

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

**APPLICATION No. O.A No. 123/2016**

APPLICANT (S)	WG CDR SOMSANKAR BHATTACHARYYA (RETD)
RESPONDENT (S)	Union of India & Others
Legal Practitioner of applicant	Legal Practitioner for Respondent (s)
Mr. S. K. Choudhury	Mr. S. K. Bhattacharyya

**ORDERS OF THE TRIBUNAL**

Order Serial Number 05

Dated 30-03-2017

Per Justice B.K. Karakey, Member (J)

1. The applicant, who has retired from service on his own request, has filed this application praying for a direction to the respondents authority to grant his disability element of pension, which has been refused on the ground that he having retired voluntarily is not entitled to disability pension under Regulation 39 of the Pension Regulation for Air Force, 1961.

2. We have heard Mr. S.K.Choudhury, learned counsel for the applicant and Mr. S.K.Bhattacharyya, learned counsel for the respondents.

3. The learned counsel for the applicant referring to the policy decision of the Govt. of India dated 29.9.2009 has submitted that the Govt. of India has adopted a policy decision to grant disability pension even to the persons who have retired from service on their own request on or after 01.01.2006. It has also been submitted that the cut off date put by the Govt. of India in the said policy decision has been interfered with by the Principal Bench of this Tribunal vide order dated 07.02.2012 passed in O.A. No. 336/2011 in the case of Maj (Retd) Rajeh Kumar Bhardwaj Vs. Union of India & Ors., which decision though was challenged by the Union of India before the Hon'ble Supreme Court, the same has been dismissed, and hence the applicant is entitled to the disability element of pension though he voluntarily retired from

service prior to 01.01.2006. Learned counsel submits that in view of the Govt. of India policy decision dated 29.9.2009, Regulation 39 of the Pension Regulation for Air Force, 1961 stood amended.

4. Learned counsel appearing for the respondents, on the other hand, has submitted that since the Pension Regulation for Air Force, 1961 has been notified in official gazette, it cannot be amended unless such amendment has again been notified in the official gazette. It has also been submitted that the policy decision dated 29.9.2009, as per his instruction, has not been notified in the official gazette. Learned counsel submits that Regulation 39 having created a bar, the applicant is not entitled to relief claimed.

5. The applicant has retired from service on his own request on 30.11.2000, that is prior to 01.01.2006. Regulation 39 of the Pension Regulation for Air Force, 1961 provides that an official who retired voluntarily shall not be eligible for payment of disability pension. Nothing could be placed before us to demonstrate that the said regulation is a statutory regulation and hence, even though the same was gazetted, it pertakes the character of an executive instruction. It is a settled position of law that an executive instruction can be replaced by another executive instruction.

6. The Govt. of India has adopted a policy decision for granting disability pension to the persons of all three services who have retired from service on their own request. The benefit of the said policy decision was extended to the personnel of all the three services including Air Force vide communication dated 29.9.2009, which provides for grant of disability pension to the persons who have retired on their own request subject to attributability or aggravation of such disability by military service. Paragraph 03 of the said communication put a cut off date i.e. 01.01.2006, which provides that provision of the said communication shall be applicable to the personnel who are retired/discharge on or after that date.

7. The said policy decision, in so far as it relates to putting of the cut off date, came to be challenged before the Principal Bench of this Tribunal in Maj (Retd) Rajesh Kumar Bhardwaj (Supra). A coordinate Bench of this Tribunal, having regard to the various provisions and also the various judicial pronouncements, has recorded findings that the cut off date put by the Govt. of India has no rational basis. Putting of such cut off date was found to be arbitrary. Hence, paragraph 03 of the said communication has been struck off.

8. It appears from the medical proceeding of the applicant, his disability was to the extent of 60 per cent in respect of disability No.1, which is found to be attributable to service.

9. That being the position, we are of the considered opinion that the applicant is entitled to disability element of pension at the rate of 60 per cent, which is to be rounded off to 75 per cent in view of the order dated 10.12.2014 passed by the Hon'ble Supreme Court in Civil Appeal No. 418 of 2012 (Union of India & Ors. Vs. Pam Avatar).

10. Respondents are, therefore, directed to pay the same to the applicant with arrear for a period of three years preceding the date of filing the O.A., which was filed on 08.09.2016. The arrear shall carry interest at the rate of 09 per cent per annum from the said date till the date of payment. Arrears along with interest shall be paid within a period of four months from the date of receipt of the copy of this order.

7. The O.A. is accordingly allowed to the extent indicated above.

8. The learned counsel appearing for the respondents has made an oral prayer to grant leave to appeal to Hon'ble Supreme Court. Since the order does not involve any question of law having general public importance, the prayer for leave to appeal to the Hon'ble Supreme Court stands rejected.

(Lt Gen Gautam Moorthy)  
Member(Administrative)

(Justice B.P. Katakey)  
Member (Judicial)