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

[redacted]
Docket No. 6192-23
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 for the District of Columbia (D.D.C.) (Case No. 22-cv-2285), filed 19 July 2023, remanding your case to the Board for Correction of Naval Records [hereinafter referred to as the Board] for reconsideration of its previous decision in Docket No. 3544-21. Specifically, your case was voluntarily remanded to the Board to issue a new decision that addresses the fact that there were two versions of a treatment note dated 3 October 2017 in the record, and any other issues that the Board concludes are appropriate to address. After careful review and reconsideration of all of the evidence of record in accordance with the Order of the D.D.C., the Board found 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 *de novo* on 29 August 2023. None of the panel members who reconsidered your application on 29 August 2023 participated in the previous review of your case in Docket No. 3544-21. The names and votes of those panel members will be furnished upon request. Your allegations of error or injustice were reviewed in accordance with administrative regulations and procedures applicatble to the proceedings of this Board. Documentary material considered by the Board included the Joint Motion for Voluntary Remand and to Stay Proceedings and your Complaint for your case before the D.D.C.; the additional matters that you submitted for the Board's consideration; the case file pertaining to Docket No. 3544-21, which included your underlying application in Docket No. 3544-21, the entirety of your application for Traumatic Servicemembers' Group Life Insurance (TSGLI), an advisory opinion (AO) from the Director, Council of Review Boards (CORB) dated 27 January 2022, and your rebuttal to that AO dated 8 February 2022; relevant portions of your naval record; and applicable statutes, regulations, and policies.

The Board continued to find that your personal appearance, with or without counsel, would not materially add to its understanding of the issues involved in your case. Accordingly, the Board

found that a personal appearance was not necessary and considered your case based upon the evidence of record.

Factual Background. Following is the factual background of your case based upon relevant portions of your naval record and the matters you submitted for the Board's consideration:

After enlisting in the Navy and entering active duty service on 24 September 1991, you served continuously on active duty for more than 26 years until your honorable discharge on 30 September 2017.

On 1 September 2016, you suffered serious injuries to both of your shoulders while holding on to the side rails of a Special Operations boat moving at high speed when the boat hit choppy waters during a readiness exercise in the [redacted].

On 1 December 2016, a magnetic resonance imaging (MRI) of your injured shoulders revealed large bilateral labrum tears. Specifically, in your right shoulder it revealed a vertical tear in the superior aspect of the labrum extending from front to back, and a partial-thickness tear at the base of the posterior labrum. In your left shoulder, it revealed a complex tear across the superior aspect of the labrum; a linear tear at the base of the posterior labrum, extending along the length of the posterior labrum; and an oblique tear in the inferior labrum.

On 12 June 2017, you had an initial consultation with the Orthopedic Surgeon (OS) to whom you were referred for "severe labral lesions," as seen on the MRI. During this consultation, your OS discussed surgical options. As you preferred starting with the right shoulder, the OS suggested conducting the surgery on that shoulder, and then proceeding with the surgical operation on the left shoulder eight weeks later.

On 6 July 2017, you underwent surgery on your right shoulder. The procedure included arthroscopic posterior labral repair and capsulorraphy; posterior superior labrum anterior and posterior (SLAP) repair; extensive glenohumeral debridement; debridement of partial rotator cuff tear; and decompression of paralabral cyst. According to your OS, your right arm was immobilized in an abduction pillow sling for the next four weeks.

During your first follow-up visit on 17 July 2017, your OS referred you for physical therapy on your right shoulder, to begin three weeks after the surgery. He directed that this treatment focus on full range of motion (ROM), gentle stretching, scapular retraction, posture training, and periscapular strengthening. He also specified that you may begin resistive exercises and rotator cuff strengthening eight weeks after the surgical procedure.

On 27 July 2017, you received an initial evaluation from the Physical Therapist (PT) to whom you were referred by your OS. In the report generated from this initial evaluation, your PT described your physical restrictions as "[Patient] still in abduction sling" and listed your functional limitations as "washing body/hair, lifting, dressing, hygiene, eating, cutting up food." He also described your "your mechanism of injury at "recovery from surgery," and one of your reported problems as "Difficulty performing [activities of daily living (ADL)] with [Right Upper

Extremity (R UE)]."[1] Your OS reviewed and certified the treatment plan discussed in this Initial Evaluation Report on 31 July 2017.

On 17 August 2017, after being seen for six therapy sessions, your PT prepared a Progress Report, which indicated that you were responding well to treatment, that your passive ROM had improved and that you were ready to be progressed. He also recorded that you reported less overall soreness. The physical "restrictions" and "problems" described on this Progress Report by your PT remained unchanged from those stated on the Initial Evaluation Report of 27 July 2017 described above.[2] Your OS endorsed this Progress Report by signature dated 17 August 2017.

On 24 August 2017, you underwent surgery on your left shoulder. The procedure included arthroscopic anterior labral repair and capsulorraphy; posterior labral repair and capsulorraphy; SLAP repair; and limited glenohumeral debridement and debridement of paralabral cyst." Six anchors were used to stabilize your labrum to the shoulder socket. Your left arm was placed in an abduction pillow sling for four weeks. The operative report for this surgical procedure commented upon your previous right shoulder surgery, observing that you were "doing very well from this."

During your first follow-up visit on 30 August 2017, your OS recommended that you begin physical therapy on your left shoulder four weeks after the surgery.

On 3 October 2017, after being seen for 14 therapy sessions, your PT prepared another Progress Report, which stated that you continued to respond well to treatment and that you reported being sometimes pain free with only some pain at times.[3] He also reported that you were "doing better with bathroom hygiene, but … still having some difficulties with bathing/showering and reaching across [your] body, dressing, pulling up pants, eating, and sleeping comfortably in bed." The physical "restrictions" and "problems" described on this progress report by your PT remained unchanged from those stated on both the Initial evaluation Report of 27 July 2017 and the previous Progress Report of 17 August 2017.

On 9 October 2017, you received an initial evaluation for your left shoulder treatment from the same PT with whom you had been conducting physical therapy on your right shoulder. Unlike the Initial Evaluation Report of 27 July 2017 for your right shoulder treatment, your PT did not mention any "restrictions" on the Initial Evaluation Report prepared for this session. The "Problems" listed on this Initial Evaluation Report were identical to those listed in the previous reports (see footnote 2), except that they referenced your left shoulder rather than your right shoulder. In the assessment section of this report, your PT stated that you have "trouble

[1] The other problems listed by your PT in this Initial Evaluation Report were stated as follows:
- Pain and soreness in [right] shoulder.
- Decreased [range of motion] of right shoulder.
- Decreased strength or [right] shoulder.
- Immobility and tenderness of scars.

[2] Your PT described your physical restrictions as "[Patient] still in abduction sling." The problems listed were those referenced in footnote 1, as well as the aforementioned "Difficulty performing ADLs with R UE."

[3] You reportedly described the worst of your pain as 3-4 on a scale of 10.

performing ADLs such as eating, hygiene, washing body and hair, and lifting with [your] non-dominant [(left) upper extremity]."

You subsequently filed a claim for TSGLI. Included with this claim were the 27 July 2017 and 9 October 2017 Initial Evaluation Reports, and the 17 August 2017 and 3 October 2017 Progress Reports, prepared by your PT.

By memorandum dated 18 December 2017, the Navy Casualty Assistance Branch (PERS-13) denied your claim for TSGLI benefits, finding that "each surgery was spaced apart with sufficient time that your recovery was sufficient to begin home exercises," and that "[t]here is no evidence from Occupational or Physical Therapy to indicate you 'medically required' any assistance [to conduct] two or more ADLs for a period of 30 consecutive days post each surgery [as] wearing a pillow sling is more for comfort than a range-of-motion restricted sling." PERS-13 further explained that, "[a]ccording to the regulations that govern the TSGLI Program, if a member is able to perform the activity by using accommodating equipment (such as a cane, walker, commode, etc.) **or adaptive behavior**, the patient is considered able to independently perform he activity (**emphasis not added**)." In reaching this conclusion, PERS-13 made specific reference to entries in the above referenced Initial Evaluation Report and Progress Reports prepared by your PT.

On 29 January 2018, you appealed the PERS-13 denial of your claim for TSGLI, asserting that you were unable to independently bathe, dress, toilet, or transfer from 6 July 2017 to 8 October 2017 and stating your belief that not enough attention was given to your original claim. With this appeal, you submitted a note from your OS, dated 29 January 2018, indicating that you "required assistance from [your] spouse for activities of daily living" from 6 July 2017 through 8 October 2017, and clarifying that the pillow sling was "required for healing and was not just for comfort."[4][5] You also provided copies of the Initial Evaluation Report of 27 July 2017 and the Progress Reports of 17 August 2017 and 3 October 2017 from your PT, along with the Initial Evaluation Report for the start of physical therapy on your left shoulder starting on 9 October 2017. However, the content of the reports associated with your right shoulder therapy had been modified. Specifically, whereas your PT had originally listed your "restrictions" as "[Patient] still in abduction sling" in each of these reports, the reports which were submitted with your TSGLI appeal stated your "restrictions" as "[Patient] still in abduction sling until return to MD. Abduction pillow sling is to keep [patient] from actively moving his R UE and to protect the surgical repair." Whereas your PT had originally listed "[d]ifficulty performing ADLs with R UE" among your "problems," this bullet had been changed to "Unable at this time to use R UE normally to perform ADLs such as washing body and hair, unbuttoning shirts and pants, showering, personal hygiene, eating/cutting up food, and lifting" in the version submitted with your TSGLI appeal. Finally, the original versions of the 27 July 2017 Initial Evaluation Report and the 17 August 2017 Progress Report had included the signature of your OS, while the modified versions submitted with your appeal did not.

[4] Your OS specifically indicated that the pillow sling "was required for four weeks after each surgery for healing."
[5] Included with this note was a copy of the standard shoulder post-operative instructions for your OS's clinic, which corroborated your OS's statement that the abduction slip was provided for healing (vice comfort as was stated by PERS-13).

In your appeal, you objected to or clarified the following assertions made in 18 December 2017 memorandum from PERS-13 explaining why your original TSGLI claim was disapproved:

- You objected to the reference in paragraph 2b of the PERS-13 memo to the 9 October 2017 Initial Evaluation Report prepared by your PT, which listed "**difficulty** washing, lifting, dressing eating, cutting up food (**emphasis not added**)." Functional Limitation description of "Difficulty," as you claimed to have been unable to perform these functions without your wife's assistance.[6]
- You objected to the inference in paragraph 2c of the PERS-13 memorandum that you purposefully delayed surgery, asserting that the memorandum referencing this assertion was provided only to give situational awareness regarding exposure to impact injuries while performing Special Operations missions.[7]
- You clarified that your two shoulder surgeries were spaced apart based upon your OS's medical determination that it was unwise to perform them at the same time due to concerns that the surgical repairs may be compromised after surgery.[8]

On 19 April 2019, you obtained a review of your medical records from a Registered Nurse (RN). Based upon the facts reported by this RN, it is apparent that she reviewed PT reports that you submitted with your TSGLI appeal, and not the reports originally prepared by the PT. Based upon this review, the RN opined that you were unable to independently perform ADLs, to include bathing, dressing, toileting, and transferring, from 6 July 2017 through 8 October 2017, for a total of 95 days. Specifically, she found that your right shoulder was immobilized in an

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[6] You provided an undated letter from your PT, which stated the following:

> I was the treating physical therapist for [you] after [your] bilateral SLAP repair surgeries on July 6, 2017 and August 24, 2017.
>
> After completing [your] initial evaluation papaerwork [sic] following [your] left shoulder SLAP repair on October 9, 2017, I realized I hadn't added [your] restrictions. [You] and I discussed this and I told [you] that I would be adding [your] restrictions in as [you] were restricted in an abduction pillow following surgery to protect the repair.
>
> I then changed difficulty performing ADLs with [your] *Left upper extremity* to unable at this time to use *the left upper extremity* normally to perform ADLs sucha [sic] as washing [your] body and hair, unbuttoning/buttoning shirts and pants, showering, personal hygiene, eating/cutting up foot [sic], and lifting [your] arm or any objects due to [your] recent SLAP repair and [your] arm being in an abduction pillow. *At that given point in time*, [you] were unable to complete those ADLs individually.
>
> (*Emphasis added*).

The Board notes that this letter pertains to changes made by your PT to his 9 October 2017 Initial Evaluation Report pertaining to your post-operative left shoulder therapy, but does not appear to address the modifications to which were made to the Initial Evaluation Report and subsequent Progress Reports pertaining to your right shoulder therapy.

[7] Paragraph 2c of the PERS-13 memorandum referenced a memorandum for record from a medical doctor that you provided with your TSGLI claim. It does not appear that that PERS-13 relied upon this evidence to deny your claim, but merely referenced it for the record.

[8] This clarification was apparently provided in response to the evidence referenced in footnote 7, as the medical doctor observed that special warfare operators often delay surgery until retirement or discharge. Again, it does not appear that PERS-13 relied upon this evidence to deny your TSGLI claim.

abduction pillow sling for six weeks after your first surgery on 6 July 2017, so you were unable to use your right arm to wash your hair or the left side of your body and backside; that you could not left your arm above mid-chest level to put on or take off upper body clothing; and that you could not button, tie, or zipper your clothing with the use of only one arm. She further found that your left shoulder was immobilized in an abduction pillow sling with non-weight bearing orders for at least the next six weeks after your 24 August 2017 surgery, while your right shoulder remained immobilized in a sling and non-weight bearing.[9] Accordingly, she found that you could not use either of your arms to raise yourself up to transfer in/out of a chair/sofa or bed, lower on/off the toilet, get clothing on/off, or clean yourself, and that you could not get into or out of the shower/bathtub, or wash your hair or any part of your body without assistance. The RN also explicitly disagreed with the PERS-13 decision to deny your claim for TSGLI benefits, providing a point-by-point response to the content of the PERS-13 memorandum of 18 December 2017.[10] In attacking the PERS-13 conclusion that "[t]here is not evidence from Occupational or Physical Therapy to indicate you 'medically required' any assistant [sic] two or more ADLs for a period of 30 consecutive days post each surgery," the RN cited the language from the modified 17 August 2017 Progress Review which stated that you were "[u]nable to use RUE normally to perform ADLs" and which was not provided to PERS-13. She also cited to the modified restriction language which was not included in the original Progress Report prepared by the PT.

On 22 April 2019, your newly hired attorney supplemented your request for reconsideration of the TSGLI decision with his own arguments and the report of the RN referenced above, along with supporting statements from you and your wife. In his letter, your attorney asserted that the standard applicable to your case was "substantial evidence," meaning that "[w]hen 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."

By letter dated 28 October 2020, the Department of the Navy Appeals Board for Traumatic Injury Protection under the TSGLI program (TSGLI Appeal Board) notified your attorney that it had unanimously voted to deny your appeal, finding that the evidence did not support your assertion that you were incapable of independently performing the claimed ADLs for any 30-day period. The TSGLI Appeal Board acknowledged that you were clearly involved in a serious training accident for which you received significant treatment, but found that the evidence did not sustain the criteria for loss of ADLs due to other traumatic injuries, as defined by the TSGLI Procedural Guide. Specifically, the TSGLI Appeal Board observed that "the medical notes annotated in [your] health record temporally proximate to [your] surgeries did indicate that [you] had difficulties performing ADLs; however, at no time does the record indicate that [you] needed other's assistance to complete ADLs. While [you] may have needed some assistance with certain ADLs, no temporally proximate evidence indicates that such assistance was medically required. Since [you] failed to meet the minimum requirements outlined in the TSGLI

[9] The Board found that this conclusion was not supported by the evidence. The evidence reflects that your right shoulder was immobilized in an abduction sling for four weeks, which had expired nearly a month before your left shoulder surgery.

[10] As you did in your TSGLI appeal, it appears that the RN objected to several references in the PERS-13 decision memorandum that did not serve as a basis for the decision.

Procedural Guide, [your] claim was disapproved; thereby supporting the previous decision made by [PERS-13]."

Procedural Background.

You first sought relief from the Board in October 2021. Specifically, you asserted an error and an injustice in the decision to deny you TSGLI benefits for 90 days of ADL losses caused by a traumatic injury, claiming that "[t]he decisions to date have discounted or ignored medical records favorable to approval, statements in support of the claim, and multiple medical opinions provided." As such, you requested a correction to your naval record to reflect your eligibility for $75,000 in TSGLI benefits.[11]

In order to assist the Board in arriving at a fair and equitable decision in your case, the Board requested an AO from the CORB Director. By memorandum dated 27 January 2022, the CORB Director provided the requested AO, finding that the evidence supports the decision of the TSGLI Appeals Board. In support of this opinion, the CORB Director cited to the TSGLI Procedural Guide, which provides that in order to be eligible for TSGLI payments for the loss of ADLs, members must demonstrate that they "***require*** assistance to perform at least two of the six activities of daily living (***emphasis not added***)," and that "if the patient is able to perform the activity by using accommodating equipment… or adaptive behavior, the patient is considered able to independently perform the activity." He further found that "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." In response to your attorney's argument that you should be granted the benefit of the doubt because there is an approximate balance in the evidence, the CORB Director opined that there was not an approximate balance in the evidence because your arguments did not equate to evidence. He also found that, when faced with conflicting arguments in the record, the TSGLI Appeal Board assigned more weight to the temporally proximate notes that were in your health record, along with their own objective, professional expertise.

In response to the AO provided by the CORB Director, you provided an evaluation, dated 8 February 2022, prepared by a Medical Doctor (MD) who was hired by your attorney to review the evidence and to render an opinion regarding whether "it is more likely than not that [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. She opined in the affirmative. In reaching this conclusion, the MD commented that your medical records were clear that "for several weeks following [your] surgery [you were] not allowed any active range of motion of [your] RIGHT shoulder," and that when you underwent your second surgery on your left shoulder on 24 August 2017 you still had marked impairment in your ability to use your right shoulder. The MD specifically found that your second surgery was "the point at which [you] would have required assistance in [your] ADLs." Specifically, the MD opined as follows:

[11] Per the TSGLI Procedural Guide, your claim for $75,000 in TSGLI benefits was based upon the loss of ADLs for more than 90 consecutive days (i.e., from 6 July 2017 until 8 October 2017). However, you further asked that the Board separately assess each 30-day period in question, each of which may qualify for $25,000 in TSGLI benefits.

> In general, 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. At the time of [your] first (RIGHT) shoulder surgery [you] were able to use [your] left arm to compensate and perform ADLs independently. However, when [you] underwent [your] second (LEFT) shoulder surgery, [your] right shoulder was not yet adequately healed to allow for this compensation. [You were] still undergoing physical therapy for [your] original (RIGHT) shoulder on October 3, 2017 (day #41 after LEFT shoulder surgery) in which he has significant functional deficits recorded above.

The MD also noted that your medical records indicated that you were using an abduction sling for your right shoulder at least through 3 October 2017.[12] The MD then discussed the ROM required to perform the ADLs of bathing, dressing, and toileting, and compared those requirements to the internal rotation of your right shoulder recorded by your PT on 3 October 2017,[13] to conclude that you "would have required assistance with the ADLs of bathing, toileting, and dressing for at least 30 days following [your] LEFT shoulder surgery."[14]

On 24 February 2022, the Board denied your request for relief in Docket No. 3544-21. Based upon its independent review of your contemporaneous medical and physical therapy records, along with the aforementioned AO and the rebuttal provided by the MD referenced above, the Board substantially concurred with the AO provided by the CORB Director. Specifically, the Board determined that your contemporaneous medical records "show that no activity of delay 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 stated that it considered whether physical or standby assistance was required, and separately assessed each 30-day period of the 90 days claimed.

After receiving the Board's decision in Docket No. 3544-21, you filed suit in the D.D.C. on 3 August 2022.

During the litigation that followed, it was discovered that there were two version of your PT's 3 October 2017 in the record. Specifically, the change in the "Problems" listed by your PT from "Difficulty performing ADLs with R UE" to "Unable at this time to R UE normally to perform ADLs such as washing body and hair, unbuttoning shirts and pants, showering, personal hygiene, eating/cutting up food, and lifting."[15] Accordingly, on 18 July 2023 you filed a joint motion for voluntary remand along with the Government to remand your case back to the Board "to issue a

[12] The Board notes that the OS who directed use of the abduction sling stated that its use was required for four weeks after surgery, or until approximately 3 August 2017.

[13] In the Progress Report prepared by your PT on 3 October 2017, the internal rotation of your right should was recorded as 0-50 degrees. The MD, citing to an article in the American Journal of Occupational Therapy, stated that an internal shoulder rotation of 65 degrees is required to wash the genital region; that the internal rotation required to don and zip pants is 75 degrees; and that the internal rotation required to reach behind the back at the level of the buttocks in order to perform toileting hygiene is 65 degrees.

[14] The MD did not address the ADL of transferring which you had claimed.

[15] The Board's review of the record on remand noted this discrepancy, and several others, on each of the several initial and progress reports prepared by your PT on 27 July 2017, 17 August 2017, and 3 October 2017, respectively.

new decision that addresses the record discrepancy and any other issues that [the Board] concludes are appropriate to address." On 19 July 2023, the D.D.C. granted this motion, remanding your case to the Board.

Conclusions.

Upon careful review and consideration of all of the evidence of record, the Board continues to find no error or injustice in the decisions made by PERS-13 or the TSGLI Appeals Board to deny your claim for TSGLI benefits. The evidence does not support your claim that you medically required assistance to perform at least two ADLs for any 30-day period as required to qualify for TSGLI payments in accordance with TSGLI Procedural Guide, much less the 95-day period from 6 July 2017 until 8 October 2017 that you claimed to qualify for the $75,000 in payments that you requested.

As a preliminary matter, this Board is required by its governing regulation to apply the presumption of regularity to the decisions made by PERS-13 and the TSGLI Appeal Board on your claim for TSGLI benefits. In the absence of evidence to the contrary, the Board must presume that these entities properly performed their duties in reaching their respective conclusions. In this regard, the Board notes that the TSGLI Appeal Board includes at least one Medical Officer, so its decision was informed by relevant medical expertise applying the standards and guidance in the TSGLI Procedural Guide. As such, it is your burden to overcome that presumption. You asserted in Docket No. 3544-21 that the PERS-13 and TSGLI Appeal Board decisions "discounted or ignored medical records favorable to approval, statements in support of the claim, and multiple medical opinions provided." The evidence, however, did not support that assertion. Rather, it reflects that entities considered all of the evidence, but simply weighted it differently than you preferred. The Board's own review of the evidence found that these conclusions were reasonable and supported by the evidence.

Your contention that you required either physical or stand-by assistance to perform the ADLs of bathing, clothing, transferring, and toileting starting on 6 July 2017 was undermined by the opinion provided byyour own expert witness. The MD stated in her evaluation of the medical evidence that you provided in rebuttal to the AO for Docket No. 3544-21 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," and that "[a]t the time of [your] first (RIGHT) shoulder surgery [you were] able to use [your] left arm to compensate and perform ADLs independently." It was also undermined by your PT. In the undated letter that he prepared to explain the change he made to the 9 October 2017 Initial Evaluation Report, he stated that it was "[a]t that given point in time," apparently referring to the restrictions related to your left shoulder since that was the subject matter of the letter, that you became unable to complete ADLs independently. He also stated in the original versions of your 27 July 2017 Initial Evaluation Report and 17 August 2017 Progress Report that you had "difficulty" performing, rather than an inability to perform, ADLs. The Board did not question that it was difficult for you to perform ADLs with one arm immobilized, or that your spouse actually did assist you with these ADLs at the time. Rather, it simply found that the medical evidence and expert testimony suggests that the earliest possible date that such assistance was arguably required medically was 24 August 2017 when your left shoulder became immobilized

after your second surgery. As such, assistance was not medically required for more than 90 days to support your claim for $75,000 in TSGLI benefits.

Your contention that you required either physical or stand-by assistance to perform the stated ADLs after 24 August 2017 is premised upon the assumption that you remained unable to use your right arm to compensate for your then-immobilized left shoulder. The evaluation conducted by your expert witness undermined this assumption as it pertained to the ADL of transferring, as her review of the medical evidence did not result in a conclusion that you were unable to transfer without assistance. The assumption is also undermined by the contemporary medical evidence. Specifically, in his note dated 19 January 2018, which you submitted in support of your appeal of the PERS-13 denial of your TSGLI claim, your OS specifically stated that the abduction sling "was required *for four weeks* after each surgery for healing (*emphasis added*)." This period ended on or about 3 August 2017, three weeks before your left shoulder surgery. As such, your right shoulder was not immobilized in an abduction pillow sling for six weeks until the end of August 2017 as you stated in your letter of 19 April 2019, and your attorney claimed in his 22 April 2019 letter and in your complaint to the D.D.C. The Board does not question that you continued using the abduction sling after this date, as you apparently appeared at subsequent physical therapy sessions using it. However, it does find that such use beyond the four weeks prescribed by the physician who assigned the restriction in the first place was not medically required based upon the medical evidence. Other evidence suggests that you had more use of your right arm as of the date of your left shoulder surgery than you claim. Specifically, on 17 August 2017, one week prior to your left shoulder surgery, your PT reported that your passive ROM had improved and that you were "ready to be progressed." Finally, the fact that your OS conducted the surgery to your left shoulder on 24 August 2017 suggests that you had adequate use of your right arm to compensate for the loss of use of your left arm due to the surgery. Otherwise, this would undermine his reason for spacing the surgeries in the first place, as you stated in your appeal of the PERS-13 denial that he spaced the two surgeries apart because he "did not want [you] to risk undoing … or damaging the repairs conducted during surgery."

The medical evidence available after the surgery on your left shoulder also does not support the assumption that your right arm remained unavailable to compensate for your immobilized left shoulder until 8 October 2017, or that you were unable to perform ADLs without assistance during this period. On 3 October 2017, you reported relatively little to no pain remaining in your right shoulder to your PT. You also reported "doing better with bathroom hygiene," but that you were "still having some *difficulties* with bathing/showering and reaching across [your] body, dressing, pulling up pants, eating, and sleeping comfortably in bed (*emphasis added*)" at that time. The fact that you reported "doing better with bathroom hygiene," as contrasted with the difficulty you reported still experiencing with the other ADLs, suggests that you were, in fact, conducting bathroom hygiene. This undermines that the opinion of the MD that you were unable to toilet without assistance at this time. Further, "difficulty" in performing the other ADLs does not imply incapability. Again, the Board does not question that it was difficult for you to perform ADLs with your left shoulder immobilized, or that your spouse did assist you with those ADLs. It simply finds insufficient evidence to conclude that such assistance was medically required.

The Board was not persuaded by the basis for the MD's opinion that you were unable to perform the ADL of bathing based upon the internal rotation requirements to perform perineal care listed in the American Journal of Occupational Therapy. In addition to the fact that you reported the ability to perform bathroom hygiene on 3 October 2017 and that that function requires the same internal rotation capability according to the source cited by the MD, the Board's personal experience and common sense reflects that minimal shoulder rotation is required for a man to perform perineal care. Additionally, in your statement dated 19 April 2019, you described the limitation to your ROM for your right armed as going "past [your] nipple line." As perineal care is conducted far below the nipple line, the Board had doubts that the internal rotation requirements cited by the MD were accurately applied to your situation. For the same reasons, the Board was not persuaded by the basis for the MD's opinion that you were unable to perform the ADL of toileting. In this regard, the Board noted that adaptive behaviors to perform the same function described by the MD without reaching behind your back, could have been employed that would require minimal shoulder rotation. The Board found your argument as it pertained to your ability to perform the ADL of dressing to be relatively more persuasive, as it could envision the difficulty described in putting on pants and underwear under the circumstances described. However, the Board also found that adaptive behaviors could be used to perform this function with minimal shoulder rotation (i.e., bending at the knees to pull pants up), and harbored serious doubts that such difficulty remained for 30 days after your left shoulder surgery since your right shoulder was not immobilized at that point and was described as nearly pain free by 3 October 2017. However, that was the only ADL about which the Board had any doubts regarding your ability to perform unassisted, and the criteria for TSGLI benefits is that assistance was required to perform <u>two</u> ADLs for at least a 30-day period. The Board did not find that you provided an "approximate balance" of evidence in favor of relief; the objective medical evidence was weighted fairly heavily in favor of a finding that you did not medically require assistance to perform two or more ADLs for any 30-day period.

With regard to the discrepancy in the record that precipitated the present remand, the Board notes that the discrepancy described in the Joint Motion (i.e., the two versions of the 3 October 2017 physical therapy progress report) was not the only such discrepancy in the record. As stated previously, there were similar discrepancies in your PT's Initial Evaluation Report of 27 July 2017 and the Progress Report of 17 August 2017. It appears that someone modified these records after PERS-13 denied your initial claim, but before your appeal of that decision, as you provided the modified versions with your appeal and the RN clearly referenced the modified versions in her assessment. The undated letter provided by your PT did not explain this discrepancy, as it addressed changes made only to the 9 October 2017 Initial Evaluation Report as it pertained to limitations pertaining to use of your left shoulder, so you offered no evidence explaining this discrepancy. The Board also noted that you, perhaps inadvertently, provided an electronic version of these documents that included "comment bubbles" next to the entries that were ultimately modified. Following are screenshots of these relevant comment bubbles as they appear on the documents:[16]

[16] These screenshots provide excerpts of the subject reports with the more relevant comments.

INITIAL EVALUATION REPORT

[redacted]

Date: 7/27/17 Phone: [redacted] Fax: [redacted]
Name: [redacted] *DOB:* [redacted]
Initial evaluation date: 7/27/17
Referring Physician: [redacted] *MD*
Primary Diagnosis: s/p SLAP repair R shoulder 7/6/17
Restrictions: pt still in abduction sling

Subjective Clinical and Functional History:
Ch
Inc *g, evening, walking around too much*
De
Are
On
Mechanism of injury: recovery from surgery

[redacted]
Please define timeline for sling

- Soft tissue: tenderness and immobility around scars, scars healing well

Problems

- Pain and soreness in R shoulder
- Decreased ROM of R shoulder
- Decreased strength of R shoulder
- Difficulty performing ADLs with R UE
- Immobility and tenderness of scars

Goals
STG 1-6 weeks

[redacted]
Difficulty needs to go away, and unable to perfom ADLS without assistance from Wife.

L
- Pt will be able to use the R shoulder and UE for all activities and ADLs without complications
- Pt will be independent with finalized HEP

PROGRESS REPORT

[redacted]

Date: 8/17/17 Phone: [redacted] Fax: [redacted]
Name: [redacted] *DOB:* [redacted]
Initial evaluation date: 7/27/17
Referring Physician: [redacted] *MD*
Primary Diagnosis: s/p SLAP repair R shoulder 7/6/17
Restrictions: pt still in abduction sling

[redacted] *has been seen for 6 therapy sessions and is responding well to treatment. Pt's PROM has improved and pt is ready to be progressed. Pt reports that overall soreness is less. Treatment has consisted of manual therapy, PROM, AAROM, moist heat, and game ready prn.*

Objective and Functional Findings

- Pain: R shoulder soreness and pain
- AROM/PROM

	R (8/17)	R	L
Flexion	nt/0-130	nt/0-95	0-120
Abduction	nt/0-123	nt/0-95	0-121
ER	nt/0-62@90	nt0-25@50abd	0-66
IR	nt/0-35@90	nt/0-33@50abd	0-55
Extension	nt	nt	nt

- MMT

	R	L
Flexion	nt	nt
Abduction	nt	nt
ER	nt	nt
IR	nt	nt
Extension	nt	nt

- Soft tissue: tenderness and immobility around scars; mobility improving

Problems

- Pain and soreness in R shoulder
- Decreased ROM of R shoulder
- Decreased strength of R shoulder
- Difficulty performing ADLs with R UE
- Immobility and tenderness of scars

Goals

ST [redacted]

Reword "difficulty" to unable

s)

LT

- Restore pain free ROM to wnls of non involved shoulder

The Board found the presence of these comments, combined with the unexplained modifications which correspond to these comments, to be suspicious and questionable. These comments suggest that at some point you attempted to communicate to your PT how these documents must be modified to support your TSGLI claim, as they seem to precisely address the deficiencies in your claim identified by PERS-13. As your PT did not address these modifications in his undated letter, the Board is left with two possible explanations for these discrepancies. Neither explanation is favorable to your claim. Even assuming the best case scenario – that your PT modified these records upon your request in order to address the inadequacies without providing the same type of explanation that he did for the 9 October 2017 report – medical records generated to achieve a particular result are not objective and are inherently unreliable. Further, either explanation rendered the opinion of the RN essentially worthless, as she relied extensively on the modified records to reach her opinion. As the Board found the modified documents to be unreliable, it disregarded them in favor of the original documents prepared by the PT.[17] The

[17] The 9 October 2017 Initial Evaluation Report that your PT addressed in his undated letter was irrelevant to the Board's review, as it provided observations outside of the period that you claimed to have been unable to perform ADLs without assistance.

Board presumes that your PT accurately recorded your self-reporting and his personal observations when he created these records. Unfortunately, those reports did not support your current claim to have been unable to perform ADLs without assistance for any 30-day period.

The Board regrets that the circumstances of your case do not warrant favorable action. 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,

12/10/2023