

**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI
(Court No.2)**

O.A. No.76/2010

IN THE MATTER OF:

Ex Nb Sub Abheybir Singh**APPLICANT**
Through: Mr. S.M. Dalal, counsel for the applicant

VERSUS

UNION OF INDIA AND OTHERS**RESPONDENTS**
Through: Mr. Ankur Chibber, counsel for the respondents

CORAM:

**HON'BLE MR. JUSTICE MANAK MOHTA, JUDICIAL MEMBER
HON'BLE LT. GEN. M.L. NAIDU, ADMINISTRATIVE MEMBER**

JUDGMENT

Date: 22.05.2012

1. The OA No.76/2010 was first filed in the Armed Forces Tribunal on 03.02.2010. Subsequently, an amended OA was filed by the applicant with due permission of the Tribunal on 06.09.2010.
2. Vide this OA, the applicant has sought quashing and setting aside of the impugned order dated 02.02.2010 (Annexure A-11) which was in response to the statutory complaint filed by the applicant dated 29.01.2009. The applicant has also sought quashing of the impugned order of discharge dated 29.01.2009 (Annexure A-1) and has prayed for being considered by the Special Review and Reclassification Medical Board in respect of the policy directive dated 04.01.2002 (Annexure A-

6). He also seeks reinstatement in service with all consequential benefits w.e.f. 01.02.2009 which includes promotion also.

3. Brief facts of the case are that the applicant was enrolled in the Army on 05.01.1983. He became a JCO/Nb Subedar on 01.01.2004. On 02.07.2007, the applicant sustained an injury in the field area which was declared as attributable to military service with the disease 'Tendo Achilles Rapture'. Consequently, he was put in low medical category for two years in A-3(P). Subsequently, the applicant went home and got himself treated from a private doctor and on return from his leave on 02.09.2007 he found that he was completely fit. On 02.09.2007 (Annexure A-3), he made an application for early re-categorisation of his medical condition. His case for early re-categorisation was turned down by the medical specialist on 31.08.2007 (Annexure A-4). The unit of the applicant initiated a statement of case on 18.09.2007 which was again rejected by the HQ on 09.10.2007 (Annexure A-5 and A-6 respectively).

4. It is alleged that the respondents issued a policy letter of 12.04.2007 under which the applicant was issued a discharge order dated 06.02.2008 which said that he will proceed on pension w.e.f. 31.08.2008.

5. On 20.02.2008, he was given a show cause notice to which he replied on 12.03.2008. In his reply he again agitated that he is perfectly fit and he should be considered for early re-categorisation. No action was taken on the reply to the show cause notice.

6. Meanwhile, his junior was promoted on 01.04.2008 to the rank of Subedar. He was barred from promotion being category A-3(P). Besides, he was discharged on 31.08.2008 as per the retirement order.

7. It has been alleged that consequent to the judgment of Hon'ble High Court of Delhi in ***Sub. (SKT) Puttan Lal Vs. Union of India & Ors. W.P.(C) No.5946/2007 decided on 20.11.2008***, he was given a call letter to rejoin and he reported back on 24.01.2009. On 29.01.2009, he again preferred a statutory complaint and subsequently he retired having completed his normal term of engagement as a Nb Subedar on 31.01.2009. In his statutory complaint (Annexure A-9) he again requested for early Reclassification Medical Board as he is physically and mentally fit. The statutory complaint was disposed off by the COAS on 02.02.2010 (Annexure A-11).

8. It has also been contended by the learned counsel for the applicant that he is in receipt of disability pension as his disability was assessed by the Release Medical Board as 20%.

9. Learned counsel for the applicant also argued that show cause notice has been given to the applicant by the CO. Whereas, as per Rule 13, show cause notice to a JCO can only be given by the GOC-in-C. Therefore, the show cause notice was illegal and needs to be struck down.

10. Learned counsel for the applicant argued that as per the amended policy instructions issued by the medical authorities, he had a right to be reviewed for his medical category after six months, as stated

in the policy letter of 04.01.2002 wherein at para 2(b) it has been stated that *“Individuals who are in LMC for more than 3 months in temporary category and more than 6 months in permanent category will be reviewed”*. However, respondents relied upon the letter dated 09.10.2007 which stated that *“Individual can apply for early re-categorisation medical board only after one year of previous medical board”*. It has been alleged that this order was incorrect as actual order of 04.01.2002 clearly states six months.

11. Learned counsel for the applicant also argued in **2003 V AD(Delhi) 663 Manoj Kumar Gope Vs Union of India**, their Lordships have hold that requirement of issuing a show cause notice could not be empty formality and submission made in reply thereto were required to be accorded due consideration before final order. He argued that in this case, in response to the show cause notice, the applicant had very clearly stated that he seeks a early Reclassification Medical Board which was not acted upon. Therefore, he should not have been discharged in the category of A-3(P) when he had applied for Reclassification by the Medical Board. He also cited AO-3/2001 in which it was stated that the Release Medical Board has very limited power and it cannot change the medical category. He quoted para 13 which is reproduced below:-

“13. When a JCO/OR, who is in permanent low medical category ‘2’ or ‘3’ in any SHAPE factor, reports to hospital or medical board, consequent to issue of orders for his

discharge/release from service in accordance with the prescribed policy, the medical board will ensure that the individual is examined for release purpose only and his existing medical category is not changed.”

Learned counsel for the applicant argued that the Medical Board did not have the powers to review the medical category that was awarded to the applicant as also confirmed by the Hon'ble Apex Court in **Union of India Versus Nb. Sub. Rajpal Singh bearing Civil Appeal No. 6587/2008 decided on 07.11.2008 (2009 (1) SCC (L&S) 92).**

12. Learned counsel for the respondents argued that the applicant was given full redressal when he was recalled to join on 24.01.2009 consequent to the judgment in the case of Puttan Lal (Supra). Therefore, nothing remains as for as the issue prior to his rejoining is concerned. He further argued that subsequent to his discharge on 31.01.2009, he filed his OA only on 03.02.2010.

13. Learned counsel for the respondents further argued that the applicant has superannuated after rejoining on 31.01.2009 on having completed his terms of engagement as a Naib Subedar. Therefore, it cannot be said that he has been denied any of his rights.

14. Having heard both the parties at length and having examined the documents produced before us, we have come to the conclusion that two issues needs to be adjudicated. The first issue being, whether the applicant was entitled to Review Medical Board after he was declared

A-3(P) on 02.07.2007 and till the time he was declared as LMC on 31.08.2008 based on the letter of 14.04.2007. The second issue is whether on rejoining on 24.01.2009 consequent to Puttan Lal's Judgment (Supra) and his statutory complaint on 29.01.2009, there was any legal bar for the respondents not to send him for early Review Medical Board which in normal course was due in July 2009.

15. As regards the first issue of the applicant having been downgraded to A-3(P) for two years on 01.08.2007 due to injury 'Tendo Achilles Rapture'. The applicant sought a review after having been treated in the Civil vide his application dated 02.09.2007 (Annexure A-3). This request was turned down by the Medical Specialist who did not examine the applicant but did so based on the "relevant rulings" on 31.09.2007 (Annexure A-4). This rejection by the Medical Specialist was justified at that stage as the applicant has just been downgraded on 01.08.2007 and not even two months have lapsed after his downgradation.

16. A statement of case dated 18.09.2007 for holding an early Recategorisation Medical Board in respect of the applicant was sent by the CO (Annexure A-5). This application as returned in action with an observation that the early Recategorisation Medical Board is only possible after one year of his previous medical board.

17. However, we have examined the policy letter (Annexure A-6). This policy letter dated 04.01.2002 lays down as under:-

“2. The modalities for implementation of Special Review and reclassification medical board as spelt out as below”

(a) CO/Commandant of the Hosp will allot block period for different units so as to spread out the work load evenly.

(b) Individuals who are in LMC for more than 3 months in temporary category and more than 6 months in Permanent category will be reviewed.

(c) Such individuals for review will be referred to concerned specialist who will opine on the present conditions of the individual and if any change in category is required, the opinion will be reviewed by the Commandant of the hospital. If change in medical category is required, the individual will be brought before a medical board.”

18. A perusal of the above policy letter clearly gives out that the applicant was entitled to early Special Review and reclassification medical board after six months, which means that is earliest on 01.02.2008. However, the respondents did not pursue the application and the statement of case and the applicant was forced to proceed on pre-mature retirement based on policy letter of 14.04.2007. This implies that the applicant was not given a fair opportunity to be reviewed by the *reclassification medical board*.

19. The applicant having rejoined on 24.01.2009 consequent to the judgment of Hon'ble High Court of Delhi in Puttan Lal's case (supra), he again put up a statutory complaint reiterating his previous pleas on

29.01.2009. In this statutory complaint, the applicant sought the following redress:-

- “(a) Order holding of Special Review and reclassification board in my respect at the earliest.*
- (b) I should not be locally discharged based on the terms of engagement of my present rank.*
- (c) Keep one vacancy reserved for me for Sub till the outcome of my Special Review and reclassification board.”*

20. Thus, the applicant again agitated for an early Special Review and reclassification medical board. He also agitated for promotion to the next rank based on his likely upgradation since he was superseded w.e.f. 01.04.2008 as his immediate junior was promoted.

21. The respondents did not take any action on his statutory complaint and finally disposed off the said complaint on 02.02.2010 without application of mind and looking to the facts of the case.

22. We are of this opinion that the opportunity to the applicant for a Special Review and reclassification medical board in order to upgrade the medical category should have been acceded to by the respondents, if not in February 2008 then at least in January 2009.

23. On the other hand, the respondents had claimed that while Release Medical Board, the medical category of A-3(P) was maintained. This was held on 31.01.2009 thereby indicating that the applicant was still unfit.

24. We also examined the opinion of the Sr. Adviser (Surgery). MH Kirkee dated 31.01.2009 in which he has opined as under:-

“He is asymptomatic.

(L) Leg - No open wound

- Small palpable gap +*
- No tenderness*
- No NV defect*

ROM - (L) Ankle full & free

Rec - Fit to be released in LMC A-3(Perm)”

25. From the above analysis we observe that the applicant was having little or no effect of ‘Tendo Achilles Rapture’. At least it was not that kind of injury which required him to be declared A-3(P).

26. We have also noted the contention of the respondents who have drawn our attention to AO-3/89 which deals with medical examination of all ranks prior to release, retirement, discharge, completion of tenure or service limit.

27. Para 13 of AO 3/2001 says that the medical board will ensure that the individual is examined for release purpose only and his existing medical category is not changed. Therefore, though Sr. Adviser (Surgical) has examined the applicant but apparently did not find anything. All the same, this being a medical opinion, we are unable to comment on this issue.

28. Had the applicant been upgraded, then he would have been entitled to promotion from 01.04.2008 when his immediate junior was

promoted. Therefore, he would have got additional time to serve as a Subedar. We have noted that the applicant has been awarded disability pension @20%. Now his pension would be rounded off to 50%. All the same, we observe that he should have been given an opportunity to go before the Review Medical Board and thus get a chance to have been medically reviewed for upgradation.

29. In view of the foregoing, we remand the case back to the respondents to conduct Special Review Medical Board in which his injury could be re-examined and should he be found to be in higher medical category other than the A-3(P), he should be entitled to all consequential benefits including the promotion from 01.04.2008.

30. We direct that the medical examination of the applicant be held within 90 days from this order and the applicant's case be considered afresh based on the outcome of the Review Medical Board. The OA is partially allowed. No orders as to costs.

(M.L. NAIDU)
(Administrative Member)

(MANAK MOHTA)
(Judicial Member)

Announced in the open Court
on this 22nd day of May, 2012