RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXX BRANCH OF SERVICE: marine corps

CASE NUMBER: PD200900569 SEPARATION DATE: 20060515

BOARD DATE: 20110816

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty LCPL/E-3 (0311/Rifleman) medically separated for anxiety disorder, not otherwise specified (NOS), and shrapnel wound, right foot with numbness and limb pain as category II diagnoses. The CI suffered wounds to the right foot, ankle, and leg from a grenade explosion in November 2004 while in Iraq. He was unable to perform within his military occupational specialty or to meet physical fitness standards after two limited duty periods. The Medical Evaluation Board (MEB) referred pain in soft tissues of limb, disturbance of skin sensation, and accident caused by other explosive materials to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. Other conditions included in the Disability Evaluation System (DES) packet are discussed below. The PEB adjudicated anxiety disorder, NOS, and shrapnel wound, right foot conditions as unfitting, rated 10% each, with application of the SECNAVINST 1850.4E, DoDI 1332.39 and the Veterans’ Administration Schedule for Rating Disabilities (VASRD). Numbness and limb pain were determined to be category II diagnoses. The CI made no appeals and was medically separated with a 20% combined disability rating.

CI CONTENTION: “Due to lack of factoring, PTSD and my disability from VA is 90%. PTSD - 70%; R Superficial Peroneal and Tibial Nerve Neuropathy – 20%; Osteoarthritis, Lumbar Spine – 10%; Osteoarthritis, Both Hips – 10%, Patellofemoral Syndrome, Both Knees – 10%.” He additionally lists all of his VA conditions and ratings as per the rating chart below.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20060310** | | | **VA (3 Mos. After Separation) – All Effective Date 20060516** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Anxiety Disorder NOS | 9413 | 10% | PTSD | 9411 | 100%\* | 20060815 |
| Shrapnel Wound R Foot | 8699-8622 | 10% | S/P Multiple Fragment Wounds RLE W/ Unicortical Fibula Fx And Acquired Flatfoot | 5311 | 20% | 20060817 |
| Numbness And Limb Pain RLE | CAT II | | R Sup Peroneal And Tibial Nerve Neuropathy S/P Multiple Fragment Wounds RLE W/ Fibula Fx And Acquired Flatfoot | 8523 | 20% | 20060817 |
| ↓No Additional MEB Entries↓ | | | Osteoarthritis Bilateral Hips | 5003 | 10% | 20060817 |
| PFS Bilateral Knees | 5014 | 10% | 20060817 |
| Osteoarthritis Lumbar Spine | 5342 | 10% | 20060817 |
| 0% x 1/Not Service Connected x 2 | | | 20060817 |
| **Combined: 20%** | | | **Combined: 100%** | | | |

\*Decreased 9411 (PTSD) to 70% (combined 90%) effective 20070101

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that there should be additional disability assigned for his other conditions and for the gravity of his condition and predictable consequences which merit consideration for a higher separation rating. While the DES considers all of the service member's medical conditions, compensation can only be offered for those medical conditions that cut short a service member's career, and then only to the degree of severity present at the time of final disposition. However, the Department of Veterans Affairs, operating under a different set of laws (Title 38, United States Code), is empowered to periodically re-evaluate veterans for the purpose of adjusting the disability rating should the degree of impairment vary over time.

Mental Condition. The PEB rating was derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act 2008 mandate for DOD adherence to VASRD §4.129. The PEB diagnosed the unfitting mental disorder as anxiety; however, the record clearly documents that this was secondary to combat trauma and accordingly §4.129 is applicable in this case. The Board notes that the commander’s assessment mentions the mental condition contributed to the CI’s inability to perform his military duties and the PEB determined that the mental condition was unfitting. 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. The most proximate source of comprehensive evidence upon which to base the permanent rating recommendation is the VA psychiatric inpatient evaluation seven months after separation; however, the MEB evaluations continue to have relevant probative value.

The narrative summary (NARSUM) addendum was based on two evaluations: 5 December 2005 and 11 January 2006, four and five months prior to separation. Symptoms included nightmares, depression, anger, stress, mood swings, sobbing in his room, and constant thoughts of the combat incidents. On mental status exam, no thought disorder was in evidence, affect was full and appropriate, mood was congruent, delusions, hallucinations, suicidal or homicidal ideation were denied, and judgment was intact. No global assessment of functioning (GAF) was documented. However, the psychiatrist noted to the battalion commander that he was fit for full duty as a rifleman.

The VA compensation and pension (C&P) exam of 15 August 2006, three months after separation, indicated that CI had taken the summer off, but planned to start a landscaping job, and subsequent records indicate that he did so. Symptoms at the time of this exam were hypervigilance, poor sleep with insomnia, intrusive thoughts, nightmares two to three times per week, occasional flashbacks, depression, anger, rage, emotional numbing, survivor guilt, avoidance, exaggerated startle reflex, and a sense of foreshortened future. He noted that his symptoms diminished with alcohol. The CI stated that he twitched in his sleep and punched his girlfriend in the back once during sleep. He denied social isolation. He was well-groomed, cooperative, and maintained good eye contact. Speech was goal directed, with normal rate, tone, and prosody. His mood was depressed and affect was anxious. There were no suicidal or homicidal ideation. There was no evidence of a formal thought disorder. There were no hallucinations or delusions. He was alert and oriented in all spheres. His memory was intact, insight and judgment were fair, and there was no evidence of delirium; though his appetite was fair and sleep was poor. The examiner noted that it was evident that posttraumatic stress disorder (PTSD) caused clinically significant distress and impairment in social and occupational function. The GAF was assessed to be 36 (GAF between 40 - 31 is consistent with some impairment in reality testing or communication or major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood).

The VA discharge summary for an in-patient evaluation of PTSD, 8 December 2006, seven months after separation, provided the most proximate evaluation for the six-month rating. He was living with two friends and was employed as a landscaper. His symptoms included recurrent thoughts and nightmares of the traumatic combat experiences, emotional and physiologic reactivity to cues that reminded him of combat, emotional numbing and distancing, a sense of a foreshortened future, hypervigilance, and an exaggerated startle response. He also reported restlessness, social withdrawal from people he did not know, sad moods, anxiety, terminal insomnia waking up from nightmares, and problems with memory and concentration. However, he also described his avoidant behavior as laid back and happy. He denied symptoms of panic attacks, delusions, hallucinations, and suicidal or homicidal ideation. He was noted to have been initially anxious and guarded, but improved during admission. He appeared comfortable, participated in activities and displayed no psychotic behavior. He was lucid, alert and well oriented. No significant cognitive or memory impairment was noted and no formal thought disorder was noted. His mood was “happy”, but affect was constricted. He was noted to take Ambien for the insomnia secondary to his PTSD. The GAF was assessed at 45 (a GAF of 50 – 41 is consistent with serious symptoms or any serious impairment in social, occupational, or school functioning.)

The Board directed its attention to its rating recommendation based upon the evidence just described. The VA assigned a 100% rating for the PTSD condition based upon §4.130 criteria at the time of the C&P exam three months after separation. The VA rater’s rationale for a 100% rating was that the CI suffered from severe social and industrial impairment. One hundred percent is assigned whenever there is evidence of total occupational and social impairment, due to such symptoms as gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent anger of hurting self or others; intermittent inability to perform activities of daily living including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name. The examiner noted that the disturbances caused clinically significant distress and impairment in social and occupational function. While the CI did not work immediately after separation, he stated that he took the summer off and the MEB examiner noted that he was cleared for full duty. Both exams noted that he had a girlfriend and the C&P examiner specifically wrote no social isolation. All members agreed that the §4.130 criteria for a rating higher than 50% were not met at the time of separation. Therefore, the minimum 50% TDRL rating (as explained above) is applicable.

The probative value of the VA psychiatric C&P examination and hospital examinations for determination of a permanent rating are strengthened by the fact that they reflect the stress of transition to civilian life which is intrinsic to the Board’s permanent rating recommendation. The MEB and C&P examinations, nevertheless, serve as useful reference points and retain relevant probative value. At the second VA exam, he was noted to have social withdrawal. He was employed as a landscaper and this type of work would allow him isolation and was not emotionally demanding. After the summer ended and he no longer worked as a landscaper, he began an intermittent job substitute teaching at an elementary school and then as a teaching assistant in special education. Alcohol binge drinking was noted, as was a history of illicit substance abuse over the summer; but he had stopped the latter and reduced the former on his own, recognizing that it was getting out of hand. A trial of Paxil was not tolerated due to side effects. The VA rater’s rationale for a 70% rating was based on the facts found. The rater noted the description for 70% and listed the symptoms, but did not specify which determined the rating. As regards to the permanent rating recommendation, all members agreed that the §4.130 that the criteria for a 30% rating were met. The Board noted that the CI had been hospitalized almost exactly at the six-month assessment point for evaluation. Additionally, the Board noted that the CI was working. Thus, the deliberations focused on a 10/30/50% rating recommendation. After due deliberation, considering the totality of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board unanimously recommends a permanent PTSD disability rating of 30% in this case.

Shrapnel Wound Right Foot/Numbness/Limb Pain. At the NARSUM on 9 January 2006, five months prior to separation, the CI reported persistent numbness of the dorsal aspect of the right foot from approximately the midline to midway to dorsal aspect of digits three through five. He noted exacerbation of pain with activity including walking. Gait and station were normal. There was a positive Tinel’s sign from one of the wound entry sites which was covered with a well healed scar. Motor function was preserved. Reflexes were symmetrical. No comment was made on range of motion (ROM) of either the foot or ankle.

At the VA C&P exam on 17 August 2006, three months after separation, he continued to have pain. He noted pain and/or paresthesias of the right foot, and the Achilles tendon and calf. Motor function, including plantar and dorsiflexion, was noted to be normal bilaterally. (Eversion and inversion strength were noted to be normal on a PT exam 10 January 2006, four months prior to separation.) ROM is annotated in the chart below. Gait was “coordinated.” Sensation was determined to be “more consistent with right superficial peroneal and right plantar branches of tibial nerve neuropathy. Possible right distal sural neuropathy...”

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Goniometric ROM –**  **Ankles** | **MEB ~ 5 Mo. Pre-Sep** | | **VA C&P ~ 3 Mo. After-Sep** | |
| **Left** | **Right** | **Left** | **Right** |
| Dorsiflexion (0-20) | - | - | 20⁰ | 10⁰ |
| Plantar Flexion (0-45) | - | - | 45⁰ | 30⁰ |
| Comment | ROM not evaluated | |  | Active ROM before pain |
| §4.71a Rating | - | - | 0% | 10% |

The PEB coded the shrapnel wound of the right foot as 8699-8622 (analogous to neuritis of the superficial peroneal nerve, moderate) rated 10%; the PEB adjudicated the numbness and limb pain as category II conditions (conditions that contribute to the unfitting condition, but are not coded as separately unfitting themselves). The VA rated two conditions in the right foot: status post multiple fragment wounds, right lower extremity with unicortical fibula fracture and acquired flat foot coded 5311 (muscle group XI function…moderately severe) and right superficial peroneal and tibial nerve (which gives rise to the sural nerve, among others) neuropathy coded 8523 (deep peroneal nerve, severe), each rated at 20%. The first condition was assigned 20% for moderately severe muscle disability…consistent complaint of loss of power, weakness, and lower threshold of fatigue. The VA assigned a 20% rating for severe incomplete paralysis of foot movements from the sural nerve neuropathy. The Board also noted that the C&P examiner documented that the pes planus was bilateral and likely present before service, with no clear evidence of service aggravation and that the pes planus was documented on the entrance exam. An acquired equinus deformity of the foot was noted while in service, consistent with limited dorsi-flexion noted on the C&P exam. The limitation in dorsi-flexion had been attributed to the shrapnel, but not to a motor loss. This is thought to be most consistent with an analogous condition of moderate limited motion of the ankle, coded 5299-5271 and rated at 10%. There is no evidence in the record that the unicortical fracture was duty limiting after the initial injury resolved. The right lower extremity multiple fragment wounds did not cause duty impairment, as evidenced by normal motor exams by both the MEB and VA. The pain was specifically determined to be a category II condition by the PEB. The superficial peroneal nerve and deep peroneal nerve both enervate muscles. Motor examination was noted to be normal, while sensation was not. The podiatry exam documented diminished sensation in the distribution of the intermediate dorsal cutaneous nerve and an electromyography/nerve conduction velocity test showed a normal screen, but symptoms were consistent with a distal sural (sensory) neuropathy. The PEB adjudicated limb numbness as a category II condition. There is no evidence that this interfered with gait and was separately unfitting. After due deliberation, considering the totality of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board unanimously recommends no recharacterization and that the foot condition be coded as 8699-8622 (analogous to neuritis of the superficial peroneal nerve, moderate), rated at 10%.

Other Contended Conditions. Additional conditions mentioned in the CI’s application include lumbar spine osteoarthritis, osteoarthritis of both hips, and bilateral patella-femoral syndrome. These conditions were reviewed by the action officer and considered by the Board. None were clinically significant during the MEB period, carried attached profiles, were the basis for limited duty, or were implicated in the commander’s assessment. There was no evidence for concluding that any of the conditions interfered with duty performance to a degree that could be argued as unfitting. The Board determined therefore that none of the stated conditions were subject to service disability rating.

Remaining Conditions. Photo-reactive keratectomy surgery was identified in the DES file. This was an elective procedure, done nine days prior to the MEB exam and two months prior to the PEB. Initial follow-up indicated normal healing. Several additional non-acute conditions or medical complaints were also documented. None were clinically active during the MEB period, carried attached profiles, were the basis for limited duty, or were implicated in the commander’s assessment. These conditions 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. Additionally, tinnitus and hearing loss were noted in the VA rating decision proximal to separation, but were not documented in the DES file. 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 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 Board to the extent they were inconsistent with the VASRD in effect at the time of the adjudication. In the matter of the PTSD condition, the Board unanimously recommends that the CI’s prior determination be modified as follows: TDRL at 50% for six months following CI’s prior medical separation IAW §4.129 and DoD direction, and then a permanent 30% disability retirement as below. In the matter of the right foot condition, the Board unanimously recommends no change in the PEB adjudication. In the matter of the osteoarthritic of the spine or hips, patellofemoral syndrome of the knees, or any other condition eligible for Board consideration, the Board unanimously agrees that it cannot recommend any findings of unfit for an additional rating at separation.

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:

|  |  |  |  |
| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Posttraumatic Stress Disorder | 9411 | 50% | 30% |
| Shrapnel Wound R Foot | 8699-8622 | 10% | 10% |
| **COMBINED** | 50% | 40% |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090916, 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) RECOMMENDATION

ICO XXXX, FORMER USMC, XXX XX XXXX

Ref: (a) DoDI 6040.44

1. I have reviewed the subject case pursuant to reference (a). The subject member’s official records are to be corrected to reflect the following retroactive disposition:

a. Separation from the Naval Service due to physical disability with placement on the Temporary Disability Retired List with a disability rating of 50 percent for the period 15 May 2006 thru 14 November 2006.

b. Final separation from Naval Service due to physical disability effective 15 November 2006 with a disability rating of 40 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.

Assistant General Counsel

(Manpower & Reserve Affairs)