

Form No.4
[(SEE RULE 11(1))]
IN THE ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

ORDER SHEET

O.A. No. 83 of 2015

APPLICANT (S) : Ex-NB SUB Ajay Kumar

RESPONDENT (S) : Union of India and Others

Legal Practitioner of applicant Legal Practitioner for Respondent (s)
Mr. Subhash Chandra Basu Mr. Anup Kumar Biswas

	<u>ORDERS OF THE TRIBUNAL</u>
	Order Serial Number : 12 Dated : 27-03-2017
	<p style="text-align: center;">Heard Mr. Subhash Chandra Basu, Ld. Counsel for the applicant and Mr. Anup Kr. Biswas, Ld. counsel for the respondents.</p> <p>2. The applicant, who is out of service since 31.7.2008, has filed this application challenging the order dated 24.6.2015 passed by the Record Officer, for OIC Records, whereby and where under the claim of the applicant for granting disability element of pension has been rejected on the ground that the disability ie., 'HYPERTRIGLYCERIDAEMIA' has been considered as neither attributable to nor aggravated by military service by the Invalidating Medical Board and the degree of disability was also found to be nil.</p> <p>3. This case has a chequered history. The applicant was enrolled in Indian Army on 21.12.82 . The due date of retirement of the applicant on attaining the age of superannuation was 31.12.2008. While the applicant was serving, based on a medical board proceeding held on 15.4.2008 he was discharged from service on 31.7.2008. The applicant, thereafter, asked for disability element of the pension which was not granted. Being aggrieved, the applicant preferred the first appeal as well as the second appeal which were dismissed by the First Appellate Committee as well as by the Second Appellate Committee. The applicant, thereafter, filed the OA No. 58 of 2012 before this Tribunal challenging the decision of the respondent authorities in not granting the disability element of the pension The said OA was decided on 17.9.2014 setting aside that RMB proceeding as well as the first and second appellate authorities orders and directing the respondent authorities to get the applicant examined by the IMB within 60 days from the date of communication of the order and to take a decision on the entitlement of the disability pension by the applicant based on the outcome of the opinion of the IMB. The Tribunal, while issuing such direction, has recorded the finding that the discharge of the applicant</p>

was invalidating him out of service. The relevant portion of the aforesaid order passed by this Tribunal is reproduced below :

"In view of the above, the application is allowed in part on contest by issuing the following directions :-

- i) The applicant is to be treated to be invalidated out of service before completion of term of engagement. Resultantly, he is held to be entitled to get all consequential benefits in accordance with rules.*
- ii) The proceeding of the RMB held on 15 Apr 2008 at MH Jodhpur stands set aside.*
- iii) The appellate orders dt. 30.12.09 and 17.3.11 be also set aside.*
- iv) The applicant be brought before an IMB within 60 days from the date of communication of this order in any Army Hospital near the residence of the applicant, who is presently stated to be residing at Danapur.*
- v) The IMB shall give its opinion afresh as regards attributability and/or aggravation aspect of the disability suffered by the applicant, the percentage of disablement etc.*
- vi) The decision of IMB be communicated to the applicant within 30 days from its approval by the competent authority.*
- vii) The applicant's entitlement to disability pension will depend on the outcome of the opinion of IMB."*

4. The IMB was then constituted by the respondent authorities on 11.5.2015 which has opined that the disability from which the applicant was suffering was neither attributable to nor aggravated by military service and the degree of disability was nil for life. Based on the said order the Record Officer for OIC Records passed the impugned order on 24.6.2015 rejecting the claim of the applicant for disability element of the pension. Hence, the present OA.

5. The learned counsel for the applicant referring to the findings recorded by this Tribunal vide order dated 17.9.14 passed in earlier litigation being OA 58 of 2012 has submitted that since this Tribunal has held that the applicant has been invalidated out from service, the applicant is entitled to disability element of the pension despite the fact that the disability was found to be neither attributable to nor aggravated by military service and the percentage of the same was nil. Learned counsel in support of his contention has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Sukhvinder Singh vs. Union of India & Ors.** reported in (2014)14 SCC 364.

6. The learned counsel for the respondents, on the other hand, referring to the averments made in the counter affidavit filed has submitted that the applicant is not entitled to disability element of the pension, the IMB having found the disability as neither attributable to nor aggravated by military service and the percentage of the same

being nil. Learned counsel also submits that the judgment passed by the Hon'ble Supreme Court in the case of Sukvinder Singh (supra), in view of the opinion of the IMB, is not applicable in the facts and circumstances of this case.

7. The applicant's due date of the retirement from service on attaining the age of superannuation was 31.12.2008. The applicant was, however, discharged from service on 31.8.2008 on medical ground after conducting a Release Medical Board on 15.4.2008 which found the applicant not fit to be retained in service as he was found to be Cat P2(perman). The opinion of the Release Medical Board was set aside by this Tribunal by the aforesaid order dated 17.9.2014, apart from setting aside the first appellate and second appellate order rejecting the claim of the applicant for disability element of the pension. The IMB conducted by the respondent authority on 11.5.2015, pursuant to the order dated 17.9.2014 passed by this Tribunal, though has found the disability of the applicant, the same was, however, found to be neither attributable to nor aggravated by military service and the degree of disability was also found to be nil. If the IMB finds that the degree of disability was nil how the applicant could have been invalidated out from service. For the purpose of invalidment the percentage of disablement must be minimum 20%, as nothing permits the Army authority to invalidate a person from service if such disablement is less than 20%, as held by the Hon'ble Supreme Court in Sukvinder's case (supra). The relevant portion of the judgment passed by the Hon'ble Supreme Court in the said case is reproduced below :

"We are of the persuasion, therefore, that firstly, any disability not recorded at the time of recruitment must be presumed to have been caused subsequently and unless proved to the contrary to be a consequence of military service. The benefit of doubt is rightly extended in favour of the member of the Armed Force; any other conclusion would be tantamount to granting a premium to the Recruitment Medical Board for their own negligence. Secondly, the morale of the Armed Force requires absolute and undiluted protection and if an injury leads to loss of service without any recompense, this morale would be severely undiluted. Thirdly, there appears to be no provisions authorizing the discharge or invalidating out of service where the disability is below twenty per cent and seems to us to be legally so. Fourthly, wherever a member of the Armed Forces is invalidate out of service, it perforce as to be assumed that his disability was found to be above twenty per cent. Fifthly, as per the extant Rules/Regulations, a disability leading to invaliding out of service would attract the grant of fifty per cent disability pension."

8. In view of the facts and circumstances of this case and the applicant having been invalidated out from service, the opinion of the Medical Board that disablement was neither attributable to nor

aggravated by military service has no relevance. The percentage of disablement of the applicant, in view of his invalidating out from service, has to be taken as twenty.

9. The contention of the respondents that the OA filed by the applicant is not maintainable as the applicant has not availed the alternative remedies available to him, i.e. the first and the second appeal, cannot be accepted as no absolute bar has been created for entertaining an OA without availing the available alternative remedy. In the present case the applicant since the year 2008 is moving pillar to post to get the dues to which he is entitled to. The applicant earlier filed the first and second appeal which were rejected. Thereafter, the applicant approached this Tribunal by filing an OA which was disposed of as aforesaid. The respondent authority has rejected the claim of the applicant by the order put under challenge in the present proceeding. If at this stage the applicant is directed to approach the first and second appellate authority, it would cause hardship and injustice to him as he has to wait for further time to get the relief to which he is entitled.

10. In view of above, the order dated 24.06.2015 passed by the Record Officer for OIC Record cannot stand the scrutiny of law and hence it is set aside.

11. The respondents are directed to pay disability element of pension at the rate of 20%, which is rounded off to 50% in view of the order passed by the Hon'ble Supreme Court on 10.12.2014 in Civil Appeal No. 418 of 2012 (**Union of India vs. Ram Avtar**). The applicant would be entitled to the arrear with effect from 1.8.2008 as the applicant is consistently pursuing his remedy before different forums, as indicated above. The arrear would carry interest at the rate of 9% per annum from the said date till the date of payment. The arrears along with interest shall be paid to the applicant within a period of four months from the date receipt of this order.

12. OA is accordingly allowed.

13. Learned counsel for the respondents, at this stage, has made an oral prayer to grant leave to appeal to the Hon'ble Supreme Court under section 31 of the AFT Act, 2007, which however, has been rejected as this order does not involve any question of law having general public importance.

14. Let a plain copy of this order, duly countersigned by the Tribunal Officer, be supplied to the parties upon observing requisite formalities.

(LT GEN GAUTAM MOORTHY)
MEMBER (ADMINISTRATIVE)

(JUSTICE B.P. KATAKEY)
MEMBER (JUDICIAL)