

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2024-00448

XXXXXXXXXXXXXXXXXX

**COUNSEL:** XXXXXXXXXXXXXXXX

**HEARING REQUESTED:** NO

### APPLICANT'S REQUEST

His official military personnel record be amended to:

- a. Reflect his unfitting condition was incurred and/or aggravated in the line of duty (ILOD).
- b. Award a medical retirement with a disability rating of 100 percent.

### APPLICANT'S CONTENTIONS

Per counsel, the applicant served in the Air National Guard (ANG) from 21 Nov 19 to 9 Sep 22<sup>1</sup>. He served on four tours: (1) Iraq [Jun – Aug 04]; (2) Iraq [Jan – May 06]; (3) Iraq [Jan – May 08]; and (4) Kuwait [Jul – Sep 19]. While deployed to Kuwait in 2019, the applicant experienced symptoms which ultimately resulted in his diagnosis of Gastrointestinal Stomal Tumor (GIST). The Air Force initially processed the applicant through the Disability Evaluation System (DES) and found his GIST diagnosis ILOD. His ILOD finding was later reevaluated and his GIST was improperly found not in the line of duty (NILOD).

First, as a matter of law, the applicant's GIST is now a presumptive service-connection under the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act (the PACT Act). At a minimum, justice requires the NILOD determination made in 2020 prior to the enactment of the PACT Act be corrected to reflect an ILOD determination. Second, even if the Air Force Board for Correction of Military Records (AFBCMR) refuses to afford the applicant the benefits required under the PACT Act, the AFBCMR should still find his GIST ILOD because the Air Force erred when it reevaluated his GIST as NILOD without the clear and unmistakable evidence that it was not aggravated by his service in Kuwait as required under law.

While deployed in both Iraq and Kuwait, the applicant was exposed to burning fuel and burn pits. While deployed to Kuwait in Jul 19, he noticed a change in his bowel habits and physique, including diarrhea, constipation, early satiety, and weight loss. He was initially treated with medication but continued to observe symptoms. After returning home from deployment on 9 Sep 19, the applicant sought further treatment and was diagnosed with GIST. On 30 Sep 19, an Air Force LOD determination was signed which recommended an ILOD determination. Of note, the LOD determination stated the applicant's oncologist concluded the tumor was present months or possible years prior and his tumor was fast-growing/high grade. On 3 Mar 20, a Medical Evaluation Board (MEB) report was prepared in preparation to refer the applicant to the Physical Evaluation Board (PEB). The MEB report noted the applicant's GIST was found ILOD on 27 Feb 20. On 11 Mar 20, the applicant's commander wrote a statement regarding the applicant's limitations due to his medical condition. The commander agreed with the referral to the MEB since the applicant had significant side effects that caused him to miss a significant amount of work. The commander wrote the applicant was deployed in support of Operation SPARTAN SHIELD beginning 18 Jun 19 when the condition originated or was incurred. The

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<sup>1</sup> The applicant was honorably discharged from the ANG on 7 Sep 22 and placed on the USAF Reserve Retired List on 8 Sep 22.

commander further attested the applicant did not have this medical condition prior to joining the Reserve<sup>2</sup> and was in military status when the condition was first diagnosed.

On 4 Sep 20, the applicant underwent an exam from the Department of Veterans Affairs (DVA) as part of the DES process. The DVA confirmed the cancer diagnosis of malignant neoplasm. On 10 Sep 20, the MEB found the applicant's tumor failed medical retention standards and referred him to the PEB. On 16 Sep 20, the PEB urged reconsideration of the ILOD finding, opining the reported doubling time for high grade/high risk GIST would mean the applicant had a sizeable tumor prior to starting his period of orders and the GIST did in fact exist prior to service. In addition, the applicant's presentation was compatible with natural progression of a large gastric GIST and its associated mass effect. The PEB requested the National Guard Bureau (NGB) return the case to the attention of a physician. On 15 Oct 20, the NGB reviewed the prior determination that the applicant's GIST was ILOD and recommended finding it NILOD. On 10 Nov 20, based on the NGB's memorandum, the applicant's commander recommended his tumor be found NILOD. On 15 Dec 20, the ANG LOD Approving Authority sent a memorandum to the PEB to evaluate the applicant's case for non-duty related fitness only, as his tumor was no longer considered ILOD.

On 5 Jan 21, the PEB determination found the tumor was NILOD. Furthermore, the PEB found the presumption of sound condition had been overcome based on the tumor size, type, growth rate, and date of discovery, all of which are incompatible with the notion the condition was incurred while on his extended active duty order and entitled to basic military pay. The PEB acknowledged the applicant became symptomatic while on deployment orders but determined that accepted medical principles establish the existence of the tumor before the beginning of his deployment orders just three months prior to the discovery of his already sizeable tumor. The PEB overcame the presumption of service aggravation based on accepted medical principles which recognize the applicant's symptoms at the time of his presentation as indicative of the natural course of his disease which is often indolent. Despite initially being in remission from his GIST as of Oct 22, on 19 Apr 23, the applicant was diagnosed with terminal Stage IV GIST with nine inoperable tumors, with two masses being measured at 4.9 cm or greater.

On 10 Aug 22, the PACT Act was signed into law recognizing the link between burn pits and environmental toxins that service members were exposed to on some deployments and the link of those toxins to over 20 conditions, including gastrointestinal cancer. Veterans are now granted presumptive service-connection for specified conditions under the PACT Act if they have a qualifying period of service. Guidance published by the DVA Veterans Benefits Administration on 22 Dec 22 provides a list of presumptive conditions associated with exposure to burn pits and other toxins, which includes diagnostic code 7343 – neoplasms, malignant. The PACT Act provides that the applicant's GIST was presumptively incurred ILOD. He has four qualifying periods of service, and his GIST diagnostic code is 7343. During the DES process, the Air Force is required to adhere to the DVA Schedule for Rating Disabilities, including PACT Act presumptions. Although the PACT Act was not in effect in 2020, justice now requires the applicant receive benefit of the PACT Act. Had the applicant been referred to the DES just a few years later, he would have benefitted from the PACT Act and been provided a medical retirement. Congress explicitly intended the PACT Act to protect veterans like the applicant regardless of their discharge date. Specifically, the PACT Act allows veterans who filed timely to obtain retroactive DVA benefits from 10 Aug 22 through today. Moreover, the PACT Act should be applied to the applicant's case because to do otherwise would shock the sense of justice.

The applicant's complete submission is at Exhibit A.

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<sup>2</sup> Applicant was a member of the Air National Guard, a reserve component of the Air Force.

## STATEMENT OF FACTS

The applicant is a retired [State] Air National Guard technical sergeant (E-6) awaiting retired pay at age 60.

On 9 Jan 20, according to AF Form 348, *Line of Duty Determination*, dated 30 Sep 19, the Appointing Authority found the applicant's diagnosed GIST to be ILOD.

On 3 Mar 20, according to the *Medical Evaluation Board Narrative Summary*, the applicant's ILOD for GIST tumor was approved on 27 Feb 20.

On 11 Mar 20, according to AF Form 1185, *Commander's Impact Statement for Medical Evaluation Board*, the applicant's commander recommended he not be retained as the applicant was not capable of performing all required crew chief duties.

On 13 Jul 20, according to AF Form 469, *Duty Limiting Condition Report*, the applicant was placed on duty and mobility restrictions with code 37 (medical defect/condition requires MEB or PEB processing in accordance with Air Force Instruction (AFI) 41-210, *TRICARE Operations and Patient Administration Functions*).

On 10 Sep 20, according to AF IMT 618, *Medical Board Report*, the applicant was diagnosed with GIST; Incurred while entitled to basic pay: Yes; Existed Prior to Service (EPTS): No; Permanently Aggravated by Service: Yes; and referred to the informal PEB (IPEB). On that same day, according to an *Impartial Medical Review (IMR) and Rebuttal Election Form*, the applicant agreed with his MEB results and will not submit a request for an IMR or rebuttal.

On 16 Sep 20, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board (Informal)*, the applicant was found unfit because of physical disability and diagnosed with:

- Category I – Unfitting Conditions:

- Malignant Neoplasm of the Digestive System with Partial Gastrectomy; Incurred while entitled to basic pay: Yes; Line of Duty: Yes; Combat-related determination as defined in Title 26, United States Code § 104 (26 USC § 104): No.

The IPEB returned the case without action as the AF Form 348 was not signed by the ARC Approving Authority and was also missing the ARC Board Administrator and legal signatures. The IPEB also requested reconsideration of the ARC LOD Board Medical Review/Recommendation, as the submitted opinion (ILOD, EPTS – No) is contradicted by accepted medical principles and scientific evidence.

On 15 Oct 20, according to an NGB/SGPS memorandum, Subject: Review of Line of Duty (LOD) Determination, this office recommended the applicant's condition be NILOD and recommended Fit for Duty processing. On 10 Nov 20, via first indorsement, NGB/JA concurred with the NGB/SGPS recommendation and found it legally sufficient. On 15 Dec 20, via second indorsement, NGB/A1PS [ANG LOD Approving Authority] determined the applicant's case to be NILOD – Not due to misconduct, and resubmitted the case to the PEB as a fitness case.

On 5 Jan 21, according to AF Form 356, the applicant was found unfit because of physical disability and diagnosed with:

- Category I – Unfitting Conditions:

- Residuals of Gastrointestinal Stromal Tumor with Surgical Resection and Chemotherapy – Existed Prior to Service without Service Aggravation; Incurred while entitled to

basic pay: No; Line of Duty: N/A; Disability Compensation Rating: N/A; Veterans Administration Schedule for Rating Disabilities (VASRD) Code: 7343; Combat-related determination as defined in 26 USC § 104: No.

The IPEB found the applicant's condition is incompatible with the rigors of military service and unfitting. The applicant's unfitting medical condition is not compensable because it was found EPTS and was not service-aggravated.

On 5 Feb 21, according to AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, the applicant did not agree with the findings and recommended disposition of the IPEB and requested a formal hearing of his case.

On 22 Oct 21, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board (Formal)*, the applicant was found unfit because of physical disability and diagnosed with:

- Category I – Unfitting Conditions:

- Residuals of Gastrointestinal Stromal Tumor with Surgical Resection and Chemotherapy – Existed Prior to Service without Service Aggravation; Is the condition compensable: N/A; VASRD Code: 7343; Disability Rating: N/A; Combat-related determination as defined in 26 USC § 104: No; Disability was incurred in a combat zone or incurred during the performance of duty in combat-related operations: No; Condition is permanent and stable: N/A.

The FPEB found the applicant's GIST is incompatible with military service and unfitting.

On 29 Oct 21, according to the Office of Disability Counsel (ODC) memorandum, the applicant requested a quality control review of his FPEB contending violations of law and policy.

On 19 Nov 21, according to XXX AMXS/CC memorandum, Subject: Informal Line of Duty Determination Notification, the applicant was notified his GIST occurred NILOD and of his right to appeal to the Appellate Authority (ANGRC/CC).

On 15 Dec 21, according to the ODC memorandum, Subject: ODC Counsel Memorandum in Support of [Applicant] Line of Duty (LOD) Determination, the applicant appealed his LOD determination.

On 3 May 22, according to an ANGRC/CC memorandum, Subject: Line of Duty Appeal Request – Gastrointestinal Stromal Tumor, the applicant's appeal request was disapproved with a final determination of NILOD.

On 22 Jun 22, according to the ODC memorandum, Subject: SAFPC Appeal of Line of Duty (LOD) Appellate Review, [Applicant], FPEB date 22 Oct 21, the applicant submitted his case to the Secretary of the Air Force Personnel Council (SAFPC) for appellate review of his LOD determination.

On 26 Aug 22, according to a SAF/MRBP memorandum, Subject: Line of Duty Appeal, SAFPC did not find sufficient basis to overturn the present NILOD determination.

On 7 Sep 22, according to Special Order XXXXX, dated 17 Jan 23, the applicant was honorably discharged from the [State] ANG and transferred to the US Air Force Reserve, effective 8 Sep 22. The applicant has applied for transfer to USAF Reserve Retired List.

On 8 Sep 22, according to Reserve Order XXXXX, dated 17 Nov 22, the applicant was relieved of current assignment, assigned to the Retired Reserve Section and placed on the USAF Reserve

Retired List. Reason: Eligible for retired pay under 10 USC § 12731 except for attainment of eligible age, physically disqualified for active duty.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisory at Exhibit C.

## **APPLICABLE AUTHORITY/GUIDANCE**

Public Law 117-168, 10 Aug 22:

Section 1. Short Title; References to Title 38, United States Code; Table of Contents.

(a) Short Title. This Act may be cited as the “Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022” or the “Honoring our PACT Act of 2022.”

(b) Matters Relating to Amendments to Title 38, United States Code.

(1) References. Except as otherwise expressly provided, when in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of Title 38, United States Code.

(2) Amendments to Tables of Contents. Except as otherwise expressly provided, when an amendment made by this Act to Title 38, United States Code, adds a section or larger organizational unit to that title or amends the designation or heading of a section or larger organizational unit in that title, that amendment also shall have the effect of amending any table of sections in that title to alter the table to conform to the changes made by the amendment.

## **AIR FORCE EVALUATION**

SAF/MRBP recommends denying the application as the applicant is not the victim of an error or injustice. The preponderance of the evidence demonstrates the applicant's GIST existed prior to his service and was not aggravated by military service but followed the natural progression of the disease.

Through counsel, the applicant contends his GIST is a presumptive service-connected condition under the PACT Act and should be deemed ILOD. Further, the applicant contends it was an error and injustice for the NGB and PEB to conclude his GIST was not aggravated ILOD by his service in Kuwait.

The applicant is correct he was diagnosed after his deployment ended on 21 Sep 19. He is also correct his wing initially considered his condition to be ILOD but changed it to NILOD after the ANG introduced the pathophysiology of his condition and mitotic rate leading to a conclusion of EPTS and not service aggravated for his condition. However, the AFBCMR should not grant the applicant's request because he is not the victim of an error or injustice. While the applicant's GIST existed prior to his service and is following GIST natural progression without any service aggravation, there is no evidence the applicant-claimed PACT Act presumptive service-connection applies to non-duty DES cases within the Department of Defense. A chronology of facts harvested from the applicant's records was provided for review.

An overarching issue/concern in this case is the science and the natural progression of this type of cancer and the fact that it was documented as an incidental finding and not related to the applicant's presenting symptoms. The applicant's counsel specifically noted the applicant had symptoms during deployment. There was no documented evidence of the symptoms or clinical notes, or incident reports submitted to support it. The earliest date of a medical document found within the electronic medical record was 25 Sep 19, after the deployment.

It is also of note that even if the symptoms were connected to the final diagnosis, scientifically, for the applicant's tumor to reach the size of seven cm at the time of the pathology report, it was already growing before the applicant was ordered to active duty just prior to deployment. GIST located in the stomach is sometimes associated with symptoms of vomiting blood, blood in stool or black stools as a result unless there is indolent endoluminal progression, then symptoms like easy satiety and bloating occur. There are no clinic reports to that effect prior to or during deployment. According to accepted medical principles, as described in the initial NGB LOD determination, the appeal of the LOD determination to the ANGRC/CC, and the appeal of this issue to the Air Force Personnel Board, a preponderance of evidence indicates the applicant's GIST existed prior to being ordered to active duty and is therefore, a condition which existed prior to his service. There is no evidence provided supporting the applicant's current argument his military service somehow caused a permanent worsening of the condition beyond its natural progression.

As for the applicant's argument regarding the DVA's decision to grant presumptive service-connection to this condition under the PACT Act, it is important to note the PACT Act applies to veterans exposed to burn pits, Agent Orange, and other toxic substances and provides the DVA authority to grant presumptive service-connection to a variety of conditions based on the veteran's presence in certain geographic areas during certain dates. This law provides authority for the DVA to presume members were exposed to burn pit toxins during some deployments without direct evidence. However, it is important to note a decision by the DVA under Title 38, USC to grant service-connection to a condition does not constitute a finding by the military department that a condition was incurred or aggravated ILOD. Because the DVA and military departments operate under differing authorities, where the decisions regarding presumptive service-connection and LOD determinations are subject to different criteria, it is not unusual for a condition to be deemed service-connected by the DVA, even though the military department did not find the condition ILOD.

Ultimately, while the applicant's contentions are duly noted, the evidence provided is not sufficient to conclude the Air Force's decision his GIST was not incurred ILOD represents an error or injustice. The applicant's condition was fairly considered by NGB when it made its initial determination this condition was not incurred ILOD, and this decision was subjected to multiple thorough and comprehensive appeals where the applicant was represented by legal counsel and afforded the opportunity to present substantial evidence in support of his claim.

The complete advisory opinion is at Exhibit C.

## **APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 26 Aug 24 for comment (Exhibit D), and the applicant replied on 24 Sep 24. In her response, counsel disagreed with the advisory opinion's conclusions that the applicant was not the victim of an error or injustice and the preponderance of the evidence demonstrated his GIST was EPTS and not aggravated by military service, but followed the natural progression of the disease. The advisory opinion ignores crucial undisputed facts highlighted in his application and it commits clear legal error by inappropriately discounting the role that prior service conditions, per Department of Defense Instruction (DoDI) 1332.18, *Disability Evaluation System*, plays in the applicant's case. Similarly, the advisory opinion underplays the significance the PACT Act's enactment should play in determinations of this nature by the DoD.

The advisory opinion fails to adequately consider whether the applicant's GIST was incurred during his earlier deployments. When making an affirmative LOD finding, a service member must demonstrate a preponderance of evidence shows duty incurrence (or aggravation). The

applicant demonstrated the required preponderance of evidence by citing the Honoring Our PACT Act of 2022, Pub. L. No. 117-168, 136 Stat. 1759 (10 Aug 22). Under the PACT Act, Congress has established a presumption that certain cancers, including the type the applicant suffers from, are service-connected due to exposure to hazardous environments, such as burn pits. While this presumption may not be legally binding on the DoD, the PACT Act still serves as federal recognition of the known connection between burn pit exposure and GIST for veterans like the applicant. The fact the PACT Act was enacted by Congress, in and of itself, represents not just a legislative determination, but it also serves as a preponderance of evidence that has yet to be rebutted, that the applicant's tumor was incurred on active duty. Otherwise stated – if Congress, as a matter of policy, has determined service members' exposure to burn pits likely caused medical conditions from which they are suffering – why should the DoD not consider that presumption and the multiple medical studies supporting the presumption, in and of itself, as strong evidence of that fact? At the very least, this legislative decision (and the corresponding presumption that it creates) constitutes a showing by the preponderance of evidence that the applicant's cancer was incurred as a result of his service, which the Air Force must refute with clear and unmistakable evidence. To date, no such evidence has been provided.

According to military policy, any medical condition incurred during one period of active service that recurs, is aggravated, or otherwise causes the service member to become unfit for duty should be considered incurred ILOD, unless it is due to misconduct, willful negligence, or intervening events when not in a duty status. The advisory opinion generally discusses the applicant's 2019 deployment in Kuwait; however, it does not discuss (other than briefly mentioning in the facts section) his Jan 06 to May 06 deployment to Iraq, and completely fails to mention his deployments to Iraq in Jun 04 to Aug 04 and Jan 08 to May 08. The advisory opinion opines, based on accepted medical principles, the applicant's cancer must have been already growing prior to his 2019 deployment, but it fails to consider he had three prior deployments during which the cancer may have been caused. We also note the advisory opinion alleges the applicant's GIST has not worsened beyond its natural progression, meaning there were not any intervening events. Since the advisory opinion does not present evidence the applicant's cancer was caused by misconduct, negligence, or non-duty status events, it should be found that his cancer was incurred ILOD.

The Board is tasked not only with correcting factual errors but also with addressing and rectifying prejudicial injustices. If the Board ignored the legislative intent behind the PACT Act and the established presumption of service-connection for the applicant's cancer due to earlier deployments, it would constitute a prejudicial injustice. It is unjust to deny the LOD status of his condition solely because the PACT Act does not legally bind the DoD. The Board has a duty to correct prejudicial injustices and must consider the legislative acknowledgment of the connection between burn pit exposure and certain cancers, as recognized in the PACT Act.

The advisory opinion relies on a flawed doubling time analysis to argue the tumor must have been present at the beginning of the applicant's 2019 deployment and accordingly, it could not have been incurred during his 2019 deployment. While literature may cite an average or quickest doubling time of 2.5 months, tumor growth can vary significantly among individuals. Growth rates are influenced by numerous factors, including overall health, immune response, and environmental conditions such as deployment stress or exposure to carcinogens. Therefore, using a general doubling time estimate to refute the presence of the tumor during deployment is not only imprecise but fails to meet the clear and unmistakable evidence standard.

Counsel believes the Board relied upon the 2016 Koizumi et al. study entitled "*Clinical implications of doubling time of gastrointestinal submucosal tumors*" in establishing what constituted accepted medical principals. This study classified cancers into three ranges: low-, medium- and high-risk based upon tumor size and mitotic figures based upon Fletcher et al.'s approach in the 2002 study *Diagnosis of Gastrointestinal Stromal Tumors: A Consensus*

*Approach.* While the sample size of the low-risk cancer was 28, the sample size of the intermediate- and high-risk cancer was only 3 each. Note that the applicant's medical professionals have classified his cancer as being high risk. Despite this, the researchers acknowledged (i) there is a higher risk class of GIST found to be associated with significant shorter doubling time, and (ii) further studies of larger groups of patients are needed to confirm their findings. Even more, the research shows there was a high-risk cancer whose doubling time was 0.8 months. Given the limitations of this study, especially with respect to high-risk cancers, it would be improper to cite this study to make any definitive conclusion concerning doubling time.

Further, the advisory opinion does not adequately address the possibility the applicant's condition may have become symptomatic or worsened during his 2019 deployment. Assuming the applicant already had cancer prior to his 2009 (sic<sup>3</sup>) deployment, since symptoms were present during service, the tumor could have been less advanced or asymptomatic at the beginning of his deployment, only becoming significant or detectable towards the end of the deployment. This possibility aligns with the notion the tumor's progression may have been accelerated by factors related to active duty. The advisory opinion must present clear and unmistakable evidence the condition was not aggravated by service, which it has failed to do. Given the uncertainties surrounding the tumor's growth rate and the close timing of the diagnosis to the end of the applicant's orders, the benefit of the doubt should be given to the service member. Any reasonable doubt regarding the timing and progression of the tumor should be resolved in favor of the applicant. The advisory opinion's failure to apply this principle undermines the fairness of the evaluation.

Finally, pursuant to 10 USC § 1216a, the DoD is required to utilize the DVA's schedule for rating disabilities and adhere to its interpretations, including the presumptions in Title 38, Chapter I, Part 3, Subpart A of the Code of Federal Regulations (CFR). Title 38, Chapter I, Part 3, Subpart A of the CFR is part of the DVA's rating schedule since the title of this Subpart is "*Ratings and Evaluations; Service Connection.*" Although the DoD is not bound by DVA service-connected disability decisions, it must consider these presumptions in its evaluations in so much as they are part of the DVA Schedule. The advisory opinion's failure to incorporate the presumption of service-connection as outlined in Title 38, CFR § 3.320 represents a deviation from the legal standards set forth in 10 USC § 1216a. The Board's decision must align with these legal obligations and consider the relevant presumptions. Given the advisory opinion's errors in fact and law, counsel respectfully requests the Board not credit its proposed conclusion and instead grant the applicant's request to correct his military records to provide a medical retirement by finding his unfitting cancer was incurred and/or aggravated ILOD and merits a disability rating of 100 percent.

The applicant's complete response is at Exhibit E.

## **FINDINGS AND CONCLUSION**

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendation of SAF/MRBP and finds a preponderance of the evidence does not substantiate the applicant's contentions. Although the

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<sup>3</sup> Typographical error, should read 2019 vice 2009.



applicant may have become symptomatic from his condition while on deployment orders, accepted medical principles establish the existence of the tumor before the beginning of his deployment orders just three months prior to the discovery of his already sizeable tumor. The tumor size, type, growth rate, and date of discovery are incompatible with the notion that the condition was incurred while on his extended active duty order and entitled to basic military pay. Further, accepted medical principles recognized the applicant's symptoms at the time of his presentation as indicative of the natural course of his disease.

Regarding the applicant's contention his GIST is now a presumptive service-connected condition under the PACT Act, this law provides the DVA the authority to presume members were exposed to burn pit toxins during some deployments without direct evidence. The PACT Act does not apply to a military department's findings under Title 10, USC. A decision by the DVA under Title 38, USC granting service-connection does not constitute a finding by the military department that a condition was incurred or aggravated ILOD. Because the DVA and military departments operate under differing authorities, where the decisions regarding presumptive service-connection and LOD determinations are subject to different criteria, it is not unusual for a condition to be deemed service-connected by the DVA, even though the military department did not find the condition occurred ILOD.

The final determination of NILOD for the applicant's unfitting condition underwent multiple thorough and comprehensive reviews. The applicant was represented by legal counsel and afforded due process throughout the proceedings. Under the DES, the finding of NILOD renders the applicant's unfitting condition non-compensable and the applicant ineligible for medical retirement. Therefore, the Board recommends against correcting the applicant's records.

## **RECOMMENDATION**

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

## **CERTIFICATION**

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2024-00448 in Executive Session on 16 Oct 24:

, Panel Chair  
, Panel Member  
, Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 8 Jan 24.  
Exhibit B: Documentary evidence, including relevant excerpts from official records.  
Exhibit C: Advisory Opinion, SAF/MRBP, dated 21 Aug 24.  
Exhibit D: Notification of Advisory, SAF/MRBC to Counsel, dated 26 Aug 24.  
Exhibit E: Counsel's Response, dated 24 Sep 24.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

**X**