RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: ARMY

CASE NUMBER: PD0900177 BOARD DATE: 20090923

SEPARATION DATE: 20080417

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

SUMMARY OF CASE: This covered individual (CI) was a Guard CWO medically separated from the Army in 2008 after 25 years of combined service. The medical basis for the separation was psychiatric illness and a back condition. He developed anxiety, later diagnosed as PTSD, and back pain during an OIF deployment in 2005-2006. Neither condition required a MEB at that time. He left active duty in 2006, but remained a member of the ARNG. Because of escalating psychiatric symptoms and worsening back pain, he underwent a MEB in 2008. He was diagnosed with Axis I A) PTSD (linked to the OIF deployment) and B) Major Depressive Episode by the Army MEB psychiatrist, which was adjudicated as depression with elements of PTSD by the PEB. The orthopedic addendum to the MEB noted the back condition as medically unacceptable and it was determined to be unfitting by the PEB. Regarding the back condition, the PEB determined that there was no documentation of treatment or impairment at the time of release from active duty and no documentation of service aggravation from subsequent military duty. It was therefore judged to be a result of natural progression and not compensable. He was also evaluated for several other medical conditions, as noted on the rating chart below. They were determined to be medically acceptable by the MEB and adjudicated as fit by the PEB. The CI was medically separated by the PEB at 10% disability for depression with elements of PTSD.

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

CI CONTENTION: The CI’s application attaches a legally-prepared document which, as ‘Relief Requested’, states, ‘Applicant requests correction of his military records to reflect that he was retired due to PTSD, rated at 70% and due to his back condition rated at 10%, for a combined rating of 70%.’

*We note the applicant (through counsel) asks the PDBR for specific correction of records and specified consequential entitlements. By law the PDBR authority is limited to making recommendation on correcting disability determinations. The actual correction of records and consequential entitlement determinations is the responsibility of the applicable Secretary and Accounting service. The applicant's request will of course remain with the application as it is processed.*

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

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service PEB** | **VA (Pre-Separation)** |
| **Condition** | **Code** | **Rating** | **Date** | **Condition** | **Code** | **Rating** | **Exam** | **Effective** |
| MAJOR DEPRESSIVE DISORDER WITH ELEMENTS OF POSTTRAUMATIC STRESS DISORDER (PTSD)… | 9434 | 10% | 20080304 | POSTTRAUMATIC STRESS DISORDER, DEPRESSION | 9434-9411 | 70% | 2007112720090421 | 20050707 |
| CHRONIC LOW BACK PAIN… | 5299- 5237 | NOT COMPENSABLE.20080304 | DEGENERATIVE JOINT DISEASE WITH MULTIPLE HERNIATED DISC | 5242 | 10% | 20061109 | 20050707 |
| No DA 3497 in evidence. NARSUM notes foot pain, ‘anesthesia’ left thigh, hearing loss, sleep apnea and Staph infections. | DA 199 notes 4 other conditions as within retention standards per MEB and not unfitting. | 20080304 | NON-PEB X 3NSC X 5 |  |  | 20061109 | Per VARD of 20080923 |
| **TOTAL Combined: 10%** | **TOTAL Combined (*Includes Non-PEB Conditions*): 80%**   |

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

ANALYSIS SUMMARY:

Psychiatric Condition. The immediate question arising on review of the case is why PTSD was rejected by the PEB regarding application of VASRD §4.129. The psychiatric addendum was explicit regarding the diagnosis of PTSD. Typical DSM IV symptoms with linkage to events of OIF were elaborated. The addendum, in fact, enumerated the Criteria A, B, C and D for PTSD. It was noted as the first Axis I diagnosis. The CI *additionally* met DSM IV criteria for Major Depressive Episode. A VA psychiatric evaluation performed in 2007 made a diagnosis of PTSD, but linked it more to a civilian occupational exposure to a prison riot in 1980. It was not formally service-connected until MEB Line of Duty determinations were received by the VA. The subsequent VA psychiatric diagnosis was PTSD, stating ‘Depressive symptoms are part of PTSD symptom complex.’ The PEB did not provide a rationale or supporting psychiatric opinion for coding and rating the psychiatric condition as depression instead of PTSD. It would appear undisputable that this was not compliant with the National Defense Authorization Act (NDAA) of 2008, which was in effect at the time of the PEB adjudication. The case should have been adjudicated IAW VASRD §4.129 and the Board must therefore recommend a 50% TDRL rating at separation, coded 9434-9411.

Notwithstanding §4.129, the PEB 10% rating at separation is inconsistent with the severity of illness evidenced in the records. Depression, as the sole diagnosis, would have still merited a 30% rating IAW VASRD §4.129. The most proximate comprehensive psychiatric evaluation to the 6 month interval for recommendation of a permanent rating is the VA psychiatric re-evaluation performed 12 months after separation. There is a VA outpatient clinical note at 6 months noting a positive response to medications, but is not detailed enough for rating. At the time of the April, 2009 re-evaluation, the CI’s symptoms were typical of PTSD, fairly severe and constant. He was not employed, and the examiner cited difficulty with work relationships as a significant factor. There was also a component of occupational impairment from his back condition. His marriage and family relationships were intact, but he was ineffective in relationships outside the immediate family. He was socially isolated and subject to angry outbursts. There was no alcohol or drug use. There were elements of some cognitive impairment documented, but no psychotic or delusional symptoms. He endorsed suicidal ideation, but denied intent. Global functioning was rated in the seriously impaired range (GAF=48). The VA rating for PTSD has remained 70% from the time it was service connected; it has not been specifically re-rated based on the more recent exam described above. This exam does connote the 70% rating threshold of ‘occupational and social impairment, with deficiencies in most areas’. It describes several of the ‘due to’ descriptors, including suicidal ideation, enumerated in §4.130 for the 70% rating. The exam does not meet the total occupational and social impairment required for a 100% rating. Since the CI was unemployed, it would be speculative to apply the ‘reduced reliability and productivity’ standard for a 50% rating. IAW VASRD §4.3, reasonable doubt is resolved in favor of the CI in recommending a permanent rating of 70% for PTSD.

Back Condition. The rationale by which the PEB adjudicated the back condition as non-compensable is somewhat tenuous. There was no dispute that it was unfitting at the time of separation, and the PEB linked it to the wearing of combat gear in Iraq. The CI’s application makes a cogent argument that the condition was compensable, citing the NDAA 2008 modification of DoDI 1332.38. This states, ‘Any medical condition incurred or aggravated during one period of active service or authorized training in any of the Armed Forces that recurs, is aggravated, or otherwise causes the member to be unfit, should be considered incurred in the line of duty, provided the origin of such impairment or its current state is not due to the member's misconduct or willful negligence, or progressed to unfitness as the result of intervening events when the member was not in a duty status.’ There was no evidence of ‘misconduct or willful negligence’ or documentation of ‘intervening events’ in evidence. The CI’s application also produced documentation of 10+ years of active military service, making the condition subject to the 8 year rule. The Board should, therefore, make a compensable rating recommendation for the CI’s back condition. The NARSUM and documented goniometric examination performed during the MEB (70⁰ flexion) support a 10% rating IAW VASRD §4.71a. This is consistent with the VA rating. The PEB coding (5299-5237) is satisfactory, although the analogous prefix is unnecessary.

Other Conditions. None of the CI’s other conditions elaborated in the NARSUM have any link to fitness in the Commander’s letter or medical profiles, and only the hearing loss was service connected by the VA. He was coded and rated by the VA for a radiculopathy associated with his lumbar disc disease, but this was after the rating decision following separation. Only a sensory component, with no link to fitness, was clinically apparent at separation. There is also in evidence a letter from the CI to the MEB that he was suffering symptoms of Traumatic Brain Injury (TBI), which he related to a concussive injury during OIF. There is no evidence in the service record of a work-up for TBI, but there is also no record of any significant symptoms in that regard. The psychiatric exam noted normal cognition. Headaches were mentioned in the MEB physical, but attributed to ‘worry’. TBI was alluded to in the VA psychiatric rating examination, but the condition has yet to be coded and rated by the VA. The Board, therefore, has no reasonable basis for recommending any additional unfitting conditions for separation rating.

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

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 PDBR to the extent they were inconsistent with the VASRD in effect at the time of the adjudication. The Board did not surmise from the record or PEB ruling in this case that any prerogatives outside the VASRD were exercised, although non-compliance with the NDAA 2008 mandate for application of VASRD §4.129 was noted. In the matter of the PTSD condition, the Board recommends an initial TDRL rating of 50% IAW VASRD §4.129; and a 70% permanent rating at 6 months IAW VASRD §4.130. In the matter of the back condition, the Board recommends a compensable rating of 10% under 5237 IAW VASRD §4.71a. In the matter of the foot pain, thigh sensory deficit, hearing loss, sleep apnea, Staph infections, reported TBI and all of the CI’s other medical conditions; the Board does not recommend a finding of unfit for additional rating at separation.

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

RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows; TDRL at 60% for 6 months effective the date of the PEB final decision(PTSD at minimum of 50% IAW §4.129 and NDAA 2008), and then a permanent combined 70% disability retirement as follows effective the date following the constructive TDRL period.

|  |  |  |  |
| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT****RATING** |
| PTSD AND MAJOR DEPRESSIVE EPISODE | 9411 | 50% | 70% |
| CHRONIC LOW BACK PAIN | 5237 | 10% | 10% |
| **COMBINED** | **60%** | **70%** |

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

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090824, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

