

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.**

(225)

CWP-11517-2020

Date of Decision: October 29, 2020

Vikas

.. Petitioner

Versus

Union of India and others

.. Respondents

(Through video conferencing)

CORAM: HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present: Mr. Vivek Singla, Advocate, for the petitioner.

Mr. Sunil Kumar Sharma, Advocate, for the respondents.

HARSIMRAN SINGH SETHI, J.(ORAL)

Present petition has been filed challenging the order dated 29.06.2020 (Annexure P-9), by which, the claim of the petitioner for medical re-assessment has been rejected being unfit on account of “Nasal Synecheie Right Side”.

The facts leading to the filing of the present writ petition are as under:-

In the year 2019, the Union of India advertised the post of Airman (Male candidates) in technical and non-technical stream, wherein for being eligible, the requisite qualification was 12th passed with minimum 50% in aggregate. Petitioner, who was fully eligible, in pursuance to the advertisement, applied and appeared for the online examination for Phase-I of selection process, which was conducted on 17.03.2019 and for the Phase-II of selection process on 11.05.2019. Petitioner cleared both the phases of the selection process and was ultimately called for medical examination,

which was scheduled to be held on 16.07.2019.

Petitioner appeared for medical examination at 15th Air Force Hospital on 16.07.2019 and after the medical examination, the petitioner was declared medically unfit on account of “Nasal Synecheie Right Side”.

As per the petitioner, the said medical unfitness was of temporary nature, which could have been cured with a minor surgery. Petitioner applied within the time frame to be assessed by the Appeal Medical Board which is situated at 5 ASC, Airforce Station, Jodhpur.

For curing the temporary medical disability, petitioner underwent the minor operation. The operation was successful and after the said operation, petitioner appeared before the Appeal Medical Board on 07/08.08.2019. The Appeal Medical Board again declared the petitioner medically unfit on the ground that after the surgery, the wounds are yet to heal and therefore, the assessment of the petitioner cannot be made in respect of his fitness or otherwise at that stage. Thereafter, the respondents went ahead with the selection and a provisional selection list was issued on 31.10.2019 in which, the petitioner was declared medically unfit and his claim for consideration for appointment was rejected.

After the rejection, the petitioner again filed a representation dated 08.04.2020 before the Central Airmen Selection Board stating that he is medically fit and therefore, he should also be considered for appointment after re-assessment of his medical fitness by the Appeal Medical Board primarily raising the ground that the Appeal Medical Board did not assess his medical fitness on merits but rejected his claim on the technicality by stating that due to the non-healing of post operative wounds, the petitioner cannot be medically examined for his fitness at that stage.

Thereafter, the petitioner filed a writ petition before this Court being CWP No.7721 of 2020 wherein, a direction was given to the

respondents to consider the representation of the petitioner and decide the same by passing an appropriate speaking order. In pursuance to the direction given by this Court dated 04.06.2020 in CWP No.7721 of 2020, the respondents passed the impugned order dated 29.06.2020 (Annexure P-9) again rejecting the claim of the petitioner on the ground that after the dismissal of the appeal, there is no provision for further appeal or re-medical of the candidate. The said order is under challenge in the present writ petition.

After notice of motion, the respondents have filed the reply. In the reply, the respondents have defended the impugned order by stating that initially when the petitioner appeared before the Medical Board, he was found medically unfit due to “Nasal Synecheie Right Side” and with regard to the rejection of his appeal, the respondents have stated that as per the opinion of the Appeal Medical Board, due to the “POST OPERATIVE STATUS NASAL SYNECHEIE RIGHT SIDE”, the petitioner was again declared unfit and in absence of any power to review the order of the Appeal Medical Board, the claim of the petitioner has rightly been rejected for being considered for appointment to the post of Airman.

Learned counsel for the respondents further submits that the Appeal Medical Board, is required to give its finding about the medical fitness of the candidate in a time bound manner as the selection process is to be finalized at the earliest, hence, in the present case, the Appeal Medical Board gave the opinion keeping in view the examination of the petitioner as on the date when he appeared before the said Appeal Medical Board on 08.08.2019.

Learned counsel for the petitioner submits that the Appeal Medical Board only rejected the case of the petitioner due to the non-

healment of the post operative wounds and as the Appeal Medical Board, even as per the instructions relied by the learned counsel for the respondents, had 12 weeks time to give its opinion after examining a candidate about the medical fitness should have given another chance to the petitioner for his evaluation after the healing of his wounds. Learned counsel for the petitioner further submits that in somewhat similar circumstances, one Mr. Sahil Sangwan, whose claim was also rejected by the Medical Board, was evaluated by the Appeal Medical Board more than once and therefore, the petitioner should have been given an opportunity for re-assessment of his medical fitness by the Appeal Medical Board after the healing of the post surgery wounds.

I have heard learned counsel for the parties and have gone through the record with their able assistance.

The petitioner, no doubt, suffered a medical disability at the time when he appeared before the Medical Board, wherein, he was found suffering from “Nasal Synecheie Right Side”. It is also not disputed by the parties that the said medical unfitness is temporary in nature and can be rectified/cured by a minor operation. Once, the petitioner had undergone the said minor surgery, it was incumbent upon the respondents to assess whether the temporary medical unfitness still existed so as to oust the petitioner from the zone of consideration for appointment to the post of Airman.

The argument, which has been raised by learned counsel appearing on the behalf of the respondents, is that as per the instructions issued by the Government of India, the Appeal Medical Board is time bound to give its opinion so that the selection process is not delayed and is

Finalized at the earliest.

There is no dispute between the parties that as per the instructions, which have been placed before this Court dated 09.01.2015 (Annexure R-4), which are the general instructions relating to the appeal medical, the Appeal Medical Board is to be completed within a period of 12 weeks. The relevant part of the instructions is as under: -

“4.1.3.1 Appeal Medical. A candidate who is declared permanently unfit for IAF/present intake is entitled for appeal against the medical disposal in accordance with AFO 09/2004 (as amended). The application for appeal medical, along with the copy of paid MRO and medical disposal, is to be submitted to the concerned ASC within 07 days (or the next working day if the 7th day happens to be a holiday) of the declaration of medical result. Any applications received after the due date will be rejected. ASC will forward all these appeal documents to the appeal centre within 2 weeks for processing. The appeal medical board is to be completed within 12 weeks.”

There is no dispute regarding the existence of those instructions, but the instructions are to be implemented in the facts and circumstances of each case. In the present case, the petitioner was evaluated by the Appeal Medical Board on 08.08.2020 whereas, the result of the selection was declared by the respondents in the 2nd week of October, which is after two months of the evaluation. There was enough time with the Medical Board to call the petitioner again after the healing of his post operational wounds for his assessment qua his fitness to be appointed to the post of Airman. It is not disputed that the Appeal Medical Board has 12 weeks time at its discretion to make recommendations. In the present case, the said discretion has not been exercised by the Appeal Medical Board to examine the petitioner regarding his medical fitness again, which act is arbitrary and cannot be sustained.

The Hon'ble Supreme Court of India while deciding **Civil Appeals No.1756-59 of 1991** on 11.04.1991 titled as '**U.P. State Road Transport Corporation and another Vs. Mohd. Ismail and others**', held that the discretion which is vested with the authorities should not be exercised according to whim, caprice or ritual. It should be exercised reasonably and impartially. The relevant paragraph No.15 of the said judgment is as under:-

“15. These are, in our opinion, extreme contentions which are not sustainable under law. There are two aspects to be borne in mind in exercising the discretion. Firstly, there are constraints within which the Corporation has to exercise its discretion. The Corporation is a public utility organisation where mediating motion is efficiency and effectiveness of public service. Efficiency and effectiveness of public service are the basic concepts which cannot be sacrificed in public administration by any statutory corporation. The Corporation has to render this public service within the resource use and allocation. It is within these constraints the Corporation has to exercise its discretion and perform its task. The second aspect relates to the manner in which the statutory discretion is to be exercised. The discretion allowed by the statute to the holder of an office, as Lord Haisbury observed in *Sharp v. Wakefield, 1891 AC 173 at p. 179*, is intended to be exercised "according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be, no arbitrary, vague and fanciful but legal and regular. And it must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself." Every discretion conferred by statute on a holder of public office must be exercised in furtherance of accomplishment of purpose of the power. The purpose of discretionary decision making under Regn. 17(3) was intended to rehabilitate the disabled drivers to the extent possible and within the above said constraints. The Corporation, therefore, cannot act mechanically, The discretion should not be exercised according to whim, caprice or ritual. The discretion should be exercised reasonably and rationally. It should be exercised faithfully and impartially. There should be proper value judgment with fairness and equity. Those drivers would have served the Corporation till their superannuation but for their unfortunate medical unfitness to carry on the driver's job. Therefore, it would not be improper if the discretion is exercised with greater concern for and sympathetic outlook to the disabled drivers subject of course to the paramount consideration of good and efficient

administration. These are some of the relevant factors to be borne in mind in exercising the discretion vested in the Corporation under Regn. 17(3).”

The Hon'ble Supreme Court of India once again while deciding **Civil Appeal No.7524 of 2011** on 30.08.2011 titled as '**Mrs. Asha Sharma** Vs. Chandigarh Administration and others', held that fairness and achievement of larger public interest is to be kept in mind while exercise of discretionary power by the authorities. The relevant paragraph No.22 of the said judgment is as under: -

“22. As already noticed, fairness in State action is the essence of proper governance. Where the authorities exercise their powers under the rules, they are expected to exercise the discretion vested in them fairly and with the intention to attain a balance between exercise of discretionary power and the larger public interest sought to be achieved by such discretion. Arbitrariness or irresponsible exercise of the power vested in the authorities, has been a matter of great concern before the courts. The Full Bench of High Court of Punjab and Haryana had declared Rule 7 of the Allotment Rules of 1972 as unconstitutional and being without any proper guidelines because the possibility of exercising unguided power resulted in arbitrariness on various occasions. Though that judgment had been set aside by this Court, surely it was still expected that the draft rules, as approved by this Court, would be acted upon fairly and without arbitrariness. However, the matters have not ended with the implementation of the new rules and, therefore, litigation in respect of these rules has been a continuous affair. The matter, which can be said to be of some public importance is not a question of the interpretation of the Allotment Rules as such, but is one of the manner of exercise of power with reference to the Allotment Rules.

Keeping in view the settled principle of law noticed hereinbefore, once the Appeal Medical Board had 12 weeks time to make its recommendations with regard to the assessing of the fitness of the petitioner for the post of Airman, rejecting the petitioner being medically unfit without being examined on merits by simply stating that due to the non-healing of the post surgical wounds, the fitness of the petitioner cannot be assessed on the date when he was examined and that too much before the expiry of the

period of 12 weeks, within which recommendations were to be made by the Appeal Medical Board, is contrary to the settled principle of law as the discretion exercised by the Appeal Medical Board not to call the petitioner to re-assess his medical fitness within the time frame of 12 weeks, is contrary to the law and cannot be sustained.

Further, it is not the case of the respondents that even after the operation, the unfitness of the petitioner persisted. The case projected by the respondents is that on the date when the petitioner appeared before the Appeal Medical Board, his wounds of the surgery were yet to heal due to which, he could not be medically assessed. That being so, the rejection of the case by the Appeal Medical Board is not on merits but on technicalities.

The procedure, which is adopted is for making selections by appointing the best available candidates. The procedure is to be applied in a manner, which does not cause prejudice to any candidate. Even the discretion, which has been given to the Appeal Medical Board of deciding the fitness of a candidate on an appeal, within a period of 12 weeks is to be exercised keeping in view the the interest of the candidates so that no prejudice is caused to a candidate who has reached that stage after clearing two phases of selection process. The Appeal Medical Board could have very easily asked the petitioner to approach within a period of 12 weeks after the healing of his post surgical wounds for the assessment of his fitness for the post of Airman.

In these hard days, when it is very difficult to get a public appointment, the efforts of the petitioner to secure a job cannot be scuttled by the exercise of a discretion in such a manner so as to frustrate the claim of the petitioner despite clearing the two phases of the selection process.

The procedures are meant for achieving a purpose and the discretion is to be used in such a manner that no candidate feels prejudice.

Further, as per the respondents, no further date for re-examination of the medical fitness was given to the petitioner by the Appeal Medical Board, as the selection was to be finalized at the earliest and in case, the Medical Board would have given another date, the result of the candidates would have been delayed thereby causing prejudice to the other selected candidates. The said reason is not plausible in the facts and circumstances of this case. The petitioner was examined by the Appeal Medical Board on 08.08.2019, whereas the result was declared on 11.10.2019 i.e. after more than two months. Once, the result was declared in the second week of October, there was sufficient time with the Appeal Medical Board to re-examine the petitioner within a period of 12 weeks, which time was available with the Appeal Medical Board at its disposal. The Medical Board could have easily assessed the petitioner again for his actual medical fitness rather than rejecting the claim merely by saying that due to the post operative “NASAL SYNECHIE RIGHT SIDE”, the medical fitness of the petitioner could not be assessed. Therefore, the reasons, which are being given by the respondents to justify the non-examination of the petitioner by the Appeal Medical Board on merits, is not borne out of the facts and circumstances of the present case and hence, cannot be accepted.

Keeping in view the facts that the petitioner competed alongwith several others and was able to clear the two phases of the selection, he is entitled for a fair opportunity to present the case about his medical fitness as well. The claim of the petitioner could not be rejected on the technicalities.

Not only this, petitioner is alleging discrimination as well. As per the petitioner, one Mr. Sahil Sangwan was examined by the Appeal Medical Board more than once, which fact is not disputed by the respondents. The only justification, which has been given by the learned counsel for the respondents, is that after the case of Mr. Sahil Sangwan was rejected by the Appeal Medical Board, the same was perused by the Central Recruiting Agency and the report of the Medical Board was found to be incorrect and under these circumstances, the Appeal Medical Board was directed to re-assess Mr. Sahil Sangwan, which is not the case with the present petitioner.

The question of law raised before this Court is whether, the Appeal Medical Board has the authority to examine a candidate more than once in case, the circumstances requires. The situation in case of Mr. Sahil Sangwan could be different but it is a matter of fact where the respondents themselves found that the decision of Appeal Medical Board was not correct, a direction had been issued to Appeal Medical Board to re-assess a candidate by the Central Recruiting Agency. That being so, the petitioner could have been easily called by the Appeal Medical Board again in case on the date of assessment i.e. 08.08.2019, the medical fitness of the petitioner could not be assessed by the Appeal Medical Board due to the post operative “Nasal Synecheie Right Side”.

Therefore, the objection, which has been raised by the respondents in their rejection order dated 29.06.2019 (Annexure P-9) that there is no provision for further appeal or remedial, is factually incorrect. Once, the respondents themselves had ordered the re-examination of Mr. Sahil Sangwan by the Appeal Medical Board and as a matter of fact Mr.

Sahil Sangwan was re-assessed by the Appeal Medical Board, rejecting the

claim of the petitioner by citing that there is no provision for appeal or remedial to be done by the Appeal Medical Board, is discriminatory in nature. That being so, the reason given for rejecting the claim of the petitioner is arbitrary and illegal and against their own act and hence cannot be sustained being discriminatory in nature and is liable to be quashed and is accordingly quashed.

Keeping in view the above, a direction is issued to the respondents to re-examine the petitioner at the level of the Appeal Medical Board and thereafter, in case the petitioner is found fit by the Appeal Medical Board, appropriate further process for appointing him be also undertaken, in case any candidate, who is lower in merit than the petitioner has been appointed already.

Learned counsel for the petitioner undertakes that he will bear the expenses of his examination by the Appeal Medical Board.

The necessary expenses will be informed to the petitioner and he will deposit the same before he is medically examined by the Appeal Medical Board. The petitioner will be informed about the date for appearance before the Medical Board well in advance so that he can avail the said opportunity.

The writ petition is allowed in above terms.

Let the examination of the petitioner by the Appeal Medical Board be done within a period of two months from the receipt of certified copy of this order subject to the required payment of expenses thereof by the petitioner.

(HARSIMRAN SINGH SETHI)
JUDGE

October 29, 2020
harsha/naresh.k

Whether speaking/reasoned: Yes
Whether reportable: Yes