

CUI//SP-MIL/SP-PRVCY

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

Work-Product

RECORD OF PROCEEDINGS**IN THE MATTER OF:****DOCKET NUMBER:** BC-2023-00554

Work-Product

COUNSEL: Work-Product**HEARING REQUESTED:** YES**APPLICANT'S REQUEST**

His Line of Duty (LOD) Determination be changed from "Not In Line of Duty (NILOD) - Not Due to Own Misconduct" to "In Line of Duty (ILOD)."

APPLICANT'S CONTENTIONS

On 4 Nov 18, he injured his back as the result of a Physical Fitness Assessment while on active duty. After the taking the fitness assessment, the pain started to gradually develop in his back and is still present to this day. While the injury may be a reoccurrence of a similar injury that occurred during a Chemical, Biological, Radiological, Nuclear (CBRN) Enhanced Response Force Package (CERFP) exercise in Sep 14 and was initially treated at the Newport Naval Clinic and resulted in him being on profile for several months, the initial injury, he has consistently scored a Fit Level of "Excellent" with corresponding composite scores of "100" on all his fitness assessments from Nov 10 thru his fitness assessment on 4 Nov 18. On 6 Nov 18, he reported to the ANGB medical clinic where he informed the medical personnel of his injury that he sustained during the fitness assessment and was told there were no doctors present at the clinic during the week and he needed a signed LOD determination in order to visit the Newport Naval Clinic. The initial LOD determination for the 4 Nov 18 injury from his immediate commander and appointing authority was ILOD. However, on 31 Mar 22, he was informed by his commander NGB/A1 had reviewed the circumstances regarding his injury and determined his ILOD determination was now NILOD. He appealed the NILOD decision to the Air National Guard Readiness Center Commander (ANGRC/CC), stating the AF Form 348, *Line of Duty Determination*, dated 4 Dec 18, Box 14d, *Condition potentially unfitting IAW AFI48-123 Retention and/or Mobility Standards*, and Box 14e, *Requires ARC LOD Determination Board Finalization*, should both be changed from "NO" to "YES" as several health professionals, both civilian and military, have informed him that due to his injury he will never be able to run again. However, the ANGR/CC denied his appeal.

Furthermore, the difficulties he incurred in trying to receive treatment is indicative of the difficulties members of the Guard go through when they have to deal with the LOD process. When his unit's medical group was not able to provide treatment, he continued to try finding medical treatment on his own by using his private insurance. He was able to receive treatment from several civilian medical facilities along with receiving treatment from the Department of Veterans Administration (DVA). If he had access to one medical facility and one doctor from the first day, then it would not have created any confusion regarding his treatment as progression of his condition worsened.

The injury happened In the Line of Duty.

The applicant's complete submission is at Exhibit A.

**AFBCMR Docket Number BC-2023-00554
CUI//SP-MIL/SP-PRVCY**

Controlled by: SAF/MRB
CUI Categories: SP-MIL/SP-PRVCY
Limited Dissemination Control: N/A
POC: SAF.MRBC.Workflow@us.af.mil

STATEMENT OF FACTS

The applicant is an Air National Guard (ANG) master sergeant (E-7).

According to documentation provided by the applicant:

On 10 Sep 14, according to MDG/SGAR memorandum, *Authorization to Receive Medical/Dental Care*, dated 18 Sep 14, the applicant felt light pain in his lower back. Two days later, 12 Sep 14, he woke up with sharp pain in the same location which grew until it was difficult to walk. It further states he was on active duty from 8 Sep 14 – 14 Sep 14 where he was working with CERFP unloading equipment, setting up and tearing down tents, which involved lot of physical activity. The applicant was authorized Military Medical Care for the disease/injury until he can be returned to full military duties without restriction.

On 4 Nov 18, according to AF Form 348, *Line of Duty Determination*, dated 4 Dec 18, after taking the fitness assessment, he started feeling pain in the mid-section and upper back. He stated this condition had bothered him in the past but was exacerbated during the fitness exam. The next day, his civilian medical provider diagnosed him with M47.897 Other Lumbar Spondylosis with associated grade 1 Spondylolisthesis (L5-S1).

On 6 Feb 18, his immediate commander, the maintenance group commander (MNX/CC), recommended a LOD of ILOD, with the wing staff judge advocate's concurrence on 7 Feb 19.

On 15 Mar 19, the appointing authority found the LOD determination to be ILOD.

On 14 Mar 22, according to his maintenance group commander's (MNX/CC) memorandum, *Notification of Determination of Not in Line of Duty*, **Work-Product** dated 31 Mar 22, the applicant was informed that after a review of an Informal investigation of the circumstances of his injury or disease, the NGB/A1 (Approving Authority), under AFI 36-2910, has determined that his condition, M47.897 Other Lumbar Spondylosis with associated grade 1 Spondylolisthesis (L5-S1) began after his fitness assessment on 4 Nov 18, to be NILOD. The applicant indicated he would submit an appeal to the Appellate Authority.

According to memorandum, *Referral to Non-Duty Related Disability System*, dated 1 Apr 22, the applicant was informed by his unit's medical group he was entered into the Non-Duty Related Disability Evaluation System (NDR DES) as a result of the ARC LOD Board's NILOD determination.

On 22 Apr 22, the applicant appealed the NILOD decision.

On 2 Sep 22, the ANGRC/CC denied his appeal and the final decision remains NILOD – Not Due To Own Misconduct.

On 25 Jan 23, the Informal Physical Evaluation Board (IPEB) found that the applicant's medical condition to be incompatible with the rigors of military service and unfitting. Additionally, the IPEB found the applicant's condition is not ratable or compensable since there is no prior service condition or Line of Duty determination showing the condition was incurred or permanently aggravated by military service.

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 1.8. *LOD Determinations Findings.* One of the following findings will be applied to the member's illness, injury, disease or death:

- ILOD: The illness, injury, disease or death was incurred or aggravated while the member was in an authorized duty status and was not the result of the member's misconduct. Note: (ARC only). Unreported medical conditions that could have resulted in denial for entrance into a period of active duty should not be considered as having become unfitting merely because they are being reported while in status. For duration of orders 30 days or less, the standard of proof is a preponderance of the evidence. Preponderance of the evidence is defined as the greater weight of credible evidence.
- NILOD, Not Due to Own Misconduct. Existed Prior to Service - Not Service Aggravated (EPTS-NSA). An informal LOD determination must be accomplished in every case where a NILOD-EPTS-NSA finding is made. This requirement applies to both RegAF/RegSF and ARC personnel. A NILOD-EPTS-NSA finding can only be made after a thorough review of the evidence determined that the member's illness, injury, or disease existed prior to the member's entry into military service with any branch or component of the Armed Forces or current periods of such service, and was not service aggravated. For duration of orders 30 days or less, the standard of proof is preponderance of the evidence.

Paragraph 1.9. Standard of Proof for LOD Determinations. Member's conditions are presumed to have been incurred in the line of duty for injuries, illnesses and/or diseases sustained while in a qualified duty status. The burden of proof is on the government to prove NILOD. For members on orders 30 days or less, the standard of proof the government must overcome to make a NILOD determination is Preponderance of the Evidence. The Air Force must determine whether the illness, injury, disease, or death is or is not in the line of duty based on medical evidence.

Paragraph 2.13. National Guard Bureau, Manpower, Personnel, and Services (NGB/AI). Serves as approving authority for ARC Formal LOD determinations.

Paragraph 2.15. National Guard Bureau, Surgeon General (NGB/SG). Serves on the ARC LOD Determination Board.

AIR FORCE EVALUATION

NGB/SGPS recommends denying the request. On 4 Nov 18, the applicant contends his Other Spondylosis, Lumbosacral Region was aggravated after taking a fitness assessment when he felt pain in his mid and upper back. However, the applicant's initial injury in Nov 18 was due to lifting aircraft scales at work while in civilian technician status. While he reportedly sustained a prior back injury during the period of 10 Sep 14 – 14 Sep 14 during a CERFP exercise, no LOD was completed. However, on 4 Dec 18, the LOD for Spondylosis, which he contends was aggravated by the fitness assessment, was generated but it was not finalized at the Approval Authority level as it appears to have stopped at the Appointing level. The LOD was transcribed into the Electronic Case Tracking (ECT) system and dispositioned as "NILOD-Not Due to Member's Misconduct" based on "medically accepted principle that spondylosis is a nonspecific degenerative change of the spine caused by aging and trauma which leads to progressive disc degeneration/disc protrusion and/or loss of disc height along with other chronic changes of the spine and soft tissue structures

including stenosis and the development osteophyte complex which encroach on the spinal cord or cause nerve compression. The onset is variable and insidious, often with changes occurring for years prior to development of any physical signs or symptoms. No substantiating evidence has been provided to suggest condition is related to any traumatic event. Spondylolisthesis is a chronic condition that may present with episodic periods of pain and will naturally progress over time. The most common etiology of spondylolisthesis is degenerative. The service member clearly has chronic degenerative disease and experienced an event that acutely exacerbated the condition; however, there is no evidence of chronic worsening above and beyond the natural progression.” It is unclear why the LOD was transcribed into ECT almost three years later, but it is presumed this occurred to appropriately allow for LOD Board finalization. The applicant appealed the NILOD decision, and the Appellate Authority disapproved the appeal request and upheld the final decision as NILOD.

NGB/SGPS goes on to describe that the applicant’s NILOD appeal documents indicate he sustained a back injury in Sep 14 as he was unloading equipment and tearing down tents during a CERFP exercise. There is no LOD or supporting medical documentation for this 2014 injury besides the 18 Sep 14 memorandum from his unit’s medical group to the Naval Health Care New England facility authorizing him to receive care for left back pain. He has been seen/treated by civilian and DVA providers for his Other Spondylosis with Radiculopathy since 2018 to the present. Due to his being unable to function in his primary Air Force Specialty Code (AFSC) and being on light duty since Nov 18 he went through a Fitness Determination evaluation. The IPEB found the applicant’s “medical condition imposes unreasonable requirements on the Air Force to maintain or protect the Service Member’s (SM) health; represents a medical risk to the health of the SM with continued service; is subject to exacerbations, continued sequelae, or progression; requires frequent follow-up with a medical specialist; requires medication needing frequent or special handling that cannot be assured in/or precludes deployment to austere locations; and limits the SM from performing the full spectrum of his AFSC duties, prohibits deploying to austere locations and prohibits meeting physical fitness requirements. Accordingly, the IPEB finds the SM’s Other Spondylosis with Radiculopathy is incompatible with the rigors of military service and unfitting. Additionally, the IPEB finds that the SM’s condition is not ratable or compensable since there is no prior service condition or line of duty determination showing the condition was incurred or permanently aggravated by military service.”

There is no additional supporting documentation in the electronic health record nor submitted by the applicant to suggest the NILOD determination was made in error. Therefore, NGB/SGPS recommends upholding the Appellate Authority’s NILOD decision.

The complete advisory opinion is at Exhibit C.

NGB/A1PS recommends denying the request. On 4 Dec 18, the LOD, in which the applicant claimed to have incurred an injury after completing his fitness assessment, was generated and was transcribed into the ECT system on 18 Aug 21. However, it was never finalized at the Approval Authority level until 14 Mar 22, when it was found to be Not In Line of Duty, Not Due to Member’s Misconduct, Existed Prior to Service with No Service Aggravation (NILOD, EPTS-NSA).

The applicant appealed the NILOD decision, and the Appellate Authority denied his appeal and upheld the final decision as NILOD, EPTS-NSA. According to the NGB/SG advisory, dated 22 May 23, the documents provided by the applicant in the appeals package indicated he sustained a back injury in Sep 14 as he was unloading equipment and tearing down tents during a CERFP exercise. There is no LOD, or supporting medical documentation, on the Sep 14 injury besides the memorandum from his unit’s medical group to the Naval Health Care New England facility, dated 18 Sep 14, authorizing him to receive care for left side back pain. He has been seen/treated

by civilian and DVA providers for his Other Spondylosis with Radiculopathy from 2018 to present. Additionally, the applicant went through a Fitness Determination where the IPEB found his Other Spondylosis with Radiculopathy is incompatible with the rigors of military service and unfitting and there is no prior service condition or line of duty determination showing the condition was incurred or permanently aggravated by military service.

Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice. NGB/A1PS concurs with NGB/SGPS with upholding the applicant's NILOD determination for Other Spondylosis, Lumbosacral Region.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinions to the applicant on 13 Jun 23 for comment (Exhibit E), and the applicant replied on 28 Jun 23 and again on 29 Jun 23. In his response, the applicant contended his medical condition Other Spondylosis with Radiculopathy was a direct result of the 4 Nov 18 Air Force Physical Fitness Assessment. As it is his duty to tell the truth, he explained while he did lift and load aircraft scales on a box truck in the middle of the week prior to the Fitness Evaluation, and had sustained injuries to his back prior to 4 Nov 18, he was never on medication or specialized care any long period of time. The fact that he performed a Fitness Evaluation and scored 100 percent it is fair to say neither his chronological age nor physical condition showed the condition existed prior to 4 Nov 18. Thus, there is a 100 percent probability the "trauma," which either occurred during or was aggravated by the Physical Fitness Assessment, is the direct cause of his condition. In this regard, the applicant states that it is highly impossible for a 54 year old Service Member to take a USAF Fitness Assessment with: "disc space narrowing and spurring at L4-5, grade 1 Spondylosis of L5-S1," radiculopathy on the left leg and still obtain a Fit Level of Excellent, with a corresponding score of 100/96.6 percent in the 25 year or younger category.

With concern to the lack of medical documents in his record, the applicant argues it is due to the medical procedures not followed or documented by the military medical personnel. As such, the applicant indicates the "Air Surgeon" should answer why there is a lack of documentation and in the civilian medical practice, it would be considered medical malpractice.

In support of his rebuttal, the applicant provides copies of his military and medical records as well as his medical records from the DVA .

The applicant's complete response is at Exhibit F.

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 and response to the advisory opinions, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendations of NGB/SGPS and NGB/A1PS and finds a preponderance of the evidence does not substantiate the applicant's contentions. Although the applicant contends the Physical Fitness Assessment resulted in a back injury that was subsequently diagnosed as Other Spondylosis, Lumbosacral Region, and this injury aggravated a similar injury that occurred four years earlier while he was in a qualified status, the Board determines that no substantiating evidence has been

provided to suggest his condition is related to any traumatic event, as Spondylolisthesis is a chronic condition that will naturally progress over time and there is no evidence of chronic worsening above and beyond the condition's natural progression. Therefore, the Board recommends against correcting the applicant's records.

4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

RECOMMENDATION

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

CERTIFICATION

The following quorum of the Board, as defined in 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-2023-00554 in Executive Session on 25 Aug 23:

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

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

- Exhibit A: Application, DD Form 149, w/atchs, dated 8 Feb 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, NGB/SGPS, dated 22 May 23.
- Exhibit D: Advisory Opinion, NGB/A1PS, w/atch, dated 7 Jun 23.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 13 Jun 23.
- Exhibit E: Applicant's Response, w/atchs, dated 28 Jun 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.

11/20/2023

X **Work-Product**

Work-Product
Board Operations Manager, AFBCMR
Signed by: USAF