

(1999) 09 P&H CK 0146
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 1580

M.S. Dhaliwal, Lt. Col. (Retd.)	Vs	APPELLANT
Union of India (UOI) and Another		RESPONDENT

Date of Decision : 23-09-1999

Acts Referred:

Pension Regulations for Army, 1961 — Regulation 173

Citation : (2000) 124 PLR 633

Hon'ble Judges : Swatanter Kumar, J

Bench : Single Bench

Advocate : J.K. Kapoor and S.M. Pardal, for the Appellant; Ashutosh Mohunta, Senior Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

Swatanter Kumar, J.—The petitioner Lt. Col. (Retd.) M.S. Dhaliwal has brought this Civil Writ Petition under Article 226 of the Constitution of India for issuance of a writ in the nature of certiorari praying for quashing the impugned order dated 22nd October, 1996, Annexure P/5 to the writ petition, passed by respondent No. 1—Union of India and consequently for grant of consequential relief.

2. Undisputed facts that emerged from the record are that the petitioner was commissioned as officer in the Indian Army on 27th June, 1965. He was subjected to Medical Board and after taking various steps, before being commissioned, was found physically fit in all respects. From August 1980 to October, 1983, the petitioner remained posted in head quarter 23 Border Roads Task Force located in Southern Mizoram. The petitioner was placed in "Low medical Category" on 30th April, 1992. It is stated that the petitioner was subjected to formal medical examination during the period of his service and was normally found fit in all respects. The illness and disease of the petitioner which only started with "Low Back Ache "continued and on 7th April, 1992, the petitioner was sent to Army Hospital, Delhi Cantonment for proper investigation and

treatment of Inter Vertebral Disc Prolapse. The disease of the petitioner was diagnosed as Rheumatoid Arthritis. Ultimately, it was felt by the medical Board that the disease of the petitioner would become worse and would spread widely in the body rendering him unfit for discharging his duties as a member of the armed forces.

3. Resultantly, on 31st March, 1994, the petitioner was released from Army after the medical board held him unfit for discharging his duties as a member of the armed forces.

4. The petitioner after his release, moved an application for grant of disability pension and other consequential relief, to the concerned authority, which was rejected by the army authorities, vide their letter dated 4th August, 1994, copy of which is appended with the writ petition as Annexure P/3. The relevant part of the order reads as under :-

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

2. The claimant may, if he so desire, prefer an appeal against the decision taken on the disability within 6 months from the date of receipt of this letter by him. The appeal may be addressed to the under Secretary, D (Pen-A) Room No. 207A Wing Sena Bhavan New Delhi -110011."

5. The petitioner, obviously, preferred an appeal against the said order, which was rejected by the Government of India, Ministry of Defence, vide Annexure P/5 to the writ petition. The relevant part of the order reads as under :-

"3. Further, as per Regulation 173 of Pension Regulations for the Army (part-I) 1961, disability pension is payable to an individual only when his disability is accepted as attributable to or aggravated by military service and is assessed at 20% or more. Attributability/aggravation is conceded if causal connection between disablement and military service is certified by the Medical Authority (Rule 8 of Entitlement Rules for Casualty Pensionary Award 1982).

4. Since in your case, the disability has been certified by the medical Authority to be of constitutional nature not connected with service, casual connection between disablement and military service is, therefore, not established. Hence, your disability is considered neither attributable to nor aggravated by the conditions of military service. You are, therefore, not entitled to any disability pension under the Provisions of Regulation 173 of Pension Regulation for the Army. Your claim for grant of disability pension is accordingly rejected."

6. It is this order, which has been challenged in this petition. The respondents have filed a detailed counter - affidavit. There is hardly any dispute to the facts, but it is stated that the posting of the petitioner at Mizoram was in no way

adverse to his health. It is stated that the disability caused to the petitioner is neither attributable nor aggravated by military service. According to the respondents, the petitioner is suffering from a disease which is constitutional disability or defect and developed with the passage of time in its normal course in no way effected by the nature of the duties which was being performed by the petitioner during his services in army.

7. As is clear from the above narrated facts, the controversy for adjudication before this Court is a very limited. There is no dispute to the fact that the petitioner was released or discharged from army on medical ground. Copy of the medical report prepared by the Medical Board, on the basis of which the petitioner was discharged from army, has been placed on record by the petitioner. The following extract of the report-confidential, Part-2-reads as under:-

"1. Was the disability contracted in service YES 2. Was it contracted in circumstances YES over which he has no contract. 3. It is directly attributable to condition of service? NO 4. If so, directly, what specific condition? NA 5. If not directly attributable to services, was it YES, disease affected aggravated there by and if so, by what specific climatic condition? condition. 6. Medical category recommended SIHIAIP 3 (T.24)E1 7. Period for which above medical category is recommended 24 weeks 8. What is the category likely to be to be decided later on. (a) Six months from (b) Finally the date of the Board? As per APPX "A" & "B" attached. 9. Any specific restriction regarding employment 10. Further investigations treatment as per opinion required N.A. 11. Period of leave recommended (if any) N.A. 12. Next due Board 14 October, 1992

8. The respondents in reply to paragraphs 14 to 18 of the writ petition has stated as under :-

"14 to 18. That in reply to the contents of paras 14 to 18, it is submitted that as per opinion of DDG, Pens (i.e. higher medical authority in the office of DGAFMS), it is a fact that RMB recommended aggravation due to climatic conditions for the ID in AFMSF 16 and assessed the disablement at 40% for two years. However, as per Entitlement Rules 1982 Para 17 and 27 (c) (ii) recommendations made by Medical Boards are only recommendatory and can be revised/reviewed by appropriate medical authorities, that i.e. MS Pens) in office of DGAFMS who is the highest medical authority in such matter. As the officer had served in peace from 1983 onward and there being no evidence of any service related casual factors, his claim for disability was rejected appropriately, His ID did not have any relationship with his service in Mizoram which was almost 10 years earlier. The disease is a constitutional one which can afflict any one in any walk of life and there is nothing in military service which resulted in its onset...."

9. It is the case of the petitioner that he was not given the copy of the medical report in time and in fact, the final report was never given to him. The above extract of the. medical report is neither disputed in the counter affidavit filed on behalf of the respondents nor any other document has been placed on record,

which could* refute or rebut or even alter the position stated in clause 5 of para-2 of the report. The report clearly says that the disease was affected by climatic conditions. Once, the disease resulting into disability is aggravated by army service or indirectly attributed to army service, the benefits accruing there from cannot be denied to a disabled officer, if otherwise, he satisfies the conditions imposed by the rules.

10. It is also not disputed that there are only two conditions precedent to the grant of disability pension viz discharge of the officer concerned on medical ground for a disability resulting from interior disease directly attributable to or aggravated by military service. The other condition being that the disability suffering should be more than 20%. There can be no doubt that in view of clause-5 above and the admitted position in the counter affidavit that the petitioner suffered 40% disability at the time of discharge. The petitioner fully satisfied the prescribed conditions. There is nothing on record to show as to what was the material facts before the authorities concerned when the government of India, Ministry of Defence passed the order dated 9th August, 1994 and the order dated 22nd October, 1996 passed by the appellate authority. Mere reproduction of the language of the rule denying the benefits to an officer per se would not be sufficient. The authority is under an implied obligation to disclose the material which would justify such denial and more particularly when on the own showing of the respondents, the petitioner at the time of release from army, had fully satisfied the prescribed conditions.

11. At this stage, it may be relevant to make reference to the judgment of this court in the case of Amar Nath Vs. Union of India and others, , where the Court, after discussing the law in detail, held as under :-

"Once this certificate was issued in favour of the appellant entitling him to receive the disability pension, this benefit could not have been withdrawn by the controller of Defence Accounts (P), Allahabad on his own without holding appellate medical board in accordance with law. Exhibit D.3 while rejecting the claim of the appellant referred to period of 10 years previous of 25.6.1988 and disability being less than 20%. This was never put to the appellant prior to the passing of the order, if the appellant was entitled to the benefit in accordance with the rules on the strength of the disability certificate Ex. P.I, the appellant could not be divested of the same without following due process of law and after giving proper opportunity to the appellant which admittedly has not been done in the present case. The corollary to this main issue is as to whether the Controller of Defence Accounts (P), Allahabad at all was, justified in assuming the jurisdiction which is not vested in it under the rules. Under the relevant rules and instructions, the respondents have the authority to constitute an Appellate Board and disturb the findings arrived at by the first medical board which again was not done, it would not be permissible to the relevant rules and instructions governing the subject.

5. In this regard, reference can be made to the judgment of a Division Bench of

this Court rendered in C.W.P. No. 17688 of 1996 Ex-Sepoy Ujagar Singh v. Union of India and Ors. (Decided on 9.10.1997): 1977 (4) R.S.T. 587 where this Court in somewhat similar circumstances, after discussing in detail the matter governing the subject held as under :-

"We are unable to see as to how the accounts branch dealing with the pension can sit over the judgment of the experts in the medical line and comment upon the extent of disability without making any reference to a detailed or higher medical board which can be constituted under the relevant instructions and rules by the Director General of Army Medical Core."

Somewhat similar defence was raised on behalf of the Union of India before the Hon"ble Apex Court in the case of Ex-Sepoy Mohinder Singh v. Union of India, Civil Appeal No. 164 of 1993 decided on 14th January, 1993, where the Court held as under:

"We have examined the relevant materials and we do not feel satisfied with the plea taken in the counter affidavit. No detail of the consultation has been disclosed by the respondent nor it is claimed that the appellant has been re-examined by any higher medical authority. We are not prepared to set on the vague allegations in the counter affidavit referred to above. In view of all the relevant circumstances of the case we are of the opinion that the Disability Pension assessed at the rate of 40% by the Medical Board which had examined the appellant, should be respected until fresh Medical Board examined the appellant again and reached different conclusion."

An identical stand was taken by the Union of India in the case of Man Raj v. Union of India, C.W.P. No. 2302 of 1997 decided of 10.9.1997 by this Court where this Court held as under:-

"Instructions No. 27 under the head of "functions and responsibilities" of Appendix-II of these instructions at best empowers the Medical Authority so constituted to give its view about assessment of disablement restricted to the medical issues. The Medical Board(s) views and findings could be subjected to an appellate view by the Director General, Armed Forces Medical Services whose view would be final. Nothing has been brought on record before us which would show that subsequent to the Medical Board, as a result of which the petitioner was discharged from Army, was held by the competent authority and that gave any findings contrary to the view expressed by the earlier Medical Board."

Reference can also be made to the decision rendered in L.P.A. No. 82 of 1997 titled as Union of India and Ors. v. Ex. Captain Harbhajan Singh, decided on 25.4.1997. In the present writ petition, no details have stated in the counter affidavit filed on behalf of the Union of India nor any documents has been produced before us which could satisfy the above enunciated principles. It has also been held that pension and likewise disability pension is recurring cause of action and mere delay will not frustrate the claim of the petitioner."

Learned counsel for the appellant has also relied upon the case of Ram Singh Jaggi v. Union of India and Ors. 1995 (4) R.S.J. 807, where a Division Bench of the Himachal Pradesh High Court took the same view.

6. From the above settled principle of law, I have no hesitation in coming to the conclusion that the learned courts below have fallen in error in coming to the conclusion that the Controller of Defence Accounts(P), Allahabad can disturb the findings of the medical board in the present manner. Admittedly, no evidence has been brought on record much less an expert evidence recorded by the medical officer to show that the finding recorded by the medical board were incorrect factually or otherwise.

7. Moreover, from the record, which has been produced by the learned counsel for the parties, I find that a specific ground was raised before the learned first Appellate Authority that Controller of Defence Accounts (P), Allahabad had no authority to express view contrary to the medical board. This contention has not been properly dealt with by the learned first Appellate Court. Keeping in view the instructions aforesaid there is no escape from setting aside the contents of exhibit D.3 being against the rule and settled law."

12. Learned counsel for the petitioner also placed reliance upon the judgment of Allahabad High Court in the case of Ram Niwas v. Union of India 1997(4) S CT47, where the Court held as under :-

".....Alternatively, even if it is presumed or accepted as has been sought to be made out in the counter-affidavit that the disease was constitutional namely the petitioner had acquired the disease along with his birth in that event the same may not be attributable to military service. But still then the same can be brought within the purview of other clause namely that it was aggravated by military service even if it was constitutional disease which did not prevent the respondents to account the petitioner in service despite the constitutional disease. Be that as it may, though a case has been sought to be made out that disease was constitutional, nothing had been produced to this Court to show either by production of any record or otherwise , particularly the opinion of the medical board that the disease was constitutional. The order of discharge refers to the opinion of medical board. Even if it is so recorded therein the same would have been the best evidence in favour of the respondents. But the respondents had never produced the same and thereby have withheld the best evidence leading to a presumption adverse to the case of respondents....."

13. Reliance was also placed on the judgment of this Court in the case of Ex-Sepoy Chatter Singh v. Union of India and Anr. 1994(1) S.L.R. 465.

14. Learned counsel appearing for the Union of India placed reliance, to dispel the arguments of the counsel for the petitioner, on the judgment of Hon"ble Supreme Court of India in the case of Union India and Anr. v. Baljit Singh, 1997(1) S.L.R. 98 argued that it was for the petitioner to establish that the injuries sustained were due to or were aggravated by military service which

contributed to the invalidation of the military service. To the legal proposition propounded, there could hardly be any dispute. The onus referred by the Hon"ble Supreme Court of India obviously refers to a primary onus on a party, who approaches the Court for seeking the relief. But once the petitioner places reliance upon the documents of the respondents to substantiate his plea of invalidation, as a result of disease or injury attributed to or aggravated by army service and such document is admitted in the counter affidavit, I am of the considered view that the petitioner would be deemed to have discharged such onus. As far as the respondents are concerned, they cannot be permitted to take advantage of their own default for not producing the document before the court, if there were any, contrary to the documents produced by the petitioner. The concept of discharge of onus must be understood in its correct perspective.

15. In other words, the onus has to be given a meaning keeping in view the fact that the court is hearing a writ petition under Article 226 of the Constitution of India and not trying a suit under the Code of Civil Procedure. Thus, in the facts and circumstances of this case, the petitioner would be deemed to have discharged such onus. Even in the counter-affidavit, no dispute has been raised to the correctness of the document, Annexure P/6. This Court has no reason to disbelieve the version put forward by the petitioner in face of uncontroverted averments. In the counter affidavit filed by the respondents, it is conceded that the petitioner suffered from 40% medical disability as per the report of the medical Board. The disease continued and ultimately the petitioner had to be invalidated out from the Army for medical disability. There is no material on record nor has it even been stated in the medical report as to on what basis the concerned authorities came to the conclusion, as stated in the counter affidavit now, that "the disease has been stated to be constitutional defect." Moreover, there is absolutely no justification on record for the Defence Account Authorities to take a view contrary to the expert opinion given by the Medical Board itself in Annexure P/7 to the writ petition. Normally the opinion of the Medical Board would bind the accounts administrative authorities unless such opinion is set aside or varied by the Medical Appellate Board under the relevant instructions and rules. It is also not disputed that the matter was never referred to the appellate medical authority on notice to the petitioner nor was the petitioner subjected to examination of the appellate medical board in accordance with the provisions of the relevant rules and the instructions issued in this regard. It was for the respondents to place on record the documents showing that the opinion of the Medical Board was altered or changed by the appellate board with notice to the petitioner or upon his examination.

16. For the reasons aforementioned, I am of the considered view that the petitioner is entitled to the relief claimed but with one exception that the medical Board categorises his disability aggravated by army service to the extent of 40% for a period of two years. Thus, while setting aside the impugned order dated 22.10.1996, Annexure P/5, to the Writ Petition, it is directed that the respondents shall consider the case of the petitioner for grant of disability

pension in accordance with law. The respondents would also have the liberty and right to subject the petitioner to re-examination by the concerned medical board for continuation of the benefits beyond the prescribed period.

17. Resultantly, the writ petition is allowed to the above extent. However, the parties shall bear their own costs.