RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Air Force

CASE NUMBER: PD2009-00627 SEPARATION DATE: 20080401

BOARD DATE: 20101201 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

SUMMARY OF CASE: This covered individual (CI) was an active duty SRA/E-4, (1C5, Aerospace Control and Warning Systems) medically separated from the Air National Guard in 2008 after 3 plus years of combined service (prior Army National Guard). The medical basis for the separation was Post Traumatic Stress Disorder (PTSD). The CI started to exhibit symptoms of PTSD following return from deployment to Camp Taji, Iraq Feb 2005-Jul 2005. The CI was treated for PTSD with group and individual therapy as well as psychiatric medications with some improvement in symptoms. The CI did not respond adequately to perform within his military occupational specialty (AFSC) and was issued an S-4 profile and referred to a Medical Evaluation Board (MEB). PTSD was addressed in the Medical Evaluation and forwarded to the Physical Evaluation Board (PEB) on the Air Force (AF) Form 618. The informal PEB adjudicated the PTSD condition as unfitting and rated 10%; with apparent application of DoDI 1332.39 E2.A1.5 which was in effect at the time of the PEB. However, DoDI 1332.39 was superseded by NDAA 2008 by the time of CI’s date of separation. The CI made no appeals, and was thus medically separated with a 10% disability rating.

CI CONTENTION: The CI states: “I was assigned less than 50% disability rating by the military for my unfitting PTSD upon discharge from active duty. In accordance with the class action notice, assign the highest final disability rating applicable consistent with 38 CFR 4.129 and DOD policy, to the extent such increase will not adversely affect my total compensation, including but not limited to compensation pursuant to CRSC.” This case is court remanded under the *Sabo et al v. United States* class action suit.

RATING COMPARISON:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB 20071227** | | | | **VA (10 Mo. Before Separation) Effective 20061229** | | | |
| **Condition** | **Code** | **Rating** | **Date** | **Condition** | **Code** | **Rating** | **Exam** |
| PTSD | 9411 | 10% | 20071227 | PTSD | 9411 | 30% | 20070511 |
| No PEB Entry | Not in DES Package | | | Hand Problem; Hearing Loss; Back Pain | | | NSC |
| **TOTAL Combined: 10%** | | | | **TOTAL Combined: 30%\*** | | | |

\*VA Appeal-granted PTSD stressor with VARD dated 20090828

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ANALYSIS SUMMARY:

PTSD Rating Recommendation: The PEB rating, as noted above, appeared to be derived at least in part from DoDI 1332.39 and the PEB preceded the promulgation of the NDAA 2008 mandate for DOD adherence to Veterans Administration Schedule for Rating Disabilities (VASRD) §4.129. However, the CI’s date of separation followed the effective date for NDAA 2008. 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 sources of evidence on which to base the permanent rating recommendation in this case are the pre-separation evaluations including the Veteran Administration (VA) Initial PTSD rating evaluation (11 months prior); MEB Narrative Summary (NARSUM) (9 months prior); and the VA Psychologist’s opinion letter (based on treatment from 8 months prior). There was no comprehensive PTSD rating examination post-separation. There were over 12 VA case management and treatment notes from the date of separation through the 6 month rating period, as well as additional notes continuing to 13 months post-separation. Regarding the CI’s pre-separation function: Symptoms noted by the VA examiner included anhedonia, hyper arousal, increasing social isolation, anxiety, depression, excessive rumination regarding service related activities and ongoing war efforts, sleep disturbance, nightmares of service related memories, decreased appetite, retreat from recreation, avoidance of social settings, and mild paranoia. The MEB documented that the CI had social isolation and avoidance of social settings. The CI was prescribed an antidepressant and the examiner noted mood changes with irritability as a concern, and stressed the exacerbation from military activities. The CI was diagnosed with AXIS II Personality Disorder which is not a condition considered a physical disability, and is not ratable. The CI’s global functioning (GAF) was assessed from moderate symptoms (GAF=55) to mild symptoms (GAF=65) during the 8 months prior to separation. The psychology summary indicated symptoms of anxiety, depression, avoidance and impairments in affect regulation, social interaction and re-experiencing of trauma. A comprehensive review of all of the pre-separation evidence would lead to independent rating IAW VASRD §4.130 of 30%. Therefore the minimum 50% TDRL rating IAW §4.129 is appropriate. Although the pre-separation evaluation serves as a useful reference point and carries relevant probative value, the Board strongly considered the less robust post-separation medical information to project the CI’s medical condition at the six month rating timeframe. As noted above, lacking rating evaluations, the Board considered the totality of the VA case management and treatment notes. The VA rated their 11 month pre-separation exam at 30% effective 20061229 (independent of §4.129). However, that rating was not accomplished until the CI’s VA Board of Appeals case was granted in 20090817 (VARD 20090828) that substantiated the CI’s stressor for PTSD. Therefore the CI had no VA rated medical condition until 16 months after separation (applied retrospectively). The CI was provided VA vocational rehabilitation and was in the VA Homeless Program (including domicile living) during the year following separation. Treatment notes indicated PTSD with mild to moderate symptoms and that the CI was only intermittently employed, and on unemployment. The CI had worked for the VA at one point, but was dismissed apparently for forgetting things or personality conflict with his supervisor. The CI’s PTSD symptoms were not clearly delineated in any single note, but the gestalt was one of continued anxiety, episodic depressed mood and motivation, anger, flattened affect and social isolation. Although beyond the 6 month rating period the CI’s lack of ability to manage his transition from the VA Homeless Program to HUD supported housing (missed appointments, lack of follow-through, changing decisions, etc.,) did not indicate return to the CI’s pre-PTSD level of high functioning. All Board members agreed that the record did not support a 70% rating under §4.130 and that the 10% threshold was exceeded. The Board deliberated therefore primarily between 50% and 30% as the permanent rating recommendation IAW §4.130. After due deliberation, considering all of the evidence, the Board agreed that a permanent separation rating of 30% was most consistent with the preponderance of the evidence and a fair recommendation in this case.

Other Conditions: No other conditions were noted in the NARSUM or found elsewhere in the Disability Evaluation System (DES) file. No other conditions were contended in the application or identified by the VA within 12 months of separation. The Board therefore has no basis for consideration of any other conditions eligible for additional rating at separation.

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, PEB reliance on DoDI 1332.39 for the rating Post-Traumatic Stress Disorder was likely operant in this case and the condition was adjudicated independently of that instruction by the Board. The service also did not apply VASRD §4.129 to the CI’s PTSD adjudication as required by NDAA 2008 in effect at the time of the CI’s separation, for which the Board also provides remedy. In the matter of the PTSD condition, the Board unanimously recommends an initial TDRL rating of 50% in retroactive compliance with VASRD §4.129 as DOD directed; and a 30% permanent rating at 6 months IAW VASRD §4.130. 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.

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** |
| Post-Traumatic Stress Disorder | 9411 | 50% | 30% |
| **COMBINED** | **50%** | **30%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100327, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

Deputy Director

Physical Disability Board of Review

SAF/MRB

1535 Command Drive, Suite E-302

Andrews AFB, MD 20762-7002

Reference your application submitted under the provisions of DoDI 6040.44 (Section 1554, 10 USC), PDBR Case Number PD-2009-00627.

After careful consideration of your application and treatment records, the Physical Disability Board of Review determined that the rating assigned at the time of final disposition of your disability evaluation system processing was not appropriate under the guidelines of the Veterans Administration Schedule for Rating Disabilities. Accordingly, the Board recommended your separation be re-characterized to reflect disability retirement, rather than separation with severance pay.

I have carefully reviewed the evidence of record and the recommendation of the Board. I concur with that finding, accept their recommendation and determined that your records should be corrected accordingly. The office responsible for making the correction will inform you when your records have been changed.

As a result of the aforementioned correction, you are entitled by law to elect coverage under the Survivor Benefit Plan (SBP). Upon receipt of this letter, you must contact the Air Force Personnel Center at 1-800-531-7502 to make arrangements to obtain an SBP briefing prior to rendering an election. If a valid election is not received within 30 days from the date of this letter, you will not be enrolled in the SBP program unless at the time of your separation, you were married or had an eligible dependent child, in such a case, failure to render an election will result in automatic enrollment.

Sincerely

Director

Air Force Review Boards Agency

Attachment:

Record of Proceedings

cc:

SAF/MRBR

DFAS-IN

PDBR PD-2009-00627

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Physical Disability Board of Review and under the authority of Section 1554, Title 10, United States Code (122 Stat. 466) and Section 1552, Title 10, United States Code (70A Stat. 116) it is directed that:

The pertinent military records of the Department of the Air Force relating to xxxxxxxxx, are corrected to show that:

a.  He was not discharged on 1 April 2008 with entitlement to disability severance pay; rather, on that date he was relieved from active duty and on 2 April 2008 his name was placed on the Temporary Disability Retired List (TDRL), with a diagnosis of Post-traumatic Stress Disorder, VASRD code 9411, rated at 50%.

b.  On 1 April 2008 he declined coverage under the Survivor Benefit Plan (SBP) because he had no eligible dependents.

c. On 2 October 2008 he was removed from the TDRL and permanently retired with a final combined disability rating of 30%.

Director

Air Force Review Boards