

## **ADDENDUM TO RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

XXXXXXXXXXXXXXXXXX

**DOCKET NUMBER:** BC-2018-00515-2

**COUNSEL:** NONE

**HEARING REQUESTED:** YES

### **APPLICANT'S REQUEST**

The Board reconsider his request his back injury be found in the line of duty (ILOD) and he receive retroactive back pay and allowances.

### **RESUME OF THE CASE**

The applicant is an Air Force Reserve (AFR) technical sergeant (E-6).

On 25 Sep 11, the applicant entered a period of active duty and was released from active duty on 15 Sep 12, per his DD Form 214, *Certificate of Release or Discharge from Active Duty*.

On 21 Aug 19, the Board considered and denied his request his injury on 9 Apr 12 while on active duty orders was ILOD. The Board noted the provided documentation was insufficient to support his claim. The Board found the applicant had not sustained his burden of proof to warrant the requested relief.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letter and Record of Proceedings at Exhibit C.

On 31 Mar 21, the applicant requested reconsideration of his request. He requests his LOD determination be processed showing his injury incurred on 9 Apr 12 while on active duty orders was ILOD.

On 9 Apr 12, while performing military honors carrying a casket at a National Cemetery he incurred a herniated disk, sciatica and injury to the lower lumbar of the back. All the information necessary for the LOD determination was turned into his Reserve Medical Unit (RMU). However, his RMU violated AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*, by not initiating an LOD determination. Although AFI 36-2910, states members should not be separated or retired while pending a final LOD determination, his records were turned in for transfer to the Inactive Ready Reserve (IRR). The AF Form 422, *Notification of Air Force Member's Qualification Status*, dated 5 May 12 and the witness statements provided show he was injured ILOD while on active duty orders.

AF Form 422, *Notification of Air Force Member's Qualification Status*, dated 5 May 12, shows the applicant was restricted from fitness components of running, walking, push-ups and sit ups. He was cleared for abdominal circumference measurement through 28 Jul 12. It stated a medical recommendation for participation waiver was pending his commander's approval.

He provides Chronological Record of Medical Care dated 10 Sep 16 documenting his complaint his LOD was not properly processed. The LOD was rejected since it had been more than 180 days since the injury.

On 7 Dec 17, the applicant's RMU informed him he was found temporarily medically disqualified for continued duty. An AF Form 469, *Duty Limiting Condition Report*, was initiated but is not included in the case. On 26 Dec 17, his RMU requested he sign the Physical Evaluation Board (PEB) Election form and requested he provide any supporting medical documentation.

In an e-mail dated 12 Jan 18, his RMU informed the applicant his LOD was canceled in 2014 due to the absence of any certified orders being produced. A second LOD was canceled on 19 Dec 16 due to the 180-day rule having elapsed. Accordingly, his injury was considered NILOD. An administrative LOD was initiated on 18 Oct 16 to secure funding for an orthopedic referral to get updated information. The applicant was advised Department of Veterans Affairs (DVA) determinations did not affect Air Force LOD determinations.

The applicant submitted an Inspector General (IG) complaint regarding his LOD. On 22 Jan 18, AFRC/IGQ closed the applicant's complaint and advised he could submit an AFBCMR application.

In a memorandum dated 4 Feb 21, his unit commander notified the applicant the AFRC/A1, the approving authority under AFI 36-2910, determined his injury of other intervertebral disc degeneration, lumbar region occurred NILOD. The determination was reached after a review of an informal investigation. The memorandum stated the applicant could request reconsideration or appeal the determination to the AFRC appellate authority.

On 11 Feb 21, the RMU informed the applicant he was identified as having a potentially medically disqualifying condition (spondylopathies, mononeuropathy) per the Medical Standards Directory (MSD) and his case may require to be submitted to AFRC/SGP via the Medical Evaluation Board's (MEB) Pre-Integrated Disability Evaluation System (IDES) process.

The applicant provides a memorandum of support from his wing commander (WG/CC) dated 9 Aug 21. His WG/CC states the applicant did everything in his power to ensure his LOD was processed in a timely manner. He was told the unit had everything required to process his LOD. In Nov 12, he then transitioned to the IRR and took a contracting position in Afghanistan. On 27 Mar 13, almost a year after the incident, the case manager was looking for proof of orders. In Apr 13, while on leave and back in country, he turned in his point credit accounting reporting system (PCARS) a second time. On 11 Feb 14, a new case manager asked for orders or his PCARS for a third time. On 25 Feb 14, the LOD was canceled for not turning in orders. Without a doubt, if his unit started the LOD process within five days of the report, the applicant would have received an ILOD determination. The applicant should not be punished for an administrative shortfall that occurred nearly a decade ago.

In an e-mail dated 26 Aug 21, his WG/CC states there were multiple errors on their part in the initial LOD determination. The following documents were provided:

AFRC IMT 348, *Informal LOD Determination*, dated 25 Feb 14, reflects the case was canceled as there were no certified military orders available. The applicant failed to provide documentation.

AFRC IMT 348 dated 19 Dec 16, reflects his diagnosis of other intervertebral disc degeneration, lumbar, moderate degenerative disc disease existed prior to service (EPTS), ILOD, service aggravated (SA). The Appointing Authority recommended ILOD on 18 Nov 16;

however, the LOD was not forwarded to the ARC LOD Review Board, but stamped case canceled with reason, "Other please specify below."

AF Form 348, *Line of Duty Determination*, dated 12 Aug 20 shows description of symptoms and diagnosis as EPTS, ILOD, Service Aggravation (SA). Other intervertebral disc degeneration, lumbar region. Details state the applicant reported back pain which started after lifting a casket. He was evaluated with MRI showing degenerative disc disease, which is chronic and would not have been due to acute injury. It also notes posterior annular tear, which may have been due to acute injury. The investigation determined AFRC instructed the RMU in 2016 to cancel the LOD because the condition was EPTS, and the applicant was not on profile from 2012 to 2016 when the LOD was processed. However, AFRC now recommended the LOD should be completed, and a determination be made rather than canceling the LOD. On 5 Dec 20, the Appointing Authority recommended the LOD Determination be ILOD. However, on 22 Jan 21, the Legal Review recommendation non-concurred with the Appointing Authority and recommended a new finding of NILOD, Not Due to Own Misconduct, EPTS with No SA (NSA). On 27 Jan 21, the ARC Approving Authority determined the final LOD Determination as NILOD-Not due to misconduct NSA.

The applicant's complete submission is at Exhibit E.

#### **APPLICABLE AUTHORITY/GUIDANCE**

DAFI 36-2910, Paragraph 1.6.8 For ARC, an LOD determination, which is valid for one year for medical purposes, must be made when the member incurs or aggravates an illness, injury or disease or receives any medical treatment while serving in qualified duty status.

Paragraph 1.6.8.4, Members have up to 180 after completion of their current duty status to report their medical conditions for a LOD determination, absent special circumstances. After 180 days have passed, the avenue for addressing previously unreported illness, injury or disease is through the Veterans Affairs (VA). Note: Special circumstances include latent onset conditions such as post-traumatic stress disorder order and other mental, behavioral and neurodevelopmental conditions.

Paragraph 1.8.2. Existed Prior to-Service Aggravation (EPTS SA). A condition is aggravated in a qualified duty status when there is a worsening of the condition over and above natural progression, caused by trauma or the nature of military service. Natural progression is the course an illness, injury or disease over time, regardless of military service.

Paragraph 1.8.3. Existed Prior to Service-Not Service Aggravated (EPTS-NSA). An informal LOD determination must be accomplished in every case where a NILOD EPTS NSA finding is made. An NILOD EPTS-NSA finding can only be made after a thorough review of the evidence determined the member's illness, injury or disease EPTS into military service and was not service aggravated. Per Table 1.1, Standards of Proof, for orders greater than 30 days is preponderance of evidence for ILOD. Standard of Proof for NILOD-EPTS-NA is clear and unmistakable evidence.

#### **AIR FORCE EVALUATION**

AFRC/A1KK recommends partial grant and recommends a new LOD be initiated on behalf of the applicant, specific to his posterior annular tear. There is evidence of an error or injustice with the review and processing of his 2016 LOD. An MRI noted a posterior annular tear, which may have been a result of an acute injury. However, no medical records were available to review so the applicant's 2016 LOD was canceled on 19 Dec 16. It is not clear if the applicant

was requested to provide documentation for this acute condition to the RMU or not; accordingly, the applicant is offered the benefit of doubt in this case.

The applicant requests his 9 Apr 12 injury be found ILOD. To consider the request, the applicant would need to still be serving, the injury would need to be acute and there would need to be proof of military status. While none of the of the LODs have medical records to support an acute injury on 9 Apr 12, the 2016 LOD did contain an MRI noting a posterior annular tear which might have been due to an acute injury rather than associated with the applicant's chronic back condition. Since no medical documentation was provided, the annular tear could not be fully evaluated and was not a part of the LOD process. For duty status, the applicant's wing commander provided the DD Form 214 for his 2012 service to prove he was in status during the time. The 2020 LOD was processed and was found NILOD-Not Due to Member's Misconduct. The applicant appealed the decision, but AFRC/CD upheld the NILOD finding on 19 Jul 21.

They do not recommend the Board grant any medical or pay benefits as a result of the processing of his 2013, 2016 or 2020 LODs. While the acute injury was noted in the 2016 LOD, it does not appear the applicant took prompt action or complied with policy in providing his RMU with documentation to process the previous LODs. As a result, his unit initiated three LODs on his behalf and had to cancel two of the LODs for lack of documentation. The third was processed and it appears the decision makers made a fair and just assessment based on the facts of the case.

The complete advisory is at Exhibit F.

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

The Board sent a copy of the advisory opinion to the applicant on 23 Dec 21 for comment (Exhibit G), but has received no response.

#### **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 the victim of an error or injustice. The Board concurs with the rationale and recommendation of AFRC/A1KK and finds a preponderance of the evidence substantiates the applicant's contentions in part. In this respect, the Board notes there were administrative delays and errors in the processing of the applicant's LODs to warrant an additional review of his LOD determination and his injury sustained in 2012. However, the Board finds the applicant has not sustained his burden of proof to warrant changing his LOD to show his back injury was ILOD. Therefore, the Board recommends correcting the applicant's records as indicated below.
4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

#### **RECOMMENDATION**

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show his Reserve Medical Unit (RMU) initiate a new line of duty (LOD) determination for evaluation of his posterior annular tear noted in the 2016 LOD MRI report finding.

#### **CERTIFICATION**

The following quorum of the Board, as defined in Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2018-00515-2 in Executive Session on 10 Dec 21 and 11 May 22:

, Panel Chair  
, Panel Member  
, Panel Member

All members voted to correct the record. The panel considered the following:

Exhibit C: Record of Proceedings, w/ Exhibits A-B, dated 17 Oct 19.  
Exhibit D: Documentary evidence, including relevant excerpts from official records.  
Exhibit E: Application, DD Form 149, w/atchs, dated 3 Mar 21.  
Exhibit F: Advisory opinion, AFRC/A1KK, dated 22 Dec 21.  
Exhibit G: Notification of advisory, SAF/MRBC, dated 23 Dec 21.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9.