FORM NO. 4

(SEE RULE 11 (1)

IN THE ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA
ORDER SHEET
APPLICATION No. O.A. No. 72/2015

APPLICANT (S) BRIG B. D. Pandey, SM (RETD)

RESPONDENT (S) Union of India & Others

Legal Practitioner for Applicant (s) Legal practitioner for Respondents

Mr. S.K. Choudhury Mr. Anand Bhandari

	ORDERS OF THE TRIBUNAL Order Serial Number: Dated :27.09.2016
	Present : Mr. S.K. Choudhury, ld. Counsel for the applicant and Mr. Anand Bhandari, ld. Counsel for the respondents assisted by Maj Narender Singh, OIC, Legal Cell. This is an application filed by the applicant under section 14 of the AFT Act, 2007, for payment of disability pension. We have heard the learned counsel appearing for the parties and perused the records. The applicant was commissioned as Second Lieutenant in Corps of Engineers in the year 1979. Thereafter, after due training he took over the command of 110 Engr Regt and worked under different status and ranks. It was in March 2001 the applicant suffered heart cardiac arrest and under went bye pass surgery and was placed in medical category as S1H1A1P4E1 post the surgery. Thereafter, in May 2002 he was placed in medical category S1H1A1P2E1 and in October 2002 he was upgraded to SHAPE-1.

	It appears that because of stress and strain the applicant suffered with high blood pressure and in January, 2012 it was detected that the applicant was suffering from Diabetes Mellitus Type-2 while posted at Visakhapatnam. Thereafter, the applicant was placed in medical category P2 Ty 24 weeks and lateron placed in medical category SHAPE 3 x. On 31.07.2013 the applicant retired in the rank of Brigadier after 34 years of meritorious service. Further, by an order dated 13th August, 2013 the applicant's claim for grant of disability pension was rejected. The first appeal filed by the applicant was rejected by the order dated 14.10.2013 and further the disability claim of the applicant was rejected by the order dated 25.02.2014 stating that the disability of the applicant was not attributable to military service. The second appeal filed by the applicant on 14.06.2014 was rejected by an order dated 13.05.2015 by SACP stating that the disability was neither attributable nor aggravated by military service. Hence, the applicant approached this Tribunal. Finding recorded in the order dated 13.05.2015 is that the aggravation occurred while the applicant was serving at the high altitude, etc. After hearing the learned counsel of both sides, at the threshold we are of the view that while considering the case of disability the respondent had not considered the agony which the applicant suffered during the course of his service. The applicant has undergone admittedly by pass surgery and suffered high blood pressure and later on suffered in the life long disease of diabetes mellitus type-II. All the three diseases from which the applicant suffered during the course of service were not even near to the applicantat the time of recruitment. In such a situation, there appears to be no reason to hold that the diseases from which

	the applicant had been suffering at the time of retirement are not attributable to Army service, which is unfortunate. While taking decision of the members of Armed Forces who serve the nation, the decision with regard to disability pension must be taken liberally and not mechanically which may compel litigations and to approach the Court or Tribunal and ultimately the Court or Tribunal may impose exemplary cost for the hardship of a member of Armed Forces. In the case of **Dharamvir Singh vs. Union of India & Ors**. decided on 2nd July, 2013 by the Hon'ble Supreme Court in Civil Appeal No. 4949 of 2013 Their Lordships of the Hon'ble Supreme Court has summarized the conditions under which a member of armed forces may be granted disability pension. For the sake of convenience para. 28 of the said judgment is reproduced below : *"28. A conjoint reading of various provisions, reproduced above, makes it clear that: (i) Disability pension to be granted to an individual who is invalided from service on account of a disability which is attributable to or aggravated by military service in nonbattle causalty and is assessed at 20% or above, the question whether a disability is attributable or aggravated by military service to be determined under "Entitlement Rules for Casualty Pensionary Awards, 1982" of Appendix-II (Regulation 173). (ii) A member is to be presumed in sound physical and mental condition upon entering if there is no note or record at the time of entrance. In the event of his subsequently being discharged from service on medical grounds any deterioration in his health is to be presumed due to service. [Rule 5 r/w Rule 14(b)]. (iii) Onus of proof is not on the claimant (employee), the corollary is that onus of proof that the condition for non-entitlement is with the employer. A claimant has a right to derive benefit of any reasonable doubt and is entitled for pensionary benefit more liberally. (Rule 9). (iv) If a disease is accepted to have been as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the 4 conditions were due to the circumstances of duty in military service. [Rule 14(c)]. (v) If no note of any disability or disease was made at the time of individual's acceptance for military service, a disease which has led to an individual's discharge or death will be deemed to have arisen in service. [14(b)]. (vi) If medical opinion holds that the disease could not have been detected on medical examination prior to the acceptance for service and that disease will not be deemed to have arisen during service, the Medical Board is required to state the reasons. [14(b)]; and (vii) It is mandatory for the Medical Board to follow the guidelines laid down in Chapter-II of the "Guide to Medical (Military Pension), 2002 – "Entitledment : General Principles", including paragraph 7, 8 and 9 as*

	referred to above." The aforesaid proposition of law have been reiterated by the Hon'ble Supreme Court in the case of **Union of India & Anr. vs. Rajbir Singh**in Civil Appeal No. 2904 of 2011. For the sake of convenience paras. 12, 15 and 16 are reproduced below :- "*12. Reference may also be made at this stage to theguidelines set out in Chapter-II of the Guide to MedicalOfficers (Military Pensions), 2002 which set out the"Entitlement: General Principles", and the approach to beadopted in such cases. Paras 7, 8 and 9 of the said guidelines reads as under:* *"**7.** Evidentiary value is attached to the record of a member's condition at the commencement of service, and such record has, therefore, to be accepted unless any different conclusion has been reached due to the inaccuracy of the record in a particular case or otherwise. Accordingly, if the disease leading to member's invalidation out of service or death while in service, was not noted in a medical report at the commencement of service, the inference would be that the disease arose during the period of member's military service. It may be that the inaccuracy or incompleteness of service record on entry in service was due to a non-disclosure of the essential facts by the member e.g. preenrolment history of an injury or disease like epilepsy, mental disorder, etc. It may also be that owing to latency or obscurity of the symptoms, a disability escaped detection on enrolment. Such lack of recognition may affect the medical categorisation of the member on enrolment and/or cause him to perform duties harmful to his condition. Again, there may occasionally be direct evidence of the contraction of a disability, otherwise than by service. In all such cases, though the disease cannot be considered to have been caused by service, the question of aggravation by subsequent service conditions will need examination.* *The following are some of the diseases which ordinarily escape detection on enrolment:* *(a) Certain congenital abnormalities which are latent and only discoverable on full investigations e.g. Congenital Defect of Spine, Spina bifida,Sacralisation,* *(b) Certain familial and hereditary diseases e.g. Haemophilia, Congential Syphilis,Haemoglobinopathy.* *(c) Certain diseases of the heart and blood vessels e.g. Coronary Atherosclerosis, Rheumatic Fever.* *(d) Diseases which may be undetectable by physical examination on enrolment, unless adequate history is given at the time by the member e.g. Gastric andDuodenal Ulcers, Epilepsy, Mental Disorders, HIVInfections.* *(e) Relapsing forms of mental disorders which have*

	intervals of normality. *(f) Diseases which have periodic attacks e.gBronchial Asthma, Epilepsy, Csom, etc.* ***8.** The question whether the invalidation or death ofa member has resulted from service conditions, hasto be judged in the light of the record of themember's condition on enrolment as noted in servicedocuments and of all other available evidence bothdirect and indirect.In addition to any documentary evidence relative tothe member's condition to entering the service anddduring service, the member must be carefully andclosely questioned on the circumstances which led tothe advent of his disease, the duration, the familyhistory, his pre-service history, etc. so that allevidence in support or against the claim iselucidated. Presidents of Medical Boards shouldmake this their personal responsibility and ensurethat opinions on attributability, aggravation orotherwise are supported by cogent reasons; theapproving authority should also be satisfied that thisquestion has been dealt with in such a way as toleave no reasonable doubt.* ***9.** On the question whether any persistingdeterioration has occurred, it is to be rememberedthat invalidation from service does not necessarilyimply that the member's health has deterioratedduring service. The disability may have been discovered soon after joining and the memberdischarged in his own interest in order to preventdeterioration. In such cases, there may even havebeen a temporary worsening during service, but ifthe treatment given before discharge was on grounds of expediency to prevent a recurrence, nolasting damage was inflicted by service and therewould be no ground for admitting entitlement. Againa member may have been invalided from servicebecause he is found so weak mentally that it isimpossible to make him an efficient soldier. Thiswould not mean that his condition has worsenedduring service, but only that it is worse than wasrealised on enrolment in the army. To sum up, ineach case the question whether any persistingdeterioration on the available evidence which willvary according to the type of the disability, theconsensus of medical opinion relating to theparticular condition and the clinical history.* *15. The legal position as stated in **Dharamvir Singh's**case (supra) is, in our opinion, in tune with the PensionRegulations, the Entitlement Rules and the Guidelines issuedto the Medical Officers. The essence of the rules, as seenearlier, is that a member of the armed forces is presumed tobe in sound physical and mental condition at the time of hisentry into service if there is no note or record to thecontrary made at the time of such entry. More importantly,in the event of his subsequent discharge from service onmedical ground, any deterioration in his health is presumedto be due to military service. This necessarily implies that nosooner a member of the force is discharged on medicalground his entitlement to claim disability pension will ariseunless of course the employer is in a position to rebut thepresumption that thedisability which he suffered wasneither attributable to nor aggravated by military service.From Rule 14(b) of the Entitlement Rules it is further clearthat if the medical opinion were to hold that the diseasesuffered by the member of the armed forces could not havebeen detected prior to acceptance for service, the MedicalBoard must state the reasons for saying so. Last but not theleast is the fact that the provision for payment of disabilitypension is a beneficial provision which ought to beinterpreted liberally so as to benefit those who have beensent home with a disability at times even*

	before theycompleted their tenure in the armed forces. There mayindeed be cases, where the disease was wholly unrelated tomilitary service, but, in order that denial of disability pensioncan be justified on that ground, it must be affirmativelyproved that the disease had nothing to do with such service. *The burden to establish such a disconnect would lie heavilyupon the employer for otherwise the rules raise apresumption that the deterioration in the health of themember of the service is on account of military service oraggravated by it. A soldier cannot be asked to prove thatthe disease was contracted by him on account of militaryservice or was aggravated by the same. The very fact thathe was upon proper physical and other tests found fit toserve in the army should rise as indeed the rules do providefor a presumption that he was disease-free at the time of hisentry into service. That presumption continues till it isproved by the employer that the disease was neitherattributable to nor aggravated by military service. For theemployer to say so, the least that is required is a statementof reasons supporting that view. That we feel is the trueessence of the rules which ought to be kept in view all thetime while dealing with cases of disability pension.* *16. Applying the above parameters to the cases at hand,we are of the view that each one of the respondents havingbeen discharged from service on account of medicaldisease/disability, the disability must be presumed to havebeen arisen in the course of service which must, in the absence of any reason recorded by the Medical Board, bepresumed to have been attributable to or aggravated bymilitary service. There is admittedly neither any note in theservicerecords of the respondents at the time of their entryinto service nor have any reasons been recorded by theMedical Board to suggest that the disease which the memberconcerned was found to be suffering from could not havebeen detected at the time of his entry into service. Theinitial presumption that the respondents were all physicallyfit and free from any disease and in sound physical andmental condition at the time of their entry into service thusremains unrebutted. Since the disability has in each case been assessed at more than 20%, their claim to disabilitypension could not have been repudiated by the appellants."* It has been further held by the Hon'ble Supreme Court in the case of **Union of India vs. Ram Avtar** in CA No. 418 of 2012 that in case the disability is less than 50% it should be rounded off 50%. In the present case the disability has been assessed at 40% at the time of retirement. Accordingly, we are of the view that the applicant may be paid disability pension at the rate of 50% from the date of retirement. Accordingly, the respondents are directed to pay to the applicant disability pension at the rate of 50% from the date of retirement along with interest at the rate of 10% per annum. Let the arrears of disability pension be made expeditiously preferably within a period of four months from

	date of receipt of certified copy of this order and fixation be made in accordance with law till life. The respondents are further directed to ensure that the payment be made as directed above. Accordingly, the OA stands allowed. The impugned orders are set aside. No costs. The original relevant records be returned to the respondents by the Registry upon obtaining proper receipt. After the order has been dictated in Court, counsel for the respondents made oral prayer for leave to appeal before the Hon'ble Supreme Court. Since no question of public importance is pointed out, we declined to such prayer and the prayer for leave to appeal is rejected. The OA thus disposed of. Let a plain copy of this order, duly countersigned by the Tribunal Officer, be handed over to the parties after observance of usual formalities. . (Lt Gen Gautam Moorthy) Member(Administrative) (Justice Devi Prasad Singh) Member (Judicial) ss.