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

[redacted]
Docket No. 5581-21
Ref: Signature Date

[redacted]

Dear [redacted]:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code, and the Order of the United States District Court of the District of Columbia (D.D.C.), dated 9 September 2021, remanding your case to the Board for Correction of Naval Records, hereinafter referred to as the "Board," to reconsider your application in light of the issues and arguments raised in your complaint to the D.D.C. and any issues, arguments, or evidence that you may submit within 30 days of the D.D.C. Order. After careful review and reconsideration of all of the evidence of record in accordance with the D.D.C. Order, the Board continued to find insufficient evidence of any probable material error or injustice warranting relief. Accordingly, your application has been denied.

A three-member panel of the Board, sitting in executive session, reconsidered your application in accordance with the D.D.C. Order on 3 February 2022. The names and votes of the panel members will be furnished upon request. Your allegations of error or injustice were reviewed in accordance with the D.D.C. Order and the administrative regulations and procedures applicable to the proceedings of the Board. Documentary material considered by the Board included your application, together with all material submitted in support thereof; the administrative record associated with your original application to the Board, which included relevant entries from your medical record and the previous denials of your TSGLI claim; your complaint to the D.D.C. dated 11 May 2021, along with the Consent Motion for Voluntary Remand and the D.D.C. Remand Order; the supplemental matters submitted via e-mail by your attorney pursuant to the D.D.C. Remand Order on 8 October 2021;[1] relevant portions of your naval record; and applicable statutes, regulations and policies. The Board also considered an advisory opinion (AO) provided by the Director, Secretary of the Navy Council of Review Boards (CORB), dated

[1] These supplemental matters simply request the Board "to fully consider all submitted statements and medical opinions," particularly that of your squadron Flight Surgeon, and noted that this statement had not been referenced by the Board previous despite the Board's previous statement that it had considered the evidence you submitted. Attached to this e-mail was the Flight Surgeon's letter and the D.D.C. Order.

2 November 2021, and the response to this AO submitted by your attorney via e-mail dated 15 November 2021.[2]

The Board determined that your personal appearance, with or without counsel, would not materially add to its understanding of the issues involved in your case. Accordingly, it determined that a personal appearance was not necessary and considered your case based upon the evidence of record.

Your record reflects that you entered active duty in the Marine Corps in November 2004. On 6 July 2011, you suffered a left occipital skull fracture with Traumatic Brain Injury (TBI), a left tibula/fibula fracture, and lung contusions as a result of a helicopter crash during training. You underwent surgery to treat your injuries and were released from hospitalization on 10 July 2011. You provided evidence that you were suffering from dizziness and vertigo after your release from hospitalization that resulted in balancing issues and required standby assistance with performance of activities of daily living (ADLs). You also claimed short-term memory and cognitive impairment that required verbal reminders to perform ADLs.

On 11 February 2013, you filed a Traumatic Servicemembers' Group Life Insurance claim for hospitalization and inability to perform ADLs. This initial claim was denied on 3 April 2013 based upon a lack of evidence that you were hospitalized for 15 consecutive days and failure to meet the TSGLI standard for inability to perform ADLs. You appealed this decision on 17 April 2013 but were again denied on 11 June 2013 for lack of medical documentation to support payment. On 6 March 2019, you filed an appeal with the TSGLI Appeals Board. Your appeal was denied on 28 October 2020 based on a finding that insufficient evidence exists that you required assistance to perform the claimed ADLs. You subsequently filed an application with this Board requesting payment of $50,000 for inability to perform at least two ADLs for 30 days without required assistance due to a TBI. You argued that the TSGLI Appeals Board failed to consider that you required verbal and standby assistance in the performance of ADLs. This Board denied your application on 25 March 2021 based on a finding that the preponderance of the evidence did not support relief. The Board primarily relied upon medical records from July 2011 that indicated you were able to perform ADLs without required assistance.

On 10 May 2021, you filed suit in the D.D.C. arguing that this Board failed to consider your application under the proper standard of review and ignored or disregarded pertinent evidence. The Court remanded your case back to the Board by Order dated 9 September 2021, directing the Board to "reconsider [your] application in light of the issues and arguments raised in [your] Complaint as well as any issues, arguments, or evidence submitted in writing by [you] to the Board within thirty (30) days of this Order." By e-mail dated 8 October 2021, your attorney submitted supplemental matters for consideration, requesting that the Board "fully consider all submitted statements and medical opinions, particularly, the statement from [your squadron flight surgeon]."

[2] This response stated only that the AO was an inadequate response to the Court's order and attached correspondence, and requested review of your attorney's last correspondence, a de novo review of your case, and compliance with the court order.

By memorandum dated 2 November 2021, the CORB Director provided an AO for the Board's consideration. The AO reiterated that, in reviewing your case file, "it was clear [you] failed to meet the minimum requirement for the loss of the [ADLs] as defined by *The TSGLI Procedural Guide*." Specifically, the AO noted that your medical records reflected that you demonstrated the ability to perform crutch ambulation without difficulty during your post-operative appointment just nine days after your injury. It also noted that your medical records reflect that you were assessed to have no motor disturbances during your orthopedic follow-up examination four days after the previously discussed post-operative appointment. Accordingly, the AO commented that while you may have needed some assistance with certain ADLs, there was no temporally proximate evidence that such assistance was medically required. The AO also commented that the evidentiary standard in SECNAVINST 1770.4A for TSGLI determinations is the preponderance of the evidence, which was the standard of evidence applied in your case. By e-mail dated 15 November 2021, your attorney responded to this AO, stating simply that it was "an inadequate response to the court's order and the attached correspondence," and requesting "a review of [his] last correspondence, a *de novo* review of this case, and compliance with the court order." Your attorney did not explain why the AO was deficient.

The Board carefully reconsidered your arguments for a TSGLI payment of $50,000 due to your inability to perform ADLs for 30 days due to TBI in light of the contentions raised in your complaint to the D.D.C. Unfortunately, the Board determined insufficient evidence exists to support relief in your case.

The Board first considered your contention that it "improperly narrowed the TSGLI Procedures Guide, which is codified by law under 38 C.F.R. 9.20 and SECNAVINST 1770.4, and 38 USC § 5107(b)," by applying the "preponderance of the evidence" standard of review rather than "substantial evidence" standard, which would require the Secretary to give any benefit of the doubt to the claimant. This contention is entirely without merit, because the "preponderance of the evidence" is the appropriate standard of review for such cases. Your argument was based on the language of 38 U.S.C. § 5107(b), which provides that the "Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." This argument is flawed, however, because "the Secretary" referred to in 38 U.S.C. § 5107 is the Secretary of Veterans Affairs, and not the Secretary of the Navy or the Secretary of Defense. The statute upon which your argument regarding the appropriate standard of review was based is not applicable to the Department of the Navy (DON). SECNAVINST 1770.4A establishes the DON TSGLI procedures, responsibilities, and appeals procedures.[3] Contrary to your contention, this regulation does not establish that the substantial evidence standard will be applied to such regulations. Rather, it specifically provides in paragraph 3e(2) of Enclosure (1) that "[t]he evidentiary standard for TSGLI determination is a preponderance of the evidence."[4]

[3] The authority of the Secretary of the Navy to establish these procedures came from 38 C.F.R. § 9.20 and 38 U.S.C. § 1980A.

[4] This provision further defines "preponderance of the evidence" as "that evidence that tends to prove one side of a disputed fact by outweighing the evidence on the other side (that is, by more than 50 percent). Preponderance does not necessarily mean a greater mass of evidence. Rather, preponderance means a superiority of evidence on one side or the other of a disputed fact. It is a term that refers to the quality, rather than the quantity, of the evidence."

Accordingly, the proper standard of review for your case is the "preponderance of the evidence," and not the "substantial evidence" standard suggested by 38 U.S.C. § 5107.

Your contention that the Board did not give any reason for why the certifying medical professionals' certifications were not credible is equally without merit. As was stated in its decision letter for Docket No. 1405-21, the Board considered the evidence you submitted to support your claim that you required standby and verbal assistance, along with medical records created contemporaneously with the treatment of your injuries. The former included the 18 January 2013 statement by your squadron's Flight Surgeon, which your attorney noted in the supplemental matters supplemented had not been commented upon. It was not a matter of finding that the statements that you provided from medical professionals lacked credibility. Rather, the Board found that your medical records, created contemporaneously with the treatment of your injuries and with the intent of accurately documenting your treatment and progress, were more relevant and reliable than statements made long after the fact by medical professionals not responsible for your care at the time in question and for the primary purpose of supporting of your TSGLI claim. This intent was very obvious in their use of specific language mirroring the TGSLI criteria and the dates of their statements relative to your TSGLI claims.

Upon reconsidering all of the evidence in your case, the Board again concluded that the preponderance of the evidence does not support the payment of your TSGLI claim. As it did in its previous review of your case, the Board considered the 18 January 2013 statement by your squadron Flight Surgeon as well as other evidence provided in support of your claim. As explained in its previous decision letter, the Board noted that there was a large discrepancy between the evidence you provided describing your inability to perform ADLs without assistance and the post-surgery medical evidence from July 2011. Specifically, a 15 July 2011 clinic note from South Orange County Orthopedics discussing your post-surgery status described you as "able to perform crutch ambulation without difficulty." Further, in your 19 July 2011 Chronological Record of Medical Care, you reported "feeling fine" with "no neurological symptoms and no motor disturbances." Additionally, a neurological motor examination demonstrated "no dysfunction." After weighing the conflicting evidence, the Board concluded that your medical treatment records were more persuasive and reliable in determining your ability to perform ADLs independently because they were created contemporaneously with your treatment during the time in question and were created to support your medical treatment rather than for the purpose of supporting your TSGLI claim. Accordingly, the Board afforded more weight to the evidence in the aforementioned medical documents in reaching its conclusions. Based upon the medical records that it found to be more persuasive and reliable, the Board found that the preponderance of the evidence reflects that your cognitive and balancing issues were resolved by 19 July 2011, only 13 days after your TBI. Consequentially, the preponderance of the evidence did not support your contention that you required standby and verbal assistance to perform at least two ADLs for 15 consecutive days due to TBI since you displayed no neurological symptoms or motor disturbances that would prevent you from performing ADLs. As a result, you failed to meet the criteria necessary to qualify for payment under 38 C.F.R. § 9.20 and the TSGLI Procedures Guide for inability to perform at least two ADLs for 15 consecutive days due to TBI. As a result, the Board found insufficient evidence of error or injustice to warrant a change to your record.

You are entitled to have the Board reconsider its decision upon the 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,

2/17/2022

[redacted]

Deputy Director

Signed by: [redacted]