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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER GREENWOOD, an
individual,

Plaintiff,

v.
UNITED STATES OF AMERICA,
Defendant.

Case No.: 16cv1754 DMS (DHB)

**ORDER (1) DENYING PLAINTIFF’S
MOTION FOR SUMMARY
JUDGMENT AND
(2) GRANTING DEFENDANT’S
CROSS-MOTION FOR SUMMARY
JUDGMENT**

This matter comes before the Court on Plaintiff’s motion for summary judgment and Defendant’s cross-motion for summary judgment. The motions are fully briefed. For the reasons set out below, the Court denies Plaintiff’s motion and grants Defendant’s motion.

**I.
FACTUAL BACKGROUND**

On February 27, 2012, Plaintiff Christopher Greenwood was a member of the United States Navy. On the night of February 27, 2012, Plaintiff fell from his apartment and was found lying on the sidewalk.¹ He was transported via ambulance to UCSD Medical Center

¹ It is unclear exactly how or where Plaintiff fell from his apartment. In the Police Report, a witness states he “heard a thump on” an awning above him, “looked up and saw legs

1 where he was diagnosed with a fractured skull. (*Id.* at ADM000029.) Plaintiff was
2 admitted to the Intensive Care Unit, and remained in the hospital until March 3, 2012.
3 Plaintiff returned to the hospital on March 4, 2012, where he was readmitted and
4 discharged the next day.

5 Plaintiff had an otolaryngology consult at the Naval Medical Center (“NMC”) on
6 March 9, 2012, at which time he was complaining primarily of facial nerve weakness. (*Id.*
7 at ADM000285.) Four days later, Plaintiff had an audiology assessment at the NMC. (*Id.*
8 at ADM000280-82.) Two days after that, Plaintiff returned to the NMC for follow-up, and
9 was seen by P.M. Kearney, PA-C. (*Id.* at ADM000277-79.) At that visit, Plaintiff reported
10 feeling sore and having upper back pain. (*Id.* at ADM000277.) PA Kearney’s notes
11 indicate “No dizziness, no vertigo, no decrease in consciousness, no decrease in
12 concentrating ability, no confusion, no memory lapses or loss, no taste disturbances, no
13 speech difficulties, no arm weakness, and no leg weakness. No gait abnormality. Good
14 coordination and no sensory disturbances.” (*Id.* at ADM000278.) PA Kearney placed
15 Plaintiff on Sick in Quarters status for thirty days. (*Id.* at ADM000304.)

16 Five days later, Plaintiff returned for follow-up with the otolaryngology department.
17 (*Id.* at ADM000274-75.) At that visit, Plaintiff denied any dizziness or vertigo and reported
18 “no difficulty with balance.” (*Id.* at ADM000274.)

19 A little more than two weeks later, on April 5, 2012, Plaintiff presented to the
20 Physical Medicine and Rehab Clinic at the NMC. (*Id.* at ADM000271-73.) During that
21 visit, Plaintiff reported no balance problems. (*Id.* at ADM000272.)
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24 dangling over the edge.” (Administrative Record (“AR”) at ADM000349.) The witness
25 “said the legs slowly slid down the side” and Plaintiff “fell sideways and hit the ground.”
26 (*Id.*) Plaintiff states he was taking the trash out of his apartment and “slipped and fell down
27 the stairwell due to the rain and wet steps.” (*Id.* at SADM000410BQ.) It appears alcohol
28 may have been a factor in Plaintiff’s fall, as the officer responding to the scene smelled
alcohol “emitting” from Plaintiff, (*id.* at ADM000349), and his blood alcohol content was
reported to be .24, three times the legal limit for operating a motor vehicle.

1 At his next visit to the Otolaryngology Department on April 17, 2012, Plaintiff
2 reported he had returned to work and was exercising without any problems. (*Id.* at
3 ADM000269.) He also denied any episodes of dizziness or vertigo, or difficulty with
4 balance. (*Id.*)

5 On August 29, 2013, Plaintiff filed a claim for \$50,000 in benefits under the
6 Traumatic Servicemembers' Group Life Insurance Policy ("TSGLI") based on the
7 February 27, 2012 accident. (*Id.* at ADM00003.) Plaintiff's claim was based on his
8 suffering a traumatic brain injury and his resulting inability to independently perform three
9 activities of daily living ("ADLs") for over thirty days. (*Id.*) In support of his claim,
10 Plaintiff submitted his medical records from USCD and the NMC, and included a statement
11 from Bassam Zakhour, M.D. (*Id.*) Dr. Zakhour did not treat Plaintiff, but reviewed his
12 medical records. (*Id.*) Plaintiff also submitted a statement on his own behalf and a
13 statement from his friend Starr Altsmannsberger. (*Id.*) That claim was denied on March
14 11, 2014. (*Id.* at ADM000329.) The basis for the denial was Plaintiff's failure to provide
15 "enough medical information to support that you could not perform ADLs independently."
16 (*Id.*)²

17 On April 7, 2014, Plaintiff filed an appeal of that decision. (*Id.* at ADM000331.)
18 That appeal was denied on June 27, 2014. (*Id.* at SADM000410AG.) The denial letter
19 states, "The medical evidence you provided was evaluated by a Medical Officer assigned
20 to the Navy Personnel Command. It was determined that your claimed injuries and the
21 available medical documentation were inconsistent with the program definition for 15
22 consecutive days of hospitalization or the loss of two or more ADLs for 120 or more days."
23 (*Id.*)

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28 ² Plaintiff's claim for hospitalization was also denied because it did not meet the TSGLI
standard. (*Id.*) Plaintiff does not dispute that reasoning here.

1 On August 11, 2014, Plaintiff appealed that decision to the TSGLI Appeals Board.
2 (*Id.* at AMD000407-09.) That appeal was denied on January 22, 2015. (*Id.* at
3 AMD000411.)

4 Plaintiff filed a request for reconsideration of that denial on February 3, 2015. (*Id.*
5 at AMD000415-16.) That request was denied on March 9, 2015. (*Id.* at AMD000451.)
6 Plaintiff filed a follow up request to that denial, (*id.* at ADM000452), to which he attached
7 a medical analysis from Nancy Olson, MSN, RN, but that request was also denied. (*Id.* at
8 ADM000471.)

9 On July 7, 2016, Plaintiff filed the present case challenging the denial of his claim
10 for benefits. The present motions followed.

11 II. 12 DISCUSSION

13 Title 38 U.S.C. § 1975 confers jurisdiction on district courts “to review decisions
14 with regard to TSGLI claims. Unfortunately, no statute or regulation offers an explication
15 of the standard of review that the Court should apply.” *Fail v. United States*, No. 12-cv-
16 01761-MSK-CBS, 2013 U.S. Dist. LEXIS 139224, at *4-5 (D. Colo. Sept. 27, 2013).
17 “Ordinarily when a federal statute creates a right to judicial review of an agency decision,
18 but does not set forth the standard of review to be used in conducting such a review, the
19 Court is to apply the familiar ‘arbitrary and capricious’ review dictated by the
20 Administrative Procedures Act[.]” *Id.* at *5. Under the APA, a court will “set aside an
21 agency’s actions ‘only if they are arbitrary, capricious, an abuse of discretion, or otherwise
22 not in accordance with law.’” *In re Big Thorne Project v. United States Forest Service*,
23 No. 1:14-cv-00013-RRB, 2017 U.S. App. LEXIS 8953, at *7 (9th Cir. May 23, 2017)
24 (quoting *Or. Nat. Res. Council Fund v. Goodman*, 505 F.3d 884, 889 (9th Cir. 2007)). In
25 making this determination, “the reviewing court ‘must consider whether the decision was
26 based on a consideration of the relevant factors and whether there has been a clear error of
27 judgment.’ This inquiry must ‘be searching and careful,’ but ‘the ultimate standard of
28 review is a narrow one.’” *March v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)

1 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

2 Agency actions will be found to be arbitrary and capricious,

3 “if the agency has relied on factors which Congress had not intended it to
4 consider, entirely failed to consider an important aspect of the problem,
5 offered an explanation for its decision that runs counter to evidence before the
6 agency, or is so implausible that it could not be ascribed to a difference in
view or the product of the agency’s expertise.”

7 *Yakutat, Inc. v. Gutierrez*, 407 F.3d 1054, 1067 (9th Cir. 2005) (quoting *Motor Vehicle*
8 *Mfrs. Ass’n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). ““This standard
9 of review is highly deferential, presuming the agency action to be valid and affirming the
10 agency action if a reasonable basis exists for its decision.”” *Pac. Dawn LLC v. Pritzker*,
11 831 F.3d 1166, 1173-74 (9th Cir. 2016) (quoting *Pac. Coast Fed’n of Fishermen’s Ass’ns*
12 *v. Blank*, 693 F.3d 1084, 1091 (9th Cir. 2012)).³

13 Turning to the decision at issue here,

14 [a] member of the uniformed services who is insured under Servicemembers’
15 Group Life Insurance shall automatically be insured for traumatic injury in
16 accordance with this section. Insurance benefits under this section shall be
17 payable if the member, while so insured, sustains a traumatic injury on or after
18 December 1, 2005, that results in a qualifying loss specified pursuant to
subsection (b)(1).

19 38 U.S.C. § 1980A(a)(1). In this case, there is no dispute Plaintiff suffered a traumatic
20 brain injury. The issue is whether Plaintiff suffered a “qualifying loss.”

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24 ³ In his motion, Plaintiff argues the “benefit of the doubt” rule applies to his case, and
25 Defendant’s failure to apply that rule was arbitrary and capricious, an abuse of discretion
26 and contrary to law. However, Plaintiff admits he did not raise this issue during the
27 administrative process. (*See* Pl.’s Response and Reply at 8.) His failure to do so amounts
28 to a waiver, and thus the Court declines to consider that argument here. *Coker v. United*
States, No. 3:15CV-00202-JHM, 2016 U.S. Dist. LEXIS 173104, at *13-14 (W.D. Ky.
Dec. 14, 2016).

1 In the event of a traumatic brain injury, a “qualifying loss” includes “the inability to
2 carry out the activities of daily living[.]” 38 U.S.C. § 1980A(b)(1)(H). “For purposes of
3 this subsection: ... The term ‘inability to carry out the activities of daily living’ means the
4 inability to independently perform two or more of the following six functions: (i) Bathing.
5 (ii) Continence. (iii) Dressing. (iv) Eating. (v) Toileting. (vi) Transferring.” 38 U.S.C.
6 § 1980A(b)(2)(D). For losses resulting from traumatic brain injury resulting in an inability
7 to perform at least two ADLs, the insured is entitled to \$25,000 at the 15th consecutive day
8 of ADL loss, an additional \$25,000 at the 30th consecutive day of ADL loss, an additional
9 \$25,000 at the 60th consecutive day of ADL loss and an additional \$25,000 at the 90th
10 consecutive day of ADL loss. 38 C.F.R. § 9.20(f)(17).

11 Here, Defendant found Plaintiff failed to show the minimum fifteen consecutive
12 days of ADL loss. The basis for this finding was Plaintiff’s failure to provide sufficient
13 medical information to support his claimed inability to perform the ADLs. Plaintiff raises
14 four arguments as to why this decision should be reversed. First, he asserts a November 5,
15 2013 email from Mary Koontz to his counsel is evidence that Defendant’s decision was
16 arbitrary, capricious and unlawful. Second, Plaintiff asserts Defendant did not provide him
17 with internal documents created during the administrative review process, which was
18 arbitrary, capricious, an abuse of discretion and contrary to law. Third, Plaintiff argues
19 Defendant misstated the evidence, addressed the evidence in conclusory fashion and failed
20 to apply the correct legal standard, which was arbitrary and capricious, an abuse of
21 discretion and contrary to law. Finally, Plaintiff contends there was sufficient evidence to
22 support his claim.

23 **A. The November 5, 2013 Email**

24 On November 5, 2013, Mary Koontz, Branch of Service Program Manager for
25 Traumatic Injury SGLI and Family SGLI, sent an email to Plaintiff’s counsel, apparently
26 in response to Plaintiff’s claim. (AR at ADM000321-22.) In that email, Ms. Koontz sets
27 out “the requirements for filing an application for TSGLI.” (*Id.* at 321.) Plaintiff asserts
28 Ms. Koontz’s email sets out “additional criterion” for adjudicating Plaintiff’s claim, which

1 is “arbitrary, capricious and unlawful.” (Pl.’s Mem. of P. & A. in Supp. of Mot. at 15.)
2 However, Ms. Koontz does not set forth any “additional criterion” for adjudicating TSGLI
3 claims. Rather, Ms. Koontz appears to be explaining the requirements for filing claims in
4 the first instance. Indeed, the email was sent after Plaintiff’s claim was submitted but
5 before it was denied, and states in the closing paragraph, “Once we have received the
6 necessary legal documents from SDP and LODI, we will begin the process of review. Until
7 such time, the claim will be held in suspense.” (AR at ADM000322.) Furthermore, the
8 specific portion of the letter cited by Plaintiff is not relevant to Plaintiff’s claim. It concerns
9 single limb injuries, not traumatic brain injuries, which is what Plaintiff suffered here. (*Id.*)
10 Thus, Plaintiff’s argument concerning Ms. Koontz’s email does not show Defendant’s
11 decision to deny Plaintiff’s claim was arbitrary, capricious or otherwise unlawful.

12 **B. Failure to Provide Documents**

13 Next, Plaintiff argues Defendant did not provide him with “significant internal
14 documents” generated during the administrative process. (Pl.’s Mem. of P. & A. in Supp.
15 of Mot. at 15-16.) He specifically cites a June 23, 2014 Memorandum from T.A. Belcher,
16 Cdr., MC, USN, (AR at AMD000403), and a January 22, 2015 Memorandum from the
17 TSGLI Appeals Board. (*Id.* at AMD000413-14.) Plaintiff asserts Defendant’s failure to
18 provide him with these documents rendered Defendant’s denial of Plaintiff’s claim
19 “arbitrary, capricious, an abuse of discretion, and contrary to law.” (Pl.’s Mem. of P. & A.
20 in Supp. of Mot. at 16.)

21 The June 23, 2014 Memorandum does not provide any information not included in
22 the denial letter of June 27, 2014. (*Compare* AR at ADM000403 *with* ADM000404.) The
23 January 22, 2015 Memorandum provides a more detailed analysis of Plaintiff’s claim, but,
24 it, too, provides the same conclusion provided in the January 22, 2015 denial letter.
25 (*Compare* AR at AMD 000411 *with* AMD000413-14.) Therefore, Plaintiff’s assertion that
26 he was “left at a disadvantage because he was not aware of the reasons for the denial” is
27 not borne out by the evidence. Moreover, Plaintiff fails to explain how his third appeal or
28 his request for reconsideration would have been any different if he had the Memoranda

1 identified above. Accordingly, Plaintiff's second argument does not show Defendant's
2 denial of the claim was arbitrary, capricious or otherwise unlawful.

3 **C. Adjudication of the Claim**

4 Finally, Plaintiff raises a number of arguments in response to Defendant's actual
5 denial of Plaintiff's claim. Specifically, Plaintiff asserts Defendant failed to apply the
6 proper standard of review and failed to consider the evidence supporting the claim.

7 In support of his argument that Defendant failed to apply the proper standard of
8 review, Plaintiff cites the final decision at the BCNR. (*Id.* at ADM000477-78.) That
9 decision states, "The injuries you suffered do not per se require assistance to perform
10 ADLs." (*Id.*) Plaintiff asserts this statement evidences Defendant applied the wrong
11 standard of review, but the Court disagrees with Plaintiff's interpretation of the evidence.
12 This statement does not indicate Defendant applied the wrong standard of review. All it
13 states is Plaintiff's injuries are not the type that automatically show an inability to perform
14 ADLs. There is nothing arbitrary or capricious about that statement, or Defendant's
15 inclusion of that statement in its final denial of Plaintiff's claim.

16 Next, Plaintiff argues there was evidence to support his claim, and Defendant either
17 ignored it or failed to consider it properly. First, there is no evidence Defendant ignored
18 Plaintiff's evidence. On the contrary, the record reflects Defendant reviewed all the
19 evidence submitted. (*See id.* at ADM000404) (stating "medical evidence you provided
20 was evaluated by a Medical Officer assigned to the Navy Personnel Command.") Second,
21 there is no evidence Defendant failed to properly consider Plaintiff's evidence. Rather, the
22 record reflects Defendant considered the evidence submitted, and based on that evidence,
23 determined Plaintiff had not shown an inability to perform two ADLs for the requisite
24 number of days. Contrary to Plaintiff's suggestion, Defendant was not required to simply
25 accept Plaintiff's evidence and award him benefits. *See Coker*, 2016 U.S. Dist. LEXIS
26 173104, at *15 (quoting *Martindale v. United States*, No. 3:15-CV-00581-GNS-DW, 2016
27 U.S. Dist. LEXIS 99362, at *4 (W.D. Ky. July 29, 2016)) ("Contrary to Plaintiff's
28 argument, it is not 'arbitrary and capricious for the Army to examine and evaluate the

1 underlying records itself, rather than relying on the certifying medical professional's
2 interpretation of the same records.”) (quotation marks omitted). Defendant was entitled
3 to, and did, conduct its own evaluation of the evidence, and based on that evaluation,
4 determined Plaintiff had not met the standard for an award of benefits. Although Plaintiff
5 disagrees with that decision, there is evidence to support it. Specifically, the medical
6 records are silent on Plaintiff's claimed inability to perform two ADLs for the required
7 length of time. On the contrary, the medical records reflect that slightly more than two
8 weeks after the accident, Plaintiff reported “No dizziness, no vertigo, no decrease in
9 consciousness, no decrease in concentrating ability, no confusion, no memory lapses or
10 loss, no taste disturbances, no speech difficulties, no arm weakness, and no leg weakness.
11 No gait abnormality. Good coordination and no sensory disturbances.” (*Id.* at
12 ADM000278.) Considering the record as a whole, there was nothing arbitrary, capricious
13 or unlawful about Defendant's denial of Plaintiff's claim.

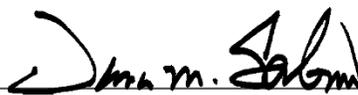
14 **III.**

15 **CONCLUSION**

16 For the reasons set out above, the Court denies Plaintiff's motion for summary
17 judgment and grants Defendant's cross-motion for summary judgment. The Clerk of Court
18 shall enter judgment accordingly, and close this case.

19 **IT IS SO ORDERED.**

20 Dated: June 6, 2017

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22 Hon. Dana M. Sabraw
23 United States District Judge
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