

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-03094

XXXXXXXXXXXXXXXXXX

COUNSEL: NXXXXXX

HEARING REQUESTED: YES

APPLICANT'S REQUEST

She be issued Medical Continuation (MEDCON) orders for the period of XX Jul 21 through XX Dec 22.

APPLICANT'S CONTENTIONS

On XXXXXX the XXXXXXXX Commander (XXXX/CC) signed the AF Form 348, *Line of Duty Determination*, and found her condition to be In the Line of Duty (ILOD). However, both her Air National Guard (ANG) unit and the National Guard Bureau (NGB) refused to accept this USAF LOD determination and by doing so violated Department of Defense Instruction (DoDI) 1241.01, *Reserve Component (RC) Line of Duty Determination for Medical and Dental Treatments and Incapacitation Pay Entitlement* and 10 USC Section 12322. Instead, they completed an improper AF Form 348 in which the Air Reserve Component (ARC) LOD Board overruled her immediate commander, the wing staff judge advocate, and the appointing authority, who all found her condition again to be ILOD, and fraudulently determined her condition to be Not ILOD (NILOD) based upon incorrect information with zero supporting evidence. Furthermore, in an additional attempt to deny her eligibility to MEDCON and the necessary medical care and without her knowledge, they made an improper Prior Service Condition (PSC) Determination. The PSC package, along with containing false statement regarding her conditions, care, and medications excluded her XXXXXX ILOD determination, her correct diagnoses, pertinent medical documentation, and failed to connect her ILOD determination to the Title 10 active duty tour during which her condition occurred.

Even though on appeal the Air National Guard Readiness Center (ANGRC) Commander (ANGRC/CC) granted an ILOD determination on 9 Nov 22, since her release from Title 10 active duty orders on 1 Jul 21, she has been unable to perform her military duties, has exhausted her savings, forced to sell her home, unable to secure housing due to lack of income, and unable to seek employment due to the lack of medical care to treat her ILOD mental health condition.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

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

From XXXX – XXXXX, according to Order Number XXXXX, dated 27 Apr 21, the applicant was ordered to Active Duty – Other Training Duty – XXXXXX in accordance with Title 10 USC 12301(d) for the purpose of attending ACSC.

On 15 Jun 21, according to the DD Form 348, dated 15 Jun 21, a LOD determination was initiated for the 27 Oct 20 diagnosis of Generalized Anxiety Disorder (GAD); F32.1, Major Depressive Disorder (MDD), Single Episode, Moderate. On 21 Jun 21, her immediate commander, as a result of their investigation determined the member was present for duty, the proximate cause was work stress related and recommended an ILOD determination.

On 24 Jun 21, according to memorandum, *Line of Duty (LOD) Determination*, the XXX Air Base Wing Judge Advocate (XXXX ABW/JA), conducted a legal review and found the recommendation of ILOD to be legally sufficient.

On 25 Jun 21, according to the AF Form 348, dated 15 Jun 21, the XXX/CC determined her GAD; F32.1, MDD, Single Episode, Moderate, to be ILOD.

On 29 Jun 21, according to an email thread between the applicant and the XXX MDG/SGA, the applicant provided the LOD and requested assistance with securing follow-on care. On 30 Jun 21, the MDG/SGA responded stating “this non-electronic version of the LOD (AF Form 348) is no longer in use and will cause administrative challenges if this form has to be submitted to NGB/SG, A1, etc.” Additionally, they stated the LOD was not completely filled out as Section 14, *Additional Information Required for ARC Members to be Completed by ARC RMD/GMU*, was left blank and they will have to see about this LOD being re-accomplished correctly.

On 30 Jun 21, according to the applicant’s DD Form 214, *Certificate of Release or Discharge from Active Duty*, she was released from active duty and reflects she was on active duty orders in accordance with 10 USC 12301(d) from 24 Jun 20 to 30 Jun 21 and attended XXXX from XX Jul xx to xx Jun xx.

On 15 Aug 21, according to AF Form 348, Case #XXXXXXX, a LOD determination was initiated for the 17 Mar 21 diagnosis of F41.9 – Anxiety Disorder, Unspecified. On 10 Feb 22, her immediate commander recommended an ILOD determination and on 5 May 22, the appointing authority determined her condition to be ILOD.

On 5 May 22, according to AF Form 348, Case #XXXXXXX, the ARC LOD Determination Board Review non-concurred with the appointing authority and recommended a new finding of: NILOD-Not Due to Own Misconduct, Existed Prior to Service (EPTS) – Yes, Not Service Aggravated (NSA) for anxiety disorder unspecified. Finally, on 17 May 22, the appointing authority made the final LOD determination of NILOD-Not Due to Member’s Misconduct (only if EPTS-NSA).

On 22 Sep 22, according to a memorandum from NGB/SGP, *Prior Service Condition (PSC) Determination*, NGB/SGPS reviewed the applicant’s case for the diagnosis of generalized anxiety disorder (GAD) and found the condition to be PSC applicable stating she has an extensive history of anxiety which reportedly began in or around 2009 with initial pilot training and her condition has not improved despite extensive outpatient therapy and medication. Additionally, it states she has not performed flight duties since 2019 and for this reason she has been recommended for further review by a Medical Evaluation Board (MEB) for a duty related fit for duty assessment.

On 9 Nov 22, according to an ANGR/CC memorandum, *LOD Determination Appeal Decision*, <applicant’s name>, Case #XXXXXXXX, the applicant was notified her appeal request was approved, and she was granted a LOD determination of ILOD.

For more information, see the excerpt of the applicant’s record at Exhibit B and the advisory at Exhibit C.

APPLICABLE AUTHORITY/GUIDANCE

DoDI 1241.01, 3. Policy: (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 ILOD 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 ILOD conditions are resolved; or (2) He or she is either found fit for duty, separated, or retired as a result of a DES finding.

Department of the Air Force Instruction (DAFI) 36-2910, *LOD Determination, MEDCON, and Incapacitation (INCAP) Pay*. MEDCON eligibility requires an LOD determination 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 meet retention or mobility standards in accordance with DAFMAN 48-123, *Medical Examinations and Standards*. Members who meet eligibility criteria for MEDCON may with their consent be retained or recalled to duty under 10 USC § 12301, Reserve Components Generally, 10 USC§ 12322, Active Duty for Health Care.

6.2.6. Members on orders greater than 30 days who have an unresolved injury, illness, disease that may render them unfit for duty or unable to meet retention and mobility standards in accordance with DAFMAN 48-123; the member; with their consent, will be retained on AD/FTNGD and upon approval for Pre-MEDCON/MEDCON converted to status under 10 USC §12301(h) or Title 32, respectively.

Department of the Air Force Manual (DAFMAN) 36-2905, *Air Force Physical Fitness Program*, 26 Jul 21, 4.2.3.3. The expiration date on the AF Form 469 represents the date the Airman is medically cleared to resume physical activities previously restricted.

AFI 48-133, *Duty Limiting Conditions*, 7 Aug 20, 1.3. Duty Limitations. Duty limitations will be entered on the AF Form 469, *Duty Limiting Condition Report*. Duty limitations are a type of profile which will indicate what the member cannot do based on his/her current occupational duties with resultant mobility and/or fitness restriction (FR) if appropriate.

AIR FORCE EVALUATION

AFPC/DPFA, recommends partially granting the application. Based on the documentation provided by the applicant and analysis of the facts, there is evidence of an error or injustice, therefore, a partial grant is recommended. Specifically, it is proposed the applicant be approved for MEDCON orders for the period of xx Apr 22 through xx Dec 22, as this represents the time when she had a finalized ILOD condition, a mobility restricting profile (MR), and an active medical plan of care which could be validated in accordance with (IAW) Air Force Instruction (AFI) 36-2910, *LOD Determination, MEDCON, and INCAP Pay*, 8 Oct 15.

The appeal of the second LOD for “anxiety” being ruled ILOD due to service aggravation “resulted in validating the original LOD,” which established 15 Jun 21 as being the initiation date of the first LOD for “anxiety” and also established 15 Jun 21 as the start date for her LOD benefits. IAW DoDI 1241.01, Enclosure 3, Section 3, the RC Service member’s eligibility for medical and dental treatment, as provided in section 1 of this enclosure will be reinstated immediately to include any medical and dental treatment rendered during the period of eligibility covered by the approved ILOD finding.

Although she is requesting her MEDCON benefits start on 1 Jul 21, even with the now finalized ILOD finding, she would not have qualified for MEDCON when her orders ended on 30 Jun 21 as she was without a mobility restricting profile as required by AFI 36-2910, paragraph 5.5,

Requesting MEDCON Orders, which states, if the members medical condition is not resolved prior to completion of the order or pre-MEDCON order extension, MEDCON may be requested through the ARC CMD. Requests for MEDCON shall be electronically forwarded, with all supporting documentation from the member's Individual Reservist Readiness Integration Organization/Individual Reserve Medical Office (RIO/IRM) (for AFR IMAs) or servicing medical unit, to the ARC CMD for validation and approval of the request and certification of the MEDCON days. Furthermore, IAW with subparagraph 5.5.1, *Initial MEDCON Order*, it states submit the following required documentation: 5.5.1.5, A completed AF Form 469, *Duty Limiting Condition Report*.

Despite her ongoing mental health care, along with the military provider recommending an "ILOD" finding for her condition, her mobility restricting profile was not renewed when the applicant followed up on 7 Jun 21. The reason for this is not clear, although it should be noted her profile release date coincided with the end of her Title 10 orders. She was initially placed on profile for more than two months, followed by a two and one-half month gap, and then placed back on profile, which she remains on to this day. There is no indication in the record her medical condition resolved or improved during the gap in her profile. In fact, her providers were still attempting to titrate her medications to effect. It is likely this "gap" was administrative in nature while she returned to her home duty station and did not represent a fitness for duty. It is also possible the military provider was reluctant to extend the profile without additional documentation from the applicant's off-base provider; however, this is speculation based on the review of the provider's note.

Nevertheless, even if the gap in the applicant's profile is considered to be administrative and not reflecting a fitness for duty, she still did not provide documentation from that time period of a medical plan of care to qualify for MEDCON. IAW AFI 36-2910, paragraph 5.5, *Requesting MEDCON Orders*, subparagraph 5.5.1.7, medical documentation, including individual medical treatment plan that incorporates occupational medicine guidelines, peer-reviewed recovery timeline with expected duration of the impairment and certified by a credentialed military medical provider; and Note: Medical documentation, including individual medical treatment plan, will be reviewed by the ARC CMD to ensure consistency with occupational medicine guidelines and peer-reviewed recovery timelines.

Upon returning to her home station, available evidence does support the fact she attempted to re-establish her mental health care. There were several visits to military providers to obtain referrals. Unfortunately, there is no evidence provided these referrals were pursued by the applicant until 1 Apr 22, when she established care with the Department of Veterans Affairs (DVA). Documentation of relatively infrequent mental health visits are not typically sufficient, IAW AFI 38-2910, paragraph 5.5.1.7, for validation of MEDCON orders. However, what is unclear is to what extent her LOD status affected her ability, at the time, to access care utilizing her TRICARE benefits.

Finally, IAW AFI 36-2910, paragraph 5.2.1.1. Members who decline or are found ineligible for MEDCON orders may be eligible for and elect INCAP Pay IAW with Chapter 6. As such, her application should be referred to the appropriate office to review her eligibility for the INCAP Pay program. However, should additional medical documentation become available, this application should be reevaluated.

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 2 Feb 23 for comment (Exhibit D), and the applicant replied on 9 Feb 23. In her response, the applicant contended the advisory, although partially correct, misstates facts, introduces unfounded speculation, and weaponizes AFI 36-2910 against her in order to deny required MEDCON as evidenced by the statement “there is evidence of an error or injustice” but then recommends the Board commit the same injustice by denying nine months of legally required MEDCON.

The attempt to deny MEDCON for the period of xx Jul 21 – 31 Mar 22 inverts the hierarchy of regulations and law by falsely using AFI 36-2910 requirements to supersede the provisions of 10 USC 12322 and DoDI 1241.01, 3. Policy: (2) When an RC Service member is on AD/FTNGD for a period of more than 30 days and, at the scheduled end of that period, has an unresolved ILOD condition that may render the member unfit for duty under the 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 ILOD conditions are resolved; or (2) He or she is either found fit for duty, separated, or retired as a result of a DES finding.

The <state> Air National Guard (XX ANG) refused to process her original LOD Determination IAW AFI 36-2910 and, as required by AFI 36-2910 paragraph 6.4.3.4, failed to “Provide MEDCON briefing and obtain a signed letter of acknowledgment (see myPers MEDCON website) from the member.” Contrary to the advisory’s assertions, she did make every effort possible to seek treatment and did receive the maximum medical care possible throughout that time.

Additionally, the advisory improperly states “she would not have qualified for MEDCON at the time: her qualifying order ended on xx Jun 21. She was without a mobility restricting profile which is required for MEDCON eligibility” but then admits “the reason for this is not clear,” that “there is no indication in the record her medical condition resolved or improved during the gap in her profile,” and then finally states “it is likely this “gap” was administrative in nature while she returned to her home duty station and did not represent a fitness for duty.” She was never returned to duty as her condition did not improve and she was never informed of the “gap” in her profile. It is unjust and unreasonable this administrative error on the part of the government be used as a means to deny her proper military status.

Furthermore, the fraudulent LOD initiated by the XX ANG was initially found to be ILOD when finalized by the XXX ARW/CC on 5 Mar 22. The only NILOD determination was subsequent when NGB, without authority or evidence, made an unsupported NILOD determination, which was overturned on appeal by the ANGRC/CC.

Finally, the advisory statement “the member still did not provide documentation from that time period, of a medical plan of care sufficient to qualify for MEDCON IAW AFI 36-2910...” is a deceptive effort to fault her, the service member suffering mental health illness, for a requirement which she had not been briefed on, and which did not exist at the time, because she had not been provided MEDCON. The ex post facto application of this requirement is unreasonable and is an argument made in bad faith and she has attached substantial documentation of her numerous efforts to obtain care, medical appointments, medications, and the significant hurdles imposed by the denial of active duty orders for that time period.

In summary, MEDCON for the period of xx Jul 21 – xx Dec 22 is required IAW USC, DoDI, and DAFL. This is an undisputable fact supported by substantial evidence. The AZ ANG and NGB engaged in egregious misconduct and illegally denied her proper LOD determination and MEDCON for nearly 18 months, effectively destroying her career, finances, civilian job opportunities, military relationships, and every aspect of her personal life.

The AFBCMR is required to correct her military record by providing Title 10 MEDCON for the entire duration following her improper release from Title 10 Federal Active Duty on 30 Jun 21, through her current MEDCON, which began on 15 Dec 22 and will continue through the completion of Integrated Disability Evaluation System.

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 the victim of an error or injustice. While the Board notes the recommendation of AFPC/DPFA to partially grant the applicant's request for MEDCON orders for the period 1 Apr 22 – 14 Dec 22, the Board finds a preponderance of the evidence substantiates the applicant's contentions. Specifically, the Board notes when the applicant came off of orders on XX Jun 21, she had an unresolved ILOD condition and IAW DoDI 1241.01, *Reserve Component (RC) Line of Duty Determination for Medical and Dental Treatments and Incapacitation Pay Entitlement* she should have remained on active duty until her LOD was complete. The Board notes on 25 Jun 21, the applicant's condition was found ILOD by the ACSC/CC; however, it was returned by her guard unit because it was completed in paper form versus being electronically processed. When her unit reinitiated the LOD determination it took approximately nine months to accomplish and was then erroneously found to be NILOD on 5 May 22. Further, given the extreme delays in processing the LOD, which appear to be due to no fault of the applicant, the fact her medical condition was ultimately found ILOD and warranted MEDCON orders, the Board supports the applicant's request to backdate her MEDCON orders to 1 Jul 21, the day after she was released from active duty. 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 was placed on active-duty orders, for the purpose of medical continuation in accordance with Title 10 U.S.C. §12301(h), from xx July 2021 through xx December 2022.

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-2022-03094 in Executive Session on 24 May 23 and 18 Aug 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 24 Nov 22.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.

Exhibit C: Advisory opinion, AFPC/DPFA, dated 30 Jan 23.

Exhibit D: Notification of advisory, SAF/MRBC to applicant, dated 2 Feb 23

Exhibit E: Applicant's response, dated 9 Feb 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