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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 8107/2011**

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Reserved on: 9th October, 2013

Date of decision: 18th November, 2013

RAMESH FONIA

..... Petitioner

Through : Mr. Arun Srivastava, Adv.

versus

UOI AND ORS

..... Respondents

Through : Mr. Himanshu Bajaj, CGSC.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MS. JUSTICE DEEPA SHARMA

GITA MITTAL, J.

1. By way of the present writ petition, a challenge is laid to the refusal of the respondents to grant disability pension to the petitioner even though he retired from service on grounds of medical unfitness resulting from an injury suffered by him while on bonafide government duty deployed at the Border Out Post (BOP) Barapansuri (Mizoram). The adjudication hinges on the issue as to whether the injuries suffered by the petitioner are attributable to service or not.

2. The facts giving rise to the present petition to the extent necessary for the purposes of the present writ petition are briefly noted hereafter.

3. The petitioner joined service with the Border Security Force on the 15th of November 1997. While undergoing his basic training at the BSF Academy at Tekanpur on the 25th of June, 1998, the petitioner sustained injuries resulting in his placement in the low medical category during the annual medical examination by the medical board on the 15th of March, 2002. The petitioner was re-examined by the BSF medical board which assembled on the 20th of January, 2003 at Bikaner which continued to place him under the low medical category S1H1A3(L)(T-48)P1E1 with effect from 20th January, 2003 to 19th January, 2004. On the 18th of January, 2004, the petitioner was re-examined by the medical board at Sri Ganga Nagar which again placed him under the low medical category S1H1A3(L)(P) P1E1.

4. On the 14th of August, 2006, the petitioner was posted as the Company Commander at the BOP Barapansuri (Mizoram). He was injured while playing a volleyball match with the company troops deployed under him and sustained injury on his right knee.

5. The medical board held on 16th of September, 2008 at Roshanbagh (West Bengal) assessed the petitioner's disability from both the injuries at 59% and observed that he was completely and permanently incapacitated for further service of any kind in the BSF in consequence of "*effects of old ACL tear (Lt) side (Optd) with screws in situ with medical meniscus injury and IDK (Rt) knee*". The medical proceedings placed by the respondents with the counter affidavit disclose the following findings:-

- | | | |
|----------|--|-----|
| 02. | Was the disability contracted in Service? | Yes |
| 03. | Was it contracted in circumstances over which he had no control? | Yes |
| 04. | Is it directly attributable condition of Service? | No. |
| 05. | If so, by what specific condition? COI done but not mentioned that the injury sustained on Govt. Duty. | |
| 06 & 07. | xxx | xxx |
| 08. | Percentage of disability permanent (As assessed by previous medical board) | 59% |

6. It appears that the respondents thereafter proceeded to serve the petitioner with the notice to show cause for his proposed invalidation from BSF Service due to permanent disability and thereafter issued an order dated 4th September, 2009 retiring the petitioner from service on the ground of physical unfitness for the aforementioned reason under the provisions of Rule 18 of the BSF Rules 1969 with pensionary benefits as admissible under the CCS (Pension) Rules with immediate effect or from the date of his release whichever was later. The petitioner accordingly proceeded on retirement with effect from the afternoon of 30th September, 2009.

7. So far as release of the pension to the petitioner was concerned, these papers were submitted to the Pay and Accounts

Department, BSF New Delhi vide communication dated 30th September, 2009 from the 105 BN BSF. The Pay and Accounts Department of the BSF refused to release the disability pension with the normal pension to the petitioner taking the view that the petitioner was himself responsible for the injuries sustained on 14th August, 2006. As such, the petitioner was granted only invalid pension equivalent to Rs.13,730/- with effect from 1st October, 2009. In the counter affidavit, the respondents have taken the stand that the Pay and Accounts Department has refused to pay the disability pension to the petitioner due to the reason that the injury sustained by him was not attributable to a bonafide government duty as opined by the then commandant 105 BN BOP in the remarks endorsed by him in the court of inquiry proceedings held on 4th of December, 2006.

8. The respondents have also urged that the medical board proceedings held on 16th September, 2008 were approved by the Inspector General (Personnel), BSF Headquarter, New Delhi on 21st October, 2008 and thereafter forwarded to 105 BN. It has been submitted that the BSF Headquarters, New Delhi thereafter had issued a show cause notice dated 16th April, 2009 to the petitioner conveying the proposed action to retire him on medical grounds and informing the petitioner that he could appeal against the decision of the medical board within 15 days of the communication failing which orders to retire him would be passed. The respondents have contended that the petitioner kept silent and did

not respond to the show cause notice as such, and on the expiry of the 15 days period, the petitioner was retired from service with the BSF as no representation or objection was received from him.

9. The challenge by the petitioner in the present case rests primarily on two grounds. The first ground is that the medical board proceedings relied upon by the respondents were never furnished to the petitioner and that the petitioner had access to them for the first time on the 16th of September, 2008 when they were filed along with the counter affidavit of the respondents to the present writ petition. As such, the petitioner was deprived of the opportunity to challenge the same. The second ground on which the petitioner assails the rejection of his claim by the respondent and refusal of the disability pension is premised on the contention that the injury which was suffered by the petitioner was unquestionably attributable to his service inasmuch as the same was suffered during the course of bonafide duty, entitling the petitioner to the award and payment of disability pension as per the applicable rules and guidelines.

10. So far as the first contention of the petitioner is concerned, the respondents rely on the communication dated 16th April, 2009 whereby the petitioner has been informed that the medical board which examined him at the BSF Berhampore Hospital on 16th September, 2008 had found him unfit for further service in the BSF and the finding of the medical board declaring him unfit for further service under Rule 19(3) of BSF Rules, 1969 was thereby

conveyed to the petitioner. By this communication, the petitioner was informed that he may appeal against the said decision of the medical board within 15 days of this communication. A perusal of this communication would show that the respondents have not enclosed a copy of the board proceedings with the letter. The tenor of the letter shows that the petitioner was being informed about the finding of the unfitness by the said medical board for the first time by this communication. It is therefore, apparent that the respondents have not furnished a copy of the medical board proceedings to the petitioner. There is thus certainly merit in the petitioner's contention that a copy of the board proceedings was never furnished to him and he was never given opportunity to appeal against the said decision.

11. It is noteworthy that the respondents have enclosed with the counter affidavit the copy of the receipt of the letter dated 16th April, 2009. This receipt also does not contain any reference to the copy of the board proceeding having been ever served upon the petitioner.

12. Certainly a meaningful challenge to the medical board proceedings could have been laid by the petitioner only if he had access to the proceedings of the board. The respondent's objection that the petitioner failed to appeal against the finding and, therefore, the same binds him is of no consequence or effect in this background.

13. At this stage, we may also note that the petitioner appears to have made an inquiry under the Right to Information Act from the respondents in respect of his claim for disability pension. The respondents responded to the same by letter dated 12th November, 2010 wherein they referred to the definition of disability pension as given in the relevant book. The extract of this reads as follows:-

“If a Government servant is boarded out of Government service on account of his disablement due to wound, injury or disease and that disablement is accepted as due to Government service, the Government servant will be granted disability pension. This disability pension will be in addition to invalid pension/gratuity, if admissible under CCS (Pension) Rules, 1972.”

From the above, it becomes crystal clear that disability element is only granted to those personnel whose disablement is accepted due to Government service. It is for your information that your injury was not accepted to Government service. Besides in COI, (which was conducted to find out the circumstances under which you had sustained injury) Comdt of your unit has opined that “Officer sustained another internal injury on his right leg (due to twisting of leg) while he was playing volleyball match on 14-6-2009 at BOP Barapansuri for which no one else but the officer himself is responsible.” Apart from the above, it is also stated in medical board proceedings that the injury sustained by you is nor directly attributable condition of service. Hence, in conclusion, it is stated that you are not entitled

to have disability elements.”

(Underlining by us)

14. It is now necessary to consider the second issue raised which arises in the present case which relates to the attributability of the injuries suffered by the petitioner which rendered him medically unfit to continue in service.

15. The respondents have taken a position that in view of the injury suffered by the petitioner in 1998 while undergoing basic training, he ought to have refrained from participating in any games. In fact, in the counter affidavit, the respondents have taken the plea that the petitioner had been placed in the low medical category due to the left knee injury sustained on 25th of June, 1998 and that he was not considered fit for all duties at par with other fit force personnel and thus he stood exempted from undergoing any kind of force level courses involving physical strain and excused from undergoing heavy exercises like field physical efficiency test (FPET) etc. This very submission of the respondents, unsupported by any formal order in this regard, is completely unworthy of any credence.

16. The matter deserves scrutiny from yet another aspect as well. The petitioner has contended that his placement in the low medical category did not impact his performance of normal duties. He was also posted in difficult areas and was performing operational duties throughout the period when he was under the low medical

category. The respondents at no point of time accorded any special treatment to the petitioner nor had to exempt him from discharge of normal duties because of his medical categorisation.

17. So far as the petitioners' postings are concerned, the respondents have disclosed that after the injuries suffered by the petitioner on the 25th of June, 1998, the petitioner served with 105 BN BSF at different places including Rajouri (Jammu); Sri Ganga Nagar (Rajasthan); Lunglei (Mizoram) and Roshanbagh (West Bengal) from 1st January, 1999 to 30th September, 2009 when he retired from the BSF.

This position is not disputed by the respondents.

18. It is, therefore, manifest that despite the leg injury sustained by the petitioner as well as his medical categorization, he was freely posted in difficult areas by the respondents. No exemption from performance of any kind of duty was granted to him. The respondents have also stated in the counter affidavit that the petitioner was performing the duties of a Company Commander, which is a leadership position carrying with it the responsibility of a large contingent of troops in difficult and remote parts of the country.

19. Being a member of a disciplined force such as the BSF, the petitioner was thus duty bound to perform all functions as any other Company Commander who may not have suffered any injury. In fact the Company Commander has to lead the company, especially to ensure the fitness of all BSF personnel posted therein.

20. The petitioner has pointed out that he had received a letter dated 8th April, 2006 from the office of the Commandant pointing out the poor performance of the sports team of 105 BN BSF during the Inter – Bn Competition – 2008. It was in this communication that Commandant had inter alia pointed out the low motivational level amongst the players to participate in the games or to achieve desired standard or put in additional efforts to succeed. The Commandant has specifically noted that the personnel were also heard putting forward their apprehensions that they might get hurt if they play and thus they are not interested in participating. The Commandant noted that this was the negative trend which was required to be arrested. In this background, the Commandant had directed the commanders (including the petitioner) to look at these two aspects very minutely and take all corrective steps immediately. It was further stated that any future deviations were likely to pose more difficulties.

21. Mr. Arun Srivastava, learned counsel for the petitioner has drawn our attention to the guidelines provided to the Company Commanders who are in occupation of the post in “***Border Security Force Mannual - Volume I OPS Directorate***”. The respondents have prescribed the daily routine in this manual for all the members of the force at the duty post. The relevant extract is as under:-

“Daily Routine

10. Unless otherwise ordered, the

- (a) Stand to
- (b) Setting out of Ops
- (c) P T
- (d) Breakfast
- (e) Trg period (only 2 periods)/sending patrols.
- (f) Lunch and rest
- (g) OTW (Own time work) as decided by BOP Comdrs.
- (h) Game**
- (i) Evening roll call
- (j) Sending of patrols/laying of border ambush/nakas.”

22. Games are thus an integral part of the daily routine to be followed by BSF personnel at the Border Out Post.

23. Learned counsel for the petitioner has drawn our attention to the guidelines issued by the respondents for computing the attributability of disability under Rule 3(A)(2) of the ***Central Civil Services (Extraordinary Pension) Rules***. The relevant extract of Rule 3(A)(2) of the ***Central Civil Services (Extraordinary Pension) Rules*** reads as follows:-

(1) xxx xxx xxx

(2) There shall be a causal connection
between-

(a) disablement and Government service ;
and

(b) death and Government service,

for attributability or aggravation to be conceded,
Guidelines in this regard are given in the
Appendix, which shall be treated as part and
parcel of these Rules.”

24. Under this rule, the respondents have notified Guidelines for conceding attributability of disablement or death to government service. The respondents have prescribed when a person subjected to the disciplinary code of the Central Armed Police Battalions would be deemed to be ‘on duty’. In this regard para 4(b)(iii) of the Guidelines reads as follows:-

“4(a). xxx xxx xxx

(b) A ***person*** subject to the disciplinary code of the Central Armed Police Battalions, ***is ‘on duty’***.

(i) xxx xxx xxx

(ii) xxx xxx xxx

(iii) ***During the period of participation in recreation, organized or permitted by service authorities, and during the period of travelling in a body or singly under organized arrangements.***”

(Emphasis supplied)

25. On application of these guidelines as well, it has to be held that the petitioner who was participating in games organized in the Battalion at the place of his posting was on bona fide duty.

26. The respondents have relied on the ***Border Security Force Manual Volume IX – Medical Directorate*** in support of their contention regarding employability limitations of different low medical category gradings. It is urged that such low medical category personnel who were in grade ‘A3(L)’ has a disease or disability above knee on one side, including pelvic girdle should be able to walk up to 5 KM at his own pace and that such low medical category personnel are fit for sedentary duties only.

27. So far as the personnel with the low medical category A3(L) is concerned, ***Border Security Force Manual Volume IX – Medical Directorate*** provides as follows:-

“(b) A3(L)

Has a disease or disability above knee on one side, including pelvic girdle should be able to walk up to 5 KM at his pace.

Fit for sedentary duties only. Not fit for high alt. and operational duties during IS duty.

28. We have noticed hereinabove the injuries suffered by the petitioner. The injuries of the petitioner were not above the knee. It

did not involve the pelvic girdle. There is nothing on record to show that the petitioner was not able to perform normal duties. In fact the respondents have assigned him operational duties and no complaint in his work has been pointed out. The above guideline has no application in the instant case.

29. It is urged that with effect from 15th March, 2002, due to the left knee injury sustained on 25th June, 1998, the petitioner was placed in low medical category S1H1A3(L)(T-48)P1E1. It is submitted that there are limitations with regard to personnel placed in grading A3(L) and that as per the ***Border Security Force Manual Volume I at page 111***, there are employability limitations of different low medical category gradings so far as persons placed in the category A3(L) are concerned.

30. We find that there is no limitation on the employability of the petitioner at any point because of the injury which he suffered in the year 1998. This is evident from the communication dated 8th April, 2008 noticed above and the various postings of the petitioner.

31. The above narration would show that even though the petitioner had been placed in the low medical category because of the injuries suffered by him in 1998, the same made no difference so far as his postings in difficult areas was concerned. It also made no difference to the position which the petitioner occupied or the work which was assigned to him.

32. The respondents did not make any special dispensation so far as work allocation was concerned qua the petitioner. He has been treated and performed duties like any other person who was not in a low medical category.

33. Also on record are the proceedings of the one man court of inquiry appointed by the Commandant 105 BN BSF vide the order dated 4th November, 2006 to inquire into the circumstances in which the petitioner sustained injury during the volley ball match. The statement of the petitioner was recorded wherein he had stated that he had suffered injuries when he was playing volley ball with the company troops as part of the daily company routine which is mandatory to ensure fitness of the troops in terms of mental and physical health. In answer to the question by the court that having known that his left leg had already been damaged and operated upon, why the petitioner took risk of playing volley ball during which he had sustained injury on 14th August, 2006, the petitioner had answered as follows:-

“Ans. Sir, I was operated in 2002 and since then I am doing regular exercise, even the doctor also advice me to do exercise. I am also doing operation duty for last 04 years in spite of my LMC. The fact is known to all Senior officers right from Comdt. to IG. In spite of my permanent LMC I have been put in operation duty at BOP in hard areas like Mizoram, & I have been doing such duties to the satisfaction of my seniors.

Hence I did not find any problem in playing

volley ball which I have been playing for last so many years. I am also doing CRP, patrolling, checking etc. for last so many years. Even at Ganga Nagar also I was Coy Cdr at I.B. and performing various types of Ops. Duties. It was a matter of chance that I got injured while playing volley ball at BOP.

Moreover being Coy Cdr it is my duty to ensure physical fitness of troops & for the same my physical association in all the activities is must. As a part of my duties I always play with troops.”

34. The impugned order dated 4th September, 2009 retiring the petitioner from service on the grounds of physical unfitness however, is for the reasons of the injury suffered by him in his left knee in the year 1998 as well as the injury on the right knee suffered in the year 2006. The impugned order has been passed under the provisions of Rule 18 of the BSF Rules 1969 with pensionary benefits as admissible under the CCS (Pension) Rules.

35. The respondents have raised no dispute that the first injury suffered in the year 1998 was attributable bonafide to government duty.

36. So far as attributability of the second injury is concerned, the only circumstance for denying that the same is an endorsement by the Company Commandant made on the 4th of December, 2006 wherein the Commandant had stated that no one else but the officer himself was responsible for the injury sustained while playing volley ball on 14th of August, 2006.

This endorsement only clarifies that no other person was involved in the infliction of the injuries which were suffered during the match. This endorsement cannot be treated as the Commandant having been stated that the same was not attributable to the service. In fact, we may note that it is the case of the respondents that no other senior officer was present at the post on the 14th of August, 2006 to support their contention that there was no pressure on the petitioner to play the games. Therefore the Commandant was not present when the petitioner suffered the injury and was incompetent to comment on the injury suffered by the petitioner.

37. We find that in fact the very same Company Commandant has submitted his opinion on the 9th of December, 2006, the relevant extract whereof reads as follows:-

“Opinion of the Commandant/Head of Office

(a)(i) Was the individual in the course of performance of an official task or a task the failure to do which would constitute an offence triable under the disciplinary code applicable to him? (Indicate the nature of the task, by whom it was ordered and when)

- Injury in the left knee of the officer occurred during the basic training which further aggravated during deployment of unit in CI Role.

- Injury in the right knee of the officer occurred during **participation of officer in the evening games (Volley Ball) at BOP.**”

(b) Was the accident due to wholly/partially to:

(i) serious negligence: No, there was no fault on the part of officer leading to injury

And/or

(ii) misconduct of the individual? NO

(indicate the nature of the serious negligence or misconduct and the grounds on which the opinion is based)”

(Emphasis by us)

38. From the above discussion, the inevitable and only possible conclusion is that the evening games were the integral part of the petitioner’s duties. It is also a fact that the petitioner was not exempted from performance of any part of the assigned duty. The respondents have themselves not treated the petitioner as any special case of low medical category. He was being assigned postings and positions just as any other BSF personnel who was not a low medical category including the hard postings. The respondents recognized the leadership required by a person in the position of a commander. There is no dispute that the petitioner had to motivate the troops towards the acquisition of physical fitness by participation in the games. The same is only possible by the officer leading from the front. It therefore, has to be held that the injuries suffered by the petitioner on 14th of August, 2006 while

playing volleyball at the Border Out Post (BOP) Barapansuri (Mizoram) was suffered by him while he was on duty.

39. We also conclude that court of inquiry conducted by the respondents only recorded the facts relating to the injuries suffered by the petitioner. It had returned no findings on the question of attributability of the injuries.

40. In view of the above discussion, we hold that the injuries suffered by the petitioner when he was on bonafide government duty were attributable to his service and that the same has resulted in disability which was evaluated by the respondents as 59% disablement in the medical board proceedings held on 21st October, 2008.

41. As a result, it has to be held that the petitioner was entitled to grant of disability pension which has been wrongly denied to him.

42. We accordingly set aside and quash the rejection of the petitioner's claim for grant of disability pension. The respondents are directed to reconsider the petitioner's claim for disability pension having regard to the above findings and pass orders thereon within four weeks from today. The order passed thereon shall be forthwith communicated to the petitioner. Arrears shall also be computed and conveyed to the petitioner within six weeks and payment of the amounts due to him shall be effected within eight weeks.

43. The petitioner shall be entitled to costs which are assessed at Rs.20,000/- and shall be paid to the petitioner within eight weeks from today.

This writ petition is allowed in the above terms.

(GITA MITTAL)
JUDGE

(DEEPA SHARMA)
JUDGE

18th NOVEMBER, 2013
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