

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-00248

XXXXXXXXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. He be placed on medical continuation (MEDCON) orders effective 1 Oct 18 through 30 Dec 21.
2. He receive back pay and benefits effective 1 Oct 18.
3. In the alternative, he receive incapacitation pay (INCAP Pay) at the full rate from 1 Oct 18 through 30 Dec 21.

APPLICANT'S CONTENTIONS

In Apr 18, he was told he would be starting the medical evaluation board (MEB) process. However, at the end of his orders, he was told he would not be offered continuation on active duty because he was not authorized to serve while taking Modafinil, prescribed for chronic fatigue due to his asthma, obstructive sleep apnea (OSA) and insomnia. He was never informed about MEDCON. He was told he would be issued INCAP Pay until his MEB was complete but then it was stopped. He was referred to an informal physical evaluation board (IPEB) in Apr 20. He was told his evaluations were delayed due to COVID-19. He does not understand how COVID-19 had any impact on his MEB but it was used as an excuse to further delay his case processing.

Counsel, on behalf of the applicant, states he was released from active duty while pending an MEB causing him financial hardship. He was on Title 10 orders for more than one year when it was determined he had unfitting conditions requiring evaluation by an MEB. In 2018, the applicant was unable to perform his duties and was placed on permanent profiles. The line of duty (LOD) determinations were issued.

On 8 Apr 16, his pulmonary function test (PFT) reflected abnormal results indicative of an obstructive airway disease. On 21 Jun 18, the deployment availability working group (DAWG) determined an initial review in lieu of (I-RILO) MEB was required. On 25 Jun 18, he was issued a permanent profile indicating he was unable to work and on 29 Jun 18, LOD paperwork was prepared.

On 30 Sep 18, despite meeting all requirements for referral to an MEB, he was released from active duty against his wishes and issued INCAP Pay. His INCAP Pay was later terminated leaving him unemployable and without appropriate compensation. The appeal of his prior service condition and termination of INCAP Pay was submitted and denied locally. There was no action taken by the National Guard Bureau (NGB).

On 6 Sep 19, a MEB narrative summary (NARSUM) was prepared recommending he be separated from service. His INCAP Pay was then stopped due to a decision his insomnia was a

prior service condition. The applicant is still in the midst of his MEB approximately two and a half years after it was initiated.

He was improperly released from active duty, given only six months of INCAP Pay and has been stuck in the integrated disability evaluation system (IDES) process for nearly two and a half years. The Department of Defense (DoD) policy specifically requires Reserve component members serving on active duty for a period of greater than 30 days be retained until the LOD conditions are resolved or the IDES process is completed. He was on orders when in Jun 18, all parties determined he was unable to perform duties and his condition was unlikely to resolve within the next year. He was not eligible to be released from duties and should have been placed on MEDCON and a medical hold until his enlistment contract ended per AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON) and Incapacitation (INCAP) Pay*, paragraph 5.1.

In accordance with AFI 36-2910, Table 2.2., The NGB did not have jurisdiction to determine his conditions were not in the LOD (NILOD) or that they existed prior to service (EPTS) since he was on Title 10 orders at the time his conditions were incurred, diagnosed and aggravated, while in status and deemed potentially unfitting and permanent. The NGB also had no authority to terminate his INCAP Pay after he was improperly released from active duty. Furthermore, the DES process is to be completed within 180 days. His conditions began in 2016 and it has been more than 863 days. The Government's claim his case is now being delayed due to COVID-19 is disingenuous.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired technical sergeant (E-6). He was placed on the permanent disability retired list (PDRL) on 31 Dec 21.

On 29 Mar 16, he entered a period of active duty.

On 30 Apr 18, while on active duty, his primary care manager (PCM) noted he was diagnosed with asthma and OSA. He was placed on duty restrictions to 1 Jul 18.

On 21 Jun 18, the deployment availability working group (DAWG) reviewed his case and noted he required I-RILO and MEB for his potentially unfitting conditions.

On 25 Jun 18 and on 29 Nov 18, the applicant's PCM noted the applicant was diagnosed with OSA and asthma and he was not authorized to work with restrictions.

On 30 Sep 18, the applicant was honorably discharged from his period of active duty with a narrative reason for separation of "Completion of Required Active Service." Item 18, *Remarks*, states, "Member completed first full term of service. Member served on active duty Title 10 U.S.C. 12301(D), from 2016 Mar 29-2018 Sep 30."

On 26 Oct 18, the applicant's condition of asthma was found ILOD per the AF Form 348, *Line of Duty Determination*, dated 5 Jul 18.

On 20 Jun 19, the applicant was not selected for reenlistment per the AF Form 418, *Selective Reenlistment Program (SRP) Consideration for Airmen*, dated 20 Jun 19. The reasons listed were he did not have a passing fitness assessment (FA) score and he was ineligible for reenlistment due to his temporary physical disqualification or pending DES. It was noted he would be extended six months.

In a memorandum dated 30 Sep 19, NGB/SGP noted the applicant's condition of insomnia was a prior service condition. The memorandum served to establish determination of ILOD in accordance with DoDI 1332.18, *Disability Evaluation System (DES)*, paragraph 7e and AFI 36-2910. Neither an informal nor formal LOD was required as there was no evidence his condition was further aggravated while in status. Accordingly, he did not qualify for pay and allowances afforded in DoDI 1241.01, *Reserve Component LOD for Medical and Dental Treatments and Incapacitation Pay and Entitlements*.

On 16 Jan 20, his commander recommended he not be retained per the AF Form 1185, *Commander's Impact Statement for Medical Evaluation Board*, dated 16 Jan 20. His commander stated he was not able to perform his military duties and it was in the best interest to separate him. He was on Title 10 orders on his original diagnosis on 8 Apr 16.

The MEB NARSUM dated 6 Sep 19, with secondary signature date of 11 Mar 20, shows the applicant's diagnosis of OSA, asthma and insomnia had an initial onset of Apr 16. The LOD for insomnia was pending with NGB. Profile restrictions were issued through 26 Feb 20 and duty restrictions included no dust or cold exposure and that he could not drive or perform military duty per his PCM.

On 8 Oct 19, the DAWG noted the applicant may not be qualified for worldwide duty, directed a MEB and that the completed MEB be forwarded to AFPC no later than 5 Feb 20.

AF Form 469, *Duty Limiting Condition Report*, dated 15 Jan 20, shows the applicant was placed on duty and mobility restrictions through 14 Jan 21. Per his PCM, the applicant was not to perform military duty and he was not able to drive. It further stated he was undergoing MEB to determine fitness for continued worldwide duty and retention.

In a letter dated 6 Mar 20, the applicant's counsel submitted an appeal of prior service condition determination for the applicant's OSA and subsequent denial of INCAP Pay. She requested his insomnia be determined ILOD, he be restored to active duty on MEDCON orders until completion of an MEB. The applicant was on orders for over four years and exposed to a variety of environmental hazards. His duties revolved around refurbishing aircraft in a makeshift hangar without proper ventilation. The risks were known by command and they took steps to check the respiratory health of the airmen on a routine basis. The applicant began to have abnormal test results and was sent for a follow-up assessment. It was through this process he was diagnosed with asthma and OSA and deemed potentially unfit for further service. He also developed chronic fatigue which caused him to be excessively tired during the day. He was prescribed Modafinil and ultimately ordered not to drive, operate machinery and was released from active duty and issued INCAP Pay.

In an email dated 25 Mar 20, the Installation Personnel Readiness Noncommissioned Officer stated the applicant was found ineligible for INCAP Pay because he was on military personnel appropriation (MPA) orders, which are considered as temporary orders and there was no loss of a job. They did not pursue whether he could have been granted drill pay in fear he would be indebted for the six months of INCAP Pay erroneously paid to him.

On 10 Apr 20, a MEB referred the applicant to the Informal Physical Evaluation Board (IPEB) for his conditions of asthma, OSA and insomnia.

In an email dated 16 Apr 20, his medical treatment facility (MTF) informed counsel the applicant was never eligible for MEDCON orders because he could not perform military duty, nor did he have an active treatment plan. He was erroneously paid full military pay during first six months

of INCAP Pay since he was only eligible for drill pay. In order to avoid the applicant being stuck with a large debt, an INCAP Pay extension was not pursued.

On 21 Apr 20, the IPEB returned the applicant's case without action stating there was insufficient information for the IPEB to make an appropriate determination. The IPEB requested a mental health NARSUM to address his insomnia and other mental health conditions, delineating current symptoms and level of function. The IPEB also requested updates related to his asthma and OSA addressing his current treatment and any recommendations from his PCM or pulmonologist.

In an e-mail dated 23 May 20, his military treatment facility (MTF) stated the applicant underwent a prior service impairment review and all of his claimed conditions were found to be ILOD. He was not eligible for MEDCON due to the fact he was unable to report for duty and not in an active treatment plan and was subsequently denied INCAP Pay. His MEB was currently pending with updates to his NARSUM.

On 21 Apr 20, the IPEB returned the applicant's case without action due to insufficient information for the IPEB to make an appropriate determination.

On 17 Nov 21, the IPEB recommended the applicant be retired for permanent disability for his conditions of asthma, insomnia and PTSD with a compensable percentage of 70 percent. His OSA was documented as a condition that can be unfitting but was not currently unfitting.

On 2 Dec 21, the applicant agreed with the findings and recommended disposition of the IPEB.

On 7 Dec 21, the Secretary of the Air Force directed the applicant be permanently retired for disability with a compensable percentage of 70 percent.

The applicant was permanently retired for physical disability effective 31 Dec 21 in the rank of technical sergeant with a compensable percentage for physical disability of 70 percent.

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

APPLICABLE AUTHORITY/GUIDANCE

DoDI 6130.03 V2, *Medical Standards for Military Service: Retention*, Section 5, Disqualifying Conditions, paragraph 5.27, Sleep Disorders, Clinical sleep disorders, including insomnia and narcolepsy that cause sleep disruption resulting in excessive daytime somnolence or other impacts on duty such as chronic use of prescription medication to promote sleep or maintain daytime wakefulness and OSA of any severity are listed as disqualifying conditions.

AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON) and Incapacitation (INCAP) Pay*, paragraph 5.1, The purpose of MEDCON is to authorize medical and dental care for members who incur or aggravate an injury, illness or disease ILOD and to provide pay and allowances while they are being evaluated, treated for or recovering from an injury, illness or disease.

Paragraph 5.2, MEDCON eligibility requires an LOD determination and a finding by a credentialed military medical provider that the member has an unresolved health condition requiring treatment that renders the member unable to meet retention or mobility standards in accordance with AFI 48-123, *Medical Examinations and Standards*.

Paragraph 5.3.1.4, Members on MEDCON orders will report to their unit or alternate duty location to perform duties consistent with their diagnosis or physical limitations, unless approved for leave in accordance with AFI 36-3003, *Military Leave Program*.

Paragraph 5.3.2, the unit commander ensures members on MEDCON orders report for duty, are appropriately utilized and are available for all medical appointments.

Paragraph 5.6.3.2, MEDCON Certification. Once the MEDCON request has been approved, an end date will be established for the current tour. This is important to prevent a break in order and ensure members have continued eligibility and access to medical care. Paragraph 5.6.3.2.1 Medical Hold. If the certified MEDCON order extends beyond the member's expiration term of service (ETS) or date of separation (DOS), the member's unit with the member's consent shall request that the member be placed on medical hold to ensure there is no loss in benefits.

Paragraph 6.1, The purpose of INCAP Pay is to authorize pay and allowances (less any civilian earned income) to those members who are not able to perform military duties because of an injury, illness or disease incurred or aggravated ILOD; or to provide pay and allowances to those members who are able to perform military duties but experience a loss of earned income as a result of an injury, illness or disease incurred or aggravated ILOD.

Paragraph 6.2, Eligibility and Qualification Determination. INCAP Pay eligibility requires an LOD determination of ILOD and a finding by a credentialed military medical provider that the member has an unresolved health condition requiring treatment that renders the member unable to perform military duties, or is able to perform military duties but demonstrates a loss of civilian earned income.

Paragraph 6.2.3, Maximum Pay Entitlement. The total amount of pay and allowances and compensation for a member who is entitled to such pay shall not exceed the amount of pay and allowances provided by law or regulation for a Regular Air Force member of corresponding grade and length of service for that period.

Paragraph, 6.3.1, the member provides the INCAP Pay Program manager with requirement documentation every 30 days while applying/receiving INCAP Pay to include, medical treatment plan, copies of medical treatment received, monthly pay documentation if claiming loss of civilian earned income, employer or self-employment information and reports all changes in medical or financial status immediately to the commander.

Table 2.2, Authorities for LOD Processing, If Member is ANG on Title 10 Federal Active Duty, Approving Authority for LOD Processing is Officer who exercises special court-martial jurisdiction over member. Note 1, In certain situations, the appointing authority, reviewing authority and approving authority may be one person (e.g., immediate commander reports directly to the officer exercising special court-martial jurisdiction over member).

AFI 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force*, paragraph 11.5.7, The AF Form 418 documents selection and non-selection for continued service and reconsideration actions. Paragraph 11.5.7.3, ANG supervisors will initiate an AF Form 418 at any time to provide to the unit commander.

AIR FORCE EVALUATION

AFPC/DPFA recommends denial for MEDCON. The applicant did not meet all MEDCON eligibility requirements for the requested period. He provided two finalized ILOD conditions for his asthma and OSA. He has been on a continuous mobility restriction since 2 May 18. The

provided documentation does not support MEDCON eligibility since both were chronic in nature and characterized as well controlled, requiring medical management and intermittent follow-up.

The applicant would have had to meet specified criteria in accordance with AFI 36-2910. The applicant's insomnia was found in the ILOD by prior service condition (PSC) determination, which is not MEDCON eligible. Further, the applicant provided AF Form 469 and provided documentation for care received for conditions that cannot be considered for MEDCON, as he was not profiled for them. An individual treatment plan is also required for MEDCON eligibility. The applicant was seen by multiple providers from 2016 through 2020. However, the only treatment plans provided were for his insomnia, which was found PSC, or for other conditions he was not profiled for. The care he received for his OSA and asthma focused on re-evaluations at the applicant's request and occurred monthly with reoccurring follow ups every two to three months.

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 12 Aug 21 for comment (Exhibit D), and the counsel replied on 21 Dec 21. In his response, the counsel stated his PEB was concluded on 17 Nov 21. He should never have been released from active duty in 2018 as he was suffering from multiple conditions that made him unfit for service. An egregious justice occurred by failing to place him on MEDCON orders and instead indicated INCAP Pay was appropriate and sufficient to cover his needs. The INCAP Pay was unjustly stopped because he reported for a medical appointment, despite his circumstances remaining the same. This presumably was because a higher level review was required.

The DES process is supposed to take 180 days but the applicant's case took 1275 days. He has been unemployed for three years and three months but received INCAP Pay for only six months total. The applicant should be placed on MEDCON orders from 1 Oct 18 through 30 Dec 21, the duration of his DES processing. In the alternative, counsel requests he be awarded INCAP Pay for the duration.

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 AFPC/DPFA and finds a preponderance of the evidence does not substantiate the applicant's contentions. In this respect, the Board notes the applicant has not sustained his burden of proof he was unjustly denied MEDCON orders or INCAP Pay. Based on the available evidence, the applicant did not meet the required criteria per AFI 36-2910 for MEDCON orders or INCAP Pay. In this respect, the Board notes a medical treatment plan is required for MEDCON orders and INCAP Pay and there is no evidence the applicant provided a medical treatment plan for his chronic medical conditions. Further, eligibility for MEDCON orders requires members to report to their unit to perform duties consistent with their diagnosis and no evidence has been provided to show the applicant performed any military duties for MEDCON eligibility. Therefore, the Board recommends against correcting the applicant's records.

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 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-2021-00248 in Executive Session on 18 Aug 21 and 23 Feb 22:

- , 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 29 Oct 20.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPFA, dated 15 Jun 21.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 12 Aug 21.
- Exhibit E: Applicant's Response, w/atchs, dated 21 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.

X

Work-Product
Board Operations Manager, AFBCMR