FROM NO. 21

(SEE RULE 102(1))

ARMED FORCES TRIBUNAL, KOLKATA BENCH

APPLICATION NO: O. A NO. 32 OF 2012

ON THIS 1ST DAY OF NOVEMBER, 2013

CORAM **HON'BLE JUSTICE RAGHUNATH RAY, MEMBER (JUDICIAL)**

HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

Shri Arumugam,
Ex-Sepoy No. 105354545M in
Territorial Army,
S/o Shri A. Subhaiah
R/o Bathu Basthi,
South Andaman-744 105

.....Applicant

-VS-

1. Union of India through
   The Secretary, M/o Defence,
   R.K.Puram, New Delhi

2. The Commander, Territorial Army Group HQs
   Southern Command, Pune- 908541
   C/o 56 APO

3. The Additional Director General,
   Territorial Army, General Staff Branch,
   IHQ of MOD (Army), Church Road,
   P.O. New Delhi-110 001

4. The Chief Record Officer,
   Records, Bihar Regiment,
   Pin-908765
   C/o 56 APO

5. The Commanding Officer,
154 INF BN (TA) Bihar,
Pin: 900474: C/O 99 APO

.... Respondents.

For the Applicant : Mr. Nilanjan Kar, Counsel

For the respondents : Mr. B.K.Das, Counsel

ORDER

PER HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

1. The applicant, who was enrolled in the Territorial Army as a Sepoy on 29.8.2003, was discharged from service under rule 14(b) (iii) of TA Rules on 28th Feb 2008 on the ground that his services were no longer required on account being placed in low medical category. Being aggrieved by such premature discharge, the applicant has filed this OA praying for grant of disability pension since he was discharged on the ground of medical disability and not due to any other reason. He has also prayed for granting him 'ex-serviceman' status.

2. The facts of the case, in brief, are that the applicant was enrolled in the 154 Infantry Battalion (TA) Bihar located in A & N Islands on 29.8.03. He had onset of the disease (*Myasthenia Gravis*) during July 2005 when he was posted at Bangalore. As is evident from the initial medical board record, which was held at INHS Dhanyantari, and finalised on 27.3.06, the applicant was placed in low medical category (P3 temporary) for a period of six months vide annexure- A2. Subsequently in the re-category review medical board held after six months, he was upgraded to permanent low medical category P2. The applicant was also referred to Army Hospital at Delhi where he underwent an operation in November 2005.

3. As per provision of TA Act and Rules, i.e. rule 14(b) (iii), any person in the TA, if downgraded to a category lower than SHAPE1, shall be discharged from service. Under such circumstances, having been downgraded to the medical category P2, a show cause notice was issued to him on 4.12.2007 (page 116 of the A/O) wherein, besides the ibid TA rule, attention of the applicant was also drawn to the provisions of Army Order 460/1973 as per which a JCO/OR who has been placed in permanent low medical category shall be discharged from TA Service. The said show cause notice was received and replied by the applicant in December 2007 (vide page 117 of A/O). In the ibid reply, the applicant admitted that he was in agreement with the authorities that he could be discharged from TA service for being placed in permanent low medical category. It is only after that, the commanding officer has endorsed his remarks in the reply to the show cause itself that the applicant would be discharged from service after carrying out a release medical board (RMB).

4. Accordingly, a RMB was carried out for the applicant at INHS Dhanyantari, Port Blair on 23.01.2008. The said medical board having agreed that the applicant had suffered from the disability "*Myasthenia Gravis G-70, Z-09.0*" and opined that the said disability was neither attributable to nor aggravated by military service, recommended his discharge from service. However, no reason has been endorsed by the said medical board as to how and why they had arrived at the conclusion that the said disease was neither attributable to nor aggravated by military service. Be that as it may, the said RMB considered his disablement percentage as 15-19%. Thus, the applicant was denied disability pension. Being aggrieved the applicant preferred an appeal before the Army HQ which was rejected. Being dissatisfied, the applicant preferred a second appeal before the Ministry of Defence which too was rejected. Hence, this original application seeking a direction to grant him disability pension as also the status of an 'ex-serviceman'.

5. The respondents have opposed the application by filing an affidavit-in-opposition. They have, however, not denied any of the aspects with regard to facts regarding service and medical particulars of the applicant as stated in the OA.

6. However, the respondents have stated that the applicant had submitted his first appeal as well as second appeal to the Army HQ and Ministry of Defence as per provision of the rules which were rejected on 21.4.09 (annexure-A4) and 16.4.10 (annexure-A7) respectively with adequate reasons. Subsequent to that the applicant had approached the Hon'ble Calcutta High Court in its Circuit Bench at Port Blair by filing writ petition No. WP 1466 of 2009 which was disposed of by a Single Bench vide order dated 14.1.2011 (annexure-A8). The Ld. Single Bench observed that different grounds were adduced by the authorities in denying the claim for disability pension of the applicant on different occasions and there was also doubt with regard to the opinion of the medical board and for that reasons, the appellate orders were quashed and direction for holding a fresh medical board was ordered.

7. However, the Govt. respondents filed an appeal against this decision and obtained an order from the Division Bench of the Hon'ble Calcutta High Court on 15.6.11 (annexure-A9). As per the ibid order of the Hon'ble Division Bench, the order of the Hon'ble Single Bench was set aside as it was passed beyond jurisdiction since at the time when the said order was passed, Armed Forces Tribunal had already been set up. However, liberty was given to the applicant to approach appropriate forum for redressal of his grievance. Accordingly, the applicant has filed the instant OA before this Bench.

8. The respondents have submitted that in terms of the Army Order No. 460/73 (extract given in page 142 of A/O) the applicant, being in permanent low medical category for a disease that was neither attributable to nor aggravated by military service, could not have been retained

in TA service any longer. Accordingly, the case was processed within the parameter of this army order and TA Rule 14(b) (iii) and he was served with a show cause notice; reply obtained and it is only after that he was discharged from TA service which is well within the rules. Moreover, the respondents have submitted that the applicant's percentage of disablement is below 20% i.e. 15-19%. Therefore, under no circumstances, he would be eligible for any disability pension as per Pension Regulations.

9. The respondents, in response to the prayer for grant of ex-serviceman's status, have submitted that unless the applicant was in receipt of any kind of pension, he could not be considered as an ex-serviceman as per extant rule. In this case, he is not even entitled to disability pension since his disability was neither attributable to nor aggravated by military service and his total embodied service was only for 4 years and 115 days, which is well below the required minimum pensionable service of 15 years. Under the circumstances, the applicant is neither eligible for service pension nor disability pension and consequentially, he is also not eligible to get the benefit of an ex-serviceman. The respondents have, therefore, prayed for dismissal of the OA.

10. We have heard the ld. Advocates for both sides at length and have perused the documents placed on record.

11. Mr. Nilanjan Kar, the ld. Adv. for the applicant has based his arguments in support of prayer for grant of disability pension by making mainly the following submissions:-

(a) Firstly, the applicant was in perfect medical condition before his enrolment into the TA service. This disease that has affected him was purely on account of his conditions of service in remote area of A & N Islands and also in J & K where he served during his brief span of 3-4 years of service.

(b) Secondly, the ld. Adv. for the applicant is of the view that the medical board has not considered the environmental conditions of his service in field areas before endorsing that such disability was neither attributable to nor aggravated by service.

(c) That besides, the ld. Adv. has argued that in case the disability of the applicant was considered to be attributable to service, then in that event, he could have been retained in service for a longer period and not discharged under the provision of Rule 14(b) (iii) of TA Rules and Army Order No. 460/73; because in case of those who are in low medical category on account of attributable/aggravation cause, mandatory discharge would not apply. Under such circumstances, the applicant has prayed that his discharge may be treated as invalidment from service and his disability be considered as attributable to and/or aggravated by military service.

(d) On acceptance of his ibid prayer, he has also prayed for consequential benefit like grant of disability pension as also the status of "ex-serviceman" so that he can get medical treatment and other benefits as are admissible to an ex-serviceman.

12. Ld. Adv. for the respondents has reiterated the contentions made in the counter affidavit and has submitted that the medical board has clearly held that the disease with which the applicant was suffering was neither attributable to nor aggravated by condition of his service. That apart, the percentage of disability was also assessed below 20% and hence, the applicant was not eligible for any disability pension in terms of relevant Pension Regulations.

13. The ld. Adv. for the respondents has also brought to our notice the MoD circular dated 5th May 2008, as also Territorial Army Directorate policy letter dated 24.10.2008 on the subject of retention of permanent casualty in Battle/on duty of Territorial Army Personnel (annexures-R1 and R2 respectively of the compliance report filed on 10.7.13). He has submitted that the

policy of retention of low medical category TA personnel till they attained the minimum pensionable service was introduced for the first time by the aforesaid policy letters which came into effect from 5th May 2008 whereas the applicant was discharged under the old rules in February 2008. As such, he was not entitled to be retained till attainment of minimum pensionable service.

14. We have considered the rival contentions very carefully. In this case the facts are almost admitted. It is the admitted position that the applicant was enrolled in TA as Sepoy on 29.8.03 and within two years of joining the service, he had developed the disease of *Myasthenia Gravis,* for which he was eventually discharged from TA service on 28.2.2008 after rendering only about 4 years and 115 days of embodied service. Obviously, he was not eligible for any service pension as he did not render minimum 15 years of service required for earning pension.

15. It is also undisputed that because of the ibid disease, the applicant was placed in low medical category S1H1A1P2E1 (perm) for which he was discharged from service after holding a Release Medical Board. His discharge was in terms of Army Order No. 460/73 and accordingly, before discharge, he was also issued with a show-cause notice dated 4.12.2007 (page 116 of the A/O). It appears that he was discharged under rule 14(b) (iii) of Territorial Army Act, Rules, 1948 vide discharge book at page 34 of the OA.

16. The issues, therefore, arise as to whether the applicant was validly discharged under rule 14(b) (iii) on medical ground; and, whether he was entitled to disability pension?

17. Here, it will be appropriate to quote relevant portion of Army Order 460/73, extract of which is annexed at page 142 of the A/O :-

Extract of Army Order 460/73

1. ....

2. (a)

(b)

(c) Category 'B' and 'C' (permanent) personnel will be sent to their respective units in the case of unit located in a peace area in the case of unit/formations located in operation area; individuals will be sent to their affiliated centre/depot and treated as attached under TA Rule 13(5). Such personnel will be discharged from the Territorial Army,"**as services no longer required" under TA Rule 14(b) (iii) or 14(c), as he case may be. They will be given a show cause notice before their discharge.** The Unit/Centre will take immediate action to initiate their cases for discharge by the competent authority and their discharge will be effected within one month from the date of receipt of medical board proceedings, duly countersigned by the competent medical authority. In the Unit/Centre expeditious action will be taken at all levels to ensure finalisation of such cases within the said time limit. "

18. It is seen that medical category 'B' and 'C" personnel will be discharged from TA "as services no longer required" under TA Rule 14(b)(iii) or 14(c), as the case may be and a show cause notice has to be given before such discharge. Undoubtedly, this procedure has been followed in the case of the applicant.

19. It is also important to quote rule 14 of TA Act & Rules for better understanding of the case, which is 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) ....

(ii) ....

(iii**) That his services are no longer required**.

(iv) **That he is medically unfit for further service**.

(c) Discharge, dismissal, removal, retrenchment – officers - ....."

20. Obviously, rule 14 (c) is not applicable in this case because no disciplinary action was taken against the applicant in the matter of his discharge. However, we find that while the respondents have discharged the applicant under rule 14(b)(iii) as his "services no longer required", but there is also another clause at sub-rule 14(b)(iv) which states discharge may be made on the ground that "he is medically unfit for further service. " In the instant case, it is the admitted position that the applicant was discharged only on medical ground as he was found in low medical category and was recommended for release by the release medical board. Therefore, appropriate rule in this case that ought to have been applied is rule 14(b) (iv) and not rule 14(b) (iii), as was done. In that view of the matter, we are of the opinion that the respondents have not applied the correct rule in the matter of discharge of the applicant from service because admittedly it was neither for any disciplinary action nor for any other reason.

21. The respondents have produced before us TA Act and Rules, 1948 and in addition extracts of AO 460/73 and AO 153/73 along with it. The said AO/153, in content, is similar to Reg. 173A of Pension Regulations for Army. The AO 153/73, as relevant in this case, is quoted as under :-

"AO 153/73: Disposal of low medical category Territorial Army personnel and their entitlement to disability pension –

1. I am directed to say that the President has been pleased to decide that personnel of the Territorial Army, **who are placed permanently in a low medical category other than 'E', will be discharged from the service. They will be deemed to have been invalided out of service for the purposes of para 1 of the post March 1948 Entitlement Rules and their claims to disability pension will be dealt with under the normal rules and disability pension will be granted to them, if otherwise admissible.**

2. Personnel referred to in para 1 above who are found to be ineligible for the grant of disability pension will be paid terminal gratuity for their qualifying service under the conditions and at the rate laid down in Regulations 318 & 319 Pension Regulations for the Army Part I (1961). "

22. Admittedly, the applicant was placed in low medical category P2 and was discharged from service through a release medical board. In terms of this AO 153/73, the applicant should

be deemed to have been invalidated out of service. Therefore, it is a clear case of invalidment and not ordinary discharge for 'service no longer required', as has been sought to be done by the respondents.

23. For the reasons stated above, we are of the considered view that the applicant ought to have been discharged for being placed in low medical category under rule 14(b) (iv) and not under rule 14(b) (iii) and his discharge should be treated to be a case of invalidment

24. Now, we come to the main prayer of the applicant for grant of disability pension. The respondents have denied the claim on the ground that his disease was neither attributable to nor aggravated by military service as opined by the medical board and further, his percentage of disability was below 20%. Therefore, as per rules, he was not entitled to any disability pension.

25. The ld. Adv. for the applicant has emphasised that when the applicant was enrolled in the TA, he was medically fit and there was no sign of the ibid disease. Further, the said disease had developed within two years of his entering into service. According to the ld. Adv., his disease has arisen due to service condition because the applicant had to work in isolated and remote location in A & N Islands as also in J & K region. Therefore, it is to be reasonably presumed that the service condition was responsible for onset of such disease.

26. We have examined all the medical board proceedings, which have been annexed with the affidavit-in-opposition. We find that it has been very clearly endorsed in the RMB proceeding that such disability did not exist before entering into the service; no such endorsement was made in his preliminary medical examination record at the time of entry into the service. We also observe from the RMB records that neither the specialist nor the medical board has anywhere mentioned the reason for the onset of such disability which actually had onset barely two years after his enrolment during July 2005.

27. The initial medical board proceeding, which was held on 25.3.06 after the onset of the disease in July 2005 (annexure-A2) has also been examined by us. Even, as per this proceeding, the reason for onset of such disability has no where been mentioned, although in the ibid medical board it has been opined that the disability was neither attributable to nor aggravated by military service.

28. In this context, we may refer to a recent decision of the Hon'ble Apex Court in the case of **Dharamvir Singh –vs- UOI & Ors,** reported in AIR 2013 SC 2840. In that case the appellant was detected to have been suffering from 'Generalized seizure (Epilepsy)" after 9 years of service, although at the time of his enrolment there was no indication of such illness. He was discharged from service on medical grounds and was denied disability pension as the medical board held that the disability was neither attributable to nor aggravated by military service; and the same was constitutional in nature. However, the contention of the applicant was that since the disease could not be detected at the time of his enrolment and no note of such illness was made to that effect, it has to be assumed that the ibid illness had developed due to stress and strain of military service. In that context, the Hon'ble Apex Court, after carefully explaining all the rules and regulations on the subject, formulated following two issues:-

> ***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?***

29. The Hon'ble Supreme Court has graphically 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 for the Army 1961 (Revised). It was also noticed by the Apex Court that the

Entitlement Rules, 1982 were amended by Ministry of Defence letter No. 1(1)/81/D (Pen-C) dated 20th June, 1996. After comparison of the Rules obtaining in 1982 Entitlement Rules as also amended Entitlement Rules of 1996 (not printed or published), it was held that both sets of rules were basically the same without any significant difference. 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.

30. In Para 28 of the judgement 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)]

v) 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.

31. After explaining Rule 423 of the 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.*

32. 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.

33. It may be pertinent to mention here that under regulation 292 of Pension Regulations for the Army, 1961, grant of pensionary awards to members of the Territorial Army shall be governed by the same general regulations as are applicable to the corresponding personnel of the army. Therefore, the analysis of the Hon'ble Apex Court as outlined above, would squarely apply to the case of the applicant who belonged to the TA.

34. As already observed above, no reason was stated by the medical board as to why it came to the conclusion that the ibid disease of the applicant was neither attributable to nor aggravated by his service condition in the Territorial Army. As held by the Hon'ble Apex Court it is the duty to the medical board to give reason in support of its finding which is absent in the instant case. In that view of the matter, we are not inclined to lay much importance on such finding of the medical board. It is, however, undisputed that percentage of disability is to be determined only by the medical board and by no other authority. Here, the percentage of disability of the applicant as assessed by the medical board is less than 20%.

35. Now, in terms of regulation 178-A of Pension Regulations, in case where an individual's disability or its aggravation at the time of invalidating is permanently below pensionable degree, he may claim to be brought before a medical board within a period of ten years from the date of his discharge. In the case before us, the applicant was not placed before any medical board for re-assessment of his disability.

36. In the instant case, therefore, in our considered opinion, the applicant should be brought before a fresh medical board both for assessment of his percentage of disability as also for determining with reasons as to whether his invalidating disease was attributable to or aggravated by military service.

37. So far as appellate orders are concerned, in our considered view, there was total non-application of mind by the respondent authorities for coming to a conclusion in denying the pension to the applicant. We are of the opinion that the appellate orders cannot stand the scrutiny of law in view of our observations made above, because the said orders did not take into consideration the lack of reason of the opinion of the medical board, and, consequently, both the appellate orders are liable to be set aside and are accordingly set aside.

38. In the result, the OA is partly allowed by issuing following directions:-

a) The applicant shall be deemed to be invalidated out of service of TA on account of medical disability for which he was unfit for further service in terms of rule 14(b) (iv) read in conjunction with Army Order 153/73.

b) The opinion of the Release Medical Board holding that the disease with which the applicant was suffering was neither attributable to nor aggravated by military service is not sustainable being arrived at without disclosing adequate reasons as required under the rules and law on the subject. Therefore, such opinion recorded by the RMB proceedings be set aside accordingly.

c) The applicant shall be brought before an Invalidating Medical Board, within 90 days from the date of communication of this order, for re-assessment of percentage of

disability and also for a reasoned opinion as to whether the ibid disease was attributable to or aggravated by military service.

d) Based on such opinion and assessment by the fresh medical board, the question of admissibility of disability pension and status of 'ex-serviceman' shall be determined by the respondents in accordance with rules.

e) No costs.

39. Let a plain copy of the order duly countersigned by the Tribunal Officer be supplied to both sides on observance of usual formalities.

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

(JUSTICE RAGHUNATH RAY)
JUDICIAL MEMBER