

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-00610

COUNSEL: NONE

INDICATED

HEARING

REQUESTED:

NOT

APPLICANT'S REQUEST

She be awarded Incapacitation (INCAP) Pay for the period 28 Nov 16 through 12 Jul 21.

APPLICANT'S CONTENTIONS

Medical continuation (MEDCON) orders should have started when she filed a DD Form 2910, *Victim Reporting Preference Statement*, and line of duty for service aggravated post-traumatic stress disorder (PTSD) from military sexual assault on 28 Nov 16 continuing through the end of the Integrated Disability Evaluation System (IDES), which did not happen. She requests INCAP Pay in lieu of MEDCON orders.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a permanently disability retired Air Force staff sergeant (E-5).

On 27 Aug 21, according to AF Form 348, *Line of Duty (LOD) Determination*, a new LOD was completed due to the applicant's original diagnosis of generalized anxiety disorder was converted to PTSD. The approving authority determined her PTSD stemming from military sexual trauma (MST) in Aug 15, to be in line of duty (ILOD).

On 13 Oct 21, an Informal Physical Evaluation Board (IPEB) found the applicant's PTSD unfitting with a disability rating of 70 percent and recommended permanent retirement.

On 3 Nov 21, according to Special Order number Work-Product, dated 28 Oct 21, the applicant was relieved from active duty and on 4 Nov 21, she was permanently disability retired with compensable percentage for physical disability of 70 percent.

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

APPLICABLE AUTHORITY/GUIDANCE

On 3 Sep 14, the Secretary of Defense issued a memorandum providing guidance to the Military Department Boards for Correction of Military/Naval Records as they carefully consider each petition regarding discharge upgrade requests by veterans claiming PTSD. In addition, time limits to reconsider decisions will be liberally waived for applications covered by this guidance.

On 25 Aug 17, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued clarifying guidance to Discharge Review Boards and Boards for Correction of Military/Naval

Records considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions [PTSD, Traumatic Brain Injury (TBI), sexual assault, or sexual harassment]. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on the aforementioned conditions.

Under Consideration of Mitigating Factors, it is noted that PTSD is not a likely cause of premeditated misconduct. Correction Boards will exercise caution in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with the aforementioned mental health conditions and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

Boards are directed to consider the following main questions when assessing requests due to mental health conditions including PTSD, TBI, sexual assault, or sexual harassment:

- a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
- b. Did that condition exist/experience occur during military service?
- c. Does that condition or experience actually excuse or mitigate the discharge?
- d. Does that condition or experience outweigh the discharge?

On 25 Jul 18, the USD P&R issued supplemental guidance to military corrections boards in determining whether relief is warranted based on equity, injustice, or clemency. These standards authorize the board to grant relief in order to ensure fundamental fairness. Clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority Boards have to ensure fundamental fairness. This guidance applies to more than clemency from sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. Each case will be assessed on its own merits. The relative weight of each principle and whether the principle supports relief in a particular case, are within the sound discretion of each Board. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, the Board should refer to the supplemental guidance, paragraphs 6 and 7.

On 8 Sep 22, Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit F).

AIR FORCE EVALUATIONS

AFRC/SGO recommends partially granting the application. In accordance with AFI 36-2910, *LOD Determination, MEDCON, and INCAP Pay*, paragraph 6.12.2, the member is able to meet retention and mobility standards and therefore not eligible for MEDCON but cannot perform the member's civilian job duties and experiences a loss of earned income, to include wages lost due to accessing treatments. See Table 7.1 for INCAP Pay guidelines and processing. Paragraph 7.2.3.1. Able to Perform Military Duties. A member who is able to perform military duties (see paragraph 7.1), as validated by the military medical authority and determined by the immediate commander, but demonstrates a loss of civilian earned income as a result of an injury, illness or disease incurred or aggravated in the LOD, is entitled to pay and allowance, including incentive and special pay, but not to exceed the amount of the demonstrated loss of civilian earned income or the maximum pay entitlement (see paragraph 7.2.3.2), whichever is less.

On 7 Nov 17, the applicant was evaluated by military mental health and was placed on a code 37 and was considered not worldwide qualified and considered not suitable for military service. This does not mean that the applicant was not able to perform military duties but that a Medical Evaluation Board (MEB) or IDES case would be required. At this time, the applicant still appeared to be able to perform military duties and there was no documented loss of civilian income.

On 9 Jan 18, the applicant's provider recommended inpatient treatment through the Department of Veterans Affairs (DVA). The applicant was admitted on 26 Feb 18 and was discharged on 19 Mar 18.

Based on the fact the applicant was able to perform military duties and there was no loss of income, recommend disapproval of INCAP Pay beginning 28 Nov 16 but consideration could be made for INCAP Pay beginning when the applicant's provider requested inpatient hospital treatment dated 9 Jan 18. Although not specifically clear in the medical records, it appears that this is the first time at which there was clear documentation of the applicant's inability to perform military duties. Although the applicant apparently still had a job/income as far back as 9 Sep 18, this date shows a significant change in the applicant's mental health. It is recommended that INCAP Pay be considered for 9 Jan 18 until the date requested by the applicant, 12 Jul 21, or whenever IDES was completed.

The complete advisory opinion is at Exhibit C.

The AFRBA Psychological Advisor completed a review of all available records and finds sufficient evidence to partially support the applicant's request for INCAP Pay, beginning 9 Jan 18, as recommended by AFRC/SGO. The applicant may consider submitting new documentation for a reconsideration of her petition in the future, indicating an inability to perform military duties and loss of civilian income due to her psychiatric conditions as early as Nov 16, if such documentation exists.

The applicant stated that she seeks INCAP Pay "in lieu of MEDCON orders" which she claims should have started on 28 Nov 16. While a review of the service and post service medical records did indicate ongoing treatment for various mental health conditions since at least 2005, and PTSD related to MST since at least 2009, there was no clear evidence of inability to perform military duties or of a loss of income due to her ILOD condition(s) until the end of 2017, and possibly the beginning of 2018, when the applicant entered an in-patient psychiatric treatment program. Therefore, as stated in the AFRC/SGO advisory memorandum, there is insufficient evidence to support the applicant's claim for INCAP beginning in Nov 16, but some evidence does exist to substantiate an INCAP Pay award beginning in late 2017/early 2018, when her inability to continue in military service or to maintain employment was documented.

Liberal consideration is applied to the applicant's petition due to the contention of a mental health condition. The following are answers to the four questions from the policy based on the available records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge? There is evidence in the record that the applicant was being treated for EPTS – service aggravated psychiatric conditions for many years preceding her medical retirement, and that these conditions eventually became incompatible with the rigors of military service.

2. Did the condition exist or experience occur during military service? Yes.

3. Does the condition or experience excuse or mitigate the discharge? There was no misconduct that led to the applicant's discharge. The psychiatric conditions were found to be disabling and unfitting for continued military service.

4. Does the condition or experience outweigh the discharge? The applicant is not contesting her medical discharge. This consideration is therefore not applicable.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATIONS

The Board sent copies of the advisory opinions to the applicant on 24 Aug 22 for comment (Exhibit E) 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 the victim of an error or injustice. The Board concurs with the rationale and recommendation of AFRC/SGO and the AFRBA Psychological Advisor and finds a preponderance of the evidence substantiates the applicant's contentions in part. Specifically, the Board finds sufficient evidence the applicant was eligible for INCAP Pay beginning when the applicant's DVA provider requested inpatient hospital treatment on 9 Jan 18, and continuing through completion of the IDES process, 4 Nov 21. 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.
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 pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show she is entitled to receive INCAP Pay from 9 Jan 18 through 4 Nov 21.

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 Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2022-00610 in Executive Session on 10 Nov 22:

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 22 Feb 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory opinion, AFRC/SGO, dated 16 May 22.
- Exhibit D: Advisory opinion, AFRBA Psychological Advisor, dated 24 Aug 22.
- Exhibit E: Notification of advisory, SAF/MRBC to applicant, dated 24 Aug 22.
- Exhibit F: Letter, SAF/MRBC, w/atc (Liberal Consideration Guidance), dated 8 Sep 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9 for Docket Number BC-2022-00610.

X

Board Operations Manager, AFBCMR