



Work-Product

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

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02141

Work-Product

COUNSEL: NONE

HEARING REQUESTED: YES

### APPLICANT'S REQUEST

She be paid incapacitation (INCAP) pay for the past 11 years because she was unable to attend inactive duty training (IDT).

### APPLICANT'S CONTENTIONS

She was determined to be medically unable to attend IDT in 2011. She applied for INCAP pay but her application was lost or misplaced. She was not aware of the process and no one explained the process to her and just gave her the papers to sign in 2020. Her unit did not process her application for INCAP pay in a timely manner and admitted to "dropping the ball." She did everything properly on her end and was told the process was being handled. She should be retroactively paid because her injuries were service-connected and were the reason she was unable to work.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is a medically retired Air Force Reserve staff sergeant (E-5).

On 10 May 13, AFRC IMT 348, *Informal Line of Duty Determination*, indicates the appointing authority and the staff judge advocate concurred with the decision the applicant's concussion, orbital floor fracture and right knee injury were found in the line of duty (ILOD). The date of the initial treatment was reported as 25 May 09.

On 13 Jul 15, AFRC IMT 348, indicates the appointing authority concurred with the decision the applicant's migraine, unspecified was found ILOD with a decision to forward to HQ AFRC Line of Duty (LOD) board. On 18 May 17, the AFRC LOD Board Review non-concurred with the appointing authority and found the applicant's condition existed prior to service (EPTS), LOD Not Applicable. On 5 Jun 17, a legal review was conducted and concurred with the appointing authority and recommended the applicant's migraines be found ILOD. On 17 Jun 17, the approving authority found the applicant's condition ILOD.

**AFBCMR Docket Number BC-2022-02141**

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Controlled by: SAF/MRB

CUI Categories: Work-Product

Limited Dissemination Control: N/A

POC: [SAF.MRBC.Workflow@us.af.mil](mailto:SAF.MRBC.Workflow@us.af.mil)

On 5 Jun 17, AFRC IMT 348, indicates the appointing authority concurred with the decision the applicant's Post-Traumatic Stress Disorder (PTSD) and Major Depressive Disorder (MDD) were found in the line of duty (ILOD) with a decision to forward to HQ AFRC Line of Duty (LOD) board. On 29 Aug 18, the approving authority found the applicant's conditions ILOD.

Dated 18 Oct 20, AF Form 1971, *Certification for Incapacitation Pay*, indicates the applicant signed an application for initial INCAP pay for the period of 16 Sep 09 through 3 Mar 09 [sic]. No other authorization or approval is indicated on the form.

On 18 Jan 22, AF IMT 618, *Medical Board Report*, indicates the applicant was referred to the Informal Physical Evaluation Board (IPEB) for PTSD, MDD, and Migraines.

On 2 Feb 22, AF Form 356, *Informal Findings and Recommended Disposition of USAF Physical Evaluation Board*, indicates the applicant was found unfit due to her medical conditions of PTSD with MDD and migraine headaches with a combined disability compensation rating of 90 percent with a recommendation of "Permanent Retirement."

On 3 Feb 22, AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, indicates the applicant agreed with the findings and recommended disposition of the board and waived her rights for any further appeal.

Dated 11 Feb 22, Special Order **Work-Product** indicates the applicant was permanently disability retired in the grade of staff sergeant with a compensable percentage for physical disability of 90 percent, effective 2 Mar 22.

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

## **APPLICABLE AUTHORITY/GUIDANCE**

U.S.C. Title 37, Section 204, Subsection (a)(g) states a member of a reserve component of a uniformed service is entitled to the pay and allowances provided by law or regulation for a member of a regular component of a uniformed service of corresponding grade and length of service whenever such member is physically disabled as the result of an injury, illness, or disease incurred or aggravated in line of duty while performing active duty or inactive duty training or while traveling to such training. Paragraph (g)(2) further states in the case of a member who receives earned income from nonmilitary employment or self-employment performed in any month in which the member is otherwise entitled to pay and allowances under paragraph (1), the total pay and allowances shall be reduced by the amount of such income. Paragraph (i)(2) further stipulates pay and allowances may not be paid under subsection (g) or (h) for a period of more than six months. The Secretary concerned may extend such period in any case if the Secretary determines that it is in the interests of fairness and equity to do so.

## **AIR FORCE EVALUATION**

AFRC/SGO recommends partially granting the applicant's request for INCAP pay for a period, not to exceed, 24 months; however, AFRC/SGO is unable to verify whether she could perform her civilian duties which would help to determine pay entitlements for INCAP pay. It is safe to say it was best for the applicant to not perform her military duties beginning in 2020 when she was found unfit by mental health. Based on available documentation and analysis of the facts, there is evidence of an error or injustice. The applicant appears to have been eligible for INCAP pay based on the date it was requested by the applicant. It is unclear as to why this was not processed. This INCAP pay would likely have been extended at six month increments so she may continue through the initial review in lieu of (IRILO) and Integrated Disability Evaluation Process (IDES) process.

The "No Pay/No Points" policy which was present until 2018, is completely separate from the LOD and INCAP pay policy. It is unclear as to why a request for a participation waiver beginning in 2010 was not submitted/approved, but "No Pay/No Points" is unrelated to LOD. INCAP entitlements are tied to a LOD. Given the applicant claims she suffered a fracture in May 09 but remained deployed goes to show the fracture was not duty limiting and would not be likely eligible for INCAP pay. In addition, this LOD was not completed until 2012. By this time, the fracture was not acute and therefore the applicant would likely have been returned to duty for this condition. The LOD for migraines was not initiated until 2015 and the LOD for MDD/PTSD was not initiated until 2017. The applicant did have migraines but the majority of her fitness for duty was based on her mental health diagnosis which was not considered "not world-wide qualified" until 2016. Based on medical information available, the applicant should have had an IRILO initiated but she did not get an ILOD finding until 2018 which would have been required for a Medical Evaluation Board (MEB) and for INCAP pay. The applicant therefore could have requested INCAP pay in 2015 when the LOD for migraines was initiated.

AFRC/SGO has no knowledge if/when the applicant was able to perform civilian duties. This would be important to help determine pay entitlements for INCAP pay. Based on DAFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*, members should be returned to duty or sent to IDES after 12 months of receiving INCAP pay. If the applicant had requested INCAP pay in 2010/2011, then a line of duty would have been required to be submitted at this time as well. The applicant was found disqualified in 2021 and medically discharged Feb 22 after undergoing the IDES process. The applicant could have requested INCAP pay again in 2017 when her LOD was initiated for PTSD/MDD; however, AFRC/SGO cannot address if INCAP pay can be retroactively paid based on no request from the applicant as INCAP pay must be requested, as it is not an automatic payment. Furthermore, AFRC/SGO has no clarity as to her performance of her civilian duties. The DAFI referenced above does state applicants should not be on INCAP pay for more than one year without a return to duty (RTD) or IDES processing. Estimating the applicant takes at least 12 months from being disqualified to work through the IDES process, if INCAP pay is approved, recommend INCAP pay not be given for more than 24 months.

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 30 May 23 for comment (Exhibit D), but has received no response.

### **ADDITIONAL AIR FORCE EVALUATION**

AFRC/A1KK recommends partially granting the applicant's request for INCAP pay for a period, not to exceed, six months awarding her INCAP pay for missed military duty. Based on the documentation provided by the applicant and analysis of the facts, there is evidence of an error or injustice. The applicant provided an AF Form 1974, signed on 18 Oct 20, requesting retroactive pay for the dates between 16 Sep 09 to 3 Mar 09. She provided it to her servicing wing for processing to which the unit confirmed receipt but did not finish processing it as outlined in DAFI 36-2910. Evidence provided shows the applicant received an INCAP financial brief signed on 9 Dec 20. Before the applicant was medically retired, she along with several helping agencies, made multiple attempts to secure the status of her INCAP pay application between 2021 and 2022. However, the applicant did not provide any supporting documentation to demonstrate a loss of civilian earned income to support her claim. There is no evidence to support INCAP pay or INCAP pay extensions were requested for dates outside, or prior to the initial INCAP request on 18 Oct 20.

Per DAFI 36-2910, paragraph 6.1, 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 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). Paragraph 6.2 states INCAP pay eligibility requires an LOD determination of ILOD and a finding by a credentialed military medical provider 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. Paragraph 6.2.4 states pay and allowances under this instruction shall be paid only during the period a member remains unable to perform military duties or is able to perform military duty 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.

The complete advisory opinion is at Exhibit E.

### **APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 29 Jun 23 for comment (Exhibit F), 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/A1KK and finds a preponderance of the evidence substantiates the applicant's contentions in part. Specifically, the evidence provided shows an application for INCAP pay, signed on 18 Oct 20, and an INCAP financial brief, signed on 9 Dec 20, which is sufficient to justify granting the applicant's request to receive INCAP pay for her missed military duty for six months starting on the date of her application. 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. The Board finds no evidence to support INCAP pay or INCAP pay extensions were requested prior to or after the initial INCAP pay request on 18 Oct 20 nor do they find a preponderance of evidence to support awarding INCAP pay beyond six months. Per U.S.C. Title 37, Section 204, Paragraph (i)(2) pay and allowances may not be paid for a period of more than six months. The Secretary concerned may extend such period in any case if the Secretary determines it is in the interests of fairness and equity to do so. 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 Incapacitation (INCAP) pay from 18 October 2020 through 17 April 2021.

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 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-2022-02141 in Executive Session on 26 Jul 23 and 30 Jul 23:

Work-Product	Panel Chair
Work-Product	Panel Member
Work-Product	Panel Member

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 5 Aug 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory opinion, AFRC/SGO, atch, dated 11 May 23.
- Exhibit D: Notification of advisory, SAF/MRBC to applicant, dated 30 May 23.
- Exhibit E: Advisory opinion, AFRC/A1KK, dated 23 Jun 23.
- Exhibit F: Notification of advisory, SAF/MRBC to applicant, dated 29 Jun 23.

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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.

2/1/2024

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Board Operations Manager, AFBCMR

Signed by:

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**AFBCMR Docket Number BC-2022-02141**

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