

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

XXXXXXXXXXXXXX

**DOCKET NUMBER:** BC-2021-03258

**COUNSEL:** XXXXXXXXXXXX

**HEARING REQUESTED:** NO

### APPLICANT'S REQUEST

He be given a medical retirement.

### APPLICANT'S CONTENTIONS

His medical condition of Neurofibromatosis Type I (NF-1) should have been found in the line of duty (ILOD). His condition did not exist prior to service (EPTS); his symptoms first appeared in 2007 and his condition was later aggravated due to the physical requirements of his Air Force Specialty Code (AFSC) as the evidence shows his condition worsening. He should have been covered by the "Eight Year Rule" per AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*, due to service aggravation. The Air Force incorrectly diagnosed his condition when he first sought treatment while on active duty orders in 2007. The initial Medical Evaluation Board (MEB) Narrative Summary (NARSUM) dated 6 October 2016, found his condition ILOD, however, it was changed to not in the line of duty (NILOD) secondary to no evidence of service aggravation by an unknown individual without authority. The Air Force Inspector General's (IGs) Office could not determine who made this change and recommended the applicant appeal to the AFBCMR. The Physical Evaluation Board (PEB) failed to recognize that the applicant was first diagnosed in 2007 and referenced the date of the official diagnosis of NF-1 in 2013. It is clear the applicant began suffering from this illness while on active duty orders but was misdiagnosed for many years.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is a former Air Force Reserve (AFR) master sergeant (E-7) awaiting retired pay at age 60.

Dated 27 June 2017, a memorandum from AFRC/SG, provided by the applicant, indicates his initial review in lieu of (IRILO) package was reviewed with a determination he was medically disqualified for continued military duty. It is noted "Case referred for fitness for duty processing only... Given the lack of service aggravation while in Reserve status per the medical documentation, member is not eligible for a new LOD determination as they have progressed to unfitness while not in a duty status."

Dated 13 August 2019, the Physical Health Template MEB NARSUM indicates the applicant was diagnosed with the following potentially unfit medical conditions, Neurofibromatosis with secondary Neurogenic bladder with a date of initial onset Jan 13; Obstructive Sleep Apnea with a date of initial onset January 2012, and Asthma with a date of initial onset of January 2011. Under LOD determination it is noted as NILOD – Not due to member’s misconduct.

On 20 September 2018, a Memorandum from the AFRC IG Office, provided by the applicant, indicates his delay in medical processing he experienced was identified, addressed, and rectified at the Reserve Command level. The change to his NARSUM is still unknown and recommended he apply through the AFBCMR for relief.

Dated 18 February 2020, a memorandum from USAFCENT AF/CC provided by the applicant, indicates his medical condition of Neurofibromatosis with secondary Neurogenic bladder occurred NILOD. The applicant acknowledged the findings and indicated he would submit an appeal to the AFRC/CD Appellate Authority within 30 days.

On 16 March 2020, documentation provided by the applicant shows he submitted an appeal to the NILOD determination. In his appeal, his counsel requests this decision be overturned noting the discrepancies in the NARSUM with regards to the LOD determination authored by an unknown source. He asked that the applicant’s medical condition be found ILOD or in the alternative, due to the criteria of the Eight Year Rule, be found as service aggravated. He has more than eight years of total active service. Additionally, he was on active duty orders when he was actively seeking treatment for chronic hip and back pain.

On 12 June 2020, a memorandum from SGP indicates the applicant was found medical disqualified for continued military service with no LOD determinations found.

On 16 July 2020, AF Form 356, *Informal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to his medical condition of Neurofibromatosis with Cauda Equina Syndrome and urinary retention with a recommendation of “Unfit.” It was found his condition was not incurred while entitled to receive basic pay. His other conditions of mild obstructive sleep apnea and reactive airway disease/asthma were rated as Category II, conditions that can be unfitting but are not currently unfitting.

On 14 October 2020, AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, indicates the applicant disagreed with the findings of the board and requested a formal hearing.

On 28 September 2020, the applicant submitted a written appeal. In the appeal, the Office of Disability Counsel (ODC) contends that his Neurofibromatosis with Cauda Equina Syndrome and Urinary Retention is a prior service condition as it was initially incurred during a period of active duty service and was permanently aggravated and caused him to become unfit for military service during his subsequent Air Force Reserve service. This condition was not due to any misconduct nor did it progress to unfitness as the result of intervening events when he was not in a military duty status. Alternately, he meets the eight year rule criteria outlined in AFI 36-2910

and respectfully requests an ILOD determination be made for his condition and that his case be returned for proper Integrated Disability Evaluation System (IDES) processing stating for the purposes of this LOD determination, what should be determinative is not when the correct diagnosis was issued, but when the condition began to present itself and if there were documented occurrences of worsening pain while on an active duty status. Given the medical records from 2007 through 2008, it is clear that his NF-1 condition was initially identified while on active duty and subsequently aggravated while still on an active duty status. The ODC submitted the following as evidence:

- a. Dated 6 October 2016, the MEB NARSUM signed by the Medical Director of the Family Health Clinic indicates the applicant has a family history of Neurofibromatosis (Son, Mother, and Uncle). It also indicates a LOD determination of yes with prognosis notes stating Neurofibromatosis (resulting in chronic low back pain) has been a chronic issue since 2013 without significant improvement in pain with medications, physical therapy, or pain management injection therapies. Do not anticipate significant improvement of symptoms given nature of disease and the fact that he is not a candidate for surgery due to the location of the neurofibromas.
- b. Dated 7 February 2017, the MEB NARSUM signed by the Medical Director of the Family Health Clinic, under LOD determination, indicates in a hand-written note, “no evidence of a Reserve Service aggravation has been submitted.”

An Addendum to this NARSUM, provided by the applicant states “the previous NARSUM written by myself notes: LOD administrative – yes. His final draft has something written into this area to reflect it is not LOD related. I am unsure when this was changed or by whom; however AHLTA records do not reflect being seen for back pain while on active duty orders in 2007.”

Dated 19 January 2021, a LOD determination memorandum from SAF/MRBP noted the following: According to AFI 36-2910, a favorable LOD finding citing the eight year rule includes being in a military status (on orders) for a period greater than 30 days when the medical condition becomes unfitting, which is determined by the PEB. The PEB identified the unfitting condition in July 2020, well past his time of active duty service. Additionally, the AFPB also acknowledged that the primary condition of NF-1 is a genetic disorder with a strong predisposition for family occurrence which takes years to develop. A review of the electronic medical record revealed the longstanding and chronic nature of the presenting symptoms in this case. In accordance with AFI 36-2910, chronic conditions and conditions where an incubation period rules out a finding that the condition started during any period of active duty, active duty for training or inactive duty training are considered EPTS and are without service aggravation. Therefore, based on these findings of fact as well as the applicable rules and instructions, the AFPB agreed that the primary condition of NF-1 and its associated syndrome and residual symptom of urinary retention be found NILOD.

On 1 February 2021, a Memorandum for Record (MFR) from the FPEB case manager indicates the applicant did not provide an AF Form 1180 to indicate his desire for a formal hearing hence waiving his rights to further appeal.

On 2 February 2021, the Secretary of the Air Force directed the applicant be separated from active service for non-duty related physical disability.

Dated 5 April 2021, Reserve Order XXXXX, indicates the applicant was assigned to the Retired Reserve effective 1 April 2021.

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

## **AIR FORCE EVALUATION**

AFRC/SGO recommends denying the applicant's request to have his medical condition of Neurofibromatosis Type I be found ILOD and granted a medical retirement. There is no evidence of an error or injustice, the LOD was filed for the condition presented in the records in 2019, shortly after the applicant developed significant complications secondary to the genetic disease of Neurofibromatosis. It is a congenital condition that EPTS. In fact it existed prior to the applicant's initial entry into the Air Force. There is no evidence to support service aggravation as the applicant contends, this is the natural progression of an unfortunate genetic disease.

There are three major clinically and genetically distinct forms of neurofibromatosis; neurofibromatosis types 1 and 2 (NF-1 and NF-2) and schwannomatosis. NF-1, also known as von Recklinghausen disease, is the most common type. The hallmarks of NF-1 are the multiple café-au-lait macules and neurofibromas. NF-1 is an autosomal dominant genetic disorder with an incidence of approximately 1 in 2600 to 3000 individuals. Approximately one-half of the cases are familial (inherited). The typical order of appearance of clinical manifestations is café-au-lait macules, axillary and/or inguinal freckling, Lisch nodules (iris hamartomas), and neurofibromas. Neurofibromas are the most common type of benign tumor that develops in patients with NF1. Neurofibromas are benign peripheral nerve sheath tumors. April 2010 is the first mention of café au lait spots noted in the applicant's medical record. In the notes, the provider states that the applicant's son was diagnosed with Neurofibromatosis and the applicant has a long history of axillary freckling, multiple hyperpigmented spots on the body, as well as multiple lumps under the skin. It is also mentioned that the applicant's mother and all five of his brothers have similar spots. A May 2010 medical record's note first mentions a diagnosis of neurofibromatosis and the applicant was instructed to follow-up with a genetic counselor.

The applicant argues that there is no evidence that this condition existed prior to his reserve orders from 5 July 2006 to 12 October 2007. NF-1 is a genetic autosomal inherited disorder which existed by definition prior to service as it was incurred at the moment of the applicant's conception and he became subject to it at that time. The MRI during this period of time shows some bone remodeling which means the condition had been present for years prior to this image, which is consistent with a much earlier time frame that the condition was present, whether or not the diagnosis was made. It had not been diagnosed during this period of orders, even though the diagnosis was considered by a physical therapist, it was certainly not a final diagnosis until years later. According to AFI 36- 2910, 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. Incurred is defined in the AFI to occur or come into being (develop), regardless of when discovered or diagnosed, and during a qualified military duty status. In this case, the diagnosis was incurred at conception as a genetic disease. The AFI does not state that a condition should be found ILOD based on the time it was diagnosed.

Clear and unmistakable evidence demonstrates that this genetic (inherited) condition was incurred before the applicant's initial entrance onto active duty and he does not meet the requirements per AFI 36-2910, paragraph 1.10.2.2.2, for the Eight Year Rule (10 U.S.C. § 1207a, *Members with over Eight Years of Active Service: Eligibility for Disability Retirement for Pre-Existing Conditions*). An illness, injury or disease that EPTS may be deemed to have occurred in a duty status for the purpose of determining disability separation or retirement by a PEB if the member has at least eight years of total active service; was on Title 10, U.S.C. active duty orders specifying a period of greater than 30 days at the time the condition became unfitting; and was not released from active duty within 30 days of commencing such period of active duty under 10 U.S.C. § 1206a, *Reserve Component Members Unable to Perform Duties When Ordered to Active Duty: Disability System Processing*, due to an EPTS condition not aggravated during the period of active duty. The applicant was not found unfit during the period of service that the applicant has referenced from 2007-2008. The applicant was not unfit for two reasons; the first being that there was no formal diagnosis made until well after this period of orders and the other is that there is no guarantee that even if the member had a diagnosis of Neurofibromatosis that he would have been disqualified. He was considered fit as a secondary set of orders were started in the middle of October for another year. Finally, if the applicant's date of alleged diagnosis is chosen as Apr 07, he did not have over eight years of prior active service at this time.

The applicant also argues that his condition was aggravated by the rigors of his duty requirements which placed a constant stress on the hip and caused pain. AFI 36-2910 defines service aggravation as a condition that is aggravated by military service when there is a permanent worsening of a pre-service medical 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 would take over time, regardless of military service. There must be clear and unmistakable evidence in order to determine a condition is NILOD for orders greater than 30 days. The LOD submitted and adjudicated using the appropriate standard of proof is clear and unmistakable evidence that the applicant's orders were for over 30 days. As a genetic disorder, this condition clearly EPTS. In addition, the progression of worsening pain and neurologic problems is consistent with the clinical course of the condition and is therefore evidence of the natural progression of the genetic disorder. Based on the records, the applicant's symptoms rapidly worsened around 2015 when not in status, which is also consistent with natural progression. The finding of NILOD, EPTS - not service aggravated, was appropriate.

The applicant argues that there were changes to the NARSUM changing the ILOD determination to NILOD secondary to no evidence of service aggravation. This office is unable to comment as to why one of the NARSUMs was submitted with that statement as it was not correct; the

addendum NARSUM was correct. This appears to be an administrative error and there is no evidence that a LOD was completed until 2019.

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 17 March 2022 for comment (Exhibit D), and the applicant replied on 14 April 2022. In his response, the applicant's counsel contends multiple physicians who have reviewed the applicant's medical file concluded that his military duties aggravated his condition. The author of his NARSUM determined that his case warranted an administrative ILOD determination. His current provider clearly states that the rigors of his active duty service aggravated his condition above and beyond the natural progression of this disease.

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 AFRC/SGO and finds a preponderance of the evidence does not substantiate the applicant's contentions. Even though the applicant's counsel contends that multiple physicians who have reviewed the applicant's medical file concluded the rigors of his active duty service aggravated his condition above and beyond the natural progression of this disease, the Board finds no evidence to support service aggravation that is, according to AFRC/SGO, the natural progression of an unfortunate genetic disease. Furthermore, the Board notes the change to the applicant's NARSUM, but does not find this change compelling enough to recommend granting the applicant's request as it appears the addendum NARSUM was correct. 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-2021-03258 in Executive Session on 22 Jun 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 2 September 2021.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFRC/SGO, w/atchs, dated 14 March 2022.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 17 March 2022.
- Exhibit E: Applicant's Response, w/atchs, dated 14 April 2022.

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