RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: ARMY

CASE NUMBER: PD0900232 SEPARATION DATE: 20060103

BOARD DATE: 20101123

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SUMMARY OF CASE: This covered individual (CI) was an active duty SSG (11B, Infantryman) medically separated from the Army in 2006 after 21 years of combined service (14 years active duty). The medical bases for separation were right ankle pain, low back pain, and cognitive disorder due to concussion. His ankle pain began while marching and was treated with reconstructive surgery, rehabilitation and arthroscopic surgery. The back pain began while lifting weights and was treated conservatively. The cognitive disorder began after an artillery round explosion, causing a 20 minute loss of consciousness and resulting in short term memory problems and other cognitive impairments. Despite treatment measures and rehabilitation efforts, he did not respond adequately to perform within his Military Occupational Specialty (MOS) or participate in the Army Physical Fitness Test (APFT). Hewas consequently issued permanent L-3/H-3/S-3 profiles and underwent a Medical Evaluation Board (MEB). The cognitive disorder, right ankle and low back conditions were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Additionally migraine headache and cervical spine conditions were addressed in the narrative summary (NARSUM) and forwarded on the DA Form 3947 as medically unacceptable conditions. Six other conditions, as identified in the rating chart below, were forwarded as medically acceptable under AR 40-501 retention standards. The latter included separate psychiatric conditions of anxiety disorder and depressive disorder which are relevant to the Board’s deliberations as elaborated below. The informal PEB adjudicated the cognitive disorder condition, right ankle condition and low back condition as unfitting. The cognitive disorder was rated 10% IAW DoDI 1332.39; the right ankle and low back conditions were rated 0% each IAW with the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was thus medically separated with a 10% combined disability rating.

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CI CONTENTION: The CI states: ‘“The cognitive disorder I was rated 10%, my medical records indicate that I have occupational and social impairment with deficiencies in work, judgment, thinking, mood and especially family relations, difficulty adapting to stressful circumstances which contribute to degradation of my family life, inability to maintain a job and the nonexistence of effective relationships.” He goes on to elaborate how his unfitting conditions have imposed ongoing barriers to employment. He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions. As a matter of policy, all service conditions are reviewed by the Board for their potential contribution to its rating recommendations.

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\*\* The Rating Comparison Table is located on the next page.

RATING COMPARISON:

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| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20050816** | | | | **VA (1 Mo. Pre-Separation) – All Effective 20060104** | | | | |
| **Condition** | | **Code** | **Rating** | **Condition** | | **Code** | **Rating** | **Exam** |
| Cognitive Disorder | 8045-9304 | | 10% | Cognitive Disorder with depressive disorder and PTSD | | 9304 | 50% | 20051129 |
| Anxiety Disorder | | Not Unfitting | |
| Depressive Disorder | | Not Unfitting | |
| Right Ankle Pain | 5099-5003 | | 0% | Right Ankle | | 5262 | 10% | 20051129 |
| Low Back Pain | | 5237 | 0% | Back / Radiculopathy Condition | | 5242 | 10% | 20051129 |
| Cervical Spine Disc Disease | | Not Unfitting | | Cervical Spine / Radiculopathy | | 5242 | 10% | 20051129 |
| Cervical Spine Joint Disease | | Not Unfitting | |
| Right shoulder impingement | | Not Unfitting | | Right shoulder impingement | 5201-5024 | | 10% | 20051129 |
| Migraines | | Not Unfitting | | Migraines | | 8100 | 0% | 20051129 |
| Left Ankle | | Not Unfitting | | Left Ankle | | 5262 | 10% | 20051129 |
| Intraocular Hypertension | | Not Unfitting | | Not Service Connected (NSC) | | | | 20051129 |
| No PEB Entry | | | | Osteoarthritis, right knee | | 5260 | 10% | 20051129 |
| No PEB Entry | | | | Osteoarthritis, left knee | | 5260 | 10% | 20051129 |
| No Additional MEB Entries | | | | **Other X 3 / NSC X 4** | | | All 0% | 20051129 |
| **TOTAL Combined: 10%** | | | | **TOTAL Combined: 80%** | | | | |

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ANALYSIS SUMMARY:

The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impact that his service-incurred condition has had on his current earning ability and quality of life. It is a fact, however, that the Disability Evaluation System (DES) has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions resulting in medical separation. This role and authority is granted by Congress to the Veterans Administration.

Cognitive Disorder Rating Recommendation. Board Members engaged in considerable debate regarding the overall approach to adjudicating this case. The case is a clinical hybrid of a traumatic brain injury (TBI)-type concussive injury (8045) with some unfitting (albeit relatively mild) cognitive impairment and a psychiatric overlay which met criteria for an Axis I diagnosis of Post-Traumatic Stress Disorder (PTSD) per the pre-separation VA Compensation & Pension (C&P) examination (the diagnosis was Anxiety, NOS per the MEB psychiatrist). The psychiatric diagnoses were submitted as separate conditions by the MEB, as per the above rating chart, and basically the psychiatric components were adjudicated as not unfitting. There was an S-3 profile prohibiting weapons access (Infantry MOS), but the Commander’s statement and all other evidence would not suggest that there was unfitting psychiatric impairment. The Board considered whether the psychiatric symptoms (possibly with a direct clinical tie to TBI, not separate PTSD) were of a magnitude that they interfered with duty performance. In other words, if the CI did not have the concussion related cognitive impairments (and unfitting orthopedic conditions), would he have been separated? A coding choice of TBI (8045) would only achieve a 10% rating under the VASRD in effect at the time. A coding choice of 9304 (dementia due to head trauma) must be rated under the §4.130 general mental formula. Although the PEB coded 8045-9304, it is not clear if their rating reflected 8045 at 10% or application of DoDI 1332.39 for a 10% rating under code 9304. Another question in this case is whether the application of §4.129 is warranted. The VA combined the psychiatric and TBI cognitive symptoms and based the separation rating on §4.129, with a later examination and rating per §4.130. The Board considered and debated three possible approaches: 1) an assigned code of 8045 with the requisite 10% rating (basically a non-recharacterization of the PEB’s decision for this condition). That is arguably a somewhat meager rating for the true disability, but for a “cognitive-only” unfitting condition this is the only achievable rating IAW the VASRD in effect; 2) concede the application of §4.129 despite the absence of a defensibly unfitting psychiatric condition; and 3) apply the 9034-derived §4.130 scale to achieve a fairer rating, but defer application of §4.129. This is a legitimate approach because absent the psychiatric cause for separation there is no applicability of §4.129. After a lengthy discussion of the advantages and drawbacks of each of the above approaches; (mindful of: the legitimacy of the PEB’s approach, the absence of evidence that the psychiatric component of the CI’s condition impacted duty performance, VASRD §4.3 (reasonable doubt), and VASRD §4.7 (higher of two evaluations); the Board determined that the most fair and just rating approach was the third option above - TBI rated analogously to dementia (8045-9304) without the stipulation of §4.129.

The CI’s symptoms at the time of the MEB and VA pre-separation psychiatric exams could best be described as moderate. Following redeployment he had endorsed some combat stress symptoms such as avoidance, hypervigilance and recurring bad dreams. These symptoms had abated with counseling by the chaplain. However, at the time of the MEB he began treatment in the behavioral health clinic for his cognitive disorder symptoms that re-awakened these quiescent posttraumatic stress symptoms. He then endorsed a number of symptoms including depression, poor sleep, memory difficulties, intrusive thoughts, avoidance and hyperarousal. He was in an intact marriage and had good relations with his wife and children. The Commander’s statement assessed the CI’s performance as adequate although diminished since his ankle injury 18 months earlier and appeared to attribute all limitations to the orthopedic impairment. The Board notes that at the time the Commander’s statement was written the CI’s post traumatic stress symptoms had re-emerged, but he had not yet been profiled for a psychiatric condition. Both the MEB and VA psychiatrist noted that the CI’s symptoms overlapped diagnoses of cognitive disorder, depression and anxiety disorder/PTSD. Since psychiatric impairment cannot be apportioned between these conditions, this issue does not affect the Board’s recommendations. Both examiners described essentially normal mental status exams (MSE) with a full affect, a somewhat depressed mood and some discernable short-term memory difficulties. Both the MEB and VA examiners estimated the CI’s social and occupational impairment as moderate in severity, and assigned a Global Assessment of Functioning (GAF) of 60 and 55 respectively, connoting moderate symptoms or moderate social and occupational impairment.

The Board directs its attention to its rating recommendations based on the evidence just described. The VA rating decision assigned a 50% rating based on §4.129 criteria. Both the MEB and initial VA examinations were most consistent with the general description for a §4.130 rating of 30%, “occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal).” The general description for a 10% rating, ‘occupational and social impairment due to mild or transient symptoms which decrease work efficiency … only during periods of significant stress, or; symptoms controlled by continuous medication’ may also be considered based on the CI’s functional abilities at the time of separation. However, the VA examiner did state that the “combined impact of his cognitive disorder, his depression, and his PTSD is greater than the impact of any of them taken individually,” and that the “vocational outlook thus is quite clouded.” In addition to the general description of occupational and social impairment, the §4.130 general formula fleshes out each rating description with a list of features or symptoms as examples for this level of impairment. This helps to determine a potential level of psychiatric impairment regardless of how well or poorly the veteran is actually faring with work and social activities at the time. Of six such descriptors under the 30% rating, three were present at separation. Of the nine descriptors under the 50% rating, three were present at separation. The deliberation was focused primarily on a 10% vs. 30% permanent rating recommendation. All members agreed that the 0% threshold was well exceeded and that the 50% threshold was not approached. The Board considered that the CI was successfully managing his assigned military duties throughout the MEB period. After due deliberation, and in consideration of all the evidence and VASRD §4.3 (reasonable doubt), the Board recommends 30% as the fair separation rating for the cognitive/psychiatric impairment in this case. This is appropriately applied to the single condition, Concussive Injury with Cognitive and Psychiatric Impairment, coded 8045-9304.

Right Ankle Condition. The MEB examination of the ankle demonstrated joint line tenderness and “1+” anterior instability. It described a “full” range-of-motion (ROM) without goniometric measurements. The pre-separation VA C&P examination provided goniometric measurements for normal ROM. This exam described “inversion laxity of the bilateral ankles”. The VA exam included the specific statement, “The function was not additionally limited by pain, fatigue, weakness, or lack of endurance following the five repetitions.” Both examiners documented a normal gait. The PEB and VA chose different coding options for the right ankle condition that yielded different ratings. The PEB rated the ankle by analogy as degenerative arthritis at 0%, consistent with §4.71a standards. The VA, which had previously rated this ankle at 10% for moderate limitation of motion, chose coding for tibia-fibula malunion with slight ankle instability rated at 10%. The instability component was specifically quoted in the rating decision as the rationale for a compensable rating. The code chosen by the VA is not supported by the pathology as a direct coding choice, but could be rational if used as an analogous coding. The core question facing the Board, independent of its coding choice, is whether a compensable rating under the VASRD is applicable in this ankle case with no compensable ROM impairment. The two pathways to a compensable rating are §4.59 (painful motion) and §4.40 (functional loss). Painful motion was specifically excluded by the VA examiner and was not documented on the MEB exam. Application of §4.59 would thus be speculative if appropriate at all. Conversely there are two rationales incorporated in §4.40 which are applicable to this case. The instability component (documented more precisely by the MEB examiner) fits with this language in §4.40, “… functional loss may be due to absence of part, or all, of the necessary bones, joints and muscles, or associated structures, or to deformity, adhesions, defective innervation, or other pathology…”. The Commander’s statement specifically implicated ankle instability as impeding physical requirements. MEB and VA evidence also documents pain with use, referred to in §4.40 as “… a part which becomes painful on use must be regarded as seriously disabled.” The Board deliberated the merits of various coding options, and the Action Officer opined that 5010-5003 (traumatic arthritis) was the better clinical fit in this case. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 10% (invoking VASRD §4.40) for the right ankle condition coded 5010-5003.

Low Back Condition. The NARSUM back exam was fairly cursory and consisted of the following entry, “Examination of the lumbar spine shows full range of motion. Waddell signs are negative for 5/5. Straight leg raise is negative bilaterally.” No goniometric measurements were provided by the MEB. The pre-separation VA C&P examination provided goniometric measurements of 80⁰ flexion and 220⁰ combined ROM. The VA examiner documented mild tenderness and painful motion on lateral excursion. Both the NARSUM and C&P examiners documented normal gait (under ankle exam in the NARSUM) and no abnormal spinal contour is in evidence. There was a paucity of other clinical evidence in the service records which was useful for §4.71a rating purposes, and of note there was no lumbar impairment implicated in the Commander’s statement. The Board must consider the heavy probative value advantage of the VA exam since it was the only one compliant with the VASRD §4.46 (accurate measurement) mandate for goniometric measurements. The VA exam was also superior in detail and credibly evidenced spinal tenderness and painful motion. The flexion measurement, the tenderness, or painful motion would individually confer a 10% rating IAW VASRD §4.71a. The PEB code of 5237 is a better fit with the evidence at separation since the VA coding for disc disease and radicular symptoms was not well supported by the clinical picture. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 10% for the back pain condition coded 5237.

Other PEB Conditions. Cervical spine degenerative disc disease (DDD) and migraine headaches were addressed in the NARSUM and forwarded to the PEB as medically unacceptable. There was no history of trauma preceding the neck DDD. The condition was chronic and stable over a period of one to two years, and was not profiled or implicated in the Commander’s statement as a duty impairment. Weekly migraine headaches had been present for six years in a stable pattern. The condition did not appear on the CI’s profile until after the MEB had begun, and was not implicated in the Commander’s statement as duty impairing. Left ankle pain, intraocular hypertension, cervical spine degenerative joint disease (DJD) and right shoulder impingement also appeared on the DA Form 3947. Each of these conditions was judged to be within AR 40-501 standards, was not profiled and was not identified as an impairment in the Commander’s statement. As discussed above, the Board agrees with the PEB adjudication of the Anxiety and Depressive Disorder Conditions as not unfitting. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for any of these conditions.

Other Conditions. Bilateral knee pain appeared in the DES file, and was identified by the VA for compensable rating within 12 months of separation. There is no argument favoring any link of this condition to fitness for its consideration by the Board as subject to additional Service rating. Several relatively minor medical conditions were identified in the NARSUM and MEB physical. These were reviewed by the Action Officer and considered by the Board. It was determined that none could be argued as unfitting and subject to separation rating.

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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. As discussed above, possible PEB reliance on DoDI 1332.39 for rating the cognitive disorder may have been operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the Concussive Injury with Cognitive and Psychiatric Impairment condition, the Board unanimously recommends a rating of 30% coded 8045-9304 IAW VASRD §4.130. In the matter of the right ankle condition, the Board unanimously recommends a rating of 10% coded 5010-5003 IAW VASRD §4.71a. In the matter of the low back condition, the Board unanimously recommends a rating of 10% coded 5237 IAW VASRD §4.71a. In the matter of the Anxiety Disorder, Depressive Disorder, cervical conditions, right shoulder condition, migraine headache, left ankle condition and Intraocular Hypertension conditions, the Board unanimously recommends no recharacterization of the PEB adjudications as not unfitting. 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.

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RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows and that the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective as of the date of his prior medical separation.

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Concussive Injury with Cognitive and Psychiatric Impairment | 8045-9304 | 30% |
| Traumatic Arthritis Right Ankle | 5010-5003 | 10% |
| Low Back Strain | 5237 | 10% |
| **COMBINED** | **40%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090310, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

