ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF: XXXXXXXXXXXXX

DOCKET NUMBER: BC-2021-02871-3

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider her request for the following:

1. She receive medical continuation (MEDCON) or Incapacitation (INCAP) Pay from 1 Apr 18 until retirement, whichever is greater.

2. She be awarded points towards retirement from the time she was placed on medical leave due to her hostile work environment and mental illness.

3. Her not in the line of duty (NILOD) determination be reversed.

4. Her records reflect all of her unfitting conditions and she be granted a medical retirement.

RESUME OF THE CASE

The applicant is a technical sergeant (E-6) in the Air National Guard (ANG).

The applicant performed a period of active duty from 14 Aug 17 to 1 Apr 18. The applicant was selected for retraining into Air Force Specialty Course (AFSC) 1N0X1, Operations Intelligence, and was placed on Title 32 orders for completion of formal training. However, the applicant was eliminated for failure to meet academic requirements. While at formal training, she reported to the mental health clinic for anxiety and depression as a reaction to the stress she experienced due to her training.

In a DD Form 149, *Application for Correction of Military Record*, dated 5 Jul 21, the applicant requested the finding on 29 Sep 20 that her mental health condition was NILOD be found ILOD. In the alternative, the applicant requested an independent review of her LODs. On 15 Dec 21, the Board partially granted her request for an independent review and directed an NGB LOD Determination Board be convened to determine if her conditions of post-traumatic stress disorder (PTSD), major depressive disorder (MDD) and generalized anxiety disorder (GAD) should be found ILOD, instead of NILOD, not due to misconduct.

On 15 Nov 21, ANGR/CC informed the applicant her appeal package was reviewed. The diagnosis of adjustment disorder with mixed anxiety and depressed mood was found ILOD and not considered a part of the LOD appeal. However, the findings of NILOD, exist prior to service-not service aggravated (EPTS-NSA) for PTSD, MDD and GAD remained. The documentation identified workplace issues as a technician, and not military service, was the foundation for her GAD and MDD. ANGR/CC also did not find the applicant met the diagnostic criteria for PTSD. Based on the documentation provided, the majority of mental health symptoms occurred after the formal training orders ended and while the applicant was performing duties in technician status.

On 10 Mar 22, the AFBCMR staff determined counsel submitted a timely rebuttal response to the NGB/A1PS advisory dated 17 Nov 21; however, the rebuttal was not considered by the Board. Counsel contended the State ANG failed to initiate the LOD investigation in a timely fashion. The discrepancies in the LODs included failure to submit witness statements and failing to submit more than 50 pages of her medical records. In view of the rebuttal response, the applicant's case was reconsidered. On 25 May 22, the Board denied the applicant's requests. While the Board noted there were administrative errors in the processing of her LOD, the Board did not find the administrative errors resulted in an injustice to the applicant, nor did the Board find an error in the conclusion of the NILOD determination. The Board also noted a rating decision by the Department of Veterans Affairs (DVA) for service connection was insufficient to substantiate an ILOD determination.

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 G.

On 31 Jan 23, the applicant requested reconsideration of her request. She provides new evidence from a medical expert as proof that the LOD investigations were incomplete. She requests correction of her records based on the financial, mental and career damages as a result of discrimination and retaliation. The memorandums from a neuro radiologist dated 10 Jan 22 and 10 Feb 23 state in his opinion, the three LODs should be redone due to wing command influence, bias and because they did not follow DAFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON) and Incapacitation (INCAP) Pay*. The conclusion her PTSD, MDD and GAD were chronic and caused by the death of her child in 2011 was incorrect, nor was it supported by any documentation. She was a well-functioning technical sergeant, with a top secret clearance when selected to attend formal training for retraining into the intelligence career field in 2017. She had trouble passing and washed out in Mar 18. Along the way, she developed a psychological stress reaction, later diagnosed as PTSD. The history fits the classic definition of a chronic illness or injury that occurred on active duty. She had follow-up mental health treatment upon return to her home station and was treated with medication for PTSD. The four-star level of the Air Force has no interest in supporting any medical LODs, which generate payments that in aggregate cost more than the annual Air Force fuel bill.

In a memorandum dated 22 Jun 22, the Office of Personnel Management (OPM) on reconsideration of the applicant's appeal found the applicant disabled due to MDD, GAD and PTSD. The applicant's request for disability retirement under Federal Employment Retirement System (FERS) was approved.

The applicant also provides the Department of Defense Human Resources Activity Diversity Management Operations Center Investigations and Resolutions Directorate Investigative File (AR-2021-07) dated 25 Jul 22. The applicant filed an Equal Employment Opportunity Complaint (EEOC) against various members of the wing for discrimination on the basis of race, color, disability, reprisal, continued pattern and practice of discrimination and maintaining a hostile working environment. The remedy requested was that her FERS retirement be processed immediately and she receive compensatory damages, benefits and back pay. The investigating officer (IO) in his declaration stated efforts were made to facilitate settlement discussions; however, no resolution was reached.

The AR-2021-07 report of investigation (ROI) includes AF Form 1185, *Commander's Impact Statement for Medical Evaluation Board (MEB),* dated 22 Mar 22. The applicant's commander recommended she not be retained. She desired a formal MEB and a 100 percent disability rating; however, other than the acute adjustment disorder, the NGB review board found no other diagnosis ILOD. The prior service package would be submitted to determine if back pain or knee pain were

conditions that were either exacerbated or incurred during any duty status. NGB has not found any mental health diagnoses ILOD.

The applicant's complete submission is at Exhibit H.

APPLICABLE AUTHORITY/GUIDANCE

10 U.S.C. § 1552, the Secretary of the Air Force (SecAF) may correct any military record the Secretary considers necessary to correct an error or remove an injustice. However, there is no authority for the Board, acting on behalf of the SecAF, to correct a state ANG record while in service of their respective state under Title 32.

DAFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*, Paragraph 1.10, the standard of evidentiary proof used in making an ILOD determination is preponderance of the evidence. Preponderance of the evidence is defined as the greater weight of credible evidence.

Paragraph 1.11. NILOD. Not due to member's misconduct with conditions that became unfitting while ordered to active duty of more than 30 days. The standard of evidentiary proof used in making EPTS, not service aggravated (NSA) determinations is clear and unmistakable evidence. Clear and unmistakable evidence means undebatable information the condition is EPTS or if increased in service was not aggravated by military service. In other words, reasonable minds could only conclude that the condition is EPTS from a review of all the evidence in the record. It is a standard of evidentiary proof that is higher than a preponderance of the evidence and clear and convincing evidence. Paragraph 1.11.1.2. Where clear and unmistakable evidence is required to establish a condition is NILOD, it may be provided by accepted medical principles meeting the reasonable certainty requirement. Medical determinations relating to the origination and onset of a disease or condition may constitute clear and unmistakable evidence when supported by the weight of medical literature.

AIR FORCE EVALUATION

The AFBCMR Medical Advisor recommends denial. The Medical Advisor finds insufficient evidence to support the applicant's request for a favorable ILOD finding for her non-mental health conditions. The absence of clear cut duty status in relation to painful episodes coupled with frequent periods of returning to full duty and known conditions to EPTS without permanent aggravation would not support a favorable LOD determination.

While the letter by a neuro-radiologist mostly spoke about the applicant's mental health conditions, he listed non-mental health conditions involving a variety of diagnostic entities which encompass a left knee and low back condition with radiculopathy. As noted from her Narrative Summary (NARSUM) dated 6 Apr 22, the applicant had a long history of knee issues dating back to her enlistment physical in 2005. However, between 2005 to 2014, there were no adverse report of knee issues. The NARSUM history also documents she was referred to orthopedics in Oct 15, prior to her tour of active duty. In Oct 15, the applicant described the pain as being present for many years and denied a history of specific injury or trauma. In Jun 16, she received a local injection to the left knee from her civilian provider. In a follow-up appointment in Aug 16, she reported the painful symptoms had resolved. She then followed up with her civilian provider in Jun 18, post her 1 Apr 18 separation from active duty. Despite x-rays being reported as normal at the time, her physician authored a letter dated 13 Jun 18 recommending she be exempt from walking or running on her fitness assessment for a six month period. In Aug 18, she was seen by her primary care provider (PCP) who documented she was physically active, not bothered by her left knee condition and was able to walk and run. No fitness restrictions were applicable at the time.

With respect to her low back pain, the records revealed inconsistent reporting of onset and causation, all of which occurred and identified after her active duty separation. On 27 Feb 19, she was seen by her PCP with a complaint of nocturnal low back pain, which started three days earlier. Despite such reporting, the clinic visit was a follow-up as she was seen on 18 Feb 19 for low backpain, before her claimed onset around 24 Feb 19. She was then placed on active duty ANG orders from 25 Feb 19 through 1 Mar 19, which she apparently fulfilled. On 26 Apr 19. She described her low back pain as intermittent, mild in severity and dull. In May 19, the orthopedic specialist noted the applicant may have strained herself doing cross fit and concluded her degenerative condition would best be treated with anti-inflammatory medication, occasional steroid use and activity modification. The VA conducted a telepath encounter on 13 Jan 21 and documented her low back pain had existed since 2018 and was injured while doing sit-ups, cross-fit training in the military. On 14 Oct 18, a civilian orthopedic clinic encounter noted a history whereby the applicant attributed her back pain secondary to a cross fit injury in 2019.

The question of either physical condition causing the applicant's inability to perform the duties of her office, grade, rank or rating remains paramount. After a review of the case file, the Medical Advisor opines that neither condition (left knee or low back) would be assessed or considered as being unfit. The NARSUM's documentation of having knee issues dating back to her enlistment physical in 2005 coupled with the known long-term development of degenerative boney changes and the formation of bone spurs around both the knee and spine lends great weight that the nidus of each condition EPTS and were not permanently service aggravated above what is medically known as the natural progression of the boney conditions in accordance with DODI 1332.18, *Disability Evaluation System.*

The complete advisory opinion is at Exhibit J.

The AFRBA Psychological Advisor finds insufficient evidence to support the applicant's request. The Psychological Advisor concurs with the opinion rendered by the NGB LOD Determination Board or ANGR/CC. The applicant did not submit any compelling evidence that would warrant overturning the opinion rendered by an independent review (as requested by the applicant her previous petition). The rationale provided by ANGR/CC for the findings of NILOD were sound and based on corroborating information and evidence presented in her medical records and the applicant's independent and non-military mental health care providers. There was also no evidence she should have received MEDCON and INCAP and additional points towards retirement as requested. In terms of the expert medical opinion, a neuro radiologist and non-mental health provider, the allegations and claims presented by this individual were without merit and not substantiated by any supporting or persuasive evidence. They were merely dissenting opinions and speculations. The ILOD determination process requires a thorough investigation into the origin of the aggravating event, diagnosis and treatment. A review of the applicant's records finds no error or injustice that were employed with the ILOD determination or the investigating officer (IO). The applicant was provided with an independent review to include her new evidence and the outcome of her LOD determination remains unchanged. She received a fair LOD determination review process contrary to the medical opinion provided. The new evidence provided was determined to be insufficient to support her request.

Liberal consideration is not appropriate to be applied to the applicant's request as ILOD, MEDCON, INCAP Pay and points towards retirement do not fall within the purview of this policy. Liberal consideration pertains to upgrade discharge requests, which these requests do not apply.

The complete advisory opinion is at Exhibit K.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 2 Mar 23 for comment (Exhibit L), and the applicant replied on 29 Mar 23. In her response, the applicant contends NGB and the advisory opinions failed to provide the clear and unmistakable evidence per DAFI 36-2910 and draws a conclusion on speculation of a majority of aggravation versus the preponderance of evidence statute requirement. The advisory opinions contradict themselves by validating the ILOD determination process requires a thorough investigation but then supports the IO's lack of due diligence revealed by the medical opinion provided. Since the NGB and advisories have not provided the medical principles standard and the IO's lack of due diligence failed to include witness statements with direct knowledge creating errors and injustice that would have been employed with the ILOD determination process, the decision should be ILOD in accordance with 38 U.S.C. § 105, 5107 and 5102. The standard of proof is a preponderance of evidence that the injury/illness was ILOD and/or aggravation occurred or did not occur ILOD. NGB's assertion that a "majority" of mental health symptoms occurred after formal training orders has no legal relevance; however, is an acknowledgment that some aggravation occurred. NGB/s statement that based on medical principles and diagnostic criteria, a PTSD diagnosis requires exposure to actual or threatened death, serious injury or sexual violence is misleading by excluding the full medical principles and diagnostic criteria.

She provides memorandums from a neuropsychologist dated 6 and 28 Mar 23. He reviewed the applicant's medical and administrative records from 19 Dec 99 to the current year. He believes her PTSD is more likely than not was due to her five year old son's tragic death in 2011, while she was on drill. This clearly meets the criteria of PTSD and many of the symptoms she reported on the psychological assessment are credible and related to PTSD. He disagrees with the attribution of her PTSD to failing the intelligence training course. He agrees she has depression and anxiety but note that her dysfunction occurred after the tragic death of her son years earlier, which was not diagnosed as PTSD, nor treated appropriately. Her condition appears to be permanent given her continued high emotional stress about both issues (son's death and failure at technical school), despite years of therapy and psychiatric medications. In his opinion some of her grief and assumed guilt and negative self-esteem will never go away and is activated in any slight hint of stress or failure, including the rejections of claims in this matter. Per the email she sent him on 28 Mar 23, it has cost her to lose her top security clearance, ability to deploy and get jobs requiring clearances. Therefore, he considers her permanently aggravated by military service to be considered ILOD for all mental health conditions and should be awarded as claimed mental disabilities. She can and could not perform job duties or be deployed and should be discharged medically with all benefits and entitlements and backpay.

The applicant's complete response is at Exhibit M.

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 recommendations of the AFBCMR Medical Advisor and the AFRBA Psychological Advisor and finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant contends she met the standard of proof her PTSD, MDD and GAD were ILOD and/or aggravated by military service; however, the Board disagrees. In this respect, the Board finds insufficient evidence to conclude the applicant's conditions were incurred or aggravated during a period of qualifying military service. As pointed out by the ANGR/CC, it appears the applicant's mental health conditions occurred while the applicant was performing duties in her technician status, rather than in a military

status. The Board recognizes the applicant sought counseling from the mental health clinic before departing her training location due to the stressors of failing her formal training course; however, there is no evidence she incurred or aggravated PTSD, GAD and MDD while on active duty orders for training. To the contrary, aside from her academic failure, the applicant was able to complete the period of her orders and return to her home station. The applicant provides letters of support from a neuroradiologist and a neuropsychologist that her conditions were ILOD; however, the Board does not find their suppositions and hypothesis persuasive. The applicant also contends the four-star level of the Air Force has no interest in supporting LODs due to costs; however, other than her own uncorroborated assertions she has provided no evidence to sustain her allegations. 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 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-2021-02871-3 in Executive Session on 15 Aug 23:

, Panel Chair
, Panel Member
, Panel Member

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

Exhibit G: Record of Proceedings, w/ Exhibits A-F, dated 3 Aug 22.
Exhibit H: Application, DD Form 149, w/atchs, dated 31 Jan 23.
Exhibit I: Documentary evidence, including relevant excerpts from official records.
Exhibit J: Advisory Opinion, AFBCMR Medical Advisor, dated 19 Feb 23.
Exhibit K: Advisory Opinion, AFBCMR Psychological Advisor, dated 23 Feb 23.
Exhibit L: Notification of Advisory, SAF/MRBC to Applicant, dated 2 Mar 23.
Exhibit M: Applicant's Response, w/atchs, dated 29 Mar 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