

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXXXXXXXXXX

DOCKET NUMBER: BC-2019-02098-2

COUNSEL: XXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider her request to show she was placed on active duty orders on 21 Sep 12 (the date of the finalized line of duty (LOD) determination) and continued on active duty until 27 Apr 16 (the date of medical separation), for the purpose of medical continuation (MEDCON) in accordance with 10 U.S.C. Section 12301.

RESUME OF THE CASE

The applicant is a former Air Force Reserve (AFR) captain (O-3) who was honorably discharged with severance pay (10 percent) on 27 Apr 16 due to her unfit condition of bilateral plantar fasciitis which was found to have existed prior to service (EPTS) with service aggravation.

On 10 Jan 20, 5 Feb 20 and 20 May 20, the Board considered and partially granted her request for MEDCON orders finding the applicant had provided sufficient evidence of an error or injustice, in part. The Board noted the applicant's AF Form 469, *Duty Limiting Condition Report*, initiated on 4 Feb 12, indicated she was undergoing a Medical Evaluation Board (MEB) to determine medical fitness for continued worldwide duty and retention. However, these limitations expired on 4 Aug 12 and the applicant did not provide an AF Form 469 for the period in question or a medical evaluation conducted by a credentialed military provider within 30 days describing why she was unable to meet standards. Additionally, as noted by the Medical Advisor, there was competing evidence that interfered with the presumption the applicant was unable to perform her military duties. The applicant also asserted, in essence, relief was warranted based on precedent and cited several AFBCMR cases she believed supported her request; however, the Board noted while it strives for consistency in the manner in which evidence is evaluated and analyzed, the Board is not bound to recommend relief in one circumstance simply because the situation being reviewed appears similar in other cases. After a careful review of the cases cited by the applicant, the Board found them all distinguishable. Unlike the applicant in the instant case, AFPC/DPFA determined all the applicants in the cited cases met the eligibility criteria for MEDCON orders. As noted above, the applicant in the instant case did not provide an AF Form 469 for the period in question or a medical evaluation conducted by a credentialed military provider within 30 days describing why she was unable to meet standards. As such, the Board did not find any of the referenced cases added any credence to the applicant's request for MEDCON orders for the entire period. Notwithstanding the above, the Board noted the Medical Advisor found it reasonable to have established MEDCON orders from the time of the applicant's second AF Form 469, initiated on 7 Mar 14. Therefore, the Board believed the interest of justice could best be served by placing

the applicant on MEDCON orders for the period 7 Mar 14 through 27 Apr 16 and recommended correcting the applicant's record as such.

On 10 May 23, the court remanded the applicant's case to the AFBCMR pursuant to Rule 52.2 of the Rules of the Court of Federal Claims in lieu of an answer to the plaintiff's complaint, instructing the AFBCMR to consider whether any alleged errors were harmless based upon the existing record, any further evidence or argument the plaintiff submits during the remand in accordance with any procedures the Board may establish for that purpose, and any further evidence the Board may wish to obtain to further develop the factual record in this matter, in accordance with the following agreed upon remand instructions:

1. Explain the difference between a legal error and an injustice for purposes of the Board's review.
2. Explain the statutory and regulatory requirements for an Air Reserve Component (ARC) service member who performs no regular duty for a lengthy period to be eligible for MEDCON orders under (1) 10 U.S.C. Section 12301(h); (2) MEDCON Policy Guidelines for Wounded, Ill, and Injured (WII) ARC airmen (Department of Air Force 24 Jul 12 hereinafter MEDCON Policy); and (3) any other applicable statutes and regulations in place between Feb 12 and Apr 16. Further explain whether the requirements to establish eligibility for MEDCON orders are the same as any requirements to establish entitlement to MEDCON orders.
3. Explain whether the plaintiff had a legal entitlement to MEDCON orders at any time during the following time periods of 21 Sep 12 through 7 Mar 14 and 7 Mar 14 through 27 Apr 16. Further explain whether any legal error (as opposed to an injustice) occurred that would have entitled the plaintiff to MEDCON orders but for that legal error.
4. Explain whether, to be eligible for MEDCON orders, an airman is required to have a "finding by a credentialed military health care provider that the airman has an unresolved health condition requiring treatment" that "renders the airman unable to meet retention or mobility standards" under MEDCON Policy. If required, explain: (1) whether any of the AF Form 469s in the administrative record (dated 4 Feb 12 and 18 Mar 14) satisfy the above requirement, and for what period of time; (2) whether the Air Force's placement of the plaintiff in a "no pay or points" status for some or all of the time period between 4 Feb 12 and 27 Apr 16, has any legal significance to her potential eligibility for MEDCON orders; (3) whether the plaintiff's Feb 12 diagnosis of a condition that did not meet medical retention standards has any legal significance to her potential eligibility for MEDCON orders; (4) whether placing the plaintiff in a "Code 37" status has any legal significance to her potential eligibility for MEDCON orders; and (5) whether referral to an MEB between 4 Feb 12 and 6 Mar 14, would have had any legal significance to the plaintiff's potential eligibility for MEDCON orders. Finally, explain whether an airman can be legally entitled to MEDCON orders if there is a lack of a timely finding by a credentialed military health care provider through no fault of the airman.
5. Explain whether, to be eligible for MEDCON orders, an airman is required to have a "medical evaluation conducted by a credentialed military provider within the last 30 days that describes why the airman is unable to meet retention or mobility standards" under MEDCON Policy. Explain how long an AF Form 469 is valid for purposes of establishing eligibility for MEDCON orders

under the MEDCON Policy. Explain who is responsible for maintaining the accuracy of an AF Form 469 and what regulatory duties, if any, are triggered when a release date indicated on an AF Form 469 expires without referral to an MEB. Specifically explain, if an airman requests MEDCON orders 31 days or more after a medical evaluation by a credentialed military provider, whether the airman must obtain a new medical evaluation to establish eligibility for MEDCON orders. And if so, explain the process by which an airman—specifically a reservist airman in a no pay or points status—may obtain such a medical evaluation sufficient to establish eligibility for MEDCON orders.

6. Explain whether, to be eligible for MEDCON orders, an airman must “volunteer” for retention or recall to active duty within the meaning of 10 U.S.C. Section 12301(h) and MEDCON Policy. And if so, explain whether: (1) the plaintiff volunteered at any time between 21 Sep 12 and 27 Apr 16; and (2) the plaintiff could have volunteered after the fact in a petition to the Board for an alleged past entitlement under MEDCON Policy. Further explain whether MEDCON orders can be backdated at the time of their creation and whether the Board can retroactively create MEDCON orders.

7. Explain whether the plaintiff was entitled to receive a MEB under applicable Air Force regulations after the Air Force diagnosed her with a disqualifying condition in Feb 12, placed her in a no pay or points status, and assigned her case a “Code 37.” Explain whether the plaintiff was legally entitled to receive an MEB within a particular amount of time, or at any time prior to Dec 14. Explain who makes the decision to convene an MEB and whether an airman can invoke any affirmative right to an MEB. Explain whether the Air Force violated any statute or applicable regulation by not convening an MEB between 2 Feb 12 and 3 Mar 14. Explain whether referral to an MEB would have required modification(s) to or reissuance of an AF Form 469 and, if so, specify the nature and extent of the required modification(s) or reissuance. Finally, explain whether the timing of the MEB or any failure to refer the plaintiff to an MEB earlier has any legal significance for determining whether the plaintiff had a legal entitlement to MEDCON orders, and whether MEDCON orders trigger an obligation to convene an MEB.

8. Explain whether the Board’s Jul 20 grant of relief with respect to the plaintiff’s claim for MEDCON orders for the time period of 7 Mar 14 through 27 Apr 16, was predicated upon a finding of legal error, an injustice, or both.

9. The Board’s Jul 20 decision found it would have been reasonable for the Air Force to have established MEDCON orders from the time of the plaintiff’s second AF Form 469, dated 7 Mar 14, such that the interests of justice supported placing her on MEDCON orders for the time period of 7 Mar 14 through 27 Apr 16. Explain whether it also would have been reasonable for the Air Force to have established MEDCON orders after the time of the plaintiff’s first AF Form 469, dated 4 Feb 12, such that the interests of justice would also support placing her on MEDCON orders for the time period of 21 Sep 12 through 6 Mar 14. Explain whether there is any evidence the plaintiff’s condition changed between the examinations in Feb 12 (as documented on AF Form 469); Mar 14 (as documented on AF Form 469); and Dec 14 (as documented by the MEB). Explain whether, individually or collectively, the following factors reasonably establish 21 Sep 12, as the start date of the plaintiff’s MEDCON orders under the same rationale the Board applied in granting relief for the 7 Mar 14 through 27 Apr 16 time frame: disqualifying condition diagnosis in Feb 12;

placement in a no pay or points status; assignment of a Code 37; any requirement to convene an MEB; and the Sep 12 LOD determination. Explain whether the Air Force violated any law or regulation by not convening an MEB between 2 Feb 12 and 3 Mar 14, and whether any such failure favors establishing 21 Sep 12, as the start date of MEDCON orders consistent with the Board's rationale for granting MEDCON orders for 7 Mar 14 through 27 Apr 16. Expressly consider evidence submitted to the Board the plaintiff had been treated at a civilian healthcare facility between 1 Mar 12 and 6 Feb 13. Explain whether there is any reason to treat the two timeframes—i.e., 21 Sep 12 to 7 Mar 14, and 7 Mar 14 to 27 Apr 16—differently in the interests of justice.

On remand, the plaintiff should be permitted to submit any additional relevant evidence and argument.

On 15 Jun 23, the applicant requested reconsideration of her request for MEDCON orders for the entire period (21 Sep 12 thru 27 Apr 16) starting with the date of the finalized LOD determination to the date of her medical separation. She again contends, through counsel, she should be retroactively placed on MEDCON orders for the earlier period, 21 Sep 12 through 6 Mar 14, for similar reasons the AFBCMR granted relief in her previous case for the later MEDCON orders of 7 Mar 14 through 27 Apr 16. When the AFBCMR determines the existence of an error or injustice under 10 U.S.C. Section 1552, it must grant full and effective relief. In the previous case the AFBCMR found she was the victim of an error or injustice recommending partial relief in the form of retroactive MEDCON orders for the period of 7 Mar 14 through 27 Apr 16. The Board based its decision on the AFBCMR Medical Advisory Opinion finding partial relief was warranted from the date of the 2014 AF Form 469, which indicated an MEB or Physical Evaluation Board (PEB) process was required and was reasonably timely followed by MEB proceedings through the date she was separated determining the appropriate start date for her MEDCON orders was the date the Air Force properly referred her to an MEB. The earlier period presents materially similar facts which warrant setting the start date of her MEDCON orders at 12 Sept 12. Her 2012 AF Form 469 should have been reasonably timely followed by MEB proceedings. The form clearly indicated she was undergoing an MEB and was marked "Code 37" stating the medical defect required MEB or PEB processing. When she was diagnosed with a disqualifying condition which did not meet retention standards, the Air Force was required to convene an MEB or request an assignment limitation code (ALC). In the previous case, the Board granted relief even though she had not submitted a formal initial request for MEDCON orders. The Air Force's failure to convene an MEB on the heels of the 2012 AF Form 469, after she was diagnosed with a disqualifying condition, assigned a Code 37, and placed in no pay/no points status, is an important aspect of the case. The primary purpose of MEDCON is to return a member to duty to be medically evaluated for disability. A referral for MEB proceedings and processing through the Disability Evaluation System (DES) are highly significant to MEDCON eligibility. The MEDCON guidelines use the DES referral date as a benchmark for eligibility, encouraging airmen to apply for MEDCON once they are entered into the DES. Once a member is placed on MEDCON orders, they are entitled to such orders until they are returned to duty or medically separated. The AFBCMR Medical Advisory Opinion recommended granting partial relief which was anchored by the finding the 2014 AF Form 469 was timely followed by MEB proceedings and therefore constituted the start date of MEDCON eligibility, which then terminated upon her medical separation. The same rationale warrants relief for the earlier period in question. The start date of her MEDCON orders should be tethered to the date regulations required her referral into the DES and her finalized LOD

should have paved the way for the MEB to convene as required. The fact the AF Form 469 contained a “release date” of 4 Aug 12 does not provide a reasonable basis to deny relief for the earlier period because the release date did not obviate the Air Force’s obligation to convene an MEB. Her 2012 AF Form 469 clearly indicated she had a disqualifying condition which is a direct reference to the standards described in AFI 48-123, *Medical Examinations and Standards*, Chapters 5 and 13, requiring MEB processing. In her 2012 narrative summary (NARSUM) she was found disqualified from active military duties due to her medical condition of Talipes Cavus describing her condition in a manner indicating it was unresolved and required treatment. The 2012 AF Form 469 also reflected she was in a no pay/no points status because of the diagnosis. Per regulation, members will not be allowed to participate in any pay or point gaining activity until the disqualifying condition has been removed or an approved waiver is received from AFRC/SG in accordance with AFI 48-123. Despite the release date on the 2012 AF Form 469, she continuously remained unable to participate in any pay or point gaining activity until her condition was definitively deemed unfitting and she was separated. Notwithstanding the expiration date on the 2012 AF Form 469, she clearly had an unresolved, disqualifying condition requiring treatment which should have established her MEDCON eligibility date on 21 Sep 12 when her LOD was finalized. Furthermore, the evidence demonstrates her disqualifying condition had not improved during the earlier period; thus, any finding she somehow became able to perform duties before 7 Mar 14 is not supported by the record as indicated in her service treatment records.

The AFBCMR is bound by its own precedent. An agency decision is arbitrary and capricious where it applies different standards to similarly situated individuals and fails to support this disparate treatment with a reasoned explanation and substantial evidence. She cites several cases similar to her case where the outcome was favorable. She was never returned to duty from the date of the 2012 AF Form 469 through the date of separation. The controlling consideration should be whether she met the fundamental MEDCON eligibility requirements that, as of 12 Sep 12, she was unable to perform her duties, had an LOD determination, and a finding by a credentialed military health care provider that she had an unresolved health condition requiring treatment and rendered her unable to meet retention or mobility standards.

In support of her reconsideration request, the applicant submitted the following evidence: (1) a legal brief; (2) a complete copy of the previous case files to include the corrections made to her records; and (3) copies of regulatory guidance to include DoDI 1241.2, *Reserve Component Incapacitation System Management*, dated 30 May 01; MEDCON Policy Guidelines for WII ARC Airmen, dated 24 Jul 12; AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*, dated 8 Oct 15; Directive-Type Memorandum (DTM) 11-015 – Integrated Disability Evaluation System (IDES), dated 19 Dec 11; AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*, dated 2 Feb 06 with revisions through 27 Nov 09; AFI 48-123, dated 24 Sep 09 with revisions through 18 Oct 11; AHLTA (Armed Forces Health Longitudinal Technology Application) Patient Record Auditing Roles, Capabilities, and Audit Request Processing Guidance Memorandum to AFI 41-210, *Patient Administration Functions*, dated 4 Jan 12; AFI 41-210, dated 6 Jun 12, AFI 10-203, *Duty Limiting Conditions*, dated 25 Jun 10; and AFI 36-2254, *Reserve Personnel Participation*, dated 26 Jul 11.

The applicant’s complete submission is at Exhibit K.

AIR FORCE EVALUATION

AF/REP (Office of Director of Personnel) recommends granting the application correcting her records to provide pay and allowances for MEDCON orders for the period of 21 Sep 12 through 6 Mar 14. Additionally, any difference in incapacitation (INCAP) pay benefits and MEDCON pay and allowances for the period of 5 Feb 12 through 5 Aug 12 should be granted along with reimbursement of any out-of-pocket medical expenses.

Based on the documentation provided by the applicant and analysis of the facts, there is evidence of an error/injustice. The applicant may not have been afforded the MEDCON option and may have been denied a valid INCAP pay extension. Furthermore, circumstances outside the applicant's control affected timely processing and disclosure of benefit options. Per Sections (a) 1074, 1074a, 12322 and 12301(h) of Title 10, U.S.C.; (b) Sections 204(g), 204(h) and 206 of Title 37, U.S.C.; (c) DoD Directive 1241.1, *Reserve Component Medical Care and Incapacitation Pay for Line of Duty Conditions*, dated 28 Feb 04 and (d) DoD Directive 1241.2, dated 30 May 01, the applicant was authorized MEDCON following the interim in line of duty (ILOD) determination made on 25 May 12. A Reserve member is entitled to pay and allowances and medical care if they are unable to perform military duty because of an illness, injury or disease incurred in the line of duty. Medical care shall be provided until the member is found fit for military duty, or the injury, illness, or disease cannot be materially improved by further hospitalization or treatment and the member has been separated or retired as the result of a DES determination.

She was unable to perform military duties, had an unresolved health condition requiring treatment which rendered her unable to meet mobility standards, and the injury was determined to have occurred in the line of duty (ILOD). She attempted to initiate an INCAP pay extension request and was denied by the wing commander because of a lack of documentation supporting she was unable to perform military duties. Her MEB had not finalized by 2014 and her AF Form 469 expired on 4 Aug 12. Per AFI 10-203, dated 25 Jun 10, paragraphs 2.9, 2.9.1, 2.9.2, the responsibility of the Reserve Physical Examination Sections and the patient's assigned provider will complete or coordinate additional clinical follow-ups or consultations needed to finalize physicals and/or assessments for clearance. ARC medical units will coordinate with the active-duty Medical Treatment Facilities or TRICARE to obtain follow-up and/or consultations for service-connected issues and any LOD determination in progress. The rationale to deny the applicant an extension of benefits was the expired 4 Aug 12 profile without any input from her. However, she had provided input despite being in a non-participatory status, and she engaged the Reserve Medical Unit (RMU) and flight surgeon each Unit Training Assembly (UTA) to provide an updated medical status. Per AFI 10-203, the responsibility for following through with ILOD case processing remained with the RMU and flight surgeon.

No evidence can be found she was afforded the MEDCON option at the time of the interim ILOD determination on 25 May 12. Because of delays in INCAP benefit processing and MEB case processing, she was potentially denied additional benefits she qualified for due to no fault of her own. Per ARC MEDCON Guidelines and Case Management Office (CMO) Integration Plan (I-plan), dated 15 Aug 12, paragraphs 1.1 and 3, MEDCON orders extend entitlements to airmen who are unable to perform military duties due to an injury, illness, or disease incurred or aggravated while on orders or in inactive duty training (IDT) status. An airman may be eligible for MEDCON orders when an injury, illness, or disease is incurred or aggravated while serving on orders and that

condition renders the airman unable to perform military duties. MEDCON eligibility requires a LOD determination and a finding by a credentialed military health care provider that the airman has an unresolved health condition requiring treatment and renders the airman unable to meet retention or mobility standards per AFI 48-123, Chapters 5 and 13. Initial requests for MEDCON orders require a copy of the airman's order covering the period during which the injury, illness, or disease was incurred or aggravated; an interim or finalized LOD (AF Form 348, *Line of Duty Determination*, or DD Form 261, *Report of Investigation Line of Duty and Misconduct Status*); a completed AF Form 469; a medical evaluation conducted by a credentialed military provider within the last 30 days that describes why the airman is unable to meet retention or mobility standards, citing a specific paragraph from Chapter 5 or 13 of AFI 48-123; an individual treatment plan approved by a credentialed military provider based on occupational medicine guidelines and peer-reviewed recovery timelines that includes the expected duration of the impairment; and a signed DD Form 2870, *Authorization for Disclosure of Medical or Dental Information*.

At the time the finalized ILOD determination was made on 21 Sep 12, the applicant would have qualified for MEDCON benefits until the MEB was finalized. With an interim ILOD finding, she was eligible for MEDCON or INCAP pay but not concurrently. Per ARC MEDCON Guidelines and CMO I-plan, paragraph 3.1 airmen who meet eligibility criteria for MEDCON orders must volunteer for retention or recall to duty and airmen who decline or are found ineligible for MEDCON orders may be eligible for INCAP pay per ARC policy. The member has to volunteer for MEDCON and if MEDCON is not an option, INCAP is an alternative option. What is unclear is whether she was notified of her MEDCON eligibility and did not select the MEDCON option or was only advised INCAP pay was an option. Her testimony consistently references her well known desire to be placed on MEDCON orders and repeated refusals by her chain of command to do so. The logical conclusion is she was not offered MEDCON as an option even though she was eligible. It was not uncommon for AFR units to misunderstand the MEDCON process especially before 2014. After 2014, AFPC/DPFA (ARC CMD) was established to aid the ARC in handling MEDCON case processing. Therefore, it is likely the unit did not understand the MEDCON benefits option and that she met the criteria. Instead, she was offered, and elected, the INCAP pay option and initial INCAP benefits were paid for 5 Feb 12 to 5 Aug 12. Thus, she is ineligible for MEDCON for that period; however, if the INCAP pay she received was less than what her pay and allowances would have been on MEDCON, that difference should be granted. This is because she wanted MEDCON from the beginning and was potentially wrongfully denied it.

The complete advisory opinion is at Exhibit M.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 11 Oct 23 for comment (Exhibit N), and the applicant replied on 3 Nov 23. In her response, the applicant, through counsel, concurs with the recommendation of the advisory opinion from AF/REP and urges the Board to adopt the relief to grant her MEDCON orders from 21 Sep 12 through 6 Mar 14 and to pay any difference in INCAP pay benefits and MEDCON pay and allowances from 5 Feb 12 through 5 Aug 12 with any out-of-pocket medical expenses reimbursed.

The applicant's complete response is at Exhibit O.

FINDINGS AND CONCLUSION

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. In the Court remand order, the Board was instructed to provide an explanation to various legal and injustice issues with the preliminary issue of explaining the difference between a legal error and an injustice. For purposes of this Board's review, an error is a mistake made in the applicant's record and an injustice is an unfair action taken against the applicant, whether intentional or not, which caused detrimental harm. In both instances, the Board has the authority to correct, if the factual evidence supports a favorable overcome. In regards this this case, the Board has the authority to backdate MEDCON orders at the time of their creation and/or retroactively create MEDCON orders.

After reviewing all Exhibits, to include the report provided by the Court remand order, the applicant's new evidence, the AF/REP Advisory, and the applicant's response, the Board concludes the applicant is the victim of an injustice finding a preponderance of the evidence substantiates the applicant's contentions. Specially, the Board finds evidence to support a correction to her records indicating she was on MEDCON orders for the period of 21 Sep 12 through 6 Mar 14. Additionally, the Board finds she should be reimbursed any difference in INCAP pay benefits and MEDCON pay and allowances for the period of 5 Feb 12 through 5 Aug 12 along with any out-of-pocket medical expenses. Therefore, the Board recommends correcting the applicant's records as indicated below.

Regulatory requirements mandate guidance for all ARC service members under Sections (a) 1074, 1074a, 12322 and 12301(h) of Title 10, U.S.C.; (b) Sections 204(g), 204(h) and 206 of Title 37, U.S.C.; (c) DoD Directive 1241.1, and (d) DoD Directive 1241.2 for entitlement to MEDCON pay. Due to circumstances outside the applicant's control, this affected the timely processing and disclosure of benefit options. The Board finds no reason or explanation as to why she was not afforded the MEDCON option at the time of her interim ILOD determination on 25 May 12. The Board determined this as an injustice because the applicant would have qualified for MEDCON benefits until the MEB was finalized, at the time the finalized ILOD determination was made on 21 Sep 12, had she been advised properly. MEDCON orders extend entitlements to members who are unable to perform military duties due to an injury, illness, or disease incurred or aggravated while on orders or in IDT status. Members may be eligible for MEDCON orders when an injury, illness, or disease is incurred or aggravated while serving on orders and that condition renders them unable to perform military duties. Members who meet eligibility criteria for MEDCON orders must volunteer for retention or recall to duty. Additionally, the service member must obtain medical documentation from their civilian provider(s) and to supply this information to the RMU for review by a credentialed military provider, along with a LOD, to determine if the condition was duty-related or service-incurred or aggravated, while in a duty status. Following examination by a credentialed healthcare provider, and depending upon the nature, severity, impact on duty/mobility, projected treatment plan, an AF Form 469 is initiated for a duration as recommended by the treating provider, and as validated by the treatment plan. Conditions

expected to resolve within 30 days do not require MEDCON orders. It is the responsibility of the Reserve Physical Examination Sections and the member's assigned medical provider to complete or coordinate clinical follow-ups and/or consultations needed to finalize physicals and/or assessments for clearance and for following through with ILOD case processing. The applicant's AF Forms 469 established on 4 Feb 12 and 6 Mar 14, do have legal significance for MEDCON purposes, when considering the plausibility, there was a failure on the part of the Military Department to timely initiate a Deployment Availability Working Group (DAWG) review. Placing a ALC "37" has legal significance in that it triggers the requirement of MEB/PEB processing, which in the Air Force, begins with a DAWG review and an initial review in lieu of (IRILO) a MEB, followed by referral of the case to AFRC/SGP or SGO for either return to duty (RTD), with or without an ALC, or referral for completion of full MEB processing, and referral to a PEB for separation under the DES. Furthermore, the fact the applicant's commander placed her in a "no pay or points" status should have triggered closer attention to her medical follow-up and disposition.

Only the service member's treating provider, in coordination with the Chief of Aerospace Medicine or Chief of the Medical Staff, or the service member's commander may request MEB processing; the latter when a service member's performance deficiencies may be medically related. Per AFI 41-210, there is no minimum medical evaluation time period and no need to wait for complete or near complete recovery. There should be no delay in referral of a member's case as long as the course of recovery is relatively predictable and a reasonable determination can be made the limiting condition is not likely to resolve or improve within 12 months to an extent which renders the member capable of fully performing the duties of his/her office, grade, rank, or rating, to include the ability to deploy to field operations. If the AF Form 469 is more than 30 days old, the provider must review the AF Form 469 restrictions, updating restrictions as needed to ensure clear and accurate portrayal of the current restrictions (specifically relating to the potentially unfitting conditions(s)). Allowing the applicant's AF Form 469 to expire, without action, warrants culpability on the part of the treating provider and the RMU. To avoid such circumstances, AFI 36-2910, states the servicing medical unit will initiate LODs, track the related treatment, update the AF Form 469 as necessary, send current and complete clinical documentation and MEDCON request to the ARC CMD. The DAWG shall review the MEDCON cases for DES consideration and collaborate with the ARC CMD on subsequent referrals to the DES and ensure the member's commander or equivalent is informed of the member's MEDCON status. MEDCON orders do not trigger an obligation to convene an MEB. For individuals carrying an AF Form 469, coded "37," the duration in this status should not exceed 365 days without initiating the pre-DES process. The process may be triggered sooner if clinical evidence indicates the service member has either deteriorated, or received or reached maximum medical benefit, without expectation of return to unrestricted duty. To avert unnecessary referrals, current policy does allow a service member to be placed on duty limitations up to 90 days, in a "light duty" status, without triggering the pre-DES process.

4. The board is mindful of the Court's remand instructions and the importance of following Court orders. In light of the decision to grant full relief to applicant based upon the existence of an injustice that is not a legal error, the board respectfully submits that those remand instructions are now moot. Under these circumstances, the board has not answered many of the specific questions posed by the Court in the remand instructions, but the board will do so should the Court deem that necessary.

5. 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 the following:

- a. She be placed on MEDCON orders for the period 6 August 2012 through 6 March 2014.
- b. She be paid the difference between the INCAP pay she received and MEDCON orders pay for the period of 5 February 2012 through 5 August 2012.
- c. She be reimbursed any medical expenses she incurred during the period of 5 February 2012 through 27 April 2016.

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-2019-02098-2 in Executive Session on 30 Nov 23:

, Panel Chair
, Panel Member
, Panel Member

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

- Exhibit J: Record of Proceedings, w/ Exhibits A-I, dated 10 Jan 20, 5 Feb 20, and 20 May 20.
Exhibit K: Application, DD Form 149, w/atchs, dated 15 Jun 23.
Exhibit L: Court of Federal Claims Remand Order, filed 10 May 23.
Exhibit M: Advisory Opinion, AF/REP, w/atchs, dated 4 Oct 23.
Exhibit N: Notification of Advisory, SAF/MRBC to Applicant, dated 11 Oct 23.
Exhibit O: Applicant's Response, dated 3 Nov 23.

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

Board Operations Manager, AFBCMR