**SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com**

**Sanjay Kumar Sharma Vs. Union of India (Uoi) and ors.**

**Sanjay Kumar Sharma Vs. Union of India (Uoi) and ors.**

**SooperKanoon Citation** : sooperkanoon.com/899116

**Court** : Jammu and Kashmir

**Decided On :** Mar-24-2005

**Reported in** : 2005(2)JKJ375

**Judge** : S.K. Gupta, J.

**Acts** : Jammu and Kashmir Constitution (Act) - Section 103; ;Constitution of India - Article 226; ;Medical Board Rules; ;Army Pension Regulations, 1961 - Regulations 53, 173 and 189

**Appeal No.** : SWP No. 2028/2k

**Appellant** : Sanjay Kumar Sharma

**Respondent** : Union of India (Uoi) and ors.

**Advocate for Def.** : Neeru Goswami, Addl. CGSC

**Advocate for Pet/Ap.** : J.S. Kotwal, Sr. Adv. and; F.S. Bhat, Adv.

**Disposition** : Petition dismissed

**Judgement** :

**S.K. Gupta, J.**

1. This petition pertains to the claim of disability pension preferred by the petitioner who happened to be a Sapper (SPR) of Indian Army and had been discharged

from Service on the ground of medical disability.

2. The petitioner came to be enrolled in the Indian Army on 28.2.1990 and was invalided from service on account of 'Insulin Dependent Diabetes Mellitus (250)' in medical category 'E.E.E' after being in service for 03 years, 05 months and 24 days in the Army. The invaliding Medical Board was held at 155 Base Hospital on 22-7-1993 and his disability was assessed at 100%. In the opinion of the Medical Board, the disease was not connected with the service, but due to metabolic defect of hereditary nature. The petitioner claims disability pension and his record was forwarded to CCDA(P) Allahabad, vide letter No. 1580946/5/D/Pen dated 12th Oct. 1993, being the final authority for adjudication. The petitioner's claim for disability pension was, however, rejected by the CCDA(P) Allahabad on 16.4.1997 on the ground that the invaliding disease was neither attributable to nor aggravated by Army service which also stood communicated to the petitioner. However, an amount of Rs. 3448/- on account of invalid gratuity through money order was remitted on 13.8.1997.

3. Aggrieved by the order of CCDA(P) Allahabad, in rejecting the claim of disability pension, the petitioner preferred an appeal before the competent authority against the said rejection. The appeal was, however, forwarded to CCDP(A) Allahabad vide, letter dated 31st July, 1997 for onward submission to Ministry of Defence, Government of India. On perusal of service/medical documents, the authority found that the disease is due to metabolic defect of hereditary nature and the medical authority being of the opinion that it is neither attributable to nor aggravated by the duties of Military service and, thus, he is not entitled to disability pension under Rules, and did not accede to the request of the petitioner and rejected the appeal which was communicated to the petitioner on 1.5.2000 which led him to prefer this petition, seeking a direction to the respondents to sanction and release the disability pension effective from the date he was invalided out of the Army service and further grant a constant attendance allowance of Rs. 300/- P.M in terms of Regulation 189 of Army Pension Regulations 1961 Part I, by issuance of writ of mandamus, in exercise of extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India read with Section 103 of the Constitution of Jammu and Kashmir.

4. Respondents were put to notice and have filed a detailed counter. The respondents admitted that the petitioner was invalided out of service on medical ground with 100% disability in the category of 'E.E.E' who has been suffering from 'Insulin Dependent Diabetes Mellitus (250)'. It is further stated that the report of the Medical Board with regard to invaliding disease was accordingly communicated to the petitioner. The respondents further submitted that the petitioner was, however, not found eligible for service pension/disability pension, but still an amount of Rs. 75,000/- by way of disability cover and Rs. 3355/- as maturity benefits of Army Group Insurance Fund vide cheque No. 0884533 dated 10 Oct. 1993 and cheque No. 083640 dated 07 Oct. 1993 drawn on Syndicate Bank have been paid. Besides, the petitioner was also paid an amount of Rs. 3448/- towards invalid gratuity on 13.8.1997 through Money Order. The disability claim of the petitioner was also submitted to CCDA(P) Allahabad, but the same stood rejected and its decision was also communicated to the petitioner. The petitioner also did not succeed in appeal and his request for disability pension was also rejected by the Ministry of Defence, Government of India. Since the invaliding disease which the petitioner has been suffering is neither attributable to nor aggravated by the duties of the Army service, the petitioner is not eligible for disability pension under Rules in the opinion of the invaliding Medical Board.

5. I have heard the learned counsel appearing for the respective parties and considered the rival contentions meticulously.

6. It is not in dispute that the Medical Board has assessed the disability of the petitioner at 100% and has also opined that the disease is not in any way connected with the service, but due to metabolic defect of hereditary nature. Based on the opinion of the medical board, CCDA (P) Allahabad, which is the final authority to adjudicate upon the disability pension, declined the claim of the petitioner, to whom it was referred for decision. The entitlement of disability pension is governed by the provision of the Army Pension Regulation 173 which reads as under:-

'173. Unless otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an individual who is

invalided out of service on account of a disability which is attributable to or aggravated by military service is non-battle casualty and is assessed at 20 per cent or over.

The question whether a disability is attributable to or aggravated by military service shall be determined under the rule in Appendix II.'

7. However, reference may be made to appendix-II under the caption 'DISEASES' which concerns manner of determination of medical disability which reads as under:-

'14. In respect of diseases, the following rule will be observed:-

(a) Cases in which it is established that conditions of Military Service did not determine or contribute to the onset of the disease but influenced the subsequent courses of the disease but influenced the subsequent courses of the disease, will fall for acceptance on the basis of aggravation.

(b) A disease which has led to an individual's discharge or death will ordinarily be deemed to have arisen in service, if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to acceptance for service, the disease will not be deemed to have arisen during service.'

8. Mr. J.S. Kotwal, senior counsel appearing for the petitioner, vehemently urged that the petitioner's disability has been assessed by the Medical Board at 155 Base Hospital C/O 99 APO at 100% and placed him in category of 'E.E.E'. According to him, the petitioner never had the ailment at the time of his entry into service as no such note is recorded in the record at the time of his entry into service. His further submission is that the petitioner has been posted in remote and border areas of China and has to take rich diet on account of climatic compulsions and, thus, suffered the disease due to metabolic defect of hereditary nature. He has also stated that the petitioner has no hereditary disease nor to any member of the family suffered from such a disease. This disease came to be

detected for the first time after rendering his Army service of 03 years, 05 months and 24 days. Thus, the ailment having been attributed due to Military service, he is entitled to claim disability pension and his case is fully covered under Regulation 173.

9. A plenary reading of the aforesaid provisions of the Regulation-173 read with appendix-II under the caption 'DISEASES' (a & b) pertaining to the manner in which the medical disability is to be determined as to whether disease is to be attributable to or aggravated by the Army service, reveals that the cause of disability, which led to a person's discharge, will ordinarily be deemed to have arisen in service, if no note of it was made at the time of his entry into the armed forces that he was suffering from such disability or unless a note is recorded at a subsequent date that the disease in question was such as could not have been detected by the medical examination before he was enrolled in the Army service. The respondents in their reply have no where stated that a note was recorded at the time of petitioner's entry into service to the effect that he has been suffering from such disability. It is also not borne out from the opinion of the Medical Board in its report that the disease in question was such as could not be detected during his medical examination at the time of petitioner's entry into service. The contention of the learned counsel for the petitioner manifestly does not appear to be tenable. The opinion recorded by the Medical Board reads as under;

'Not connected with Service and is due to metabolic defect of hereditary nature.'

10. The medical board in its opinion has recorded with an unerring clarity that the ailment is due to a metabolic defect of hereditary nature and the same is not connected with the service. This shows that this is constitutional in nature and, thus, same could not be detected during medical examination of the petitioner prior to his enrolment in the Army. It is, thus, manifestly neither attributable to or aggravated by Military service, but constitutional being metabolic defect of hereditary nature. Such being the case, the disability of the petitioner though assessed at 100% cannot be said to be covered by Regulation 173 as the requirement of the said provision had not been fulfilled. The appellant did not challenge the invaliding report of the Medical Board on the basis of which he has

been discharged from service.

11. For grant of disability pension, the prerequisite condition is that such disability must either be attributable to or aggravated by Military service clearly, therefore, the opinion of the Medical Board rules out the applicability of Regulation 173 read with appendix-II under the caption 'DISEASES' (a & b). The Medical Board found that disease from which the petitioner was suffering was not attributable to or aggravated by the Military service and was due to metabolic defect of hereditary nature. This being a constitutional disease could not be detected on medical examination at the time of entry of the petitioner into Military service. In view of the opinion of the Medical Board, the petitioner, in my considered opinion, can derive no benefit from Regulation 173 of the Army Pension Regulation.

12. It was also contended by Mr Kotwal, learned Senior counsel appearing for the petitioner, that in view of a clear provision of Regulation 189, the petitioner is entitled to get constant attendance medical allowance in view of 100% disability assessed by the Medical Board. In order to appreciate the submission of Mr. Kotwal, the Regulation 189, for facility of reference is reproduced, as under:-

'189. A constant attendance allowance at the rate of Rs. 300/- p.m. may be granted to an individual who is awarded a disability pension as for 100 percent disablement, if in the opinion of the invaliding or a resurvey medical board he needs the services of a constant attendant for atleast a period of three months, and the necessity arises solely from the condition of the accepted disability or disabilities.'

13. A plain reading of this provision shows that benefit can be derived under this provision only, if the medical board has recommended the case of a person for constant attendant medical allowance. On going through the report of the medical board, it is no where found that in the opinion of the board, the petitioner needed service of a constant attendant. The contention for grant of such allowance having not been fulfilled, the petitioner cannot be said to be entitled to claim constant attendant allowance under Regulation 189 of Army Pension Regulations. This contention of the petitioner is also, therefore, being devoid of any legal force and the same cannot be accepted.

14. Mr. Kotwal, to buttress his argument, has relied upon the judgment in case reported as Union of India and Ors. v. Bodhan Lal Yadav, 1994 (1) SCT 369, where the claim of medical disability was allowed. There is no dispute with regard to the principle laid-down in the aforesaid judgment, but it is not applicable to the facts of this case, being distinguishable.

15. In case Union of India and Ors. v. Dhir Singh Chhina, Colonel (Retd), (Mil LJ 2003 SC 1), the Apex Court, while dealing with the grant of disability pension, held as under:-

'...The diseases from which he was suffering were not found to be attributable to or aggravated by military service, and were in the nature of constitutional diseases. Such being the opinion of the Medical Board, in our view the respondent can derive no benefit from Regulation 53. The opinion of the Medical Board has not been assailed in this proceeding and therefore, must be accepted.'

16. On the overall conspectus of the aforesaid discussion, there is no valid reason in my considered opinion to grant the relief prayed for. Petition fails and is, accordingly, dismissed.

**SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com**