

EXHIBIT 4

Seth Watkins

From: Seth Watkins <Watkins@adduci.com>
Sent: Monday, November 09, 2015 6:33 AM
To: ogcfoiaappeals@va.gov
Cc: King, Jeanne VBAPHILINS
Subject: FOIA Appeal re Request to Veterans Benefit Administration (and/or the VA Insurance Center), FOIA Request # 16-00661-F
Attachments: 2015.08.06 letter from Robert L. Nabors II.PDF

This will appeal the denial of information requested under FOIA.

Pending before the VA is a request dated and emailed to the VA on October 8, 2015. A copy of the request is forwarded below, along with its attachment ("FOIA Request"). We understand from email correspondence with Ms. Jeanne King (also copied below) that the VA has assigned this **FOIA Request # 16-00661-F**.

Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), a response to the FOIA Request was due within 20 business days. Requester deems the VA's failure to provide a response determination within the statutory time limits as a denial of the FOIA Request. Requester hereby appeals the denial of the FOIA Request. See, e.g., 5 U.S.C. § 552(a)(6)(C).

Please respond to this appeal within 20 business days in accordance with 5 U.S.C. § 552(a)(6)(A)(ii).

Thank you.

Sincerely,
/s/
Seth A. Watkins

Seth A. Watkins, Ph.D.
ADDUCI, MASTRIANI & SCHAUMBERG LLP
1133 Connecticut Avenue, NW
Washington, DC 20036
Tel. 202-407-8647
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From: King, Jeanne VBAPHILINS [mailto:jeanne.king@va.gov]
Sent: Thursday, October 29, 2015 3:45 PM

To: Seth Watkins <Watkins@adduci.com>

Subject: RE: [EXTERNAL] RE: FOIA Request

Mr. Watkins:

RE: FOIA # 16-00661-F

I concur that your account of our conversation from Tuesday, October 27, 2015 appears to be accurate as a summary of my effort to clarify the scope of your FOIA request. If the effort to gather the indicated documents should prove to be exceptionally unwieldy or onerous in actual practice, you may be contacted again in order to discuss the issue.

Thank you again for your assistance with this process.

Jeanne King

Jeanne King
Attorney-Advisor/FOIA Officer
Insurance Service
Department of Veterans Affairs

From: Seth Watkins [<mailto:Watkins@adduci.com>]

Sent: Wednesday, October 28, 2015 1:16 PM

To: King, Jeanne VBAPHILINS

Subject: [EXTERNAL] RE: FOIA Request

Dear Ms. King,

This email responds to your inquiry by telephone yesterday concerning the scope of the October 8, 2015 FOIA request reproduced below.

Requester hereby narrows the scope of this FOIA request to the following specific categories of records concerning the "comprehensive review of the TSGLI program as it approaches its 10th year anniversary" (hereinafter, "Review"):

- . records that set out or reflect the timing of the Review (e.g., when started, when to be completed);
- . records that set out or reflect which individuals are conducting and/or participating in the Review;
- . records that set out or reflect the scope of the Review;
- . records that set out or reflect any decision or intention to include, not include, or consider including, in the Review any consideration of the issues raised in the Petition for Rulemaking by Army First Sergeant Hugh Campbell McKinney, Retired, to Amend 38 C.F.R. § 9.20 Governing Traumatic Injury Protection Provided by Statute at 38

U.S.C. § 1980A submitted to the VA on March 16, 2015 and denied by the VA by letter dated August 6, 2015;

- . records that set out or reflect the planned reporting of any observations, results, conclusions, and/or recommendations arising from the Review (e.g., will a formal assessment be compiled and distributed, and if so, to whom and will the assessment, or any portion or summary thereof, be made public);
- . records that set out or reflect any decision to limit the Review to being “internal” (e.g., not seeking public comment and/or involvement, and no notice to the public that the Review is being conducted);
- . records that set out or reflect which veterans and military service organizations (VSOs), if any, have been included, or will be included, as participants in the Review, and the extent of their involvement (e.g., are the opinions of VSOs being sought or otherwise offered in connection with the Review; are VSOs participating in any meetings concerning the Review);
- . records that set out or reflect any communications between the VA and any non-government entities or individuals, including but not limited to the VSOs, concerning the Review (requester expressly excludes communications solely between VA/DoD and Prudential concerning any review of Prudential’s role in the administration of the TSGLI program); and
- . records that set out or reflect any communications between the VA and Congress (including but not limited to any member of Congress, committee thereof, or staff member) concerning the Review.

If the above specific categories of documents remain too broad and would capture an onerous number of documents, please let me know and requester will consider further narrowing the scope of this FOIA Request.

Thank you.

Sincerely,

Seth A. Watkins

Seth A. Watkins, Ph.D.
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From: Seth Watkins
Sent: Thursday, October 08, 2015 2:54 AM
To: 'FOIA.VBAINS@va.gov' <FOIA.VBAINS@va.gov>
Subject: FOIA Request

This is a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

On behalf of our client Hugh C. McKinney, we hereby request copies of the following records under FOIA, preferably sent to the requester's undersigned attorney by email in electronic format (pdf):

- all records in any way concerning or relating to the "comprehensive review" referenced in the statement "**VA, in consultation with DoD, is currently conducting a comprehensive review of the TSGLI program as it approaches its 10th year anniversary in December 2015 to ensure that the program is operating effectively and meeting the intent of Congress,**" which statement was made on page 2 of the attached letter from Robert L. Nabors II of the U.S. Department of Veterans Affairs to Seth A. Watkins, dated August 6, 2015, concerning denial by the VA of the Petition for Rulemaking by Army First Sergeant Hugh Campbell McKinney, Retired, to Amend 38 C.F.R. § 9.20 Governing Traumatic Injury Protection Provided by Statute at 38 U.S.C. § 1980A (note that the denial of the rulemaking petition is the subject of a Petition for Review filed on behalf of petitioner/requester with the U.S. Court of Appeals for the Federal Circuit on October 5, 2015, *McKinney v. McDonald*, No. 16-1032).

We hereby consent to pay all costs incurred for search, duplication and review of materials up to \$250.00. If additional costs will be required, please contact me for my approval.

If any records are withheld from release, please identify the withheld records by producing and providing to me an index pursuant to *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973).

If the Veterans Benefit Administration (and/or the VA Insurance Center) does not have custody or control over certain requested and responsive records but knows or believes that another component of the VA subject to FOIA does, please forward this FOIA request to the appropriate person and inform us that you have done so.

Please respond within 20 business days in accordance with 5 U.S.C. § 552(a)(6)(A).

If you have any questions about this request, please contact me immediately by the means listed below.

Thank you for your assistance with this matter.

Sincerely,
/s/
Seth A. Watkins

Seth A. Watkins, Ph.D.
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DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON DC 20420

August 6, 2015

Mr. Seth A. Watkins, Ph.D.
Adduci Mastriani & Schaumberg LLP
1133 Connecticut Ave., N.W.
Washington, D.C. 20036

Dear Dr. Watkins:

This is in response to your petition pursuant to 5 U.S.C. § 553(e) ("Petition"), requesting that the Department of Veterans Affairs (VA) revise 38 C.F.R. § 9.20 governing the Servicemembers' Group Life Insurance Traumatic Injury Protection (TSGLI) program. You filed this request on behalf of Hugh C. McKinney, a retired service member, whose TSGLI claim alleging loss of activities of daily living (ADLs) due to a stroke that was caused by a traumatic brain injury from an improvised explosive device (IED) was denied by the United States Army.

The Petition requests that VA:

1. Amend the definition of "traumatic event" in 38 C.F.R. § 9.20(b)(1) to include "application of . . . explosive ordnance . . . causing damage to a living being."
2. Amend the definition of "traumatic injury" in 38 C.F.R. § 9.20(c)(2)(ii) to include a "physical illness or disease . . . caused by . . . explosive ordnance."
3. Amend the list of exclusions in 38 C.F.R. § 9.20(e)(4)(i) to provide that a scheduled loss resulting from "physical illness or disease caused by explosive ordnance" will not be excluded from TSGLI coverage.
4. Add the following definition of "explosive ordnance" to 38 C.F.R. § 9.20(e)(6): "all munitions containing explosives, . . . includ[ing], but . . . not limited to, improvised explosive devices (IEDs)."

Petition, at 2-3.

Congress established the TSGLI program to provide financial assistance to severely injured servicemembers who suffer a traumatic injury directly resulting in a TSGLI scheduled loss. See Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 1032, 119 Stat. 231, 257. TSGLI coverage is modeled after commercial Accidental Death and Dismemberment (AD&D) insurance coverage, specifically, the "dismemberment" portion

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Mr. Seth A. Watkins, Ph.D.

of the coverage, and accordingly VA's implementing regulation at 38 C.F.R. § 9.20 is based on commercial AD&D policies. 70 Fed. Reg. 75,940 (Dec. 22, 2005).

The TSGLI statute provides benefits to a person insured under Servicemembers' Group Life Insurance for a TSGLI scheduled loss that "results directly from a traumatic injury . . . and from no other cause." 38 U.S.C. § 1980A(c)(1); *see also* 38 C.F.R. § 9.20(d)(2). VA defined the term "traumatic event" to mean "the application of external force, violence, chemical, biological, or radiological weapons, or accidental ingestion of a contaminated substance causing damage to a living being." 38 C.F.R. § 9.20(b)(1). The term "injury" ordinarily refers to an injury caused by external violence, as opposed to a disease. 70 Fed. Reg. at 75,941. When VA first promulgated 38 C.F.R. § 9.20, the Department recognized that the process by which pyogenic infection, chemical, biological, or radiological weapons, or accidental ingestion of a contaminated substance produces immediate harm may be characterized as a disease process; however, the Department included physical illness or disease caused by such hazards within the definition of "traumatic injury" in 38 C.F.R. § 9.20(c)(1) because "including immediate traumatic harm due to those unique hazards of military service is consistent with the purpose of TSGLI." *Id.*

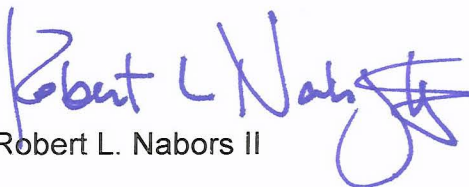
The Petition contends that IEDs are also a unique hazard of military service and, therefore, the TSGLI program should cover losses due to physical illness or disease caused by IEDs. Petition, at 18-24. VA is required to consult with the Department of Defense (DoD) on all TSGLI regulations. 38 U.S.C. § 1980A(j). VA, in consultation with DoD, is currently conducting a comprehensive review of the TSGLI program as it approaches its 10th year anniversary in December 2015 to ensure that the program is operating effectively and meeting the intent of Congress. As part of this review, VA will analyze the relationship between explosion of an IED and development of a physical illness or disease, which is raised in the Petition. A decision on this issue will require consultation with military medical experts and review of the latest research, including Institute of Medicine reports such as *Gulf War and Health: Long-Term Effects of Blast Exposures* (2014). Also, because VA is obligated to manage the TSGLI program "on the basis of sound actuarial principles," 38 U.S.C. § 1980A(e)(4), VA must also conduct an actuarial assessment of any such regulatory amendment on the TSGLI program.

3.

Mr. Seth A. Watkins, Ph.D.

For the foregoing reasons, VA is unable at this time to adopt the changes requested in the Petition. Accordingly, the Petition is denied. Please be assured, however, that we will carefully consider your suggested amendments and the views expressed in the Petition when formulating future proposals regarding the TSGLI regulations. We appreciate your interest in this matter.

Sincerely,



Robert L. Nabors II