



Work-Product

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

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-02101

Work-Product

COUNSEL: Work-Product

HEARING REQUESTED: NO

### APPLICANT'S REQUEST

He be given a medical retirement.

### APPLICANT'S CONTENTIONS

His initial sprain occurred in 2011 and not at the time of his motor vehicle accident. The applicant's commander should make the determination based on his character and integrity, the injury occurred in Work-Product. The Command Directed Investigation (CDI) also concluded there was no substantiation to the claim the car accident obliterated his ankle because, if this were true, then surgery would have been immediate and not two months after the accident. Furthermore, the investigation found he did not commit willful neglect or gross negligence when he took his fitness test on 21 Aug 12 without following restrictions. He was given verbal authorization by his primary care physician (PCP) to take the test and was later given written permission. Because the written permission was so close to the fitness test, this supported his claim he was given verbal permission and the two line of duty (LOD) NGB personnel did not believe he engaged in misconduct.

In the Staff Judge Advocate's legal review of the CDI, it is noted his left ankle injury is presumed to be considered in line of duty (ILOD) because he was in an Inactive Duty Training (IADT) status which shows the injury was service aggravated and the totality of the circumstances and there being no clear and unmistakable evidence to find his left ankle injury was not in line of duty (NILOD), the presumption afforded to all airmen was not successfully rebutted and his injury should be considered ILOD-service aggravated. Regardless of the outcome of the investigation, he was separated with an honorable discharge but not a medical retirement and is now scheduled for a below the knee amputation in Sep 23.

He was told by his leadership, Major Work-Pr... and Chief Work-Pr... from the medical group determined his injury existed prior to service (EPTS); however, ILOD determinations are the purview of the commander not the medical group. Therefore, medical group personnel overstepped their authority. Chief Work-Product in the medical group clearly exceeded her authority because her involvement should have been limited to administrative duties and the Inspector General's (IG) investigation states she lied about the applicant's duty status and made determinations about the LOD which were not hers to make and the CDI states she deliberately used influence to the

**AFBCMR Docket Number BC-2023-02101**

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Controlled by: SAF/MRB  
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detriment of his case. Furthermore, Major [Work-...] contacted Doctor [Work-Product] who was influenced to change his letter after the initial finding his injury was exacerbated while on duty.

The preponderance of evidence supports his injury rendered him unfit for continued service and was exacerbated by his service; therefore, he should be monetarily compensated. His injury was determined to be ILOD-service aggravated and two independent investigations discovered inexcusable material error and misconduct on the parts of Chief [Work-Pr...] and Major [Work-Pro...].

The applicant's complete submission is at Exhibit A.

## STATEMENT OF FACTS

The applicant is a former Air National Guard (ANG) technical sergeant (E-6).

Dated 22 Oct 14, the Aeromedical Summary indicates the applicant initially reported complaints of ankle pain on 13 Sep 10; however, was not able to recall a specific injury. He indicated, while he was deployed to [Work-Product] in Jan 11, he injured his left ankle but did not seek medical care until Apr 11, approximately three months after the injury. The report further notes the applicant was on a limiting AF Form 469, *Duty Limiting Condition Report*, stating he was not able to run when he completed his fitness test on 21 Aug 12. On 7 Sep 12, he was evaluated by his medical group and reported no pain, so he was returned to duty without limitations. The report goes on to state the applicant claims the injury to his left ankle is a LOD injury that he suffered while training for and completing a physical fitness test on 21 Aug 12; however, after careful review of his medical record and documentation from civilian providers, there does not appear to be any indication that this injury is LOD.

On 11 Sep 14, the applicant acknowledged his non-duty related, medical disqualification case would be entered into the Disability Evaluation System (DES) for a fitness determination only.

On 17 Sep 14, his commander recommended granting him a waiver to continue his military service stating he may never be able to deploy; however, he continues to perform and operate at a high standard and significantly contributes to the overall mission effectiveness. His commander also indicates the applicant was not in a military status when the medical condition was first diagnosed.

On 28 Apr 15, NGB/A1PS sent a request for a Non-Duty Disability Evaluation System (NDDDES) fitness determination to HQ AFPC/DPSDD indicating the applicant was identified with a non-duty related physical defect or condition that rendered him unfit for duty. He was found medically disqualified from service due to transient arthropathy involving his ankle and foot noting he had extensive history of left ankle pain that detracted from his ability to perform his military duties.

On 5 May 15, the Informal Physical Evaluation Board (IPEB) found the applicant unfit for continued military service due to his ankle pain. The board noted the applicant had an extensive history of left ankle pain dating to 2010 with no specific injury and further outlines his various medical procedures regarding his left ankle, his commander's recommendation, and his profile

restrictions. The board also noted he took a full fitness test in Aug 12 and was returned to full duty in Sep 12; however, continued to have ankle pain/issues.

Dated 8 Jul 15, the applicant disagreed with the findings of the IPEB and elected to have his case referred to the Formal Physical Evaluation Board (FPEB) for a non-duty related fitness determination only. In his appeal, the board contention slip indicates he has the ability to adequately perform his duties and should be found fit for duty.

On 21 Sep 15, the FPEB found the applicant unfit for continued military service due to his ankle pain.

On 24 Sep 15, the applicant acknowledged the finds of the FPEB indicating he agreed and did not wish to submit a rebuttal.

Dated 21 Oct 15, in a letter provided by the applicant, the IG office recommended his command should perform a LOD investigation to determine if the applicant's injury was aggravated by the completion of his fitness test. It was noted the applicant was denied his Medical Evaluation Board (MEB) waiver and was to be medically retired. NGB personnel informed the IG an approved LOD would grant the applicant Department of Veterans Affairs (DVA) benefits and some additional Tricare benefits and would in no way delay or effect his medical separation. The IG also stated the NGB personnel recommended the unit initiate and complete another formal LOD and they also conveyed they saw no misconduct on the applicant's part regarding his fitness test; however, advised the applicant would need to provide medical evidence to show his fitness test aggravated his condition.

On 15 Feb 16, AF Form 348, *Line of Duty Determination*, indicates the applicant's left ankle pain was found to have EPTS, not service aggravated (NSA). It is noted the applicant passed his fitness assessment on 8 Aug 12 with an exemption for the run and again took a second fitness assessment on 21 Aug 12 without exemptions while on an AF Form 469 restricting him from the run due to post-operation. He was later seen by his surgeon who opined the fitness assessment did not re-injure the ankle and blamed it on sequelae of the initial injury. The form further notes as a result of an investigation, based on the volume of medical documentation, conflicting testimonials, and inconsistent information, a LOD could not be determined; therefore, a CDI was conducted and a recommendation of an ILOD determination was made on 3 May 16 and the appointing authority concurred on 18 May 16. However, on 15 Sep 16, NGB/SG determined his injury was not in the line of duty (NILOD)-not due to own misconduct and the approving authority, on 27 Sep 16, determined his injury was NILOD-not due to member's misconduct (only if EPTS-NSA with no indication of misconduct).

On 8 May 18, NGB Form 22, *National Guard Bureau Report of Separation and Record of Service*, reflects the applicant was honorably discharged from the ANG after serving 17 years, 8 months, and 24 days of total service for pay. He was discharged, with a narrative reason for separation "Physical Disqualification."

Dated 27 Jun 18, Reserve Order **Work-Product** indicates the applicant was assigned to the Retired Reserve and placed on the USAF Reserve Retired List (RRL), effective 9 May 18.

On 24 Nov 21, ARPC/DPTT sent the applicant the standard Notification of Eligibility for retired pay informing him that he completed the required years under the provisions of Title 10 U.S.C., Section 12731 and is entitled to retired pay upon application prior to age 60.

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

## AIR FORCE EVALUATION

NGB/SGPS recommends denying the application finding no evidence of an error or injustice regarding the applicant being afforded the option of his case being reviewed by the Physical Evaluation Board. The applicant elected to enter the NDDes process. The IPEB and the FPEB reviewed the applicant's case and rendered their disposition. Notably, the relevant LOD was ultimately finalized as NILOD, EPTS/NSA.

Applicant contends he injured his left ankle while deployed to Korea; however, did not report the injury upon his return in fear of mistreatment from specific personnel within his medical unit. The applicant was involved in a motor vehicle accident in 2012 and had surgery in Mar 12 on his ankle. The applicant was placed on an AF Form 469 that detailed his limitations and stated he was given a verbal clearance from his civilian provider to perform his fitness assessment. He completed all components of the fitness assessment and passed on 21 Aug 12 while on the active AF Form 469 that prescribed fitness limitations. He complained of some ankle soreness afterwards but attributed it to not actively using his ankle; however, began to have additional pain after he completed the fitness assessment and attributed the pain to the fitness assessment. He requested to initiate a LOD and was told by his medical group, an LOD would not be initiated because his ankle injury EPTS.

He filed an IG complaint against his medical group, stating his ankle injury was duty related as it occurred while in an active qualified status. The IG completed their investigation and recommended the medical group perform an LOD investigation to determine if the applicant's injury was aggravated by his completion of the fitness assessment. A CDI for a LOD was initiated. The analysis of the CDI resulted in the Staff Judge Advocate Legal Review stating pursuant to AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*, paragraph 1.8, the applicant's left ankle injury is presumed to be considered an injury sustained ILOD if he was in an IADT status and the evidence shows the injury was aggravated during a period of authorized training with the **Work-Product** (ANG). Based on the evidence, the totality of the circumstances, and there being no "clear and unmistakable" evidence to find the applicant's left ankle injury was NILOD, the presumption afforded to all airmen were not successfully rebutted, and his left ankle injury should be considered ILOD-service aggravated. The LOD was then routed through the LOD board at the Air National Guard Readiness Center, and after review by medical, legal, and policy experts, it was finalized as NILOD because the condition EPTS and was NSA. Note that this finalized determination was in agreement with local medical opinion that the condition EPTS/NSA.

The applicant's unresolved ankle issue became unfitting, and the applicant was entered into the NDDDES. The applicant indicated he desired to enter the NDDDES, and his case was referred to the IPEB for review. He then elected to have his case referred to the FPEB solely for a fitness determination which found the applicant unfit to perform the duties of his office, grade, rank or rating due the diagnosis of ankle pain.

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 12 Mar 24 for comment (Exhibit D), but has received no response.

## **FINDINGS AND CONCLUSION**

1. The application was not timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendation of NGB/SGPS and finds a preponderance of the evidence does not substantiate the applicant's contentions. Specifically, the Board finds the applicant's contention of his initial sprain occurring in 2011 in **Work-Product** not supported by the evidence as noted in the Aeromedical Summary dated 22 Oct 14, he initially reported complaints of ankle pain in 2010 which would indicate his injury existed prior to his active-duty service in **Work-Product**. As to the issue whether his fitness test permanently aggravated his ankle injury, the Board finds this was not supported by medical evidence as he was found fit and returned to duty without limitations after his completion of the test and it was noted his surgeon opined his fitness assessment did not re-injure his ankle and blamed it on sequelae of the initial injury. Furthermore, the Board finds no error or injustice regarding the processing of his LOD determination. The Air National Guard Readiness Center correctly came to the conclusion the applicant's injury was NILOD-NSA after being reviewed by medical, legal, and policy experts. Therefore, the Board recommends against correcting the applicant's record. The Board also notes the applicant did not file the application within three years of discovering the alleged error or injustice, as required by Section 1552 of Title 10, United States Code, and Department of the Air Force Instruction 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*. The Board does not find it in the interest of justice to waive the three-year filing requirement and finds the application untimely.

## **RECOMMENDATION**

The Board recommends informing the applicant the application was not timely filed; it would not be in the interest of justice to excuse the delay; 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-2023-02101 in Executive Session on 17 Apr 24:

Work-Product

Panel Chair

Panel Member

Panel Member

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

Exhibit A: Application, DD Form 149, w/atchs, dated 21 Jun 23.

Exhibit B: Documentary evidence, including relevant excerpts from official records.

Exhibit C: Advisory Opinion, NGB/SGPS, w/atch, dated 7 Mar 24.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 12 Mar 24.

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.

5/13/2024

Work-Product

Board Operations Manager, AFBCMR  
Signed by: USAF