

RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXX

DOCKET NUMBER: BC-2022-00149

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

1. He be given a medical separation.
2. He be awarded incapacitation (INCAP) pay for the period of 17 Aug 18 through 16 Feb 19.

APPLICANT'S CONTENTIONS

He has a service-connected disability and needs his discharge changed to medical. He had an in the line of duty (ILOD) injury which was identified as permanent and disqualifying for continued military service. He was coded with an assignment availability code (ACC) of 37 with a pending Medical Evaluation Board/Physical Evaluation Board (MEB/PEB). He was never processed by a medical board and his unit just left his contract run out. His unit violated laws and regulations that resulted in the denial of benefits he is entitled to. Some of these laws include Health Insurance Portability and Accountability Act (HIPAA) violations, denial of INCAP pay, no Integrated Disability Evaluation System (IDES) referral, and a denial of disability severance compensation.

To support his claim, the applicant submitted medical records, his INCAP pay application, and other military records relating to his case showing his knee injury was found ILOD. Additionally, he submitted his Department of Veterans Affairs (DVA) rating, dated 12 Jun 19, for his right knee patellar articular fissuring rated at 10 percent, effective 5 Mar 18.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air National Guard senior airman (E-4).

On 7 Apr 18, AF Form 348, *Line of Duty Determination*, indicates the applicant's right knee injury was found ILOD by the appointing authority.

On 9 Sep 18, AF Form 1971, *Certification for Incapacitation Pay*, indicates the applicant applied for INCAP pay for the period 17 Aug 18 through 16 Feb 19 which was denied by his commander on 22 May 19 due to the applicant's failure to provide needed medical documentation to process his claim. It is noted the Physical Evaluation Board Liaison Officer (PEBLO) returned his application without action requesting an evaluation for his medical package due to the medical documentation being insufficient.

On 2 Dec 18, AF Form 469, *Duty Limiting Condition Report*, indicates the applicant was identified with a potential medical disqualification that must be processed through the disability evaluation system (DES) to continue his military career.

Between Mar 19 through Nov 19, the applicant filed numerous Inspector General (IG) complaints alleging the unit failed to process his disability case and his request for INCAP pay according to regulation. In his complaints he details numerous conversations he had with unit personnel regarding his requests and lack of support.

On 12 Dec 19, a letter from the Wing IG office indicates a clarification of the applicant's complaints was needed. In this letter the applicant's complaint summary is as follows:

The applicant is alleging his unit's Medical Group violated the following regulations: AFI 10-203, *Duty Limiting Conditions*, AFI 41-210, *Tricare Operations and Patient Administration Functions*, AFI 48-123, *Medical Examinations and Standards*, AFI 36-2910, *Line of Duty (Misconduct) Determination*, 37 U.S.C. section 204, and the Uniform Code of Military Justice (UCMJ) Article 92. He claims the Wing is not following AFI's and he just wants his case processed correctly. He said that he should have been processed through a MEB, but due to delays in the Medical Group's processing his medical paperwork, his MEB was returned requiring an updated medical evaluation. He also states he is due pay and entitlements (INCAP) and requests a complete copy of his medical records.

At the end of Dec 19, the complaint analysis worksheet indicates the applicant's case was dismissed noting the applicant was told numerous times from his first sergeant, squadron commander, and wing medical staff that he needs to see an orthopedic surgeon and have the doctor notes or any clinical documentation sent to the wing medical staff. It is the IG's determination the after visit summary that was submitted to the PEBLO as part of the applicant's medical package was not done out of malice. The Medical Group and his leadership has done all they can to assist him.

On 19 Nov 20, NGB Form 22, *National Guard Bureau Report of Separation and Record of Service*, reflects the applicant was honorably discharged from the Air National Guard after serving 12 years, 11 months, and 1 day of total service for pay. He was discharged, with a narrative reason for separation of "Expiration of Enlistment."

For more information, see the excerpt of the applicant's record at Exhibit B, the IG Case files at Exhibit K, and the advisories at Exhibits E, F, and H.

AIR FORCE EVALUATION

On 19 May 22, an email from the AFBCMR staff was sent to the applicant requesting the following per NGB/SG, in order to provide an accurate assessment of his case (Exhibit C):

- a. All military and civilian medical documentation related to all illnesses, injury and potentially disqualifying medical conditions. Medical documentation should include

pertinent labs, diagnostic reports, specialty consults, and/or encounter notes related to the condition(s).

b. Proof of service at time of injury/illness/disease incurred or was service-aggravated (i.e. Orders, Pay Roster, DD Form 214, etc).

On 21 May 22, the applicant responded and provide additional medical documentation related to his case (Exhibit D).

NGB/SGPS recommends denying the applicant's request for a medical separation and defers the applicant's request for INCAP pay to NGB/A1; however NGB/SG notes his ILOD condition does appear to have limited his ability to perform his civilian job.

The applicant was treated by an orthopedic center from Feb through Oct 18 for the diagnosis of Chondromalacia of right patella. The applicant's provider recommended noninvasive modalities such as anti-inflammatory medication and pain creams prior to considering steroidal injection. Dated 28 Aug 18, a clinical note in the history section states the applicant took a new job which required quite a lot of heavy lifting and this caused a flare in his knee. He has been off his job for roughly one month, and his knee is definitely better but still fairly uncomfortable in the anterior aspect. He denies a particular injury, locking or any instability. The applicant's referenced job was in a non-duty status and appears to have resulted in an exacerbation of pain due to his right knee condition. The applicant eventually decided to proceed with steroid injections during his 13 Sep 18 appointment, as well as discontinuing his warehouse job. The medical note dated 22 Oct 18 indicates the applicant's articular damage at the back of his patella is permanent, but will not affect range of motion and strength; the goal is to self-treat with typical oral and cream analgesics if the knee flares.

As noted, the applicant has a finalized ILOD for his right knee injury. The applicant also has a service-connected DVA rating of 10 percent for right knee patellar articular fissuring effective 5 Mar 18. The AF Form 469 dated 2 Dec 18, indicates the applicant as being identified as having a potential medical disqualification requiring processing through the DES for continued military service. There is a single clinical encounter noted in the electronic medical record from the day prior indicating a Narrative Summary was completed; however, there are no identified medical records at any time thereafter through his date of honorable discharge on 16 Nov 20.

The DES, can by law, under Title 10, United States Code (U.S.C.), only offer compensation for those service-incurred diseases or injuries which specifically rendered a member unfit for continued service and were the cause for career termination; and then only for the degree of impairment present at the "snapshot" time of separation and not based on future progression of injury or illness. The DVA on the other hand, operates under a different set of laws (Title 38, U.S.C.) with a different purpose and is authorized to offer compensation for any medical condition determined service incurred, without regard to and independent of its demonstrated or proven impact upon a service member's retainability, fitness to serve, or the length of time since date of discharge. The DVA can also conduct periodic re-evaluations for the purpose of adjusting the disability rating awards (increase or decrease) over the lifetime of the Veteran.

The complete advisory opinion is at Exhibit E.

NGB/A1PS recommends denying the applicant's request for INCAP pay finding no evidence of an error or injustice. Per AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*, dated 8 Oct 15, NGB/A1PS recommends the service member resubmit proof that an INCAP request was submitted by the wing and proof of financial statements addressing income lost during the INCAP request of 17 Aug 18 to 16 Feb 19.

NGB/A1PS reviewed the documentation associated with the service member's request for pay/allowances in the form of INCAP pay. The applicant provided a copy of AF Form 1971 for INCAP pay for the period of 17 Aug 18 to 16 Feb 19, signed by the applicant on 9 Sep 18, but the form had not been adjudicated or properly processed per AFI 36-2910. NGB/A1PS is unable to process any requests for reimbursement of pay/allowances without an adjudicated AF Form 1971. NGB/A1PS contacted the applicant's unit (personnel, medical, and financial management offices) and they informed NGB, they had no record of this request being processed through their offices for adjudication. Given the requested time-period of INCAP as reflected on the AF Form 1971, from 17 Aug 18 to 16 Feb 19, the processing of INCAP would require a Staff Summary Sheet requesting initial INCAP pay signed by the immediate commander or an INCAP pay extension signed by the Wing Commander per AFI 36-2910 paragraph 6.4.1.1.1. The applicant's evidence submitted with his application does not provide proof the INCAP package was submitted to NGB/A1PS for approval/disapproval. NGB/A1PS has reviewed internal records of packages submitted in 2018 and 2019 and there is no record of the applicant's package. Additionally, per AFI 36-2910, paragraphs 6.4.1.1.14, 6.4.1.1.14.1, 6.4.1.1.14.2 and 6.4.1.1.14.3, the applicant has not provided financial documentation of loss income.

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinions to the applicant on 20 Jan 23 for comment (Exhibit G), but has received no response.

ADDITIONAL AIR FORCE EVALUATION

The AFBCMR Medical Advisor recommends partially granting the applicant's request for a medical separation to reflect discharge with severance pay (DWSP) with a maximum of 10 percent impairment rating under the Veterans Affairs Schedule for Rating Disabilities (VASRD) code 5003 for painful motion of a major joint. The applicant met his burden of proof in providing sufficient evidence to demonstrate the existence of an unfitting right knee condition and in the setting of an approved ILOD determination, processing via the DES would have been most appropriate.

In reviewing the advisory from the NGB Surgeon's office, the Medical Advisor saw no actual stated reason for their denial recommendation. As an assumption, the Medical Advisor believes their decision was heavily based upon a single encounter with the applicant's provider halfway through his 10-month treatment period which noted the following in the history section of the

exam note. "...took a new job which required quite a lot of heavy lifting and this flared his knee, and he has been off his job I believe for roughly one month, and his knee is definitely better but still fairly uncomfortable in the anterior aspect." The author of the advisory stated, "The applicant's referenced job was in a non-duty status and appears to have resulted in an exacerbation of pain due to his right knee condition." Additionally, the author noted the applicant's orthopedic provider indicated the articular damage at the back of his patella (kneecap) is permanent but will not affect range of motion and strength.

The reviewed evidence unmistakably revealed the applicant incurred a right knee injury while performing military duties. Having a known ILOD injury, the remaining question deals with fitness. In other words, was his right knee condition unfit for continued military service? As of Dec 18 (date of the AF Form 469), the DoD obviously thought the applicant had a potentially unfitting condition by placing a code 37 on his case. Such action should have initiated an initial review in lieu of (IRILO) which would have either returned the service member back to duty with an assignment limitation code or refer his case to a full MEB. Although recognizing the comment the applicant's non-duty job may have caused a flare-up of his knee pain and improvement when not performing such job activities, the Medical Advisor still must point out the uncomfortable knee pain remained. The continued knee pain in the context of torn cartilage being a permanent condition coupled with 10 months of continuous treatment was appropriately considered a potentially unfitting condition. However, it appeared the DoD lacked further processing via an IRILO. Based upon the above noted parameters, the Medical Advisor opines if the DoD did what was required by placing a code 37 on the AF Form 469, the Air Force Personnel Center (after reviewing a submitted IRILO) would have most likely referred the applicant's case to a full MEB.

The complete advisory opinion is at Exhibit H.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 26 Jan 23 for comment (Exhibit I), and the applicant replied on 6 Feb 23 and again on 13 Feb 23. In his response, the applicant contends he encountered record/document omission and exclusion by his Wing after his injury, and then by the DVA during his disability claim processing. His injury incurred ILOD at the firing range during weapons qualification on 1 Feb 18 and was documented on the AF Form 978 on 5 Feb 18. He did not write a comprehensive statement of the event as the standard/requirement was unknown at the time. No one on the firing range rendered first aid to him at the time of his injury and he was told to finish the firing range training. His supervisor was informed of his injury but he was forced to continue to participate in the deployment exercise under duress. For several months, he underwent medical care for this injury and received a diagnosis of "permanent injury with work restrictions" on 5 Oct 18.

P----- D----- & C----- (PDC), was his former employer. On 16 Aug 18, PDC Human Resources, furnished a letter to him which stated PDC cannot accommodate his restrictions and that he will not be allowed to return to work at this time which left him without income effective immediately. The company sent another letter on 18 Sep 18, which ended his employment effective 18 Sep 18. He submitted his application for INCAP pay on 9 Sep 18 with no help from his unit and after several inquiries was told on 22 May 19, his application was denied by his wing commander.

Because of the false claims, failure to follow regulations, and the lack of help and response from his unit, he filed IG complaints and a congressional inquiry. He should have received INCAP benefits while being processed through the DES, as required under DoDI 1332.18, *Disability Evaluation System*. Instead, he was subjected to hostility and was denied benefits afforded to him under the law. His Wing and the National Guard Bureau have taken actions to great length to obfuscate the facts. He should have been medically discharged as this injury had adversely impacted his entire life.

The applicant references attachments throughout his response to which he was told would need to be provided through the portal or hard copy mail, but not as attachments to an email. He requested an extension to mail the documents. He was sent a letter stating his case would be closed until he responded. He responded stating he had only requested an extension of time to respond to the two Advisory Opinions from the NGB. He did not request the case to be administratively closed. This request for more time was in response to his seemingly unusual directions and conflicting messages. He had submitted the comment to those two opinions from NGB in an email sent on 7 Feb 23. Therefore, he does not need an extension of time and asked that his case proceed processing immediately, as it should never have been closed.

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 concludes the applicant is the victim of an error or injustice. While we note the conflicting advisory opinions prepared in this case; however, after thoroughly reviewing this application, the Board concurs with the rationale and recommendation of the AFBCMR Medical Advisor and finds a preponderance of the evidence substantiates the applicant's contentions in part. Specifically, the applicant has provided sufficient evidence to demonstrate the existence of an unfitting right knee condition and in the setting of an approved ILOD determination, processing via the disability evaluation system (DES), would have been most appropriate, which is sufficient to justify granting the applicant's request for a medical separation to reflect discharge with severance pay (DWSP) at a 10 percent disability rating. In addition, the Board agrees with the Inspector Generals (IGs) determination the applicant's unit did all they could to assist him with his INCAP pay application but the required medical documentation was not submitted. However, for the remainder of the applicant's request, the evidence presented did not demonstrate an error or injustice, and the Board therefore finds no basis to recommend granting that portion of the applicant's request. Therefore, the Board recommends correcting the applicant's records as indicated below.

The applicant retains the right to request reconsideration of this decision and recommends he submit proof that an INCAP pay request was submitted by his unit along with the required medical documentation and proof of financial statements addressing lost income during the period in question.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to the APPLICANT be corrected to show the following:

- a. On 18 June 2020, he was found unfit to perform the duties of his office, rank, grade, or rating by reason of physical disability, incurred while he was entitled to receive basic pay; that the diagnosis in his case was right knee pain, the Department of Veterans Affairs (DVA) rated as right knee patellar articular fissuring, under the Veteran Affairs Schedule for Rating Disabilities (VASRD) code 5003, rated at 10 percent; the degree of impairment was permanent; the disability was not due to intentional misconduct or willful neglect; the disability was not incurred during a period of unauthorized absence; and the disability was not received as a direct result of armed conflict or caused by an instrumentality of war.
- b. On 19 June 2020, he was not discharged due to expiration of enlistment but instead was discharged due to physical disability – entitled to severance payment, with a 10 percent compensable disability rating.

However, regarding the remainder of the applicant's request, the Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the application will only be reconsidered upon receipt of relevant evidence not already considered by the Board.

CERTIFICATION

The following quorum of the Board, as defined in the 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-2022-00149 in Executive Session on 22 Mar 23:

- , Panel Chair
- , Panel Member
- , Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 20 Nov 21.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Email to Applicant, SAF/MRBC, dated 19 May 22.
- Exhibit D: Applicant's Response, w/atchs, 21 May 22.
- Exhibit E: Advisory Opinion, NGB/SGPS, dated 8 Aug 22.
- Exhibit F: Advisory Opinion, NGB/A1PS, w/atchs, dated 4 Jan 23.
- Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 20 Jan 23.
- Exhibit H: Advisory Opinion, AFBCMR Medical Advisor, dated 24 Jan 23.
- Exhibit I: Notification of Advisory, SAF/MRBC to Applicant, dated 26 Jan 23.
- Exhibit J: Applicant's Response, dated 6 Feb 23 and 13 Feb 23.
- Exhibit K: Report of Investigation – WITHDRAWN.

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