability to 40%. The Chief Controller of Defence Accounts (Pension) reduced the disability still further to less than 20%. As a result of which, the appellant therein was held to be not entitled to disability pension at all. Taking note of the aforesaid fact, the Supreme Court has observed that the disability assessed at the rate of 40% by the Medical Board which had examined the appellant, should not be rejected until a fresh Medical Board examined the appellant again and came to a different conclusion. The appellant was entitled to disability pension at the rate of 40%, till the matter was re-examined by an appropriate constituted Medical Board. In view of the aforesaid ratio of law laid down by the Supreme Court, it would have to be held that the disability of the petitioner cannot be attributed to military service as the Medical Board has held that the disease is constitutional in nature. It has been categorically stated by the Medical Board that there is no injury to the left ear of the petitioner. In the written statement, it is categorically stated that the disease from which the petitioner was suffering could not be detected at the time of enrollment of the petitioner. The petitioner has sought to connect the disease to military service by stating that he was slapped seven times during the period of training by his Platoons Incharge. Apart from the bald assertion made in paragraph 7 of the writ petition, there is no other material on record to show that the disability is in any manner connected to the incident of slapping. Even otherwise, these assertions cannot be accepted as the petitioner has failed to implead any of the individuals mentioned in paragraph 7 of the writ petition, who are said to have witnessed the incident of slapping.

8. The judgments cited by the learned counsel for the petitioner are of no assistance to the petition. In Dalbir Singh's case (supra), the Medical Board had declared the petitioner therein unfit to continue in the Indian Military Service. In that case, the Medical Board had come to the opinion that the disability of the petitioner did not exist before entering service. The disability was

aggravated due to stress and strain of service. The effects of aggravation were still persisting and would continue to persist for a material period. The disability was not attributable to the individuals own "negligence or misconduct. It was also not aggravated by the negligence or misconduct of the individual. Composite assessment of disability was stated to be 20%. Therefore, this Court held that the petitioner was entitled to disability pension under Rule 173 of the Pension Regulations for the Army, 1961 Part I. This Court (Swatanter Kumar, J.) also took note of the fact that the petitioner's primary onus to plead facts justifying his claim for such a pension was fully discharged. The petitioner therein had relied upon the documents of the respondents and mainly on the report of the Medical Board. It was, therefore, held that onus thereafter shifted to the respondents to establish that the petitioner was not entitled to claim the disability pension. In that case, inspite of the report of the Medical Board, the claim of the petitioner was rejected by the Chief Controller of Defence Accounts (Pensions) by coming to the conclusion that the petitioner's disability was neither attributable to nor aggravated by military service. This conclusion was rejected by this Court with the following observations:-

"4..... It is not even averred in the counter affidavit that the report of the Medical Board before notice was subjected to any Appellate Medical Board in accordance with the instructions and regulations framed by the respondents themselves. The Chief Controller of Defence Accounts (Pensions) per se would have no authority to sit over the judgment of the Medical Board. The findings recorded by the Medical Board can only be upset by the Appellate Medical Board constituted under Instruction No. 27 the head of "Functions and Responsibilities" of Appendix II of the regulations. That too after granting opportunity to the petitioners to appear before the Medical Board. ..."

9. In the present case, no material has been placed on the record by the petitioner to show that the disability is attributable to military service.

10. In Palwinder Singh's case (supra), this Court had come to the conclusion that the disease suffered by the petitioner was not constitutional in nature and was in fact attributable to Army service. In Satpal Singh's case (supra) again this Court held that the petitioner at the time of enrolment in the Army had been placed in category A-I. He developed the disease of Epilepsy Grand Mal during service. In the case of Ex-Subedar Garja Singh (supra), again this Court had come to the conclusion that the disease suffered by the petitioner therein was not constitutional in nature. He was found to be suffering from Essential Hypertension. At the time when he joined the Army service, the Medical Board had placed the petitioner in category "AYE". He was down-graded to the Medical Category of "CEE(T)".

11. As noticed earlier, the petitioner in this case has singularly failed to give any proof of the fact that the disability was either attributable or aggravated by Army service.

12. The respondents, on the other hand, have placed on record the findings of the Medical Board which has given the opinion that the disability viz. CHRONIC SUPPURATIVE OTITIS MEDIA (BIL) 382 existed prior to the enrollment and was not detected by the Recruiting Medical Officer. It has been categorically held that the disability is not connected with the Army service.

13. Furthermore, the illness was within the knowledge of the petitioner. He ought to have made a full disclosure before the Medical Board at the time of his medical examination. A similar view has been expressed by Swatanter Kumar, J. in the case of Dalbir Singh (supra) wherein it has been observed as follows:-

"5... A candidate, who wishes to join Indian Army, can offer himself for a medical examination as per the strict standard prescribed by the Army and which are sought to be adhered to by its Medical Officers/Medical Board. Obviously there is also an obligation upon the petitioner to disclose all correct facts within his knowledge. Once the petitioner had done so, no fault can be found with his conduct. As already noticed nothing depicts from the entire service record of the petitioner that he had been ailing from this disease prior to 1995...."

14. We are in respectful agreement with the aforesaid observations of Swatanter Kumar, J. In the present case, the petitioner did not disclose the correct facts to the Medical Board. Hence no note was made with regard to the illness of the petitioner which ultimately led to his discharge on account of the disability detected by the subsequent Medical Board. Even otherwise, the case of the petitioner has to be examined in view of the ratio of law laid down by the Supreme Court in the case of Union of India and anr. v. Baljit Singh 1997(1) S.L.R. 98. On the basis of the aforesaid judgment, Mr. Gurpreet Singh has submitted that even if it is accepted that the disease has arisen in service, it was necessary for the petitioner to establish 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. This submission of Mr. Gurpreet Singh is fully supported by ratio of law laid down by the Supreme Court in Baljit Singh's case (supra). In that case, the respondent had sustained moderately severe injury while he was in Army Service. He was down-graded to Medical Category "CEE" (temporary) by a duly constituted Medical Board. He was discharged from the Military Hospital on 12.8.1979. In February 1980 he was diagnosed by the Psychiatric OPD to have a "Neurosis Superimposed on an immature histrionic personality". He was recommended to be invalidated out of service. He was discharged from service by consent as an invalidated man on 31.5.1981. He filed a writ petition in the High Court of Himachal Pradesh at Shimla. By judgment dated 31.10.1995, the High Court directed the appellants to pay him disability pension. The Union of India filed an appeal in the Supreme Court. Counsel for the Union of India, inter-alia, contended that after examination of the respondent by the Board of Doctors, as per Col.2 (iii), it was reported that the injury was not connected with the service and as a result, he cannot be declared to have suffered injury due to the service. On the other hand,

it was contended by the counsel for the respondent that the respondent had sustained the injury while in service, and therefore, he was entitled to disability pension. Considering the aforesaid submissions of the learned counsel, the Supreme Court observed as follows:-

"6. 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 paragraph 7 which contemplates that in respect of a disease the rules enumerated thereunder 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 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. In view of the report of the Medical Board of Doctors, it is not due to 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."

15. The aforesaid observations in Baljit Singh's case have been considered and followed by the Kerala High Court in a Full Bench decision rendered in W.A. Nos.1784 of 1997, 173, 2075 of 1998, 1028, 1054, 1987 and 2728 of 1999 and O.P. No.6550 of 1999-D decided on 22.3.2000. After noticing the aforesaid observations of the Supreme Court, Pasayat, C.J. (As His Lordship then was) speaking for the Full Bench observed as follows:-

"5. ... Some of the Hon"ble Judges who have dealt with the matter seem to have proceeded on the basis that what was required to establish was that the disease is not attributable to military service or has not been aggravated by it, and therefore, burden of establishing it was placed on the employer. What the Supreme Court has clearly laid down is that when a claim is made, it has to be

affirmatively established. Obviously, the claim is made by a person claiming disability pension. Therefore, the initial burden is on him to establish that the injury sustained while in service was due to military service or was aggravated which contributed to invalidation for military service.

6. At this juncture, it is necessary to take note of the indications in Appendix II referred to in Regulation 173, more particularly Rule 2 thereof. Same reads as follows:

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

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

(i) is attributable to military service; or

(ii) existed before or arose during military service.....

(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.

As a bare reading of the provision shows that disablement or death shall be accepted as due to military service provided certain aspects are certified. This certification has to be done by the Medical Board. But several aspects have to be taken into account by the Medical Board while doing the certification. They are dealt with in Rule 4 which reads as follows:

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

Additionally Rule 7 throws also light on the modality to be observed. Same so far as relevant reads as follows:

"7. In respect of disease the following rules will be observed:

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(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 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."

We find that the examination by the Medical Board cannot be termed to be an empty formality. This is evident from the fact that the examining body is required

to record reasons as contemplated in Rule 7(B). the purpose of incorporation of such condition seems to be that the benefit is being denied to a person who claims it on account of disease or injury while in military service.

7. We, therefore, answer the reference in the following terms:

(a) The burden will be on the claimant to establish that the injury or the disease was on account of the military service or aggravated on account of it.

(b) The onus in this regard is of a rebuttable nature.

(c) The Medical Board is required to elaborately deal with the matter and record reasons as contemplated in Rule 7(b) to Appendix II and also to take note of various aspects highlighted in Appendix II itself.

(d) Unless the requisite formalities which are to be observed have been so done, the appellate body or for that matter the High Court while exercising power under Article 226 of the Constitution can examine the matter. But the scope of judicial review in such matter is rather limited as the High Court does not act as the appellate authority. Only when the conclusions are perverse, without any material to support it or where irrelevant materials have been taken into consideration for arriving at a conclusion, the High Court can interfere while adjudicating the petition under Article 226 of the Constitution, (see Mohan Amba Prasad Agnihotri and Others Vs. Bhaskar Balwant Aher (D) Through I.Rs., .

16. In view of the law laid down in the aforesaid judgments of the Supreme Court as well as of the Kerala High Court, we find no merit in the writ petition.

17. Consequently, the writ petition is hereby dismissed. No costs.

Sd/- S.S. Grewal, J.