FORM NO – 4

(SEE RULE 11 (1)

IN THE ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOLKATA

ORDER SHEET

APPLICATION No : O A 86/2013

APPLICANT (S)	Ex Sep Gour Chandra Mondal
RESPONDENT (S)	Union of India & 5 Ors
Legal Practitioner of applicant	Legal Practitioner for Respondent (s)
Miss Manika Roy	Mr. Mintu Kr. Goswami

NOTES OF THE REGISTRY	**ORDERS OF THE TRIBUNAL** Order Sl. No. : Dated : 25.06.2014
	Ms Manika Roy, Ld Advocate appears for the applicant. The applicant is also present in person. Mr. Mintu Kumar Goswami, Ld Advocate appears on behalf of the respondents. The original application is taken up for hearing. 2. The applicant, who was invalidated out of TA Service, feeling aggrieved by non-grant of disability pension, has filed this application under Sec 14 of the AFT Act, praying for a direction upon the respondents to grant him disability pension with effect from 18-1-2003 with interest. 3. The case of the applicant, in brief, is that he was enrolled in the Territorial Army (113 Infantry Battalion (TA) Rajput on 17-1-1992 as GD (Rect) and after completion of training he was posted to 'A' Coy of the said TA Battalion for general duties. At the time of entry into TA service, he was in good state of health. In 1998 he was embodied under Rule 33 of TA Act for counter insurgency duties and posted to OP area (Assam) (OP-Rhino) for guarding vital Army Installations. That apart, the applicant was also posted in field areas in Jammu and Kashmir in 1993-94 for such duties under OP-Surakshak. Subsequently, the applicant

	was again embodied for the period from 30-11-2000 to January 2001 for counter insurgency duties in J&K under OP- Rakshak. During this period the applicant felt some problems in his eyes and reported to his senior and was treated in MI room by administering some eye drops in his eyes. Subsequently at the end of 2000 the applicant was again embodied for the period from 30-11-2000 to January 2002 and posted to N.E. Region. At that time the applicant again felt same problem in his eyes for which he was operated at 151 Base Hospital. He was placed in low medical category E2(permanent) w.e.f. 5-6-2002 and was diagnosed as suffering from "Bilateral Cataract (OPTD). He was operated in his both eyes. Thereafter, he was placed in medical category E5 (Perm) and it was held by the medical authority that he was not suitable for retention in service due to such illness. Accordingly, he was discharged on 18-1-2003 through an invalidating Medical Board. According to the applicant his eye problem developed due to performance of duties in Assam Area for guarding vital petroleum installations for a considerable period of time. The applicant states that at the time of entry in TA service he was medically fit and there was no such disease in his eyes and hence it has to be assumed that his eye problem occurred due to condition of service. 4. After his discharge on medical ground, the applicant was denied disability pension on the ground that the ibid disability was not attributable to nor aggravated by military service. The applicant preferred an appeal which was rejected on 29-3-2007 (Annexure A1). He also submitted a second appeal to the Defence Minister's Appellate Committee on pension which too was rejected on 20-10-2009 (Annexure A1). Thereafter the applicant has filed this OA in the year 2013 praying for the relief as stated above. 5. Since there was delay in filing the OA, the applicant also

	filed an application seeking condonation of delay under section 22 of AFT Act,2007 being MA 120 of 2013 which was allowed vide order dated 24-10-2013. 6. The respondents have contested the application by filing a reply affidavit in which they have stated that the applicant was enrolled in TA on 17-11-1992 and was invalidated on 9-1-2003 under rule 14 (b) (iv) of TA Regulations 1948 as revised being placed in low medical category (E5) for his disability of BILATERAL CATARACT (OPTD). It is further stated that the applicant, out of his total service, has rendered 5 years ad 202 days of embodied service. It is also stated that even though his disability was assessed at 40% for life but the Invalidment Medical Board held that his disability was neither attributable to nor aggravated by military service. Therefore, the PCDA (p) Allahabad rejected the claim for disability pension vide order dated 3-11-2004. Against such refusal to grant disability pension, the applicant preferred a first appeal dated 7-4-2005 which was duly considered by the Army Hqrs and was rejected on 29-3-2007. The applicant preferred a second appeal before the MoD, but that too was rejected by the Govt. on 20-10-2009. It is submitted that since the applicant did not render minimum qualifying service for earning pension, (served only for 5 years and 202 days of embodied service), he could not also be granted invalidment pension. He was also not entitled to disability pension in terms of reg. 173 of Pension Regulations for the Army, as according to the Medical Board, the disability suffered by the applicant in his eyes was neither attributable to nor aggravated by military service even though percentage of disability was 40% for life. He was however paid all other entitlements as per rules in November 2004. Stating all these, the respondents have therefore prayed for rejection of the application.

	7. During the course of hearing Ms Manika Roy, the learned advocate for the applicant, has submitted that at the time of entry into the service, the applicant was medically examined and was found to be fit in all respects and there was no defect in his eyes. During the entire embodied service in the TA, the applicant all along was posted in Field Areas in J&K and North East in areas of countering insurgency operations, which would have contributed to the ibid disability because cataract could not have been ordinarily developed at young age unless subjected to specific hostile environment. The applicant has stated in para 4.5 of his OA that he was detailed for guarding vital petroleum installations in North East, which could be one of the reasons that caused such defects in his eyes. She has also submitted that the Medical Board has not recorded any reason as to why the disability suffered by the applicant could not be considered as attributable to or aggravated by military service. She has pointed out that it is due to the negative opinion given by the medical board that the PCDA(P) rejected the claim for disability pension. She has also stated that the appellate authorities did not also go into the service details of the applicant and mechanically rejected the appeals relying on such negative report by the Invalidment Medical Board with un-substantiated opinion. 8. Mr. Mintu Kumar Goswami, the learned advocate for the respondents has contented that the opinion of the Medical Board which consists of expert doctors is to be given due weightage as held by the Hon'ble Apex Court in a catena of decisions. He has also pointed out that the applicant has not challenged the Medical Board's opinion in his appeals. He has further submitted that the applicant has only rendered 5 years and 7 months of embodied service. Therefore, he is also not eligible to get invalidment pension for which minimum 10 years

service is required. Mr Goswami forecefully submits that in view of the clear medical opinion that the ibid disability was neither attributable to nor aggravated by military service, the applicant cannot be granted disability pension as he does not fulfill the conditions stipulated in the relevant regulation i.e. Reg. 173 of Pension Regulations.

9. We have given our anxious thought to the submissions made by the ld. advocate for both parties. We have also carefully perused the original medical board proceedings as produced by the respondents.

10. In this case, it is undisputed that the applicant was enrolled in TA on 17 Nov 1992 and was discharged on medical ground on 9 Jan 2003 (on 18.1.03 as per applicant vide para 4.5 of the OA). It is also admitted that the applicant suffered "Bilateral Cataract (OPTD) in the year 2002 for which he was operated in both eyes and thereafter placed in low medical category E5 for which the medical board held that he was not suitable for further service and accordingly he was discharged under TA Act Rule 14(b)(iv). It will be appropriate to quote the relevant provision of ibid rule 14 as under :-

> "14. *Discharge*—(a) Every person enrolled shall, on becoming entitled to receive his discharge under the Act or these rules, be so discharged with all convenient speed.
>
> (b) Any such person may be discharged as hereinafter provided on any of the following grounds namely—
>
> (i) That he has been convicted by a criminal court of an offence punishable with transportation or imprisonment.
>
> (ii) That he has in filling up any form prescribed by these rules or otherwise for the purpose of obtaining his enrolment made any statement which was false and which he knew to be false or did not believe to be true.
>
> (iii) That his services are no longer required.
>
> **(iv) That he is medically unfit for further service**."

	11. Obviously, the applicant was discharged on medical ground under rule 14(b)(iv) being found to be unfit for further service placed in medical category E5 for his eye problems. It is also not in dispute that the applicant rendered 5 years and 202 days of embodied service even though he was in TA for more than 10 years i.e. from Nov 1992 to Jan 2003. It may be noted that in TA, persons are inducted on part time or for limited period and not on regular basis. During embodiment they are required to serve the Army and during disembodiment, they can pursue their own vocation. It is also a fact on record that the applicant was posted in field/CI areas in J & K and NE almost all through his embodied service. 12. Before we proceed further to examine the merit of the case, it will be appropriate to consider an oral objection raised by the ld. adv. for the respondents regarding jurisdiction of this Tribunal to adjudicate the issue. By relying on an earlier decision of this Bench in the case of **Major Akhil Srivastava** (OA 28 of 2010) decided on 20.8.2013, it is submitted that since the applicant is a discharged soldier from TA, this Tribunal has no jurisdiction. However, we failed to understand the logic. In OA 28 of 2010, the applicant challenged his discharge from TA while he was in disembodied stage. By referring to Army Act, Sec. 2(1) (e), it was held that the applicant therein could not be said to be governed under the Army Act as he was in a disembodied stage during the period the cause of action arose. Therefore, he could not claim any relief from the Armed Forces Tribunal under the provision of Sec. 2 of the AFT Act, 2007. In the present case, however, the applicant was in active service in an embodied stage when he was invalidated out through a duly constituted medical board. It is not the case of the respondents that the applicant was in disembodied stage at the time when he was discharged on medical ground. Therefore, his grievance can very

well be adjudicated upon by this Tribunal in accordance with law. Hence, we cannot accept the objection of the respondents in this regard which stands overruled.

13. The main grievance of the applicant is that even though he was discharged on medical ground during his embodiment period, he was not granted any disability pension on the ground that his disability was neither attributable to nor aggravated by military service as opined by the medical board.

14. Now, as per reg. 325 of Pension Regulations, in case of TA personnel of Other Rank (like the applicant), same rules are applicable of corresponding rank of Army for grant of disability pension. Thus, reg. 173 is applicable in this case which stipulates that –

> "173. – Unless otherwise specifically provided a disability pension consisting of service element and disability element may be granted to an individual who is invalidated out of service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed 20 per cent or over. .."
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> 173a. – Individuals who are placed in a lower medical category (other than 'E') permanently and who are discharged because of 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 and who having retained in alternative appointment are discharged before completion of their engagement, shall be deemed to have been invalidated from service for the purpose of the entitlement rules laid down in Appendix II to these Regulations."

15. It is the specific case of the respondents that the medical board has clearly held that the disability, with which the applicant had suffered, was not attributable to nor aggravated by military service. Therefore, the applicant was not eligible for grant of any disability pension even though the other conditions

	of reg. 173 have been fulfilled. It is contended by the ld. adv. for the respondents that the medical opinion is rendered by experts and therefore it has to be obeyed and cannot be interfered with by the court or Tribunal as per dictum of the Hon'ble Supreme Court. 16. This stand of the respondents is disputed by the ld. adv. for the applicant by contending that the applicant during his embodied service was all along posted in field areas like J & K and N E Region for counter insurgency duties. According to her submission, such onerous duties have contributed to the development of eye problem at a very young age i.e. 35-36 (year of birth is 1966). The medical board without going through this aspect has very mechanically held that the disability was not attributable to military service. 17. It is true that medical opinion is ordinarily to be given due weightage and primacy unless any thing contrary to the rules is brought on record. However, in a recent decision in the case of **Veer Pal Singh –vs- Secretary, Ministry of Defence, AIR 2013 SC 2828** it has been held by the Hon'ble Apex Court in para 11 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."** 18. Under such circumstances, we are required to be scrutinize the medical board proceedings carefully for the limited

purpose of judicial review for determining whether or not the conclusion reached by it is legally sustainable.

19. In this context, we may also refer to another recent decision of the Hon'ble Apex Court in the case of **Dharamvir Singh –vs- UOI & Ors,** AIR 2013 SC 2480. In that case, the Hon'ble Apex Court by analyzing Entitlement Rules as also Guide to Medical Officers (Military Pension) 2002 has formulated the following two issues for consideration :-

i) Whether a member of Armed Forces can be presumed to have been in sound physical and mental condition upon entering service in absence of disabilities or disease noted or recorded at the time of entrance?

ii) Whether the appellant is entitled for disability pension?

20. The Hon'ble Supreme Court has elaborately discussed the scope of rules 5.6, 7(a), (b) and (c), 8, 9 and 14(a), (b), (c) and (d) of Entitlement Rules, 1982 as also regulation 173 of Pension Regulations. The Apex Court also discussed the effect of earlier decision of the Hon'ble Supreme Court in **UOI & Ors –vs- Keshar Singh**, (2007) 12 SCC 675, as also the case of **Om Prakash Singh – vs- UOI & Ors**, (2010) 12 SCC 667. The Apex Court also considered rule 423 of General Rules of Guide to Medical Officers (Military Pensions) 2002.

In para 28 of the judgement (supra) it is held as under:-

"28. A conjoint reading of various provisions, reproduced above, makes it clear that –

(i) Disability pension to be granted to an individual who is invalidated from service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is

	assessed at 20% or over. 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 service 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 conditions were due to the circumstances of duty in military service. [Rule 14©].*** ***(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. [rule 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. [Rule 14(b)]*** ***(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 – Entitlement : General Principles", including paragraph 7, 8 and 9 as referred to above."***

	21. After explaining Rule 423 of Guide to Medical Officers (Military Pensions) 2002, which deals with attributability aspect, it has been observed by the Apex Court in para 25 of the ibid judgement :- ***"25. Therefore, as per rule 423 following procedures to be followed by the Medical Board :*** ***(i) Evidence both direct and circumstantial to be taken into account by the Board and benefit of reasonable doubt, if any would go to the individual;*** ***(ii) a disease which has led to an individual's discharge or death will ordinarily be treated to have arisen in service, if no note of it was made at the time of individual's acceptance for service in Armed Forces.*** ***(iii) If the medical opinion holds that the disease could not have been detected on medical examination prior to acceptance for service and the disease will not be deemed to have been arisen during military service, the Board is required to state the reason for the same."*** 22. Therefore, it is crystal clear that in the case of **Dharamvir Singh** (supra), the Hon'ble Apex Court has mainly dealt with the role and duty of medical board in assessing the condition of disability of the individual with reasons. It has been categorically pointed out that as per rule 9 of Entitlement Rules, 1982, the "**onus of proof**" is not on the claimant and he shall not be called upon to prove the conditions of entitlements and he will get any benefit of doubt. In other words, the claimant is not required to prove his entitlement of pension such pensionary benefit is to be given more liberally. The duty of the medical board has also been highlighted in that decision as reproduced above. 23. Keeping in view the aforesaid legal position enunciated by the Hon'ble Apex Court, we may examine the medical board proceedings held in respect of the present applicant.

	24. IMB was held on 15 Nov 2002 at 151 MH. In Part III of the format, against column 1 where it is to be recorded as to whether the disability existed before entering service, it has been noted as "No". Similarly against column 2 (a)(b) and (c) where it is to be opined whether the disability is attributable to service or aggravated, etc. it is clearly written "NO'. However, against column C i.e. the cause of disability, it is opined that it is "constitutional disorder." In Part II where statement of the case and personal and family history is to be recorded, it is simply written that "opinion attached". However, from the opinion that is attached and signed by Lt. Col. A.K.Jain, Gr. Specialist (Opth), nowhere the family history is recorded. It is only stated that it is a case of B/L cataract (OPTD). The percentage is shown as 40% for life. The specialist has not indicated that the disability was constitutional disorder which the board has opined. But no reason is given anywhere to indicate as to how the disease could have occurred at such young age. Therefore, the opinion of the Board to the effect that the disability was 'constitutional disorder' is not supported by the specialist's opinion. 25. As held by the Hon'ble Apex Court, it is duty of the medical board to clearly give reason for the opinion, especially when there was no note about any such eye trouble suffered by the applicant at the time of his enrolment. The medical board has also not mentioned that such eye disorder could not be detected through medical examination held at the time of enrolment. 26. It will be appropriate to quote below the observations of the Hon'ble Apex Court in paras 30-33 of the ibid decision as under :- "***30. In the present case it is undisputed that no note of any disease has been recorded at the time of appellant's acceptance for military service. The***

	respondents have failed to bring on record any document to suggest that the appellant was under treatment for such a disease or by hereditary he is suffering from such disease. In absence of any note in the service record at the time of acceptance of joining of appellant it was incumbent on the part of the Medical Board to call for records and look into the same before coming to an opinion that the disease could not have been detected on medical examination prior to the acceptance for military service, but nothing is on the record to suggest that any such record was called for by the Medical Board or looked into it and no reasons have been recorded in writing to come to the conclusion that the disability is not due to military service. " 27. After carefully going through the medical board proceedings, we are of the opinion that the medical board has not considered the case of the applicant strictly in accordance with the guidelines enumerated in the "Guide to Medical Officers (Military Pension) 2002 and has very mechanically given their opinion which is not supported by the specialist's views. In such circumstances, we are unable to uphold the medical opinion that the ibid disability of the applicant was not attributable to military service and is due to constitutional disorder. In the absence of any contrary materials, benefit of doubt would go to the discharged soldier and onus of proof lies strictly on the respondents, which is manifestly absent in this case. 28. Similarly, from the appellate orders, we find that the said orders were passed only on the basis of the ibid medical opinion without looking into any other aspects. In such view of the matter, these orders also cannot stand to judicial scrutiny. It is time and again held by the Hon'ble apex Court that the appellate authority should give reason for its decision which is not available from the record. It simply rejected the appeal on perusal of the "service/medical documents". Accordingly, the

	appellate orders dt. 29.3.07 and 2.6.07 also stand quashed. 29. We take note of the fact that the applicant was discharged long back in 2003 and more than ten years have passed. At this stage, it will, perhaps, not be possible to re-assess the cause of the disability if the case is remanded to a fresh medical board for consideration. So far as percentage of disability is concerned, it is not in dispute that such percentage was assessed at 40% for life. In such circumstances, we are of the opinion that it is a fit case where this Tribunal should interfere and reject the medical board opinion with regard to attributability/aggravation issue. As a consequence, it has to be held that the disability of the applicant was attributable to or aggravated by military service and thus, he was entitled to disability pension at the rate of 40% with rounding off benefit as applicable under the rules. 30. However, we also take note of the fact that although the applicant was discharged on medical ground in Jan 2003, he approached this Tribunal only in 2013 i.e. long ten years thereafter. In such circumstances, we are of the opinion that the benefit of disability pension should be restricted to three years prior to filing of this OA before this Tribunal on 18.9.13 i.e. he will be entitled to grant of disability pension w.e.f. 1.9.2010. 31. In view of the foregoing, this original application stands allowed on contest but without any costs, by passing the following directions as in subsequent paragraphs. 32. The respondents are directed to sanction disability pension to the applicant for 40% disablement for life with rounding off benefit as per rules, w.e.f. 1.9.2010. This order be implemented including payment of arrears within four months from the date of communication of this order. In default, the respondents shall be liable to pay interest @ 9% per annum on the admissible dues to the applicant. 33. Let the original records be returned to the respondents

	on proper receipt. 34. Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both sides on observance of usual formalities. (LT. GEN K.P.D.SAMANTA) MEMBER(A) (JUSTICE RAGHUNATH RAY) MEMBER(J)