

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02756

XXXXXXXX

COUNSEL: XXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

He be placed back on Medical Continuation (MEDCON) orders from 28 May 22 through present for continued Integrated Disability Evaluation System (IDES) processing.

APPLICANT'S CONTENTIONS

He was incorrectly released from MEDCON orders, due to his inappropriate IDES case deferment/disenrollment, while still requiring ongoing treatment for a duty limiting condition sustained in the line of duty (ILOD) during his active duty (AD) tour. He was unable to perform the duties of his Air Force Specialty Code (AFSC) and surgery was necessary to resolve the ILOD conditions.

In support of his contentions, the applicant cites the following regulations: Department of Defense Instruction (DoDI) 1241.01, dated 19 Apr 16, "When an RC Service member is on active duty (AD) or full-time National Guard duty (FTNGD) for a period of more than 30 days and, at the scheduled end of that period, has unresolved in-LOD condition that may render the member unfit for duty under the Disability Evaluation System (DES), but this has not yet been determined by the DES, the member...WILL, with his or her consent, BE RETAINED on AD until: 1. Outstanding in-LOD conditions are resolved; or 2. He or she is either found fit for duty, separated, or retired as a result of a DES;" Air Force Instruction (AFI) 36-3212, *Physical Evaluation for Retention, Retirement and Separation*, 2 Feb 06, paragraph 8.6.2, "ARC members who incur or aggravate an injury, illness or disease in the line of duty while on order for more than 30 days are not involuntarily released from those orders until final disposition of their disability case. The members' entitlement to full pay and allowances and benefits continue to the same extent provided by law or regulation to regular component members;" and AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*, dated 8 Oct 15, paragraph 5.1.1, "'MEDCON orders shall begin when the condition renders the member unable to perform military duties."

Furthermore, in a near exact AFBCMR case, the Board concluded that another Air Reserve Component (ARC) member's MEDCON orders should be backdated. The board recommended that the member should have been retained, ensuring his rightful entitlement to continuation on AD until final disposition of his case. It is clear that he should not have been released from AD orders as he was still receiving weekly treatment for this issue. He could not perform the duties of his AFSC and could not return to his civilian job (which may render him unfit for duty).

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is an Air National Guard major (O-4).

On 1 May 19, according to the applicant's DD Form 214, *Certificate of Release or Discharge from Active Duty*, the applicant was placed on active duty orders for the purpose of MEDCON through 27 May 22.

On 20 Nov 19, according to a memorandum for record from the Chief of Ophthalmology at XXXXX Medical Center, dated 28 Jun 21 and an Operative Report from the Center, provided by the applicant in his rebuttal to the OPR advisory, indicate he had a retinal hole and dislocated intraocular lens in the left eye and underwent successful surgery, which resulted in his visual improvement.

On 15 Apr 22, according to the AFPC/IGQ Memorandum For Record (MFR), *Inspector General Complaint of Analysis of (XXXXXXX)*, dated 21 Jul 22, the applicant requested, via myPers, an extension to his MEDCON orders from AFPC/DPFAM.

On 20 May 22, according to the National Guard Bureau/Medical Standards Branch (NGB/SGPS) Form FL4, the XXX Medical Group (MDG) was informed that the applicant's case has been reviewed and his defect(s) may render him not qualified for worldwide duty. Further, it directed the MDG to conduct a medical evaluation board (MEB) and to forward the completed MEB to HQ AFPC no later than 24 Aug 22. In addition, they were instructed the applicant must be placed on an AF Form 469, *Duty Limiting Condition Report*, with a Medical Mobility Restriction for MEB/PEB processing, Code 37, until Disability System processing is completed.

On 23 May 22, according to the myPers thread, the applicant's request for MEDCON extension was denied listing the reasons for denial as the applicant does not currently meet MEDCON eligibility due to disenrollment from the DES and lack of an active treatment plan.

On 21 Jun 22, *according to the DoD Case Referral*, the applicant contacted the DoD Office of Investigations (OIG) via the DoD Hotline with the allegation of failure to follow regulations. His complaint description is as follows: "I was wrongfully removed from Federal Title 10 Active Duty Medical Continuation (MEDCON) orders today, 27 May 2022, even though I received a memo dated 20 May 2022, from the National Guard Bureau, directing me BACK into the Military Disability Evaluation System until completion. The MHS Genesis website program proves that I did have two military medical appointments scheduled per week and I show for work everyday. This violates the DoDI 1241.1 and other Military Codes that I will attach to this complaint. I feel discrimination as a National Guard member by this action despite my Federal Title 10 Active Duty Status." The DoD OIG referred the case to the Department of the Air Force (DAF) IG.

On 22 Jun 22, according to the *Case File Worksheet, XXXXXX*, the DAF/IG assigned the complaint to the AFPC/IG for resolution.

On 21 Jul 22, according to the AFPC/IGQ MFR, dated 21 Jul 22, the AFPC/IGQ Complaints Resolution Specialist stated that upon review of the applicant's complaint, myPers information, and Department of Defense Instructions they did not identify any credible evidence of violation of law, instruction, regulation, or policy.

On 12 Aug 22, according to the email from the 15 Medical Group (MDG), *Request 4th Reenrollment VTA Case #(XXXXXXXXXX)*, the XX MDG Physical Evaluation Board Liaison Officer (PEBLO) requested approval to reenroll MEB case for the fourth time and referenced the following status of his previous cases:

a. 1st Case, #XXXXXX from 2018, the applicant was disenrolled due to continuation of Medical Health care and additional unfitting conditions being established which caused the case to stall.

b. 2nd Case, #XXXXXXXX in 2019, the case was disenrolled in the appeals stage due to loss of the PEBLO and low manning in the MEB office.

c. 3rd Case #XXXXXXXX was deferred in 2021 due to missing impartial review documentation, numerous LODs requiring AFPC/DFPA reviews not being reviewed. Further, they state since this deferral the member's exams along with several other required documentation has expired and before the member can be reenrolled, the MDG requires IDES compliance and Pentagon approval.

On 20 Sep 22, the Director, Disability Evaluation System (DES) responded they requested a new case be created and that they will forward the new number when they get it. In the response, they note that, among other reasons, that loss of personnel is also not a reason for disenrollment.

On 14 Dec 22, according to *Case File Worksheet XXXXXXXXX*, the applicant filed an IG complaint with the XX Wing (WG)/IG alleging a violation of AFI 36-2910, paragraph 1.6.8. On 15 Dec 22, the XX WG/IG responded, in an email, to the applicant acknowledging receipt of his complaint and states that based on an initial review of the information provided and a review of his previous IG complaint for the same issue(s), they recommend he initiates the complaint with the AFPC/IGX for the best path of resolution for his case.

On 13 Jan 23, a pull from the Military Personnel Database System provided the applicant's Point Credit Accounting Summary report, which confirms he has been on continuous active-duty status for his Retention and Retirement years 1 Jun 14 through 31 May 22.

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 6.1. Purpose. The primary purpose of MEDCON is to facilitate the authorization for access to medical and dental care for members who incur or aggravate an injury, illness or disease while in a qualified duty status and to return members to duty as expeditiously as possible. Members who are referred into DES while on AD may be retained on AD while processing through the DES IAW DoDI 1332.18. However, members without an active treatment plan will not be maintained on MEDCON solely for the purpose of entry in DES. If the member requires further treatment and has a restorative care plan, they may reapply for MEDCON while processing through the DES.

AFI 36-2910, *Line of Duty (LOD) determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*, 8 Oct 15, paragraph 5.1.1., MEDCON orders shall begin when the condition renders the member unable to perform military duties (not necessarily when the injury or illness occurred, when the disease was diagnosed or when the member was released from active duty).

AFI 36-3212, *Physical Evaluation for Retention, Retirement and Separation*, 15 Jul 19, paragraph 4.6. Duty and Pay Status. 4.6.1. An ARC member who incurs or aggravates an injury, illness or disease while performing duty in an authorized military status may be continued on

orders solely for processing under this instruction. (Refer to AFI 36-2910, for medical continuation orders and AFI 41-210 for placing ARC members on medical hold). 4.6.1.1. The member is eligible to receive medical care and evaluation. 4.6.2. Type of Order. The type of order the service member is on when injury or illness occurred should be the same type of order the member remains on until returned to duty or separated.

DoDI 1241.01, *Reserve Component (RC) Line of Duty Determination for Medical and Dental Treatments and Incapacitation Pay Entitlements*, paragraph 3.a.(2): When an RC Service member is on active duty (AD) or full-time National Guard duty (FTNGD) for a period of more than 30 days and, at the scheduled end of that period, has an unresolved in-LOD condition that may render the member unfit for duty under the Disability Evaluation System (DES), but this has not yet been determined by the DES, the member: (a) Will, with his or her consent, be retained on AD or FTNGD until: 1. Outstanding in-LOD conditions are resolved; or 2. He or she is either found fit for duty, separated, or retired as a result of a DES finding.

37 U.S.C. Chapter 2, Section 204, *Entitlement* (g)(1)(A): 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— (A) in line of duty while performing active duty.

AIR FORCE EVALUATION

AFPC/DPFA recommends denying the applicant's request for MEDCON orders. The applicant has three Line of Duty (LOD) determinations that could meet the criteria for MEDCON; however, none were valid during the requested time period. In accordance with DAFI 36-2910, paragraph 6.2.7. If a member has an injury, illness and/or a disease; received care for 365 days and is not in the DES, a new LOD will not be initiated. If the member requires care after a year, the member may receive their care through the DVA. Therefore, as these aforementioned LODs all exceeded 365 days from the date of initial injury, they are unable to be used to validate the need for MEDCON.

While the applicant does have a current AF Form 469, *Duty Limiting Condition Report*, and is profiled with Mobility Restrictions, the applicant does not meet the eligibility requirements for MEDCON for two (2) reasons; invalid LODs, and a lack of a restorative treatment plan. While he did not provide a treatment plan with his submission, he did provide the first page to medical progress notes for 12, 13, 17, 18, 25, 26, and 27 May 22. These notes lack information to determine if he would meet MEDCON eligibility as they only capture three (3) weeks of treatment and contain no information that can be reviewed to validate a restorative treatment plan. His LODs are still Interim and since they are over 365 days from the date of diagnosis, they are no longer valid for him to receive care at a Military Treatment Facility (MTF). As such, he should seek continued care at the Department of Veterans Affairs.

Currently, he is enrolled in the Disability Evaluations System (DES); however, the Air Reserve Component Case Management Division (ARC CMD) is unable to validate the need for MEDCON as no restorative treatment plan has been provided for review. Therefore, per DAFI 36-2910 paragraphs 6.1 and 6.2.7, members who did not enter into the DES while on Active Duty orders will need to meet eligibility for MEDCON and will not be maintained on MEDCON to process through the DES.

Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice, thereby denying his request to be placed back on MEDCON orders effective 28 May 22 through the present for continued IDES processing as he has been re-

enrolled in IDES. However, he is encouraged to provide medical treatment notes that demonstrate a valid restorative treatment plan for ARC CMD to validate. Per DAFI 36-2910, he must meet MEDCON eligibility requirements in order to be placed back on MEDCON.

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 21 Dec 22 for comment (Exhibit D), and the applicant replied on 19 Jan 23. In his response he contends that he is a victim of injustice due the Air Force's: disregard for retention of service members; failure of Air Force medical providers in their duty to document patient encounters IAW AFI 48-133, *Duty Limiting Conditions*; and the impact of the poor medical documentation.

Since 2019, he has been requesting a LOD for a dislocated eye lens and has even filed a Department of the Air Force Inspector General complaint which has been acknowledged by both the DAF Director of Complaints Resolution and the Chief, AF Disability Policy and Procedures on 6 Jul 21. On 15 Dec 22, he filed a second IG complaint, with the XXth Wing IG, regarding his request for a LOD for his eye lens. According to his XXXX Ophthalmology visit report, dated 2 Dec 22, his eye lens has become aggravated further showing that it is tilted and touching the back of his iris. He was on Title 10 Active Duty orders for more than 30 days when those conditions were initially diagnosed and the new AFI 36-2910, DoDI 1241.01, *Reserve Component (RC) Line of Duty Determination for Medical and Dental Treatments and Incapacitation Pay Entitlements*, and the new DES DoDI 1332.18, *Disability Evaluation System*, dated 10 Nov 22, all say that he will be continued, retained, and kept on active duty. Specifically, DoDI 1332.18, paragraph 1.2.k., reads, "RC Service members on active duty orders specifying a period of more than 30 days, who incur a potentially unfitting condition during that time will, with their consent, be kept on active duty for disability processing until final disposition by the Secretary of the Military Dept concerned." Additionally, Air Force medical providers have a duty to document patient encounters in accordance with AF I48-133. He complied with the AFI guidance regarding Airman identifying injuries and reported the eye lens surgery and requested an LOD from his new primary care manager (PCM) in Feb 22 and have been seeking restorative care since being terminated from those orders.

His Post Traumatic Stress Disorder (PTSD) and his Traumatic Brain Injury (TBI) are recorded in his medical records as unfitting conditions for over a year which justifies his current enrollment in the DoD DES program.

The Air Force cannot take away rights prescribed by a higher authority. DoDI 1241.01 page 9, subparagraph b. Emergent care: states An RC Service member requiring treatment for an emergency medical condition while in qualified status (20 Nov 19), will be authorized an interim In-LOD determination in order to authorize emergent care. Emergent care is defined in this DoDI as a medical condition that is threatening to life, limb, or sight. He was not provided a valid Interim LOD, and to date none has been provided. AFI36-2910, 8 Oct 15, and its replacement DAFI 36-2910, 3 Sep 21, both speak to this mandatory requirement for retention of an injured service member:

a. AFI 36-2910, 8 Oct 15, paragraph 1.7.5, Members should not be separated or retired while pending a final LOD determination.

b. DAFI 36-2910, 3 Sep 21, paragraph 1.6.8.5, Members should not be separated or retired while pending a final LOD determination.

Therefore, it is required for an Interim LOD be finalized by the approving authority prior to release from active duty.

The XXXth Wing Medical Group conducted an active duty medical evaluation board on 27 Dec 22 to determine whether his PTSD and TBI were unfitting conditions for retention. If he was diagnosed with these conditions while on Federal Active Duty, then sent to the DES, why was he terminated from active duty then told to face an active duty discharge as a civilian?

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 AFPC/DPFA and finds a preponderance of the evidence does not substantiate the applicant's contentions. The Board determines the documents provided by the applicant do not support a continuum of care that would meet MEDCON eligibility. Specifically, the Board finds there is no evidence of a valid Line of Duty which met the eligibility criteria, there is insufficient evidence to support a valid restorative treatment plan, and finally, at the time of his MEDCON termination, the applicant had already been disenrolled from the Disability Evaluation System implying a Fitness for Duty /Return to Duty. Therefore, the Board recommends against correcting the applicant's records.

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-2022-02756 in Executive Session on 21 Jun 23:

- , 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 18 Oct 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AFPC/DPFA, dated 20 Dec 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 21 Dec 22.
- Exhibit E: Applicant's Response, w/atchs, dated 19 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.

X

Board Operations Manager, AFBCMR