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**UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS**

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-01294

Work-Product

COUNSEL: *Work-Product*

HEARING REQUESTED: YES

APPLICANT'S REQUEST

He receive Incapacitation (INCAP) Pay for the time period of 17 Mar 14 – 16 Sep 14.

APPLICANT'S CONTENTIONS

Following his Line of Duty (LOD) appeal, his LOD determination was found to be In the Line of Duty (ILOD) and he applied for INCAP Pay which is yet to be approved and he has exhausted all options at the wing level.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is an Air Force Reserve staff sergeant (E-5).

On 14 Apr 14, according to his DD Form 214, *Certificate of Release or Discharge from Active Duty*, he served in support of Operation ENDURING FREEDOM from 1 Sep 13 - 16 Apr 14.

On 4 Jun 14, according to AFRC IMT 348, *Informal Line of Duty Determination*, Case *Work-Product Work-Product* undated, the applicant was diagnosed with Post-Traumatic Stress Disorder (PTSD) with depression. Additionally, the diagnosis states he was diagnosed with generalized anxiety disorder in 2010; has been treated for depression; symptoms of PTSD, which started during post-deployment on Jun 14; and was diagnosed with PTSD by West-LA VMAC on 11 Jun 14.

On 3 - 4 May 14; 12 - 13, 23 - 24 Jul 14; 9 - 10 Aug 14; 13 - 14 Sep 14; and 4 - 5 Oct 14, according to the applicant's Point Credit Summary report, dated 13 Dec 22, pulled from the Military Personnel Database System, the applicant attended Inactive Duty For Training (IDT) and accrued retirement points and pay for those dates.

On 20 Sep 14, according to Department of Veterans Affairs letter provided by the applicant, dated 18 Sep 14, he was scheduled to be admitted to the department's Men's Trauma Recovery Rehabilitation Program.

On 16 Oct 14, according to AFRC IMT 348, *Work-Product* the applicant's condition was determined Existed Prior to Service (EPTS)-LOD not Applicable. The applicant was mobilized for a deployment from 1 Sep 13 – 16 Apr 14. On 19 Sep 14 he alerted his supervisor that he was seeking treatment for a deployment related issue after visiting the VA emergency room on 4 Jun 14 for treatment for depression. On 19 Sep 14 his commander was notified of his condition, no specifics, just PTSD related to a previous deployment and that his supervisor did not mention any

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issues that occurred during the deployment to Kuwait. On 17 Oct 14, the staff judge advocate (SJA) concurred and on 19 Oct 14, the appointing authority determined his condition to be Existed Prior to Service (EPTS)-LOD not Applicable and Forward to HQ AFRC LOD Board. On 4 Nov 14, the AFRC LOD Board concurred and on 27 Nov 14 the legal reviewer concurred. On 1 Dec 14, the approving authority determined the applicant's LOD to be EPTS-LOD not Applicable.

On 16 May 15, according to AFRC IMT 348, **Work-Product** the applicant's commander recommended a Formal LOD Investigation based on the finding of the informal LOD investigation. The informal investigation reveals that on 20 Apr 15, the applicant received initial treatment and was diagnosed for "Rape, adult," and states that while deployed to Al Saleem AB, Kuwait, between 1 Sep 13 and 20 Apr 14, the applicant reported he was struck over the head, knocked unconscious, and sexually assaulted. On 24 Jun 15, the SJA advocate concurred and on 17 Jul 15, the appointing authority determined that a Formal Investigation be conducted.

On 18 Aug 15, according to DD Form 261, *Report of Investigation – Line of Duty and Misconduct Status*, **Work-Product** the investigating officer (IO) determined it was ILOD finding that the member experienced a traumatic event while deployed causing severe Post Traumatic Stress Disorder (PTSD) symptoms and the event is suspected to be military sexual trauma (MST). On 1 Sep 15, the appointing authority disapproved and substituted a finding of: EPTS – Service Aggravated. He states while there is no way to determine whether or not the MST occurred, the medical documentation points to a deterioration in the applicant's ability to function post-deployment and attributes this to PTSD. However, given that the applicant suffered some level of depression prior to deployment, and that he cannot say with certainty that the sexual assault occurred as claimed, the appointing authority made a recommendation based on the PTSD symptoms and diagnosis alone and found it to be Not ILOD (NILOD) – EPTS – Service Aggravated. On 9 Dec 15, the final approval authority determined it to be NILOD– Not Due to Own Misconduct.

On 20 Jan 16, according to the Department of Veterans Affairs letter provided by the applicant, dated 22 Mar 16, he was informed that his PTSD compensable percentage was changed from 50 percent to 100 percent.

On 9 Feb 21, according to HQ AFRC/CV memorandum, *Line of Duty Determination Appeal Decision – Attorney-Client* **Work-Product** provided by the applicant, the appellate authority approved the applicant's appeal request and determined it to be ILOD.

On 18 Feb 21, according to the AF Form 1971, *Certification for Incapacitation Pay*, having been notified of his LOD approval, he requested INCAP Pay for the period of 17 Mar 14 to 16 Sep 14. On this same date, according to the memorandum, *Statement of Earned Civilian Income*, the applicant certified his civilian income, to include income from self-employment and all non-military income, for the incapacitation period of 17 Mar 14 to 16 Sep 14 was \$0.

On 16 Mar 21, in an email provided by the applicant, the wing INCAP Program Manager (PM) informed him that "everything looks good on my side of the house" and that the Initial INCAP Pay Package was forwarded to medical for review.

On 18 Aug 21, in an email provided by the applicant, the wing Health Service Management sent the applicant a DD Form 2870, *Authorization for Disclosure of Medical or Dental Information*, with a request to complete and submit back, which the applicant complied with the same day.

On 19 Apr 22, in an email provided by the applicant, he requested a status update from the wing INCAP PM of his INCAP Pay request.

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On 19 Jul 22, according to AF Form 1971, Part V, *Reserve Pay Office or ANG Financial Management Office*, Block 14, *Member has loss of earned income* is marked "NO". Block 15, *Date of loss of earned income* is left blank. Part V was signed by the Reserve Pay Office Certifying Authority.

On 10 Aug 22, according to Special Order Number [REDACTED] *Work-Product* dated 26 Jul 22, he was permanently retired in the grade of staff sergeant with a compensable percentage for disability of 70 percent.

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

APPLICABLE AUTHORITY/GUIDANCE

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

Paragraph 6.1 states the purpose of INCAP Pay is to authorize pay and allowances (less any civilian earned income) to those members who are not able to perform military duties because of an injury, illness or disease incurred or aggravated in the line of duty; or to provide pay and allowances to those members who are able to perform military duties (see para. 6.2.2) but experience a loss of earned income as a result of an injury, illness or disease incurred or aggravated in the line of duty (37 U.S.C. § 204).

In accordance with (IAW) paragraph 6.2, INCAP Pay eligibility requires an LOD determination of ILOD and a finding by a credentialed military medical provider that the member has an unresolved health condition requiring treatment that renders the member unable to perform military duties, **or is able to perform military duties but demonstrates a loss of civilian earned income.**

IAW paragraph 6.2.1. **Unable to Perform Military Duties.** A member, who is unable to perform military duties (unable to meet retention or mobility standards IAW AFI 48-123), as determined by a military medical authority and the member's immediate commander, due to an injury, illness or disease incurred or aggravated in the line of duty, is entitled to full pay and allowances (including all incentives and special pays to which entitled, if otherwise eligible) IAW para. 6.2.3, less any civilian earned income. **The member shall not be allowed to attend IDT periods or to acquire retirement points for performing IDTs while receiving INCAP Pay.**

IAW paragraph 6.2.2. **Able to Perform Military Duties.** A member who is able to perform military duties (see para. 6.5.1.3), as validated by the 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 line of duty, 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 para. 6.2.3), whichever is less. (T-1).

IAW Paragraph 6.4.1.1.14. If the member is claiming loss of earned income: Employer/employee release statement and Statement from Civilian Employer (on Company Letterhead); If employed, pay statement (i.e., pay stub, pay statement or civilian leave and earning statement) from civilian employer; If self-employed, self-employed/unemployment statement, gain/loss statement and income protection statement.

AIR FORCE EVALUATION

AFRC/A1KK recommends granting the applicant's request. Based on the documentation provided by the applicant and analysis of the facts, there is evidence of an error or injustice as the applicant's INCAP Pay application was not processed in a timely fashion by his assigned wing. On 9 Feb 21, the applicant received an ILOD determination after his LOD Appeal was approved by the Appellate Authority. On or about 18 Feb 21 he submitted a signed application for INCAP Pay to his wing's INCAP Program Manager. A series of email exchanges for additional documents between his representative (sister), his squadron commander, and the INCAP PM, shows that his INCAP application was forwarded on 16 Mar 21 to the servicing medical unit by the INCAP PM. Extensive email documentation provided by the applicant shows that his INCAP application was not "actioned again" until Aug 20 when the servicing medical unit sent the applicant a DD Form 2870 with a request for him to sign and submit. On 24 Aug 21, the servicing medical unit then forwarded the INCAP package to his squadron commander, who on 25 Aug 21 recommended approval.

On 6 Sep 22, the wing INCAP PM confirmed the above timeline and cites a gap in the processing of the INCAP Pay request from 25 Aug 21 until a follow up on 27 Apr 22 when the package, which was lost between the applicant's unit and medical, had to be re-created. On 24 May 22, it was forwarded to the wing financial management (FM) office. On 19 Jul 22, FM replied that the applicant needed to provide a recoupment letter, which he did so on 29 Jul 22. On 11 Aug 22, the INCAP package was sent back to FM and on 30 Aug 22, the package was forwarded to the wing staff judge advocate where, as of 6 Sep 22, it currently resides.

The complete advisory opinion is at Exhibit C.

AFRC/SGO recommends denying the applicant's request for INCAP Pay for the dates of 17 Mar 14 – 16 Sep 14. Based upon documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice. The applicant was able to participate in military drills as there is evidence that the applicant completed and was paid for drill. In accordance with AFI 36-2910, unless he is able to show loss of civilian income for this time period, he was not eligible for INCAP Pay. However, based on the only available documentation, beginning 20 Oct 14, on his admission to inpatient treatment until he was medically retired, he was unable to perform military duties.

MEDCON or INCAP approval does not involve AFRC/SGO. However, it should be noted that generally if a member is on MEDCON or INCAP Pay for over six months, SAF or AFRC/SGO approval is required.

The complete advisory is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

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

ADDITIONAL AIR FORCE EVALUATION

On 24 Jan 23, AFRC/A1KK provided a revised advisory opinion and now recommends denying the applicant's request for INCAP Pay for the period of 17 Mar 14 – 16 Sep 14. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice. Based upon his credited participation during the requested time period and lack of

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demonstrated loss of civilian income, the member appears ineligible for INCAP Pay IAW AFI 36-2910. However, there is evidence of an error or injustice in terms of his LOD and INCAP Pay application being processed in a timely manner. AFI 36-2910, Table 6.1 dictates that supporting agencies have a total of 30 workdays from the date the member submits an Initial INCAP Pay application to coordinate all requests. It is evident the applicant complied with all the requirements as guided by supporting wing agencies after being notified of his approved ILOD and discrepancies related to timelines should not be held against the applicant after receipt of the ILOD. The wing INCAP PM was contacted in support of this advisory, confirmed the following timeline and stated that the package had been lost between the medical and the member's unit from Aug 21 – Apr 22 at which time it was re-created by the INCAP PM to continue routing.

Initial timeline:

- Applicant was mobilized from 30 Aug 13 – 20 Apr 14.
- After returning, applicant participated in Annual Tour (AT) and Unit Training Assemblies (UTAs) through Oct 14.
- Applicant's last credited participation was 4-5 Oct 14.
- On 7 Oct 14, LOD Case 20141007-008 was initiated and resulted in an EPTS-LOD not Applicable determination
- Apr 15; a second LOD Case #20150429-006 was initiated for a different condition covering the same deployment period/period of active duty status and was investigated as a Formal LOD resulting in a NILOD determination.
- Nov 20; the applicant was allowed to submit an appeal for Case #20150429-006 as both the unit commander and AFRC/SG confirmed he was not properly notified of the appeal process at the wing level.
- On 9 Feb 21, Member was notified by the wing INCAP PM of his appeal ILOD determination and the potential for INCAP Pay.
- On 18 Feb 21, the applicant begins his application and coordination of INCAP Pay requirements with the INCP PM.
- 16 Mar 21, the INCAP PM notified the applicant and his representative that she had all needed documents and his INCAP Pay request was forwarded to the serving RMU (reserve medical unit).
- On 8 Aug 21, the military medical provider at the RMU signed the applicant's AF Form 1971, designating the applicant as "unable to perform military duties. It continued to process with the RMU through 18 Aug 21.
- 25 Aug 21, the applicant's commander signed the AF Form 1971 recommending "Approval" of the applicant's INCAP Pay request.

Most recently, it has been reviewed by the wing staff judge advocate (JA) who identified several concerns with the applicant's request not already addressed and these relevant concerns were investigated.

a. Duty Restrictions and Member Participation. Although the applicant may have been unable to perform military duties at the time of his INCAP Pay application, his participation record supports that he was able to perform military duties during requested INCAP Pay period.

b. Eligibility. IAW AFI36-2910, paragraph 6.2, because he was able to perform all military duties, met all known UTA and AT required during that time period and was already credited for that participation, he is ineligible for INCAP Pay during the requested period unless proof of a loss of civilian earned income can be produced.

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c. Entitlement and Calculations. At this time the applicant has not demonstrated a loss of civilian earned income for the requested period, only that civilian income was not received.

However, since the member has already retired, this advisory defers to the Board's decision as to whether an eligibility date of 20 Oct 14 should be considered for an Initial INCAP request; if the existing AF Form 469, dated 24 Nov 15 applies; or if more information beyond AFRC/SG's advisory opinion is needed. However, the following should be verified to properly validate and/or calculate a future entitlement/extension:

a. A new Civilian Earned Income Declaration reflecting the full dates the member did not receive civilian income before his medical retirement on 10 Aug 22.

b. A statement of unemployment from the member and clarification as to the dates the member continued to receive Social Security Disability benefits after Dec 16.

c. Any additional medical documentation substantiating the applicant's treatment post-Jun 14.

The complete advisory opinion is at Exhibit F.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 25 Jan 23 for comment (Exhibit G), 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 recommendation of AFRC/A1KK and AFRC/SGO and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board finds although the applicant may have been unable to perform military duties at the time of his INCAP Pay application, his participation record supports he was able to perform military duties during the requested INCAP Pay period and because he was able to perform all military duties, met all known UTA and AT required during that time period and was already credited for that participation, he is ineligible for INCAP Pay during the requested period unless proof of a loss of civilian earned income can be produced. As such, the applicant has not demonstrated a loss of civilian earned income during the requested period, only that civilian income was not received. Therefore, the Board determines that in accordance with the governing directives, he does not meet the INCAP Pay eligibility requirements. The Board takes note of the wing staff judge advocate's comments and determines that based upon the information provided, eligibility for a revised INCAP Pay period cannot be validated at this time. However, should the applicant provide proof of loss of civilian income, the Board is willing to reconsider his request. Therefore, based on the information provided the Board recommends against correcting the applicant's record.
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 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-2022-01294 in Executive Session on 22 Feb 23:

<i>Work-Product</i>	Panel Chair
<i>Work-Product</i>	Panel Member
<i>Work-Product</i>	Member

All members voted against correcting the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 3 May 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFRC/A1KK, w/atchs, dated 11 Oct 22.
- Exhibit D: Advisory Opinion, AFRC/SGO, dated 20 Dec 22.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 23 Jan 23
- Exhibit F: Additional Advisory Opinion, AFRC/A1KK, dated 24 Jan 23.
- Exhibit G: Notification of Advisory, SAF/MRBC to Applicant, dated 25 Jan 23.

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.

9/19/2023

X *Work-Product*

Work-Product

Board Operations Manager, AFBCMR
Signed by: USAF