

(2022) 06 AFT CK 0008

Armed Forces Tribunal Principal Bench, New Delhi**Case No:** OA 1015 Of 2020 with MA 129 Of 2021

Nb Sub Hamendra Kumar

APPELLANT

Vs

Union of India & Ors

RESPONDENT

Date of Decision: June 3, 2022**Acts Referred:**

- Armed Forces Tribunal Act, 2007 - Section 14
- Territorial Army Rules, 1948 - Rule 13(5), 14, 14(b)(iii), 14(b)(iv), 14(c)

Hon'ble Judges: Rajendra Menon, Chairperson, (J); P.M. Hariz, Member (A)**Bench:** Division Bench**Advocate:** Pushpendra Kumar Dhaka, Avdhesh Kumar Singh**Final Decision:** Dismissed

Judgement

1. Invoking the jurisdiction of this Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007, applicant has filed this application and the reliefs claimed by him read as under:

A. Direction to the respondents to set aside the impugned order dated 21.07.2020 and

B. Direction to the respondent to allow the applicant to continue his service till the present term of engagement i.e. 30.11.2027 or till he reaches superannuation

service and / or rehabilitated.

C. The Applicant may be granted any other relief which this Hon'ble Tribunal deem appropriate, just and proper in the interest of justice and in the facts and circumstances of the case.

2. The applicant that he was enrolled in 153 Infantry Battalion (Territorial Army) DOGRA on 06.11.2001. It is his case that before his enrolment,

he underwent

thorough medical examination; he was found to be physically and mentally fit and it is only after analysing his medical fitness that he was enrolled as a Sepoy in

the Dogra Regiment and subsequently promoted to the rank of Naib Subedar (Nb Sub).

3. It is the case of the applicant that he was an excellent sportsperson and maintained his physical standard in SHAPE-I. However, while he was posted in a high altitude area (HAA)

in May, 2018, he was diagnosed with a disease i.e. Chronic Myeloid Leukaemia. He was subjected to Medical Board examination on 27.12.2018 and the applicant, a

38 years old JCO, was found to be suffering from the aforesaid ailment classified as CML-CP (May 18), initially found to have Leucocytosis with TLC-24000 PBS.

Annexure A-2 is a Medical Board certificate filed by the applicant wherein he was permanently classified as a Low Medical Category P-2 and entitled for

discharge and this categorisation was done with effect from 03.01.2019.

4. It is the case of the applicant that he has sincerely and with dedication completed his service; was awarded commendation certificate vide Annexure A-3; his treatment

continued in various hospitals but all of a sudden, on 25.04.2020, a Show Cause Notice (Annexure A-4) was issued to the applicant indicating that on

account of his medical categorisation and in view of the letter of the Director General Territorial Army Integrated Headquarters of MoD (Army) dated 24.04.2020, as the

applicant's disability is 'Neither Attributable to Nor Aggravated by service (NANA), and he has put in more than 10 years of service, applicant is to be discharged after having

undergone Release Medical Board (RMB). It was indicated that no sheltered appointment was available. Subsequently, he was discharged by

the impugned order and challenging the discharge order, this application has been filed.

5. Learned counsel appearing for the applicant invited our attention to the Territorial Army Act Rules, 1948 Part III Rule 14 pertaining to discharge and referring to clause (c) argued

that discharge, dismissal, removal and retirement of officers of the Territorial Army has to be in accordance with the corresponding rules applicable in the regular

Army and he argued that as a Nb Sub, the applicant was entitled to work upto the age of 54 years or completion of 26 years of service, whichever is earlier, and his discharge being

contrary to the rules, the same is unsustainable in law. Taking us through various documents, the ailment of the applicant, the order dated 06.02.2019 passed by this Tribunal in

O.A. No. 128 of 2018 [Ex Risaldar Harbans Singh Vs. Union of India & Ors.] and judgement rendered by the Hon'ble Supreme Court on 07.11.2008 in Civil Appeal No. 6587 of

2008 [Union of India (UOI) and Others Vs. Rcdpal Singh] it was argued that as the applicant has been discharged without subjecting him to Release Medical Board,

the discharge is unsustainable. Learned counsel submitted that in the facts and circumstances of the case, discharge be declared as illegal.

6. Respondents have filed a detailed counter affidavit and it is their contention that the applicant was placed in the LMC and his case is governed by the Army Order 460/73 filed as

Annexure R-1 and copy of the Govt. of India, MoD letter dated 05.05.2008 filed as Annexure R-2. Reference is made to Army Order, particularly clause 2(c) of Army Order 460/73,

which reads as under:

2. JCOs, ORs and NCs(E) of the Territorial Army belonging to units embodied for service will be disposed of as under on discharge from hospitals :-

xxx

xxx

(c) Category 13' and 'C' (Permanent) personnel will be sent to their respective units in the case of units located in a peace area. In the case of units/formations located in operational area,

Â individualsÂ Â willÂ beÂ sentÂ toÂ Â their affiliated Centre/Depot and treated as attached under TA Rule 13(5). Such personnel will be discharged from, the Territorial Army ""as services no

longer required"" under TA Rule 14(b)(iii) or 14(c), as the case may be: They will be given a 'show cause' notice before their discharge; The Unit/Centre will take immediate action to initiate their

cases for discharge by the competent authority and their discharge will be effected within one month from the date of receipt of medical Board proceedings, duly countersigned by the competent

medical authority, in the unit/Centre. Expeditious action will be taken at all levels to ensure finalisation of such cases with-, in the said time limit.

and the requirement of the Circular dated 05.05.2008, taking note of the ailment of the applicant, which was first diagnosed vide Medical Board Report (Annexure R-3) held on

20.07.2018, subsequently, Â clarified Â and Â ratified vide the Â opinion of the Specialist with regard to the classification of the ailment vide Medical Board's Report dated 20.07.2018

and finally in the final report of the Re-Categorisation Medical Board held on 03.01.2019, based on which the impugned action was taken, it is Â said Â that Â the applicant was found to

Â be Â suffering from 'Chronic Myeloid Leukaemia' (Chronic Phase) (C-91) and he was recommended for discharge by the Medical Board. Â Reference is also made to the report of

the Medical Board dated 27.12.2018 available at Page 70 based on which the Show Cause Notice was issued and there being no sheltered appointment available, it is said that the

applicant was discharged on medical grounds in accordance to the requirement of the Statute.

7. It is the case of the respondents that the applicant being in the permanent LMC, he has to be retained in service till completionÂ of 10Â yearsÂ of Â serviceÂ andÂ asÂ noÂ

sheltered appointment is available in the Territorial Army, action has been taken in accordance with the policies of the Territorial Army as contained in Annexure R-12 on 24.10.2008

and TA Rule 14(b)(iii) or 14(c), as the case may be, after due application of mind. Â According to the respondents, as the applicant is not a member Â of the Â regular Army, Â the

Â action Â taken being in accordance with law, no indulgence into the matter is called for.

8. In the matter of granting sheltered appointment to the applicant, and action taken in the case of the applicant, it was arguedÂ Â thatÂ Â afterÂ Â ShowÂ Â CauseÂ Â NoticeÂ

Â wasÂ Â issued,Â Â the applicant's case was taken up with the Territorial Army Group HQ Central Command and learned counsel further referred to theÂ communicationÂ of

Â theÂ DteÂ General,Â TerritorialÂ Army Integrated HQ MoD (Army) dated 21.07.2020 (Annexure R-7), where sanction was accorded for discharge under Rule 14 of the

Territorial Army Act Rules, 1948 and Govt. of India, MoD letter dated 05.05.2008.Â Â Subsequently, the Battalion took up the Â case Â with Â the Â Dogra Â Regiment Â with Â the

Â Records Â for providing old medical documents of the applicant and the case was referred to the Military Hospital, Meerut for conducting the Release Â Medical Â Board Â of

Junior Â Commissioned Â Officer Â on 24.07.2020 and thereafter the action has been taken.

9. It is the case of the respondents that the Battalion of the applicant is to move from peace area to Counter-Insurgency Operational Area; the applicant's medical condition does not

permit him to work in this area and as the entire unit is shifting to Counter-Insurgency Operational Area, the applicant, a person with permanent LMC, cannot be employed and as

sheltered Â appointment is Â also not available, Â the impugned action taken is sustainable.

10. Further Â it Â isÂ argued Â by Â theÂ respondents Â that Â the applicant Â being Â a Junior Â Commissioned Â Officer was given service on humanitarian grounds as the

Battalion HQ while being in a peace area, however, the Battalion HQ was embodied in Counter-Insurgency Operational Area (Field) in Udhampur (Jammu & Kashmir). Therefore, as

the provisions of Army Order 46/80 (AnnexureÂ Â R-11)Â Â pertainingÂ Â toÂ Â sheltered appointment are not applicable to Territorial Army personnel, it is argued that action has

been taken rightly in the matter.

11. We have heard the learned counsel for the parties and have perused the record. We find that the applicant was initially diagnosed with the disease 'Chronic Myeloid Leukaemia'

when he was subjected to medical examination initially on 20.07.2018. Even though prior to that, he was in SHAPE-1, when the applicant was subjected to clinical

assessment and when opinions of Specialist Medical Authorities were obtained after evaluating the history of the applicant, the diagnosis was confirmed as 'Chronic Myeloid Leukaemia'

and the applicant was found to be unfit for performing heavy duties and was finally categorised in LMC (P2) with effect from 03.01.2019 vide Medical Board

Report dated 03.01.2019. He was found to be a 'Chronic Myeloid Leukaemia' (Chronic Phase) case and this was the confirmation of the recommendations earlier made on

27.12.2018 wherein after due medical examination and opinion, discharge summary of the case was prepared by the Medical Board and in the advice given by the

Medical Board after medical examination in Part III of the Medical Board's Report available at Page 71, the final diagnosis and advice read as under:

Final Diagnosis: CHRONIC MYELOID LEUKEMIA-

CHRONIC PHASE

PART III

TREATMENT UNDERTAKING/ADVISED

(The summary of Medical treatment of surgery/procedure performed and medical advice given)

He was started on 1st line TKI Imatinib 400mg OD wef 31 May 2018

Advice :-

1. TFR to MH Meerut for HMB and further disposal
2. Recommended to be placed in Med Cat P2 (P)
3. Tab Imatinib 400 mg OD
4. Tab Folic Acid 5 mg OD

5. Unfit for HAA/ECC/FA/CI/Ops/BPET/PPt/PPG/ Night Duties/strenuous duties
6. Monthly review at nearest MH with CBC reports
7. Next BCR ABL on 30 May 2019 & review with this report on OPD basis at this centre.
12. The applicant was found to be 'unfit' by the Medical Board and in Part-IV, following recommendations were made:

PART -IV

RECOMMENDATIONS

Discussion: This 38 yrs old young serving JCO is a diagnosed case of CML-CP (May 2018), initially found to have Leukocytosis with TLC-24000 PBS showed Neutrophilic leukocytosis with shift to

left. On evaluation at CHWC (BMA & BM Bx, PBS, JAK2 mutation 8.5 RT PQR BCR ABL) diagnosed as a case of CML-CP and started on Tab Imatinib 400mg once daily w.e.f 31st May 2018. He

was tolerating Imatinib well and showed satisfactory response to TKI therapy & was placed in LMC P3 (T-24) w.e.f Jul 18. Now transferred from MH Meerut for Review and Recat.

Now, his BCR ABL is 0.15070 00 (IS). Patient is now asymptomatic & hemodynamically stable at present. However, he will need regular follow up. Recommended to be placed in Med cat P2 (P). Fit

for discharge.

Medical classification recommended:

(a) Medical Classification : Recommended to be placed in Med cat P2(P)

(b) Disability Profile : CHRONIC MYELOID LEUKEMIA- CHRONIC PHASE

Dated : 27 DEC 2018

Sd/-

(S K PRAMANIK)

Col

SR Adv (Medicine &

Clinical Hematology)

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13. It is based on this evaluation done which was further clarified and confirmed in the Medical Board proceedings (Recategorisation) done on 03.01.2019 as is available at Page 68 of

the Paper Book that the Show Cause Notice dated 25.04.2020 was issued to the applicant based on which the action has been taken.

14. As per the provisions of Army Order 460/73, Category 'B' and 'C' (Permanent) medical category personnel can be discharged under Clause 2(c) and further

as per the Govt. Policy dated 05.05.2008, persons who have sustained permanent medical disability will be discharged except when the disability is a result of

Battle Casualty, Training/Exercise or Operational Alerts; Field Firing/Battle Inoculation/Range accidents; Aid to civil authorities; Assistance in

natural calamity and Performance of bonafide military duty. As the case of the applicant did not fall in any of these categories and the Medical Board's report dated 20.07.2018

indicated that it was a case of NANA i.e. Neither attributable to Nor aggravated by military service, the action was taken to issue the Show Cause Notice and a perusal of the

provisions of Rule 14 (b)(iv) of the Territorial Army Act Rules, 1948 indicates that a person may be discharged on the ground of his being 'medically unfit for further service', action is

taken under this rule and the case of the applicant for grant of sheltered appointment was also evaluated and as no sheltered appointment was available, he was discharged on medical

grounds. Further, in the policy contained in Annexure R-12 dated 24.10.2008, issued by the Additional Director General, Territorial Army, General Staff Branch in Para

2, it has been clearly stipulated in clarification to Army Order 460/73 and Govt. Policy letter dated 05.05.2008 that a TA personnel who becomes LMC (Permanent) are to be discharged

from service is 'no longer required' under TA Rule 14(b)(iii) and under Para 3 of the Policy, it has been indicated that unlike regular Army, Territorial Army is a part time

concept.Â Â The strength of nucleus staff known as Permanent Staff is very limited, key Duty staff, permanent in nature, are taken from the Army for temporary duration of 3 to 5

years and as per the provisions of Army Order 46/80, the provisions of sheltered Â appointment Â are Â not Â applicable Â to Â TA Â personnel looking to the peculiar nature of the

service rendered in the Territorial Army.

15. Taking note of all these factors, we are of the considered view that if the applicant was found to be medically unfit for being retained in service and if sheltered appointment was not

available to him, interference into the matter is not called for.

16. As far as the contention of the applicant that no Re-survey Medical Board was done before his discharge as is required under the provisions of Army Act, 1950 and Army Rules,

1954 is concerned, we are of the considered view that neither this plea has been raised in the petition nor is anything brought to our notice as to under what provisions, a Re-survey

Medical Board becomes necessary in the case of the personnel of the Territorial Army.Â Â However, in case of the applicant, a perusal of the medical documents goes to show that

initially in the year 2018, he was subjected to Medical Board when he was found to be in the LMC and unfit for service.Â Â This was on 27.12.2018 and thereafter, his case was again

reviewed and on 03.01.2019, Â he Â was Â subjected Â to Â Re-categorisation Â Medical Board proceedings in accordance to the requirement of the policy of the Territorial Army

and when he was found to be suffering Â from Â 'Chronic Â Myeloid Â Leukaemia', Â he was Â again recommended for discharge. Â The Competent Authority perused on

08.01.2019Â theÂ medicalÂ BoardÂ reportÂ of 03.01.2019, approved it and it is only after this approval and referring the matter to the Headquarters, the record office and

conducting various Â other procedures that the Â Show Cause Notice was issued on 25.04.2020 and the action taken.

17. ThatÂ beingÂ so,Â the Â judgmentsÂ reliedÂ uponÂ by Â the applicant which pertain to members of the regular Army which are governed by specific rules and regulations

applicable to the Army and when the service conditions and the rules applicable to a personnel of Territorial Army, a temporary organisation, is entirely different, we cannot apply the

judgments relied upon ipso facto and grant relief to the applicant. This is a case where the applicant is a JCO in the Territorial Army, he has been found to be medically unfit to

be retained in service; the Respondents have evaluated his case in the backdrop of rules and policies applicable and finally no provision for grant of sheltered appointment and

no scope available for retaining the applicant in service on account of shifting of unit to a Counter-Insurgency Operational Area, where the applicant cannot be shifted, the impugned

action has been taken The impugned action having been taken on administrative consideration and on evaluation of various factual aspects relevant to the issue in question, we, in

exercise of our limited jurisdiction of judicial review in the facts and circumstances of the case, do not find any ground to interfere into the matter.

18. Accordingly, as no case made out for interference into the matter, we dismiss the OA. As such, pending MA(s), if any, also stands closed.

19. There is no order as to costs.

Pronounced in open Court on this 3rd June, 2022.