



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

[REDACTED]
Docket No: 6669-17
DEC 15 2017

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD ICO
[REDACTED] XXX-XX-[REDACTED] USMC RET

Ref: (a) Title 10 U.S.C. 1552

- Encl: (1) DD Form 149 w/attachments
(2) U.S. District Court for the District of [REDACTED] order of 25 June 2017
(3) Petitioner's affidavit of 12 Jan 2015
(4) Spouse's affidavit of 12 Jan 2015
(5) Independent Nurse Review statement of 13 Jan 2015
(6) TSGLI Appeals Board MFR of 2 Jun 2013 w/ medical officer notes
(7) TSGLI Appeals Board decision letter of 13 Sep 2017
(8) Director, Secretary of the Navy Council of Review Board ltr 1001 CORB: 001 of 14 Sep 2017
(9) Petitioner comments of 2 October 2017

1. Pursuant to the provisions of reference (a) Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected to award him Traumatic Servicemembers' Group Life Insurance (TSGLI) for his inability to perform at least two Activities of Daily Living (ADLs) for 30 days due to a traumatic injury other than Traumatic Brain Injury (TBI). His original application was denied by the Board on 28 July 2016 based on a finding that Petitioner did not qualify for TSGLI payment since they determined he could perform three of the four claimed ADLs since they did not require the use of his injured leg or could be accomplished with accommodating equipment. Petitioner filed suit in U.S. District Court and his case was remanded back to the Board to provide an opportunity to consider whether an error or injustice exists in light of a more fully developed record; in particular, whether Petitioner was eligible for TSGLI payment for inability to perform at least two ADLs for 15 or more days due to TBI.

2. The Board, consisting of [REDACTED], reviewed Petitioner's allegations of error and injustice on 16 November 2017 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies. In addition, the Board considered the 13 September 2017 decision of the TSGLI Appeals Board and the advisory opinion contained in Director, Secretary of the Navy Council of Review Boards ltr 1001 CORB: 001 of 14 September 2017; copies of both which were provided to Petitioner for comment. Petitioner provided comments in a letter dated 2 October 2017.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner was on active duty when he was involved in a motor vehicle accident on 24 January 2005. A Humvee Petitioner was riding in was struck by a tractor trailer during a night exercise. Petitioner was airlifted from the accident to a hospital where he was diagnosed with an intertrochanteric right femoral fracture, closed head injury, ophthalmic injury, vestibular cochlear injury, and right shoulder injury.

c. Between 25 January 2005 through 2 February 2005, Petitioner underwent five surgeries to address his various injuries. He was released from the hospital on 3 February 2005 in a wheelchair with instruction not to bear weight on his right lower extremity. He was not cleared for partial weight bearing until 11 March 2005. He commenced physical therapy in March 2005 but no records are available.

d. Petitioner filed his first TSGLI claim on 2 March 2006 requesting payment for inability to perform ADLs for 120 days. However, his claim was denied since his injuries did not occur in a combat zone.

e. On 3 October 2011, Petitioner files another TSGLI claim after the law was changed to cover his traumatic injury. He requested payment for 15 days of hospitalization and inability to perform ADLs for 30 days. This claim was denied on 11 October 2012 since Petitioner was not hospitalized for 15 days and his medical records did not support a finding that he was unable to perform the claimed ADLs. Petitioner appealed the decision.

f. On 2 June 2013, the TSGLI Appeals Board affirmed the decision to deny Petitioner's TSGLI claim. His case was denied because Petitioner's TBI treatment did not support inability to perform ADLs without required assistance and his medical record did not provide substantive evidence that proved loss of ADLs. However, the medical officer notes confirmed that Petitioner suffered TBI as a result of his accident and arrived to the hospital intubated.

e. Petitioner filed for reconsideration of the TSGLI Appeals Board decision with Director, Secretary of the Navy Council of Review Board. He submitted affidavits supporting his claim as well as a medical opinion that he required assistance to perform ADLs for 30 days after his surgery. However, Petitioner's request for reconsideration was denied due to lack of material new evidence for reconsideration. Petitioner subsequently filed an application with this Board and was denied as previously discussed. His case was remanded back to this Board by the U.S. District Court after he filed suit.

f. The TSGLI Appeals Board reconsidered Petitioner's case based on the remand from federal court and again denied his request for TSGLI payment. In their decision letter of 13 September 2017, they concluded that Petitioner did not qualify for TSGLI due to TBI since he did not "experience" TBI since his hospitalization and need for care were based solely on his leg injuries. Additionally, the TSGLI Board relied upon the fact that Petitioner did not request consideration of loss of ADLs due to TBI in his TSGLI claim. In reviewing his claim for loss of

ability to perform his other claimed ADLs, the TSGLI Appeals Board determined that there was no reason why Petitioner could not perform the claimed ADLs since he had use of both upper extremities. In their opinion, the level of assistance received by Petitioner would only be required in highly unusual situations resulting from medical complications. They go on to assess that there was no medical evidence to lead them to conclude that Petitioner's recovery was anything other than routine. Director, Secretary of the Navy Council of Review Boards provided an advisory opinion concurring with the 13 September 2017 TSGLI Appeals Board decision.

g. Petitioner provided rebuttal comments to the 13 September 2017 TSGLI Appeals Board decision and the concurring endorsement. In his response, he raised a number of arguments but relies upon the non-weight bearing status of Petitioner that required him to use a wheelchair during the claimed period.

CONCLUSION

Upon review and consideration of all the evidence of record, the Board finds the existence of an injustice warranting the following corrective action.

The Board concluded that the nature and seriousness of Petitioner's injuries to his right leg and hip prevented him from bathing and dressing without required assistance from 24 January 2005 through 11 March 2005; a period of more than 30 days but less than 60 days. While the Board agreed with the TSGLI Appeals Board that Petitioner had use of his upper extremities, the Board took into consideration that Petitioner suffered a fracture to his right hip in addition to his right femur. So while in most cases, Servicemembers could be expected to utilize uninjured extremities when one limb is injured, the Board felt the combined fractures to his hip and leg would immobilize a normal individual for the period claimed. So despite the lack of medical evidence that specifically mentions Petitioner was unable to perform the claimed ADLs, the nature of the injury combined with the affidavit provided his caregiver was sufficient evidence to find an injustice exists in this case.

Despite the finding that Petitioner was unable to bathe or dress himself without required assistance from 24 January 2005 through 11 March 2005, the Board determined there was insufficient evidence to support a finding that he was unable to do so due to his TBI. Contrary to the recent TSGLI Appeals Board finding that Petitioner did not experience TBI, the Board found medical evidence that Petitioner was diagnosed with TBI as a result of his traumatic accident. However, as pointed out in the TSGLI Appeals Board decision of 13 September 2017, affidavits from Petitioner and his spouse do not state he was unable to perform the ADLs due to TBI symptoms but, rather, focus on difficulties caused by his leg and hip injuries. Further, Petitioner did not claim TSGLI payments on his application as a result of TBI further supporting the Board's belief that Petitioner did not feel his TBI qualified for TSGLI payments. Finally, Petitioner's medical records indicate that he was primarily treated for his non-TBI related injuries and did not receive any limiting instructions pertaining to his TBI upon his discharge from the hospital. These factors combined to convince the Board insufficient evidence exists to find Petitioner was unable to perform two or more ADLs for more than 15 days due to TBI.

RECOMMENDATION:

That Petitioner's naval record be corrected, where appropriate, to show that:

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XXX-XX

USMC RET

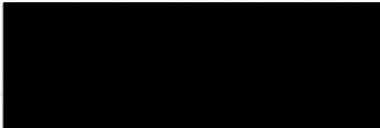
Petitioner was approved for a \$25,000 TSGLI payment for a traumatic injury other than TBI for his inability to bathe and dress from 24 January 2005 through 11 March 2005.

A copy of this Report of Proceedings will be filed in Petitioner's naval record.

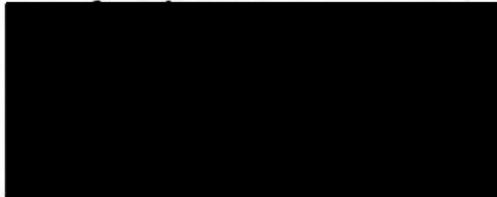
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.


Recorder

5. The foregoing action of the Board is submitted for your review and action.


Executive Director

Reviewed and Approved ~~/Disapproved~~


3 Jan 2018