

(2019) 12 AFT CK 0007

In the Armed Forces Tribunal

Case No : Original Application No. 1165 Of 2019, Miscellaneous Application No. 3104 Of 2019

Pawan Kumar

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 11-12-2019

Acts Referred:

Army Act, 1950 — Section 63, 39(a)

Army Rules, 1954 — Section 13, Rule 13 (I)(ii)(a), 13(3)

Citation : (2019) 12 AFT CK 0007

Hon'ble Judges : Rajendra Menon, J; Philip Campose, Member (A)

Bench : Division Bench

Advocate : Archana Ramesh, J.S. Yadav

Final Decision : Dismissed

Judgement

MA 3104/2019

1. For the reasons carved out in the application, twenty three days delay in filing the rejoinder affidavit is condoned. MA stands disposed of.

OA 1165/2019

The OA is dismissed vide separate detailed order of even date.

Interim orders granted on 11k September, 2019, stand vacated.

M.A. No. 3104 of 2019:

Vide this MA, the applicant seeks condonation of delay of 23 days in filing rejoinder. For the reasons carved out in the application, delay is condoned and rejoinder is taken on record.

M.A. No. 3104 of 2019 stands disposed of accordingly.

O.A. No. 1165 of 2019:

Aggrieved by the order of Respondent No. 3 (Senior Records Officer, Jat Regiment) vide letter dated 05.04.2019 directing his discharge from service

on 30.09.2019 on account of non-availability of sheltered appointment, the applicant, a serving soldier of Sepoy rank with about five years of service,

who is a permanent low medical category A2 for medical condition 'Right Hippocampal Ganglioglioma (Optd)' since 26.06.2018, has filed this original

application for the following reliefs :

(a) To set aside the impugned letter dated 05.04.2019 and extend the applicant's service till completion of 17 years of colour service in keeping with

contents of Army HQ (MP Directorate) policy letter of 30.09.2010.

(b) In the interim, stay the discharge of the applicant.

Accordingly, in the hearing on 11.09.2019, as the pleadings were not complete, stay was granted on the applicant's discharge till such time that the

case was heard. The case has come up for hearing today.

2. Heard the learned counsels on both sides and perused the pleadings and documents on file.

3. Ms. Archana Ramesh, learned counsel for the applicant has submitted that the applicant was enrolled as a Sepoy in the infantry (Jat Regiment) on

28.03.2014 in a medically fit condition. Subsequently, in 2015, while serving at Meerut in October 2015, he was downgraded medically to Permanent

Medical Category P3 for 'Right Hippocampal Ganglioglioma (Optd)'. Thereafter, in October 2018, while serving with his unit in a field/counter

insurgency area (Uri, J&K), he was detected with Grade 1 Listhesis L5/S1, for which he has been downgraded to Medical Category P3 (Temporary

24 weeks) since 05.02.2019, which has been assessed as 'aggravated' due to military service. The applicant continued to serve after being provided

sheltered appointments in the unit. However, as informed in the impugned letter of 05.04.2019, the sheltered appointment has been withdrawn and the

applicant's discharge was ordered w.e.f. 30.09.2019 on the basis of Para 2(b) of Appendix to Army Order (AO) 46/80 and IHQ of MoD (Army)

letters No. B/10201/Vol-VI/MP-3 (PBOR) dated 30.09.2010 and LMC/Inf-6 (Pers) dated 27.07.2018. Counsel contends that this is unjust and

contrary to the directions as contained in Para 6 of Army HQ letter of 30.09.2010. Paras 5 and 6 of the said letter are reproduced as hereunder:

6. Guiding Principles. The guiding principles that should be considered by the

Commanding Officers and DIC Records for

retention/discharge of permanent LMC personnel are as under:

(a) All endeavour should be made to allow such personnel to complete their minimum pensionable service in their present rank as under :-

(i) Personnel in SHAPE 5 The minimum period of qualifying service actually rendered and required for an invalid pension is 10 years.

(ii) Personnel in SHAPE 2/3 The minimum period of qualifying service actually rendered and required for earning service pension will be

15 years (Auth Para 5.1.2 of MoD, Department of Ex Servicemen Welfare Letter No. 17(4)/2008 (2)/D(Pen/Pol) dated 12 November 2008).

(b) Take into consideration the nature of disability and capability of the individual to look after himself outside the service and the need to

continue treatment at Services Hospitals which may not be located in the vicinity of individuals home station.

(c) Take into consideration the circumstances under which the injury was sustained and/or aggravated. No

differentiations should be made between attributable and non attributable cases, except for Battle Casualties. Each case should be examined on

merit.

(d) Ensure provisioning of requisite medical treatment to the individual including fitting of artificial limbs or such aids which will assist the

individual to carry out his normal functions post discharge.

(e) Consider the effect on pension benefits from central and state Govt./ IHQ of MoD (Army)/Non Government Organization and any other

such organisation

(f) Discharge of such permanent LMC personnel should help maintain the operational efficiency of the unit as also management. Every

case should be decided on its merit after analysing effect on state of manpower holdings in the Regiment/Corps and time required to recoup

the void so created

4. Learned counsel refers to amendment to earlier Rule 13 of the Army Rules, 1954 vide Gazette Notification dated

29.05.2010 whereby it is now amended that the Commanding Officer is the competent authority to authorize discharge of personnel who are found to be in

Medical Category SHAPE 2/3 by a Medical Board, when no sheltered appointments are available in the unit, or the individual is surplus to the organisation, after his medical condition is reviewed.

5. Reliance is placed by the applicant on the judgment dated 07.11.2008 of the Honble Supreme Court in the matter of Union of India & Ors. Vs.

Rajpal Singh /Civil Appeal No. 6587 of 2008], whereby the Court had observed at Para 14 as follows :

14. It is pointed out that army personnel are put in the afore -mentioned medical categories i.e. SHAPE on the basis of a periodical

Medical Board which is held for an individual after the age of 35 years and thereafter at an interval of every 5 years. If the army personnel

is in SHAPE 1, he is not required to undergo further Medical Board except annual medical examination. However, the army personnel who

is placed in SHAPE II and SHAPE III on the annual medical examination, he is placed in low medical category (temporary) for a period of

six months. After six months, he is placed before the Review Medical Board and if at the end of six months, his category remains

unchanged, that category is awarded to him on permanent basis and he is placed in ""low medical category (permanent)"". After award of

low medical category (permanent), the army personnel is placed before the Review Medical Board, the medical category of the personnel

may be changed keeping in view the change in any component of SHAPE. Thus, SHAPE II or SHAPE III may be placed in SHAPE I also

and vice versa. It is the say of the appellants that the release of certain medical category (permanent) personnel is regulated by Army Order

No. 46 of 1980, which contemplates that the army personnel, who is placed in low medical category (permanent), is to be retained in service

for a minimum period of 15 years (for Sepoy) and 20 years (for JCO) and during this period he is entitled to all promotions as per the rules;

the discharge of low medical category is regulated as per the above-mentioned Army Order and before the discharge, the personnel is

placed before the ""Release Medical Board"" for a mandatory examination before the order of discharge is passed. An army personnel who

is categorized as SHAPE V is considered to be not fit for further service of the Army and on placing such a personnel in SHAPE V he is

mandatorily brought before Invalidating Board in terms of Rule 13(3), whereas an army personnel who is in SHAPE II or in SHAPE III, is

to undergo different Medical Boards apart from annual medical examination. The said personnel are not totally unfit but at the same time

they are not fit for all the army duties and, therefore, they are retained for 15 years or 20 years, as the case may be, on the sheltered post

mandatorily.

Counsel thus contends that the service of low medical category personnel like the applicant have to be mandatorily extended till the time he completes

the minimum period for earning service pension viz. 15 years, and a further 2 years of extended colour service as applicable to him.

6. Reference has also been made to Para 4(b) of AG (PS) policy letter of 10.10.1997 on Promotion Criteria of JCO/NCOs to reiterate the applicant's

claim for continuation in service despite his low medical category status. The same is reproduced as hereunder:

Medical Standards (all promotions to the rank of Dfr/Hav and Above

4. Must be in medical category AYE. However, personnel in lower medical category (both temporary and permanent) as a result of the

circumstances indicated below would be eligible :-

(a) Eligible upto Medical Category TEE'

xxx x.xx

(b) Eligible upto to Medical Category 'BEE'

Personnel placed in medical category 'BEE' will be eligible for promotion to the next higher rank. This will include both temporary and

permanent low medical categories. This will be Irrespective of whether or not the disease, sickness or injury is attributable/non-attributable

to or aggravated by service conditions. However, cases of medical category 'BEE' (both temporary/ permanent) due to psychological causes,

misconduct or self inflicted injuries will not be eligible for promotion.

7. Counsel contends that it is blatantly unfair that personnel who are in low medical category status which makes them eligible for promotion to higher

ranks are being discharged from service without completing pensionable service. Counsel asserted that, therefore, the impugned discharge letter,

based on the recommendations of the Commanding Officer, being unjust and

illegal, deserves to be quashed and consequent benefits be provided to the applicant.

8. Mr. I.S. Yadav, learned counsel for the respondents, on the other hand, controverts the arguments made on behalf of the applicant based on his contention that the impugned discharge order was issued after following the extant policy and rules and that too after making a serious endeavor to enable the applicant to complete his pensionable service, provided he met the general principles of retention in service, as laid down in Para 2 of AO

46/80. The same is reproduced as under :-

Retention

2. General principles

(a) The employment of permanent low medical category personnel, at all times, is subject to the availability of suitable alternative

appointments commensurate with their medical category and also to the proviso that this can be justified in the public interest and that their

retention will not exceed the sanctioned strength of the regiment/corps. When such an appointment is not available or when their retention is

either not considered necessary in the interest of the service or it exceeds the sanctioned strength of the regiment/corps, they will be

discharged irrespective of the service put in by them.

(b) Ordinarily, permanent low medical category personnel will be retained in service till completion of 15 years service in the case of JCOs

and 10 years in the case of OR (including NCOs). However, such personnel may continue to be retained in service beyond the above period

until they become due for discharge in the normal manner subject to their willingness and the fulfillment of the stipulation laid down in Sub

Para (a) above.

Counsel contends that as it was determined by the Commanding Officer, after deliberate endeavor whether to retain the applicant in service, that

there was no sheltered appointment that could be given to him and that he could not be retained in service in public interest, he recommended his

discharge and his Release Medical Board was done prior to discharge, which is mandated as per current rules. Thus, there are no procedural

infirmities, in contravention to existing rules, that have been committed in

ordering the discharge of the applicant.

9. Learned counsel for the respondents has referred to the Show Cause Notice dated 12.10.2018 by the Commanding Officer 17 JAT, the contents of

which clearly highlight the reason for ordering discharge after making an endeavor to provide sheltered appointments to the applicant to enable his

retention in service, if warranted. Operative parts of the same are reproduced as hereunder:-

SHOW CAUSE NOTICE

1. Ref. AO 46/80 and IHQ of MoD (Army) letter No. B/33098/AG/PS-2(c) dt 20 Sep 2010.

2. You have been downgraded to low medical category S1H1A1P3(P)E1 (Permt) wef 26 Jun 2018 (for 2 yrs) for a Diag RT

HIPPOCAMPAL GANGLIOGLIOIVIA (OPTD). As per IHQ of MoD (Army) letter quoted para 1 above, you cannot be retained in service

in your present low medical category. However, the unit provided you various sheltered apt like office runner in HQ 161 Inf Bde and as

assistant to Mess Hay, Offr Mess, to which you failed/showed incompetency to work.

3. Therefore, you are hereby served notice to show cause, as to why you should not be discharged from service under AR 13(3) III (iii) (a)

(i) within six months from the date of issue of this notice.

4. xxx xxx xxx

The receipt of the same has been acknowledged by the applicant in his reply vide letter dated 11.11.2018.

10. Counsel contends that the applicant's medical status was downgraded permanently within 18 months of his enrolment into service for a medical

ailment which was not attributable nor aggravated by military service. Thereafter, an effort was made to assign the applicant to appointments entailing

sedentary duties but he could not measure upto the requirements. It is also pertinent that the applicant has been punished twice, viz. under Sections 63

and Section 39(a) of the Army Act, 1950, in July 2018 and November 2018 respectively. Counsel has contended that, with a view to assess the

applicant's working efficiency in his permanent low medical category status and related suitability for retention in service, a preliminary inquiry was

conducted under orders of the Commanding Officer 17 JAT, which determined

that, despite the best efforts of the unit to employ him in sheltered appointments, the applicant displayed incompetency to work due to his medical condition, and recommended that the sheltered appointment be withdrawn. It is only based on that recommendation that the Commanding Officer issued a Show Cause Notice to the applicant, and having received his reply, ordered his discharge to be implemented, after conduct of Release Medical Board.

11. Further, learned counsel contends that the applicant cannot take support from the judgment of the Hon'ble Supreme Court (SC) in the Rajpal

Singh's case (supra), as, in that case, the Courts had found fault with the respondents to the extent that Invalidation Medical Board in respect of the

petitioner(s) in that case had not been held prior to ordering their/his discharge. However, since then, an amendment was made to Item 1 (ii) (a) of

Rule 13 of the Army Rules, 1954 vide Gazette Notification dated 29.05.2010 whereby assessment of the Release Medical Board suffice when an

individual is to be discharged on orders of the Commanding Officer on grounds that he is a SHAPE 2/3 low medical category, combined with the fact

that no sheltered appointment is available in the unit or he is surplus to the organization.

Consideration:

12. We have given careful consideration to the arguments on both sides and find that the primary issue before us is whether the applicant, a Sepoy

with five years of service, who is a permanent low medical category, whose discharge has been ordered by his Commanding Officer (CO 17 JAT)

under the provisions of Army Rule 13 I (ii)(a) on the ground that no sheltered appointment is available, can be so discharged prior to his completing

minimum pensionable service of 15 years.

13. It has been argued on behalf of the applicant that though he is a permanent low medical category since October 2015, and has completed only five

years of service, he should be allowed to complete the laid down minimum pensionable service of 15 years by providing him 'sheltered appointments'

as per extant rules, specifically AO 46/80 and IHQ of MoD (Army) letter No. 13/33098/AG/PS-2(c) dated 20 September 2010. Counsel has also

made reference to judgment of the Hon'ble Supreme Court in the case of Rajpal Singh (supra) to claim that low medical category personnel are

mandatorily required to complete minimum pensionable service before they are discharged from service.

14. On the other hand, learned counsel for the respondents has argued that, as per current policy/statutory rules, a Commanding Officer is empowered

to authorize discharge of SHAPE 2/3 (Permanent) low medical category personnel in case there are no sheltered appointments available to employ

the individual concerned or in case he or she is surplus to the authorized strength of the organization. To that extent, it is the responsibility of the

Commanding Officer to assess the availability of alternative/sheltered appointments to employ the individual as also to assess whether such

employment can be justified in public interest. Counsel has averred that an endeavour was made to provide suitable sheltered appointments to the

applicant and the discharge has been authorized only after the applicant has failed to perform satisfactorily in these appointments. Moreover, the

applicant has also indulged in acts of indiscipline which have led to his being awarded punishments under Sections 63 and 39(a) of the Army Act,

1950. Thus, counsel contends that the applicant's continued service cannot be justified to be in public interest. Further, Para 6 of the Army HQ policy

letter dated 30.09.2010 does not direct mandatory provision of sheltered appointments upto completion of pensionable service. It only directs that an

endeavour be made for provision of such appointments, but it must also satisfy the norms of public interest.

15. Having considered the aforesaid arguments, we are of the opinion that adequate endeavour was made by Respondent No. 3 to provide sheltered

appointments to the applicant to enable his retention in service and that he was justified in withdrawing the sheltered appointment after finding

justifiable reasons for the same. Further, Release Medical Board was conducted prior to the applicant's discharge.

16. We find that the impugned order of discharge under AR 13(3) I (ii) (a)(i) was in consonance with the guidelines laid down in Army Order 46/80

and the Policy letter dated 30.09.2010.

The impugned order, therefore, does not call for any interference.

17. The OA accordingly stands dismissed with no order as to costs.