

'Neurostimulator Neither Treatment Nor Cure': Kerala High Court Declares Teenager With 40% Disability Eligible For PwD Quota In KEAM Courses

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

V.G. ARUN; J.

WP(C) NO. 36743 OF 2022; 21 November, 2022

ASWIN KRISHNA PRASAD versus STATE OF KERALA

Petitioner/s by Advs. D. Kishore, Meera Gopinath, R. Muraleekrishnan (Malakkara)

Respondent/s by Advs. Advocate General Office Kerala, P.G. Pramod, Amminikutty K. (Government Pleaders)

J U D G M E N T

The petitioner, a boy aged 19 years, is suffering from primary generalised dystonia and has been assessed to be having 40% permanent disability. Dystonia is a movement disorder that causes the muscles to contract involuntarily. This can cause repetitive twisting movements. Generalised dystonia occurs when the movement disorder is not limited to a single part of the body, but affects multiple muscle groups. As the petitioner was having moderately severe disability from primary generalised dystonia in spite of optimal medical treatment, he was advised bilateral Globus Pallidus Internus Deep Brain Stimulation. Accordingly, the petitioner underwent a surgery on 29.07.2016 and a pulsegenerator (Neurostimulator) was implanted in the subcutaneous plane over the chest wall. The neurostimulator generates and delivers electrical impulses into an area of the brain called Globus Pallidus in a precisely programmed manner resulting in relief to dystonia symptoms.

2. The petitioner has applied for the common admission to professional degree courses through KEAM-2022 and secured rank No.33975. The petitioner has chosen Veterinary as his optional course. Being a person with benchmark disability of 40%, the petitioner is claiming reservation meant for persons with disability under Clause 5.3 of Ext.P4 prospectus for admission to professional degree courses-2022. As stipulated in Clause 5.3, the petitioner appeared before the Medical Board at Government Medical College, Kottayam and was assessed with disability of 40% and found eligible for PwD quota. In the State Level Committee meeting held thereafter, the petitioner's medical report was examined and the committee found the petitioner to be not suitable for studying medical and medical allied courses. As a result, the petitioner's name was not included in the provisional list of PwD candidates published on 12.10.2022. Aggrieved by the non-inclusion, the petitioner preferred a complaint before the State Medical Board. Based on the complaint, the petitioner was directed to appear before the State Medical Board at the Directorate of Medical Education, Thiruvananthapuram on 15.10.2022. The State Medical Board found the petitioner suitable for all courses except fisheries, but not eligible for PwD quota. This is for the reason that the petitioner was found to be having zero percentage disability with the neurostimulator.

3. Thereupon, the petitioner preferred a complaint before the State Commissioner for Persons with Disabilities. In Ext.P6 order, the Commissioner has found that, as the petitioner is issued with disability certificate under Section 58(2) of the Rights of Persons with Disabilities Act, 2016, the certificate is valid across the country under Section 58(3) of the Act and the second certification or review of the disability certificate is illegal and unwarranted. The Commissioner has also held that the suitability test conducted by the State Medical Board is sustainable in view of the

provisions in the prospectus. The Commissioner finally directed the Director of Medical Education to obtain a considered opinion from the Professor and the Head of the Department of Neurology, Government Medical College, Thiruvananthapuram as to whether dystonia would come within the purview of chronic neurological condition.

4. Based on the direction in Ext.P6, the petitioner was examined by the Head of the Department of Neurology. According to the petitioner, during the course of such examination, he was instructed to switch off the neurostimulator. This was strongly objected to by the petitioner and his mother, pointing out that the direction goes against the specific instruction in Ext.P2 certificate issued from the Sree Chithira Thirunal Institute for Medical Sciences and Technology (SCTIMST), where the implant was done. Therefore, the petitioner and his mother rushed to the institute and obtained Ext.P7 medical certificate, wherein the Professor of Neurology, SCTIMST has strongly discouraged switching off the stimulator, as such action is scientifically and ethically wrong and could result in severe disability or even be lifethreatening.

5. According to the petitioner, in spite of earnest attempts, the petitioner was not able to meet the Professor and Head of Neurology, Medical College Thiruvananthapuram, so as to hand over Ext.P7. Aggrieved by the denial of reservation benefit, the petitioner has approached this Court seeking the following reliefs;

a. Declare that the denial of benefit of reservation available to the Persons with Disability to the petitioner provided as per Section 32 of the Rights of Persons with Disabilities Act, 2016 as well as under Clauses 4.1.3 and 5.3 of Exhibit P4 prospectus for the admission to Profession Degree Courses as per KEAM 2022 is illegal.

b. Declare that the petitioner is eligible to be included in the 5% quota reserved for Persons with Disabilities for admission to the Bachelor of Veterinary Science Course or any other Course of KEAM 2022 to which he is eligible as the petitioner is having 40% permanent disability of Primary Generalized Dystonia as evident from Exhibits P1, P2, P3 and P7.

c. issue a writ of mandamus or any other appropriate writ, direction or order directing the respondents to grant the benefit of reservation under the category of reservation for Persons with Disabilities to the petitioner for the Bachelor of Veterinary Science Course or any other Courses referred to in Exhibit P4 KEAM Prospectus, 2022 so as to enable him to secure admission in the quota reserved for Persons with Disability, if otherwise eligible.

d. To dispense with the filing of English translation of vernacular documents produced along with the Writ Petition."

6. Adv.D.Kishore, learned Counsel for the petitioner submitted that the respondents have committed gross illegality by denying eligible benefit to the petitioner. Reference is made to the definition of 'Persons with Benchmark Disability' in Section 2(r) of the Act and Section 32 providing for reservation in higher educational institutions for Persons with Benchmark Disability. It is submitted that Ext.P3 disability certificate shows that the petitioner is having 40% permanent disability and as part of the admission process, the Medical Board had found the petitioner to be suitable for admission under the PwD quota. As such, the petitioner's eligibility and suitability stands proved and the State Level Committee or the State Medical Board had absolutely no reason to come to a different conclusion. It is submitted that the finding of the State Level Committee and Medical Board is based on a patently wrong reasoning that with the neurostimulator implanted, the petitioner is having no disability. Learned Counsel submitted that such reasoning is akin to finding a person whose leg

is amputated to be having no disability while using an artificial limb. It is contended that such skewed reasoning will defeat the very purpose of the Act.

7. Adv.Pramod P.G, learned Government Pleader, contended that the decisions of the State Level Board and State Level Committee are taken in terms of Clause 5.3 of the prospectus. Clause 5.3 makes it clear that the State Medical Board will examine the degree of physical disability of candidates who are provisionally included in the PwD category. The State Board is also conferred with the power to review the certificate issued by the District Medical Board. The State Level Committee constituted by the Government under the Chairmanship of the Commissioner for Entrance Examination will take a final decision on the eligibility of a candidate for PwD quota and the suitability of the candidate to study a particular course applied by him/her. Only those candidates who are having minimum 40% of any disability and are found to be physically suitable by the committee for the courses opted by the candidates will be chosen, as only the physically fit can undergo the rigors of a professional course. Thus, selection of candidates under the PwD category is based on their merit in the Entrance Examination and physical suitability and not on the basis of the degree in disability.

8. It is submitted that on assessing the petitioner's suitability, the State Medical Board found that, with the neurostimulator implanted, the petitioner is having no dystonia, bradykinesia, dysarthria, weakness and disability. The said conclusion was arrived at, following Section A 1.1.(a) of the Guidelines for assessing specific locomotor disability, which stipulates that the estimation and measurement shall be made when the clinical condition has reached the stage of maximum improvement with medical treatment. The State Medical Board found that with the treatment being provided by implanting the neurostimulator, the petitioner is having zero disability. Finally, it is contended that this Court is not expected to sit in judgment over the opinion of the expert body.

9. The Rights of Persons with Disabilities Act, 2016 was introduced pursuant to the United Nations General Convention on the Rights of Persons with Disabilities, to which India is also a signatory. Amongst other things, the UN convention envisages non-discrimination and full and effective participation of persons with disabilities. Article 41 of the Constitution of India also requires the State to make effective provisions to secure the right to education in cases of disablement. Section 32 of the Act requires all Government institutions of higher education and higher education institutions receiving aid from the Government to reserve not less than 5% seats for persons with benchmark disabilities. 'Persons with Disabilities' is defined by Section 2(s), as a person with long term, physical, mental, intellectual or sensory impairment, which, in interaction with barriers, hinders his full and effective participation in society equally with others. The definition of 'persons with benchmark disability' at Section 2(r) means a person with not less than forty per cent, of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority.

10. As per Ext.P3, the petitioner has been certified as a person suffering from 40 % permanent disability. Therefore, the petitioner falls within the definition of 'persons with benchmark disability', thereby making him eligible for reservation under Section 32. As per Clause 5.3 of the prospectus, 5% of the seats available to the State for allotment from the State rank list are reserved for candidates with benchmark

disabilities. As contended by the learned Government Pleader, not only the eligibility of a candidate, but his suitability to study a particular course is to be assessed. As far as the petitioner is concerned, he was found eligible and suitable by the Medical Board. The State Medical Board and State Level Committee have held the petitioner to be ineligible by finding to be having no disability with the neurostimulator. In order to find the petitioner to be having no disability with the stimulator, the respondents have relied on Section A 1.1(a) of the guidelines for assessing specific locomotor disabilities under the Act. As per that Clause, the estimation and measurement of a person with disability shall be made when the clinical condition has reached the stage of maximum improvement with medical treatment. The question therefore whether the implant of a neurostimulator can be equated to medical treatment or whether it is only a therapy. There is essential difference between the terms 'treatment and 'therapy'. While treatment is used in the sense of cure, 'therapy' is used in the sense of rehabilitation. Ext.P2 medical certificate shows that the neurostimulator implanted surgically delivers electrical impulses into the Globus Pallidus Internus Deep Brain area of the petitioner's brain in a precisely programmed manner resulting in relief of dystonia symptoms. It is hence evident that the neurostimulator provides only relief of the symptoms and is neither a treatment nor a cure. In Ext.P7 medical certificate, it is clearly stated that the disability is only temporarily relieved by the therapy and the underlined disease is persisting and has no cure with any of the treatment options available currently. In Ext.P7, a comparison is also drawn in the following manner;

“Control of symptoms achieved by DBS can be compared to the relief provided by a hearingaid to a person with severely defective hearing - the basic disease is not cured or controlled by the therapy; only the symptoms are relieved to help the patient perform his activities / routines.”

11. As such, the guidelines relied on by the respondents have no application in the petitioner's case, the deep brain stimulation provided through the neurostimulator being a therapy and not a treatment. The petitioner continues to be a person with 40% disability, who being provided relief by implanting the stimulator. Any other interpretation will be against the objective of the Act, intended to provide full and effective participation and inclusion in society of persons with disabilities.

In the result, the writ petition is allowed and the petitioner is declared to be eligible to be included in the 5% quota reserved for admission to persons with disabilities in KEAM2022. Consequently, the Commissioner for Entrance Examinations is directed to include the petitioner's name in the provisional list of PwD candidates.