FROM NO. 21

(SEE RULE 102(1))

ARMED FORCES TRIBUNAL , KOLKATA BENCH

APPLICATION NO : T. A NO. 41 OF 2012 (WP No. 4349-w of 2001)

ON THIS 24TH DAY OF SEPTEMBER, 2013

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

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

Shri Manash Kumar Mitra,
Son of Sri Haralal Mitra,
CFN, Identification No. 16476078, Last worked
In the office of 989 AD Regiment Workshop at Mumbai
Resident of Village & PO Patulia via Titagarh,
District - 24 Parganas (North).

.....Applicant

-VS-

1. Union of India through
   The Secretary, Defence,
   South Block, New Delhi-110 011.

2. The Chief Controller of Defence Accounts (P), Allahabad.
   Uttar Pradesh

3. The Record Officer, Vidyut Aur Yantrik Engineer,
   Abhilekh Karyaalaya, EME Records,
   Secunderabad-500 021

.... Respondents.

For the Petitioner: Mrs. Rina Karmakar, Advocate

For the Respondents: Mr. D.K.Mukherjee, Advocate.

ORDER

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

This application was originally filed in the Hon'ble Calcutta High Court as a writ petition being No. WP 4349(W) of 2001, which was later transferred to this Tribunal under operation of Sec. 34 of the Armed Forces Tribunal Act, 2007 and renumbered as TA No. 41 of 2012 and admitted for hearing. The main prayer of the applicant is for grant of disability pension.

2. The applicant was enrolled in the Corps of EME on 28.7.77. According to the applicant, while he was undergoing a war-like training at Meerut Cantt, he met with an accident in May 1982 during duty hours. Since then he had been suffering from headache, anxiety, forgetfulness and lack of concentration. He was admitted and treated at the Military Hospital, Meerut on 04 Oct 1982. Before being discharged, he was brought before a medical board on 7.12.82 at MH, Meerut itself, where he was diagnosed as a case of 'Anxiety Neurosis' and placed in low medical category CEE (Psy) temporarily for three months. Subsequently such medical category was reviewed and extended from time to time through periodic re-categorization medical boards. Finally, the last medical board was held on 16.4.84 at INHS (Ashvini), Bombay, where he was placed in low medical category permanently. His disability was diagnosed as "ANXIETY NEUROSIS" (300) for which he was discharged from service w.e.f. 1.10.1984 after rendering a little over 7 years of service. Before being discharged prematurely he was brought before an Invaliding Medical Board (IMB) on 03 Sep 1984 at INHS Ashvini, Bombay. This invaliding medical board held that his disability was neither attributable to nor aggravated by military service, though his disability was assessed at 20% for two years. As his disability was held to be neither attributable to nor aggravated by military service, he was not granted any disability pension,

although he was invalidated out of service just after seven years of service for a disability, which the applicant claimed to be on account of service. Being aggrieved for non-grant of any disability pension, the applicant made an appeal against such decision on 25.3.85 which was rejected by the Govt. in July 1986. According to the applicant, he continued to make representations for grant of disability pension; but having found no fruitful result, he finally approached the Hon'ble Calcutta High Court in the year 2001 by filing this writ petition seeking a direction upon the respondents to grant him disability pension on the ground that his disability had arisen due to the accident which occurred during duty hours and, therefore, the same was attributable to his military service. This writ application was subsequently transferred to the Armed Forces Tribunal, Kolkata Bench and is now being heard as TA 41/2012.

3. The respondents have contested the application by filing a counter affidavit in which they have inter alia raised the question of maintainability of the application on the ground of delay. It is stated that the applicant was discharged from service in 1984 and his appeal against non-grant of disability pension was rejected in 1985 whereas he had filed the instant writ petition before the Hon'ble High Court in the year 2001 i.e. more than 15 years after the cause of action arose and therefore, the application is barred by law of limitation.

4. On merit of the case, the respondents have not disputed that the applicant was enrolled in the Army on 28.3.77 and was discharged on being placed in low medical category due to his disability "ANXIETY NEUROSIS" in 1984. Relying on the submissions made in their Counter Affidavit, the respondents submitted that the applicant was placed before a duly constituted medical board i.e. Release Medical Board and it was held that his disability was neither

attributable nor aggravated by military service and the disability was opined by the medical board as a constitutional disorder. As per EME records, the applicant was not willing to continue in alternative employment (annexure-R1) and as such, he was discharged under rule 13(3)(III)(v) of Army Rules. His claim for grant of disability pension was referred to the PCDA (P) Allahabad for consideration. However, the PCDA (P) rejected the claim vide order dated 15.1.1985. He was, however, granted a sum of Rs. 4052.45 on account of invaliding gratuity and DCRG. It is further stated that the applicant preferred an appeal against the decision of the PCDA(P) which was considered and rejected by the Govt. of India, Ministry of Defence vide letter dated 31st July 1986. It was further reiterated by the respondents that the applicant was not forced for discharge from service; on the contrary, he was offered alternative sheltered appointment which the applicant was unwilling to accept. Therefore, he had to be discharged from service, since he could not continue in that low medical category. It is also stated by the respondents that since the applicant did not fulfill the dual conditions as stipulated in regulation 173 of the Pension Regulations; i.e. the disability must be attributable to or aggravated by military service and the percentage of disability must be 20% or above, the applicant could not be granted any disability pension. It is contended that the opinion of medical board is final and has to be honoured. According to the respondents, the applicant has not been able to make out a case for grant of disability pension and under such circumstances, the application is liable to be dismissed both on merit as also on the ground of limitation.

5. The applicant has filed a rejoinder in which the contentions as raised in the writ petition have been reiterated. It is stated that, when the applicant entered service he was medically examined and there was no indication of any disability and he was completely fit. The disability

suffered by the applicant arose only after he met with an accident during duty hours and hence it must be held that the ibid disability was attributable to military service. However, the medical board without going into the factual position has mechanically held that the disease was a constitutional disorder and not attributable to military service. There was no reason recorded as to how the opinion of the medical board was arrived at and based on what materials. Reference has also been made to Reg. 173A of the Pension Regulations to contend that even if the applicant expressed his unwillingness to accept alternative appointment; that would not make him ineligible to get disability pension.

6. We have heard the learned advocates for both sides. Apart from making oral submissions, ld. adv. for the applicant has also filed a written note of argument which we have gone through. Ld. advocate for the respondents has produced before us the original RMB proceedings as also the service records (Sheet Roll) of the applicant. We have carefully gone through the same.

7. Ld. adv. for the applicant has laid much emphasis on the accident that the applicant had sustained during duty hours at Merrut Cant while undergoing a war-like training in May 1982 and submitted that due to such accident that the disease had arisen; because after this accident the symptom of the disease developed. He was admitted in MH, Meerut from 4.10.82 to 10.12.82 in psychiatric ward and due to his medical condition he was asked to appear before the medical board on 8.12.82. As per the recommendations of that initial categorization medical board held at MH Meerut dated 8th Dec 1982, the applicant was placed in low medical category CEE(Psy) for six months. Subsequently also the applicant appeared before a re-

categorization medical board in September 1983 and on that occasion also the same recommendation was made. Another medical board was held on 16.4.84 and on this occasion he was placed in permanent low medical category with 20% disability. He was diagnosed to have been suffering from "Anxiety Neurosis" and was recommended for release by the Release Medical Board and accordingly he was discharged from service on 1.10.84. Her contention is that at the time of joining the army service, the applicant was medically examined and there was no indication of any disease and therefore, it has be presumed that the ibid disability suffered by the applicant had arisen due to military service. Ld. counsel has referred to a decision of the Hon'ble Jammu & Kashmir High Court in the case of **Devinder Singh –vs- UOI & Ors,** reported in 2008(1) SLR 23. In that case the appellant was suffering from 'neurosis' and no finding by the medical board was there that the disease could have been detected at the time of entry into service. Therefore, it was held that presumption should be that the appellant contracted the disease while in service and hence he was entitled to disability pension. The Ld. Counsel has also referred to a decision of Principal Bench of AFT in the case of **Naik Rajender Singh –vs- UOI & Ors** (OA 735 of 2010) decided on 11.5.2011 (unreported). She has also relied on another decision of Hon'ble J & K High Court in the case of **Darshana Devi –vs- UOI & Ors,** reported in 2008(1) SLR 276.

8. Ld. adv. for the respondents, per contra, has raised the question of limitation by contending that the application is hopelessly time barred since he has approached the court of law after a long delay of 15 years from the time the cause of action arose. In such circumstances, the application is to be rejected on the ground of limitation alone. So far as merit is concerned, he has placed reliance on the decision of the Hon'ble Supreme Court in the

case of **UOI –vs- Spr Mohinder Singh** (Civil Appeal No. 164/1993 decided on 14.1.1993) and contended that the opinion of medical experts should be given primacy and cannot be interfered with. He contended that the applicant was discharged on account of his being in low medical category which was held by the appropriate medical board to be not attributable to nor aggravated by military service and therefore, as per Reg. 173 of Pension Reg for Army 1961, he was not entitled to any disability pension.

9. We have carefully considered the rival contentions and have perused the original medical board proceedings that have been placed before us.

10. In this case, the facts are not in very much dispute. It is the admitted position that the applicant has rendered only a little over 7 years of service from 1977 to 1984 and therefore, in the normal course, he is not entitled to any service pension. It is also undisputed that the applicant was discharged due to his being in low medical category as he was suffering from the disability of "ANXIETY NEUROSIS" and the extent of his disability was assessed at 20% for two years by the medical board. The respondents have contended that as per regulation 173, since the applicant did not fulfill the conditions laid down therein, he was not entitled to any disability pension and accordingly, his claim for disability pension was rightly rejected by the PCDA (P). His appeal against non-grant of disability pension was considered and rejected by the Central Govt. long back in July 1986. It is also their case that the applicant was offered alternative appointment but he was not willing to accept such appointment and hence there was no other alternative than to discharge him from service under rule 13(3)(III)(v) of Army Rules.

11. Admittedly, the applicant did not fulfill his terms of service and much before completion of tenure; he had to be discharged due to his being placed in low medical category. Obviously, therefore, it is a case of curtailment of service due to medical ground. In such a situation, rule 13(3)(iii)(v) is not the rule that can be applied for discharge of the applicant. He was declared medically unfit for further service and therefore, his case is covered by rule 13(3)(III)(iii). In that event, he should have been placed before an Invalidating Medical Board (IMB) instead of being placed before Release Medical Board (RMB) in accordance with the rule.

12. We may now come to regulations 173 and 173A of Pension Regulations, 1961 on which much reliance has been placed by both parties. The said regulations are quoted below for the sake of convenience:

> *"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.*
>
> *The question whether a disability is attributable to or aggravated by military service shall be determined under the rule in Appendix II"*
>
> *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.*
>
> *Note : The above provision shall also apply to individuals who are placed in a low medical category while on extended service and are discharged on that account before the completion of the period of their extension. "*

13. From the above regulations it is clear that in order to be eligible to get disability pension, two conditions are to be fulfilled which as follows :-

i) The individual who is invalidated out of service due to a disability which must be attributable to or aggravated by military service,

ii) The extent of disability is 20 per cent or more.

14. In the instant case, the applicant was discharged from service on medical ground before completion of his terms of employment. As noted earlier, he was placed before a release medical board before discharge whereas in such cases, he ought to have been placed before an invalidating medical board. However, the medical board has opined that his disability was not attributable to or aggravated by military service. Thus, the first condition is not fulfilled by the applicant in order to get disability pension.

15. The extent of disability of the applicant was assessed at 20% for two years by the medical board. However, he was not placed before a re-survey medical board after two years, possibly because he was not granted any disability pension nor the applicant ever applied for placing him before re-survey medical board.

16. It is no doubt true that in a catena of judicial decisions it has been held that opinion of the medical board has to be given due weightage and court or tribunal should not ordinarily interfere with the opinion of medical board unless there is apparent discrepancy that is noticed. However, in a recent decision in the case of **Veer Pal Singh –vs- Secretary, Ministry of Defence,** (Civil Appeal No. 5922 of 2012) decided on 2nd July 2013 (2013(8) SCALE 58), it was held 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."**

Thus, it appears that there is no bar in scrutinizing the medical board opinion in order to adjudicate upon the dispute regarding grant of disability pension.

17. In this context, we may refer also to a very recent decision of the Hon'ble Apex Court in the case of **Dharamvir Singh –vs- UOI & Ors,** (Civil Appeal No. 4949 of 2013) decided on 2nd July 2013 (2013(8) SCALE 686). 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 ground and was denied disability pension as the medical board held that the disability was not attributable to 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 considered the matter after carefully explaining all the rules and regulations on the subject and formulated the 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?

18. 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. It was also noticed by the Apex Court that the Entitlement Rules, 1982 were allegedly amended by Ministry of Defence letter No. 1(1)/81/D(Pen-C) dated 20th June, 1996 and 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.

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)]

(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.***

19. 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 top 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."

20. From the above observations, it is crystal clear that 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.

21. In para 18 and 19 of the said judgement it has been observed as follows:-

"18. A disability is 'attributable to or aggravated by military service' to be determined under the "Entitlement Rules for Casualty Pensisonary Awards, 1982, as shown in Appendix II. Rule 5 relates to approach to the entitlement Rules for casualty pensionary Awards, 1982 based on presumption as shown hereunder:-

"Rule 5. The approach to the question of entitlement to casualty pensionary awards and evaluation of disabilities shall be based on the following presumptions:

Prior to and During service

(a) Member is presumed to have been in sound physical and mental condition upon entering except as to physical disabilities noted or recorded at the time of entrance.

(b) In the event of his subsequently being discharged from service on medical grounds any deterioration in his health which has taken place is due to service."

From rule 5 we find that a general presumption is to be drawn that a member is presumed to have been in sound physical and medical condition upon entering service except as to physical disabilities noted or recorded at the time of entrance. If a person is discharged from service on medical ground for deterioration in his health it is to be presumed that the deterioration in the health has taken place due to service.

19. "Onus of proof" is not on claimant as apparent from rule 9 which reads as follows :-

"Rule 9. ONUS OF PROOF – The claimant shall not be called upon the prove the conditions of entitle3ments. He/she will receive the benefit of any reasonable doubt. This benefit will be given more liberally to the claimants in field/afloat service cases."

From a bare perusal of Rule 9 it is clear that a member, who is declared disabled from service, is not required to prove his entitlement of pension and such pensionary benefits to be given more liberally to the claimants."

22. It will also be appropriate to quote below the observations of the Hon'ble Apex Court in paras 30-33 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. In fact, non-application of mind

of Medical Board is apparent from clause (d) of paragraph 2 of the opinion of the Medical Board, which is as follows :

'(d) In the case of a disability under C the board should state

what exactly in their opinion is the cause thereof Yes

Disability is not related to mil service"

---

31. *Paragraph 1 of 'Chapter II' – "Entitlement : General Principles" specifically stipulates that certificate of a constituted medical authority vis-à-vis invalidating disability, or death, forms the basis of compensation payable by the Government, the decision to admit or refuse entitlement is not solely a matter which can be determined finally by the medical authorities alone. It may require also the consideration of other circumstances e.g. service conditions, pre-and post-service history, verification of wound or injury, corroboration of statements, collecting and weighing the value of evidence, and in some instances, matters of military law and dispute. For the said reasons the Medical Board was required to examine the cases in the light of etiology of the particular disease and after considering all the relevant particulars of a case, it was required to record its conclusion with reasons in support, in clear terms and language which the Pension Sanctioning Authority would be able to appreciate.*

32. *In spite of the aforesaid provisions, the Pension Sanctioning Authority failed to notice that the Medical Board had not given any reason in support of its opinion, particularly when there is no note of such disease or disability available in the service record of the appellant at the time of acceptance for military service. Without going through the aforesaid facts the Pension Sanctioning Authority mechanically passed the impugned order of rejection based on the report of the Medical Board. As per Rules 5 and 9 of 'Entitlement Rules for Casualty Pensionary Awards, 1982', the appellant is entitled for presumption and benefit of presumption in his favour. In absence of any evidence on record to show that the appellant was suffering from "Genrealised seizure (Epilepsy)" at the time of acceptance of his service, it will be presumed that the appellant was in sound physical and mental condition at the time of entering the service and deterioration in his health has taken place due to service.....".*

23. In the case before us, the ld. adv. for the applicant has raised the identical issue that at the time of enrolment in army service, the applicant was medically examined and there was no note of any such disease which subsequently arose during the course of service and that too, after the applicant suffered

an accident during duty hours and therefore, the decision of the Medical Board that such disability was not attributable to or aggravated by military service and it is only a constitutional disorder is absolutely arbitrary and cannot be accepted by any person with general prudence.

24. In view of the rule position as explained by the Hon'ble Apex Court in Dharamvir's case (supra), we may examine the medical board proceedings that have been produced before us by the respondents.

25. We notice that indeed there was no note of any disability recorded at the time of entry into military service. We further notice that in Para 4 of Part I of the Medical Proceedings (RMB) dated 03 Sep 1984 (Original Records), the incident of vehicular accident suffered by the applicant was noted and it was also signed by the applicant. We further notice from the service record (Sheet Roll) of the applicant (Original Records) that there are two entries on two different dates based on Part II order where at page 9 in respect of 'medical categorization', it was recorded that the disability of the applicant was attributable to and/or aggravated by service condition. It will be appropriate to reproduce the said noting herein below:-

08.12.82 - CEE (Psychological) Temp. 6 months MH Merrut Part II O -989ADR 6/29/83

Disease : ANXIETY NEUROSIS

Disability - Not attributable to conditions of service but Aggravated due to precipitate by an vehicular accident While on duty

==========

29 Sept. 83 CEE (Psy) Temp. 6 months INHHS ASVINI 955 ADRMS 17/EME/9/84

Diag : Neurosis for Re cat

Attributability : Attributable to the service.

==========

26. These recordings were made much before the applicant was placed before the RMB in 03 Sep 1984. However, the RMB, it is noticed, did not take into account such opinions, which were recorded much earlier; let alone to give reason as to how it differed from the same and on what basis. The RMB in one line opinion at column 2(d) of Part III has stated that the cause of disability is **"constitutional disorder not connected with service."**

27. In view of the evidence on record, and in the absence of any material to the contrary, it is obvious that the medical board has acted carelessly and failed in its duty to properly assess the attributability aspect in terms of rule 423 of the "Guide to Medical Officers (Military Pensions) 2002" as explained above. The said medical board has recorded its opinion in a mechanical manner without application of mind and without consulting the records and earlier medical opinion. In such a situation, we are of the considered opinion that the "benefit of doubt" under rule 9 of Entitlement Rules has to be given to the applicant and it has to be held that the ibid disability of the applicant, which had arisen during the course of service, is attributable to and aggravated by service.

28. The applicant having thus fulfilled the dual conditions prescribed in reg. 173 is held entitled to disability pension. Of course, the respondents have taken the point that the applicant was not willing to accept alternative appointment but that will also not change the position in view of Reg. 173A quoted above which inter alia states that even if the individual is unwilling to accept alternative appointment, he should be deemed to be invalidated out of service.

29. We have already held that in this case the applicant could not complete his term of engagement in service because of his medical disability and his service was curtailed. He was

declared medically unfit for further service. In such circumstances, as held by the Hon'ble Apex court in the case of **Union of India –vs- Rajpal Singh**, reported in 2008(12) SCC 476, the proper course that should have been adopted by the respondents was to place him before a invalidating medical board and not before release medical board. However, we find that long time has elapsed since the RMB was held in the September 1984 and at this distant date it will neither be practical nor feasible to direct for holding an IMB for the applicant. We are, therefore, of the considered opinion that the RMB that was held on 03.9.1984 should be considered as if it is an IMB because basically there is no material difference in these two types of boards. In fact, we find from the original records that the ibid RMB dated 03 Sep 1984 bears a heading, "MEDICAL BOARD PROCEEDINGS INVALIDING ALL RANKS". However, the RMB assessed the percentage of disability of the applicant to 20% for two years. Therefore, it is necessary to place the applicant before a Re-Survey Medical Board in order to assess his percentage disability afresh.

30. In view of the discussion made above, we are of the opinion that the applicant should be paid disability pension at the rate of 20% disability with rounding off benefit from the date it is applicable as per extant government rules. However, he should be placed before a Re-survey medical board immediately and payment of disability pension further will depend on the assessment to be made by such Re-survey medical board.

31. We are also not oblivious of the fact that the applicant has approached the Hon'ble High Court in the year 2001 i.e. long 15 years after he was refused to be paid disability pension in 1986, a point that has been raised by the respondents. However, since claim for pension is a

recurring cause of action, we have not thought it fit and proper to reject the application on the ground of limitation and have decided it on merit. But so far as arrear payment is concerned, by following the ratio decided by Hon'ble Apex Court in the case of **Shiv Dass –vs- UOI** reported in AIR 2007 SC 1330, we are of the view that such payment will be admissible to the applicant with effect from a date three years prior to the filing of the instant writ petition i.e. from 1.1.1999.

32. Accordingly, the application is allowed by issuing the following directions:-

i) The applicant shall be treated to have been invalidated out of service on account of medical disability which was attributable to and aggravated by condition of military service. Accordingly, the RMB that was held on 03.9.1984 be treated to be an IMB and the applicant shall be deemed to be invalidated out in terms of rule 13(3)(III)(iii) of Army Rules.

ii) The applicant shall be paid disability pension at the rate of 20% disability with effect from 1.1.1999 with benefit of rounding off as applicable under the Govt. policy. He is also held entitled to get any other consequential benefit that may accrue due to his invalidating out of service on account of medical disability.

iii) The applicant shall be issued with a PPO for disability payment within 90 days of receipt of this Order by PCDA (P) and EME Records. Any further delay in implementation shall attract an interest of 12% per year payable to the applicant.

iv) Such payment will continue to be made till a re-survey medical board is held to assess the percentage of his disability. Such re-survey medical board should be held as early as possible after giving notice to the applicant, preferably within 90 days.

v) Further payment of disability pension will depend on the decision of the Re-survey medical board as directed above.

vi) N o costs.

33. The departmental records be returned to the respondents on proper receipt.

34. Let a plain copy of this order duly countersigned by the Tribunal officer be furnished to both sides on observance of due formalities.

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

(JUSTICE RAGHUNATH RAY)
MEMBER (JUDICIAL)