RECORD OF PROCEEDINGS

IN THE MATTER OF: XXXXXXXXXX

DOCKET NUMBER: BC-2022-00540

COUNSEL: XXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

1. Her Line of Duty (LOD) Determination of Not In-Line of Duty (NILOD) be reinvestigated and an In-Line of Duty (ILOD) determination be rendered.

2. She be reimbursed $1700.00 in counseling services that were not covered due to the NILOD determination.

3. She be allowed to appeal a Department of Veterans Administration (DVA) compensation claim for post-traumatic stress disorder (PTSD)/depression/anxiety/insomnia. **(Outside SECAF Authority – not for Board adjudication)**

APPLICANT'S CONTENTIONS

On 13 Oct 17, her best friend of over 13 years committed suicide in front of her while they were enroute to her scheduled unit training assembly (UTA). In her Memorandum for Record for Late Initiation of LOD, dated 6 Jun 18, she states that she did not initiate a LOD determination in the days following this incident because of the emotional stress she was under. When she found herself in a position to reflect on the events she realized that she met the requirements for an LOD and initiated a request for Post-Traumatic Stress Disorder (PTSD) disorder. However, the LOD Determination Board Approving Authority found her condition to be NILOD-Not Due to Member's Misconduct - Existed Prior to Service, Not Service Aggravated (EPTS-NSA).

According to the applicant's support documents, she appealed this determination decision based upon DAFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay,* which states there are two instances when NILOD-Not due to Member's Misconduct determination is made: paragraph 1.10.2.1 Absent Without Authority which is used "when a formal investigation determined the member's illness, injury, disease or death occurred while absent without authority; and paragraph 1.10.2.2 Existed Prior to Service (EPTS) – Not Service Aggravated (NSA) , which is used when a formal investigation determined by clear and unmistakable evidence that the member's illness, injury, or disease or the underlying condition causing it, existed prior to the member's entry into military service.

In regards to paragraph 1.10.2.1, she was not absent without authority as she was enroute to her duty location for inactive duty for training (IDT) and was therefore in a qualified duty status. As for paragraph 1.10.2.2., she argues that there is no clear and unmistakable evidence that the illness, injury, disease or underlying condition causing it, existed prior to her entry into military service or in periods between such service. The flight doctor along with the LOD technician stated in multiple records that there is no evidence of prior diagnosis of the illness, injury, or disease. Specifically, the Aeromedical Services Information Management System (ASIMS) Duty Limiting Condition (DLC) notes a diagnosis of PTSD with anxiety and depression related to bereavement and witness to suicide of her boyfriend. Additionally, when she filed her NILOD determination appeal, she provided all the required documentation, to include her physician

records and Military Entry Processing Station records, but the chief enlisted manager refused to upload her appeal in the Electronic Case Tracking (ECT) system. Because of this, she did not have the opportunity to appeal the NILOD determination with records that would disprove the finding of EPTS-NSA and as a result her appeal was denied. This traumatic incident was not due to her negligence or fault, it occurred while she was in status and should have been adjudicated as such.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a currently serving Air Force Reserve master sergeant (E-7).

According to documents provided by the applicant:

On 6 Jun 18, the applicant submitted a *Memorandum for Record for Late Initiation of LOD,* which indicates that she requested a late LOD determination, after researching the criteria for LODs and realizing that she met the requirements. On this same date, she signed an *Authorization & Request for Release of Confidential Information and Privileged Communication,* from Heritage Family Counseling Services, which indicates her request for all records pertaining to Bereavement from the Oct 17 incident be released to the XXXX Medical Squadron.

On 20 Jun 18, the applicant signed another *Authorization & Request for Release of Confidential Information and Privileged Communication,* from Heritage Family Counseling Services, which indicates an additional request for her initial session notes be disclosed to the XXXXth Medical Squadron.

According to the session notes, she was first seen by her Licensed Clinical Marriage and Family Therapist (LCFMT) on 24 Oct 17 for recently witnessing the death by suicide of her boyfriend and was diagnosed with Acute Stress Disorder. She was seen by her provider again on 7 Nov 17 and retained the same diagnosis with a chief concern of "recent event, witnessed boyfriend's death by suicide." On 19 Jun 18, she was diagnosed with PTSD with the same chief concern.

According to AF Form 348, *Line of Duty Determination*, signed 28 Jun 19, shows the applicant's condition was determined NILOD – Not Due to Member's Misconduct (EPTS-NSA). On 12 Feb 19, a LOD investigation was initiated and reflects that at the time of this occurrence the applicant was both present for duty and was traveling to or from inactive duty training (IDT), or between successive periods of IDT, and indicates that on 13 Oct 17 she witnessed her boyfriend's suicide and on 24 Oct 17, she sought treatment from a civilian provider who diagnosed her with PTSD, unspecified. On 6 Apr 19, her immediate commander's LOD determination recommendation was ILOD. On 7 May 19, the wing staff judge advocate concurred and on 20 May 19 the appointing authority's LOD determination was ILOD. On 2 Jun 19, the ARC LOD Board action/recommendation was ILOD. However, the ARC LOD Board medical review representative and the ARC LOD Board legal representative both non-concurred and recommended a new finding of NILOD – Not Due to Member Misconduct. On 28 Jun 19, the approving authority rendered a final LOD determination of NILOD – Not due to Member's Misconduct (only if EPTS-NSA with no indication of misconduct).

On 1 Jul 19, the applicant was notified of the approving authority's final NILOD – Not Due to Member's Misconduct determination, and acknowledged that she intended to file an appeal with the appellate authority.

On 31 Jul 19, the applicant submitted an appeal of the NILOD – Not Due to Member's Misconduct determination and requested a new determination be made.

On 28 Feb 20, the applicant was notified by AFRC/CV, Appellate Authority, that her appeal has been denied and the final determination remained NILOD – Not Due to Member's Misconduct.

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

APPLICABLE AUTHORITY/GUIDANCE

Air Force Instruction (AFI) 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP),* 8 Oct 15:

1.6. When an LOD Determination is Required.

1.6.8 For ARC, in addition to the situations listed above, an LOD determination, which is valid for one year for medical purposes, must be made when:

1.6.8.2. The member incurs or aggravates an illness, injury or disease while traveling directly to or from the place at which duty is performed.

1.6.8.3. The member dies, incurs, or aggravates an illness, injury or disease while remaining overnight immediately before and between successive periods of IDT, at or in the vicinity of the site of the IDT, if the site is outside reasonable commuting distance from the member's residence.

1.7. Additional Requirements.

1.7.1. An LOD determination is accomplished for a single illness, injury or disease and cannot be reused to claim subsequent benefits and entitlements after a member has been returned to duty without restrictions pertaining to the original illness, injury or disease.

1.7.1.1. If there is subsequent service aggravation of the illness, injury or disease, a new LOD determination must be accomplished.

1.7.4. ARC only. After release from active duty or IDT, members have 180 days to ensure any illness, injury or disease that was incurred or aggravated while in a duty status is reported for LOD determination consideration. When the member does not report his/her illness, injury or disease, the member is presumed to be able to perform military duties, does not require treatment and has no unresolved health condition rendering the member unable to meet retention or mobility standards IAW AFI 48-123, Medical Examinations and Standards. The only avenue for addressing previously unreported illness, injury or disease is through the VA.

1.8. Presumption of LOD Status.

1.8.1. An illness, injury, disease or death sustained by a member in any duty status is presumed to be ILOD. This presumption may be rebutted when evidence shows the member was NILOD.
1.8.2. Any medical condition, incurred or aggravated during one period of active service or authorized training in any of the Armed Forces, that recurs, is aggravated or otherwise causes the member to be unfit, should be considered incurred ILOD. A new LOD determination should be initiated if the condition recurs after an interval period of resumed fitness and is then subsequently aggravated or otherwise causes the member to be unfit.

1.9. Standard of Proof for LOD Determinations. Except where otherwise noted, the standard of evidentiary proof used in making an LOD determination is preponderance of evidence. Preponderance of evidence is defined as the greater weight of credible evidence.

1.10. LOD Determinations.

1.10.1. In Line of Duty (ILOD). 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.

1.10.1.1. For ARC members, this includes while the member was in any duty status (including direct travel status).

1.10.2. Not in Line of Duty (NILOD)-Not Due to Member's Misconduct.

1.10.2.2. Existed Prior to Service (EPTS)-Not Service Aggravated (NSA). A determination of NILOD-Not Due to Member's Misconduct is also made when an investigation determined, by clear and unmistakable evidence, the member's illness, injury, disease or the underlying condition causing it, existed prior to the member's entry into military service with any branch or component of the Armed Forces or between periods of such service, and was not service aggravated. EPTS-NSA conditions include chronic conditions and conditions where the incubation period rules out a finding that the condition started during any period of active duty, active duty for training (ADT) or IDT.

2.2. General Roles and Responsibilities.

2.2.1. Member. When a member incurs or aggravates an injury, illness or disease while serving in a duty status, the medical condition must be promptly reported within 24 hours to the member's commander and servicing medical facility/unit. (T-1) For ARC members, when not in a duty status, the medical condition must be promptly reported (ideally within 72 hours or less) to the member's commander and servicing medical facility/unit. (T-1)

2.2.1.1. Failure to report the injury, illness or disease in a timely manner will require a written explanation to the commander and servicing medical facility/unit. (T-1)

2.2.1.2. For ARC, members who fail to provide relevant supporting medical documentation within 5 working days of notification of the injury, illness or disease to the military medical provider may be processed for non-compliance. (T-1)

AIR FORCE EVALUATION

AFRC/SGO recommends denying the applicant's request, stating that there is no evidence of an error or injustice and that the NILOD finding be upheld. There are several reasons for this recommendation; the applicant was well aware of the LOD timelines as DAFI 36-2910 states it must be initiated within 180 days; she was receiving care shortly after the incident but did not request the LOD within DAFI 36-2910 driven timeline; and finally, there is no evidence that this tragic event was related to, or aggravated by, military service.

On 16 Jun 18, an LOD was initiated and subsequently cancelled as it was acknowledged that the applicant failed to report the medical condition, IAW DAFI 36-2910, within 72 hours and initiate an LOD within 180 days. On 12 Feb 19, a LOD was initiated and it was finalized on 1 Jul 19 with a determination of Not In-Line of Duty – Not Due to Member's Misconduct (EPTS-NSA) as it was felt by the LOD Board, to include JA and A1, that the condition existed prior to service

and was not service aggravated. The applicant acknowledged the finding and hand-checked the section stating that she may submit an appeal to the AFRC/CV, Appellate Authority, within 30 days. On 31 Jul 19, the applicant appealed the NILOD finding and although the she provided references from DAFI 36-2910, she provided no new medical evidence and claims that she was not allowed the opportunity to provide documentation, such as physician records or MEPS records to disprove the "existed prior to service" finding. On 28 Feb 20, the appeal was denied and the determination remained NILOD – Not Due to Member's Misconduct.

There are medical records, not submitted by the applicant, that include prior mental health diagnosis. She admits that she was dealing with multiple stressors at the same time of the incident so there is clear and convincing evidence that the condition existed prior to service (EPTS). Clear and convincing evidence is evidence indicating that the thing to be proved is probable or reasonably certain. It is a burden of proof that is higher than a preponderance of evidence, but lower than clear and unmistakable evidence. The applicant erroneously states that clear and unmistakable evidence is required to overturn an NILOD finding; however, in accordance with DAFI 36-2910, for members on orders of 30 days or less, the required standard of proof required to overturn a NILOD determination is preponderance of the evidence. Preponderance of the Evidence is defined as the greater weight of credible evidence. That evidence that, when fairly considered, produces the stronger impression and is more convincing as to its truth when weighed against opposing evidence.

DAFI 36-2910 requires filing of LODs within 180 days after completing their current duty status to report their medical conditions for a LOD determination. There are some exceptions to this to include mental health conditions which can be latent onset. In her case, she was receiving treatment several days after the incident so the 180 day requirement is mandated.

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 28 Apr 22 for comment (Exhibit D), and the applicant replied on 13 May 22. In her response, the applicant contends there are issues that have been brought up by the AFRC/SGO that she feels require clarification.

In response to SGOs comment regarding her failure to report the incident within 72 hours, the applicant contends that she reported the incident on 13 Oct 17 to her supervisor, first sergeant and commander, which was the same day the incident occurred. In addition, on 17 Oct 13, when she finally reported for her UTA, her commander should have placed her on pre-MEDCON orders and completed the AF Form 348, but he did not. As a result, the first LOD was not filed until 16 Jun 18 and was subsequently cancelled, because of the frequent turnover of her medical squadron. Furthermore while SGO suggests that it was canceled because she failed to report the incident within 72 hours, it should not impact her ability to request and obtain a LOD determination. In accordance with DAFI 36-2910, Paragraph 3.2.2.2.1, "Failure to report the injury, illness or disease in a timely manner will not impact a member's ability to request and obtain a Line of Duty determination, but will require a written explanation to the commander and servicing medical facility/unit providing rationale for the delayed reporting." As such, the LOD was erroneously cancelled and the statement from her commander explaining the delay was provided for the Jun 18 LOD submission.

In addition, the applicant states that the LOD technician failed to properly place all of diagnosis into the ECT program and for her 2019 appeal, she provided additional records from her therapist, along with DVA records, but again her servicing medical squadron did not load the records in ECT.

The applicant goes on to reference that the comment, "There are medical records not submitted by the member for this LOD…" are hurtful and should be accompanied by evidence. As she originally stated, she was going through a divorce, a custody battle, and dealing with homelessness, which did cause some anxiety and sad moods. However, this was very short lived and not something that she continuously suffered through. She was never, nor has she ever, been diagnosed with PTSD and for a medical professional to state that "there is clear and convincing evidence that the condition existed prior to service" is absurd. Moreover, DAFI 36-2910, Paragraph 1.12.1. states "For the purposes of DES processing, a prior service condition is any medical condition incurred or aggravated during one period of active service or authorized training in any of the Military Services that recurs, is aggravated, or otherwise causes the member to be unfit, should be considered incurred in the LOD, provided the origin of such condition or its current state is not due to the service member's misconduct or willful negligence or progressed to unfitness as the result of the intervening events when the service member was not in a duty status." In this respect, even if her condition did exist prior to service, then DAFI 36-2910 would still apply as the condition could have been aggravated and should be considered incurred in LOD.

Finally, the applicant states, that the records to disprove that PTSD existed prior to military service were provided and that there is a preponderance of the evidence that shows her initial diagnosis on 24 Oct 17. She was in a qualified duty status, and therefore should be presumed in the line of duty and the burden of proof is with the Air Force to overcome the presumption.

She is asking for a closer look at the facts of this case and the regulations and makes several other references to the AFI and other sources in regards to LOD investigations, suicide and PTSD. She says that any reasonable doubt should be resolved favorably to support a determination of ILOD. She is not looking for financial compensation, even though it was inappropriate that she had to pay $1700.00 for treatment because the LOD was not initiated or approved, nor was she given the opportunity to receive treatment under an interim LOD. She has never had a diagnosis of PTSD prior to military service and requests proper reconsideration of her LOD.

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. The applicant argues that clear and unmistakable evidence is required to overturn a NILOD finding; however, in accordance with DAFI 36-2910, for members on orders of 30 days or less, the standard of proof required to overturn a NILOD determination is preponderance of the evidence. Preponderance of the evidence is defined as the greater weight of credible evidence. That evidence that when fairly considered, produces the stronger impression and is more convincing as to its truth when weighed against the opposing evidence. Although the Board sympathies with the applicant regarding this tragic event, the Board determines that the preponderance of the evidence in her case shows that the condition existed prior to service. This evidence includes the applicant's medical records, which indicate a prior mental health diagnosis and the applicant's admission that she was dealing with multiple stressors at the same time of the incident. Furthermore, the applicant has provided no new evidence that was not previously presented in her initial LOD determination or her appeal. Therefore, the Board finds that the LOD

determination of NILOD – Not Due to Member's Misconduct (EPTS-NSA) is upheld and 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-2022-00540 in Executive Session on 24 Aug 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 15 Feb 22.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, AFRC/SGO, dated 25 Apr 22.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 28 Apr 22.
Exhibit E: Applicant's Response, w/atchs, dated 13 May 22.

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

Board Operations Manager, AFBCMR