DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-117

[redacted]
[redacted]MST1 (Retired)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on March 28, 2018, and assigned it to staff attorney [redacted] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated May 31, 2019, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a Marine Science Technician First Class (MST1/E-6) who was medically retired from the Coast Guard on March 12, 2018, asked the Board to correct his record by retroactively approving his Traumatic Injury Protection benefits under the Servicemembers' Group Life Insurance Traumatic Injury Protection (TSGLI) claim.[1] The applicant, through counsel, claimed that his TSGLI claim should have been approved because he met all of the requirements.

The applicant asserted that the main issue was whether or not he sustained a qualifying "loss." TSGLI procedures exclude benefits for "mental or physical illness or disease." However, injuries "caused by a pyogenic[2] infection, biological, chemical, or radiological weapon, or accidental ingestion of a contaminated substance" are covered.[3] The applicant stated that he was bitten by a mosquito while on leave and contracted West Nile Virus (WNV). He argued that contracting WNV should be considered a pyogenic infection. The applicant stated that the TSGLI office conceded that the mosquito bite met the requirement of a "traumatic event," but "failed to provide fair

[1] To be granted TSGLI, a member must have a "qualifying loss" as a result of a "traumatic injury" due to a "traumatic event," and one type of a qualifying loss is to be unable to perform at least two of six activities of daily living (ADLs), which concern eating, bathing, dressing, toileting, transferring, and continence. 38 C.F.R. § 9.20.
[2] "Pyogenic" means involving or relating to production of pus. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 32nd Ed. (2012), p. 1561
[3] 38 C.F.R. § 9.20(c)(2).

and proper consideration of whether the West Nile Virus should be considered within the exceptions of illness and disease." The applicant argued that if he had suffered from a more "common and broad labeled pyogenic infection from a mosquito bite" then he would have clearly qualified for TSGLI benefits. Because he was diagnosed with WNV, a "rare diagnosis," however, he was denied benefits. He asserted that every "rare disease" such as WNV cannot be listed as an exception to the disease and illness bar but should nonetheless be considered as included.

The applicant stated that TSGLI benefits are administered by the Secretary of the Department of Veterans Affairs (VA) and 38 U.S.C. § 5107(b). Citing VA regulations, he argued that the applicable standard that must be applied by the Board is "substantial evidence" which means "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."[4] The applicant asked that the Board review the case *de novo* using this standard, which would lead to granting his request for relief.

In support of his application, the applicant provided several documents, the most relevant of which are described in the Summary of the Record, below. He also provided copies of five court decisions:

1. In *Blackwood v. United States*, which is not reported in the Federal Supplement,[5] the plaintiff, an Army member, had been denied TSGLI benefits after falling six feet onto his head and suffering a neck injury on an obstacle training course. His claim was denied because he was not able to show that he was unable to perform two more or more activities of daily living (ADLs) for at least thirty days. The plaintiff was in the hospital for three days for partial paralysis and five days later was seen for a follow-up. He was seen again about two weeks later and the doctor noted that the plaintiff had "several limitations in basic functional mobility such as bathing, dressing, and grooming. All ADLs are limited and [plaintiff] is not performing job duties at this time." In Part B of the plaintiff's TSGLI application, the doctor who treated the plaintiff noted that the plaintiff continued to (more than 120 days after the incident) have ongoing inabilities to independently bathe, dress, eat, toilet or transfer. The plaintiff's request, and subsequent appeals, were denied because it was determined that the plaintiff did not indicate that his injuries rendered him incapable of performing ADLs for thirty days or longer because he had been given accommodating equipment (such as a cane, crutches, and/or a wheelchair). With the plaintiff's final appeal to the Army, he included a letter from his wife which spoke to the extent of the plaintiff's need for physical assistance. The defendant conceded that the plaintiff suffered a covered traumatic injury. The court noted that the Army Board for Correction of Military Records (ABCMR) did not make reference to the letter from the plaintiff's wife and stated that the ABCMR therefore "either failed to consider this evidence or simply discounted it without explanation, either of which would clearly be arbitrary and capricious action," as the letter provided significant support for the plaintiff's claim. The court found that the "ABCMR's decision to deny plaintiff's final appeal for TSGLI benefits was arbitrary and capricious because the decision ran counter to the evidence presented." The plaintiff had asked for TSGLI benefits for 120 days, but the Court found that the record indicated that the plaintiff

[4] 38 U.S.C. § 5107(b).
[5] *Blackwood v. United States*, Civ. Action No. 3:15CV-00402-JHM (W.D. Ky. Oct. 5, 2016).

had clearly shown that he was unable to perform at least two ADLs for at least 60 days, and so remanded the case for further processing.[6]

2. *Fail v. United States*, which was not reported in the Federal Supplement,[7] involved a class-action suit with eight plaintiffs, each of whom served or had served in the Army. The court upheld several of the plaintiffs' TSGLI claim denials but reversed two: Mr. A had injured his knee by aggravating a previously torn ACL while on an obstacle course. His record included a letter from his wife to substantiate the assistance Mr. A required for ADLs. His claim had been denied because the Army found that he could perform ADLs with his accommodating equipment. The Court found that Mr. A's wife's statement was "enough to permit the conclusion that [he was] qualified for benefits" because it was a "statement from a percipient witness about the specific limitations that [were] actually experienced" and so vacated his denial of benefits. Mr. M had fallen down stairs and struck a pole. His record also included a letter from his wife attesting to the physical assistance Mr. M required following his surgery. The court found that nothing in the record rebutted the remarks in the wife's letter and found that it served as "conclusive proof that Mr. [M] did indeed require the assistance described."

3. In *Yearwood v. United States*, 124 F. Supp. 3d 1204 (N.D. Ala. 2015), the plaintiff had argued before the Army BCMR that 38 U.S.C. § 5107 applied, which requires the veteran seeking the benefit "to present and support a claim for benefits." This section further states that when there is "an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary [of the Department of Veterans Affairs (VA)] shall give the benefit of the doubt to the claimant." The plaintiff, an activated Army National Guard member, had cut his right hand while clearing his service weapon of ammunition. A few days later, he developed a mass on the right side of his chest with pain in his right shoulder. He was determined to have a pyogenic infection, specifically a staph infection, and was evacuated to Walter Reed Army Medical Center where he was additionally diagnosed with bone and joint infections. He received multiple surgeries and after his discharge he remained on an intravenous infusion in order to combat his infections. The plaintiff required the assistance of his wife for bathing and dressing. He requested TSGLI coverage, asserting that he had required physical assistance for at least two ADLs for more than thirty days.

   The Army determined that the plaintiff was not involved in a traumatic event and that his loss was due to an illness. The court noted that all three decisions from the Army (the initial decision and the two appeals) did not explain their findings and included only very simple and conclusory findings. The court found that the Army BCMR had applied the wrong burden of proof – requiring him to prove his assertions by a preponderance of the evidence "rather than merely by substantial evidence, and in so doing, erroneously reversed the burden of proof by failing to give the plaintiff the benefit of the doubt as required by

[6] The applicant provided several court cases remanding a BCMR's decision based in part or fully on a spouse's or family member's declaration attesting to the physical assistance needed by the plaintiff. However, the record before the Board does not include a similar letter or declaration and the Coast Guard did not dispute the applicant's inability to perform ADLs.

[7] *Fail v. United States*, Civ. Action No. 12-cv-01761-MSK-CBS (D. Colo. Sept. 27, 2013).

§ 5107(b)." The court stated that the Army BCMR acknowledged the "benefit of the doubt" rule but "misapplied it by effectively equating it to a preponderance of the evidence standard." The court stated that once a member or veteran meets this standard, it is the government's job to rebut that balance by a preponderance of the evidence.

The court in *Yearwood* found that an "accidental cut sustained while manipulating a weapon falls squarely within the definition of a traumatic event." Therefore, the court found that the Army BCMR's finding that the plaintiff's cut to his hand was not the result of a traumatic event was arbitrary and capricious. "That the cut appeared minor at the time does not dispense with his claim if the infection developed directly from it." Regarding whether the plaintiff could prove that his infections had resulted from the cut on his hand, the court noted that the difficulty in "pinpointing the precise time and location of infection means that such a determination necessarily is made on probabilities," and found that the plaintiff had met his burden in this regard. Overall, the court found that the positive and negative evidence regarding the plaintiff's claim was substantially equal, therefore the Army BCMR had a statutory duty to apply the "benefit of the doubt" doctrine, which they did not do. The court remanded the decision to the Army BCMR.

4. In *Koffanus v. United States*, 175 F. Supp. 3d 769 (W.D. Ky. 2016), the plaintiff was in the Army National Guard (not activated) and was shot in the foot at a restaurant in the United States after a gunman opened fire on several Army National Guard members. She was hospitalized, underwent surgery, and was discharged the next day. She required assistive equipment for ambulating and "an assistive person for transferring, toileting, bathing, and dressing." Three months later, she had reconstructive surgery and after about four weeks she was "walking using a boot." The plaintiff's request and both appeals for TSGLI were denied because there was not enough evidence to show that she could not perform ADLs independently. When the plaintiff applied to the Army BCMR, she submitted a letter from her spouse, who attested to the physical assistance the plaintiff needed following the injury. The Army BCMR denied the plaintiff's claim, finding that otherwise "healthy patients are not rendered ADL incapable by a single limb trauma/ dysfunction/immobilization." The court found that the documents submitted by the plaintiff contradicted the Army BCMR's conclusion that the documentation did "not indicate that the injury rendered the [plaintiff] incapable of performing any ADLs for 30 days or more." Instead, the court found that the record showed that the plaintiff was incapable of dressing, transferring, and bathing for thirty days or more. The court largely based this on certifications from two doctors, discharge instructions, and the letter from the plaintiff's spouse. The court noted that "letters from caregivers provide strong corroborating evidence of a patient's claim."

5. In *Carver v. United States*, which is not reported in the Federal Supplement,[8] the plaintiff was in the Army National Guard when he injured his ankle in a forklift accident. The plaintiff's TSGLI requests were denied because he was found to be able to perform ADLs with adaptive devices such as a wheelchair, crutches, bed-side commode, shower chair, and a 3D walker boot. On the plaintiff's second appeal to the Army, he included a letter from his father who acted as his caregiver during his recovery. The court found that the Army

[8] *Carver v. United States*, Civ. Action No. 3:15CV-00401-JHM (W.D. Ky. Oct. 5, 2016).

BCMR's decision to deny the plaintiff's request was arbitrary and capricious because it "ran counter to the evidence presented" from his record, notably the letter from his father.

SUMMARY OF THE RECORD

Several documents[9] state that while on leave in September 2016, the applicant was bitten by a mosquito. He sought treatment at a Coast Guard medical facility on September 15, 2016, and a private medical center on September 16, 2016. He was admitted to a hospital on September 17, 2016, where he stayed for forty-nine days for medical issues related to the mosquito bite.

On November 17, 2017, the applicant submitted an application for TSGLI benefits. In Part A, which is to be filled out by the applicant, he stated that a few days after receiving a "painful insect bite" from a mosquito in September 2016, the pain began to travel up his left leg to his lower back. He stated that on September 15, 2016, he sought medical care from a military facility but on September 16, 2016, he went to an urgent care facility because his condition had worsened. The applicant stated on that September 17, 2016, he woke up in pain and attempted to walk but collapsed after a few steps. He was admitted to a hospital for "high fever, full body spasms, spinal cord damage (pareses) of both legs (more so on the left [than] right), reduce[d] lung capacity, double vision, mental cognitive issues, blood clot of both legs (DVT), whole body weakness, and urine retention (catheter)." He asserted that he required physical assistance and stand-by assistance for bathing, using the toilet, and transferring. He stated that even after he was released from the hospital after forty-nine days, he still required stand-by assistance from his wife. He stated that he was still receiving physical therapy three times a week and, because of the spinal cord damage, he still used a wheelchair for 75% of his day. He stated that he was told he may never fully recover from the mosquito bite. Part B, which is to be completed by a "medical professional who is a licensed practitioner of the healing arts acting within the scope of his/her practice," was completed by a medical professional who did not treat the applicant but reviewed his medical records. The section asking for a description of the injury states the following:

> Since hospitalization on 17 SEP 2016 and inpatient stay of 49 days, he reached the apex of his lower extremity weakness, diagnosed with paraparesis with transverse myelitis from West Nile Virus (from a mosquito bite) at discharge. During his inpatient stay, he would be unable to bear weight, stand, ambulate, or transfer bed to wheelchair/wheelchair to toilet/shower bathtub without physical assistance due to lower extremity weakness and muscle spasm.
>
> With physical therapy, learning coping skills, and recovery time since discharge from his hospital stay, he would have some return of function mostly to his R lower extremity and L hip, which allowed more independent transferring. He, to date, still requires assisting devices to ambulate.

The health care professional noted in a comment section that the applicant's symptoms progressed from a WNV "infection settling" to an increased risk of clotting and poor motor strength. The health care professional claimed that the applicant needed the following assistance from September 17, 2016—the day the applicant was hospitalized—through December 20, 2016:

[9] These include the original TSGLI application for benefits, his February 7, 2018, memorandum to PSC, and various medical documents provided by the applicant. The BCMR did not receive the applicant's medical record.

- Bathing: The applicant required physical and stand-by assistance from the hospital nurses September 17, 2016, to November 4, 2016, to get in and out of the bath. He then needed stand-by assistance from his wife in order to get in and out of the bath from November 4, 2016, to December 20, 2016.

- Continence: The applicant required physical assistance only for the period from September 19, 2016, to October 3, 2016 (while hospitalized), as he was catheterized and needed physical help in emptying the urine bag.

- Toileting: The applicant needed physical assistance from the hospital nurses to get on and off the toilet and also to and from the toilet from October 3, 2016, to November 4, 2016. He required stand-by assistance from his wife to get on and off the toilet and to get to and from the toilet from November 4, 2016, to December 20, 2016.

- Transferring: The applicant required physical assistance from the hospital nurses to get in and out of his bed and chair from September 17, 2016, to November 4, 2016. He then required stand-by assistance from his wife to get in and out of his bed and chair from November 4, 2016, to December 20, 2016.

On December 5, 2017, a lieutenant in the Coast Guard Personnel Service Center (PSC), Personnel Services Division, Field Support office informed the applicant that his claim had been disapproved because his losses were the result of WNV, which is a physical illness or disease not covered by TSGLI. The applicant was informed of his right to appeal.

On February 7, 2018, the applicant, through his attorney, replied to PSC and requested reconsideration of his TSGLI claim. The applicant claimed that he was unable to perform at least two ADLs for more than 90 days, but less than 120 days. He complained that the government was the insurance policy holder of the TSGLI, which limited any lawsuit for bad faith. The applicant argued that WNV was caused by a mosquito bite, which itself was an external force so his medical issues should not be considered just a disease or illness. Instead, he argued, they should be considered under one of the exceptions to the disease or illness rule. The applicant argued that the "bar to benefits applies to illnesses and diseases without an external impact or a known cause, and medical treatment or complications of medical treatment that involve internal forces." He stated that although a mosquito bite is a small external force, it is an external force nonetheless. The applicant argued that in this way, a mosquito bite is similar to contaminated substances and biological weapons and unlike a common illness or infection. He asserted that even if the TSGLI office disagreed, WNV does not fit squarely into any category and because of the appropriate standard of review, the tie should go in the applicant's favor.

On February 13, 2018, a lieutenant in PSC's TSGLI Certifying Office informed the applicant that his claim had been reconsidered but was "not approved because the medical records provided indicate that the loss was the result of West Nile Virus, which is considered a physical illness or disease." PSC stated that the applicant was considered to have experienced a traumatic event because the mosquito bite was "an external force," but he was not considered to have suffered a "traumatic injury" according to the rules. The applicant was again informed of his right to appeal the decision.

On February 20, 2018, the applicant, through his attorney, replied to PSC, Personnel Services Division. He agreed that he had suffered a traumatic event but disagreed with PSC's remaining analysis. He argued that although WNV is a rare illness or disease, that does not mean it does not fall within the exceptions. The applicant asserted that of the four examples regarding complications from an illness or disease discussed in the TSGLI Procedures Guide on the issue, WNV does not clearly fit into any of them. The applicant noted the example regarding a pyogenic infection, which includes a car accident victim who loses a leg due to gangrene from a pus-forming infection of her injuries. The applicant asserted that the term "pyrogenic infection" is very broad and is defined by one medical dictionary as "any infection that results in pus production."[10] He argued that a "pyogenic infection is akin to the West Nile Virus" and that "in some cases, a mosquito bite involves an infection with pus." The applicant claimed that the purpose of the bar for illnesses and diseases for TSGLI benefits is to deny benefits for common health problems and complications "from internal sources." He asserted that TSGLI is intended to protect members from unforeseen issues that involve a direct, external impact and cause a devastating physical and financial loss to the member. The applicant argued that WNV precipitating from a mosquito bite clearly falls within the purpose and procedures of the TSGLI. He requested that his claim be approved.

On March 12, 2018, the applicant was medically retired from the Coast Guard. On March 15, 2018, a commander serving as the TSGLI Appeals Board President stated that the TSGLI Appeals Board had convened to evaluate the applicant's claim and determined that his claim was not approved. The Appeals Board had upheld the original determination because the facts did "not conform to the requirements for TSGLI coverage because the record [did] not show that his disease [was] a pyogenic infection." The memorandum informed the applicant of his appeal rights which consisted of applying to the BCMR.

VIEWS OF THE COAST GUARD

On August 27, 2018, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC conceded that the mosquito bite was a traumatic event, "due to the insect [bite] being an external force." However, PSC argued, the applicant was not considered to have suffered a "traumatic injury" because physical illnesses and diseases that are not caused by pyogenic infections (or other exceptions) are not covered under TSGLI. PSC stated that WNV is considered an illness or disease and not a pyogenic infection. Therefore, PSC recommended that the Board deny relief.

With its advisory opinion, PSC provided an email chain with a VA Insurance Specialist. On January 31, 2018, PSC stated that there were some questions regarding TSGLI. On February 1, 2018, the Insurance Specialist replied and quoted 38 C.F.R. § 9.20(b)(1) and (c)(2). She stated that the applicant did not meet the terms of § 9.20(c)(2), which provides that a traumatic injury

[10] The applicant cited MOSBY'S MEDICAL DICTIONARY, 9th Ed. (2009).

does not include damage to the body caused by a physical illness or disease. The Insurance Specialist stated that the applicant's loss was due to WNV "which is an illness or disease specifically prohibited under this provision." She stated the following regarding TSGLI coverage:

> Member must meet all of these criteria to be paid:
>
> 1. SGLI coverage at the time of event – member meets this.
> 2. Suffer a [traumatic event] – member meets this.
> 3. Suffer a scheduled loss – member meets this criteria
> 4. The Scheduled loss must be due directly to the traumatic event – member meets this criteria.
> 5. The scheduled loss must occur within 2 years of the [traumatic event] – members meets this.
> 6. The member must survive 7 days from the date of the [traumatic event] – member meets this.
> 7. The member's loss cannot be due to any of the following:
>
> Attempted Suicide – does not apply
> Felony Crime – does not apply
> Illegal Drugs – does not apply
> Intentional Self-Infliction – does not apply
> Mental disorder – does not apply
> Mental/physical illness (UNLESS due to pyogenic infection, [biological, chemical, or radiological] weapons, or accidental ingestion of contaminated substance – member does NOT meet this criteria.
>
> So, while the member experienced a traumatic event (insect bite) and that traumatic event led to a Scheduled Loss (hospital/ADL) the actual loss occurred due to an illness/disease that was result of the insect bite. Because TSGLI excludes losses caused by illness/disease, the benefit is not payable.
>
> This is no different than a prior Navy case where the member:
> Was bitten by a spider. The bite is a traumatic event. The member developed rocky mountain spotted fever. The rocky mountain spotted fever caused the member to go into a coma. The loss was not payable via TSGLI but the coma was caused by the rocky mountain spotted fever.
>
> However, if this case had been slightly different we would pay:
> Was bitten by a spider. The bite is a traumatic event. The member did not develop any type of disease or illness but rather went into immediate anaphylactic shock after the bite and immediately fell into a coma. The loss was payable via TSGLI because the loss was due directly to the bite/shock – there was no intervening illness or disease.
>
> Other cases from other branches on this issue that have been denied:
>
> Tick bite – Lyme disease
> Spider – Rocky mountain fever
> Mosquito – malaria
> Animal bite – Rabies
>
> Other cases from other branches on this issues that have been paid due to bite from anaphylactic shock:
>
> Bee bite – shock
> Animal bite – shock
> Spider bite – shock
> Snake bite – venom/shock

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 4, 2018, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. The applicant, through his attorney, replied on September

10, 2018. He stated that he disagreed with the Coast Guard's advisory opinion. He stated that this case involves a dispute as to the interpretation of the law and its application to the facts of his case. The applicant requested a *de novo* review of his claim and his unique arguments. He thanked the Board for its time.

APPLICABLE LAW AND POLICY

Statutes

Title 38 U.S.C. § 1980A, "Traumatic Injury Protection," states the following in pertinent part (emphasis added):

> (a)(1) A member of the uniformed services who is insured under Servicemembers' Group Life Insurance shall automatically be insured for traumatic injury in accordance with this section. Insurance benefits under this section shall be payable if the member, while so insured, sustains a traumatic injury on or after December 1, 2005, that results in a qualifying loss specified pursuant to subsection (b)(1).
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> • • •
>
> (b)(1) A member who is insured against traumatic injury under this section is insured against such losses due to traumatic injury (in this section referred to as "qualifying losses") as are prescribed by the Secretary by regulation. **Qualifying losses so prescribed shall include the following:**
>
> (A) Total and permanent loss of sight.
>
> (B) Loss of a hand or foot by severance at or above the wrist or ankle.
>
> (C) Total and permanent loss of speech.
>
> (D) Total and permanent loss of hearing in both ears.
>
> (E) Loss of thumb and index finger of the same hand by severance at or above the metacarpophalangeal joints.
>
> (F) Quadriplegia, paraplegia, or hemiplegia.
>
> (G) Burns greater than second degree, covering 30 percent of the body or 30 percent of the face.
>
> **(H) Coma or the inability to carry out the activities of daily living resulting from traumatic injury to the brain.**
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> (2) For purposes of this subsection:
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> • • •
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> (D) The term "inability to carry out the activities of daily living" means the inability to independently perform two or more of the following six functions:
>
> (i) Bathing.
>
> (ii) Continence.
>
> (iii) Dressing.
>
> (iv) Eating.
>
> (v) Toileting.
>
> (vi) Transferring.
>
> (3) The Secretary may prescribe, by regulation, conditions under which coverage otherwise provided under this section is excluded.
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> • • •
>
> (c)(1) A payment may be made to a member under this section only for a qualifying loss that results directly from a traumatic injury sustained while the member is covered against loss under this section and from no other cause.

(2)(A) A payment may be made to a member under this section for a qualifying loss resulting from a traumatic injury only for a loss that is incurred during the applicable period of time specified pursuant to subparagraph (B).

(B) For each qualifying loss, the Secretary shall prescribe, by regulation, a period of time to be the period of time within which a loss of that type must be incurred, determined from the date on which the member sustains the traumatic injury resulting in that loss, in order for that loss to be covered under this section.

• • •

(j) Regulations under this section shall be prescribed in consultation with the Secretary of Defense.

Title 38 U.S.C. § 5107 states the following:

(a) Claimant responsibility.-- Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary.

(b) Benefit of the doubt.-- 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.

Regulations

Title 38 C.F.R. § 9.20 states the following in pertinent part (emphasis added):

(a) What is traumatic injury protection? Traumatic injury protection provides for the payment of a specified benefit amount to a member insured by Servicemembers' Group Life Insurance who sustains a traumatic injury directly resulting in a scheduled loss.

(b) What is a traumatic event?

(1) A traumatic event is the application of external force, violence, chemical, biological, or radiological weapons, or accidental ingestion of a contaminated substance causing damage to a living being occurring on or after October 7, 2001.

(2) A traumatic event does not include a medical or surgical procedure in and of itself.

(c) What is a traumatic injury?

(1) A traumatic injury is physical damage to a living body that is caused by a traumatic event as defined in paragraph (b) of this section.

(2) For purposes of this section, the term "traumatic injury" does not include damage to a living body caused by—

(i) A mental disorder; or

(ii) A mental or physical illness or disease, except if the physical illness or disease is caused by a pyogenic infection, biological, chemical, or radiological weapons, or accidental ingestion of a contaminated substance.

(3) For purposes of this section, all traumatic injuries will be considered to have occurred at the same time as the traumatic event.

(d) What are the eligibility requirements for payment of traumatic injury protection benefits? You must meet all of the following requirements in order to be eligible for traumatic injury protection benefits.

(1) You must be a member of the uniformed services who is insured by Servicemembers' Group Life Insurance …

(2) You must suffer a scheduled loss that is a direct result of a traumatic injury and no other cause.

• • •

(e) What is a scheduled loss and what amount will be paid because of that loss?

(1) The term "scheduled loss" means a condition listed in the schedule in paragraph (e)(7) of this section if directly caused by a traumatic injury. A scheduled loss is payable at the amount specified in the schedule.

(2) The maximum amount payable under the schedule for all losses resulting from traumatic events occurring within a seven-day period is $100,000. We will calculate the seven-day period beginning with the day on which the first traumatic event occurs.

(3) A benefit will not be paid if a scheduled loss is due to a traumatic injury—[suicide attempt, drug abuse, etc.]

• • •

(4) A benefit will not be paid for a scheduled loss resulting from—

(i) A physical or mental illness or disease, whether or not caused by a traumatic injury, other than a pyogenic infection or physical illness or disease caused by biological, chemical, or radiological weapons or accidental ingestion of a contaminated substance; or

(ii) A mental disorder whether or not caused by a traumatic injury.

• • •

(6) Definitions. For purposes of this section—

• • •

(vi) The term inability to carry out activities of daily living means the inability to independently perform at least two of the six following functions:

(A) Bathing.

(B) Continence.

(C) Dressing.

(D) Eating.

(E) Toileting.

(F) Transferring in or out of a bed or chair with or without equipment.

(vii) The term pyogenic infection means a pus-producing infection.

(viii) The term contaminated substance means food or water made unfit for consumption by humans because of the presence of chemicals, radioactive elements, bacteria, or organisms.

(ix) The term chemical weapon means chemical substances intended to kill, seriously injure, or incapacitate humans through their physiological effects.

(x) The term biological weapon means biological agents or microorganisms intended to kill, seriously injure, or incapacitate humans through their physiological effects.

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(7) Schedule of Losses. [A table showing the amounts payable for various types of qualifying losses.]

(g) Who will determine eligibility for traumatic injury protection benefits? Each uniformed service will certify its own members for traumatic injury protection benefits based upon section 1032 of Public Law 109–13, section 501 of Public Law 109–233, and this section. The uniformed service will certify whether you were at the time of the traumatic injury insured under Servicemembers' Group Life Insurance and whether you have sustained a qualifying loss.

• • •

> (k) The Traumatic Servicemembers' Group Life Insurance program will be administered in accordance with this rule, except to the extent that any regulatory provision is inconsistent with subsequently enacted applicable law.

Policy

Part 1 of the VA's "Traumatic Injury Protection Under Servicemembers' Group Life Insurance (TSGLI): A Procedural Guide," states that the TSGLI program "provides for payment to Servicemembers who are severely injured … as the result of a traumatic event and suffer a loss that qualifies for payment under TSGLI. … TSGLI payments range from $25,000 to $100,000 based on the qualifying loss suffered." Member are eligible if they are covered under the Servicemembers' Group Life Insurance, experience a traumatic event that directly results in a traumatic injury causing a scheduled loss. Part 1 also includes the following definitions:

- An "external force" is "a force of power that causes an individual to meet involuntarily with an object, matter, or entity that causes the individual harm." Whereas internal forces are defined as "forces acting between body parts."
- A "traumatic event" is the "application of external force, violence, chemical, biological, or radiological weapons, accidental ingestion of a contaminated substance, or exposure to the elements that causes damage to the body." A traumatic event "must involve a physical impact upon an individual." Examples provided in Guide include an airplane crash and falling in the bathtub. An example would not be "the stress or strain of the normal work effort that is employed by an individual, such as straining one's back from lifting a ladder."
- "Direct result means there must be a clear connection between the traumatic event and resulting loss and no other factor aside from the traumatic event can play a part in causing the loss."
- A "traumatic injury" is "the physical damage to [the member's] body that results from a traumatic event."
- A "scheduled loss" is "a condition listed in the TSGLI Schedule of Losses if that condition is directly caused by a traumatic injury."

Part 1 of the guide also states that to qualify for TSGLI benefits, a member must meet all of these requirements:

> 1) The member must suffer a scheduled loss … that is a direct result of a traumatic injury due to a traumatic event and no other cause.
> 2) The member must have suffered the traumatic event before midnight of the day that the member separates from the uniformed services.
> 3) The member must suffer the scheduled loss within two years (730) days of the traumatic event.
> 4) The member must survive for a period of at least seven full days from the date of the traumatic event. The seven-day period begins on the date and time of the traumatic event … and ends 168 full hours later.
> 5) If injured on or after December 1, 2005, the member must be insured by SGLI at the time of the traumatic event. …

Under "Injuries Excluded From TSGLI Payment," Part 1 of the guide lists those caused by a mental or physical illness or disease, unless the illness or disease was caused by a "pyogenic infection, biological, chemical, or radiological weapon, or accidental ingestion of a contaminated substance." An example is provided for pyogenic infection: "A member is injured in a car accident. She suffers injuries to her leg. Unfortunately, her wounds develop a pus-forming infection (pyogenic infection) and spread gangrene up her leg resulting in the loss of her leg. The member's loss would be covered by TSGLI."

The guide defines "contaminated substance" as "food or water made unfit for consumption by humans because of the presence of chemicals, radioactive elements, bacteria, or organisms." The example provided is a member going into a coma after drinking contaminated water from a stream in Iraq.

The guide states that a member is considered to have a qualified loss of ADLs if he "**REQUIRES assistance** to perform at least two of the six activities of daily living. If the patient 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 the activity" (emphasis in original). The six ADLs concern bathing, continence, dressing, eating, toileting, and transferring.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[11]

3. The applicant alleged that the Coast Guard's denial of his TSGLI claim was erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[12] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[13]

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[11] *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).
[12] 33 C.F.R. § 52.24(b).
[13] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

4. The applicant argued that the standard to be used by the Board should be "substantial evidence" because TSGLI benefits are administered under 38 U.S.C. § 5107(b), which states that "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."[14] The applicant argued that this standard applies to the Board as stated in *Yearwood v. United States*, 124 F. Supp. 3d 1204 (N.D. Ala. 2015). But *Yearwood* is not controlling, and the standard in § 5107(b) applies to TSGLI offices and requires giving the benefit of the doubt only in situations in which "there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter." In light of 38 U.S.C. § 5107(b), 10 U.S.C. § 1552, and 33 C.F.R. § 52.24(b), the Board must determine in this case whether the preponderance of the evidence shows that the denial of TSGLI coverage is erroneous or unjust, which it would be if the TSGLI authorities erred or abused their discretion in deciding that the applicant did not suffer a "qualifying loss" entitling him to benefits pursuant to 38 U.S.C. § 1980A. Such an error or abuse of discretion could include not giving the applicant the benefit of the doubt if there were "an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter."[15]

5. In 38 U.S.C. § 1980A, Congress provided TSGLI coverage for "qualifying losses," which it defined as including a total and permanent loss of sight, speech, or hearing; certain paralyses, burns, and amputations; and "coma and the inability to carry out the activities of daily living resulting from traumatic injury to the brain."[16] In this case, the Coast Guard did not address whether the applicant was able "to carry out the activities of daily living" and instead denied TSGLI benefits after finding that his losses of function while he was recovering from WNV did not result from a "traumatic injury to the brain" as defined by regulation and policy.[17] The applicant argued that his losses of function due to WNV should be considered to have resulted from a "traumatic injury to the brain" because his WNV was caused by a mosquito bite, which is an "application of external force" meeting the VA's definition of a "traumatic event."[18] Therefore, the initial question before the Board is whether the applicant's "losses"[19] while he was recovering from WNV "result[ed] from traumatic injury to the brain," as required by 38 U.S.C. § 1980A.

6. The applicant has not submitted any evidence showing that his losses of function (damage) resulted "from traumatic injury to the brain"[20] as defined by law or policy. Therefore, there is not "an approximate balance of positive and negative evidence"[21] regarding this issue that

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[14] 38 U.S.C. § 5107(b).
[15] *Id.*
[16] *Id.* at § 1980A(b)(1)(H).
[17] Congress authorized the Secretary of the VA to prescribe the regulations for this section in consultation with the Secretary of Defense. *Id.* at § 1980A(b)(3) and (j).
[18] 38 C.F.R. § 9.20(b)(1) (defining "traumatic event" as "the application of external force, violence, chemical, biological, or radiological weapons, accidental ingestion of a contaminated substance, or exposure to the elements that causes damage to the body"); U.S. Department of Veterans Affairs, "Traumatic Injury Protection Under Servicemembers' Group Life Insurance (TSGLI): A Procedural Guide," Version 2.33, Part 1 (2015).
[19] Because the Board does not reach the issue of whether the applicant was unable to perform ADLs, as he alleged, the Board will, like the TSGLI authorities, refer to his physical problems as "losses" (of function), but by using the term "losses," the Board does not mean or imply that the applicant's losses were "qualifying" within the meaning of 38 U.S.C. § 1980A.
[20] 38 U.S.C. § 1980A(b)(1)(H).
[21] *Id.*

would warrant finding that the Coast Guard's determination that he did not suffer a "qualifying loss" was erroneous or unjust and granting relief in this case pursuant to 38 U.S.C. §§ 1980A and 5107 and 10 U.S.C. § 1552. To have suffered qualifying losses of function "resulting from traumatic injury to the brain," the applicant would have to have incurred a "traumatic injury." A "traumatic injury" is defined as "physical damage to a living body caused by a traumatic event" but *not* "damage caused by … [a] mental or physical illness or disease, except if the physical illness or disease is caused by a pyogenic infection, biological, chemical, or radiological weapons, or accidental ingestion of a contaminated substance."[22] Therefore, damage resulting from an illness or disease constitutes a "traumatic injury" for the purposes of TSGLI only if the "illness or disease is caused by a pyogenic infection, biological, chemical, or radiological weapons, or accidental ingestion of a contaminated substance."[23] In this case, the applicant's losses of function were caused by WNV, which is a disease.[24] And, as the applicant admitted, his WNV was caused by a mosquito bite that introduced the virus into his body.[25] The applicant has submitted no evidence to show that WNV is ever "caused by a pyogenic infection, biological, chemical, or radiological weapons, or accidental ingestion of a contaminated substance."[26] Therefore, although a mosquito bite apparently meets the definition of a "traumatic event," the applicant's losses of function (damage) did not result from a "traumatic injury to the brain" under applicable law and policy because WNV is not "caused by a pyogenic infection, biological, chemical, or radiological weapons, or accidental ingestion of a contaminated substance."[27] In this regard, the Board notes the following:

a. A "pyogenic infection" is a pus-inducing infection,[28] and some pus-inducing infections can develop into a disease, such as gangrene and necrotizing fasciitis.[29] There is no evidence that the applicant's WVN was caused by a pus-inducing infection.

b. A mosquito bite is not a "weapon … intended to kill, seriously injure, or incapacitate humans through their physiological effects."[30]

c. A mosquito bite is not "accidental ingestion of a contaminated substance," which is defined to mean accidental ingestion of "food or water made unfit for consumption by humans."[31]

7. The applicant argued that WNV should be considered a "pyogenic infection" and so constitute a "traumatic injury." But he submitted no evidence showing that WNV is a "pyogenic infection."[32] Furthermore, under 38 C.F.R. § 9.20(c)(2)(ii), WNV would have to be *caused* by a

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[22] 38 C.F.R. § 9.20(c)(2)(ii).
[23] *Id.*
[24] HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, 18th Ed., Vol. 1 (2012), p. 1622-25.
[25] *Id.*
[26] 38 C.F.R. § 9.20(c)(2)(ii).
[27] *Id.* at § 9.20(c)(2)(ii).
[28] *Id.* at § 9.20(e)(6)(vii); DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 32nd Ed. (2012), p. 1561; U.S. Department of Veterans Affairs, "Traumatic Injury Protection Under Servicemembers' Group Life Insurance (TSGLI): A Procedural Guide," Version 2.33, Part 1 (2015).
[29] HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, 18th Ed., Vol. 1 (2012), p. 1336.
[30] 38 C.F.R. § 9.20(e)(6)(x).
[31] *Id.* at § 9.20(e)(6)(viii).
[32] DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 32nd Ed. (2012), pp. 613, 1083 (listing the potential symptoms of WNV as drowsiness, severe headaches, rash, abdominal pain, nausea, loss of appetite, and swelling of the lymph nodes).

pyogenic infection to count as a "traumatic injury"—as gangrene develops from pus-producing infections.

8. The applicant argued that WNV should be considered *akin to* a pyogenic infection and so count as a "traumatic injury" because the VA's TSGLI procedural guide cannot be expected to list every single malady that exists. But the guide merely quotes the controlling regulation, which clearly provides that most illnesses and diseases do *not* constitute "traumatic injuries" and that only those illnesses and diseases that are c*aused by* a "pyogenic infection, biological, chemical, or radiological weapons, or accidental ingestion of a contaminated substance"[33] may constitute "traumatic injuries." There is no evidence that the inclusion of the term "pyogenic infection" in the regulations was intended to mean anything except pyogenic infections.

9. There is no evidence that the applicant suffered a "traumatic injury" as defined at 38 C.F.R. § 9.20(c) and required by 38 U.S.C. § 1980A, and those laws provide that most illnesses and diseases—no matter how debilitating—cannot cause "qualifying losses" entitling a member to TSGLI benefits. Therefore, the applicant has not proven by a preponderance of the evidence that the Coast Guard's denial of TSGLI benefits constitutes an error, injustice, or abuse of discretion. And as noted above, there is no basis for giving the applicant the benefit of the doubt in this matter, pursuant to 38 U.S.C. § 5107, because there is no "approximate balance of positive and negative evidence" regarding whether his WNV constituted a "traumatic injury" under the law. Finally, because the applicant has not shown that he suffered a "traumatic injury," the Board need not consider whether he met the other legal requirements for TSGLI benefits.

10. Accordingly, the applicant's request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

[33] 38 C.F.R. § 9.20(c)(2)(ii).

ORDER

The application of MST1 [redacted], USCG (Retired), for correction of his military record is denied.

May 31, 2019

[redacted]