

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-02484

XXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His official military personnel record be amended to reflect:

- a. Pre-Medical Continuation (MEDCON) orders, with pay/points/entitlements, for the period 5 May 17 – 4 Jun 17.
- b. MEDCON orders, with pay/points/entitlements, for the period 5 Jun 17 – 5 Feb 19.
- c. Award of Incapacitation (INCAP) pay for the period 6 Feb 19 – 3 Jun 21.
- d. Award of Special Compensation for Assistance with Activities of Daily Living (SCAADL). **(Applicant failed to exhaust lower administrative remedies).**

APPLICANT'S CONTENTIONS

His Air Force Reserve unit and local Casualty Assistance Representative (CAR) did not file a Casualty Morning Report (CMR) – Very Seriously Injured, at the time of his injury on 5 May 17 when he was on his way to his Unit Training Assembly (UTA). He was in a motor vehicle/motorcycle accident and suffered a severe Traumatic Brain Injury (TBI) that severed his optic nerves on impact, and he is now blind. As a result of the unit not reporting his injury, he was not enrolled in the Air Force Wounded Warrior (AFW2) Program and not placed on Pre-MEDCON and MEDCON orders during his recovery, rehabilitation, and Medical Evaluation Board (MEB). He was not afforded the opportunity to apply for INCAP pay when his Department of Veterans Affairs (DVA) compensation was awarded, which would have resulted in his removal from MEDCON and his application for INCAP pay, which he would remain on until his retirement date, as he was not able to work due to his injury. He was finally enrolled in AFW2 in 2021, four years after his initial injury, and learned about the benefits and entitlements he would have received years ago. If the CMR had been accomplished at the time of his injury in 2017, AFW2 would have enrolled him immediately in accordance with their enrollment procedures. AFW2 worked with the CAR for months to have the CMR documented to assist him with his Traumatic Injury Protection under Servicemembers' Group Life Insurance (TSGLI) application. This has taken over a year, and his TSGLI was approved based on the number of items he is asking to be corrected.

He has not completed his AF Form 1971, *Certification for Incapacitation Pay*, in its entirety as he is no longer at his unit but has initiated the form in his current Air Force Board for Correction of Military Records (AFBCMR) application.

He is not asking for MEDCON beyond 5 Feb 19 due to the fact he received a 100 percent permanent and total rating from DVA on 6 Feb 19 and is not eligible to receive both DVA compensation and active duty pay while in active duty status. However, once MEDCON is approved, he asks his medical retirement pay be adjusted based on additional points earned. He

also is not asking for medical expenses to be reimbursed as his care was paid for by both the civilian insurance paid out by the individual that caused the accident and the DVA.

Finally, he requested award of SCAADL for a total of one year and five months to cover when his injury occurred on 5 May 17, and he was discharged from the hospital on 7 Jul 17. He attended a DVA Blind Rehabilitation Center from 8 Dec 18 through 1 Feb 19 and returned home and continued to live with his mother from 2 Feb 19 through his date of separation on 4 Jun 21. Based on guidance from AFW2, in good faith he had his mother (caregiver) attempt to fill out the complicated SCAADL forms with former medical providers they could track down, and it took about a month. Once completed, he was told the forms needed numerous edits and then was told by their Air Force point of contact there is no provision to allow for retroactive payments for SCAADL. He has not attached the forms they attempted to fill out. They are complicated and after the fact, and he is depending on his mother to understand what is needed, but they are with his Non-Medical Care Manager at AFW2.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force Reserve staff sergeant (E-5).

On 5 May 17, according to AF Form 348, *Line of Duty Determination*, the applicant received multiple injuries as a result of a motor vehicle/motorcycle accident while on his way to his UTA. The Approving Authority found the applicant's injuries to be In the Line of Duty (ILOD), on 28 Aug 18.

On 4 May 20, according to AF Form 1185, *Commander's Impact Statement for Medical Evaluation Board*, the applicant could not satisfactorily perform all primary AFSC [Air Force Specialty Code] in-garrison duties and could not perform his primary duties in an austere/deployed environment.

On 8 Jun 20, according to a HQ AFRC/SGOZ memorandum, Subject: Review in Lieu of (RILO) Disqualification, the applicant was determined to be medically disqualified for continued military duty and was eligible for processing through the MEB and Air Force Integrated Disability Evaluation System (IDES).

On 30 Mar 21, according to AF Form 469, *Duty Limiting Condition*, the applicant had a medical defect/condition that required MEB or Physical Evaluation Board (PEB) processing.

On 30 Mar 21, according to AF Form 618, *Medical Board Report*, the applicant was diagnosed with Enucleation of Eye, Seizures R/T Trauma, Fracture of Vertebrae – Surgical Spinal Fusion, and referred to the Informal Physical Evaluation Board (IPEB).

On 23 Apr 21, according to DVA Rating Decision, provided by the applicant, he was awarded a combined evaluation for compensation of 100 percent from 6 Feb 19.

On 5 May 21, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board*, the applicant was diagnosed with the following Category I – Unfitting Conditions:

- Legal blindness in both eyes with atrophy of globe of left eye, and right eye lower lid ectropion, corneal scar, dry eye syndrome, visual field defect, and photophobia; Veterans Administration Schedule for Rating Disabilities (VASRD) Code 6009-6062; 100 percent disability rating.

- Traumatic Brain Injury (TBI), status-post maxillary fracture with hardware; VASRD Code 8045; 40 percent disability rating.

- Tonic-clonic seizures or grand mal epilepsy associated with TBI, status-post maxillary fracture with hardware; VASRD Code 8045-8910; 20 percent disability rating.

- Intervertebral disc syndrome of the thoracolumbar spine with spondylolisthesis and spinal fusion, status-post T12 fractures including the right lamina, left pedicle, and bilateral transverse processes, status-post L1-L2 chance fracture; VASRD Code 5239; 10 percent disability rating.

The IPEB recommended permanent retirement with a combined compensable percentage of 100 percent.

On 10 May 21, according to AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, the applicant agreed to the findings and recommended disposition of the IPEB and waived his rights for any further appeal. He did not request a one-time reconsideration of the DVA disability ratings for conditions found unfitting by the IPEB.

On 11 May 21, according to an AFPC/DPF-QA memorandum, Subject: Physical Evaluation, the Secretary of the Air Force directed the applicant be permanently retired under the provisions of Title 10, United States Code, Section 1204 (10 USC § 1204), with a compensable percentage for physical disability of 100 percent.

On 3 Jun 21, according to Special Order Number XXXX, dated 20 May 21, the applicant was relieved from active duty, organization, and station of assignment. Effective 4 Jun 21, he was permanently disability retired in the grade of staff sergeant (E-5), with a compensable percentage of disability of 100 percent, with 4 years, 9 months, and 29 days active service for retirement.

On 29 Jul 22, according to *Defense Casualty Information Processing System (DCIPS) Casualty Report*, provided by the applicant, a casualty report was submitted to the Air Force Personnel Center Casualty Matters.

On 29 Nov 22, according to an AFPC/DPFC letter, provided by the applicant, he was awarded \$100,000.00 TSGLI for loss of sight in both eyes.

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

AIR FORCE EVALUATION

AFRC/SGO recommends partially granting the application. There is no evidence of an error but based on the submitted information, the applicant may not have been informed of the requirements for MEDCON or INCAP pay.

An LOD determination was initiated on 20 Oct 17 based on injuries sustained from a motorcycle accident on 5 May 17. On 28 Aug 18, the incident was determined to be ILOD for several conditions. A RILO was initiated on 26 May 20, and on 8 Jun 20, AFRC/SGO found the applicant to be disqualified and directed him to an MEB for further processing and determination of military fitness for duty. The applicant's initial rating from the DVA was 100 percent, effective 6 Feb 19, based on documentation submitted. He was officially retired on 3 Jun 21 [sic¹].

¹ According to Special Order No. XXXX, the applicant was relieved from active duty, organization, and station of assignment on 3 Jun 21, and retired effective 4 Jun 21.

In accordance with Department of the Air Force Instruction (DAFI) 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*:

3.2.2.6.3.3. An Interim LOD determination is valid for 55 days and is replaced upon completion of the finalized LOD determination.

6.2.11. Unless the member is entered into the DES, in accordance with AFMAN 41-210, *Tricare Operations and Patient Administration*, the cumulative total number of MEDCON days to include Pre-MEDCON (for both military personnel appropriation (MPA), Title 32 and RPA orders) may not exceed 270 days without review by the SAF/MR for potential termination pursuant to paragraph 6.10.

Additionally, paragraph 6.5. states Pre-MEDCON orders cannot be backdated and paragraph 6.9.5.8. states MEDCON orders cannot be backdated.

7.1.1. The purpose of INCAP pay is to authorize pay and allowances to those members who are not able to perform military duties to include light duties not associated with their Air Force specialty code, because of an injury, illness or disease incurred in the LOD; 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 in the LOD (37 USC § 204).

7.2.1. Unable to Perform Military Duties. A member, who is unable to perform military duties including light duties outside the member's Air Force Specialty Code, as determined by a military medical authority and the member's immediate commander, due to an injury, illness or disease incurred or aggravated ILOD, is eligible for full pay and allowances (including incentives and special pays to which entitled, if otherwise eligible) in accordance with paragraph 7.2, and less any civilian earned income the member has, regardless of type of duty status. If there is no civilian income, there is no offset of monies and member is entitled to full INCAP Pay.

The applicant has an ILOD finding and was appropriately disqualified and directed to MEB/IDES. He would not have been able to perform military duties; therefore, based on DAFI 36-2910, would be eligible for full pay and allowances. However, per paragraph 7.2.4., INCAP pay will not exceed six months. An extension may be granted for an additional period of time, but not to exceed one year. Given the severity of the applicant's injuries, a RILO should have been initiated shortly after the original injury date. In this case, the RILO was initiated three years following the accident. The applicant should have been disqualified within six months of the original injury and he would have been entered into the IDES whether or not he had requested INCAP pay or MEDCON. While MEDCON cannot be backdated, if it were, he would likely not have been on MEDCON for greater than 365 days, and perhaps one more year to complete the IDES process, which means he would have separated around May 19. After he received his full disability in Feb 19, he may have been eligible for INCAP pay until his date of separation in Jun 21. The applicant may be considered eligible for INCAP pay since he was unable to perform military duties, so loss of civilian income was not required.

It is unclear why there was a delay in initiating the fitness for duty case. It should have been initiated by 2018; therefore, the case was delayed by over a year, and the applicant should have been separated close to 2020. It is important to note that AFRC/SGO is a member of the LOD Board making Line of Duty adjudications but is not involved in granting or approving MEDCON and only involved in INCAP pay after the initial six months and the member is requesting an extension to INCAP pay. Recommend further information from the office of primary responsibility (OPR) regarding MEDCON; however, up to two years of INCAP pay could be considered based on the ILOD finding and severity of injuries.

The complete advisory opinion is at Exhibit C.

AFPC/DPFA recommends partially granting the application. Based on the documentation provided and analysis of the facts, there is evidence of an error or injustice.

The applicant would have to meet the specified criteria in accordance with AFI 36-2910: (1) A copy of his orders covering the period during which the injury, illness, or disease was incurred or aggravated; (Partially Met) Note: Orders were not provided, however a finalized LOD indicating a three-day UTA was submitted with the package. (2) An interim or finalized LOD (AF Form 348 or DD Form 261, *Report of Investigation Line of Duty and Misconduct Status*); (Partially Met) Note: An LOD was provided that was finalized on 28 Aug 18 by the Approving Authority. In accordance with AFI 36-2910, a finalized LOD would have been required when there was a break in orders. A significant delay was noted both in LOD initiation as well as LOD adjudication. (3) A completed AF Form 469; (Partially Met) Note: AF Form 469 was not provided with this package. A review of the medical records system (ASIMS) did reveal an entry on 23 Oct 17 indicating the LOD was initiated and would need to be forward to the Physical Evaluation Board Liaison Officer for MEB processing once finalized. This indicated the applicant was already considered on profile and potentially unfit. The full profile history is no longer available in ASIMS following an applicant's retirement. (4) A medical evaluation conducted by a credentialed military provider within the last 30 days that describes why the applicant is unable to meet retention or mobility standards, citing a specific paragraph from Chapter 5 or Chapter 13 of AFI 48-123, *Medical Examinations and Standards*; (Partially Met) Note: Medical documentation was not provided with this package, although the applicant did receive much of his care through the DVA. However, based on the severity of the applicant's injuries, he certainly would not have been able to meet retention or mobility standards. (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).

In accordance with AFI 36-2910, due to the break in orders, the applicant would have required a finalized LOD to meet MEDCON eligibility requirements. This applicant's LOD was finalized on 28 Aug 18 making this the earliest date of MEDCON eligibility; therefore, recommend partially granting the applicant's request for MEDCON from 28 Aug 18 through 5 Feb 19. Although no profile information was submitted and medical documentation is limited, the applicant almost certainly would have met other MEDCON eligibility requirements, based on the extent of his injuries, through the requested MEDCON end date of 5 Feb 19. With respect to the period from 5 May 17 through the finalization of the LOD on 27 Aug 18, there is a clear delay in both the initiation and adjudication of the LOD. While this office is not the OPR, this delay represents a clear injustice. Should the Board agree and grant LOD benefits beginning on the date of the injury, the applicant would almost certainly have maintained MEDCON eligibility during the requested timeframe from 5 May 17 through 5 Feb 19.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 20 Feb 24 for comment (Exhibit E) 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, the Board concludes the applicant is the victim of an error and injustice. The Board concurs with the rationale of both AFRC/SGO and AFPC/DPFA and finds a preponderance of the evidence substantiates the applicant's contentions. However, the Board recommends the applicant's request for Pre-MEDCON and MEDCON for the periods 5 May 17 – 4 Jun 17 and 5 Jun 17 – 5 Feb 19, respectively, and INCAP pay for the period 6 Feb 19 – 3 Jun 21, be granted in full. Both OPRs found the applicant met the eligibility requirements for requested relief in accordance with the applicable guidance, and their recommendations for partial grant were based on delays in the IDES process, which the Board found to be outside the applicant's control. 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. He was placed on active-duty orders, for the purpose of medical continuation in accordance with 10 USC § 12301(h), from 5 May 17 through 5 Feb 19.

b. He is entitled to receive Incapacitation (INCAP) pay from 6 Feb 19 through 3 Jun 21.

CERTIFICATION

The following quorum of the Board, as defined in DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2023-02484 in Executive Session on 14 May 24:

, 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 31 Jul 23.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory opinion, AFRC/SGO, dated 16 Jan 24.
Exhibit D: Advisory opinion, AFPC/DPFA, dated 14 Feb 24.
Exhibit E: Notification of advisory, SAF/MRBC to applicant, dated 20 Feb 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.

X

Board Operations Manager, AFBCMR