FORM NO – 21
(See Rule 102 (1)

ARMED FORCES TRIBUNAL, KOLKATA BENCH

APPLICATION NO : TA 67 OF 2011 (CWJC 18530/2008)

This 24th Day of June, 2013

CORAM : Hon'ble Mr. Justice Raghunath Ray, Member (Judicial)
Hon'ble Lt. Gen. K.P.D. Samanta, Member (Administrative)

EX HAV Ajay Kumar, Army No.14910639 P, Son of Shri Kameshwar Singh, resident of Village Anantpur, P.O. Peoshour, Dist. Nalanda (Bihar)

..... Petitioner

-VS -

1. Union of India represented through the Secretary, M/o Defence, Army HQ, Defence H.Q., New Delhi-110 011

2. Chief of Army Staff, Army H.Q. Defence H.Q. New Delhi 110011

3. The Record Officer, Mechanical Infantry Regiment, Abhilekh Karyalaya, Record the Mech Inf. Regt., Ahmadnagar – 414 110

4. The Officer In-charge, PCDA (P), Allahabad (UP)

5. The Officer In-charge, AGPS – 4, Army H.Q. Defence HQ, New Delhi

..... Respondents

For the applicant : Mr. Fulman Singh, Advocate

For the respondents: Mr. S.K.Bhattacharyya, Advocate

O R D E R

Mr. Fulman Singh, ld. adv. appears for the applicant and Mr. Sandip Kr. Bhattacharyya, ld. adv. appears on behalf of the respondents. The Transferred Application is taken up for hearing. Heard ld. advocates for both sides at length.

2. The applicant is a former Havildar of Indian Army belonging to the Mechanized Infantry which is a Combat Arm of the Army, who fight from within ICV (Infantry Combatant Vehicle). He was last posted in 19 Mechanized Infantry Battalion (MECHINF). His case, in brief, is that he was enrolled on 02.07.83 and was discharged on 31.6.04 before fulfilling his complete terms of engagement on medical grounds. As per terms and conditions of service a Havildar serves for 24 years subject to screening through a Screening Board, for extension, on completion of 22nd year of service. In his case, he was, however, discharged on medical ground, as submitted by him, while he had 3 more years' service left in the Army. At the time of discharge, he was put through a Release Medical Board (RMB for short) on 13.2.2004 that was conducted in 176 Military Hospital (vide page 12 of the A/O) (the ibid original medial board proceeding was inspected by the court).

3. As per the ibid RMB, the applicant was suffering from 'BILATERIAL OTSCLEROSIS (EAR) LT (OPTD)" (ICD No. H91.8). He had been in low medical category because of ibid disease since August 1999 but had been continuing in service. The above RMB opined that the applicant's disability was attributable due to military service on account of exposure to loud noise during military service that had its onset in August 1999 while serving at Bikaner. Such endorsement is available at page 53 of the ibid medical board proceeding. He was awarded 20% disablement for the ibid disease

which is evident from the endorsement at page 6 of the said medical board proceeding. The said medical board was duly constituted and its findings were approved by the higher medical authority i.e. ADMS of HQ 18 Infantry Division. However, the applicant did not receive any disability pension despite the ibid recommendation. Instead he was communicated by the PCDA (O), Allahabad, vide letter dt. 28.9.04 (annexure-11) that he was not entitled to any disability pension since as per the Medical Adviser (Pension) attached to the PCDA's office such disability was considered neither attributable nor aggravated due to military service.

4. Finding that the rejection being contrary to the recommendation of the RMB, the applicant filed a first appeal before the competent authority (PS-4, Army HQ) but it was rejected by the said authority in November 2006 which was communicated to the applicant on 19.12.06 by the Records of Mechanized Infantry Regiment (annexure-5). Being aggrieved, the applicant appealed before the Ministry of Defence as per provision of second appeal, for which he was called to Base Hospital at Delhi Cantonment for conducting an appeal medical board vide letter from the Base Hospital, Delhi Cant. Dt. 29.9.07 (annexure-7). The applicant accordingly proceeded to Delhi and appeared before the appeal medical board that was held on 17.12.07. Copy of the ibid appeal medical board proceeding has been filed by the applicant (annexure-A8). However, the original records of this appeal medical board dt. 17.12.07 has been made available for our perusal by the respondents. It is observed from the said appeal medical board proceedings that this medical board considered his disability to be not attributable and not aggravated due to military service and it further reduced the percentage of disability to 15-19%. Accordingly, his 2nd appeal was rejected by the Govt. on the ground that the applicant's

disability was neither considered as attributable nor aggravated due to military service. Therefore, under Pension Regulation 173, no disability pension could be granted to him unless such disability was attributable or aggravated due to military service.

5. Being aggrieved by the rejection of his second appeal by the Govt., the applicant approached the Hon'ble Patna High Court by filing the instant writ petition being CWJC No. 18530 of 2008, which has subsequently been transferred to this Tribunal after coming into force of the AFT Act, 2007 and accordingly it has been renumbered as TA 67 of 2011.

6. The main contention of the applicant is that how could another medical board grossly change the opinion of the first medical board without assigning any reason. He has, therefore, prayed that he should be sanctioned disability pension in accordance with the recommendation of the first RMB which had considered his disability to be attributable to and aggravated by military service and his percentage of disability was 20% as assessed by the said RMB.

7. The applicant has further prayed that since his service was curtailed from his entitled service of 24 years and he was discharged because of medical disability, the RMB may be regarded as IMB and his case should be treated as a case of invalidment for being in low medical category. His prayer is further to extend him the benefit of rounding off of disability pension as per Govt. policy on the subject, by which he would get 50% disability pension instead of 20%.

8. To support his argument, the ld. counsel for the applicant has relied on a decision of the Hon'ble Supreme Court in the case of **Madan Singh Shekhawat –vs- UOI & Ors,**

(1999) 6 SCC 459. The ld. counsel has especially drawn our attention to Para 14 and 15 of the said judgement wherein it is observed inter alia as follows:-

> "..... it is the duty of the court to interpret a provision, especially a beneficial provision, liberally so as to give it a wider meaning rather than a restrictive meaning which would negate the very object of the rules. .."

9. While referring the contents of the ibid decision, ld. counsel for the applicant submits that appeal medical board gave its opinion on the status of the disability of the applicant on the date the applicant had appeared before the said board in December 2007. That board was held without the appropriate opinion of the commanding officer of his battalion (19 Mechanized Infantry Battalion) whereas his opinion was available at the time when his RMB was held in February 2004. He is, therefore, of the view that enough attention was not given to the environmental condition of his service through which he had been functioning in the deserts of Bikaner during the year 1996-99. The ld. counsel for the applicant brought to our notice the nature of duty of the applicant. Being a Havildar of Mechanized Infantry Battalion, he was to operate from within a Tank like combat vehicle which is called ICV. He was required to command the crew of this ICV thereby subjecting himself to heavy noise of guns and shells which are fired from this ICV and also the noisy environment akin to that of a tank or gun that he had to operate. All these aspects actually contributed to his disability which was well considered by his commanding officer while endorsing his opinion in the Part II of the medical board proceedings when he was subjected to the earlier RMB in 2004. The RMB was also considerate enough to examine all these aspects of service environment and took into account the effect of such conditions while deciding upon the attributabilty aspect of his disability. In contrast, the appeal medical board went into no such details. That Board did

not even bother to ask him or obtain any opinion from his commanding officer (CO, 19 MECHINF) with regards to his conditions of service when/ prior to the onset of his disability. Therefore, considering the ratio of the ibid decision of the Hon'ble Supreme court, he is of the view that the decision of the earlier RMB, which is still valid, is more advantageous to him besides being more logical. Therefore, he prays that the disability award as per recommendation of the RMB be made operative.

10. The respondents have broadly relied on the counter affidavit and have submitted that the applicant was discharged under Army Rule 13(3)I(ii)(c) and 13(3)III(V) read in conjunction with Army Rule 13(2A). It is submitted that the applicant was discharged being in low medical category i.e. lower than SHAPE-1 under the ibid provisions of the rules. They, however, admitted that the applicant was willing to serve but due to non-availability of sheltered appointment, his discharge was issued by the Mechanized Infantry Records. It is on this account that he was placed before a RMB and was, thereafter, discharged as per the ibid rules. There is no dispute with regard to contents of the RMB proceedings but the respondents contend that the PCDA rejected the disability pension claim which is documented and already presented by the applicant upon which the respondents have also no dispute. They, however, brought to our notice with regard to the fact that after the applicant filed the second appeal against rejection of his disability pension on 22.1.07 by the first appellate authority, the same was submitted to the Govt. of India on 19.2.07. The DGAFMS constituted an appeal medical board which opined that " onset of the Invaliding Disease (ID) "BILATERAL OCTOSCLEROSIS (LT) EAR (OPTD) was in 1996. The ID is a hereditary progressive disorder which is unaffected by service conditions". Therefore, the appeal medical board considered the percentage of

applicant's disablement to be 15-19% and not attributable to nor aggravated by military service. In this connection, Mr. Bhattacharyya, ld. adv. for the respondents drew our attention to the contents of Regulation 173 of Pension Regulation, 1961, Part I wherein it is clearly stated that disability has to be 20% or more and attributable or aggravated due to military service for a person to be eligible to receive disability pension.

11. Mr. Bhattacharyya reiterated the points that have been mentioned in the counter affidavit and laid emphasis on the contents of appeal medical board, a copy of which is annexed by him as annexure-B1 to the counter affidavit. He has especially drawn our attention to endorsement of the Medical Board at part IV (internal page 4) wherein it is endorsed by the Board that:

> "ID is a hereditary progressive disorder which is unaffected by service condition and hence considered as NANA (Re. para 58, Chapter VI of Guide to Medical Officers, 2002)"

12. He also drew our attention to the expert opinion of Col. A.K.Meheta, a Classified Specialist (ENT) wherein he has very clearly mentioned that the disability was neither attributable nor aggravated by service. Mr. Bhattcharyya is of the view that in the absence of any positive finding in the said medical board, it will not be proper for the authorities to sanction any disability pension in violation of the provisions contained in Reg. 173 of Pension Regulation.

13. As regards the fate of the first Release Medical Board of 2004 upon which the applicant has laid much emphasis, Mr. Bhattacharyya submits that the RMB of February 2004 would automatically lose its value since the appeal medical board was held later in 2007 as the applicant himself had filed an appeal before the Ministry of Defence. Therefore, at this stage, to rely upon the medical board that was challenged by the

applicant himself and now that the opinion of the appeal medical board has been made available, is grossly improper. In consonance with the opinion of the appeal medical board the applicant has no case for grant of disability pension in his favour.

14. So far as the prayer made by the applicant to treat his discharge to be a case of invalidment is concerned, Mr. Bhattacharyya submits that the applicant could not have served his full tenure being in low medical category but he was allowed to serve till he earned his full pension. For further service up to 24 years, he had to go through a screening board for which he was not eligible being in low medical category. Moreover, there was no sheltered appointment for him to continue in service. Therefore, it would be treated as a normal discharge under the provisions of Army Rule 13(3)I(ii)© and 13(3)III(V) read in conjunction with Army Rule 13(2A), as mentioned above and not a case of invalidment.

15. We have given our thoughtful consideration to the rival contentions and have very carefully perused the records including the original two medical board proceedings produced before us.

16. At the outset, we are of the view that two issues are required to be decided by us in this case.

17. The first issue is whether the applicant was required to be discharged through an RMB or IMB since his entitled service of 24 years was indeed curtailed by 3 years and instead he was discharged after 21 years of service. There are no records to suggest that he was ever put through a screening board although he was in low medical category ($S_1H_2A_1P_1E_1$) since 1996.

18. The second issue that arises is that there are two medical opinions on record. The first medical board held on 13.2.04 at 176 MH, which was considered by the respondents as Release Medical board and the second medical board which was an appeal medical board held in December 2007 at Base Hospital, Delhi Cant.

19. The first medical board of February 2004 opined the applicant's disability to be attributable and percentage of disability was assessed at 20% whereas the appeal medical board differed and considered the disability was neither attributable nor aggravated due to military service and it also reduced the percentage of disability to 15-19%.

20. While adjudicating the first issue i.e. whether the applicant was to be discharged in normal course or was to be considered as invalidated out, we are quite clear that the condition of service of a Havildar is actually 22 years extendable to 24 years subject to being found suitable through a screening board. In case of this applicant, however, admittedly he was discharged after 21 years of service, thus, curtailing his service by 3 years.

21. In this connection, we may refer to a recent decision of this Bench in the case of **Atul Chandra Karmakar –vs- UOI & Ors (TA 41 of 2011)** decided on 17.5.2013 (unreported). In that case, the applicant was also a Havildar in the Corps of EME and due to low medical category he was discharged from service on completion of 24 years without granting him extension upto 26 years. The question that fell for consideration was whether the prescribed service of the applicant indeed curtailed on account of medical category? While discussing this issue, the Tribunal analysed the Govt. policy letters dt. 3.9.1998 and CDA circular No. 301 dt. 27.5.2002. It was inter alia observed in para 16, 17 and 18 as follows :-

"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."

22. This decision of this Tribunal has not yet been reversed by any higher forum nor any stay has been granted and as such, the ratio of this decision still holds the field.

23. Under the circumstances, following the above precedent, we are clearly of the view that the applicant was sent on discharge 3 years before his due date on account of his medical disability. Therefore, it is nothing but curtailment of his entitled service.

Therefore, in view of our decision in the afore-cited case, it has to be termed as a case of invalidment on medical ground and in such case he should have been put through an Invalidating Medical Board (IMB) instead of putting him through RMB vide **Rajpal Singh's** case decided by the Hon'ble Supreme Court (2008 (12) SCC 476). In that view of the matter, we are inclined to view that the RMB held in February 2004 has to be treated as IMB since materially there is no difference in conduct of such medical boards. Accordingly, the applicant is held eligible to get all consequential benefits of a Havildar, who was invalidated out of service on medical ground prematurely rather than being discharged on fulfillment of terms of conditions.

24. In order to decide the second issue, it is very important for us to keep in mind the ratio of some important decisions of the Hon'ble Apex Court on the issue, the sum and substance of which is that the opinion of medical board is to be given weightage and the court or Tribunal should not ordinarily interfere with such opinion of the medical board unless it is found to be perverse or gross infirmity is apparent on the face of the record. (vide **UOI & Ors –vs- Jujhar Singh,** AIR 2011 SC 2598, **Secretary, Ministry of Defence –vs- A.V.Damodaran (dead) through LRs** (2009) 9 SCC 140, **UOI –vs-Baljit Singh** (1996) 11 SCC 315, **UOI –vs- Keshar Singh**, (2007) 12 SCC 675 etc).

25. In the instant case, we find that the appeal medical board has nowhere cited the reasons for differing with the opinion of the earlier RMB held in February 2004. In fact, the opinion of the expert which in this case is an ENT Specialist differed, although the opinion of the appeal medical board of 2007 has been written by a classified specialist of the rank of Colonel whereas in the case of the RMB of 2004 it was also endorsed by an expert who is a graded specialist of ENT of the rank of Lt. Col. It is interesting to note

while comparing the two medical boards proceedings, that the appeal medical board of 2007 has considered on examination that impairment of his right ear which was not operated earlier is deteriorating further than what it was when he was examined in 2004. Despite such finding, the appeal medical board of 2007 has brought down the disablement percentage from 20% to 15-19%. This appears to be a contradiction of the findings by the expert.

26. Another important defect in the appeal medical board that we find is that the opinion of the commanding officer in part II of the appeal medical board proceedings has been signed by one Lt. Col. Balbir Singh whose appointment is as Chief Record Officer; whereas the same part (Part II) of remark page has been signed in the applicant's earlier medical board of 2004 by his actual commanding officer, who was Col. R.N.Singh, CO, 19 MECHINF Regiment. While analyzing this issue we find that the Record Officer is not competent to place his opinion on this part of the medical board proceeding since it also relates to his service conditions including the nature of duties etc. It is very glaring to note that the commanding officer's endorsement in RMB of 2004 is to the effect that *"I consider the disability attributable due to exposure to loud noise of firing during military service"*; but this type of endorsement is totally missing from Lt. Col. Balbir Singh's statement in the same part of appeal medical board proceeding. We are of the view that the applicant being a NCO of Mechanized Infantry Unit must have a statement of a CO belonging to his unit rather than from a General service Record Officer who would have no knowledge or experience regarding service conditions in Infantry or Mechanized Infantry battalion. This is an important defect because this part is to be treated as an input

to the medical board while they consider the attributability/aggravation aspect of disability.

17. Therefore, we are of the view that the appeal medical board was not properly conducted and no reason was assigned as to why the opinion of the earlier board was rejected. Even when the Ministry of Defence rejected the second appeal of the applicant, they did not assign any reason as to why the earlier medical board's opinion was rejected by the appeal medical board.

28. We also observe from the records that the applicant's first appeal was rejected in a very mechanical manner by the authorities as is evident from the contents of the rejection letter dt. 19.12.06 (annexure-A5). The reason assigned is –

> "…. Your invaliding disability of ID BILATERAL OCTOSCLEROSIS (LT) EAR (OPTD)" is neither attributable nor aggravated by military service. Therefore, you are not entitled to disability pension as per regulation 173 of Pension Regulations for Army, Part I, 1961"

29. The ibid endorsement of the first appellate authority is absolutely contrary to the endorsement of the opinion in the RMB of February 2004. At the time the first appeal was rejected which was in December 2006, there was no question of any other medical board. Therefore, it is very clear that the first appellate authority has considered the applicant's appeal in a very routine and mechanical manner without even going through the relevant documents or making any efforts to assimilate the real reason of grievance. Similarly, the PCDA has also not given any reason to differ with the expert opinion of the RMB.

30. Our above findings and observations, after going through the original documents, as submitted by the respondents, we are inclined to consider that the appeal medical board cannot be taken at its face value. At the same time, it will also not be proper for us

to totally rely on the first release medical board of February 2004 since contrary opinion has been passed by the appeal medical board subsequently.

31. Under such circumstances, to meet the ends of justice, we are inclined to allow one more chance to the respondents to examine the applicant by a special appeal medical board wherein a senior expert of the level of a Consultant in ENT must give his opinion after examining the applicant and both the ibid medical boards in question including due consideration to the nature of service conditions that the applicant was subjected to being a NCO in a MECHINF unit as authenticated by the CO 19 MECHINF in his endorsement in the RMB of 2004. The opinion of such a special medical board should pin-point as to why it would differ or concur with the opinion of the experts in either of the two medical boards mentioned above. This medical board must give reason since benefit of doubt, as a matter of natural justice, must always to be given to the aggrieved person, in this case, the applicant. Moreover, the Guide to Medical Officers of 2002 is merely a guide and does not always cover all aspects of hazard of military service conditions in the country. It is for this reason that the opinion of the commanding officer is always an important input for the expert medical officer when he decides on cases like this. The special appeal medical board must look into all such aspects objectively and *de-novo*.

32. In view of our findings made above, the Transferred Application stands allowed in part by issuing the following directions :-

a) The applicant should be treated to have been invalidated out of service due to low medical category before fulfilling his entitled tenure and would be entitled to all consequential benefits as per rules.

b) Since considerable time has elapsed, we direct to treat the RMB of the applicant held in February 2004 as an IMB for invalidating him out, as required under Army Rule 13(3)(III)(iii).

c) The respondents are directed to constitute a special appeal medical board within 60 days from the date of communication of this order, in which an expert ENT surgeon of the level of a Consultant should be included and he will examine the applicant and give his opinion accordingly. While doing so, he will take into consideration the service conditions of the applicant which was given by his CO at the time of his release in 2004 and also look into the earlier opinion given by such experts in the RMB (since converted as IMB) and also the appeal medial board and give reasons of his concurrence or disagreement, as the case may be, with either of two boards.

d) The result of the special medical board will be binding on both parties. If, the special appeal medical board recommends grant of disability pension in favour of the applicant, the respondents shall pay him such pension including the benefit of 'rounding off' as applicable, from the date of his entitlement, within 60 days from such recommendation.

e) Needless to say that the special appeal medical board will give notice to the applicant to appear before it on an appointed day at the place where such board will be held; but the applicant will be entitled to TA/DA for the purpose as per his entitlement according to rules.

f) No order as to costs.

g) Let the original records be returned back to the respondents on proper receipt.

h) Let a plain copy of this order duly countersigned by the Tribunal Officer be furnished to both parties.

(LT. GEN. K.P.D.SAMANTA)
ADMINISTRATIVE MEMBER

(JUSTICE RAGHUNATH RAY)
JUDICIAL MEMBER