

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-01202-2

XXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXX

HEARING REQUESTED: NO

APPLICANT'S REQUEST

The Board reconsider his request to be given Servicemembers' Group Life Insurance Traumatic Injury Protection Program (TSGLI) benefits for the inability to perform Activities of Daily Living (ADLs) between 61 and 120 days after his injury.

RESUME OF THE CASE

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

On 23 Nov 21 and 11 Dec 21, the Board considered and denied his request for Servicemembers' Group Life Insurance Traumatic Injury Protection Program (TSGLI) benefits for the inability to perform Activities of Daily Living (ADL) between 61 and 120 days after his injury. The Board agreed with the opinion and recommendation of NGB/A1PS, finding a preponderance of the evidence did not substantiate the applicant's contentions.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letter and Record of Proceedings at Exhibit H.

On 31 Jan 23, the United States Court of Federal Claims remanded the case back to the AFBCMR to evaluate the following issues with specificity:

- a. The addition of the Affidavit of the applicant's spouse in the 8 Feb 21 appeal to the AFBCMR.
- b. The opinion of Plaintiff's orthopedic surgeon, located in Part B of the original GL 20005 Form.

The Remand order is at Exhibit I.

The notarized affidavit of the applicant's spouse dated 15 Oct 20, states in part that when the applicant started physical therapy on 26 Oct 16, "he had no degree of independence, with his activities of daily living, including bathing, dressing, transferring, and toileting. Not only was he unable to deal with these things, without my hands-on help, but I also had to be right next to him to physically support him and to make sure that he did not fall. From the time of his injury, until at least mid-February 2017, he had significant balance issues. If he had been left alone to ambulate or even stand still during this window, he would be a significant fall risk. As stated in

the PT record of January 18, 2017, he had significantly instability in his right knee. As of October 26, 2016, he required hands-on assistance for bathing, dressing, transferring and toileting. Regarding bathing, I had to physically assist him getting in and out of the tub. When he showered, I had to actually put on much of his clothing. Regarding transferring, I had to physically assist him transferring to and from bed, chairs, and the toilet. Regarding toileting, I had to physically steady him while he was standing up. I also had to physically help him up and down off the toilet seat. As we progressed into November, he could do more of his own activities of daily living, including dressing, toileting, and transferring. For example, by November 23, he had just started to dress independently. However, by that time, I still had to physically help him with his bathing as described above. In addition, as of November 23, 2016, I had to provide stand-by assistance to him regarding dressing, toileting, and transferring. Regarding dressing, for those parts that required him to be on his feet, I needed to be right there or else he would have fallen. I frequently had to put my hands on him to steady him. The same thing could be said regarding his toileting and transferring; if on his feet, or getting up and off his feet, I needed to be there to steady him. My need to provide this stand-by assistance was driven by two things. First, based upon my own observations as to his balance problems, it was absolutely necessary for safety reasons. Further, my husband told me repeatedly at least through the beginning of 2017 that J.C. told him to make sure that I was right there as he engaged in each of these activities. As of January 1, 2017, my need to provide hands-on assistance, even as to bathing, ended. However, it was well after February 13, 2017 when I did not need to provide stand-by assistance for toileting, transferring, dressing and bathing.”

The complete Affidavit is at Exhibit A.

Part B of Form GL 20005, dated 18 Oct 18 – Medical Professional’s Statement, indicates the applicant was unable to bathe, dress, toilet or transfer independently from 26 Aug 16 to 13 Feb 17 and required hands-on and stand-by assistance. The orthopedic surgeon stated he had been directly involved in the applicant’s care for his loss and his statement was based upon his examination of the patient, and/or, a review of the pertinent medical evidence.

Extract from Form GL 20005 is attached at Exhibit A.

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 again reviewing all Exhibits, the Board remains unconvinced the evidence presented demonstrates an error or injustice. The applicant’s claim for inability to perform at least two ADLs due to his injury at the 90-day point and beyond does not meet the standard TSGLI criteria for this claimed loss. As noted by AFPC, the applicant’s medical records do not indicate he was unable to reasonably complete two or more ADLs in an independent or modified independent manner, as required under program rules. Although the applicant provides an affidavit and opinion from his orthopedic surgeon’s stating he was unable to independently perform the ADLs of the ability to independently bathe, dress, toilet, and transfer until well after the 120-day mark, the medical records appear to undercut the spouse’s and surgeon’s evidence. The physical

therapy (PT) notes dated 23 Nov 16, indicates the applicant was right leg weight bearing and able to dress independently. With the exception of showering, the medical records indicate the applicant was able to independently dress, toilet, and transfer, albeit requiring additional time to accomplish, by the 90-day post injury date. Further, as noted in the advisory opinion dated 1 Oct 21, all the services arrived at a consensus opinion that in the case of injuries affecting one limb only, it is the expectation that all ADLs can be accomplished independently or in a modified independent manner within the first 30-day period following injury. The advisory opinion also indicates there are instances in which even single limb injuries can result in a medical requirement for assistance in ADLs; however, in these cases, documentation of the extenuating circumstances is expected. While the applicant was approved for loss of ability to independently perform ADL for the 30 and 60-day milestones, he has not provided substantial documentation with extenuating circumstances to warrant granting the loss of ability to independently perform ADLs for the 90- or 120-days milestones. Giving the circumstances in this case coupled with the fact there were no physical therapy comments he required any other assistance except for showering, the Board believes the decision to grant the loss of ability to independently perform ADLs for the 30 and 60-day milestones was appropriate and constitutes full and fitting relief. Absent persuasive evidence he was denied rights to which he was entitled, the Board recommends against correcting the applicant's records.

RECOMMENDATION

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, 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-2021-01202-2 in Executive Session on 12 Jul 23:

- , Panel Chair
- , Panel Member
- , Panel Member

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

- Exhibit H: Record of Proceedings, w/ Exhibits A-G, dated 23 Nov 21 and 11 Dec 21.
- Exhibit I: Stipulation of Dismissal Court Remand, dated 31 Jan 23.

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