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**United States Court of Appeals
for the Fifth Circuit**

No. 21-40661

DAWN MOORE,

Plaintiff—Appellant,

versus

UNITED STATES OF AMERICA,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:18-CV-102

(Filed Jan. 10, 2022)

Before SMITH, HIGGINSON, and WILLETT, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that Appellee's opposed motion for summary affirmance is GRANTED. IT IS FURTHER ORDERED that Appellee's alternative motion for an extension of thirty (30) days to file its brief is DEEMED MOOT.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

DAWN M. MOORE,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO.
	§	5:18-CV-00102-RWS
v.	§	
	§	
UNITED STATES OF	§	
AMERICA,	§	
	§	
Defendant.	§	

ORDER

(Filed Jul. 21, 2021)

Before the Court is Plaintiff Dawn M. Moore's ("Plaintiff" or "Moore") Motion for Summary Judgment (Docket No. 16) and Defendant United States's Cross-Motion for Summary Judgment and Response in Opposition to Plaintiff's Motion for Summary Judgment (Docket No. 19). Moore filed an amended response to the United States's motion (Docket No. 21), and the United States filed a reply (Docket No. 22). After review and consideration of the motions and the parties' arguments, the United States's motion is **GRANTED** and Moore's motion is **DENIED**.

BACKGROUND

I. Moore's Army Service

Moore served in the U.S. Army as a tracked vehicle mechanic from March 1996 until July 2007.

Administrative Record ("AR") at 396–398, 489.¹ Moore was a Staff Sergeant (E-6) at the time of her separation. *Id.* at 396–398. In February 2016, Moore filed two separate applications for Servicemembers' Group Life Insurance Traumatic Injury Protection ("TSGLI") benefits for injuries she incurred in May 2003 and October 2004. *Id.* at 188–200, 248–260.

II. Moore's First TSGLI Application

Moore's first application was for a right knee injury she incurred on May 21, 2003, while attending the Army's Basic Non-Commissioned Officer Course ("BNCOC"). *Id.* at 189. According to Moore, while playing Frisbee football during physical training, she jumped in the air for the Frisbee and, upon landing, "felt a sharp pain shooting in [her] knee." *Id.* Moore went to the local medical clinic but they "could not tell what the damage was." *Id.* Moore was placed on crutches and released. *Id.* Because Moore still had a field exercise to complete, the Commandant of the course wanted to send her home early. *Id.* Yet after "pleading [her] case," Moore was allowed to attend the field exercise on crutches and eventually graduated from the course. *Id.*; see also *id.* at 441 (Moore's BNCOC evaluation report noting that the course lasted until June 17, 2003, and that Moore "achieved course standards").

¹ Citations to the Administrative Record (Docket Nos. 15, 15-1, 15-2) use the Bates numbers on the bottom right-hand corner of each page (000001–000513).

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According to Moore, her sister flew to meet her in Aberdeen, Maryland, and drove her back to her permanent duty station at Fort Hood, Texas. *Id.* at 189. Once back at Fort Hood, Moore went to the orthopedic clinic at the Army Community Hospital for reevaluation, where “[i]t was determined that [Moore] had torn [her] meniscus.” *Id.* Moore was sent for physical therapy for eight weeks before having surgery. *Id.* Following her surgery, she was “placed on 30 days [of] convalescent leave,” during which time her father came from South Carolina to “take care of [her] and [her] children.” *Id.* Moore claims that her father “did everything that needed to be done around the house,” including “cook[ing], clean[ing], runn[ing] [her] bath, tak[ing] [her] to appointments, [and] shop[ping].” *Id.* Moore claims that her daughter would help her with dressing “when needed.” *Id.* When Moore returned to work, she was placed on physical training restrictions for an additional four weeks, along with physical therapy twice a week, as she “eased [her] way back into walking without a crutch,” moving from “fast pace[d] walking, into slow[ly] jog[ging], then running at [her] own pace.” *Id.*

In her first application, dated February 10, 2016, Moore alleged the inability to bathe and dress independently from May 21, 2003, to September 24, 2003 (over 120 days). *Id.* at 198. In support of her application, Moore submitted portions of her medical records. *Id.* at 201–217. Her application was signed by a medical professional on February 29, 2016, attesting that he reviewed Moore’s medical records but did not observe her purported loss. *Id.* at 200.

III. Moore's Second TSGLI Application

Moore's second TSGLI application, also submitted on February 10, 2016, was for another right knee injury she incurred the following year on October 7, 2004, while playing basketball at a military base in Iraq. *Id.* at 249. According to Moore, she went up for a rebound and when she landed, she heard a "pop" and felt a "shooting pain from [her] knee up her thigh." *Id.* Moore claims that her knee was "swollen immediately," and that she was taken to receive medical care but was told that "[her] knee was too swollen and [she] was in too much pain to [be] fully examine[d]." *Id.* Moore was given crutches to move around "until the s[w]elling went down enough to [be] examine[d]." *Id.* After roughly a week, Moore went back for a follow-up examination, at which point she was told that her "ACL was torn." *Id.*

According to Moore, she was medically evacuated to Germany on October 13, 2004, then back to her duty station at Fort Hood, Texas. *Id.* She went to the orthopedic clinic where "it was confirmed that [she] had no ACL visible." *Id.* Moore had to "wait for the remaining swelling to go down and do physical therapy before [receiving] surgery." *Id.* On December 20, 2004, a "graft was taken from [Moore's] left knee to repair the ACL in [her] right knee." *Id.* Following the procedure, Moore was "placed on [thirty] days [of] convalescent leave with crutches," during which time her father came from South Carolina to help "t[ak]e care of [her] and [her] children." *Id.* Moore claims that her father "did everything that needed to be done around the house,"

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including “cooking, cleaning, taking [her] to appointments, [and] fixing [her] bath water.” *Id.* As well, Moore claims that her daughter would “help dress[] her.” *Id.* Moore was given an additional two weeks of leave due to swelling and she “continued physical therapy for months.” *Id.* Once Moore returned to work, she “was never able to run again [and] even fast pace[d] walking hurt.” *Id.*

In this second application, Moore alleged the inability to bathe, dress, toilet and transfer independently from October 7, 2004, to February 13, 2005 (over 120 days). *Id.* at 258–259. In support of her application, Moore submitted portions of her medical records. *Id.* at 276–302. Her application was signed by a medical professional, attesting that he reviewed Moore’s medical records but did not observe her purported loss. *Id.* at 260.

IV. The U.S. Army TSGLI Office Denies Moore’s Applications for Benefits

On March 14, 2016, the U.S. Army TSGLI Office informed Moore that she was ineligible for TSGLI benefits because her claimed loss was not a direct result of a qualifying traumatic event. *Id.* at 261–262. On April 8, 2016, Moore submitted a revised application with additional medical documentation, *id.* at 220–241, which was denied on July 7, 2016. *Id.* at 245–247. In the decision letter, the Chief of the TSGLI Special Compensation Branch explained to Moore that “[t]he supporting documents submitted with [her] claim

indicate[d] that [her] losses were a result of multiple nontraumatic knee injuries, which does not meet the definition of traumatic event resulting in a traumatic injury under the TSGLI Program.” *Id.* at 322. Explaining further, the Chief cited documentation provided with Moore’s claim that “indicate[d] [Moore] [was] being seen for right knee pain and intermittent swelling for the last [seven] years, that [her] symptoms started when [she] twisted her knee in basic training, and that [her] symptoms were made worse with running and jumping.” *Id.* Accordingly, “[t]here was no evidence that [Moore’s] claimed losses were the result of a single qualifying traumatic event.” *Id.*

V. Moore’s Reconsideration Request

On February 15, 2017, Moore requested reconsideration of her denied applications for benefits and offered four letters from various family members to demonstrate her need for assistance with “activities of daily living” (“ADLs”). *Id.* at 325–329. All four letters have the same date and contain the following identical language regarding Moore’s purported limitations:

[Moore] needed hands on assistance getting in and out the tub, drying off, and putting on lotion, hands on assistance getting dress (standing/sitting putting on and taking off clothes, socks, and shoes), assistance sitting down and standing up from the toilet, and she could not drive so she needed to be taken everywhere she was on crutches for months.

See id. at 326–329. All four letters state that these purported limitations existed “during [Moore’s] meniscal (May 21, 2003) and ACL (October 7, 2004) injuries and surgeries” but provide no further details regarding specific dates. *Id.* All four letters state that Moore’s father was one of her “caregivers” following her two injuries, but that he passed away from cancer and was therefore unavailable to provide a statement. *Id.*

On August 16, 2017, Moore’s reconsideration request was denied. *Id.* at 369–371. In the decision letter, the Chief of the TSGLI Special Compensation Branch explained to Moore that “[t]he supporting documents submitted with [her] claim indicate[d] that [her] losses were a result of twisting [her] knee, which does not meet the definition of traumatic event resulting in a traumatic injury under the TSGLI Program.” *Id.* at 369. The Chief cited documentation provided with Moore’s claim that “state[d] [Moore] sustained a ‘[n]on-contact twisting valgus injury.’” *Id.* Because “[t]here was no evidence that there was an external force or violence[,] [Moore] did not meet involuntarily with an object or entity, and [her] injury was not caused by a physical impact upon [her],” Moore’s “claimed losses were [not] the result of a qualifying traumatic event.” *Id.*

VI. Moore’s Suit in This Court

On August 15, 2018, Moore filed suit in this Court challenging the denial of her TSGLI claims. *See* Docket No. 1. Although the suit was timely filed and no further

administrative exhaustion was necessary, the parties jointly agreed to stay this suit so that Moore could pursue further administrative remedies with the Army Board for Correction of Military Records ("ABCMR" or the "Board"). *See* Docket No. 6. The Court granted the stay. Docket No. 7. Following issuance of the stay, Moore filed an application with the ABCMR. AR at 108–165.

VII. The ABCMR's Opinion

After considering Moore's application and all underlying documents contained in the administrative record, the ABCMR unanimously voted to deny Moore's request for relief and issued an opinion detailing the same. *Id.* at 3–14. The ABCMR focused exclusively on Moore's failure to demonstrate the inability to perform at least two ADLs for at least thirty consecutive days, as required. *Id.* at 8–9. Prior to issuing its decision, however, the Board sought and received two advisory opinions from subject matter experts.

The first opinion was from the Chief of the Special Compensation Branch. *Id.* at 97–107. In formulating its opinion, the Special Compensation Branch reviewed the history of Moore's TSGLI claims. *Id.* at 98. It then reviewed and interpreted all relevant medical documents related to her claims. *See id.* at 100–101, 104–105. Finally, it summarized the significant events surrounding the claims, *see id.* at 99, 103, and provided an opinion tied to the evidence. *Id.* at 101, 105–106.

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As it relates to Moore's first claim, the Special Compensation Branch found that "the medical record does not support the 30 consecutive day milestone of basic ADL loss." *Id.* at 101. It found "little definitive objective data presented supporting or refuting the claimed loss." *Id.* It specifically considered the statements by Moore's family members and found that they conveyed "no definitive ADL assistance." *Id.* Likewise, it found that "all things her father helped with would be Instrumental Activities of Daily Living (IADLs) . . . things like cooking, cleaning, running errands or running kids to school, and other things like banking." *Id.* at 101-102. It also considered Moore's claim regarding her daughter's assistance, and explained:

[Moore] stated that her daughter would help her dress when needed. This would [have] only been one ADL and does not appear it was a continuous[] need. However, ADL assistance is not the standard for TSGLI payment. The standard is that the ADL assistance must have been rendered because without such assistance the Soldier could not have performed ADLs in even a modified independent manner. According to her statements there w[as] no consistent ADL assistance rendered besides the IADL's which are not part of TSGLI standard for payment.

Id. at 102.

The Special Compensation Branch found it "important to note that [Moore] was able to complete the BNCOC training on crutches." *Id.* "This included

toileting and transferring herself while at BNCOC.” *Id.* It noted that “[t]hese same ADL’s could be easily performed with crutches even after [Moore’s] surgery.” *Id.* It highlighted a specific entry in Moore’s medical records from shortly after her surgery in August 2003 wherein Moore “state[d] she [had] some pain after running after her child to rescue them from a dog.” *Id.* It noted that “[Moore] had fully functioning arms, back, neck, both hips, and right leg,” citing to the medical record that “consistently shows functional active [range of motion] in the right knee during the claimed ADL loss period.” *Id.* The Special Compensation Branch concluded by stating:

Generally, non-weight bearing restrictions in a single limb are not sufficient to cause that level of impairment. It is also noted that activity descriptions in the personal statements by the [Plaintiff] are most consistent with modified independence. Numerous [physical therapy] notes document active range of motion. No other medical documentation was submitted to prove otherwise. There is no evidence of a period of 120 days or greater of continuous ADL impairment.

Id.

With respect to Moore’s second claim, the Special Compensation Branch reached similar findings. In summary, it stated:

This is not a new event for [Moore] as she had suffered a very similar injury during a Frisbee football game. She has had several issues with

the right ACL tear in the past but was always [been] mobile on crutches. She attended physical therapy (PT) which frequently reported pain 1-3 [out of] 10. On her PT notes it was documented she was doing ball squats, lateral step ups, isolated squats[,] which [] are all indicative of active range of motion and use of the leg.

Id. at 103.

Accordingly, the Special Compensation Branch found that "the medical record does not support the 30, 60, 90, or 120 consecutive day milestone of basic ADL loss." *Id.* at 105. It noted that "[i]f you look at each medical documentation sent in by the [Plaintiff], no one states there is ADL loss or that she had any trouble with ADLs." *Id.* Specifically, "[Moore] ha[d] active range of motion at every visit, strength in her quadriceps [was] 5/5 at every visit that it was documented[,] and she stated in several notes that she was doing well." *Id.* at 105-106. Further, "[Moore] attend[ed] PT for weeks before and after surgery and she was succeeding, increasing repetitions and the range of motion she had." *Id.* at 106. The Special Compensation Branch found that "[a]ccording to [Moore's] statements there w[as] no consistent ADL assistance rendered besides the IADL's which are not part of TSGLI standard for payment." *Id.*

The second advisory opinion was from Army Review Board Agency ("ARBA") Medical Advisor, Colonel (Col.) Shawn Holmes. *Id.* at 85-88. Col. Holmes reviewed Moore's TSGLI applications, underlying

medical documents available to him and the Special Compensation Branch's advisory opinion. *Id.* at 85–86. Ultimately, Col. Holmes came to the same conclusion regarding Moore's purported ADL limitations. *Id.* at 87–88. He found that “[b]oth injuries were treated surgically, and there is no documentation to indicate any significant post-operative complications that would have rendered [Moore] unable to perform [ADLs] for more than a continuous 30, 60, 90, or 120 day period of time.” *Id.* at 87.

Col. Holmes noted that Moore was allowed to remain in BNCOC training and complete the course following her first injury. *Id.* This, according to Col. Holmes, “demonstrates that she did not suffer a qualifying loss as defined by the TSGLI Procedural Guide at the time of her initial reported date of injury.” *Id.* And “[a]lthough [Moore] states she received assistance from other classmates of hers attending the BNCOC training, there are no statements submitted from these individuals detailing the type or degree of assistance provided or the duration of the alleged assistance.” *Id.* Similarly, other than Moore's statements and medical documents from her flight out of Iraq, “there is no other medical documentation to support [Moore's] statements that she was unable to independently perform ADL's . . . following the second injury or second surgery.” *Id.* at 87–88.

After receiving both advisory opinions, the ABCMR reviewed all documents in the administrative record and unanimously voted to deny Moore's request for relief. *Id.* at 3–14. The Board focused exclusively on

Moore's failure to demonstrate the inability to perform at least two ADLs for at least thirty consecutive days, as required. *Id.* at 8–9. Focusing first on Moore's injury during BNCOC, the Board found that despite Moore's claim that "other Soldiers in her BNCOC class helped her to deal with her infirmity," the "TSGLI standards require an inability to perform at least two [ADLs] for at least 30 consecutive days." *Id.* at 10. The Board "f[ou]nd it difficult to imagine that the BNCOC leadership and BNCOC commandant would permit a Soldier to continue with the course if that Soldier were so severely debilitated that she needed the constant ministrations of her follow [Non-Commissioned Officer] NCO students." *Id.*

Further, as it relates to her surgery, "[a]lthough [Moore] claims she needed family members' help to perform ADLs, the Board note[d] that the knee surgery was fairly routine, that [Moore] was otherwise a healthy young woman at the time, and that she had a healthy leg and two healthy arms and hands to assist in her activities." *Id.* at 10–11. The Board "therefore f[ou]nd it implausible that [Moore] was incapable of performing two ADLs for any period of 30 consecutive days in 2003." *Id.* at 11.

Turning to Moore's second injury, the Board found that Moore "underwent successful surgery to repair [her] ACL," and that "[a]lthough th[e] surgery and its resulting physical rehabilitation were no doubt unpleasant, a surgery to repair a knee ligament d[id] not strike th[e] Board as the kind of injury that would debilitate a healthy young woman for at least 30

consecutive days.” *Id.* And while Moore’s TSGLI application contained “certification” statements offered by medical professionals, the Board found that they “state[d] little more than ‘to the best of my knowledge, the provided information appears to be true.’” *Id.* Further, “the certification statements were rendered more than a decade after the injuries.” *Id.*

Ultimately, the Board “d[id] not see how a neutral factfinder could find that [Moore], based on her two knee injuries, lost one or more ADLs for any 30 consecutive day time period.” *Id.* As a result, it found that Moore “failed to demonstrate by a preponderance of evidence that she incurred a loss of at least two ADLs for any period of 30 consecutive days.” *Id.*

APPLICABLE LAW

I. Servicemembers’ Group Life Insurance Traumatic Injury Protection Program

In 2005, Congress amended the preexisting Servicemembers’ Group Life Insurance Act in 2005 to add the Traumatic Injury Protection program. The TSGLI provides lump sum payments of \$25,000 to \$100,000 to members who meet the Department of Defense’s criteria. 38 U.S.C. § 1980A(d)(1). Pursuant to 38 U.S.C. § 1980A(a) and (b), a service member is entitled to TSGLI benefits if she sustained a “traumatic injury” after December 2005 and the injury caused a “qualifying loss.” *Austin v. United States*, No. SA-14-CA-277, 2014 WL 12637958, at *2 (W.D. Tex. July 7, 2014); see also *Fail v. United States*, No. 12-CV-01761-MSK-CBS,

2013 WL 5418169, at *2 (D. Colo. Sept. 27, 2013). “As relevant here, a qualifying loss is one that renders a service member unable to independently perform two of the following six ‘activities of daily living,’ or ‘ADLs’: bathing, continence, dressing, eating, toileting, and transferring.” *Austin*, 2014 WL 12637958, at *2 (citing 38 U.S.C. § 1980A(b)(2)(D)(i)(vi)). A service member can perform these functions “independently” when she does not require human assistance. *Turpin v. United States*, No. 5:18-CV-00180-OLG-RBF, 2019 WL 4060892, at *2 (W.D. Tex. Feb. 19, 2019) (citing *White v. United States of America*, No. CV 17-193 (RMC), 2018 WL 5251740, at *1–2 (D.D.C. Oct. 22, 2018)). “If [a claimant] is able to perform the activity by using accommodating equipment (such as a cane, walker, commode etc.) or adaptive behavior, the [claimant] is considered able to independently perform the activity.” *Id.* If a claimant can meet this standard, the program pays \$25,000 for each period of 30 days that the claimant is disabled, up to a maximum of \$100,000 for 120 days. 38 C.F.R. § 9.20(f)(20).

II. Standard of Review

This suit is brought under 38 U.S.C. § 1975, which confers jurisdiction on the federal district courts to adjudicate claims founded on the TSGLI program. Docket No. 1. Here, “[b]oth parties agree that, because 38 U.S.C. § 1975 does not provide an applicable standard of review, this action is governed by § 706 of the Administrative Procedures Act [APA].” *Austin*, 2014 WL 12637958, at *2 (citing *Hayward v. Dep’t of Labor*, 536

F.3d 376, 379 (5th Cir. 2008) (holding that, when a statute does not set forth a standard of review, courts apply the “arbitrary and capricious” standard set forth in section 706(2)(A) of the APA)). Under the APA, an agency’s action must be upheld unless it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A).

“In applying this highly deferential standard of review, courts afford agency actions a ‘presumption of regularity’ and defer to them even if the court would have decided the issue differently.” *Austin v. U.S., Dept. of the U.S. Army*, 614 F. App’x 198, 202 (5th Cir. 2015) (quoting *Hasie v. Office of the Comptroller of the Currency of the U.S.*, 633 F.3d 361, 365 (5th Cir. 2011)). “While the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment, and while this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.” *Id.* at 202–203 (internal quotations omitted). Accordingly, the decision will “pass[] muster if it articulated a rational connection between the facts found and the decision made.” *Id.* (internal quotations omitted). “This articulation need not be perfect, so long as the agency’s reasoning can be discerned.” *Id.*

The ABCMR possesses the statutory authority to “correct any [Army] record” if necessary to “correct an error or remove an injustice.” *Stoneburner v. Sec’y of the Army*, 153 F.3d 485, 488 (5th Cir. 1998) (quoting 10 U.S.C. § 1552(a)(1)). In this context, the Court’s review is “exceptionally deferential” because “[j]udges are not

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given the task of running the Army.” *Williams v. Wynne*, 533 F.3d 360, 368 (5th Cir. 2008); *Stoneburner*, 152 F.3d at 488.

DISCUSSION

As an initial matter, the United States filed a motion to amend the briefing schedule prior to its deadline to file its cross-motion for summary judgment (Docket No. 18). That motion indicated that the Army litigation counsel assigned to this case would be unable to meet the original deadline due to complications with COVID-19 and other administrative difficulties and asked for a 30-day extension. *Id.* at 5–6. The United States filed its cross motion for summary judgment and response (Docket No. 19) 18 days later. Moore indicated that she was opposed to the motion, but filed no response explaining such opposition to the Court or any prejudice she would suffer by such an extension. Once the United States filed its cross-motion and response, the parties briefed the motions without issue. *See* Docket Nos. 20–22. There are no outstanding deadlines or pending trial date in this action. *See* Docket No. 14. Accordingly, the Court **GRANTS** the United States’s motion (Docket No. 18) and will consider all filings currently before it.

Moore argues that the Board’s decision is arbitrary and capricious because the evidence demonstrates that she suffered two qualifying traumatic events—evidence that she argues the Board disregarded in reaching its decision. Docket No. 21 at 6–9.

Moore contends that the court's analysis in *Fail v. United States* is dispositive, as she suffered similar injuries to the plaintiff, Christian Andersonn, and has provided similar documentary evidence showing that she was unable to independently perform at least two ADLs in the time periods following both injuries. *Id.* (citing 2013 WL 5418169, at *9–10).

The United States responds that the Board did not determine whether or not Moore had suffered a qualifying traumatic injury, but rather focused on whether she had demonstrated an inability to independently perform two or more ADLs for any of the requisite time periods. Docket No. 19 at 17–18. In doing so, the United States contends that the Board reviewed Moore's letters but gave them less weight than other evidence in the record—a decision that is well within the Board's discretion and is supported by the weight of the evidence. Docket No. 22 at 2–4. The United States argues that the letters lack foundation for the statements regarding Moore's purported ADL limitations and none of the authors allege to have personally assisted Moore with any ADLs. *Id.*

Moore has failed to show that the Board's decision was arbitrary or capricious. The Board reviewed all the evidence in the record as well as the two advisory opinions from the Special Compensation Branch and ARBA Medical Advisor in reaching its decision. The Special Compensation Branch opinion noted that “[i]f you look at each medical documentation sent in by the [Plaintiff], no one states there is ADL loss or that she had any trouble with ADLs.” AR at 105. The ARBA opinion

similarly noted that both of Moore's claimed injuries were treated surgically, "and there is no documentation to indicate any significant post-operative complications that would have rendered [Plaintiff] unable to perform [ADLs] for more than a continuous 30, 60, 90, or 120 day period of time." *Id.* at 87.

Regarding Moore's first claim, while she states that she received assistance from BNCOC classmates in performing ADLs, "there are no statements submitted from these individuals detailing the type or degree of assistance provided or the duration of the alleged assistance." *Id.* There was no medical documentation detailing that Moore was unable to independently perform ADLs following her meniscal injury, and the Board found "it difficult to imagine that the BNCOC leadership and BNCOC commandant would permit [Moore] to continue with the course if [Moore was] so severely debilitated that she needed the constant ministrations of her [classmates]." *Id.* at 8–10. Ultimately, the Board found that the evidence in the record rendered it "implausible" that Moore was unable to perform two ADLs for any period of 30 consecutive days in 2003. *Id.* at 11. Regarding Moore's second injury, the Board similarly reviewed all of the objective medical and factual evidence in the record and relied on the aforementioned advisory opinions. Moore has provided no evidence to justify disturbing the Board's finding, which is based on a thorough review of the evidence in the record.

Moore argues that, like Andersonn in *Fail*, the letters she provided from her family provided sufficient

evidence such that the Board should have found that she was unable to perform two ADLs for a requisite period. Docket No. 21 at 8–11. Moore attempts to compare her administrative record with that of Anderson's in *Fail* because they suffered a similar injury. The similarities, however, end there. The *Fail* court specifically noted that Anderson's record was "unusual" because it included a written statement from his wife detailing the care she personally provided to Anderson, including specific limitations Anderson faced, specific assistance she provided and the exact dates she assisted him. *Fail*, 2013 WL 5418169, at *9. The *Fail* court found that this constituted "clear and un rebutted evidence that Mr. Anderson indeed employed human assistance to perform the various ADLs during the 60-day time period set forth in the statement." *Id.* at *10.

Moore's record contains no such clear and un rebutted evidence. While Moore has provided four letters from her family members detailing her alleged ADL assistance, none of the letters claim to have personally assisted Moore with any ADLs. *See* AR at 326–329. Moore's two siblings claim that Moore's father and two minor children, DLM and DRM, cared for her following her injuries. *See id.* at 327–328. Moore's son, DLM, however, claims that his grandfather and minor sister, DRM, cared for Moore following her injuries. *Id.* at 326. Finally, Moore's daughter, DRM, claims that her grandfather and minor brother, DLM, cared for Moore during her injuries. *Id.* at 329. None of the individuals in four letters claim to have personally assisted Moore

following her injuries, nor do they provide a foundation for their statements regarding Moore's limitations. *See id.* at 326–329.

The fact that the Board was not persuaded by Moore's letters does not mean that the Board failed to consider them or that its decision was arbitrary and capricious. "The mere fact that the administrative record contain[s] *some* evidence supporting the claimant's ADL loss [is] not enough to render the [Board's] decision to deny benefits arbitrary and capricious." *Austin*, 614 F. App'x at 205 (emphasis in original) (citing *Weller v. United States*, No. 14-68-SCR, 2014 WL 5320133, at *4 (M.D. La. Oct. 17, 2014) ("That the plaintiff can point to evidence in the record which supports his claim is not dispositive.")). Even where a reviewing court might have concluded that family statements alone were sufficient to establish a plaintiff's claimed ADL loss, "the highly deferential standard of review that applies to [these] case[s] precludes substituting [the court's] judgment for that of the agency." *Id.* It was not arbitrary and capricious for the Board to rely on the medical evidence and other objective facts in the record instead of statements submitted by Moore's family members. *See id.*

Similarly, Moore has failed to show that the Board's decision was not rationally connected to the facts or unsupported by evidence. Moore contends that the Board's finding that Moore did not suffer a "traumatic event" is unsupported by substantial evidence and contradicted by evidence in the record. Docket No. 16 at 9. Regarding Moore's first TSGLI claim, Moore

argues that the medical evidence definitively shows that Moore had a torn meniscus. *Id.* Moore likewise argues that the medical evidence demonstrates that she suffered a torn ACL. *Id.* at 16. According to Moore, the ARBA opinion rendered a conclusion contrary to the substantial evidence in the record when it found that “[b]ased on the definition of a scheduled loss from a traumatic event in the TSGLI Procedural Guide, the applicant did not meet the criteria to qualify for benefits.” *Id.* at 13–14 (citing AR at 184).

The United States argues that Moore improperly focuses on the ARBA advisory opinion’s finding that she did not suffer a qualifying injury, which is not at issue before the Court. Docket No. 19 at 17. The United States contends that summary judgment is appropriate because Moore fails to even address the Board’s decision—which is what this Court is reviewing—and disregards the fact that the Board denied Moore’s benefits based on the second TSGLI requirement: whether Moore “incurred a loss of at least two ADLs for any period of 30 consecutive days.” *Id.* at 17–18 (citing AR at 11). Lastly, the United States argues that the Board’s finding that Moore was capable of a much higher level of functioning than she portrayed in her claims was rationally connected to the facts presented in Moore’s medical records and is based on substantial evidence in the record. *Id.* at 22.

Moore’s amended response points again to *Fail* to argue that the Board’s decision is contrary to the evidence in the record. Docket No. 21 at 5–11. Moore does not address the United States’s argument that,

irrespective of whether the Board found that Moore had suffered a qualifying injury or not, the Board nonetheless found that she had not demonstrated that she was unable to perform at least two ADLs for any requisite period. But Moore does argue that the Board's decision ignores the four testimonial letters provided by Moore's family members and thus is contrary to the evidence in the record. *Id.* at 11–12. The Court has addressed above why Moore's reliance on *Fail* is misplaced. The record demonstrates that the Board did not rely on any one medical opinion or piece of evidence, but rather reviewed and considered the entire administrative record in reaching its decision. The Board based its decision on the facts in the record and chose to give greater weight to the objective evidence than to Moore's testimonial evidence. Such a decision is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). It is not the province of this Court to second-guess the Board's decision where no clear error of judgment is present. *Austin*, 614 F. App'x at 202–03.

CONCLUSION

For the foregoing reasons, the United States's Motion to Amend Briefing Schedule (Docket No. 18) and Cross-Motion for Summary Judgment (Docket No. 19) are **GRANTED**, and Moore's Motion for Summary Judgment (Docket No. 16) is **DENIED**. Moore's claims are **DISMISSED WITH PREJUDICE**.

App. 25

**So ORDERED and SIGNED this 21st day of
July, 2021.**

/s/ Robert W. Schroeder III

ROBERT W. SCHROEDER III
UNITED STATES DISTRICT
JUDGE

App. 26

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

DAWN M. MOORE,	§	
Plaintiff,	§	CIVIL ACTION NO.
	§	5:18-CV-00102-RWS
v.	§	
UNITED STATES OF	§	
AMERICA,	§	
Defendant.	§	

ORDER

Pursuant to the Court's orders dismissing the case, the Court hereby enters Final Judgment. Accordingly, it is

ORDERED that the above-captioned case is **DISMISSED WITH PREJUDICE**. All motions by either party not previously ruled on are hereby **DENIED-AS-MOOT**.

The Clerk of the Court is directed to close the case.

It is so **ORDERED**.

So ORDERED and SIGNED this 21st day of July, 2021.

/s/ Robert W. Schroeder III

ROBERT W. SCHROEDER III
UNITED STATES DISTRICT
JUDGE

App. 27

**United States Court of Appeals
for the Fifth Circuit**

No. 21-40661

DAWN MOORE,

Plaintiff—Appellant,

versus

UNITED STATES OF AMERICA,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:18-CV-102

ON PETITION FOR REHEARING EN BANC

(Filed Apr. 19, 2022)

Before SMITH, HIGGINSON, and WILLETT, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a motion for reconsideration (5TH CIR. R. 35 I.O.P.), the motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

April 19, 2022

Lyle W. Cayce
Clerk

No. 21-40661

DAWN MOORE,

Plaintiff—Appellant,

versus

UNITED STATES OF AMERICA,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:18-CV-102

ON PETITION FOR REHEARING EN BANC

Before SMITH, HIGGINSON, and WILLETT, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a motion for reconsideration (5TH CIR. R. 35 I.O.P.), the motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.