

FROM NO. 21

(SEE RULE 102(1))

ARMED FORCES TRIBUNAL , KOLKATA BENCH

APPLICATION NO : T. A NO. 41 OF 2011

ON THIS 17th DAY OF May, 2013

CORAM HON'BLE JUSTICE RAGHUNATH RAY, MEMBER (JUDICIAL)
HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

Atul Chandra Karmakar,
Son of Shri Shiv Narayan Karmakar,
Resident of Village Gopalpur,
Police Station - Amdabad,
District - Katihar.

.....Appellant

-VS-

1. Union of India through
The Secretary, Defence,
South Block, New Delhi.
2. The Army General (Chief of the Army Staff),
South Block, New Delhi.
3. The Controller of Defence Accounts, Allahabad.
4. The Commanding Officer, 451 Armed., T P S Workshop,
C/O 56 APO, Patiala, Punjab.
5. The Col. Commanding Officer, Military Hospital,
Danapur Cantt., Patna, Bihar.
6. The Major Surgical Special Military Hospital,
Danapur Cantt., Patna, Bihar.
7. The Commanding Officer, E M E Records,
Secundrabad, Hyderabad – 21.

.... Respondents.

For the Petitioner: Mrs. Soma Panda, Advocate
Miss Ashima Roy Chowdhury, Advocate.

For the Respondents: Mr. B K Das, Advocate.

ORDER

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. 16248 of 2006 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. 41 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 Corps of EME in the trade vehicle mechanic on 13.06.1975. Through the span of routine service he received his due promotions and reached to the rank of Havildar. However, he met with a vehicle accident in February, 1997 for which he was admitted in Military Hospital at Patiala from 24.02.1997 to 10.06.1997. In the ibid accident he had suffered multiple fractures and was thus placed in 'low medical category'. However, the circumstances of injury was considered to be on account of military duty and thus, a court of inquiry was held by the Unit that opined the ibid injury to be attributable to military service. Accordingly he was placed in low medical category i.e. Category CEE. Because of his low medical category, he was neither eligible for any further promotion nor extension of service beyond the stipulated 24 years of service as per the terms and conditions laid down for a Havildar. In accordance with the rules, he was discharged on 30.06.1999 after completion of 24 years of service in the normal course. At the time of

discharge, he was produced before a Release Medical Board (RMB) in Military Hospital at Patiala on 27.09.1998. The ibid RMB considered his disabilities {(a) *Fracture Tibia Fibula (Lt) old*; and (b) *Fracture Lateral Condylle of Tibia (Rt) old*} to be attributable to military service and the Board assessed the percentage of disablement as 40% for two years. Subsequently, after a gap of two years, the applicant was brought before the Re-Survey Medical Board (RSMB) which assessed his disabilities at 30 % for life.

3. On account of the percentage of disablement changing from 40% to 30%, his disability pension amount was also reduced accordingly. As of now, the applicant is receiving full service element of pension as available and 30% disability pension. All other entitled dues have been received by the applicant. The applicant in his prayer made in the writ petition and further amplified in the supplementary affidavit filed by him at this Tribunal on 26.11.2011 relate to the fact that he missed his promotion to the rank of Naib Subedar on which account his pension amount has been reduced. The second part of prayer is that, had he remained in fit medical category, he would have been eligible for two years extension of service which was denied to him because of an accident for which he was not at fault at all. He is also aggrieved on the fact that he has not been given any compensation for suffering from such disabilities.

4. Miss Roychowdhury, Id. adv. for the applicant, making her oral submission emphasized on the issue that the accident which caused the injury and subsequently resulted in down-gradation of medical category of the applicant, has, in fact, jeopardized the entire career prospects of the applicant. She further advanced her argument by submitting that the court of inquiry in the said accident had blamed the driver of the vehicle and the applicant was no way at fault. Despite such a situation, the applicant, for no fault of his, has lost out on extension of

service and further promotion purely because he remained in low medical category. She prays for due compensation because of the above unfortunate situation for which, as submitted by her, the military authorities are to be blamed. She, therefore, insisted that the applicant should be given the pension of the next higher rank which is Naib Subedar and such promotion should also be conferred upon him. Moreover, she is of the view that reduction of percentage of disability from 40% to 30% has caused reduction of disability pension that the applicant was in receipt of. Such reduction of disability pension emoluments has caused great financial loss to the applicant. According to Miss Roychowdhury, this is unjust and arbitrary; therefore the percentage of disability of the applicant should remain as was initially awarded which is 40%.

5. On 16.4.2013, we heard Miss Ashima Roychowdhury, Id. adv.-on-record for the applicant and Mr. B.K.Das, Id. adv. appearing for the respondents at length. However, after elaborate arguments, Miss Roy Chowdhury prayed for an adjournment in order to enable her senior Mrs. Soma Panda, Id. adv. to argue the matter further. Although, Miss Roy Chowdhury argued at length and concluded her arguments but for the sake of justice, we adjourned the matter for further argument by her senior. Accordingly, the matter was listed on 23.4.13 for further hearing on which date, Ms. Panda appeared and argued.

6. Mrs. Panda besides reiterating the arguments already advanced by Miss Roy Chowdhury, submitted that the applicant ought to have been placed before a Invalidment Medical Board (IMB) as it was a case of accident for which he became in low medical category and could not get his due promotion or extension of service for which he was otherwise eligible. She also contended that the applicant was already directed to undergo promotional training but due to his being in low medical category for the said accident, he could not do so

and the respondents also did not exempt him from undergoing such training. In support of her argument, she relied on a decision of the Principal Bench decided on 2.8.10 in TA 418 of 2010 (**Ram Karan –vs- UOI & Ors**). In that decision, the Principal Bench relied upon the decision of the Apex Court in the case of **Union of India –vs- Rajpal Singh**, reported in 2008(12) SCC476. Mrs. Panda has referred to para 7 and 8 of the decision of the Principal Bench where it was observed that Invalidating Medical Board is required to be constituted in appropriate case instead of Release Medical Board. Mrs. Panda emphasized that it is a fit case where the applicant ought to have been placed before IMB and not RMB.

7. Mrs. Panda raised another important issue with regard to the terms and conditions of service of a Havildar. She brought to our notice that 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. In this particular case, as emphasized by her, the applicant could have served upto 26 years but his service was curtailed by two years and he was made to retire at 24 years on account of his medical category that has stood on the way while considering his extension of two years beyond the period of 24 years. Had he been in category AYE, then he might have availed this extra two years of service. She further tried to justify by submitting that there was no other reason except the fact that he was in a low medical category on account of a disability which was attributable to military service, for which he was not granted extension. On this ground alone, the applicant's retirement after 24 years of service should be considered as "curtailment of service". As per instruction whenever the service is curtailed on account of medical category, then in that case, it should be treated as invalidment from service and not as normal

retirement. Therefore, Mrs. Panda prayed that release medical board should be treated as an invalidment medical board and the applicant should be considered as if he retired with curtailment of service, thus, allowing him rounding off benefit as per provision as contained in Ministry of Defence letter No. 1(2)/97/D PEN-C dt. 31.1.2001. In that situation, as explained by Mrs. Panda that her prayers in the writ application may be modified to the extent that in case no relief is possible as prayed for, at least the benefit of rounding off of his disability pension should be allowed on the basis of this oral prayer as made by her.

8. Mr. B K Das, learned counsel appearing on behalf of the respondents did not dispute the facts which were submitted by the opposite side through the writ petition, supplementary affidavit and during the oral submission made by the learned counsel for the applicant. His submission primarily relied upon the affidavit-in-opposition as was filed by him and the original medical records which were produced by them upon instruction from this Tribunal. He reiterated on the point that opinion of the specialists in a medical board cannot be ordinarily interfered with. Therefore, he draws our attention to the opinion of the release medical board in Para 2 of part III of the said medical proceedings wherein it has been very clearly mentioned that the injury sustained was on military duty for which the disabilities are considered to be attributable to military service. In Para 4 of part III of the ibid proceedings the percentage of disability that has been assessed by the ibid board is 40% composite for a duration of two years which was later, after a gap of two years, reassessed by Re-Survey Medical Board to be 30% for life. Therefore, as submitted by Mr. Das, the authorities have been paying the applicant his entitled disability pension totally in accordance with rules and in consonance with the assessment made by the ibid medical boards.

9. So far as the presumptive prayer that the applicant should have been a Naib Subedar is concerned, Mr. Das submits that promotion to the rank of Havildar to Naib Subedar is based on various promotion criteria. In the present case, the applicant did not fulfill the medical criteria since he was in Category CEE and therefore could not be detailed for Havildar to Naib Subedar promotion course. Subsequently, Mr. Das explained that although the category of the applicant was incurred on account of service attributable medical disabilities, the applicant still has to be treated as category CEE personnel. Therefore, rules did not permit for a Havildar in medical category 'C' to be considered for promotion of Naib Subedar. Such relaxations do not exist for those who have been downgraded in medical category due to a reasons attributable to service which is entirely different from those who are in low medical category due to battle casualty or on account of enemy action. This aspect has been adequately explained in Para 9 of their counter affidavit. Under such circumstances, Mr. Das very clearly submitted that the applicant indeed had no grievance and therefore, the application should be dismissed.

10. As regards the case laws cited by the Id. adv. for the applicant, Mr. Das submitted that those decisions are quite distinguishable on facts and, therefore, the ratio of those decisions are not applicable.

11. Mr. Das vehemently opposed the alternative submission made by Mrs. Panda on the issue that new prayer cannot be allowed at this stage through an oral submission by stating that the applicant's discharge was on account of curtailed service. He, therefore, contested this contention by submitting that the terms and conditions of a Havildar allow an individual to serve upto 24 years. Further extension of two years is given to him subject to certain conditions, of which "acceptable medical category" is also a condition. Such conditions are

examined in a screening board and extension of two years is only granted if recommended by such screening board. He, however, admitted that in case of this applicant, there was no other reason except that he was in medical category 'CEE' which was not an acceptable medical category for him to be eligible for grant of extension of service for two years. However, Mr. Das emphasized and relied upon the counter affidavit by submitting that the applicant completed the term and condition, which was 24 years of service; thus, his discharge from service after completion of 24 years of service was absolutely in order. In view of such submission made by him, he has prayed that the question of rounding off provision would not in any way be relevant since rounding off of disability pension is applicable only to those who are discharged before completion of their prescribed service limit.

12. We have examined the affidavits and annexure as filed by both parties in detail and also considered the submissions of the learned counsel from both sides. Having considered all aspects of the matter, we are of the view that the applicant's prayer for a presumption that he would have become a Naib Subedar had he not met with that fateful accident, which brought his medical category down, is too far-fetched and has no substance for any further consideration. We also notice that the applicant's percentage of disability was brought down from 40% to 30% based on the recommendation of the duly constituted Re-survey medical Board, and, therefore, such reduction is in order and the respondents cannot be held responsible for that.

13. However, the only aspect that remains for our consideration and application of mind is on the issue of curtailment of service, as raised by Mrs. Panda. Was the prescribed service of the applicant indeed curtailed on account of medical category ? While discussing on this issue

we would like to bring on record a few aspects of Govt. policy letters, which are reproduced below :-

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No. F.14(3)/98/D(AG),
Bharat Sarkar/Government of India
Raksha Mantralaya/Ministry of Defence
NEW DELHI-110 011
3RD September, 1998

To

The Chief of the Army Staff,
New Delhi

Sub : **RETIREMENT= JCOs/NCOs**

Sir,

I am directed to refer to paragraph 6 of Ministry of Personnel, Public Grievances and Pension (Department of Personnel & Training) OM No. 25012/2/97-Estt(A) dated 13-5-1998 and this Ministry's letter No. 14(3)/98/D(AG) dated 30thMay 1998 and to convey the sanction of the President to the laying down of the following revised terms of service/tenure and age limits for retirement in their respect with effect from 30thMay 1998 in partial modification of the existing rules as contained in paragraph 163 of the Regulations for the Army (1987) as amended, and Government of India, Ministry of Defence letter No. A/16099/Policy/AG/PS-2(c)/20085/S/D(AG) dated 16th December, 1976, governing terms of service/tenure limits for retirement of JCOs and NCOs :-

	Rank	Service/age/tenure limits for retirement
(a)	Naik	On completion of 22 years service with colours extendable by 2 years by screening or 49 years of age whichever is earlier
(b)	Dafadar/ Havildar	On completion of 24 years service with colours extendable by 2 years by screening or 49 years of age whichever is earlier
(C)	Naib Rissaldar/ Naib Subedar	26 years of pensionable service extendable by 2 years by screening or 52 years of age, whichever is earlier.
(d)	Risaldar/ Subedar	28 years of pensionable service extendable by 2 years by screening or 52 years of age, whichever is earlier.
(e)	Risaldar Major/ Subedar Major	32 years of pensionable service extendable by 2 years by screening or four year tenure or 54 years of age, whichever is earlier.

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CIRCULAR NO. 301
 No. Gts/Toch/0110-V
 Office of the PCDA(P)
 Allahabad dt. 27.05.2002

The OI/C
 RO/PAO(ORS)

Sub : Benefits of rounding of disability elements in respect of PBOR discharged/released from military service before completion of service tenure on medical grounds being in low medical category (LMC category)

As per reg. 173A PRA-1 (1961), PBOR who are placed permanently in lower medical category (other than) and who are discharged because no alternative employment in their own trade/category suitable to their low medical category could be provided or who are unwilling to accept the alternative employment or having been retained in alternative appointment are discharged before completion of their engagement shall be deemed to have been invalidated out of service. This fact has also been emphasized by Ministry of Defence vide their letter No. 3/57/2001/D(Pen A&AC) dt. 11.04.2002 (copy enclosed) while giving clarifications on two individual cases.

In view of the above the individuals who are discharged from military service before completion of service tenure on medical ground in low medical category are to be considered as invalidated out of military service. Therefore, they will be given benefits of rounding off disability elements as per provisions contained in para 7(II)(a) of MoD letter No. 1(2)/98/D(Pen-C) d. 1.01.2001 in post -96 cases i.e.

Less than 50% disability to	50%
Between 50% to 75% disability	75%
Above 75% disability	100%

You are therefore requested to verify your records and review the affected cases of the pensioners discharged on low medical category (in post 96 category) before completion of service limit and the same to be sent to the OI/C by name to Shri DC Hansda, SAO, Officer in Charge G3 Section of this office for revision of their disability element on LPC cum-datasheet (DIS) applicable in post 96 disability revision cases. However, on Top of LPC-cum-data sheet Low Medical category before completion of tenure” should prominently be written in Red Ink by hand in order to distinguish that the affected case is of Low Medical Category.

Sd/-
(M.V.Dubey)
Dy. CDA(P) “

14. The MoD policy letter dated 3.9.1998 quoted above lays down the service conditions of army personnel (JCOs and other ranks) as it relates to their retirement on attainment of a particular length of service or age whichever is earlier. While analyzing this aspect we did take note of the fact that in the Army, unlike in other central government services, soldiers retire at a much younger age and lesser service. We also note that the permitted service span and age stipulations increase as one attains higher ranks. We were also given to understand by the Id. Counsel for the applicant that such unique provisions are there to enable the Army to remain young and fit which is a necessity to perform their role effectively. We are of the view that every policy enunciated by the government bringing in changes to terms and conditions of service span and age of retirement would always have an object. In this case it is evident to understand the background that age of retirement of all central government employees was increased by two years with effect from 1.1.96 consequent to the Vth CPC recommendations. When the same orders were applied to the Army, a rider was added that two years extension of service would be provided subject to certain conditions that includes 'acceptable medical category'. As submitted by the Id. Counsel for the respondents, once the soldier opts for extension of service for two years, he is screened through a screening board where his medical and discipline criteria are examined. If found acceptable, extension of service by two years is always granted to all soldiers across board. In the instant case, as clarified by the Id. counsel, the applicant did not meet the acceptable medical criteria and therefore was not given extension of service. The acceptable medical category is 'AYE', but the applicant was in category 'CEE', which was not acceptable as per rules.

15. In view of the discussion above, we are of the view that the respondent authorities acted under rules to discharge the applicant on completion of 24 years of service and not allowing him to serve up to

26 years because he was in low medical category. The issue before us is not with regards to appropriateness of his discharge after 24 years service; but the issue is as to what is the stipulated service limit for retirement for a Havildar in the Army that the applicant was?

16. After analyzing the ibid government policy letter of 3.9.1998, as reproduced above, we are of the view to interpret the object and language of the relevant policy letter as that the service limit for a Havildar is 26 years, subject to two years extension granted after 24 years or on attaining 49 years of age whichever is earlier. Only by interpreting in this manner, the object and spirit of two years age extension granted from 1.1.96 to all central government employees including the armed forces is met with due consideration to the peculiar service condition of the armed forces and the need to keep the soldiers young and fit. By interpreting in the manner that the respondents have done, 'service limit for Havildar remains 24 years which can be extended by two years' indicates that these two years are a bonus or a privilege that are granted subject to certain conditions. In effect that was never the object of the government when they issued the ibid policy subsequent to Vth CPC. Moreover, a military career of a soldier is always subject to remaining fit and disciplined. Whenever he fails to remain within the acceptable limits of such criteria his continuance in service is always curtailed under provisions of rules. A soldier faces such uncertainties from the time he is recruited. That does not mean the laid down term and conditions of service are tampered with. Therefore it reasonable to interpret the rules as done by us that is to say, a Havildar, post 1.1.96, can serve up to 26 years of service subject to grant of extension after 24 years of service or on attaining 49 years of age which ever is earlier.

17. Under such circumstances as discussed above, we are of the view that the applicant's service was curtailed by two years due to a medical disability that was attributable to military service; thus putting him in low medical category 'CEE', which was not the 'acceptable medical category' to grant him extension of two years after completion of 24 years of service. Therefore, the RMB held for him at the

time of discharge should be considered as IMB and consequential benefits like 'rounding off' of disability pension as per rules need to be made applicable to him.

18. In consideration of our analysis of ibid policy letters as made above, we are of the view that the applicant will be eligible for "rounding off" of his disability pension which as per extant rule is 50% since he was in receipt of 30% disability pension.

19. In view of the above discussion, we allow this application in part 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, thus, treating his Release Medical Board as Invalidment Medical Board.
- b) Accordingly, the applicant shall be paid disability pension for 50% disablement by providing him the benefit of rounding off his disability pension from 30% to 50% in accordance with extant rules.
- c) 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.
- d) 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 in December 2006 and as such, we direct that arrears shall restricted to three years prior to the date of filing of writ petition i.e. such arrears shall be calculated and payable w.e.f. 1.12.2003 and payment shall be made to the applicant within four months from the date of receipt of a copy of this order. In default, the entire amount will carry interest at the rate of 12% per annum from the date of expiry of four months time limit till such payment is actually made.

e) There will be no order as to costs.

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

21. 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)