FROM NO. 21

(SEE RULE 102(1))

ARMED FORCES TRIBUNAL, KOLKATA BENCH

APPLICATION NO: T. A NO. 43 OF 2011

ON THIS 12th DAY OF SEPTEMBER, 2014

CORAM HON'BLE JUSTICE RAGHUNATH RAY, MEMBER (JUDICIAL)

HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

Sunil Prasad Singh,
Son of Shri Ram Pravesh Singh,
Resident of Village Baruari,
P.O. Baruari,
District - Muzaffarpur (Bihar).

……Applicant

-VS-

1. Union of India through
The Defence Secretary, Raksha Bhawan,
South Block, New Delhi.

2. The Chief of Army Staff,
Army Headquarter,
South Block, DHQ P.O.
New Delhi- 110011.

3. Dy. Director,
Additional Dte. General of Personnel Services – 4 (Imp – II),
Adjutant General Branch, Army Head Quarters,
D H Q P.O.,
New Delhi – 110011.

4. The Officer-in-Charge/Records Officer,
Artillery Records,
Nasik Road Camp, Nasik,
Pin – 422 101.

5. The Chief Controller, CDA (Pension),
P.O. Allahabad, Uttar Pradesh.

…. …. Respondents.

For the Applicant: Mr. B P Subba, Advocate.

For the Respondents: Mr. Sandip Kumar Bhattacharyya, Advocate.

O R D E R

PER HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

This application was originally filed in the Hon'ble Patna High Court as writ petition No. CWJC No. 5278 of 2007 which was later, vide judicial order dated 07.03.2011 passed by the Hon'ble Single Judge of the Patna High Court, transferred to this Tribunal under operation of Sec. 34 of the Armed Forces Tribunal Act, 2007 and renumbered as TA No. 43 of 2011 and admitted for hearing.

2. The brief facts of the case are that the applicant was enrolled in the Indian Army in the Regiment of Artillery on 23.03.1984. Through the span of routine service he received his due promotions and reached to the rank of Havildar. After rendering more than 21 years of service, he was discharged from service with effect from 31.07.2005 being placed in low medical category E-2 (Permanent). He was placed in low medical category (LMC), E-2 with effect from 15.09.2004 due to disability of "cataract both eyes OPTD H-26". As per Govt. of India, Ministry of Defence Policy letter dt. 3rd September, 1998, the term of service of Havildar is actually 24 years' colour service extendable by two years by way of screening or 49 years of age whichever is earlier. The authorities, however, decided in 2005 while the applicant had just about 21 years of service that his further retention in service in LMC (E-2) was not necessary in terms of Army

Order 46/80. Prior to his discharge from service, he was brought before a Release Medical Board held at 167 Military Hospital on 05.04.2005 to assess the cause, nature and degree of disablement. The said Medical Board opined his disability as 'neither attributable to nor aggravated by military service' and also not connected with service. The degree of disablement was assessed at 15-19% for life. He was thus discharged from Military Service before completion of his service tenure on medical ground in low medical category on the authority of AO 46/1980. The applicant was sanctioned his entitled service pension and all other retirement benefits as would be applicable on completion of 21 years of service; but he was not granted any disability pension for which he is aggrieved.

3. The disability pension claim of the applicant was forwarded by the Artillery Records on 05.10.2005 to the PCDA (P), Allahabad, who rejected such claim vide their letter dated 03.02.2006 on the ground that the disability was neither attributable to nor aggravated by the military service and also assessed the degree of disablement was less than 20%. The fact was communicated to the applicant by the Artillery Records vide their letter dated 10.03.2006 (Annexure -1).

4. Aggrieved by such rejection of his disability pension claim, the applicant preferred an appeal on 22.06.2006 (Annexure-2) to the Additional Director General of Personnel Services {PS-4(D}, Adjutant General's Branch for consideration. Such appeal was examined by the Appellate Committee on First Appeals (ACFA) and rejected vide letter dated 14.03.2007 on the same ground i.e. the invalidating disability 'cataract both eye OPTD' was neither attributable to nor aggravated by military service.

5. Mr. Subba, learned counsel appearing for the applicant submits that the on-set of cataract, for which the applicant was discharged was attributable to and aggravated by military service and the applicant should not have been discharged from service for that as he was otherwise fit for retention in service in any alternative trade. Moreover, his vision and other parameters of eye were normal after he was operated for cataract. There is nothing to prove in the enrolment papers that the applicant had any cataract at the time of his enrolment; he obviously developed this disease at a very young age because of his exposure to snow and other difficult areas of field service that was a part of exigency of military service. The applicant has none in his family with such disease for any one to opine that it was hereditary. Since the said disability developed during the service life of the applicant, it should be construed to justify such disability as attributable to or aggravated by military service unless it is otherwise proved by the respondents.

6. The second point urged by Mr. Subba is that although Release Medical Board has opined that the cataract was neither attributable to nor aggravated by military service, the Eye Specialist's opinion in the medical board proceedings does not specifically says so. There is no expert opinion or explanation by an ophthalmologist (eye specialist) to specifically support the opinion of the release medical board with regards to the fact whether there was any possibility of developing cataract or contributing to its early onset on account of his service in J&K in field and snow bound area. Mr. Subba is of the view that the release medical board opinion was arbitrary and they have failed to give benefit of doubt to the applicant whose service span was curtailed and he was boarded out of service prematurely. The applicant could have served at least up to 24 years of service, but he was thrown out after 21 years and five months of service

just because he was in E-2 medical category that had practically no employability restrictions. Despite his service being curtailed, as emphasised by Mr. Subba, the respondent authorities call it as 'discharge' and not 'invalidment'. Strangely, therefore, he got no benefit of being invalidated out of service. Therefore, Mr. Subba feels that the applicant's discharge should be treated as discharge on invalidment and not a normal discharge. That besides the benefit of doubt should go in favour of the applicant and he should be allowed disability pension.

7. As regards the percentage of disability, Mr. Subba submits that the invalid pension should be rounded off in accordance with the relevant rules of the Army on the subject.

8. Mr. Sandip Kumar Bhattacharyya, learned counsel appearing for the respondents largely relied on the averments made in his affidavit in opposition. He further submits that there is no curtailment of service in this case. The RMB opined that the disease was neither attributable to nor aggravated by military service and therefore, the respondents cannot change the opinion of the RMB and must follow the opinion of the RMB. His discharge was recommended for being in the Low Medical Category E-2 by the RMB; and since the Medical Board is an expert body, due weight, value and credence should be given to its medical opinion. It is not open to the Tribunal to interfere with the medical opinion of the Board.

9. Mr. Bhattacharyya further submits that the applicant has duly been paid full commutation value of his pension and as such he should not claim any disability pension.

10. We have heard the rival submissions from both sides. As is seen from the stated facts, the applicant was enrolled on 23rd Mar 1984 and was discharged from service on 31 July 05 for being in low medical category E-2, under rule 13(3) (III) (v) of Army Rules. His further retention

was not considered necessary as per Army Order 46/80 read in conjunction with Army Rule 13(2A). Thus, he was not provided any sheltered appointment, even though he could have served for a further period as per his entitlement.

11. There are two issues that need to be analysed before we arrive at any conclusions. They are:-

(a) Is this a case of normal discharge, as made out by the respondent authorities, or is it to be treated as a case of 'Invalidment' as submitted by the applicant? and

(b) Is the disability attributable to or aggravated by military service?

12. Let us analyse the first issue now. The issue is no longer res integra. An adjudication upon the type of discharge, "invalidment' or 'routine', would result in entitlement or otherwise of consequential benefits. In **Rajpal Singh. 2009(1) SCC 216**, identical question was considered. There, Rajpal Singh, a JCO was declared in low medical category and was discharged from service on the recommendation of a release medical board (RMB) and not of invalidment medical board (IMB) as required under clause I (ii) of Rule 13(3). (Incidentally it is mentioned that identical provision is there in clause III (iii) of Rule 13(3) in respect of other rank official like the applicant). Challenging the said discharge, Rajpal Singh moved before the Hon'ble Delhi High Court contending that he should have been placed before an IMB. The stand of the respondents was that retention of low medical category personnel is always subject to the availability of suitable sheltered appointment. Since no suitable sheltered appointed was available in field area, the applicant (Rajpal) had to be discharged from service under Army Rule 13(3) (I) (iii) (c) (similar as rule 13(3) (III) (v) as in the case of OR) read with Rule 13(2A) and

Army Order 46/1980. The Hon'ble Delhi High Court held that such discharge was illegal being de hors the rules and quashed the discharge order with direction for reinstatement of the petitioner. Against this order of the Hon'ble Delhi High Court, the Union of India respondents went before the Hon'ble Supreme court in appeal.

13. The Hon'ble Apex Court after analyzing Rule 13, (2A) of Army Rules as also Army Order 46/80 and other Govt. orders relied on by the UOI appellants, observed in Para 27 as follows :-

> "27. In view of the foregoing interpretation of the relevant rule, we are in agreement with the High Court that where a JCO is sought to be discharged on the ground of medical unfitness for further service, his case has to be dealt with strictly in accordance with the procedure contemplated in clause I (ii) in column 2 of the Table appended to Rule 13. **The rule prescribes a particular procedure for discharge of a JCO on account of medical unfitness, which must be followed and, therefore, any order of discharged passed without subjecting him to the Invalidating Board would fall foul of the said statutory rule.**

The Hon'ble Apex Court further held in paragraphs 30 and 31 of the said judgement as under:-

> "30. A plain reading of the Army Order shows that it comes into operation after an opinion has been formed as to whether a particular personnel is to be retained in service or not, if so for what period. If a person is to be retained in service despite his low medical category for a particular period as stipulated in Army Order 46 of 1980, the question of subjecting him to the Invalidating Board may not arise. However, **if a person is to be discharged on the ground of medical unfitness, at that stage of his tenure of service or extended service within the meaning of the Army Order, he has to be discharged as per the procedure laid down in Clause I (ii) in Column 2 of the said Table.**
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> 31. Similarly, sub-rule (2-A) of Rule 13, heavily relied upon by the appellants does not carry the case of the appellants any further. **It is only an enabling provision** to authorize the Commanding Officer to discharge from service a person or a class of persons in respect whereof a decision has been taken by the Central Government or the Chief of the Army Staff to discharge him from service either unconditionally or on the fulfillment of certain specified conditions. **The said provision is not in any way in conflict with the scope of the remaining part of Rule 13, so as to give it an overriding effect, being a non obstante provision**."

14. In view of the law declared by the Hon'ble Apex Court, we have to hold that the discharge of the applicant under army rule 13(3) (III) (v) through an RMB is irregular. He ought to have been placed before an Invalidment Medical Board (IMB) and discharged under Army Rule 13(3) (III) (iii) having been found medically unsuitable for further service. It is quite evident from the facts that the service span of the applicant was indeed curtailed from a minimum of 24 years to 21 years and five months without any valid reasons. Being in low medical category of E-2, he even did not have any employment restriction nor did he ever ask for any sheltered appointment. That having not been done, the discharge of the applicant is to be held as irregular and illegal being de hors the rules. Be it noted that amendment of rule 13 was made subsequently in 2010; therefore, it is not applicable in the case of the applicant.

15. In view of the discussion as analysed above supported by the ratio of the ibid Apex Court decision (**Rajpal Singh-supra)** it is quite clear that the applicants discharge is to be treated as discharge on 'invalidment', having been found medically unfit for further service under Army Rule 13 (3) III (iii). Be that as it may, the present RMB can be treated as IMB for us to consider and analyse the second issue, on '*attributability/aggravation'.* To further strengthen our analysis of the second issue, upon which the prayer of the applicant for disability pension will depend, we would like to consider the provisions of the relevant sections of the entitlement rules that are part of Pension Regulations for the Army 1961 (as amended), which are quoted below:-

> "**<u>Entitlement Rules for Casualty Pensionary Awards, 1982</u>** *(Referred to in Regulations 48, 173 and 185 of Pension Regulations for the Army)*
>
> xxxxx

5. The approach to the question of entitlement to casualty pensionary awards and evaluation of disabilities shall be based on the following presumptions:

(a) A member is presumed to have been in sound physical and mental condition upon entering service except as to physical disabilities noted or recorded at the time of entrance.

(b) In the event of his subsequently being discharged from service on medical grounds any deterioration in his health which has taken place is due to service.

xxxxxxx

9. **Onus of Proof:** The claimant shall not be called upon to prove the conditions of entitlements. He/ She will receive the benefits of any reasonable doubt. The benefit will be given more liberally to the claimants in field/ afloat service causes.

18. **Predisposition:** "Predisposition" of "inherent constitutional tendency" in itself is not a disease. And if there is a precipitating or causative factor in service which produces the disease, then it is attributable to service, notwithstanding the inherent disposition.

19. **xxxxx**

20. **Condition of Unknown Aetiology:** There are a number of medical conditions which are unknown aetilogy. In dealing with such conditions, the following guiding principles are laid down:-

(a) If nothing at all is known about the cause of the disease, and the presumption of entitlement in favour of the claimant is not rebutted, attributability should be conceded.

(b) xxxxxxx "

16. We have also gone through the original medical board proceedings as submitted before us in detail. Nowhere has the medical board opined that the cataract existed at the time of enrolment of the applicant. Therefore, benefit of doubt can reasonably go in favour of the applicant that the onset of cataract is attributable to or aggravated by the military service. It is abundantly clear that the onus lies on the Government to establish that the disability is not on account of military service. Had the applicant not been in military service, it would not have

resulted in invalidment and curtailment of service at the age the applicant retired. We feel that the Government has failed to establish so through the Medical Board. Even the specialist has not specifically opined that the disease, onset of cataract, was not attributable to or aggravated by military service. The original Medical Board Proceedings also do not go to suggest that such disability had either existed or had potentials to manifest. In the present case we observe that the onset of cataract in both eyes manifested when the applicant was in his forties. This Court had called the Senior Advisor of Ophthalmology at Command Hospital, Kolkata to obtain his expert views to assist us. He appeared before us on 23 Apr 2014 and his opinion has been recorded in our order dated 23rd April 2014, relevant extracts of the same are quoted below:-

> "xxxxxxx. Col Sandeep Shankar, Senior Advisor, Ophthalmology Department from Command Hospital, Kolkata is present in the court. He has perused the original documents including the medical board proceedings xxxxxx. As per his opinion, cataract is generally age related. However, early onset of cataract is possible due to various other reasons xxxxxxxxx. That besides he does not disagree that various other reasons like trauma, radiation, skin diseases, drug uses and medication may induce cataract development. There are some other some other reasons also for which chances of cataract development cannot be ruled out. However, he feels these are very rare generally it is either age related or on account of trauma. Having gone through the records, he admits that it is quite clear that being an operator in trade in the Regiment of Artillery, the applicant has served in various fields and high altitude areas during his service life for about 22 years. However, in the absence of any report from the CO with regard to his employment details, it is difficult to conclude anything in this regard at this stage.
>
> That notwithstanding, Col Sandeep Shankar admits that long exposure in snowbound and high altitude areas could result in onset of cataract also. xxxxxxxxxxx. However, since the cataract has already been operated and the applicant has already been implanted with artificial lenses, the exact cause of cataract cannot be ascertained at this stage. xxxxxxxxxxx."

17. Having perused the records, we find that the applicant was in fact posted in snow bound areas and in higher altitudes which could result in the onset of cataract and it can be presumed that it is due to the military service. It appears that the medical board has not analysed nor

discussed this aspect of the matter; and has mechanically opined that the ibid disability has no connection with service conditions. It is quite clear from the provisions of the 'Entitlement Rules-1982 (Para 9) as quoted ibid that the onus of proof that it is not due to service conditions lies on the respondents. We found the RMB opinion bereft of any reasons or rationale. Therefore such opinion cannot be accepted at its face value when subjected to judicial review. We cannot worship such an opinion just because the board members of the RMB have expressed such a view without even a supporting opinion from an expert (eye specialist).

18. For our above view, we place reliance on the decision of the Hon'ble Supreme Court in the case of **Dharam Vir Singh –vs- UOI & Ors**, AIR 2013 SC 2840. Here, we may also refer to yet another recent decision of the Hon'ble Apex Court in the case of **Veer Pal Singh –vs- Secretary, Ministry of Defence,** AIR 2013 SC 2827. In that case, in Para 11 of the said judgement, the Hon'ble Apex Court has observed as under:-

> **"11. Although, the Courts are extremely loath to interfere with the opinion of the experts, there is nothing like exclusion of judicial review of the decision taken on the basis of such opinion. What needs to be emphasized is that the opinion of the experts deserves respect and not worship and the Courts and other judicial/quasi-judicial forums entrusted with the task of deciding the disputes relating to premature release/discharge from the Army cannot, in each and every case, refuse to examine the record of the Medical Board for determining whether or not the conclusion reached by it is legally sustainable."**

19. Having discussed the second issue with regards to attributability/aggravation in the ibid paragraphs with the background of the Entitlement Rules (quoted above) and ratio of ibid Apex Court judgments **{Dharma Veer Singh (supra) and Veer Pal Singh (supra)}** we are quite convinced that the applicant with his service profile in field and snowbound areas could have had the misfortune to have hastened the process of development of cataract. Relying on the opinion of the Senior Advisor Ophthalmology (as in our order 20 dated 23.04.2014), we are

inclined to consider the disability as attributable to and also aggravated by military service thus differing from the opinion of the RMB which was not guided by any opinion of the expert (eye specialist) on this aspect. Moreover, the Senior Advisor Ophthalmology opined before us on 23.04.2014 that at this belated stage, when the cataract has been removed by operation and replaced by artificial lenses in 2004, the exact cause of cataract cannot be ascertained by an examination now in 2014. It is nearly past ten years since he was operated. Therefore it is futile at this stage to subject him to a fresh medical board to opine on the aspect of attributability/ aggravation. We are thus constrained to do a judicial review, finding the opinion of the RMB in this regard grossly unreasonable. We are thus inclined to grant the benefit to the applicant by considering the said disability as attributable to and aggravated by military service.

19. As per provisions contained in Para 7(II) (a) of Ministry of Defence letter No. 1(2)/97/D (Pen C) dated 21-01-2001; all those (post 1996) who are discharged from military service before completion of service tenure on medical ground in low medical category and such cases are to be considered as invalidated out of military service and their disability should be rounded off in the manner as indicated below:-

0 to 20% disability	20%
21 to 50% disability	50%;
Between 51 to 75% disability	75%
Above 75% disability	100%

By this circular the appropriate authorities have been asked to review the affected cases of PBOR discharged for being in low medical category before completion of service tenure. The

case of the applicant is squarely covered by this circular once his disability is held to be attributable to and aggravated by military service and his discharge is treated as 'invalidment'.

20. In view of the above discussion, we allow this application on contest by issuing the following directions:-

a) The respondents shall consider the discharge of the applicant as invalidation out of service on account of medical disability under AR 13 (3) (III) (iii), thus, treating his Release Medical Board as Invalidment Medical Board.

b) His disability will be treated as attributable to and aggravated by military service and the same will be endorsed in his service documents and RMB/IMB accordingly based on this order.

c) Accordingly, the applicant shall be paid disability pension of 20% disablement by providing him the benefit of rounding off his disability pension from 15-19 % to 20% in accordance with extant rules.

d) Such payment of enhanced disability pension will be payable with immediate effect but not later than two months from the date of receipt of a copy of this order.

e) So far as arrears of such enhanced disability pension is concerned, we find that the applicant filed the writ petition before the Hon'ble Patna High Court on 23.04.2007 which is well within three years from his date of discharge (31.07.2005); and as such, we direct that arrears shall be paid with effect from his date of discharge within 90 days from the date of receipt of this order by the OC Records and the PCDA (P); in default, the entire amount will carry interest at the rate of 12% per annum from the date of expiry of 90 days till such payment is actually made.

f) There will be no order as to costs.

21. The original documents submitted by the respondents be returned to them on proper receipt.

22. Let a plain copy of this order, duly countersigned by the Tribunal Officer, be furnished to the learned Advocates for both the sides.

(LT GEN KPD SAMANTA)
MEMBER (ADMINISTRATIVE)

(JUSTICE RAGHUNATH RAY)
MEMBER (JUDICIAL)