

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

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Date of decision: 6th August, 2020

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W.P.(C) No.4456/2020

JONU TIWARI

... PETITIONER

Through: Mr. Vikas Kochar & Mr. O.P. Bhadani, Advs.

Versus

UNION OF INDIA & ORS.

...RESPONDENTS

Through: Mr. Nirvikar Verma, Adv. along with Wing Commander B. Mishra.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

JUSTICE RAJIV SAHAI ENDLAW

1. The petitioner, a candidate for recruitment as Airmen in Group 'X' and 'Y' category of the respondents Indian Air Force (IAF) and having been found unfit by the Medical Board as well as the Appeal Medical Board, on account of "Varicocele (Left)", has filed this petition, (i) for a direction to the respondents IAF to produce complete record of the case; (ii) seeking quashing of the findings dated 10th January, 2020 of the Medical Board and dated 5th February, 2020 of the Appeal Medical Board; (iii) seeking mandamus to the respondents IAF to conduct re-medical examination of the petitioner at any designated military hospital; and, (iv) seeking mandamus for selection of the petitioner as Airmen, if found medically fit.

2. The petition came up first before this Court on 23rd July, 2020, when it was the plea / contention of the plaintiff that, (i) the Appeal Medical Board did not even medically examine him; (ii) the decision of the Appeal Medical Board was not informed to him; (iii) he had undergone a surgical procedure between examination by the Medical Board and Appeal Medical Board, for correction of the 'Varicocele' but the impact thereof has not been assessed; (iv) even the Manual of Medical Examinations and Medical Boards (IAP 4303 of September 2010, 4th Edition), in Para 4.3.18 thereof states that slight degree of 'Varicocele' should be accepted; (v) no assessment of the degree of 'Varicocele' has been done; and, (vi) else, the petitioner is meritorious, having been placed at Serial No.86 in the merit list comprising of 4382 candidates.

3. In view of the aforesaid contentions, vide order dated 23rd July, 2020, the counsel for the respondents IAF, appearing on advance notice, was directed to produce before us the record of the Medical Board as well as of the Appeal Medical Board qua the petitioner, including the medical tests, if any, carried out and the degree of 'Varicocele' if any assessed, which the petitioner was found suffering from. The counsel for the respondents IAF was also directed to inform, whether the impact of surgery claimed to have been undertaken by the petitioner before being examined by the Appeal Medical Board was considered by the Appeal Medical Board.

4. In compliance of the above, the counsel for the respondents IAF has filed before this Court documents pertaining to the primary medical examination as well as appeal medical examination of the petitioner together with the letter dated 29th July, 2020 issued by the Medical Advisor, Medical

Wing, Central Airmen Selection Board and the relevant extract of the Manual of Medical Examinations and Medical Boards, IAP 4303, (4th Edition : September 2010).

5. The counsel for the petitioner, when first appeared before us today, stated that copies of the documents filed before us had not been supplied to him. The matter, on the request of the counsel for the petitioner, was passed over with direction to the counsel for the respondents IAF to supply all the said documents to the counsel for the petitioner. Though on passover, the counsel for the petitioner complained that the copy of the letter dated 29th July, 2020 of the Medical Advisor, Medical Wing, Central Airmen Selection Board had not been supplied to him but we verbally informed the contents to the counsel for the petitioner and have heard the counsels.

6. The counsel for the petitioner, at the outset has contended that the respondents IAF have not complied with the part of the earlier order dated 23rd July, 2020 requiring the respondents IAF to place before us the medical tests if any carried out and the degree of 'Varicocele' if any assessed. It is contended that in the documents produced, nowhere is the degree of 'Varicocele' from which the petitioner has been found to be suffering from, determined or recorded. It is argued that the petitioner has now learnt that the 'Medical Directive I' requires the respondents IAF to determine and state the degree of 'Varicocele' from which a candidate is found to be suffering.

7. However on enquiry, the counsel for the petitioner admits that the petitioner, in the petition has nowhere pleaded the 'Medical Directive I', to which reference is made and it is further stated that neither the counsel for

the petitioner nor the petitioner has seen any such 'Medical Directive I' and are stating so on the basis of what they have been told.

8. The counsel for the petitioner has next drawn our attention to page 19 of the documents filed by the respondents IAF, to contend that therefrom it is evident that the Appeal Medical Board had advised a "USG colour Doppler Inguinoscrotal region" test to be done on the petitioner but from page 16 of the documents aforesaid, it is evident that the test which was done was "USG No.1916 – CH(EC)" which is not the same as the test which was advised. Attention is next invited to the Outpatient Department (OPD) Record dated 5th June, 2020 of District Hospital, Agra, Annexure P-8 to the petition, with the opinion of General Surgeon, District Hospital, Agra "No Varicocele at present as a clinically and colour Doppler also shows that which was done on 04/06/2020". It is argued that there is thus a divergence of opinion, with the General Surgeon of District Hospital, Agra opining on 5th June, 2020 that the petitioner did not have any 'Varicocele' and the Medical Board and the Appeal Medical Board of the respondents IAF on 10th January, 2020 and 5th February, 2020 respectively, opining presence of 'Varicocele (Left)', with the Appeal Medical Board also reporting 'local inflammation'. It is contended that in view of the said divergence of opinion, a case for referring the petitioner for another medical opinion is made out.

9. Per contra, the counsel for the respondents IAF has drawn attention to page 24 of the documents filed by him, being the extract of the Manual of Medical Examinations and Medical Boards, IAP 4303, (4th Edition : September 2010) which, in Clause 4.3.6 provides as under:

“4.3.6 During abdominal examination note will be made of any hepatic or splenic enlargement. Look for hemorrhoids, condylomata, presence of hernia or undescended testis, hydrocele, bubonocoele, varicocele or any other swelling of the scrotum. These will be causes for rejection”

Attention is next drawn to paragraph 4(j) of the petition where the petitioner has pleaded on oath that he was not thoroughly tested by the Appeal Medical Board and was declared unfit based upon the previous medical record of the Medical Board, inspite of repeated requests of the petitioner, to carry out thorough medical checkup and that the respondents IAF did not pay heed to the same. It is argued that the documents filed by the respondents IAF, and which are not disputed by the counsel for the petitioner and rather on which the counsel for the petitioner has relied, show that the Appeal Medical Board conducted a thorough checkup of the petitioner including of ultrasonography (USG). It is argued that thus the petitioner got notice of this petition issued by indulging in falsehood. Attention in this context is also drawn to the application pleaded by the petitioner to have been preferred by him for Review Medical Board, filed as Annexure P-11 to the petition, and it is pointed out that the petitioner therein also has admitted that the specialist doctor of the Appeal Medical Board examined him and conveyed to the petitioner on 5th February, 2020 that the petitioner was unfit. It is argued that false pleadings in this respect also have been made in the petition. It is contended that had the petitioner pleaded the correct facts as are now admitted, there would have been no ambiguity for this Court to have entertained the petition. Attention is also drawn to the application for Review Medical Board, where the petitioner has admitted that though he was asked to collect the report of the Review Medical Board but

because of being devastated on being informed that he was unfit, did not go to collect the same. It is argued that on the contrary before this Court, it was argued on 23rd July, 2020 that the decision of the Appeal Medical Board was not informed to the petitioner.

10. The counsel for the respondents IAF has further argued that in none of the grounds taken in the petition has any challenge been made to the reports of the Medical Board or the Appeal Medical Board or any defect therein pleaded. Attention is drawn to page 18 of the documents filed by the respondents IAF containing the thumb mark of the petitioner against the proceedings of 5th February, 2020 before the Review Medical Board. The counsel for the respondents IAF has also invited our attention to Annexure P-7 to the petition, being the Certificate dated 26th January, 2020 of the Consultant Surgeon of J.K. Hospital, Agra consulted by the petitioner, to the effect that the petitioner was operated for 'Left Varicocele under Spinal Canal' on 16th January, 2020 and that 'he is fit to join his duty and has been cured completely after the operation'. It is contended that none of the documents of the hospitals otherwise consulted by the petitioner also state the degree of 'Varicocele' which the petitioner was suffering from. With respect to the judgments (i) dated 22nd February, 2019 in CWP No.21081/2016 (O&M) titled **Yogesh Vs. Union of India**; and, (ii) dated 22nd November, 2019 in CWP No.34117/2019 (O&M) titled **Sumit Vs. Union of India**, of the High Court of Punjab & Haryana, relied upon by the petitioner in the petition itself, it is contended that not only are the said judgments of a Single Judge but this Bench in judgment dated 15th July, 2020 in W.P.(C) No.3930/2020 titled **Preeti Yadav Vs. Union of India** and in judgment dated 29th July, 2020 in W.P.(C) No.3626/2020 titled **Nishant W.P.(C) No.4456/2020**

Kumar Vs. Union of India has held to the contrary and thus the judgments of the Single Judge Bench of the Punjab & Haryana High Court are of no avail. Lastly, attention is drawn to Clause 3.6.7 of Manual of Medical Examinations and Medical Boards, IAP 4303, (4th Edition : September 2010) as under:

“3.6.7. **Hydrocele or Varicocele.** These should be properly treated before fitness is considered. Minor degree of Varicocele should not entail rejection.”

to contend that the same also prescribes that ‘Varicocele’ has to be properly treated before fitness is considered and the Appeal Medical Board found the petitioner, inspite of surgery claimed to have been undertaken, to be even then suffering from ‘Varicocele (Left)’ and also having swelling in the scrotal region. It is contended that Manual of Medical Examinations and Medical Boards, IAP 4303, (4th Edition : September 2010) is advisory in nature and ultimately it is for the doctors of the respondents IAF, which the petitioner is to serve, who have to take a decision with respect to medical fitness, considering the nature of duties and the places at which such duties have to be performed, to be performed by the petitioner, once recruited.

11. The counsel for the petitioner has in rejoinder contended that the Appeal Medical Board has not considered the surgery undertaken by the petitioner and that the judgments of the High Court of Punjab & Haryana though of a Single Judge Bench, refer to a Division Bench judgment dated 24th October, 2016 of this Court in W.P.(C) No.9239/2016 titled ***Vikash Vs. Union of India.***

12. We have considered the rival contentions.

13. With the documents produced by the respondents IAF, the contentions of the petitioner as made on 23rd July, 2020 and as recorded in the order of that date, that the Appeal Medical Board did not even medically examine the petitioner, that the decision of the Appeal Medical Board was not informed to the petitioner and that the impact of the surgery claimed to have been undertaken by the petitioner was not assessed by the Appeal Medical Board, do not survive. Rather, it is indeed found that the petitioner, while approaching this Court did not represent the facts correctly and as also borne out from the documents which the respondents IAF have produced.

14. That leaves the contention of the counsel for the petitioner with respect to the degree of 'Varicocele'. The petitioner in this context relies on Clause 3.6.7 reproduced above as well as Clause 4.3.18 as under:

“4.3.18. Acceptance of candidates detected to have minor defence/disabilities are to be assessed in relation to their effect on function. Minor degrees of defects as under can be accepted.

(a) Slight degree of Varicocele.

(b) Minor degree of Knock-Knees, bow legs and hammer toes,
(Standard given in Section III Chapter 9 will apply)

(c) Any other minor defects, which in the opinion of the RMO will not interfere with the efficient performance of Air Force duties.”

of the Manual of Medical Examinations and Medical Boards, IAP 4303, (4th Edition : September 2010). The Medical Advisor of the Medical Wing of the Central Airmen Selection Board, in his letter dated 29th July, 2020, in this context has *inter alia* stated as under:

“AF NET:7240/7242

Medical Wing
Central Airmen Selection Board
Brar Square
Delhi Cantt.-110010

CASB/1001/1/Med

29 Jul 20

O IC Legal Cell

COURT CASE : WP(C) NO.4456/2020 FILED BY JONU TIWARI VS UOI & ORS BEFORE THE HON'BLE HIGH COURT OF DELHI AT NEW DELHI

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3. Further, if the petitioner has minor degree of Varicocele, specialist will mention the term clearly i.e. minor / slight. In the present case specialist has given opinion based on the report of ultrasonography which was conducted at Command hospital (EC), Kolkata and opined as **“Varicocele (Lt) present with local inflammation, USG scrotum No.1916 dated 03 Feb 20 shows Varicocele (Lt) Unfit for Varicocele (Lt)”** (copy annexed). Hence the opinion of specialist is Varicocele (Lt) with local inflammation and cause for rejection as per para 4.3.6 of IAP 4303 (IVth Edition) (copy annexed).

4. The candidate's claim of having undergone surgery for Varicocele (Lt) in civil hospital is not valid as the specialist at Command hospital (EC), Kolkata had opined him unfit on the basis of ultrasonography of scrotum. It may be noted that opinion given by specialist is based on medical condition of the candidate on that day and in accordance with medical standards and policies of recruitment medical examination. Further intimated that the opinion of the civil specialist can neither be taken into consideration nor can it be made binding for selection in the Armed Forces. The same is mentioned in “Certificate by Candidate Prior to Recruitment Medical Examination” signed by the petitioner (copy annexed).

5.

Sd/-
(J.S. Wagle)
Gp Capt
Medical Advisor”

15. We are satisfied with the aforesaid explanation, particularly because none of the medical prescriptions relied upon by the petitioner also mention the degree of 'Varicocele'. We may mention that none of the clauses of the Manual aforesaid relied upon by the petitioner also require the degree of 'Varicocele' to be determined or lays down upto what degree 'Varicocele' is to be treated as minor and acceptable and beyond which it is unacceptable. The Manual also uses the words 'minor' and 'slight' and requires the effect thereof to be assessed in relation to function. We can well envisage that what may be considered as 'minor' or 'slight' may have a major effect on the functions required to be performed. None of the private medical practitioners consulted by the petitioner, and on the basis of whose opinion the petitioner challenges the opinion of the doctors / specialist of the respondents IAF, were / are in a position to judge the effect of the 'Varicocele' on the function which the petitioner, once recruited, would be required to perform as an Airmen. It is the doctors of the respondents IAF only, who also deal with Airmen once recruited and are posted at the same places as the Airmen and are aware of the varied duties which the Airmen are required to perform, who by sheer experience and personal interaction with Airmen, can assess the effect of the disability on the functions required to be performed.

16. We have in ***Priti Yadav*** supra, in judgment dated 27th July, 2020 in W.P.(C) No.4558/2020 titled ***Sharvan Kumar Rai Vs. Union of India***, in ***Nishant Kumar*** supra and in judgment dated 22nd May, 2020 in W.P.(C) No.3237/2020 titled ***Dhiraj Milind Dhurve Vs. Union Public Service Commission***, *inter alia* held that (i) fitness for serving requisite duties in the Air Force is a matter of opinion and if in the opinion of the authorities constituted under the Rules of the Air Force the petitioner is unfit, a report of

a medical practitioner of another organization which does not intend to recruit the petitioner and which will not be affected by the medical unfitness of the petitioner, cannot be the basis for interfering with the assessment by the specialist of the Air Force; (ii) it cannot be lost sight of that just as in justice delivery system, appeal provisions are provided to eliminate the possibility of human error, so has the appeal remedy been made available in the matter of medical examination at the time of recruitment in Air Force and just like the decision making before the Courts cannot be indefinite, so can the decision making with respect to medical fitness in the Air Force, be not indefinite; (iii) there has to be a finality in decision making, as is there in the justice delivery system; (iv) it cannot be lost sight of, that no mala fides are attributed with respect to any of the medical examinations or with respect to the team of medical professionals conducting the medical examination; (v) it is the medical practitioners of the Defence Services who have themselves undergone the rigours of the training and discharge the functions of the organization, who are best suited to form an opinion as to the medical fitness of the candidates to be recruited and once they have so formed their opinion, there can be no interference therewith, at the mere asking of a rejected/disgruntled candidate; and, (vi) candidates found medically unfit cannot seek a change of the terms subject to which they have taken the examination and which terms uniformly apply to all candidates; only a few of all those found medically unfit, who approach the Court, cannot be permitted another round of medical test.

17. With a large number of such cases coming before this Court, all accompanied with opinions from private medical practitioners as well as from doctors of the government hospitals, contrary to the opinions of the Medical Boards / Appeal Medical Board / Review Medical Board of IAF, have also made us wonder, what weightage is to be given to the opinion of the doctor of the choice of the petitioner. We have been asking counsels, whether the government hospitals, when approached to opine on a matter on which the Medical Board / Appeal Medical Board / Review Medical Board of the IAF has opined to the contrary, constitute a Medical Board comprising of doctors selected by the hospital and the opinion of which Medical Board comprising of impartial doctors, can be given weightage. No definite answer has been given by any of the counsels. It appears that the candidates intending to challenge the opinion of the Medical Board / Appeal Medical Board / Review Medical Board of IAF, choose which doctor in the government hospital to approach. Such procedure, of the seeker of medical opinion choosing the doctor, does not inspire confidence, even if the doctor concerned is employed in a government hospital and renders opinion on printed stationary of the government hospital. Moreover as aforesaid, the said doctors are not aware of the rigours which the person whom they are certifying as fit, will have to perform / discharge.

18. The petitioner has failed to make out a case for us to entertain any doubt about the correctness of the findings of the Medical Board or the Appeal Medical Board of the respondents IAF or for reference of the petitioner for yet another medical opinion. The arguments raised today and as noted above are also without any basis and contrary to the pleadings on oath earlier made. The opinion of the General Surgeon of the District

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Hospital, Agra, chosen by the petitioner for seeking an opinion, is based on the report of a Doppler test shown by the petitioner to him and which report has not been filed by the petitioner. Rather, the Certificate dated 26th January, 2020 of J.K. Hospital, Agra indicates that the surgery if any was carried out at the said hospital and not at the District Hospital, Agra which appears to have been approached just before filing this petition and for the purposes of this petition, suspecting that the certificate of J.K. Hospital, Agra will not carry any weight, and which District Hospital, Agra did not carry out any tests of its own and appears to have given opinion on the basis of some report of Colour Doppler Ultrasonography shown by the petitioner.

19. Dismissed.

RAJIV SAHAI ENDLAW, J.

AUGUST 06, 2020
'gsr'..

ASHA MENON, J.