RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXX BRANCH OF SERVICE: MARINE CORPS

CASE NUMBER: PD200900622 SEPARATION DATE: 20040814

BOARD DATE: 20110310 DATE REMOVED FROM TDRL: 20060808

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SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a Reserve LCpl/E-3 (6048/ALSS/Flight Equipment Technician), medically separated from the Marine Corps in 2006. The medical basis for the separation was partial epilepsy with impairment of consciousness. CI experienced two seizures while on active duty. The first seizure occurred in April 2003 while on extended active duty for training. The seizure was thought to be related to alcohol and supplements, and he was not referred for a Medical Evaluation Board (MEB). He was called to active duty in January 2004 and deployed to Iraq. In April 2004 while serving on active duty in Iraq, the CI was hospitalized for a witnessed seizure episode that occurred shortly after going to bed. The evaluation concluded with a diagnosis of epilepsy, medically disqualifying for continued military service, and the CI underwent an MEB. Partial epilepsy with impairment of consciousness was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable. The informal PEB (IPEB) adjudicated the partial epilepsy with impairment of consciousness condition as unfitting, with likely application of the SECNAVINST 1850.4E Enclosure (9) and DoDI 1332.39, E2.A1.4.3. He was placed on the Temporary Disability Retired List (TDRL) in August 2004 with a rating of 40%. He underwent TDRL reevaluation in the spring of 2006, and the IPEB removed him from the TDRL with a permanent rating of 20%. The CI appealed to the formal PEB in May 2006, and was then medically separated in August 2006 with a 20% disability rating.

CI CONTENTION: The CI states: “Condition still inhibits my life as evidenced by my VA disability compensation.”

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RATING COMPARISON:

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| **Service IPEB – Dated 20060322** | **VA (Prior to & After Separation from TDRL)\*** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL - 20040814** | **TDRL** | **Sep.** | **40%-80% VA Raings\*** |
| Partial Epilepsy…  | 8999-8910 | 40% | 20% | Seizure Disorder | 8910 | 40% | 20051031 |
| 80% | 20070109 |
| 60% | 20090826 |
| **Final Combined: 20%** | **Total Combined: 40%** |

\*VA Seizure Disorder ratings effective: 40% from 20040815; 80% from 20070109; and 60% from 20091201

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ANALYSIS SUMMARY: Several Navy records are not in evidence and could not be located after requests to the Navy, the VA, and the CI. The CI did not respond to correspondence requesting copies of any relevant documentation; however reported having no documentation during follow-up telephonic contact. Further such attempts would likely be futile and would introduce further undue delay in processing the case. Specifically missing are documents pertaining to CI’s permanent disposition at the time of removal from the TDRL, particularly any narrative summary, contemporaneous medical documentation, or PEB rating rationale. The historical SECNAVINST 1850.4E and DoDI 1332.39 rating criteria in force at the time of removal from the TDRL significantly differ from the VA Schedule for Rating Disabilities (VASRD) criteria.

Partial Epilepsy with Impairment of Consciousness / Seizure Disorder. VASRD criteria for rating epilepsy are based on the frequency of major or minor seizures. The clinical description of the seizures is consistent with VA criteria for a major seizure (generalized tonic-clonic with loss of consciousness). At the time of the October 31, 2005 Compensation and Pension (C&P) examination, approximately six months before TDRL reevaluation in 2006, the CI reported experiencing four seizures: one seizure in April 2004, May 2004, October 20, 2004, and in early January 2005, with no seizures between January 2005 and the VA C&P examination.

The VA rating of 40% was based on the C&P on October 31, 2005 and CI report of a seizure October 20, 2004 and January 2005; i.e. 2 major seizures in the past 12 months (“at least 1 major seizure in the last 6 months or 2 in the last year”) although there had been only 1 seizure in the preceding 365 days at the time of the C&P examination, exceeding the 12 month period by 10 days. Strict application of criteria at that time might achieve a 20% evaluation (“at least one major seizure in the last two years; or at least two minor seizures in the last six months”).

There is no further information regarding the occurrence of seizures until the next C&P examination in January 2007, approximately five months following finalization from TDRL. At that time, CI was employed, driving (“license had never been taken away before [October 2007] because seizures were at night in sleep”), and stated the condition had a minor effect on daily activity. He reported experiencing “four to six” seizures per year (description consistent with major seizures) on medication upon which an 80% VA evaluation was based. The Board noted that the history of seizure frequency reported in this C&P examination lacked the detailed description of the C&P examination in October 2005, or any corroborating treatment medical records. The VA decreased the CI’s rating to 60% based on exam of August 2009 when the CI was no longer on medications due to side-effects, and this was considered outside the timeframe for rating proximate to separation.

The Board reviewed and concurred with the TDRL entry rating of 40% IAW VASRD §4.124a (including without application of service rules noted above). The Board must determine the most appropriate fit with VASRD §4.124a criteria for its permanent rating recommendation at the time of permanent disability disposition from military service. Due to the fact that DoD and Navy disability rating guidance in effect at the time significantly altered the PEB’s approach to rating seizure disorder, and absent documentation to the contrary, the Board could not presume regularity in government proceedings at the time of the 2006 PEB and removal from the TDRL. However, the Board noted that at the time of placement on the TDRL use of those special rules would have resulted in 0% rating, which was not the case. The Board notes that the available evidence of the October 2005 C&P examination 10 months prior to removal from the TDRL supported a 20% rating, while the January 2007 C&P examination five months afterwards suggests a higher rating based on CI report of “approximately four to six” major seizures per year. Due to the level of detail, the Board concluded the October 31, 2005 C&P has higher probative value than the January 2007 examination. Based on the fact that the evidence of record entering the period TDRL re-evaluation did not support a higher rating, and the absence of substantial credible evidence to the contrary at the time of the PEB in late spring 2006, the Board concludes that the preponderance of evidence does not support a higher rating than 20% (“at least one major seizure in the past two years and none in the past six months”).

Remaining Conditions. No other conditions were identified in the available documentation, and no other conditions were service connected with a compensable rating by the VA within twelve months of separation or contended by the CI. The Board therefore has no reasonable basis for recommending any additional unfitting conditions for 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. In the matter of the seizure disorder and IAW VASRD §4.124a, the Board unanimously recommends a TDRL rating of 40%, and by a vote of 2:1, a permanent rating of 20% coded 8910. The single voter for dissent (who recommended a rating of 40%) submitted the addended minority opinion. 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 therefore recommends that there be no recharacterization of the CI’s disability and separation determination.

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| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT****RATING** |
| Partial Epilepsy with Impairment of Consciousness | 8999-8910 | 40% | 20% |
| **COMBINED** | **40%** | **20%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20091005, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

 Deputy Director

 Physical Disability Board of Review

MINORITY OPINION: The AO disagrees with the majority and recommends a 40% permanent rating for seizure disorder. The PEB permanent rating at time of removal from the TDRL, as described above, is presumed to have been derived from SECNAVINST 1850.4E Enclosure (9) and/or DoDI 1332.39, E2.A1.4.3.which were in effect at the time, and preceded the promulgation of the National Defense Authorization Act 2008 mandate for Department of Defense adherence to Veterans Administration Schedule for Rating Disabilities (VASRD). At the time of final adjudication, SECNAVINST 1850.4E and DoDI 1332.39 modified the normal application of VASRD rating criteria for seizure disorder to rate based on industrial impairment, and to not consider seizures related to alcohol ingestion, and to consider nocturnal seizures as generally not relevant for rating consideration (under industrial impairment). It is likely that the PEB applied guidance from the SECNAVINST and/or DoDI in determining a permanent rating, most likely with regard to decreasing the weight placed on CI’s nocturnal seizures. VASRD guidance under VA Disability Code 8910 bases the rating solely on the frequency of major or minor seizures and specifically contradicts the intent of the prior DoD-specific guidance in “Note (3): There will be no distinction between diurnal and nocturnal major seizures.” The clinical description of the CI’s seizures is consistent with VA criteria for a major seizure (generalized tonic-clonic with loss of consciousness). The key issue then is determining what the frequency of major seizures was during the one year prior to exit from TDRL (August 2005-August 2006).

Any single seizure after February 2006 or two seizures after August 2005 would meet the 40% criteria of “at least one major seizure in the last six months or two in the last year.” While the October 2005 C&P exam (10 *months prior to exit from TDRL*) did not document a recent seizure (January 2005 as most recent), it covered, at most, three months of the critical one-year period. The January 2007 C&P examination (*five months after exit from TDRL*) indicated a history of “on the medication he only has approximately four to six” major seizures per year. This documentation of seizure history is not up to the desired level of detail; however, there is no requirement for any documented witness statements or mandate for seeking post-seizure treatment in the VASRD (contrasting with intervertebral disc [back] incapacitating episodes). VA guidance is that once a formal diagnosis of seizure is documented, the normal lay person is an adequate judge of when they have had a seizure, and therefore this report of seizure frequency must be considered. Even conceding the minimum of four seizures in the year prior to the January 2007 exam, there is almost a certainty that the CI had either one seizure in the six months prior to, or two seizures in the one year prior to, exit from TDRL in August 2006. There was also no evidence to counter that C&P seizure history report. Data may have been contained in the service/DES records; however, no records were available for that time period, despite multiple searches by the Navy. The assumption of DES regularity is of very doubtful help in this case as there was a marked difference in the DOD/Navy criteria for rating from the VASRD in effect at the time of removal from TDRL. The DES could have appropriately rated the CI at 20% IAW DoD-specific guidance, given many scenarios that would be rated at 40% IAW application of the VASRD alone.

The combination of absence of DES evidence contemporaneous with the time of permanent disposition, the likelihood that the PEB applied special rules that would result in a lower rating, and the post-separation C&P seizure history warrants application of reasonable doubt in the favor of the member (VASRD §4.3). Considering the totality of the evidence and mindful of VASRD §4.3 (reasonable doubt), the AO recommends a permanent disability rating of 40% in this case as appropriate, fair and equitable.

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| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT****RATING** |
| Seizure Disorder | 8910 | 40% | 40% |
| **COMBINED** | **40%** | **40%** |

MEMORANDUM FOR DIRECTOR, SECRETARY OF THE NAVY COUNCIL OF REVIEW BOARDS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION ICO XXXXXX, FORMER USMC, XXX XX XXXX

Ref: (a) DoDI 6040.44

 (b) PDBR ltr dtd 23 Mar 11

 I have reviewed the subject case pursuant to reference (a) and, for the reasons set forth in reference (b), approve the recommendation of the PDBR Mr. XXXX’s records not be corrected to reflect a change in either his characterization of separation or the disability rating previously assigned by the Department of the Navy’s Physical Evaluation Board.

 Principal Deputy

 Assistant Secretary of the Navy

 (Manpower & Reserve Affairs)