

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2022-02918

XXXXXXXXXXXX

**COUNSEL:** XXXXXXXXXXXX

**HEARING REQUESTED:** NO

### APPLICANT'S REQUEST

Her military record be corrected to reflect the following:

1. Pay, points, and entitlements from 21 Mar 17 to 28 Jul 19, to include either,
  - a. Reimbursement and award of Incapacitation Pay (INCAP) from 7 Aug 18 – 28 Jul 19; or alternatively,
  - b. Approve Medical Continuation (MEDCON) orders from 7 Aug 18 to 28 Jul 19.
2. Reimbursement for mileage, tolls, parking, and travel fees for the In the Line of Duty (ILOD) related appointments from 21 Mar 17 – 28 Jul 19.
3. Reimbursement of healthcare monthly premiums for ILOD care from 21 Mar 17 – 28 Jul 19.
4. Conditions annotated on AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*, are considered Combat-Related – Instrumentality of War: Due to Environmental Hazards, Chlorine Exposure.
5. Award of Combat-Related Special Compensation (CRSC).
6. Issuance of a final AF Form 707, *Officer Performance Report (Lt thru Col)*.
7. Retroactive promotion to the grade of major (O-4), effective Jan 18.
8. Constructive credit for retroactive appointment in the grade of captain (O-3) (**request added in applicant's rebuttal response, dated 21 Feb 23**).
9. Correct NGB Form 22, *Report of Separation and Record of Service*, Block 10d, *Total Service for Pay* to reflect "16 03 24" vice "16 02 24." (**request added in applicant's rebuttal response, dated 21 Feb 23**).
10. Credit for one year satisfactory service for the period 5 Apr 18 – 5 Apr 19 (**request added in applicant's rebuttal response, dated 21 Feb 23**).
11. Additionally, provide a report of individuals who accessed and viewed the applicant's medical records. (**Not within the Board's Authority**).
12. Any other relief warranted in the interest of justice and in accordance with (IAW) facts prescribed herein.

### APPLICANT'S CONTENTIONS

In an 18-page legal brief, through counsel, the applicant contends her journey from the Air Force was fraught with an error and injustice. Instead of focusing on care for acute, often debilitating, and chronic diseases and conditions, she had to become an expert in the Integrated Disability Evaluation System (IDES), MEDCON orders, INCAP Pay, and medical reimbursement. She was ultimately medically retired; however, the process has left her with out-of-pocket losses, missing entitlements, inaccurate records, and relief/compensation must be made.

She was unable to work due to her combat-related ILOD injuries; however, after 7 Jul 18, she was neither fully granted MEDCON orders nor INCAP pay. Moreover, she had to pay prescription costs, healthcare premiums, mileage, and allied expenses for the ILOD-related care, treatment, travel, and appointments. As a final insult, she was not issued a final Officer Performance Report (OPR) and the Informal Physical Evaluation Board (IPEB) failed to characterize her conditions as combat-related.

Prior to her military service, she was physically and mentally sound, with no physical ailments to hinder her personal or professional success. She enlisted in the Air Force in Apr 03, less than two weeks after the invasion of Iraq. Throughout her career, she trained and worked with live nerve agents. She graduated from the Readiness Apprentice Course at the US Army Chemical Defense Training Facility where she completed 424 hours of training, including working with live nerve agents, VX, and Sarin. She also worked with live nerve agents when she attended the Emergency Management Craftsman Course and during the Chemical, Biological, Radiological, Nuclear, and High Yield Explosives (CBRNE) Responder Course.

She deployed in May 07 through Oct 07 in support of Operations IRAQI FREEDOM/ENDURING FREEDOM and received hazardous duty pay. While deployed, she had an adverse reaction to a rapid sequence of vaccinations received prior to her departure with what felt like golf ball sized lymph nodes accompanied by severe pain. During the flight to Southwest Asia, over 36 hours, she was unable to lower her arms at her side, barely able to lift them overhead, and had limited range of motion. She was told this reaction was normal; however, the rapid sequence of vaccinations she received was not normal and is now considered against protocol. While serving as the training noncommissioned officer in charge, she operated and responded to wing-wide chemical and biological detection systems and maintained the emergency response equipment, to include neutralizing agents, specifically chlorine. Additionally, while deployed, she was exposed to smoke from burning trash or feces, vehicle or truck exhaust fumes, radar/microwaves, loud noises, sand/dust, and chlorine – calcium hypochlorite, as noted in her Post-Deployment Health Assessment (PDHA).

As a result of that exposure, she developed many respiratory illnesses and infections and continuous shortness of breath. She was diagnosed with RAD due to chemical exposure and is still receiving treatment for this condition. It was also during and after this deployment she noticed significant fatigue, not feeling rested after sleeping, as well as excessive perspiration and continued exposure concerns. She noted these concerns in her PDHA, but no referrals were made at that time to discover the cause of these issues. She was active in intramural sports, athletic squadron competitions, and triathlons; however, during the deployment, she began to experience nagging back pain she had not previously experienced, and it limited her physical activity. In Aug 07, she was asked to move chlorine containers from a small building to the equipment shed across base. This event was the basis for an ILOD that was not completed until 2011. She was eventually sent through a Medical Evaluation Board (MEB) for that condition and was returned to duty with an assignment limitation code.

Despite the health issues that plagued her, she was certified as a Family Nurse Practitioner, was commissioned, and served as a Clinical Nurse in the [State] Air National Guard. She continued to experience many of the constitutional symptoms that were indicative of relapsing-remitting Multiple Sclerosis (RRMS), and in 2015, she was diagnosed with RRMS. She informed the Flight Surgeon and understood the case would be brought before the Deployment Availability Working Group, then referred to the National Guard Bureau for a fitness for duty determination. It was not until 2016 that she was informed the only option was to enter the Non-Duty Disability Evaluation System or pick a separation date. At this time, the Department of Veterans Affairs (DVA) had already service-connected her RRMS. She obtained counsel to seek an ILOD determination.

During this process, her personal health information (PHI) was compromised and she reported the breach. An investigation was conducted and the medical group staff noted her PHI was disclosed outside of those with a need to know, not in accordance with Health Insurance Portability and Accountability Act (HIPAA). The Privacy Act Officer suggested a Commander Directed Investigation (CDI); however, the CDI produced more frustration as she was never briefed on the findings, nor provided a list of the disclosure.

In Mar 17, her RRMS and allied conditions were determined to be ILOD, and the IDES process was initiated. Prior to 2017, she continued a successful civilian career; however, due to her ILOD medical condition, she was terminated from her employment in Jul 18. She had been out of work and unpaid since Feb 18. She sought INCAP pay and did not receive any compensation until Feb 19, with that payment only covering Aug 17 – Feb 18. She applied for and was denied INCAP for Feb – Aug 18. In Feb 18, she inquired about MEDCON. She was told a package could be submitted to the National Guard Bureau, Office of the Surgeon General (NGB/SG) and was directed to the NGB/SG SharePoint site, but the links did not work. She contacted the Air Force Personnel Center (AFPC) and was informed her medical group should be assembling and submitting the required documents for her. She experienced other inconsistencies when trying to get referrals for care, recoupment of medical costs, and the INCAP application process. She finally had to go to the Department of Veterans Affairs (DVA) for care and use her Tricare Reserve Select.

According to Air Force Instruction (AFI) 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*, and Title 37, United States Code, Section 204 (37 USC 204), 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. Moreover, travel and associated costs for care may qualify for reimbursement. It is the responsibility of the Air National Guard Wing Finance Office to educate the service member on their pay and allowance entitlements. The applicant's first payment was more than a year after submission and no further payments were made despite her appeals. There was no appropriate basis for denial or discontinuation. Alternatively, MEDCON orders should have been approved in accordance with AFI 36-2910, as she met the criteria. She was eventually approved for MEDCON, but for a limited period. She had to pay out of pocket for health-related expenses to include travel and premiums. Moreover, her appeals for reimbursement went unresolved until 2021 and she was still not made whole for these expenses or for her incomplete INCAP or MEDCON compensation.

On 28 Jul 19, she was medically retired, but her conditions were not classified as combat-related by the IPEB. Her RRMS and secondary conditions related to RRMS were determined to be causally connected to her deployment to Kuwait in 2007, specifically noting the applicant had an adverse reaction to pre-deployment vaccinations, various occupational exposures to include chlorine, burn pits, sand, dust, and exhaust, as well as chemicals used to combat chemical and biological threats; however, the IPEB failed to follow the guidelines for making combat-related determinations. If a condition is combat-related, and the service member is retired, they may apply for Combat-Related Special Compensation (CRSC). Due to misclassification, the applicant has been deprived of these benefits.

The applicant's complete submission is at Exhibit A.

## **STATEMENT OF FACTS**

The applicant is a retired Air National Guard captain (O-3).

On 16 May 19, according to AF Form 356, the applicant was found unfit due to physical disability, with the following conditions that are permanent and stable, incurred while entitled to receive basic pay, incurred in the line of duty in time of war or national emergency, but not incurred in a combat zone or during the performance of duty in combat-related operations:

- Multiple Sclerosis (MS), with headaches and symptoms of neuropathy:
  - Voiding Dysfunction Attributed to MS [Veterans Administration Schedule for Rating Disabilities (VASRD) Code: 8018-7542; Department of Veterans Affairs (DVA) rated as 60 percent
  - Tension Headaches Attributed to MS [VASRD Code: 8018-8100]; DVA rated as 50 percent
  - Left Upper Extremity Weakness Attributed to MS [VASRD Code: 8018-8515]; DVA rated as 20 percent
  - Left Lower Extremity Weakness Attributed to MS and Radiculopathy [VASRD Code: 8018-8520]; DVA rated as 10 percent
  - With Bilateral Factor applied to Codes 8515 and 8520
  - Other MS Items rated at 0 percent
- Major Depressive Disorder (MDD) with Adjustment Disorder; DVA rated as MDD Moderate with Anxious Distress; Panic Attacks and Insomnia Disorder [VASRD Code: 9440-9434]; DVA rated as 50 percent
- Degenerative Arthritis and Spondylolisthesis of the Lumbosacral Spine (Existed Prior to Service with Service Aggravation); DVA rated as Lumbar Spine Degenerative Joint Disease with Intervertebral Disc Syndrome [VASRD Code: 5242]; DVA rated as 40 percent

She was recommended for permanent retirement with a combined compensable percentage for disability of 100 percent.

On 26 May 19, according to AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, the applicant agreed with the findings and recommended disposition of the IPEB and waived her rights for any further appeal. She did not request a one-time reconsideration of the DVA disability ratings for the conditions found unfitting by the IPEB.

On 24 Jun 19, according to AFPC/DPFA letter, provided by the applicant, the 17 Dec 18 decision to disapprove her MEDCON request was overturned, and she was found eligible for MEDCON for the period 17 Dec 18 – 28 Jul 19.

On 28 Jun 19, according to Special Order XXXXX, dated 9 Jul 19, the applicant was relieved from assignment and honorably discharged from the [State] Air National Guard and as a member of the Reserve of the Air Force, and placed on the Permanent Disability Retired List (PDRL), effective 29 Jun 19.

On 28 Jul 19, according to Special Order Number XXXXX, dated 17 Jun 19, the applicant was relieved from active duty, organization, and assignment, and permanently disability retired, effective 29 Jul 19, with a compensable percentage for physical disability of 100 percent. On this same date, the applicant was furnished an honorable discharge, with Authority and Reason: AFI 36-3212, Paragraph Chapter 8; Retirement-Permanent Disability Retirement List (PDRL), SPD: SEJ [Mandatory Retirement Disability, Permanent], and credited with 16 years, 2 months, 24 days total service for pay.

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

## APPLICABLE AUTHORITY/GUIDANCE

Department of Defense Instruction (DoDI) 1241.01, *Reserve Component (RC) Line of Duty Determination for Medical and Dental Treatments and Incapacitation Pay Entitlements*, Enclosure 4 – *Special Pay and Allowances for RC Members with and In-LOD Determination*:

1. *TRAVEL AND TRANSPORTATION ALLOWANCE*. An RC Service member is entitled to travel and transportation allowances, or monetary allowances in place thereof, for necessary travel incident to medical and dental treatment resulting from an In-LOD determination in accordance with section 204(j) of Reference (f) [37 USC 204] as implemented by paragraph 7085 of the Joint Travel Regulations (Reference (o)) [Joint Travel Regulations “Uniformed Service Members and DoD Civilian Employees”].

Air Force Manual (AFMAN) 41-210, *TRICARE Operations and Patient Administration*, Chapter 4, *Patient Administration Functions*:

Section 4E – *Line of Duty Program Administration*

4.12. *Line of Duty Determinations*.

4.12.3. Following the start of a Line of Duty determination, initial direct care and/or TRICARE network healthcare may not be denied to any AD service member or RC service member.

4.12.4. Following the completion of a Line of Duty determination:

4.12.4.2. Continued direct care and/or TRICARE network healthcare entitlements of RC service member may be impacted by Line of Duty determinations.

4.12.12. *Line of Duty Requirements for Members of the Reserve Component*. Reference DoDI 1241.01, AFI 36-2910 and AFI 36-3212.

4.12.12.3. Any RC service member seeking government sponsored healthcare must produce at least a partially completed AF Form 348 (1st side completed and signed by the provider initiating the Line of Duty determination process). (T-1). The partially completed Line of Duty determination form may be used as healthcare eligibility verification source when the service member seeks government sponsored healthcare without possessing current AD status orders or when a DEERS healthcare eligibility check indicates no current coverage.

4.12.12.4. If a Line of Duty determination cannot be made before the tour of duty ends, and the individual requires further hospitalization or treatment, continue with any necessary healthcare related to the potentially service-connected injury or illness.

4.12.12.6. If the final Line of Duty determination is “In Line of Duty,” document the notification and advise the patient that care continues at government expense until service member is found fit and returned to duty or separated by the Disability Evaluation System for the documented medical condition.

4.12.12.7. *“Interim” Line of Duty Determination for Healthcare: An informal or formal Line of Duty investigation, still ongoing, and where a final Line of Duty determination has not yet been determined*. An Interim Line of Duty determination for healthcare is comprised of the completed medical portion (front part) of the AF Form 348 (with a provider signature). The form should contain a description of the service member’s illness, injury or disease, and date of occurrence. In accordance with AFI 36-2910, the military officer’s signature does not constitute a completed Line of Duty determination. The Interim Line of Duty determination for healthcare is used to provide eligibility for direct or TRICARE network healthcare when DEERS indicates a RC service member may not be eligible for medical or dental benefits. In other words, the completed first side of the AF Form 348 (including a provider signature) may be used to verify a RC service member’s entitlement to medical care at government expense when not on AD orders.

4.12.12.10. Air National Guard (ANG) Service Members: The medical officers who first provide treatment or the medical officers stationed nearest to the non-Air Force medical facility that first provides treatment, in cooperation with the MTF or GMU patient administration or Line of Duty representative, should initiate the AF Form 348.

*Commander Directed Investigation (CDI) Guide, Chapter 7. Post-Report Actions, dated 18 Feb 16:*

7.1. *Closure with Subjects, Suspects, and Complainants.* Final notification of CDI results is exclusively the commander's prerogative. The commander makes final notification of the CDI results to the complainant (if any) and subject, either verbally or in writing.

7.4. *CDI Records Release.* The initiating commander is the release authority for CDIs. Commanders should limit access to CDIs to offices and agencies within the AF with an official need to know. Release CDIs outside the AF only as required by existing laws. CDIs may not be released, reproduced, or disseminated in whole or in part, or incorporated into another system of records without the express permission of the initiating commander. Where documents or information is incorporated into the CDI from another system of records, permission from the owner of that system of records must be obtained prior to release of the pertinent document or information. IOs should consult with their legal advisor prior to incorporating information from another system of records (such as AFOSI reports, hospital records or civilian police reports) into the CDI. Commanders should coordinate any information release with their JAG.

7.4.1. *Applicability of Privacy Act.* The Privacy Act (PA) of 1974, 5 USC §552a, applies to CDIs. In all correspondence relating to CDIs, including notification letters, commanders must refrain from using an individual's name, but may use the individual's duty title. This is to protect the privacy of individuals involved. Additionally, complainants, witnesses and others are not entitled to know what command action was taken against subjects or suspects. Commanders should consult their JAG with any questions relating to the PA and prior to authorizing release of a CDI to any person.

*AFI 36-2910, Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay:*

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.

6.2.1.1. If the member is unable to perform military duties and is eligible for MEDCON but declines MEDCON, the member is still entitled to INCAP Pay minus any civilian earned income.

6.2.1.2. The member shall not be allowed to attend IDT periods or to acquire retirement points for performing IDTs while receiving INCAP Pay.

6.2.1.3. Retirement Point Exception. The member may earn retirement points in order to satisfy the requirements for a qualifying year of service by completing approved correspondence courses as determined by the Base Education and Training Manager (BETM) through the Extension Course Institute (ECI).

*Air National Guard Instruction (ANGI) 36-2005, Appointment of Officers in the Air National Guard of the United States and as Reserves of the Air Force, dated 15 Mar 05:*

2.13. *Medical Officers.* ANG physicians, nurses, and dental officers will be awarded a primary Air Force Specialty Code (AFSC) in the specialty or sub-specialty they are most qualified. This qualification will be based on training, experience, license, and standards set forth in AFMAN 36-2105 and AFI 36-2005.

Table 3.1. *Grade Determination, Rule 3:* To be eligible for appointment in the grade of captain, applicant's service credit awarded IAW AFI 36-2005 must be at least 4 years and the applicant's age must be less than 40 years.

AFI 36-2005, *Appointment in Commissioned Grades and Designation and Assignment in Professional Categories – Reserve of the Air Force and United States Air Force*, dated 1 May 98 (IC 2003-1, dated 19 May 03):

Table 2.1. *Grade Determination, Rule 3:* To be eligible for appointment in the grade of captain, applicant's service credit awarded must be at least 4 years and the applicant's age must be less than 40 years.

Table 2.5. *Service Credit on Appointment or Designation as a Biomedical Sciences Corps (BSC), Medical Service Corps (MSC), or Nurse Corps (NC) Officer,*

Rule 1: If appointing or designating an individual as a nurse and they have completed a master's degree in nursing then the amount of service credit awarded is 24 months.

Rule 39: If appointing or designating an individual as a health services administrator and they have completed a master's or Ph.D. degree in health business or public administration, computer science, engineering, planning, or related degree as determined by HQ AFPC/DPAMF or HQ ARPC/DAO then the amount of service credit awarded is one year for each school year, not to exceed 24 months for a master's degree or 48 months for a doctorate degree.

### 6.3. *Nurses.*

6.3.1. Appointment as Second Lieutenant. In addition to meeting eligibility requirements outlined in Chapter 2, applicants must:

6.3.1.2. Meet the following education requirements:

6.3.1.2.3. For Air National Guard - must be a graduate of an associate degree, diploma or baccalaureate degree program in nursing which is accredited by a nationally recognized nursing accrediting agency. Effective 1 October 2000, registered nurse applicants must possess a baccalaureate degree in nursing (nationally accredited BSN program) or a health-related field.

## **AIR FORCE EVALUATION**

ARPC/DPTSP recommends denying the applicant's request for retirement points for the period 7 Aug 18 – 28 Jul 19. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice.

In accordance with Air Force Manual (AFMAN) 36-2136, *Reserve Personnel Participation*, Chapter 2, paragraph 2.2., "...Points may only be credited to the date a Reservist actually performed duty." Per the applicant's Point Credit Accounting and Reporting System (PCARS) report, there is no evidence she "actually performed the duty" on continuous active duty orders for this period. During this period, the applicant performed four inactive duty (IDT) periods and earned five Advanced Distributed Learning retirement points.

The applicant's records accurately reflect all duty performed during this period; however, this information can be altered upon receipt of source documents such as certified MEDCON orders,

DD Form 214, *Certificate of Release or Discharge from Active Duty*, pay records, or Air Force Board for Correction of Military Records (AFBCMR) directive.

The complete advisory opinion is at Exhibit C.

NGB/AIPO recommends partially granting the application. This advisory addresses the applicant's request for a final OPR and retroactive promotion to major (O-4).

The applicant contended a final OPR was not provided; however, she does not provide evidence to support an OPR was requested or clarification on any errors. According to Department of the Air Force Instruction (DAFI) 36-2406, *Officer and Enlisted Evaluation Systems*, paragraphs 3.4.7.1. – 3.4.7.3., annual evaluations are optional for officers with an approved separation or retirement date that is within one year after the SCOD [static close out date], but the decision to complete a final evaluation should consider the member's preference. It is important to note paragraph 3.4.7.3. states, "an evaluation will not be accomplished after a member has officially separated or retired."

A review of the applicant's official military records reflects an OPR for the period 8 Jun 17 – 7 Jun 18. The applicant was recommended for permanent retirement by the PEB on 16 May 19. Based on these dates and the applicant's date of separation, a final OPR could have been accomplished but may have been overshadowed by disability processing; however, it may be difficult to accomplish a final OPR at this time due to shifts in squadron/wing/state personnel and the amount of time lapsed.

Regarding the applicant's request for retroactive promotion to major (O-4), AFI 36-2504, *Officer Promotion, Continuation and Selective Early Removal in the Reserve of the Air Force*, Table 2.1., promotion eligibility from captain to major requires seven years' time in grade. The applicant was promoted to captain, effective 8 Jun 17, and would not have been eligible for promotion to major (O-4) until Jun 24.

The complete advisory opinion is at Exhibit D.

AFPC/DPFDD recommends denying the applicant's request to correct her AF Form 356 to reflect her unfitting conditions are combat-related due to an instrumentality of war and award of CRSC.

Under Title 10, United States Code, the IPEB must determine if a member's condition(s) renders them unfit for continued military service relating to their office, grade, rank, or rating. Additionally, in accordance with Department of Defense Instruction (DoDI) 1332.18, *Disability Evaluation System*, Appendix 5 to Enclosure 3, the IPEB renders a final decision on whether an injury or disease that makes the service member unfit, or that contributes to unfitness, was incurred in combat with an enemy of the United States, was the result of armed conflict, or was caused by an instrumentality of war during war. A disability is considered combat-related if it makes the service member unfit or contributes to unfitness and the preponderance of evidence shows it was incurred under any of the following circumstances:

(1) As a Direct Result of Armed Conflict. Injury or disability was incurred in combat with an enemy of the United States. To qualify under this rule a Service member must be engaged with members of opposing armed forces and forces are in close enough proximity to potentially inflict physical harm on one another. Furthermore, to be "engaged with" indicates each party has the potential to cause physical harm to the other; it is reciprocal.

(2) While Engaged in Hazardous Service. Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.

(3) Under Conditions Simulating War. In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, and



leadership reaction courses; grenade and live fire weapons practice; bayonet training; hand-to-hand combat training; rappelling; and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

(4) Caused by an Instrumentality of War. Occurrence during a period of war is not a requirement to qualify. If the disability was incurred during any period of service as a result of wounds caused by a military weapon, accidents involving a military combat vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material, the criteria are met. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, an injury resulting from a service member falling on the deck of a ship while participating in a sports activity would not normally be considered an injury caused by an instrumentality of war (the ship) since the sports activity and not the ship caused the fall. The exception occurs if the operation of the ship caused the fall.

On 23 Jan 19, an MEB was convened and found the applicant potentially unfit for 1) MS; 2) RAD; 3) Degenerative Arthritis of the Spine; 4) Tension Headaches; 5) Neuropathy of the Left Upper and Left Lower Extremities Secondary to MS; 6) Adjustment Disorder; and 7) MDD, Single Episode, Moderate to Severe.

On 16 May 19, the IPEB found the applicant unfit for 1) MS with Headaches and Symptoms of Neuropathy; 2) MDD with Adjustment Disorder [DVA rated as MDD, Moderate with Anxious Distress, Panic Attacks and Insomnia Disorder]; and 3) Degenerative Arthritis and Spondylolisthesis of the Lumbosacral Spine (Existed Prior to Service with Service Aggravation) [DVA rated as Lumbar Spine Degenerative Joint Disease with Intervertebral Disc Syndrome]. The IPEB determined none of these unfitting conditions were either incurred in a combat zone or combat-related in accordance with guidance in DoDI 1332.18.

RAD was placed in Category II – Conditions that can be unfitting but are not currently unfitting, and provided the following rationale, “The IPEB has reviewed the SM’s [service member] diagnosis of RAD and finds this condition does not prevent the reasonable performance of duties, does not impose unreasonable requirements to maintain or protect the SM’s health, and does not represent a medical risk; therefore, this condition is currently not unfitting.”

The IPEB based these decisions on information contained in the Medical and Mental Health Narrative Summaries (NARSUM). The medical NARSUM mainly addressed the applicant’s MS with associated symptoms and back condition. Although it did note she had reported occupational exposure, to include inhalation of chlorine, burn pits, sand, dust, and exhaust, during her deployment to Kuwait in 2007, her health while deployed was very good and she only experienced runny nose, diarrhea, and fatigue. She was only seen twice in sick call during this deployment. There is no mention in the NARSUM of how RAD negatively affected her ability to perform her assigned duties and only listed asthma/chronic obstructive pulmonary disease in her Pertinent Past Medical History. The mental health NARSUM mainly attributed her mental health conditions to her MS diagnosis and navigating through the military disability system. On 26 May 19, the applicant agreed with the IPEB findings and did not appeal to the Formal PEB to request her unfitting conditions be found to have been incurred in a combat zone and/or combat-related or to have RAD moved to a Category I unfitting condition.

The applicant is now requesting that a condition the IPEB determined was not unfitting or compensable to be combat-related due to environmental exposures while deployed. She additionally asserts her MS should be considered combat-related due to a rapid sequence of pre-deployment vaccinations though there is no medical evidence to support this claim. The applicant’s mental health condition is also not considered combat-related as it did not stem from a deployment related event.

Further, the CRSC section has no record the applicant ever submitted a claim through their office. Although the IPEB may find some disabilities combat-related or occurred in a combat zone in accordance with AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*, their decision does not automatically qualify a disability as combat-related under the CRSC program. The CRSC program provides compensation for combat-related injuries, and consequently, their standards are much more rigorous when determining disabilities under current criteria. Finally, CRSC can be approved based on substantiating documentation provided by the member even if the PEB determines that same condition is not combat-related for DES purposes.

The complete advisory opinion is at Exhibit E.

NGB/A1PS recommends partially granting the applicant's request for INCAP pay. Based on the second extension of INCAP requested by the applicant, and adjudication by ARC CMD to overturn a previous MEDCON denial, this office supports partial INCAP relief, for the period 8 Aug 18 – 16 Dec 19 [sic].

The applicant provided an AF Form 1971, *Certification for Incapacitation Pay*, for INCAP second extension for 8 Aug 18 – 8 Feb 19. It was signed by the applicant on 24 May 19, the Military Medical Provider on 13 Jun 19, Immediate Commander on 18 Jun 19, and Wing Commander on 20 Jun 19, finalizing the submission to NGB/A1PS. The applicant had provided all required documentation in support of the request, and there is evidence the package was received by NGB/A1PS for approval/disapproval.

Additionally, records show the applicant had previously been denied MEDCON by ARC CMD for the original request dated 17 Dec 18. Subsequent email traffic shows ARC CMD contacted the applicant to inform her the MEDCON denial was overturned, as of 20 Jun 19, and she was eligible for MEDCON for the period 17 Dec 18 – 27 Jun 19 [sic].

The complete advisory opinion is at Exhibit F.

NGB/SGP recommends denying the applicant's request to correct her AF Form 356 to reflect her unfitting conditions are combat-related due to an instrumentality of war: environmental hazards, chlorine exposure, and award of CRSC. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice.

The applicant went through the DES process and the IPEB found the applicant's MS with Headaches and Symptoms of Neuropathy, MDD with Adjustment Disorder, Degenerative Arthritis, and Spondylolisthesis of the Lumbosacral Spine conditions prevented her from reasonably performing the duties of her office, grade, rank or rating and recommended permanent retirement with a disability rating of 100 percent in accordance with the VASRD guidelines. The IPEB reviewed the RAD diagnosis and found the condition did not prevent the applicant from reasonably performing her duties, did not impose unreasonable requirements to maintain or protect the applicant's health, and was not a risk nor unfitting.

The applicant agreed with the IPEB recommendations and findings; waived her right for further appeal; and declined to request a one-time reconsideration of the DVA disability ratings for the conditions found unfitting, as indicated on the AF Form 1180, dated 26 May 19. She now contends these conditions, as well as her diagnosis of RAD, should be considered disabilities incurred in a combat zone or incurred during the performance of duty in combat-related operations as designated by the Secretary of Defense.

The DES can only offer compensation for those service-incurred diseases or injuries which specifically rendered a member unfit for continued service and were the cause for career

termination and then only for the degree of impairment present at the “snapshot” time of separation and not based on future progression of injury or illness. The DVA operates under a different set of laws, with a different purpose, and is authorized to offer compensation for any medical condition determined service incurred, without regard to, and independent of, its demonstrated or proven impact upon a service member’s retainability, fitness to serve, or the length of time since date of discharge. The DVA can also conduct periodic re-evaluations for the purpose of adjusting the disability rating awards (increase or decrease) over the lifetime of the veteran.

The complete advisory opinion is at Exhibit G.

AFPC/DPFA recommends granting the applicant’s request for MEDCON orders for the period 7 Aug 18 – 28 Jul 19. Based on the documentation provided by the applicant and analysis of the facts, there is evidence of an error or injustice. It was during this time the applicant met all MEDCON eligibility criteria. It should be noted the applicant would not have been eligible during periods when she was otherwise employed, or during periods when she received INCAP pay.

The applicant would have met the specified criteria in accordance with AFI 36-2910:

1. A copy of the Airman’s orders covering the period during which the injury, illness, or disease was incurred or aggravated; (Met)
  - The applicant provided orders for Title 10/MPA period when diseases were incurred.
2. An interim or finalized LOD (AF Form 348, *Line of Duty Determination* or DD Form 261, *Report of Investigation Line of Duty and Misconduct Status*); (Met)
  - The applicant’s ILOD determination for multiple diagnoses. The LOD was finalized on 21 Mar 17 which is when the LOD would have met eligibility for MEDCON as the applicant had a break from the qualifying set of orders.
3. A completed AF Form 469, *Duty Limiting Condition Report*; (Met)
  - The applicant had a mobility restricting profile for MS on 23 Mar 17. Adjustment disorder was added to the profile on 17 Aug 18, but the profile otherwise continued through her separation date. There was an ALC-C2 [assignment limitation code] for RAD.
4. A medical evaluation conducted by a credential military provider within the last 30 days that describes why the Airman is unable to meet retention or mobility standards, citing a specific paragraph from Chapter 5 or 13 of AFI 48-123; (Met)
5. An individual treatment plan approved by a credentialed military provider based on occupational medicine guidelines and peer-reviewed recovery timelines that includes the expected duration of the impairment; (Partially Met)
  - The applicant submitted several pages in the two initial applications for MEDCON. Focusing on the Adjustment Disorder w/Anxiety diagnosis, the applicant was seen monthly in Nov 17 through Mar 18. She was seen again on 8 May 18 and regularly seen once a month through Oct 18. In Oct 18, she was seen for Insomnia and Adjustment disorder with the frequency increasing to almost weekly through Nov 18 for CBT-I treatment which focused on Insomnia related to Adjustment Disorder/Anxiety. According to treatment plans she submitted, she was seen weekly, with appointment dates from May 18 through Feb 19. Not all treatment notes were available for review to validate the need for MEDCON. There are several dates for which no notes were provided that the applicant states she was seen: 2 Feb 18, 16 Oct 18, 14/18 Dec 18, 8/15 Jan 19, 2/19 Feb 19, 15/23 Mar 19 and 14 May 19. No additional days for treatment were submitted or treatment notes. The applicant was seen by Physical Therapy for lumbar pain for herniated disc, ophthalmologist for vision concerns, and speech therapist for dysphagia. With the provided progress notes, DPFA is able to validate a need from 20 Aug 18 through 29 Nov 18. The missing documentation from December 2018 through the remaining eligibility period based off her profile of 17 Aug 19 cannot be validated without treatment notes for Adjustment Disorder with Anxiety. DPFA stands by the recommendation made regarding

the initial MEDCON application. Based on the available medical documentation, the applicant's treatment plan did not meet eligibility criteria. Further, the LOD would not have been considered eligible for authorizing MEDCON per DoDI 1241.01, para 3.c., "*The in-LOD determination will be used to authorize appropriate medical and dental treatment for the covered condition for not longer than 1 year from diagnosis without being identified for referral to the DES.*" At the time of the request, the diagnosis was made greater than one year prior and the applicant had yet to enter the DES. Further review of the second MEDCON application found overturning the decision during appeal was just. At the time, the medical documentation was limited and the applicant's status within the IDES was not apparent. Additional medical information was included with the appeal as was the applicant's entry into the IDES on 6 Jun 18. It was after this date the applicant's LOD can be used to authorize MEDCON, so long as other eligibility criteria have been met. The applicant's condition progressively worsened through 2018 requiring additional evaluation and treatment, ultimately culminating in her inability to continue both her military and civilian occupations. Particularly, her increased need for mental health services, which was added to her profile on 17 Aug 18, factored significantly into her eligibility.

The complete advisory opinion is at Exhibit H.

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

The Board sent copies of the advisory opinions to the applicant on 25 Jan 23 for comment (Exhibit I), and the applicant replied on 21 Feb 23. In her response, the applicant contended she understood that if she elected MEDCON, she would receive active duty points for that period; however, if given a choice to elect or decline MEDCON in favor of INCAP pay, she chooses to accept INCAP pay from 7 Aug 18 – 28 Jul 19.

In response to NGB/AIPO advisory, the applicant clarified her request for promotion to major, explaining she asks for review of her commissioning as a second lieutenant in 2013, vice as a captain. She held a master's degree and was informed she was commissioned as a medical administration officer instead of a registered nurse. Regarding her request for a final OPR, while still serving she requested an annotation of "Airman is not rated for this period, 7 Jun 18 – 8 Jun 19. No comments authorized IAW AFI 36-2406. 365 days non-rated" as directed by the Force Support Squadron. This was not honored; however, because the advisory recommendation states it should have been completed, she is satisfied without seeking a final OPR.

Further, in response to AFPC/DPFDD advisory, the applicant acknowledges she needs to apply for CRSC to the appropriate office and CRSC can be approved even if the IPEB determines the same condition is not combat-related for IDES purposes. However, she did understand when she accepted the IPEB findings, they could be addressed at the Air Force Board for Correction of Military Records (AFBCMR).

In accordance with existing guidance, the applicant understands she may elect INCAP pay instead of MEDCON, with the latter approved for 8 Aug 18 – 28 Jul 19. She had submitted INCAP extension requests through 27 Jul 19 when her case was closed by NGB/A1 after she separated on 28 Jul 19. As noted on the documents, her lost civilian wages were \$44.98 per hour in 2017 and \$45.88 per hour in 2018. She did not have an hourly rate increase in 2019 as she was terminated due to continued medical leave and ILOD medical care. She submitted work reports and INCAP income statements every 30 days showing neither income nor employment since being placed on medical leave on 23 Feb 18. In May 19, she was advised by NGB/A1 that extensions needed to cover six-month increments and amendments were made accordingly. The final second extension request was for 8 Aug 18 – 8 Feb 19, and as of 13 Sep 19, was under review by NGB/A1PS. The third extension, for the period 9 Feb 19 – 27 Jul 19, was never routed to NGB, although submitted and updated at wing level. The final unpaid INCAP spans 8

Aug 18 – 28 Jul 19. The decision to stop processing INCAP extensions was made to exhaust MEDCON appeals prior to applying to the AFBCMR.

In response to NGB/SG advisory, the applicant understands the recommendation is that although the chlorine exposure, and other environmental exposures, occurred in a combat zone, the noted diagnoses are not considered combat-related since they were diagnosed later, although they have presumptive correlation. She further understands because the RAD diagnosis was not found unfitting, it was not reviewed for combat relation.

Regarding the AFPC/DPFA recommendation that she is eligible for MEDCON for the period 7 Aug 18 – 28 Jul 19, she is eligible to elect either MEDCON or INCAP, and chooses to accept INCAP pay from 7 Aug 18 – 28 Jul 19. She did not receive any pay, either MEDCON or INCAP pay, from 7 Aug 18 – 28 Jul 19, and she was on continued medical leave.

In reference to her medical records, she presented all records to the Medical Group. If they are not in her military medical records, or with the applications, it is because they were not scanned/uploaded by Medical Group personnel. Despite this administrative shortfall, MEDCON was approved.

Additionally, there are ongoing discrepancies in her date of separation (DOS). Her 28 Jun 19 DOS was updated to 28 Jul 19; however, numerous documents still reflect the June date. Her NGB Form 22 has the correct DOS, but the total service for pay should read 16 years, 3 months, 24 days to reflect the additional month of service.

Finally, her request for outstanding travel reimbursement for ILOD appointments and exams were not addressed in the advisory opinions. Dates and mileage of ILOD medical appointments are noted on the Optional Forms 1164, *Claim for Reimbursement for Expenditures on Official Business*, which she was later informed the Finance Office would enter into DD Forms 1351, *Travel Voucher or Subvoucher*. She was then told mileage could not be reimbursed in INCAP status though she was in the IDES/MEB process; therefore, no reimbursements were made. She does not see within AFI 36-2910 that travel reimbursement is not permitted for ILOD/IDES purposes.

Finally, if applicable with INCAP status, she is requesting credit for a satisfactory year of service from 5 Apr 18 – 5 Apr 19. Numerous Air Reserve Command wings place members on points-only orders while on INCAP for medical appointments, DVA exams, Air Force Wounded Warrior (AFW2) events, Physical Health Assessments, etc. Despite her involvement in 45 days of AFW2 events and 131+ days of ILOD-related exams/appointments from 23 Feb 18 – 28 Jul 19 alone, she was not afforded a good year. It does not affect her pay or retirement, but rather exhibits consistency and equity across the Air Force.

The applicant's complete response is at Exhibit J.

#### **AMENDED AIR FORCE EVALUATION**

ARPC/DPTSP amended the previous advisory to correct the reference provided. The recommendation to deny the applicant's request for retirement points for the period 7 Aug 18 – 28 Jul 19 remains unchanged.

The complete amended advisory opinion is at Exhibit K.

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

The Board sent a copy of the amended advisory opinion to the applicant on 7 Mar 23 for comment (Exhibit L) 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, to include the applicant's rebuttal comments the Board concludes the applicant is the victim of an error or injustice regarding her request for INCAP pay/MEDCON, in part. The Board notes the rationale of NGB/A1PS and AFPC/DPFA; however, in response to the applicant's preference for INCAP pay in lieu of MEDCON, as noted in her rebuttal response dated 21 Feb 23, the Board concurs with the recommendation of NGB/A1PS regarding relief for the period not previously covered through her discharge on 28 Jul 19, for pay only, as the applicant is ineligible for points while receiving INCAP pay. In addition, the Board finds the applicant meets the requirements for travel and transportation allowance, in accordance with DoDI 1241.01, *Reserve Component (RC) Line of Duty Determination for Medical and Dental Treatments and Incapacitation Pay Entitlements*, Enclosure 4 – *Special Pay and Allowances for RC Members with an In-LOD Determination*, incident to medical treatment resulting from her ILOD determination, dated 21 Mar 17. Due to the complex nature of, and multiple agencies involved in, adjudicating the applicant's benefits and entitlements, the Board further directs a comprehensive audit be conducted on the entitlements already provided the applicant as a result of her ILOD status, prior to executing any part of the Board's recommendation, to prevent possible overpayment and/or unauthorized dual compensation to the applicant. Finally, sufficient evidence has been presented to demonstrate an error with respect to the applicant's request to correct her NGB Form 22, *Report of Separation and Record of Service*, Block 10d, *Total Service for Pay*. Specifically, as a result of the applicant's adjusted date of separation, the Board recommends correcting her NGB Form 22, Block 10d to reflect one additional month of service. However, for the remainder of the applicant's requests 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. Specifically, with respect to the applicant's request to be reimbursed for healthcare monthly premiums. The Board notes the applicant was authorized TRICARE network healthcare entitlements for her ILOD medical treatment at no cost to her; therefore, her decision to acquire and utilize TRICARE Reserve Select coverage was voluntary and the premiums her responsibility. With respect to her requests her conditions on the AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*, be annotated Combat-Related – Instrumentality of War: Due to Environmental Hazards, Chlorine Exposure and award of Combat-Related Special Compensation (CRSC), the Board concurs with the rationale and recommendations of AFPC/DPFDD and NGB/SGP. Specifically, the Board finds the applicant's disability was not incurred in a combat zone or incurred during the performance of duty in combat-related operations as designated by the Secretary of Defense. The Board notes the applicant agreed with the IPEB recommendation and waived her rights for further appeal as indicated on the AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition* dated 26 May 19, and provides no evidence to justify overturning her original decision. In addition, there is no evidence the applicant ever submitted a claim for Combat-Related Special Compensation. As for the applicant's request she be issued a final AF Form 707, *Officer Performance Report (OPR) (Lt thru Col)*. The Board notes the recommendation of NGB/A1PO to grant the applicant's request for a final OPR; however, the applicant's statement to withdraw her request, as noted in her rebuttal renders this request moot. Regarding the applicant's request for retroactive promotion to the grade of major (O-4). In

accordance with AFI 36-2504, *Officer Promotion, Continuation and Selective Early Removal in the Reserve of the Air Force*, Table 2.1., promotion eligibility from captain to major requires seven years' time in grade. The applicant was promoted to captain, effective 8 Jun 17, and would not have been eligible for promotion to the grade of major (O-4) until Jun 24. The applicant request she be given constructive credit for retroactive appointment in the grade of captain (O-3), as noted in her rebuttal; however, the applicant was not commissioned as a medical administrative officer and therefore, did not meet the requirements for constructive service credit to the higher grade. Regarding the applicant's request for satisfactory service credit for the period 5 Apr 18 – 5 Apr 19, as noted in her rebuttal, the Board finds the timeframe conflicts with the applicant's INCAP pay claim and medical disqualification from worldwide duty, which rendered her ineligible for pay/points. Therefore, the Board finds no basis to recommend granting this portion of her request addressed above. Finally, the applicant's request for a report of individuals who, as a result of a Commander Directed Investigation, were found to have accessed and viewed her medical records, the Board notes this request is outside the Boards purview. Therefore, the Board recommends correcting the applicant's records as indicated below.

### **RECOMMENDATION**

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show:

- a. She is entitled to Incapacitation Pay (INCAP) from 8 August 2018 – 28 July 2019.
- b. She is entitled to travel and transportation allowances, or monetary allowances in place thereof, for necessary travel incident to medical treatment resulting from her In the Line of Duty (ILOD) determination, effective 21 March 2017 through her date of separation, 28 July 2019.
- c. Her NGB Form 22, *Report of Separation and Record of Service*, issued in conjunction with her 28 July 2019 discharge, Block 10d, *Total Service for Pay*, be corrected to reflect "16 03 24" vice "16 02 24."
- d. Her ILOD-related entitlements paid to date will receive a comprehensive audit by the National Guard Bureau Office of Primary Responsibility, in coordination with the Defense Finance and Accounting Service, to prevent overpayment and/or unauthorized dual compensation.

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 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-2022-02918 in Executive Session on 24 May 23:

, 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 4 Oct 22.  
Exhibit B: Documentary evidence, including relevant excerpts from official records.  
Exhibit C: Advisory opinion, ARPC/DPTSP, w/atchs, dated 16 Nov 22.

- Exhibit D: Advisory opinion, NGB/A1PO, w/atchs, dated 8 Dec 22.
- Exhibit E: Advisory opinion, AFPC/DPFDD, w/atchs, dated 12 Dec 22.
- Exhibit F: Advisory opinion, NGB/A1PS, dated 20 Dec 22.
- Exhibit G: Advisory opinion, NGB/SGP, dated 5 Jan 23.
- Exhibit H: Advisory opinion, AFPC/DPFA, dated 13 Jan 23.
- Exhibit I: Notification of advisory, SAF/MRBC to applicant, dated 25 Jan 23.
- Exhibit J: Applicant's response, w/atchs, dated 21 Feb 23.
- Exhibit K: Amended Advisory opinion, ARPC/DPTSP, w/atchs, 16 Nov 22.
- Exhibit L: Notification of amended advisory, SAF/MRBC to applicant, dated 7 Mar 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

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Board Operations Manager, AFBCMR