RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: usmc

CASE NUMBER: PD0900363 BOARD DATE: 20091021

SEPARATION DATE: 20080515

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SUMMARY OF CASE: This covered individual (CI) was a Corporal who was medically separated from the Marine Corps in 2008 after 4 years of service. The medical basis for the separation was Traumatic Brain Injury (TBI). CI was referred to the PEB, found unfit and separated at 10% disability.

The CI was conducting a dismounted patrol in Iraq on 20061113 when he was exposed to an improvised explosive device (IED) blast and suffered multiple fragmentation wounds to both lower extremities including a traumatic arthrotomy of the right ankle, superficial fragment wounds to the left ankle, as well as a head injury. The most notable lower extremity injury was to the right ankle with large metallic fragments overlying the neurovascular bundle. He underwent formal debridement and wound exploration in Iraq and was then transferred to Landstuhl on 20061116. While there examination revealed normal sensation and strength with normal distal pulses, an 8cm incision on the right ankle with some swelling but no erythema or warmth, and superficial wounds on the medial and lateral left ankle. No right ankle fracture was present and small fragments were noted in the area of the proximal left fibula. He was able to ambulate with crutches and was transferred to Camp Lejune on 20061119. He received rehabilitative care while on limited duty and his Commander’s letter states he ‘puts forth a concerted effort to recover from his injuries and has taken his rehabilitation seriously.’

At the end of his second limited duty he underwent a medical board for his bilateral lower extremity injuries and was referred to the Navy Physical Evaluation Board (PEB). The Informal PEB determined his lower extremity injuries were not unfitting but that he was unfit for continued military service secondary to TBI. He was then separated with a 10% disability for 8045-9304 Traumatic Brain Injury using the Veterans Affairs Schedule for Ratings Disabilities (VASRD) and applicable Navy and Department of Defense regulations.

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CI CONTENTION: The CI contends: “RIGHT ANKLE IED-BLAST IN IRAQ.” Congressman Walter B. Jones (NC) adds: “Mr. Sheppard is requesting reconsideration of a disability rating for injuries received from an IED blast in Iraq.”

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RATING COMPARISON:

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| **Previous Determinations**  |
| **Service** | **VA (1 Month Pre-Separation Exam)** |
| **PEB Condition** | **Code** | **Rating** | **Date** | **Condition** | **Code** | **Rating** | **Exam Date** | **Effective date** |
| Traumatic Brain Injury | 8045-9304 | 10% | 20080229 | Traumatic Brain Injury With Post Concussion SyndromeAnd Headaches [Predischarge Exam] | 8045-9304 | 10% | 20080421 | 20080516 |
| Foot Pain With Running After Shrapnel WoundsBilateral Legs  | CAT III (not separately unfitting and does not contribute to the unfitting condition) | 20080229 |  Post Operative Shrapnel Wound, Right Ankle (Claimed As Right Foot Condition And Right Lower Leg Pain StatusPost Shrapnel Wound) [Predischarge Exam] | 5310-5271 | 10% | 20080421 | 20080516 |
|  |  |  |  | Scar, Post Operative Right Ankle Shrapnel Wound | 7802 | 0% | 20080421 | 20080516 |
|  |  |  |  | Scar, Status Post Shrapnel Wound, Left Calf (Claimed AsLeft Foot And Lower Left Leg Pain, Status Post ShrapnelWound) | 7802 | 0% | 20080421 | 20080516 |
|  |  |  |  | PTSD With Mild Cognitive Disorder (Claimed As Depression And Sleep Disorder) | 9411 | 30% | 20080501 | 20080516 |
|  |  |  |  | Cervical Spine Strain [Predischarge Exam] | 5237 | 10% | 20080421 | 20080516 |
|  |  |  |  | Patellofemoral Syndrome, Right Knee [Predischarge Exam] | 5299-5260 | 0% | 20080421 | 20080516 |
|  |  |  |  | Patellofemoral Syndrome, Left Knee [Predischarge Exam] | 5299-5260 | 0% | 20080421 | 20080516 |
|  |  |  |  | Pes Planus, Bilateral Feet [Predischarge Exam] | 5276 | 0% | 20080421 | 20080516 |
|  |  |  |  | Tinea Pedis, Bilateral Feet (Claimed As Skin Condition,Bilateral Feet) [Predischarge Exam] | 7813 | 0% | 20080421 | 20080516 |
| **TOTAL Combined:** 10% | **TOTAL Combined (*incl non-PEB Dxs****):* 50% from 05/16/2008  |

**Analysis Summary**:

**Traumatic Brain Injury (TBI)**

The CI separated in May 2008 which is prior to the effective date of the New TBI rating criteria but after the effective dates of the two VA Fast letters pertaining to TBI and the 2008 NDAA.

The newer TBI coding (effective 20081023) was not in effect at the time of CI's discharge (20080515). However, two VA Training Letters applicable to rating TBI are considered to be applicable (VA Training Letter 06-03, SUBJ: Rating Traumatic Brain Injury Cases, dated 20060213, and VA Training Letter 07-05 Revised, SUBJ: Evaluating Residuals of Traumatic Brain Injury, dated 20070831). The Training Letters (TL) may be used in application of the VASRD IAW Policy Memorandum on Implementing Disability-related Provisions of the NDAA 2008 (Pub L. 110-181), dated 20081014, E7.1.4. The NDAA was effective 20080128. The 2007 training letter details the proper way to evaluate the residuals of TBI and includes using analogous codes that have criteria that resembles the type, location, and severity of the residual.

The CI had cognitive impairments, sleep disturbance, and irritability as well as headaches and tinnitus related to his TBI. The VA used the CI’s cognitive impairment, sleep disturbance, and irritability to support a 30% rating for 9304-9411 PTSD with Mild Cognitive Disorder and rated the headaches as a purely subjective complaint recognized as symptomatic of brain trauma (8045-9304 TBI with Post-Concussive Syndrome and Headaches, 10%). They rated subjective complaints under TBI and cognitive complaints under the co-morbid PTSD. So 30% combined with 10% leads to 40% overall rating for functional limitation due to TBI based on pre-discharge evaluation. The Navy rated TBI at 10% 8045-9304 Traumatic Brain Injury (9304 is Dementia Due to Brain Trauma). The PEB did not address PTSD but AHLTA notes stated PTSD alone was not unfitting. The Navy rating was consistent with the VASRD in effect at the time of separation but not with the training letters mentioned above. The Navy rating also does not appear to be consistent with the CI’s functional limitations secondary to his cognitive deficits.

Neuropsychological testing demonstrated the CI had mild to moderate deficits in attention and concentration as well as impaired memory. Applying the VA training letters which were in effect at the time of the CI’s separation, the CI’s TBI warrants a rating of 30% base on his level of cognitive impairment. The cognitive impairment is an essential part of the disability due to the unfitting condition of TBI and the VASRD General Rating Formula for Mental Illness is used to rate 8045-9304 Traumatic Brain Injury with Mild to Moderate Cognitive Impairment. If the CI had separated after the current TBI rating criteria was in effect, he would have rated at 40% if his cognitive impairment was considered mild (level 2) or 70% if his cognitive impairment was considered moderate (level 3).

IAW with VA Training Letters 06-03 (20060213) and 07-05 (20070831) the CI’s cognitive impairments should be rated under 8045-9304 Dementia Due to Brain Trauma using the General Rating Formula for Mental Illness and his headaches and tinnitus should be rated as purely subjective complaints recognized as symptomatic of brain trauma under 8045. While the CI does not have a diagnosis of Dementia due to Head Trauma, he has mild to moderate cognitive impairments that are part of his TBI and his functional limitation is at the 30% level. The appropriate rating is at least 30% for 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), due to such symptoms as mild to moderate memory loss, mild to moderate deficits in attention and concentration, chronic sleep impairment, depressed mood, irritability. The CI has some of the symptoms in the 50% rating under the General Rating Formula for Mental Illness: he does have impairment of long and short term memory (e.g. retention of only highly learned tasks, forgetting to complete tasks), difficulty understanding complex commands, and flattened affect. However he does not appear to have generalized reduced reliability and productivity or difficulty in establishing and maintaining effective work and social relationships. Therefore, the 30% rating is appropriate.

The CI also has headaches as part of his TBI. They are not migraines and are not prostrating and therefore do not meet the minimum compensable rating criteria for 8100 Migraine Headaches. The headaches should therefore be rated as 8045 at 10% for the purely subjective complaint of headache recognized as symptomatic of brain trauma. The CI also had tinnitus related to his TBI and this is included in the 10% rating for subjective complaints symptomatic of brain trauma under 8045.

**Shrapnel Wounds Bilateral Lower Extremities**

The CI’s lower extremity musculoskeletal injuries secondary to the IED should be considered unfitting. The CI had greatly increased symptoms of pain and numbness in both feet with any increase in activity above the minimum required for activities of daily living. He couldn’t run and would not be able to do a fitness test. The Commander’s Letter specifically states the CI’s injuries prevent him from working in his MOS. Both lower extremities had normal motor and sensory examinations documented by both the Navy and the VA. The Navy examination demonstrated full range of motion (ROM) but did not document whether or not pain was present on initial examination or with repetitive motion and this information is required for rating. The right ankle demonstrated a ROM limited to 15 degrees of dorsiflexion by pain after repetitive motion on the VA examination one month prior to separation and this should be rated as 5310-5271 10% for ROM limited by pain IAW VASRD paragraph 4.59. The left lower extremity demonstrated full ROM, no pain with motion, and no pain, fatigue, weakness, lack of endurance, or incoordination with repetitive motion and should be rated as 5310-5271 0%. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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. After careful consideration of all available information, the Board concluded by simple majority that the CI’s condition is appropriately rated at a combined 40% with 30% for 8045-9304 Traumatic Brain Injury with Mild to Moderate Cognitive Impairment, 10% for 8045 Traumatic Brain Injury with Subjective Complaints of Headache and Tinnitus, 10% for 5310-5271 Post-Operative Shrapnel Wound, Right Ankle, and 0% for Shrapnel Wound, Left Lower Extremity.

While none of the services were routinely using VA training letters (VA Training Letter 06-03, SUBJ: Rating Traumatic Brain Injury Cases, dated 20060213, and VA Training Letter 07-05 Revised, SUBJ: Evaluating Residuals of Traumatic Brain Injury, dated 20070831) when rating Traumatic Brain Injury (TBI) at the time of this CI’s separation in May 2008, the PDBR is authorized to use them in application of the VASRD. This authorization is IAW the Policy Memorandum on Implementing Disability-related Provisions of the NDAA 2008 (Pub L. 110-181), dated 20081014, E7.1.4. The NDAA was effective 20080128. The 2007 training letter details the proper way to evaluate the residuals of TBI and includes using analogous codes that have criteria that resembles the type, location, and severity of the residual. The training letters authorize rating residuals that meet the rating criteria under analogous codes in addition to the 10% rating under 8045 for purely subjective complaints that are symptoms of TBI, such as headaches.

The CI suffered a TBI with residuals including mild to moderate cognitive impairment, headaches, tinnitus, sleep disturbance, mood disturbance, and irritability. He had a normal MRI and neuropsychological testing demonstrated the CI had mild to moderate deficits in attention and concentration as well as impaired memory. A rating of 30% for 8045-9304 TBI with Mild to Moderate Cognitive Impairment is warranted under the VASRD General Rating Formula for Mental Disorders by the presence of 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), due to symptoms of mild to moderate memory loss, mild to moderate deficits in attention and concentration, chronic sleep impairment, depressed mood, irritability, difficulty understanding complex commands, and flattened affect. A rating of 10% for 8045 TBI with Subjective Complaints of Headaches and Tinnitus is based on the presence of subjective symptoms of headaches and tinnitus as residuals of TBI. The headaches do not meet the minimum rating criteria for 8100 Migraine Headaches and are therefore rated as a symptom of TBI.

A majority of the Board opined that the CI’s lower extremity injuries were unfitting. A 10% rating for 5310-5271 Post-Operative Shrapnel Wound, Right Ankle is based on painful motion of the right ankle IAW VASRD paragraph 4.59. Pain was present at fifteen degrees of dorsiflexion with repetitive motion of the right ankle. The left lower extremity had no limited or painful ROM and a 0% rating is applied for 5310-5271 Shrapnel Wound, Left Lower Extremity.

The other conditions rated by the VA (Post Traumatic Stress Disorder, Cervical Spine Strain, Right and Left Knee Patellofemoral Syndrome, Pes Planus, Scars, and Tinea Pedis) were not evaluated or rated as part of the Disability Evaluation System (DES) process and could not be considered by the Board.

The single voter for dissent (who did not consider the lower extremity injuries to be unfitting) opted not to submit a minority opinion.

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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 the CI’s prior medical separation.

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| Unfitting Condition | VASRD Code | Rating |
| TRAUMATIC BRAIN INJURY WITH MILD TO MODERATE COGNITIVE IMPAIRMENT | 8045-9304 | 30% |
| TRAUAMTIC BRAIN INJURY WITH SUBJECTIVE COMPLAINT OF HEADACHE | 8045 | 10% |
| POST OPERATIVE SHRAPNEL WOUND, RIGHT ANKLE | 5310-5271 | 10% |
| SHRAPNEL WOUND, LEFT LOWER EXTREMITY | 5310-5271 |  0% |
| Combined | 40% |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090429, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

 President

 Physical Disability Board of Review

MEMORANDUM FOR DEPUTY COMMANDANT, MANPOWER & RESERVE

 AFFAIRS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR)

Ref: (a) DoDI 6040.44

Encl: (1) PDBR ltr dtd 9 Dec 09 w/encl

1. I have reviewed the subject case pursuant to reference (a) and approve the recommendation of the Physical Disability Board of Review (enclosure (1)).

2. 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 rated at 40% (increased from 10%) with placement on the Permanent Disability Retired List effective the date of discharge.

3. 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)