RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Marine corps

CASE NUMBER: PD0900096 SEPARATION DATE: 20080331

BOARD DATE: 20101124

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

SUMMARY OF CASE: This covered individual (CI) was a CPL (0331, Machine Gunner), medically separated from the Marine Corps in 2008 after 4 years of service. The medical basis for the separation was Post Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI) and Neural Hearing Loss. Following two deployments to Iraq with heavy fighting including a history of “being the victim of six different blast related injuries from improvised explosive devices, rocket propelled grenades and closed room weapon firing as a machine gunner,” the CI had a hearing loss and difficulty following conversations and hearing commands. He was placed on limited duty (LIMDU) for Tinnitus (ringing in the ears) and noise induced hearing loss in Feb 07. The CI had evidence of, and was diagnosed with, TBI and PTSD. The CI was treated with a hearing aid, with continued hearing complaints and 100% speech discrimination on testing. PTSD was treated primarily in the civilian sector with psychiatric medication and counseling for persistent “mixed anxiety and malaise or depression,” difficulty understanding his provider, avoidance, and sleep impairment. The CI had subjective headaches, personality change and memory complaints. The CI had objective evidence of decreased visual memory and perceptual motor skills. The CI’s symptoms did not improve to the level where he could resume the duties of his MOS and he was referred to a Medical Evaluation Board (MEB). The NAVMED 6100/1 listed Intracranial Injury, Migraine, Tension Headache, Insomnia, Personality Changes, Memory Loss, PTSD, Tinnitus, and Neutral Hearing Loss as diagnoses. The Physical Evaluation Board (PEB) adjudged the PTSD, TBI, and Neural Hearing Loss to be unfitting for continued military service. The Personality Changes; Insomnia; Cognitive Impairment; Changes in Recent Memory; Headaches with Mixed Feature including Migraine and Tension; and Tinnitus conditions were determined to be “Related Category 2 Diagnosis” and not separately unfitting or rated. The PEB rated PTSD at 10%, TBI at 10% and Hearing Loss at 0%. The CI made no appeals, and was then medically separated with a 20% combined disability rating.

CI CONTENTION: The CI’s two applications and attached letter and documents stated: “I was assigned less than 50% disability rating by the military for my unfitting PTSD upon discharge from active duty. The PDBR should assign the highest final disability rating applicable consistent with 38 CFR 4.129 and DOD policy.” The CI additionally requests that his fitness determinations be reversed and that he receive ‘the highest rating possible’ for all of his PEB and VA conditions. The CI specified Traumatic Brain Injury (PEB 10%; VA 30%) and requested application of the new (TBI) criteria effective Oct 28, 2008 of at least 50%. This case is court remanded under the *Sabo et al v. United States* class action suit.

RATING COMPARISON:

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20080117** | | | | | **VA (2 wks Pre-Separation) – All Effective 20080401** | | | |
| **Condition** | | **Code** | | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| PTSD | | 9411 | | 10% | PTSD | 9411 | 70% | 20080315 |
|  | Insomnia | | Cat 2 | |
| Personality Changes | | Cat 2 | |
| Traumatic Brain Injury | | 8045-9304 | | 10% | Status Post Concussion w/Traumatic Brain Injury | 8045-8100 | 30% | 20080306 |
|  | Cognitive Impairment | | Cat 2 | |
| Changes in Recent Memory | | Cat 2 | |
|  | Headaches … w/mixed | | Cat 2 | |
| Neural Hearing Loss | | 6100 | | 0% | Bilateral Hearing Loss … | 6100 | 0% | 20080306 |
|  | Tinnitus | | Cat 2 | | Tinnitus | 6260 | 10% | 20080306 |
| ↓No Additional MEB Entries↓ | | | | | Left Big Toe … | 5003-5284 | 10% | 20080320 |
| Left Index Finger … | 7804 | 10% | 20080320 |
| Lumbago (Lower Back Pain) | 5237 | 0% | 20080313 |
| Bilateral Knee and Eye Conditions | | NSC | |
| **TOTAL Combined: 20%** | | | | | **TOTAL Combined (*Includes Non-PEB Conditions*): 90%** | | | |

ANALYSIS SUMMARY: The PEB rated TBI as a single condition under the analogous 8045-9304 code at 10%. This approach, although consistent with the Veterans Administration Schedule for Rating Disabilities (VASRD) in effect at that time, is not congruent with the current requirement for the Board to adhere solely to the VA disability rating guidelines (IAW DoDI 6040.44 and the NDAA 2008). This implicitly includes adherence to any concurrent applicable disability rating policy changes issued via 'FAST' or Training Letters (in this case, TL 06-03, FEB 06 and TL 07-05, AUG 07). By precedent and legal opinion, the Board is obligated to comply with the Training Letters and 'unbundle' the elements of TBI (previously rated collectively as post-concussion syndrome). This provides a fairer and more complete disability rating assessment, and is aligned with the mission of the Board. Although the CI specifically contended for a re-rating of TBI under the “post October 28, 2008 VA rating criteria,” his case must be adjudicated using the VASRD in effect at the time of his separation as noted above. The provisions of FL08-36, implementing the new TBI rating criteria were not in effect until 20081023 (greater than 6 months post-separation); therefore, the current VASRD TBI rating criteria are not applicable in this case for separation rating determination. The symptoms of TBI overlap with those of PTSD, and the Board apportioned symptoms which were medically defensible into the predominant (higher rating) condition IAW VASRD guidance.

PTSD Rating Recommendation. The PEB rating was likely derived from SECNAVINST 1850.4E and/or DoDI 1332.39, which was in effect at the time of the PEB. However, the CI’s date of separation followed the promulgation of the National Defense Authorization Act (NDAA) 2008 mandate for DOD adherence to VASRD §4.129. IAW DoDI 6040.44 and DOD guidance (which applies current VASRD §4.129 to all Board cases), the Board is obligated to recommend a minimum 50% PTSD rating for a retroactive six month period of Temporary Disability Retired List (TDRL). The Board must then determine the most appropriate fit with VASRD §4.130 criteria at six months for its permanent rating recommendation. As noted above, the overlap of symptoms from the CI’s TBI was considered in the rating. The Board also considered the symptoms from the Category 2 conditions of Insomnia and Personality Changes in rating the PEB’s primary unfitting conditions of PTSD and TBI. The most proximate source of comprehensive evidence on which to base the permanent rating recommendation in this case is an extrapolation from the MEB exam (6 mo pre-separation), the VA initial psychiatric rating evaluation (2 weeks pre-separation) and the VA PTSD review evaluation (21 months after separation) including VA treatment records from 9 months after separation. At the time of the MEB evaluation the CI was on medication for PTSD which was noted as moderate in severity. The CI was not being treated with psychotherapeutic medications or therapy at the time of the VA rating exam and his symptoms of PTSD were considerably worse: Global assessment of functioning (GAF) was assessed in the range of serious symptoms (GAF=50) and the examiner also diagnosed Panic Disorder without agoraphobia as secondary to PTSD. In addition to the MEB symptoms of sleep impairment, disturbances of motivation and mood, anxiety, relationship difficulties, hypervigilance, avoidance, and difficulty in understanding complex commands continued with a higher level of difficulty or symptom severity in almost all areas. Additional symptoms noted were a flattened affect, impairment of short- and long-term memory, impaired abstract thinking, panic attacks (< 1x/week), hyper-startle and suspiciousness. Independent rating of the MEB psychiatric evaluation, under §4.130 criteria, would rate 30%, and the pre-separation VA evaluation would rate closer to 70% than to 50% with application of VASRD §4.3 (reasonable doubt). Regarding its psychiatric rating recommendations, the Board considered whether the minimum 50% threshold for the TDRL rating period was exceeded, given the VA pre-separation evaluation. However, the Board considered that there were significant acute stressors from the CI’s separation of service that likely impacted the CI’s symptoms and presentation at the time of the 2 week pre-separation VA evaluation. It was agreed that §4.130 criteria for a higher rating could not be justified and that 50% was the appropriate TDRL rating, as mandated in its recommendation. The first post-separation psychiatric data begins with VA treatment records from 9 months after separation and culminates in the VA PTSD evaluation exam 21 months after separation. The CI’s PTSD condition was assessed as being stable or slightly worsening until approximately 10 months after separation when the CI engaged in psychotherapy and had a more robust support system. The CI moved out from his wife 8 months after service separation and by the VA exam had divorced from his wife attributed to “every problem I have between PTSD and the brain injury killed the marriage.” The CI was involved with romantic relationship with some problems. He had episodes of binge drinking of 10+ drinks if drinking by himself or with friends, and only 2 if with his girlfriend. He was employed full time as a “court officer with responsibilities in the lockup area” and was receiving accommodation for difficulties at work related to sleepiness, irritability, and memory; “Supervisors are aware of his situation and are supportive, though in such cases will try to assign less stressful duties for the day.” Prior PTSD symptoms continued with the examiner noting Brain Syndrome “and PTSD share many sxs (sic: symptoms) (notably ones dealing with memory, concentration, emotional dysregulation). These disorders likely amplify each other in connection with such sxs.” Global functioning was assessed in the range of serious impairment (GAF=46). The CI never endorsed suicidal or homicidal ideations, nor demonstrated any psychotic features. The VA continued the CI’s 70% PTSD rating based on this evaluation. Independent rating, with application of VASRD §4.3 (reasonable doubt), would yield a 70% rating. All Board members agreed that the record was insufficient to support a 100% rating under §4.130 based on the evidence, and that the 30% threshold was well exceeded. The Board deliberated therefore primarily between 50% vs. 70% as the permanent rating recommendation IAW §4.130. At the six month rating timeframe, the CI was not yet separated or divorced from his wife, and had not had any successful therapy or treatment. There was no indication of any symptom improvement until approximately one year post separation, and any improvement was not adjudged to be applicable to the six month rating period. There were no indications of remissions in his PTSD symptoms. In addition to “Occupational and social impairment with reduced reliability and productivity” the CI more likely than not had “deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood.” Although the preponderance of the evidence appears to favor a 70% rating IAW VASRD §4.130, an argument remains for a 50% rating. After due deliberation, the Board agreed that a permanent PTSD rating of 50% is the most representative of impairment and a fair recommendation in this case.

TBI Condition. The CI was exposed to multiple blasts (6-7) with either a brief loss of consciousness or amnesia on at least one exposure. A brain Magnetic Resonance Imaging (MRI) was normal. The primary blast-related symptoms were daily “headaches with mixed features including migraine and tension”, insomnia, personality changes, changes in recent memory (visual memory and perceptuomotor skills), and tinnitus. The narrative summary (NARSUM) examiner noted that the CI’s symptoms of TBI “are quite debilitating” and recommended the subsequent Audiology/ENT and Psychology addendums which were accomplished and included in the Disability Evaluation System (DES) package. The VA TBI exam was accomplished pre-separation and indicated more objective and subjective symptoms than the treatment record’s Neuropsychological report of 4-5 months prior to separation (20070801). The summary note for TBI (20090301) one year post separation indicated worsening of the CI’s TBI with abnormal gait, balance and gaze. The referenced abnormal SPECT scan with perfusion deficits in the orbital frontal lobes and anterior temporal lobes supported the diagnosis of TBI as more severe than mild. As discussed above, the tenets of TL 07-05, AUG 07, were applied to rating the CI’s TBI. The PEB’s determined Category 2 conditions of “cognitive impairment” and “changes in recent memory” and “personality changes” overlapped with the CI’s unfitting PTSD condition discussed above. Care was taken to ensure that pyramiding was avoided in rating TBI separately from PTSD and not “double counting” any symptom for both conditions. The PEB’s determined Category 2 condition of “Tinnitus” was considered under TBI as the symptom onset was following a blast event. Application of TL07-05 essentially removed the prior 10% maximum stipulation for rating subjective symptoms IAW VASRD code 8045 paragraph 2; and allows multiple analogous coding using 8045-#### for the complex TBI symptoms. The CI’s personality changes (irritability), memory, cognitive impairment, and insomnia symptoms were applied in the CI’s PTSD rating and cannot be additionally used for a TBI rating. The Board considered if sufficient cognitive impairment symptoms could be separated from the PTSD rating, but adjudged that those symptoms were needed to support the higher PTSD rating. The remaining symptoms of tinnitus and headache were considered for rating under 8045. The onset of the CI’s tinnitus was following a blast exposure. Although tinnitus alone was not separately unfitting (Category 2), it is an indicator of more significant TBI, and following the tenets of TL07-05, it should be coded as 8045-6260 at 10%. The CI’s onset of headache was following a blast injury. Headaches were daily; 20-30 minutes; sharp/throbbing pain; there was nausea without vomiting or aura. The CI complained of light and noise sensitivity with some dizziness during the headaches. The VA applied the TL07-05 tenets to rate this evaluation as Status Post Concussion w/Traumatic Brain Injury, coded 8045-8100 at 30%. VA rationale was:

“Since the disability at issue does not have its own evaluation criteria assigned in VA regulations, a closely related disease or injury was used for this purpose. Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned. Your symptoms are evaluated at 30 percent because your the (sic) overall picture demonstrates an evaluation higher than 10 percent.”

There was no reevaluation or re-rating of the CI’s TBI using the new criteria for 8045 in the record. The Board found the VA TBI rating rationale in this case compelling for the time period following TL07-05 and prior to the newer VA TBI rating criteria, although it would likely not apply during other timeframes. After extensive deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt) and TL07-05, the Board recommends a separation rating of 30% for the Traumatic Brain Injury condition, coded 8045-8100, and Tinnitus secondary to TBI coded 8045-6260 at 10%.

Hearing Condition. As noted above, the PEB’s Category 2 condition of “Tinnitus” was considered under TBI. The CI had documented bilateral hearing loss due to traumatic noise exposure and blast injury and used a hearing aid. There was no significant loss in speech discrimination (98% and 100% at VA testing) testing, and the pure tone hearing loss was rated by the PEB and VA as 0% which is confirmed by independent rating. There is no evidence that the condition changed during the six months post separation. There is not reasonable doubt in the CI’s favor, therefore, to justify a Board recommendation for other than the 0% rating assigned by the PEB for the hearing condition on entry and exit from the constructive PTSD TDRL period.

Other DES Mentioned Conditions [Lumbago (Lower Back Pain/LBP)]. LBP was identified in the DES package as a history of Lower Back Pain. There were scant treatment notes for LBP in the record, and no evidence of ratable peripheral nerve impairment. The NMA noted that the CI could accomplish his fitness testing (PRT/PFT). No link to fitness is in evidence for the LBP condition. The VA exam noted no pain on full range of motion and rated this condition as 0%. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of LBP as an unfitting condition for separation rating.

Other Conditions. The Left Big Toe and Left Index Finger conditions rated by the VA were not referenced in the DES package. The Board does not have the authority under DoDI 6040.44 to render fitness or rating recommendations for any conditions not considered by the DES. The Left Big Toe, Left Index Finger, and any contended conditions not covered above remain eligible for Board for Correction of Naval Records (BCNR) consideration.

BOARD FINDINGS: IAW DoDI 6040.44, provisions of DoD or Military Department regulations or guidelines relied upon by the PEB will not be considered by the Board to the extent they were inconsistent with the VASRD in effect at the time of the adjudication. The PEB also did not apply VASRD §4.129 to the CI’s PTSD adjudication as required by NDAA 2008 in effect at the time, for which the Board also provides remedy. As discussed above, some Board recommendations in this case are IAW application of TL07-05, issued 20070831, to rating under VASRD code 8045 prior to promulgation of the current standards effective 20081023. In the matter of the Post-Traumatic Stress Disorder condition, the Board unanimously recommends an initial TDRL rating of 50% in retroactive compliance with VASRD §4.129 as DOD directed; and, by a vote of 2:1 a 50% permanent rating at 6 months IAW VASRD §4.130. The single voter for dissent (who recommended adopting the VA rating 9411 at 70%) did not elect to submit a minority opinion. In the matter of the Traumatic Brain Injury condition, the Board unanimously recommends a rating as follows: Traumatic Brain Injury condition, coded 8045-8100 and rated 30%; and, Tinnitus secondary to TBI coded 8045-6260 at 10%; IAW VASRD §4.124a. and TL07-05. In the matter of the Neural Hearing Loss condition and IAW VASRD §4.85, the Board unanimously recommends no change in the PEB adjudication. In the matter of the Low Back Pain condition, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as additionally unfitting for rating at separation.

RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows; TDRL at 70% for 6 months following CI’s prior medical separation (PTSD at minimum of 50% IAW §4.129 and DoD direction) and then a permanent combined 70% disability retirement as below.

|  |  |  |  |
| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Post-Traumatic Stress Disorder | 9411 | 50% | 50% |
| Traumatic Brain Injury | 8045-8100 | 30% | 30% |
| Tinnitus, Residual of Blast Injury | 8045-6260 | 10% | 10% |
| Neural Hearing Loss | 6100 | 0% | 0% |
| **COMBINED** | **70%** | **70%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294(s), dated 20090202 and 20100309, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

Deputy Director

Physical Disability Board of Review

MEMORANDUM FOR DEPUTY COMMANDANT, MANPOWER & RESERVE AFFAIRS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

Ref: (a) DoDI 6040.44

Encl: (1) PDBR ltr dtd 2 Dec 10

1. I have reviewed the subject case pursuant to reference (a) and concur with the recommendation set forth in enclosure (1). The subject member’s official records are to be corrected to reflect the following disposition:

a. Separation from the naval service due to physical disability with placement on the Temporary Disability Retired List with a disability rating of 70 percent for the period 31 March 2008 thru 30 September 2008.

b. Final separation from naval service due to physical disability effective 1 October 2008 with a disability rating of 70 percent and placement on the Permanent Disability Retired List.

2. Please ensure all necessary actions are taken to implement this decision, including the recoupment of previously paid funds if appropriate, and notification to the subject member once those actions are completed.

Principal Deputy

Assistant Secretary of the Navy

(Manpower & Reserve Affairs)