

COURT No.1
ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

1.
OA 1539/2018

Col Peyush Joshi
Versus
Union of India & Ors.

..... Applicant
..... Respondents

For Applicant : Mr. Rajendra Kumar, Advocate
For Respondents : Col. Ajeen Kumar, OIC, Legal Cell

CORAM:
HON'BLE MR. JUSTICE VIRENDER SINGH, CHAIRPERSON
HON'BLE LT. GEN. PHILIP CAMPOSE, MEMBER (A)

ORDER
21.02.2019

Vide our detailed judgment of even date, we have dismissed OA 1539/2018 on merits. Faced with this situation, Mr. Rajendra Kumar, Advocate, learned counsel for the applicant has made an oral prayer for grant of leave under Section 31 of the Armed Forces Tribunal Act, 2007 for challenging the judgment of the Tribunal before the Hon'ble Supreme Court.

2. We have heard Mr. Rajendra Kumar and the opposite side as well.
3. In our view, learned counsel for the applicant has not been able to carve out any point of law of public importance much less point of law of general public importance as we have decided the main OA on its individual facts finding no point of law involved in it .
4. Resultantly, oral prayer for grant of leave stands declined.

(VIRENDER SINGH)
CHAIRPERSON

(PHILIP CAMPOSE)
MEMBER (A)

**COURT No. 1, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

O.A. No. 1539 OF 2018

In the matter of :

Col. Peyush Joshi

... Applicant

Versus

Union of India & Ors.

... Respondents

For Applicant : Mr. Rajendra Kumar, Advocate

For Respondents : Mr. V. Pattabhi Ram, Advocate

CORAM :

**HON'BLE MR. JUSTICE VIRENDER SINGH, CHAIRPERSON
HON'BLE LT. GEN. PHILIP CAMPOSE, MEMBER (A)**

J U D G M E N T

Aggrieved by the order vide IHQ (MoD) letter No. A/21508/2SRMB/Results/MS-5 dated 17.07.2018, whereby he has been found medically unfit for promotion to the rank of Brigadier by the No. 2 Special Review Medical Board (SRMB) held on 29.05.2018, the applicant, who is a serving low medical category (LMC) Colonel of the Army Ordnance Corps (AOC), who otherwise stands approved for promotion has filed this application with a prayer that the impugned order be set aside and he be promoted to the rank of Brigadier.

2. This is the second round of litigation by the applicant. In the first instance, when the applicant had been similarly found unfit for promotion by the No. 2 SRMB conducted by the Army on 25.06.2015, the applicant had filed O.A. No. 168 of 2017 in

this Tribunal with a similar prayer. In that case, this Tribunal had, on 20.03.2018, ordered as follows :

“44. Keeping in view the applicant’s medical condition and recommendations of the medical authority in the chain, as an exceptional case, the Court feels that the ends of justice would be met if the applicant is made to undergo an additional SRMB to assess his medical status, if any, for promotion. Accordingly, the OA is partially allowed, with a direction that a SRMB be held in respect of the applicant within a period of three months of the date of this order. The consequent reliefs thereof for promotion, if any, will follow, based on the recommendation of the SRMB.”

3. Consequently, the applicant was put through No. 2 SRMB on 29.05.2018, which also found the applicant unfit for grant of promotion to the rank of Brigadier on account of his medical condition.

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

5. Learned counsel for the applicant submits that the applicant, who was approved by the Selection Board for promotion to the rank of Brigadier in the AOC vide letter of 18.11.2014, being in low medical category P2, had to be assessed by the SRMB for suitability for grant of rank, keeping in view his medical condition, his capacity to perform his duties effectively and the nature of his duties in the new rank. In this regard, he refers to Para 14 of IHQ of MoD (Army) letter No. 04502/MS Policy on conduct of SRMB, which states :

"14. Actions by Military Secretary's

Branch. *On declassification of the selection board results, the concerned Controlling Group at Military Secretary's Branch will identify eligible empanelled officers who are required to be screened by the SRMB. The Controlling Groups will also identify officers who have been medically downgraded while holding the rank of Colonel/Brigadier and need to be screened by SRMB to ascertain their suitability for tenantry Criteria/Part Criteria appointments in the present rank. The concerned Controlling Group will obtain the under-mentioned documents and forward the same to MS-5 for perusal by SRMB :-*

- (a) Special Report initiated by IO and RO, covering performance of the officer in his present appointment.*

Specimen copy of the Special Report is given at Appendix to this letter.

(b) Latest Medical Board proceedings."

6. With regard to Special Report at Para 14(a) of MS Branch policy letter, counsel avers that, in their Special Report, endorsed on 03.04.2018, the Initiating Officer (IO) and Reviewing Officer (RO) have stated as follows :

"3. Comments by IO

The disability of the officer does not adversely affect his performance in any manner.

4. Recommendation for employment (commensurate with the medical classification and the performance) :

Fit for designated criteria appts as also Staff/ERE/Instructional appt within bounds of employment restrictions.

SD/-

(Deepak Saini)

Brig

Date : 03 Apr 18

Dy GOC 29 Inf Div

5. Comments by RO

The officer's performance is not adversely affected by the disability of the officer.

6. Recommendation for employment (commensurate with the medical classification and the performance)

The officer is Fit for employment in designated criteria appts as also Staff/ ERE/ Instructional appointments within the bounds of emp restrictions.

SD/-
(K. Narayanan)
Maj Gen

Date : 03 Apr 18 GOC 29 Inf Div"

7. Counsel has handed over the findings dated 26.05.2018 of the Medical Board of 167 MH which assessed his employability restriction as under :

"EMPLOYABILITY RESTRICTIONS LOW MEDICAL CATEGORY OFFRS

Personal No. : IC-48176H Rank : Col
Name : PEYUSH JOSHI Unit : HQ 29 INF DIV
Med CI : SHAPE -2y
Dis profile : P2 (P) for both dis (a) CAD -DVD-POST PTCA and dis (b) STRICTURE BULBAR URETHRA wef 27 May 2018
Diagnosis : (a) CAD-DVD-POST PTCA
(b) STRICTURE BULBAR URETHRA

COPE CODING

COPE Code		Employability Restrictions	Remarks and justification
C	2(a) & (b)	Unfit for High altitude & Extreme of cold climate	Disability may aggravate
O	1	To be under surveillance by nearest MO.	Monthly review by AMA.
P	2(a)	Unfit for extreme exertion and competitive sports	To prevent further aggravation.

<i>E</i>	<i>O</i>	<i>No limitation.</i>	<i>exclusive</i>	<i>NA</i>
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*Place : 167 Military Hospital
PIN : 901215
C/O 56 APO*

*(N Subramanyam)
Lt Col AMC
President Medical Board*

Dated : 26 May 2018."

8. Counsel produces report on Employability Restrictions dated 26.05.2018 and contends that the Employability (COPE Code) of the applicant has improved since the conduct of the first SRMB, viz. 'O' Factor (Degree of Medical Observation Required) has improved from '2' (Periodic Check-Up) to '1' (Monthly review by AMA) and 'E' Factor (Exclusive Limitations) has improved from '1' (Low Fat/Low Calorific Diet) to O (No exclusive limitation). However, counsel concedes that the applicant remains the same in 'C' Factor (Climate and Terrain Restrictions), where he remains at '2' (Unfit for high altitude and extreme of cold climate) and in P Factor (Physical capability limitations), where he remains at '2' (Unfit for extreme exertion and competitive sports). Counsel contends however that 'C-2' has only minimal implications as there is only one out of 37 appointments for Brigadiers in the AOC which is in high altitude and extreme cold climate, and P2 status is not relevant, as officers of Brigadier rank, more so in AOC, do not have to undergo extreme physical exertion or mandatory participation in competitive sports.

9. Counsel for the applicant places reliance on the order dated 04.10.2017 of AFT (RB), Jabalpur decided in favour of the petitioner therein, in the matter of **Maj. Gen. Deepinder Singh Vs. Union of India & Ors. (O.A. No. 39 (J)/2017)** in support of the applicant's case.

10. Counsel avers that the SRMB is not an expert medical body in the true sense. There are two medical members, in the form of a medical specialist and a surgical specialist and their advice to the other members of the SRMB cannot overrule the assessment of the Cardiologist at R&R Hospital, Delhi, the highest authority on cardiac cases, who had assessed as follows on 12.07.2016 :

“49 years old serving officer, a known case of Ant Wall MI sustained in 2011. PTCA to LAD was done in May 2011. He has subsequently remained Asymptomatic on medical management. Echo shows severe LV dysfunction and Stress Thallium shows fixed perfusion defect in LAD territory. He has excellent effort tolerance and does not show any reversible ischemia during TMT.”

11. Counsel for the respondents is not present in Court. Instead, Col Ajeen Kumar, Colonel MS Legal, IHQ of MoD

(Army) represents the respondents. Col. Ajeen Kumar controverts the arguments made on behalf of the applicant.

12. Col. Ajeen Kumar states that, consequent to Order of AFT (PB) dated 20.03.2018, the respondents had conducted the SRMB of the applicant yet again on 29.05.2018, after fresh performance inputs were taken from IO/RO of the applicant on 03.04.2018 and Medical Board was conducted afresh at 167 Military Hospital on 25.05.2018. The SRMB, after having considered the inputs, very fairly, had declared the applicant unfit for grant of promotion. He refers to the Clinical Assessment (Part II) of the Medical Board Proceedings of 25.05.2018, where it is stated :

"PART II

CLINICAL ASSESSMENT

Principal Disabilities : CAD-DVD-Post PTCA to LAD

1. History.

- (a) **Location of onset** : Peace (Mhow)
- (b) **Date & time of onset** : 23 May 2011
- (c) **Relevant history** : 51 year old serving officer without any modifiable risk factors developed sudden onset anginal chest pain in May 2011. Clinical, Cardiac Biomarkers, ECG & CAG revealed CAD-DVD-Post PTCA to LAD, 2D ECHO revealed severe LV dysfunction with EF:30%, akinetic apex, Basal IVS hypokinetic. Managed with PCI,

anti coagulation, antiplatelets, ACE inhibitors, Beta blocker and statins.

Presently: No c/o chest pain, dyspnoea or syncope with good effort tolerance in NYHA-1. Regular cardiology evaluation has been done at service hospital cardiology centres.

2. Physical examination findings:

G/E: Pulse: 70/min, regular, BP: 124/78 mm/Hg, no pedal edema.

CVS: S1S2 normal, no organic cardiac murmur, Rest exam: WNL.

3. Investigation reports: Sr Chol:144 mg%, TG: 83 mg%, HDL: 40 mg%.

BS F: 86 mg%, PP: 98 mg%, Rest Haemogram/Biochemistry: WNL.

ECG dtd. May 2018: T inversion VI-V6. Poor R progression.

4. Diagnosis: CAD-DVD-Post PTCA to LAD."

13. Col Ajeen Kumar submits that the medical report shows that the applicant's 2D Echo test, with regard to his principal (heart) disability, "revealed severe LV (left ventricle) dysfunction with EF (Ejection Fraction): 30%." Further, his second disability related to Stricture Bulbar Urethra, has also resulted in certain limitations in his employability. These have resulted in the SRMB, correctly and fairly, making an assessment that the applicant was unfit for promotion to the rank of Brigadier.

14. The Board Proceedings of the SRMB were handed over for perusal to the Tribunal.

Consideration :

15. We have given careful consideration to the pleadings and documents before us and find that the main issue before the Tribunal is, whether the decision arrived at by the second SRMB, conducted by the respondents on 29.05.2018, pursuant to the order of this Tribunal dated 20.03.2018, meets the due standards of justice in terms of being just, fair and reasonable.

16. We have examined the Board Proceedings of the SRMB dated 29.05.2018. We find that a Medical Specialist (Lt. Col. Pradeep Behal, Classified Specialist (Medicine), Base Hospital, Delhi Cantt.) was one of the medical advisors at the SRMB, who would have rendered medical advice to the members of the SRMB. As per the SRMB proceedings, which were examined by the Tribunal, the Chairman and Members of the SRMB have clearly given the reasons for their assessment of non-fitness of the applicant. We have no reason to refute these assessments. We also note that neither has any malafide been alleged by the applicant, nor do we perceive the same while perusing the proceedings. However, we found that the date of the 2D Echo test was not reflected in the report dated 25.05.2018 of the Medical Specialist 167 Military

Hospital. Hence, we heard the matter on 15.01.2019, wherein the respondents were ordered to conduct a fresh 2D Echo Test at Army Hospital on 23.01.2019 to ascertain whether there were any improvements in his earlier heart condition of 'severe LV dysfunction with Ejection Fraction (EF) 30%', as reflected in his 2D Echo Test report of 2016, based on which the SRMB on 29.05.2018 had taken its decision of rejecting him for promotion. The 2D Echo Test report of the applicant, conducted under supervision of the Head of Department, Cardiology of Army Hospital (R&R) on 23.01.2019 was placed before us during the course of hearing of the matter on 05.02.2019. On perusal of the report, we find that there is no improvement in Ejection Fraction, which remains at 30%. Thus, we see no case meriting any intervention in the No. 2 SRMB results by the Tribunal.

17. We may state here that the judgment rendered by the Armed Forces Tribunal, Regional Bench, Jabalpur in *Deepinder Singh's case* and relied on by learned counsel for the applicant, perhaps will have no bearing upon the facts of the present case, therefore, the applicant cannot derive any advantage from the same.

18. The net result is that the instant OA is liable to be dismissed lacking merit in it. Ordered accordingly. No order as to costs.

Pronounced in court on this 21st day of February, 2019.

**[JUSTICE VIRENDER SINGH]
CHAIRPERSON**

**[LT. GEN. PHILIP CAMPOSE]
MEMBER (A)**