

## ADDENDUM TO RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2020-02018-2

XXXXXXXXXXXXXXXXXX

**COUNSEL:** XXXXXXXXXXXXXXXX

**HEARING REQUESTED:** NO

### APPLICANT'S REQUEST

The Board reconsider her request for a line of duty (LOD) determination on her medical condition of Systemic Lupus Erythematosus (SLE) and she be given a medical retirement.

### RESUME OF THE CASE

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

On 19 May 21, the Board considered and denied her request to grant her a LOD determination and a medical retirement for her medical condition of SLE; finding the applicant had provided insufficient evidence of an error or injustice to justify relief. The Board noted, under the presumption of regularity, referring to the previous boards' decisions, the applicant's SLE condition was found not in the line of duty (NILOD) and found no evidence to refute that decision. The Board noted counsel's contention the AFBCMR should follow the precedent set forth in *Santiago v. Brown* where the Court of Veterans Appeals cited the law (Title 38 U.S.C.) "presumes" for the purpose of service-connection that some chronic diseases that manifest themselves to a certain extent within one year after discharge had been incurred in or aggravated by such service, even though there is no evidence of such a disease during the period of service. However, the Board did not find this argument compelling enough to grant the applicant's request.

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 F.

On 21 Sep 21, the applicant requested reconsideration of her request for a LOD determination and medical retirement for her medical condition of SLE. She again contends through counsel, the Air Force Personnel Board (AFPB) erred when determining the applicant's condition was NILOD. Counsel opines that sufficient evidence (submitted medical excerpts from 2015 and 2016) demonstrates the aggravation and service-connection of her chronic illness while on active-duty. Counsel points out a precedent set forth in a 1993 veteran's appeal to the Court for Veterans Appeals (*Santiago v. Brown*) stating the 1993 appeal is analogous with the applicant's case (SLE diagnosed five months after discharge from Title 32 orders); where the law "presumes" for the purpose of service-connection that some chronic diseases that manifest themselves to a certain extent within one year after discharge, had their onset in service (Title 38 USC, Section 1112), notwithstanding there is no evidence of such disease during the period of service. Finally, counsel contends the applicant's official SLE diagnosis was determined on 19 Jan 16, when she was on Title 10 orders and should qualify her for a LOD determination.

This contention and the evidence submitted (dated 19 Apr 21) was reviewed by the Board on 19 May 21 in the previous case (Exhibit E). The applicant resubmitted this evidence along with her new application (dated 21 Sep 21), but no new evidence was submitted that was not previously reviewed by the Board. However, this evidence (dated 19 Apr 21) was never reviewed by the AFBCMR Medical Advisor for a follow-up opinion; therefore, a subsequent advisory was obtained.

The applicant's complete submission is at Exhibit G.

## **AIR FORCE EVALUATION**

The AFBCMR Medical Advisor recommends denying the application. After an exhaustive review of the available records, newly submitted documents, and the prior advisory, the Medical Advisor opines in dialogue with the Air Force Rheumatology consultant that the time of incurrence of the applicant's SLE condition was in mid-Nov 15 with the presence of the Smith antibody. Although a Reservist at the time, the applicant was not on a period of active duty and therefore, a favorable LOD determination finding cannot be supported. In counsel's conclusive arguments, he brings forth two reasons of why the applicant's condition of SLE should be found as in the line of duty (ILOD). First, he notes that her prior period of symptoms leading up to a diagnosis was clearly during a time of her being in active military status. Secondly, counsel cites a prior court case as precedent noting verbiage in Title 38; Code for Federal Regulations indicating a chronic disease and its time of diagnosis. Additionally, counsel cites that the applicant's diagnosis was made on 19 Jan 16...the second day of her active-duty orders and therefore, a favorable ILOD should be concluded. It remains paramount that a full understanding of AFI 36-2910, *Line of Duty (LOD), Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*, section 1.10 (LODD) and paragraph 1.10.1 (ILOD) be brought forward. It states, "A determination of ILOD is made when the illness, injury, disease or death was not due to the member's misconduct and was incurred when the member was present for duty or absent with authority or when the illness, injury or disease was service-aggravated." Emphasis is placed on when the condition was "incurred" and not when it was "diagnosed." In reference to what counsel stated about when the applicant was diagnosed with SLE...as he noted on 19 Jan 16; however, the record review clearly first cited and declared such a diagnosis on 14 Jan 16 (four days prior to starting her active-duty orders). Although counsel cited an inaccurate date of diagnosis, it matters not for as previously noted, it matters when the condition was first incurred and not when officially diagnosed.

As discussed in the previous AFBCMR Medical Advisory from Mar 21, SLE can frequently have flare-ups of symptoms; sometimes getting worse for a while, then an improvement, sometimes even to the point of resolution. This case "may" reflect such exacerbations and there did exist a degree of uncertainty due to the various other diagnostic possibilities. Also, decreasing a direct correlation to her physical symptoms is the fact that other reasons were expressed as causing such pain. They included bilateral carpal tunnel syndrome, a fall onto her right hand/arm and lastly, her acknowledgement of symptoms after performing core body exercise routines.

In discussion with the USAF Surgeon General's approved senior Rheumatology consultant, he provided information that axial (spine-related) pain is not a component or a feature that is associated with SLE; only peripheral joint pain is related. In this case the predominant physical complaint from the applicant from mid-2014 through 2015 was indeed axial-related back pain. Although the applicant's early physical symptoms were not classic for SLE, the Air Force consultant concluded that having a positive serum antibody; known as "Smith Antibody" is indeed evidence of the incurrence of SLE. That finding remains essential for knowing the incurrence of such a condition. The laboratory sample of blood was collected on 17 Nov 15.

Lastly, the advisor addresses counsel's mentioning of Title 38 U.S.C. which is titled "Veteran's Benefits" and lists definitions for the terms of Veteran, periods of war, and chronic diseases. Appropriately, the applicant's counsel cited Title 38 verbiage correctly without addressing the single caveat of "periods of war." Everything that counsel cited would be correct if the omitted item of "during a period of war" was included. The Title 38 defined periods of war were not correlated with the applicant's time of service. Therefore, the claimed example carried essentially no probative value.

The complete advisory opinion is at Exhibit H.

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

The Board sent a copy of the advisory opinion to the applicant on 27 Jun 22 for comment (Exhibit I), and the applicant replied on 27 Jul 22. In her response, the applicant's counsel contends her military records should be corrected to reflect her chronic illness, diagnosed just five months after she was discharged from Title 32 orders, as ILOD. She demonstrated sufficient signs and symptoms to warrant the conclusion her condition existed on and prior to Aug 15 while she was on Title 32 orders. Furthermore, Title 38 U.S.C. Section 1112 should be observed in determining her direct service connection to her time in service, given that she exhibited a chronic disease. Lastly, her diagnosis on 19 Jan 16 should qualify her for ILOD determination since she was on Title 10 orders when she received her official diagnosis for SLE. The incurred date, for purposes of an LOD determination, should not be backdated to dates before physicians were certain of the diagnosis. On 14 Jan 16, her doctor stated that he will formally diagnose her for SLE, without providing an exact date for when this diagnosis would be made. Her official diagnosis was not made until 19 Jan 16, when her doctor met with her to discuss her lab results and complete the SLE workup, meeting the four out of eleven criteria for a SLE diagnosis.

The applicant's complete response is at Exhibit J.

#### **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 remains unconvinced the evidence presented demonstrates an error or injustice. The Board concurs with the rationale and recommendation of the AFBCMR Medical Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. Specifically, the Board finds the evidence presented insufficient to justify granting the applicant a LOD determination and be medically retired for her medical condition of Systemic Lupus Erythematosus finding her condition was not incurred while in an active-duty status. Furthermore, the Board finds the application of Title 38 U.S.C. Section 1112 does not apply to her chronic disease, due to the Title's defined periods of war not correlating with the applicant's time of service. 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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2020-02018-2 in Executive Session on 27 Jul 22 and 20 Sep 22:

, Panel Chair  
, Panel Member  
, Panel Member

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

Exhibit F: Record of Proceedings, w/ Exhibits A-E, dated 19 May 21.  
Exhibit G: Application, DD Form 149, w/atchs, dated 21 Sep 21.  
Exhibit H: Advisory Opinion, AFBCMR Medical Advisor, dated 9 May 22.  
Exhibit I: Notification of Advisory, SAF/MRBC to Applicant, dated 27 Jun 22.  
Exhibit J: Applicant's Response, dated 27 Jul 22.

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.

**X**

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Board Operations Manager, AFBCMR