

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-158



FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on June 12, 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 April 5, 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 Seaman who was medically retired from active duty in the Coast Guard on November 29, 2015, 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 He stated that his claim should have been approved based on "objective evidence."

The applicant explained that he had submitted an application for TSGLI compensation, followed by two appeals, regarding "traumatic injury sustained to [his] left ankle." He stated that the injury occurred while he was on active duty in June 2013 when a bathroom partition dropped on the back of his left ankle. The applicant saw his primary physician, who referred him to an orthopedic specialist. The applicant underwent surgery on his ankle on August 4, 2014. Under normal circumstances, he would have been able to use crutches following this surgery. However, he had received surgery on his left shoulder on April 22, 2014, and he was scheduled to receive surgery on his right shoulder in December 2014. Because both of his shoulders were injured, he was unable to use crutches to keep his weight off of his left ankle following his ankle surgery.

¹ To be granted TSGLI, a member must suffer a qualifying traumatic injury or prove that he is unable to perform at least two of six activities of daily living (ADLs), which are eating, bathing, dressing, toileting, transferring, and continence. Title 38 C.F.R. § 9.20(e)(6)(iv).

The applicant stated that his TSGLI claim was first denied on June 25, 2015, because several of his medical notes documented his use of crutches. In addition, he had been issued a knee walker due to the difficulty he had using crutches. The applicant had his doctor provide an addendum to the notes, however, which the applicant argued should have “sufficed for the approval of the claim” because it clarified that the applicant had been instructed not to use crutches. He asserted that his doctor would not have risked his reputation by lying on this addendum. He stated that the knee walker was also not sufficient for helping him get to his apartment, which was on the second floor. He stated that he also had difficulty in storing the knee walker in his vehicle, and he was not able to drive due to the medications he had been prescribed. The applicant asserted that the knee walker did not assist him in bathing either, for which he required hands-on assistance to get in and out of the bathtub. The applicant asserted that he understood that the knee walker “is considered accommodating equipment” but it did not help him in bathing, maneuvering up and down stairs, or driving him to and from doctor appointments. He added that during this time, his right ankle could not always support his weight “and in fact require[d] surgery based on the determination of [his doctor].”² He asserted that his TSGLI claim was “adequately justified and supported with concrete documentation from medical professionals” and therefore requested that the Board correct his record to show that his TSGLI claim was granted.

In support of his application, the applicant provided several documents which are described below in the Summary of the Record. He also provided several pictures of a bathtub. It looks to be slightly larger than a standard builder’s grade bathtub. The applicant provided several pictures of a staircase, presumably the stairs leading to his apartment. There are fifteen carpeted stairs, a small landing with wood or laminate, and a ninety degree turn to three more carpeted stairs.

SUMMARY OF THE RECORD

The applicant enlisted in the regular Coast Guard on February 8, 2011. On June 4, 2013, the applicant was seen by a Coast Guard physician. He complained of left ankle pain after a “wall divider [fell] on foot.” The applicant had reported that it had happened “about a month ago” and there was “some popping and crushing sounds” but he had continued to work. When he walked there was still a “crushing popping sound and the pain [was] about a 7/10 most of the time.”

On August 4, 2014, the applicant underwent surgery on his left ankle.

On August 15, 2014, the applicant was seen by his orthopedic specialist. The notes state that the applicant reported problems in his shoulders and that he was “having problems walking with the crutches.”

On August 27, 2014, the applicant was again seen by his orthopedic specialist. The notes state that he was in the office “on crutches from the R ankle surgery.”³ (The applicant made a note on a copy of this document to please “refer to addendum correcting the incorrect documentation.”)

² The applicant’s injury that is relevant to the claim at issue here was to his left ankle. He also had issues with his right ankle feeling “weak” and needing a brace. His orthopedic doctor eventually determined that his right ankle needed surgery as well, but he did not receive surgery on his right ankle until after the events at issue here.

³ The office notes state “R ankle surgery” and the addendum does not address this. While the applicant does later have complaints about his right ankle, there is no other evidence that he had had surgery on his right ankle by this time and so the “R” appears to be an error.

The medical notes also state that “overall both shoulders are quite sore due to having use[d] crutches due to non weight bearing status on ankle.” The notes state that the applicant had been completely unable to use his left arm from April 22, 2014, through June 22, 2014, due to surgery on the left shoulder. After that time, the applicant began physical therapy for his left shoulder. The notes also state that once the applicant was “off the crutches we can see him back for an injection in the left shoulder and finish up the rehab for that one and then fix the right.”

On September 8, 2014, the applicant was seen by his Coast Guard physician. The notes state that he had received orthopedic surgery to his left ankle on August 4, 2014, and as a result he had a convalescent leave request for twelve weeks. The notes states that the leave request was complicated “as member unable to use crutches as he is just recently finished orthopedic surgery for his left shoulder. And has additional right shoulder planned in December.” The applicant also felt that his right ankle was “becoming weak” and he requested a brace for it.

On September 26, 2014, the applicant was seen by his orthopedic specialist. The notes state “[a]pparently, he has had some issues with his right ankle and it giving way recently. He has had to wear an ASO brace to help it from giving way.” The applicant was instructed to begin physical therapy. The notes also state that he had “required assistance in his activities of daily living, due to the fact that he has been unable to bear weight to protect the lateral ligament reconstruction.”

On March 13, 2015, the applicant submitted an application for his TSGLI claim. He stated that a bathroom partition had been dropped on the back of his left ankle and that it was reported to his primary physician on June 4, 2013. The applicant himself described the assistance he needed in Part B of his application, which is supposed to be completed by a “medical professional who is a licensed practitioner of the healing arts acting within the scope of his/her practice.” However, the final page of Part B is signed by a doctor. The applicant claimed that he needed all of the following assistance from August 4, 2014, through October 6, 2014:

- Bathing: The applicant stated that he was unable to bathe independently because he “needed wife to lower me in the bath as well as pick me out of the tub. Wife also had to assist in drying me off.”
- Dressing: He stated that he was unable to dress himself independently because his wife “assisted [him] in putting on pants/shorts.”
- Toileting: The applicant stated that he was unable to use the toilet independently because his wife “assisted lowering on toilet as well as helping me get off the toilet. As I progressed, stand-by assistance was needed in case of any trouble.”
- Transferring: He stated that he was unable to transfer independently because his wife provided standby assistance whenever he was transferring.

On June 25, 2015, a Lieutenant Commander (LCDR) at the Coast Guard Personnel Service Center (PSC), Personnel Services Division, Field Support office made a determination on the applicant’s TSGLI claim application. The LCDR determined that the applicant’s claim was not approved because his medical records did not contain an adequate amount of information to support that he could not perform activities of daily living (ADL) independently. The decision

stated that the documentation the applicant submitted “did not take into account the TSGLI definition of need, which means the person cannot do for him/herself, or is unable to use assistive devices to compensate for the lost use of, in this case, the left leg.” In order to be successful on a claim for TSGLI, a member must demonstrate his inability to independently perform “at least two of the six ADLs (eating, bathing, dressing, toileting, transferring, and continence).” The LCDR found that the applicant’s inability to bear weight was offset by the use of crutches, and therefore denied his claim. He was informed of his right to appeal.

On August 25, 2015, the applicant’s orthopedic surgeon provided an addendum to the office notes from August 27, 2014. The addendum states that during that visit, the doctor had discussed his recommendation “to not use crutches.” The doctor stated that the applicant was in quite a bit of difficulty “since he needed crutches for the ankle and the 2 damaged shoulders pretty much prohibit[ed] the use of crutches.”

On September 14, 2015, a Commander (CDR) from PSC, Personnel Services Division, Field Support office made a determination on the applicant’s appeal of his TSGLI claim and noted that to qualify for benefits based on an inability to perform ADLs, “a claimant must have been unable to independently perform at least two ADLs for at least 30 consecutive days. The claimant is considered *unable* to perform an activity independently only if he or she requires at least one of the following, without which they would be *incapable* of performing the task: a. Physical assistance (hands-on) or, b. Stand-by assistance (within arm’s reach) or c. Verbal assistance (must be instructed).” The CDR denied the applicant’s claim because his “loss did not meet the TSGLI criteria.” The decision noted that the previous decision had found that the applicant’s inability to bear weight on his left ankle was offset by his use of crutches. In his appeal, the applicant asserted that he had been advised by his orthopedic surgeon not to use crutches. However, the Coast Guard found that two separate medical providers had documented his use of crutches during his three-week follow-up visit on August 27, 2014. The CDR also noted that the addendum provided had been created at the request of the applicant. The applicant was informed of his right to appeal.

The applicant was medically retired from the Coast Guard on November 29, 2015. He had a total of four years, nine months, and twenty-two days of service.

On September 13, 2016, the applicant had an attorney write a brief to support his second appeal of his TSGLI claim. The attorney argued that the applicant had “gone well beyond what is necessary for his claim to be approved.” The brief reiterated the arguments the applicant had made in his TSGLI application. The brief included an affidavit from the applicant’s wife. She stated that she was employed as a physical therapist. She stated that as a result of the applicant’s left ankle surgery and his previous left shoulder surgery, he had been instructed not to use crutches while he was recovering. As a result, she “had to assist [the applicant] with his Activities of Daily Living, which included helping [him] bathe, dress, use the toilet, and transfer.” She stated that in assisting the applicant she had provided physical assistance, as well as stand-by assistance from August 4, 2014, through October 6, 2014.

On October 12, 2016, the applicant received a decision on his TSGLI appeal from a review panel. The applicant’s claim was denied because “his loss did not meet the TSGLI criteria.” The review panel found that the applicant was able to perform daily activities by using accommodating

equipment or adaptive behavior, and so he was considered to have been able to independently perform these activities. The review panel stated that while statements, such as the applicant's wife's statement, are considered, "medical documentation is required to support the losses claimed." The applicant was informed that if he wished to appeal this decision he could apply to the BCMR.

VIEWS OF THE COAST GUARD

On December 3, 2018, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case. The JAG argued that the applicant had failed to carry his "burden of production and burden of persuasion in proving, by a preponderance of the evidence that he was unable to independently perform at least two ADLs." The JAG stated that the applicant misunderstood, at least in part, the basis of the TSGLI denial when he focused on the reputation and professionalism of his orthopedic surgeon. The JAG clarified that it was not the intention of the Coast Guard to challenge the accuracy of the doctor's notes or his addendum stating that the applicant was instructed to refrain from the use of crutches. However, the JAG argued that the single note "is not sufficient to meet the applicant's burden of proof."

The JAG asserted that this is particularly true given that multiple medical documents make note of the applicant's use of crutches, despite the apparent instruction against their use. "While the applicant may have experienced discomfort in the usage of crutches, his medical records make clear that he used them enabling him to perform the ADLs." Further, the JAG noted that the applicant admitted in his BCMR application that he was provided with an alternative to crutches – a knee walker. This additional mobility aid did not affect or exacerbate his existing shoulder conditions and the JAG argued that this further justifies the denial of his TSGLI claim. The JAG asserted that the applicant's arguments that the knee walker was not viable for using the stairs and that he could not store it in his vehicle were "unsupported by evidence." The JAG stated that the applicant provided no evidence other than his own self-serving declaration that the knee walker was an insufficient mobility aid. Moreover, the JAG explained, under TSGLI, ADL loss must be certified by a healthcare provider, as well as being substantiated by proper documentation, which the applicant failed to do. The JAG therefore recommended that the Board deny relief.

With her recommendation, the JAG adopted the findings and analysis provided in a memorandum prepared by PSC. PSC stated that the application is timely and the Board should therefore consider the application on its merits. PSC stated that it concurred with the original decisions regarding the applicant's TSGLI claims. PSC argued that the applicant was issued accommodating equipment, including crutches and a knee walker, which enabled him to independently perform ADLs. PSC recommended that the Board deny relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 21, 2018, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. The applicant responded on January 11, 2019, and stated that he disagreed with the Coast Guard's advisory opinion. He stated that the purpose of the TSGLI coverage is to provide assistance to members who experience hardships and to provide them with a sense of security. He acknowledged that the purpose of the Coast Guard's advisory opinion is

to “prevent those who do not qualify for TSGLI compensation from receiving the benefit,” but he asserted that the advisory opinion ignored the “instructions, notes, and expertise of two orthopedic surgeons and a military physician.” The applicant stated that the pictures he submitted were added in an effort to provide a better understanding of the difficulty of completing ADLs.

The applicant argued that after reviewing his medical records, a reasonable person is “bound to conclude that assistance was required” for ADLs. He stated that he could not bear weight on his left ankle or on either shoulder, therefore he had trouble “descending/ascending the stairs, lowering and raising out of the tub, in using the restroom, etc. Driving was out of the question based on the inability to navigate the stairs that led out to the vehicle, lift and load the knee walker into the vehicle, and drive to appointments while on opioids.” The applicant asserted that every request for further documentation required for justification for his claim was “provided promptly.” He stated that he was told that the documents that were requested “would lead to approval of [his] TSGLI claim.”

The applicant stated that he disagreed with the Coast Guard’s advisory opinion. He stated that for three months he could not bear weight on his left ankle or either shoulder and it was “trying” on his family. He alleged that three medical professionals had acknowledged the need for assistance with ADLs. He requested that the Board grant his request based on the “concrete evidence” he provided.

APPLICABLE REGULATIONS

Title 38 C.F.R. § 9.20(e)(6)(iv) states that “the term inability to carry out activities of daily living means the inability to independently perform at least two of the six following functions:” bathing, continence, dressing, eating, toileting, and transferring in or out of a bed or chair with or without equipment.

The TSGLI Procedural Guide, Part I, states the following regarding General Information:

The Servicemembers’ Group Life Insurance Traumatic Injury Protection (TSGLI) program is an automatic provision under Servicemembers Group Life Insurance (SGLI). TSGLI provides for payment to Servicemembers who are severely injured (on or off duty) as the result of a traumatic event and suffer a loss that qualifies for payment under TSGLI. TSGLI is designed to help traumatically injured Servicemembers and their families with financial burdens associated with recovery from a severe injury.

Part I, Qualifying to TSGLI Payment, states the following:

In order to qualify for TSGLI payment, a member must meet all of the following 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, as measured by Zulu (Greenwich Meridian) time and ends 168 full hours later.

- 5) If injured on or after or after December 1, 2005, the member must be insured by SGLI at the time of the traumatic event. If injured from October 7, 2001 through November 30, 2005, the member does not need to be insured by SGLI to qualify for a TSGLI payment.

Appendix B defines Activities of Daily Living (ADLs) as “routine self-care activities that a person normally performs every day without needing assistance. The six basic ADL are eating, bathing, dressing, toileting, transferring [moving in and out of a bed or chair], and continence.”

The TSGLI application form, SGLV 8600, explains that to qualify for TSGLI benefits based on inability to perform ADLs, the patient must “require” assistance to be able to perform two ADLs “for at least 15 days for traumatic brain injury and at least 30 days for any other traumatic injury.” A medical professional and licensed practitioner acting within the scope of his or her practice must complete Part B of the form, including the descriptions of assistance needed, to certify that the patient is physically unable to do two or more of the following:

- Bathing: “He/she **requires** assistance from another person to bathe (including sponge bath) more than one part of the body or get in or out of the tub or shower.”
- Continence: “He/she is partially or totally unable to control bowel and bladder function or **requires** assistance from another person to manage catheter or colostomy bag.”
- Dressing: “He/she **requires** assistance from another person to get and put on clothing, socks or shoes.”
- Eating: “He/she **requires** assistance from another person to: get food from plate to mouth, OR take liquid nourishment from a straw or cup, OR he/she is fed intravenously or by a feeding tube.”
- Toilet: “He/she must use a bedpan or urinal to toilet, OR he/she **requires** assistance from another person with any of the following: going to and from the toilet, getting on and off the toilet, cleaning self after toileting, getting clothing off and on.”
- Transfer: “He/she **requires** assistance from another person to move into or out of a bed or chair.”

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.⁴

2. 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

⁴ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers’ and Sailors’ Civil Relief Act of 1940, the BCMR’s three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member’s active duty service).

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.⁵ 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.”⁶

3. The applicant argued that the Coast Guard erred in denying his TSGLI claim. He reasoned that because his orthopedic doctor had instructed him not to use crutches and prescribed a knee walker for him and because his wife had assisted him with several of the ADLs, he should be entitled to TSGLI benefits. The applicant’s medical records show that at the time he was convalescing from his left ankle surgery in August, September, and October 2014, he had previously had surgery on his left shoulder in April 2014, had been undergoing physical therapy for this shoulder, and was due to have surgery on his right shoulder the following December. His records also show that his right ankle, on which he was standing, sometimes felt weak. The Board does not doubt, based on the applicant’s medical record, that he was instructed to avoid using crutches while convalescing from his ankle surgery and to use a knee walker instead. The record shows, however, that he sometimes used crutches to get around. The Board notes that the applicant did not deny using crutches to get to doctors’ appointments, for example. And while he was unable to use the knee walker on stairs and when driving, being unable to use stairs or to drive without assistance does not factor into the ADLs or eligibility for TSGLI.

4. To qualify for TSGLI benefits, the applicant was required to prove that he was physically incapable of performing at least two of the ADLs without assistance for 30 consecutive days in accordance with 38 C.F.R. § 9.20(e)(6)(iv). In addition, a medical professional acting within the scope of his or her duties had to complete all of Part B of the TSGLI application form. Although a medical professional signed Part B of the applicant’s application, the applicant himself entered the claims and descriptions of the assistance his wife provided in Part B. It is clear that the applicant’s wife frequently helped him during the period in question, but the Board agrees with the JAG that his wife’s statement does not outweigh the findings of the PSC Personnel Services Division, Field Support office or the appeal review panel, which are presumptively correct.⁷ The Board cannot conclude, based on the record before it, that because of his sore shoulders and inability to put weight on his left foot/ankle, the applicant was physically incapable of performing two of the ADLs without assistance for 30 consecutive days. Therefore, the Board cannot conclude that the Coast Guard TSGLI office erred in denying the applicant’s TSGLI claim.

5. Accordingly, relief should be denied because the applicant has failed to prove by a preponderance of the evidence that PSC, Personnel Services Division, Field Support office, committed an error or injustice by denying his claim.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁵ 33 C.F.R. § 52.24(b).

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁷ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

ORDER

The application of former SN [REDACTED], USCG, for correction of his military record is denied.

April 5, 2019

