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SGT CHAMAN LAL

v.

UNION OF INDIA AND OTHERS

(Civil Appeal No. 8834 of 2015)

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JULY 25, 2017

**[DIPAK MISRA, AMITAVA ROY AND
A. M. KHANWILKAR, JJ.]**

Service Law:

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Promotion – On selection post – Claim for – By the handicapped officer, whose medical category was A4G4 (P) – Alleging discrimination in the matter of consideration for promotion, as officers with more percentage of disability were granted promotion – Application dismissed – On appeal, held: Medical category of the appellant-officer is assessed on the basis of parameters specified in the Guide to Medical Officers (Military Pensions) 2008 – There is no reason to doubt the medical assessment of the appellant categorizing him as A4G4 (P) by the Medical Board – The categorization is based on several factors and not singularly dependant on the percentage of disability – Promotion to the post of JWO is a select promotion hedged with the medical fitness eligibility criterion – Mere empanelment in the list of candidates due for promotion, would not create any vested right in the candidate to be promoted – The claim for promotion would depend on the fulfillment of eligibility requirements as per the promotion policy prevalent at the relevant time – The appellant did not possess the medical fitness qualification for being considered for select promotion to the post of JWO.

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Persons with Disabilities (Equal Opportunities, Protection of Right and Full Participation) Act, 1995:

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s. 47(2) – Benefit under – Claim for – Held: The provision under sub-section (2) is not an absolute stipulation, but subject to the proviso – The proviso empowers the appropriate Government to exempt any establishment from its application, by issuing notification in that behalf – In the present case, notification was issued exempting the establishment, in which the appellant was employed, at the

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*relevant time from the application of the provisions of the Act – A
Therefore, the appellant cannot claim benefit u/s. 47(2) – Service
Law – Promotion.*

Dismissing the appeal, the Court

HELD: 1.1 The plea of the appellant regarding B
discrimination, has been justly rejected by the Tribunal. The
relevant facts regarding the officers who were named by the
appellant before the Tribunal have been analysed by the Tribunal
and there is no infirmity in the said analysis, as the same is
founded on the record before the Tribunal. Therefore, the plea
of the appellant, that the named officers had a higher percentage C
of disability and were kept in high medical category, but the
appellant was not given similar benefit, deserves to be rejected.
[Paras 9, 11][487-B, C-D, G-H]

1.2 The medical category of the appellant is assessed on D
the basis of objective parameters specified in the Guide to Medical
Officers (Military Pensions) 2008, issued by the office of DGAFMS.
The basis of assessment and other related matters to observe
objectivity in assessment have been delineated in this policy
document. The medical assessment is done by the concerned
Board on those parameters without any exception. [Para 12][489- E
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1.3 There is no no tangible reason to doubt the medical
assessment report in the case of the appellant, categorising the
appellant as A4G4 (P). The fact that the percentage of disability
of the appellant is relatively less than the other named officers
would make no difference. In that, the percentage of disability is F
not the governing factor, but the relevant consideration is the
categorisation done by the Medical Board. The categorisation is
based on several factors and not singularly dependent on the
percentage of disability. To wit, an individual may bear more
percentage of disability but would still have nil employability G
restrictions. The medical category is thus dependent on the
employment and functional capacity of the individual which may
vary from case to case. That is determined by the experts after
applying the objective parameters noted in the policy document
in that regard. Even otherwise, having regard to the exigencies
of the service involved and in the interest of overall standard of H

A efficiency thereof, relatively increased rigorous adherence of all relevant norms bearing on the suitability for select promotion is called for. [Para 13][494-D-G]

B 1.4 Therefore, less percentage of disability suffered by the appellant *per se* cannot be the basis to place the appellant under category A4G3 promotable medical category. The appellant had resorted to other proceedings, including by way of two successive writ petitions before the High Court regarding the issue of nature of medical treatment given to him and incorrect categorisation. Findings recorded in those proceedings could have been the basis for the Tribunal to non-suit the appellant at the threshold. C However, the Tribunal independently considered each of the grievances of the appellant and rejected the same being devoid of merit. [Para 14][494-G-H; 495-A-B]

D 1.5 The fact that the appellant has been empanelled in the list of candidates due for promotion and also qualified the merit bench mark, does not mean that he has acquired any vested right. The promotion to the post of JWO, indisputably, is a select promotion hedged with the medical fitness eligibility criterion to be fulfilled by the incumbent. That is not so in the case of time bound promotion. [Para 15][495-B-C]

E 2.1 Sub-section (1) of s. 47 of Persons with Disabilities (Equal Opportunities, Protection of Right and Full Participation) Act, 1995 has no application to the fact situation of the present case. Sub-section (2), is attracted to cases of promotion. It has an enabling provision in the form of a proviso. Thus, it is not an absolute stipulation, but subject to the proviso. The proviso empowers the appropriate Government to exempt any establishment from its application, by issuing notification in that behalf. Admittedly, the Government of India, Ministry of Social F Justice and Empowerment has issued Notification No.16-27/2001-N 101, dated 28.03.2002 after the assent was given by the G President of India in April 2002. The effect of issuance of this notification is to exempt the establishment in which the appellant was in service at the relevant time from the application of the provisions of the said Act. It is not the case of the appellant that the appellant was empanelled in the list of candidates due for H promotion prior to the issuance of the aforesaid notification. He

was empanelled for the first time for promotion post March 2002. Thus understood, the appellant cannot claim benefit of Section 47, which has no application consequent to the issuance of the stated notification. [Paras 16, 17][495-G-H; 496-A-B, E-F]

2.2 Mere empanelment of an incumbent in the list of candidates due for promotion would not create any vested right in him, to be promoted on select post. At best he would only have a right to be considered for promotion. That claim of promotion would depend on the fulfillment of eligibility requirements as per the promotion policy applicable at the relevant time. The appellant did not possess the medical fitness qualification for being considered for select promotion to the post of JWO. The appellant has erroneously assumed that he was due for promotion in March 2002, which fact is not corroborated from the record. The record, however, indicates that the appellant was considered for promotion firstly in 2005-06 and also in the year 2006-07, but he could not qualify the merit criteria within the available vacancies in his trade rank. He was not considered nor was due for promotion to the next higher rank pre March 2002. Thus, the dispensation stipulated in Section 47 of the said Act, has no application to the present case. [Para 18][496-G-H; 497-A-B]

3. The fact that the appellant is doing the same job for the past eleven years, cannot be the basis to issue direction to promote the appellant notwithstanding lack of eligibility regarding medical fitness for the select promotion. There is no challenge to the promotion policy applicable at the relevant time or as is presently applicable for select promotion. That plainly commands that airmen holding medical categories A4G4 (P) would not be eligible for select promotion and can be considered only for time bound promotion. The post of JWO is admittedly a select promotion post. The appellant, therefore, cannot succeed merely on the basis of his claim of vast experience, knowledge and performance, unless he fulfills the eligibility criteria including medical fitness for select promotion. [Para 19][497-C-D]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 8834 of 2015.

From the Judgment and Order dated 28.10.2014 of the Armed

A Forces Tribunal Regional Bench Mumbai in OA 60 of 2013.

Appellant-in-person.

Y. P. Adhyaru, Sr. Adv., Santosh Kumar, M. K. Maroria, Advs.
for the Respondents.

B The Judgment of the Court was delivered by

A. M. KHANWILKAR, J. 1. The appellant joined the Indian Air Force as an airman in Clerk General Duties (CGD) trade on 12.10.1987. He was promoted from time to time and became sergeant in 1998. Due to health issues, he was reported sick several times at the

C Air Force Station, New Delhi. He was treated by the Air Force doctors and specialists of Base Hospital Delhi Cantt. The appellant got MRI Scan for his right leg at Max Medical Centre at his own expense on 26.08.2001. That revealed some abnormality with right tibia bone. It was diagnosed as Osteogenic Sarcoma or Osteomyelitis. In October, 2001, he was advised to undergo chemotherapy and other related treatments.

D He was then referred by the medical Oncologist to the Surgical Oncologist, who advised him to remove the right tibia bone and some part of the knee joint, allegedly without conducting any proper medical tests. After surgery the appellant was discharged from hospital with low medical category with instructions to report after three months for knee replacement surgery. The appellant claims that he was ill-advised by the

E respondents for removal of bone for cancer (NHL) and fitment of artificial knee. Besides, he was given prosthesis of an extra large size and advised admission in Joint Replacement Centre Ward at Army Hospital Research and Referral Delhi Cantt-10. The appellant was then admitted on

F 03.06.2002, for removal of cancerous bone. However, post surgery oncopathologist's report dated 11.06.2002 showed that there was no evidence of Non Hodgkin's Lymphoma in the entire specimen so removed. The appellant asserts that he suffered permanent disability because of the negligence of the doctors in the Army Hospital and as a result of which, his medical category was changed from BEE (P) to

G CEE (P) by the Medical Board.

2. The appellant, therefore, after exchanging correspondence with the department, filed a writ petition before the Delhi High Court bearing Writ Petition No.3712/2003, praying for an enquiry against the concerned doctors, to retain him in service and to grant him promotion as usual or to compensate him for causing permanent disability attributable at par with

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battle causality. That petition was disposed of with liberty to the appellant to make representation to the authorities and with a direction to the authorities to consider the same expeditiously. Pursuant to such representation, the appellant was granted extension of service of six years up to 31st October 2013 and again for another six years till 31st October 2019, as a result of which the appellant continues to hold the post of sergeant.

3. The appellant then filed another writ petition before the Delhi High Court bearing Writ Petition (C) No.1191 of 2008, praying for diverse reliefs inter alia to conduct an independent inquiry to find out the negligence of the medical authorities, to grant him promotion retrospectively w.e.f. 01.07.2007 to the next higher rank of Junior Warrant Officer (for short "JWO"). The Division Bench of the High Court observed that most of the reliefs were prayed by the appellant in the earlier writ petition and the same were barred by the principle of *res judicata*. It appears that the appellant had filed some other proceedings as noted by the Division Bench in the judgment. The Division Bench then declined to grant any relief to the appellant.

4. The appellant continued to assert that he was entitled for promotion to the rank of JWO in 2007 as he was placed in the promotion panel 2007-2008. However, he was denied promotion because he was placed in low medical category CEE(P) A4G4(P). That, the appellant contended, was in contravention of the provisions of Section 47 of the Persons with Disabilities (Equal Opportunities Protection of Right and Full Participation) Act, 1995 (for short "said Act"). The appellant having realised that he was not being considered for promotion to the post of JWO and was discriminated in the matter of consideration - as two other officers namely, Air Commodore P. Chakraborty and Honorary Flying Officer P.K. Choudhury, who had suffered more percentage of disability than that of the appellant were granted promotion, he approached the Armed Forces Tribunal, Regional Bench, Mumbai at Mumbai by way of Original Application No.60/2013 praying for the following reliefs:

"8. That in light of the aforesaid facts and circumstances, this Hon'ble Court may graciously be pleased to award the following reliefs to the applicant:-

a) To direct respondents to consider applicant's case (Medical

- A *Category) at least at par with leg amputated cases if not higher i.e., A4G3 and to consider/grant applicant promotion to the next higher rank of Junior Warrant Officer as the respondent's action is highly discriminatory/arbitrary/biased and malicious in not doing so already.*
- B *b) To direct respondents to comply the provisions of Section 47 (1) & (2) of Persons with disabilities and Full Participation Act 1995 as applicant became disabled in October 2001 i.e. before obtaining exemption and to set aside the provisions of their promotion policy letter with retrospective effect/ consequential reliefs in the instant case.*
- C *c) To call for the medical records of Air Commodore P. Chakraborty (15632) AE(L) and 631060 Hony Fg Offr P.K. Choudhary Rdo Fit as both of them are leg amputated cases if this Hon'ble Court so desires in the interest of justice equity and fair play and then to consider applicant's case at par with them.*
- D *.....”*

5. The respondents resisted the said application, denying that there was any medical negligence in the treatment of the appellant or that he was wrongly categorised in the low medical category A4G4(P). The respondents also stoutly refuted the allegation of discrimination or for that matter, that the other two named officers have been favoured or treated differently. The respondents also contended that the appellant had unsuccessfully approached the High Court for similar reliefs in the past. Further, reliance placed on Section 47 of the said Act by the appellant was ill-advised and misplaced.

6. The Tribunal by the impugned judgment dated 28.10.2014 was pleased to dismiss the original application preferred by the appellant. The Tribunal noted that the reliefs claimed in the original application were unsuccessfully pursued by the appellant in the past, by way of other proceedings including before the High Court. Nevertheless, the Tribunal went on to examine the points canvassed by the appellant independently and found that the same were devoid of merit. The Tribunal adverted to the promotion policy dated 15.05.2007 issued by the Air Headquarters, Vayu Bhavan, New Delhi for the relevant period 2007-08, 2008-09 and for 2011-12 and the fresh promotion policy dated

04.01.2012 applicable for the year 2012-13 and 2013-14. The relevant
extract of the policy reads thus: A

*"17. Promotion and extension to ground crew vis-à-vis their
medical categories would be governed in the following
manner: (Refer Appendix 'C' & 'D')*

*(a) A4 G1 & A4 G2 (T/P) These would be promotionable
medical categories for both time bound and select promotions.
Airmen would be eligible for extension of service in the normal
course as applicable presently.* B

*(b) A4 G3 (T/P) These would be promotable categories for
time bound promotions. Promotion to select rank (JWO
onwards) would be through condonation board. A4 G3 (T)
will be considered only through a condonation board held in
Feb/Mar of the year. In such cases, national seniority will
not be protected. Airmen would be eligible for extension of
service in the normal course as applicable presently provided
they fulfill all other requisite service conditions. Modalities
for promotion and protection of seniority in case of airmen
holding category A4G3 (T) who are upgraded to A4G1/A4G2
is attached as Appendix "C".* C D

*(c) A4 G4 (T/P) Airmen holding these categories would not
be eligible for select promotions. They would be eligible only
for time bound promotions. Extension of service would be
only through condonation board, provided they fulfil all other
requisite conditions. Modalities for promotion and protection
of seniority in case of airmen holding medial category A4G4
(T) who are upgraded to A4G1/A4G2/A4G3 is attached as
Appendix "C". Extension of service would be only through a
condonation board."* E F

(emphasis supplied)

Having noticed the said policy and reckoning the fact that the
appellant was placed under low medical category A4G4 (P), the Tribunal
has held that the appellant was not eligible for select promotion but only
eligible for time bound promotion. Hence, the Tribunal concluded that no
relief can be granted to the appellant. The Tribunal then proceeded to
examine the argument of discrimination as pursued by the appellant. In G

A that, Air Commodore P. Chakraborty and Honorary Flying Officer P.K. Choudhury were treated differently even though they have a higher percentage of disability than that of the appellant. The Tribunal, on the basis of material on record, held that the said two officers were not placed under low medical category A4G4 (P), unlike the appellant. They were, however, placed in category A4G2 (P) and A4G3 (P) respectively, at the relevant point of time; and thus could be considered for select promotion. The appellant, during the hearing of the original application before the Tribunal, pointed out three more cases of officers who, according to the appellant, had suffered more percentage of disability than the appellant namely Warrant Officer Chandrasekhar, Warrant Officer J.B. Yadav and Cadet R.K. Herojit Singh. The Tribunal examined even these new facts urged by the appellant. The Tribunal, however, noticed that the two officers, namely, Warrant Officer Chandrasekhar and Warrant Officer J.B. Yadav, were placed in the low medical category A4G3 (P) respectively at the relevant point of time. Hence, were eligible for being considered for select promotion. In case of Cadet R.K. Herojit Singh, it was found that he was commissioned in the Indian Air Force under special circumstances, after taking into consideration his promising career before the accident which occurred during his training. He was advisedly commissioned to work in the accounts department for the whole of his life and not as a pilot. Hence, that case could plainly be distinguished. Even the argument of the appellant with reference to Section 47, in particular proviso to sub-section (2) of the said Act, did not commend to the Tribunal. Accordingly, as the nature of work assigned to the appellant was of a Cryptographer and moreso since the provisions of the Act stood exempted to the establishment of the Armed Forces in which the appellant was working namely Indian Air Force, the Tribunal concluded that for select promotion such as JWO onwards, the minimum low medical category was specified as A4G3 (P) and that too through Condonation Board. The Tribunal has noted that the appellant was not denied time bound promotion which is only up to the rank of sergeant. Rather, the appellant was already working on that post. The appellant was not working in a civilian post but in the Indian Air Force and for which reason the argument founded on Section 47 of the said Act was unavailable to him. The Tribunal accordingly dismissed the original application.

7. Being aggrieved, the appellant has approached this Court by

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way of appeal which was admitted on 15.10.2015. The appellant has now adverted to another case of officer, namely, Warrant Officer D.K. Thakur, Cryptographer who has been assessed of having 60% composite disability on record but still was considered for promotion. The medical record of this officer, however, indicates that he has been placed in medical category A4G2 (P). The respondents have filed detailed affidavit before this Court reiterating the stand taken before the Tribunal. During the hearing on 26.04.2017, the court passed the following order:

“O R D E R

Heard Mr.Chaman Lal, the appellant-in-person and Mr.Yashank Adhyaru, learned senior counsel for the respondents.

It is submitted by Mr.Chaman Lal that one Shri J.B.Yadav who is presently posted at Air Force Station, Hindon, Ghaziabad though more handicapped yet has been confirmed and given the benefit of promotion. Mr.Yashank Adhyaru, learned senior counsel would submit that it would depend upon the work and function of the disabled person whether he can carry out the nature of the job assigned to him and disability factor has to be judged by the concerned Medical Board which has been done in the present case.

Having heard Mr.Chaman Lal, the appellant-in-person and learned senior counsel for the respondents, to satisfy ourselves we direct the Medical Board from Indian Air Force and two doctors from All India Institute of Medical Sciences (AIIMS), New Delhi to examine Shri J.B.Yadav and Shri Chaman Lal, the appellant in this appeal with regard to their disability and also their functional disability regard being had to the nature of the work. The report shall be filed in a sealed cover before this Court in the first week of July, 2017. The Medical Board while considering the disability shall also deal with the medical category in its report. The appellant shall be notified about the date after the first respondent and its functionaries constitute a Medical Board consisting of doctors from the Indian Air Force and two doctors from the All India Institute of Medical Sciences, New Delhi. The date shall be intimated to the appellant as well as Mr. J. B.Yadav

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A *ten days in advance so that they remain present on the date fixed.*

Let the matter be listed on 11th July, 2017.

Needless to say, we have issued this direction as we intend to satisfy ourselves.”

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When the matter was taken up for hearing on 11.07.2017, the Court was informed that Shri J.B. Yadav having attained the age of superannuation, did not appear before the Medical Board constituted by this Court. As a result, the matter was proceeded for hearing on the basis of the material already on record.

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8. The appellant who has appeared in person, essentially has raised three contentions as articulated in IA No. 51305/2017 filed by him. The same read thus:

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“(a) Whether there is discrimination in the award of Medical Category as persons (cited cases) having more percentage of disability/disabilities, were kept in higher medical category (promotable medical category) and were given promotions than Appellant who would be retained in service till February 2026 (till superannuation) and he is merely a clerk like an accountant despite being empanelled since last 11 years?

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(b) Whether Provisions of Section 47(1) & (2) of Persons With Disability Act 1995 reproduced under Rights of Persons With Disabilities 2016 are applicable to Appellant or not that too when his case pertains to pre-exemption period i.e., of March 2002 whereas Respondents obtained exemption which got the assent of President on 13 April 2002?

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(c) Whether Respondents rightly denying promotion to Appellant that too when he had been doing same job since last eleven years (despite empanelment) which is done by the person holding promotional post and replacing/substituting Warranted Ranks as in appellant's trade sergeant to Master Warrant Officer used to do same job and appellant had vast experience and knowledge pertaining to his trade for which Respondents never complained so far?”

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The respondents on the other hand reiterate the stand taken in the response filed to the original application as well as this appeal and noticed by the Tribunal while rejecting the original application. The respondents are represented by Shri Yashank Adhyaru, Senior Advocate. A

9. With regard to the first contention raised by the appellant regarding discrimination, the same, in our view, has been justly rejected by the Tribunal. As aforesaid, in the original application the appellant had adverted to cases of only two officers viz. Air Commodore P. Chakraborty and Honorary Flying Officer P.K. Choudhury. During the hearing of the original application before the Tribunal, the appellant also referred to the cases of three other officers namely Warrant Officer Chandrasekhar, Warrant Officer J.B. Yadav and Cadet R.K. Herojit Singh. The relevant facts regarding the aforementioned officers have been analysed by the Tribunal and we find no infirmity in the said analysis, as the same is founded on the record before the Tribunal. The officers Air Commodore P. Chakraborty, Honorary Flying Officer P.K. Choudhury, Warrant Officer Chandrasekhar and Warrant Officer J.B. Yadav have been placed in low medical category "other than A4G4 (P)" which are promotional/promotable medical categories, unlike A4G4 (P) in which the appellant has been categorised. Indisputably, persons classified in A4G4 (P) category are not eligible for select promotion but are eligible only for time bound promotions. The appellant is claiming promotion to the post of JWO, which is a select promotion. The appellant has already been given time bound promotion as sergeant; and is working as such since 1998. The appellant has also been granted financial benefit as available to a JWO under MAC applicable w.e.f. 01.09.2008. B
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10. As regards the case of Cadet R.K. Herojit Singh, the respondents have explained the circumstances in which he was commissioned, but deputed to work in the accounts department for the whole tenure as a special case and under special circumstances. His case was different (of being commissioned) because of the special circumstances; and not being a case of promotion inspite of low medical category. F
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11. The argument of the appellant, that the above named officers had a higher percentage of disability and were kept in high medical category, but the appellant was not given similar benefit deserves to be rejected. The medical report of the appellant reads thus:

A “TRUE TYPED COPY OF MEDICAL BOARD PROCEEDINGS
RE-CATEGORISATION BOARD

BMI : 26.36 Kg/M

WHR : 0.89

PART : I

- B Place of Medical Board : 9 BRD AF Authority: IAP 4303.
1. Name : CHAMAN LAL 2. Ser. No. 726381-F 3. Rank : SGT
4. Unit : 9 BRD 5. Service : IAF 6. Trade : CRYPTO
7. DOB : 20.02.1969 (Age : 45 Yrs) 8. Sex: Male HT :172 cm
Wt. 78 Kg
09. Add while on leave : N/A
C 10. Date of Enrolment : 12.10.1987 10. Record Office : AFRO
11. Past Med History : As per Col 15.
12. Duty Ceased : Not Ceased.
14. Present Med Cat : A4G4 (P) wef. Sd/x Inld Sign.

PART : II

- D 15. Details of Present and Previous Disabilities :-
- | Principle/Other Disabilities | Date & Place of Origin | Previous Med Cat with date | Next Med Cat |
|------------------------------|---|----------------------------|--------------|
| 1. Non Hodgkin's Lymphoma | Upper 1/3 rd of Rt Tibia Optd
New Delhi diagnosed in Oct 01 as LCA+ | A4G4 | Yearly |

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16. Specialists Opinions: Attached separately.
17. Is the disability Attributable to Service? (Y/N) If so Pl. explain
F Dis (I) Yes as per GMO Military Pensions 2008 Chapter VI Para 10 (b) (IV).
18. If not directly attributable to service, was it aggravated by service: (Y/N) : No N/A.
726381-F Sgt Chaman Lal Trade : Crypto Unit : 9 BRD
19. Med Cat Now Recommended : A4G4 (P)
G For Dis 1 : A4G4(P)
20. Percentage of Disability (Only for Permanent LMC)
Previous Disablement % :60%
Present Disablement % :60%
21. Any Restriction regarding Employment : Fit for trade
H duties.

22. *Instructions given to the individual by the President of the Med Board. You are placed in Lower Medical Category A4G4 (permanent) wef. Subject to approval by higher authorities.* A

12. The medical category is assessed on the basis of objective parameters specified in the Guide to Medical Officers (Military Pensions) 2008, issued by the office of DGAFMS. The basis of assessment and other related matters to observe objectivity in assessment have been delineated in this policy document. The medical assessment is done by the concerned Board on those parameters without any exception. The relevant extract of the said policy document reads thus: B

“ASSESSMENT C

Definition.

1. *Medical Officers are called upon to evaluate a disablement at the time of Invaliding Medical Board, Release Medical Board, Review Medical Board, or Appeal Medical Board for those invalidated/released in low med cat, or on subsequent occasions.* D

2. *The evaluation of a disablement for pension purposes is called assessment.*

Basis of assessment. E

3. *The purpose of the disablement evaluation is to ensure compensation on equal terms for all members of the Armed Forces of similar status suffering from a like disablement which may be due to injury or disease. It is estimated by reference to the physical or mental capacity for the exercise of the necessary functions of a normally occupied life, which would be expected in a healthy person of the same age and sex. It should represent the extent to which the disablement has reduced that capacity. It is determined solely on general functional capacity. Consideration should not be given to the member's capacity or incapacity to follow his own or any specific trade or occupation. Assessment should be based on measurement of plain facts. Sympathy, sentiments and personal feelings should not come in the way of assessment.* F G

For arriving at a proper assessment of a disability, it is H

A *necessary to elicit a conclusive history, carry out a thorough clinical examination and all relevant laboratory and radiological investigations. It has to be determined whether the disability is temporary or permanent and also the degree of disablement as it pertains to working capacity. The physical examination and laboratory tests must be relied upon more*

B *than ever to substantiate or disprove symptoms and complaints. In many cases, the physical findings may be negative, but the patient may complain only of pain, e.g. a headache, pain in the chest etc. The evaluation of a*

C *disablement based on measurement of function is a sound procedure by means of which a reliable medical opinion may be reached by reason or logic rather than by intuition, conjecture or assumption. However where investigations facilities are not available the assessment will be done on the basis of clinical findings.*

D **Definition of Function**

4. *The term "function" is one that is commonly used to denote the usefulness of a part of the body. In stating the extent of loss of function of a part, one has got to find out what the patient cannot do. For this, one should know what constitutes activity with perfection. When anatomical or physiological changes have taken place leading to the stiffness, atrophy or pain and the usefulness and the efficiency of the organ are impaired, the extent of the clinical disturbance is revealed through physical examinations.*

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F *However, the extent of deficiency of functional ability does not correspond to the extent of physical limitation. Limitation of motion by 50 per cent does not mean 50 percent loss of function. The clinical findings must be designated as factors contributing to the loss of function and not measuring it.*

G 5. *In analysing the problem of assessment a thorough examination together with a deterioration of the anatomical or physiological alterations from normal as compared to abnormal physical state of the same age and sex and the effect of such alterations are taken into consideration. In the case of injuries or diseases, the important points to note are:*

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(a) *Quickness of action.*

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(b) *Coordination of movements.*

(c) *Strength.*

(d) *Security.*

(e) *Endurance.*

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Expressed negatively, loss of function may be estimated in terms of (a) delayed action; (b) awkwardness; (c) weakness; (d) insecurity; (e) diminished endurance; (f) lowered swift factor and (g) the adverse influence of the conspicuous impairment.

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6. *The functional factors e.g. in the hand may be stated as (a) quickness and nimbleness of digital action; (b) coordination of fingers and thumb in opposing finger tips to thumb and thumb to fingers and palm; (c) Strength of gripping and fist making ability, striking, slapping, holding and pushing power; (d) security or reliability of delicate finger sense; and (e) endurance of holding, gripping or pinching.*

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In respect of leg, foot and toes, the factors would be : (a) quickness, nimbleness, springiness of step and gait (b) coordination of feet and toes in smoothness and steadiness of steps and gait (c) strength or weight-bearing and power of action in standing, walking, running or jumping and (d) security or reliability or toe, heel or foot action.

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In an examination of the back, the gait, deformity, dressing or undressing, sitting down or getting up attitude will have to be taken into consideration, as also muscle spasm. Stiffness of the spine causes movement of the hips prior to that of the spine.

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In the hip, the stance or gait or sitting down as in dressing, muscle spasm or rigidity, swelling or atrophy, degree of movement at the hip; have to be taken into consideration.

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In the knee, the gait, swelling, atrophy, movements painful or free, limitation of such movements have to be considered.

In the foot, the gait, deformity, swelling, movements active

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A *and passive, muscle power, weight-bearing on toes and heels, and ankylosis if any, have to be taken into consideration.*

In the shoulder, the general appearance, deformity, swelling, atrophy, extent of motion painful or free, will have to be considered, as also any neurological signs. The same applies to elbow, wrist and the hands.

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In head injury cases, the peculiar characteristic manner of special coordination of movements, gait, general appearance and behaviour with an examination of the scalp, the eyes, the facial expression along with an examination of the reflexes will have to be considered amongst other symptoms attributed to trauma, such as headache, dizziness, insomnia, nausea, vomiting etc.

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In all the above, there must be distinct recognition between organic disturbances and functional neurosis. Once this distinction is made in the clinical entity of the disability, the examiner is in a position to evaluate the disability on the merits of pathological significance.

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Principles of Assessment.

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7. The assessment of a disability for pension purposes is the estimate of the degree of disablement it causes, which can properly be ascribed to service. The disablement properly referable to service is assessed slightly differently at the time of discharge from the forces.

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8. There are various stages of a disability. These are: treatment period, healing period, temporary disablement or permanent disablement-partial or total. Thus, a disability causes disablement which may be temporary or permanent.

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9. In the light of the above, differentiation should be made between "NIL DISABLEMENT" and "NO DISABILITY".

"Nil Disablement" means that although a definite disability is, or has been in evidence, any disablement resulting there from has either ceased or has become so small as not to be appreciable.

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"No Disability" means a case where an individual is said to

be suffering from a disability but medical science can find no evidence of the existence of that disability either present or past. A

10. Disabilities which necessitate invalidation from service are capable of improvement in due course or are of permanent nature. "Permanent" means persisting for all times, i.e. the disablement is supposed to be in a permanent state when the condition of the disability is unchangeable. B

Computation of Assessment.

11. In the forces, the evaluation of disablement or assessment, is made to ensure compensation on equal terms for all members suffering from like disablement. When the assessment is below twenty per cent, it may be assessed as 1-5 per cent; 6-10 per cent; 11-14 per cent and 15-19 per cent. Subsequent assessments are made in multiples of 10, rising from 20 per cent; to maximum of 100 per cent. If the disability is assessed at 100 per cent, a recommendation will invariably be made as to the necessity or otherwise for a constant attendant, bearing in mind that the necessity arises solely from the condition of disability. If an attendant is recommended, the period for which such attendant is necessary, should be mentioned. C
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A member of the Armed Forces who is in receipt of a disability pension in respect of disablement, the degree of which is not less than 100 per cent, may be awarded constant attendant allowance if it is certified by the Medical Board why a constant attendant on him is necessary on account of the disablement. F

At the Time of Discharge From the Forces.

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15. Assessment with Regard to Percentage of Disability. G

The assessment with regard to percentage of disability as recommended by the Invaliding Medical Board, Release Medical Board would be treated as final unless the individual himself requests for review except in case of disabilities which

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A *are not of permanent nature. The opinion of the Reassessment Medical Board, Review Medical Board or Appeal Medical Board, which will be constituted by DGAFMS (later two) as & when required, will be final.*

B *16. **Reassessment of Disability.** There will be no periodical reviews by the Resurvey Medical Boards for re-assessment of disabilities. In case of disabilities adjudicated as being of a permanent nature, the decision once arrived at will be final unless the individual himself requests for a review. In cases of disabilities which are not of a permanent nature, there will be only one review of the percentage by a Medical Board to be carried out later within a specified time frame. The percentage of disability assessed/recommended by the Board will be final unless the individual himself asks for a review. The review will be carried out by Review Medical Board constituted by DGAFMS."*

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D 13. No tangible reason is forthcoming to doubt the medical assessment report in the case of the appellant, categorising the appellant as A4G4 (P). The fact that the percentage of disability of the appellant is relatively less than the other named officers would make no difference. In that, the percentage of disability is not the governing factor, but the relevant consideration is the categorisation done by the Medical Board. The categorisation is based on several factors and not singularly dependent on the percentage of disability. To wit, an individual may bear more percentage of disability but would still have nil employability restrictions. The medical category is thus dependent on the employment and functional capacity of the individual which may vary from case to case. That is determined by the experts after applying the objective parameters noted in the policy document in that regard. Even otherwise, having regard to the exigencies of the service involved and in the interest of overall standard of efficiency thereof, relatively increased rigorous adherence of all relevant norms bearing on the suitability for select promotion is called for.

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H 14. Suffice it to observe that less percentage of disability suffered by the appellant *per se* cannot be the basis to place the appellant under category A4G3 promotable medical category. Needless to mention that the appellant had resorted to other proceedings including by way of two successive writ petitions before the High Court regarding the issue of

nature of medical treatment given to him and incorrect categorisation. Findings recorded in those proceedings could have been the basis for the Tribunal to non-suit the appellant at the threshold. However, we find that the Tribunal independently considered each of the grievances of the appellant and rejected the same being devoid of merit. We fully agree with that analysis and conclusions therefor.

15. The fact that the appellant has been empanelled in the list of candidates due for promotion and also qualified the merit bench mark, does not mean that he has acquired any vested right. The promotion to the post of JWO, indisputably, is a select promotion hedged with the medical fitness eligibility criterion to be fulfilled by the incumbent. That is not so in the case of time bound promotion. We hold that there is no substance in the contention that the appellant has in fact or in law been discriminated in any manner.

16. We may now advert to the second contention pursued by the appellant, founded on Section 47 of the said Act. The said provision reads thus:

“47. Non-discrimination in Government employments.-

(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.”

Sub-section (1) has no application to the fact situation of the present

A case. Sub-section (2), is attracted to cases of promotion. It has an enabling provision in the form of a proviso. Thus, it is not an absolute stipulation, but subject to the proviso. The proviso empowers the appropriate Government to exempt any establishment from its application, by issuing notification in that behalf. Admittedly, the Government of India, Ministry of Social Justice and Empowerment has issued Notification No.16-27/2001-N 101, dated 28.03.2002 after the assent was given by the President of India in April 2002. It was published in the Official Gazette on 13.04.2002. The same reads thus:

**“MINISTRY OF SOCIAL JUSTICE AND
EMPOWERMENT**

New Delhi, the 28TH March, 2002

S.O. 1179.- In exercise of the powers conferred by proviso to Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996) the Central Government having regard to the type of work carried on hereby exempt all categories of posts of combatant personnel of the Armed Forces from the provision of the said section.

[No. 16-27/2001-NI.1]

Smt. RAJWANT SANDHU, Jt. Secy.”

17. The effect of issuance of this notification is to exempt the establishment in which the appellant was in service at the relevant time from the application of the provisions of the said Act. It is not the case of the appellant that the appellant was empanelled in the list of candidates due for promotion prior to the issuance of the aforesaid notification. He was empanelled for the first time for promotion post March 2002. Thus understood, the appellant cannot claim benefit of Section 47, which has no application consequent to the issuance of the stated notification.

18. It is a well established position that mere empanelment of an incumbent in the list of candidates due for promotion would not create any vested right in him, to be promoted on select post. At best he would only have a right to be considered for promotion. That claim of promotion would depend on the fulfillment of eligibility requirements as per the promotion policy applicable at the relevant time. The appellant did not possess the medical fitness qualification for being considered for select promotion to the post of JWO. The appellant has erroneously assumed

that he was due for promotion in March 2002, which fact is not corroborated from the record. The record, however, indicates that the appellant was considered for promotion firstly in 2005-06 and also in the year 2006-07, but he could not qualify the merit criteria within the available vacancies in his trade rank. He was not considered nor was due for promotion to the next higher rank pre March 2002. Suffice it to observe that the dispensation stipulated in Section 47 of the said Act, has no application to the present case.

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19. As regards the third contention, the same deserves to be stated to be rejected. The fact that the appellant is doing the same job for the past eleven years, cannot be the basis to issue direction to promote the appellant notwithstanding lack of eligibility regarding medical fitness for the select promotion. There is no challenge to the promotion policy applicable at the relevant time or as is presently applicable for select promotion. That plainly commands that airmen holding medical categories A4G4 (P) would not be eligible for select promotion and can be considered only for time bound promotion. The post of JWO is admittedly a select promotion post. The appellant, therefore, cannot succeed merely on the basis of his claim of vast experience, knowledge and performance unless he fulfills the eligibility criteria including medical fitness for select promotion.

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20. Accordingly, this appeal fails and the same is dismissed with no order as to costs.

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