



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

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Docket No. 3544-21
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted was insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

A three-member panel of the Board, sitting in executive session, considered your application on 24 February 2022. The names and votes of the members of the panel will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, relevant portions of your naval record and applicable statutes, regulations and policies, to include the entirety of your application for Traumatic Servicemembers' Group Life Insurance (TSGLI), the 27 January 2022 advisory opinion (AO) from the Director, Secretary of the Navy, Council of Review Boards (CORB), and the 8 February 2022 rebuttal to the AO provided by you.

Regarding your request for a personal appearance, the Board determined that a personal appearance with or without counsel would not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

A review of your record shows that, after a period in the Delayed Entry Program, you entered active duty with Navy on 24 September 1991. On 1 September 2016, while training in the █, you received shoulder injuries while holding the rails of a Naval Special Warfare rigid hull inflatable boat as it impacted high seas. You eventually received a medical evaluation of your shoulders, which indicated shoulder surgery. While your complete medical records contain a full description of the treatment you received, on 6 July 2017, you had surgery on your right shoulder. On 24 August 2017, you had surgery on your left shoulder. You filed a claim for TSGLI, and on 18 December 2017, your claim was denied, as follows, in part:

Following a thorough review of the medical documentation you provided, each surgery was spaced apart with sufficient time that your recovery was sufficient to begin home exercises. There is no evidence from Occupational or Physical Therapy to indicate you

“medically required” any assistance two or more ADLs for a period of 30 consecutive days post each surgery wearing a pillow sling is more for comfort than a range-of-motion restricted sling.

You appealed the denial of your claim for TSGLI, and on 28 October 2020, the TSGLI Appeals Board denied your appeal, as follows, in part:

It was clear from the evidence made available to the Board that [Petitioner] was involved in a serious training accident. It was also clear to the Board that [Petitioner] received significant treatment for his injuries. That said, in reviewing [Petitioner’s] case file, it was clear to the Board that [Petitioner] failed to meet the minimum requirement for loss of ADLs as defined by The TSGLI Procedural Guide.

More specifically, the medical notes annotated in the member’s health record temporally proximate to his surgeries did indicate that [Petitioner] had difficulties performing ADLs; however, at no time does the record indicate that he needed other’s assistance to complete ADLs. While [Petitioner] may have needed some assistance with certain ADLs, no temporally proximate evidence indicates that such assistance was medically required. Since [Petitioner] failed to meet the minimum requirements outlined in the TSGLI Procedural Guide, his claim was disapproved; thereby supporting the previous decision made by Navy Personnel Command.

To assist it in reviewing the medical records in connection with your current petition, this Board obtained the 27 January 2022 AO. According to the AO, in part:

In this case, the record shows that no ADL support was required for any 30-day period following the applicant’s training accident. Although the applicant, along with his wife and some healthcare providers, opine that it was difficult for him to perform ADLs for an extended period, treatment notes annotated in his record proximate to the time of his surgery indicate that no such assistance was required.

The applicant’s attorney opines that that the applicant should be afforded the benefit of the doubt, and thus granted relief, because there is an approximate balance in the evidence; however, that is not the case. While the evidence does include conflicting arguments as to whether or not the applicant required assistance to perform ADLs, the mere existence of these arguments does not automatically accord them all the same weight.

When faced with the conflicting arguments in the record, the Board members weighted the temporally proximate notes that were annotated in the applicant’s health record, along with their own, objective, professional expertise. Because the Board weighted the evidence, there is not an approximate balance in the evidence. Said another way, this is a matter of quality versus quantity. More importantly, the weighted evidence did not indicate that the member required assistance to perform at least two of the six activities of daily living. That being the case, the Board denied the applicant’s claim in accordance with TSGLI loss code 3, which states that applicants should not receive compensation if, “documentation provided does not indicate the member’s loss met the minimum TSGLI standard.”

In summary, resolving all doubt to the applicant's benefit, the evidence does not support the assertion that the applicant required assistance to perform at least two of the six activities of daily living, and for that reason, he does not merit TSGLI compensation

You were provided a copy of the AO, and you provided a rebuttal to the AO, which the Board carefully reviewed. Your rebuttal document acknowledges that, "someone who undergoes surgery of a single shoulder would not necessarily have a deficit in their ability to perform ADLs because they would be able to use the opposite arm to perform these ADLs." But, according to your rebuttal the AO, "when he underwent his second (LEFT) shoulder surgery, his right shoulder was not yet adequately healed to allow for this compensation. He was still undergoing physical therapy for his original (RIGHT) shoulder on October 3, 2017 (day #41 after LEFT shoulder surgery) in which he has significant functional deficits recorded above." Thus, according to your rebuttal AO, you were "unable to independently perform at least 2 ADLs for a period of at least 30 days as a result of injury sustained in September 2016."

The Board carefully considered your arguments that you deserve payment of █ for loss of ADLs for a period of 90 days due to your shoulder injuries. In its review of your petition, in addition to the aforementioned AO and rebuttal to the AO, the Board independently reviewed your contemporaneous medical and physical therapy records. As a result of its review, the Board substantially concurred with the AO. The Board acknowledged the opinion set forth in your rebuttal to the AO, but the Board determined that your medical records at the relevant time period show that no activity of daily living (ADL) support was medically required for any 30-day period following your training accident and that treatment notes in your record proximate to the time of your surgery indicate that no such assistance was required. In making this finding, the Board considered whether physical or standby assistance was required and separately assessed each 30-day period of the 90 days claimed. Therefore, after weighing the totality of the evidence, the Board concluded that the preponderance of the evidence does not support a finding that you met the criteria for payment of █ under the TSGLI program.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not previously presented to or considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

3/7/2022

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Deputy Director

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