

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-00224

XXXXXXXXXX

COUNSEL: XXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. His Line of Duty (LOD) Determination be changed from "Not In Line of Duty (NILOD) - Not Due to Own Misconduct" to "In Line of Duty (ILOD)" or in the alternative
2. He be allowed to appeal his LOD Determination of "NILOD-Not Due to Own Misconduct."

APPLICANT'S CONTENTIONS

His injury occurred performing Physical Training (PT) while deployed under Title 10 orders in support of Operation FREEDOM SENTINEL and meets the criteria for an LOD determination of ILOD. He has been through numerous Army, Air Force, Drug Enforcement Agency (DEA), and Federal Bureau of Investigations (FBI) physicals and he has never been diagnosed with an inguinal hernia or has been informed that he had a disposition for an inguinal hernia. He has had multiple back-to-back 100 percent physical fitness test scores from the Army, Air Force, DEA, and FBI and at no time did he ever experience inguinal pain or issues that would indicate he was afflicted with this disease.

The burden of proof that a pre-existing condition did not exist should not be on the member, for it is impossible to prove. The Department of Veterans Affairs, based on a review of his orders, discharge paperwork, medical records, and a physical exam determined that the hernia was service connected. Therefore, it could not have existed prior to service. The only proof of the condition is the injury itself, and that was incurred while performing PT while deployed and that he should be granted the ILOD determination in order to receive the necessary medical follow-up care.

Additionally, after receiving notification of his NILOD determination, he was advised he could submit an appeal within 45 days. He signed the notification and indicated that he would submit an appeal and did so within 32 days. On 16 Dec 21, NGB/A1 sent an email stating that effective 3 Sep 21, a revision to Air Force Instruction (AFI) 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay* became effective and changed the requirement to submit an LOD appeal from within 45 days of receipt of the LOD determination to submit an appeal within 30 days. Neither his commander or his Force Support Squadron LOD Point of Contact provided an updated NGB/A1 memorandum for record that removed the 45 day requirement and replaced it with the 30 day requirement.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is an Air National Guard lieutenant colonel (O-5).

According to the applicant's DD Form 214, *Certificate of Release or Discharge from Active Duty*, dated 8 Sep 20, the applicant served in support of Operation FREEDOM SENTINEL from 4 Jan 20 – 8 Sep 20 and was deployed to Al Udeid AB, Qatar, from 11 Jan 20 – 20 Jul 20.

On 17 Nov 20, according to an AF Form 348, *Line of Duty Determination*, Case XXXXXXXX provided by the applicant, a LOD was initiated due to abdominal pain that incurred when the applicant was performing PT on 6 Mar 20. On 23 Sep 21, the ARC LOD Determination Board recommended that the applicant's medical diagnosis of unilateral inguinal hernia, without obstruction or gangrene, be "NILOD - Not Due to Member's Misconduct" and on 23 Sep 21, the approval authority concurred and determined his condition was "NILOD - Not Due to Member's Misconduct (Existed Prior to Service – Not Service Aggravated (EPTS-NSA))."

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

APPLICABLE AUTHORITY/GUIDANCE

Department of the Air Force Instruction (DAFI) 36-2910, Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay, 3 Sep 21:

Paragraph 1.8. *LOD Determinations Findings*. One of the following findings will be applied to the member's illness, injury, disease or death:

- ILOD: The illness, injury, disease or death was incurred or aggravated while the member was in an authorized duty status and was not the result of the member's misconduct. Note: (ARC only). Unreported medical conditions that could have resulted in denial for entrance into a period of active duty should not be considered as having become unfitting merely because they are being reported while in status. For duration of orders greater than 30 days, the standard of proof is a preponderance of the evidence. Preponderance of the evidence is defined as the greater weight of credible evidence.
- NILOD, Not Due to Own Misconduct. Existed Prior to Service - Not Service Aggravated (EPTS-NSA). An informal LOD determination must be accomplished in every case where a NILOD-EPTS-NSA finding is made. This requirement applies to both RegAF/RegSF and ARC personnel. A NILOD-EPTS-NSA finding can only be made after a thorough review of the evidence determined that the member's illness, injury, or disease existed prior to the member's entry into military service with any branch or component of the Armed Forces or current periods of such service, and was not service aggravated. For duration of orders greater than 30 days, the standard of proof is clear and unmistakable evidence.
- *Clear and unmistakable* evidence means undebatable information that the condition existed prior to military service or if increased in service was not aggravated by military service. In other words, reasonable minds could only conclude that the condition existed prior to military service from a review of all of 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.
- 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. Accepted medical principles may be discerned through reference to medical literature. 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. This clear and unmistakable evidence shall be furnished to the member in conjunction with the finding to be used in any appeal efforts.

Paragraph 3.2.5. *Appeal of a Final LOD Determination.* A final LOD determination may be appealed once by the member if the following conditions are met by the appellant: provide the appeal in writing for any reason to the LOD Program Manager; submit the written appeal within 30 days of the LOD determination; and if there is any new and compelling evidence that was not previously considered, but is now present and indicates new information relevant to the appeal.

AIR FORCE EVALUATION

NGB/A1PS recommends denying the applicant's request to change, or appeal, his NILOD determination. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice that would result in a changed LOD determination. The applicant's package was reviewed in its entirety and confirms that the applicant was diagnosed with a unilateral inguinal hernia, without obstruction or gangrene, that he claims he incurred while performing PT while in a Title 10, deployed status.

According to AFI 36-2910, dated 8 Oct 15, paragraph 1.10.2.2, *Existed Prior to Service (EPTS)-Not Service Aggravated*, states that a determination of NILOD-Not Due to Member's Misconduct is made when an investigation has determined by clear and unmistakable evidence that the member's illness, injury, disease or underlying condition that caused it, existed prior to service. These conditions include chronic conditions where the incubation period rules out a finding that a condition starting during the period of active duty (AD), active duty for training (ADT), or inactive duty for training (IDT). NGB/SG determined that there is no indication of service aggravation beyond the natural progression as the condition would progress to the degree with or without military service as it is the natural progression of the underlying connective tissue disease.

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 15 Sep 22 for comment (Exhibit D), but has received no response.

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 recommendations of NGB/A1PS and NGB/SG and finds a preponderance of the evidence does not substantiate the applicant's contentions. 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 2.1, considered Docket Number BC-2022-00224 in Executive Session on 5 Oct 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 30 Dec 21.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, NGB/A1PS, w/atch, dated 13 Sep 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 15 Sep 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.12.9.

X

Board Operations Manager, AFBCMR