RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXX BRANCH OF SERVICE: NAVY

CASE NUMBER: PD0900629 SEPARATION DATE: 20041102

BOARD DATE: 20110208

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an E-6 (IT1, Information Systems Administrator/Recruiter) medically separated from the Navy in 2004 after over seven years of service. The medical basis for the separation was Traumatic Brain Injury (TBI). While on vacation in June 2002, the CI fell off a 25-40 foot cliff while riding an all terrain vehicle (ATV). He sustained severe fractures to his face to include leakage of cerebral spinal fluid, frontal sinus fracture, injury to the right orbit, and comminuted nasal fractures, with resultant loss of smell (anosmia) and loss of taste (ageusia). His injuries required surgical reconstruction with plates, titanium mesh, and screws. A subsequent revision surgery for bilateral leaking tear ducts was performed. The CI also developed severe migraines and vertigo following the head injury which both interfered with his ability to perform his military duties. The CI could not perform within his military occupational specialty (MOS) or to participate in a physical fitness test. He was assigned duty outside his regular MOS, working as a recruiter, and was therefore referred to a Medical Evaluation Board (MEB). The Air Force performed the MEB and diagnosed TBI, posttraumatic migraine HA, and central vertigo. The case was forwarded to the US Navy Physical Evaluation Board (PEB). The informal PEB (IPEB) determined TBI to be unfitting with central vertigo and post traumatic migraine headaches as related Category II conditions and not separately unfitting from the TBI. Anosmia and ageusia were adjudicated as not unfitting conditions for military service (Category III). The IPEB rated the TBI at 10% using the Veterans Affairs Schedule for Ratings Disabilities (VASRD) and applicable Navy and Department of Defense regulations. The CI appealed and met a formal PEB (FPEB). The FPEB upheld the earlier PEB decisions, with two additional not unfitting conditions (Category III) of lumbosacral and cervical strain. The CI made no further appeals, and was separated at 10% disability.

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CI CONTENTION: The CI states: “The evaluation is too low … My records show a more serious head injury and symptoms, yet the Physical Evaluations Board did not recognize these issues. Furthermore, all of my injuries were not evaluated and this oversight is so extreme 10% disability rating compared to 90% rating by the VA.”

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Rating Comparison Chart on Page 2

RATING COMPARISON:

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Service FPEB - 20040727** | | | | **VA (Pre-Separation) – All Effective 20041103** | | | | |
| **Conditions** | | **Code** | **Rating** | **Condition** | | **Code** | **Rating** | **Exam** |
| TBI | 8045-9304 | | 10% | Post Traumatic Memory Def | 9399-9304 | | 10% | 20040719 |
| Central Vertigo | | Cat II | | Vertigo Post Trauma | | 6204 | 30% | 20040719 |
| Post Traumatic Migraine Headache | | Cat II | | Post Trauma Migraines | | 8100 | 50% | 20040719 |
| Anosmia | | Cat III | | Anosmia | | 6275 | 10% | 20041103 |
| Ageusia | | Cat III | | Ageusia | | 6276 | 0% | 20041103 |
| Lumbosacral Strain | | Cat III | | Strain Spine (TL) | | 5237 | 0% | 20040719 |
| Cervical Strain | | Cat III | | Cerv Strain Degen Changes | | 5237 | 20% | 20040719 |
| ↓No Additional MEB/PEB Entries↓ | | | | L/R Orbital Fx  s/p Surgery w/ Scars … | 5299-5296 | | 50% | 20040719 |
| Hypesthesia LU Extrem a/w cervical … | 8599-8515 | | 10% | 20050606 |
| Dacryocystorhinostomy… | | 6025 | 0% | 20040719 |
| Dev Septum w/Blockage… | | 6502 | 0% | 20040719 |
| Sinusitis | | 6510 | 0% | 20040719 |
| GERD | 7399-7346 | | 10% | 20040719 |
| Scars R/ arm | | 7801 | 10% | 20040719 |
| Sinusitis; Tinea pedis plantaris; Strain L/hand knuckle; Strain R/wrist hand; Strain R/ elbows; Strain L/knee; Strain R/ knee; Herpes simplex: All 0% | | | | |
| 2 X NSC | | | | |
| **Total: 10%** | | | | **TOTAL Combined (Includes Non-PEB Conditions): 90%** | | | | |

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ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that there should be additional disability assigned for conditions which the VA rated. However, the DES has neither the role nor the authority to compensate service members for conditions that are not unfitting for continued duty, even when diagnosed on duty or not unfitting residuals of unfitting conditions. This role and authority is granted by Congress to the Veterans Administration. The Board authority resides in evaluating the fairness of DES fitness decisions and rating determinations for disability at the time of separation. The formal hearing evaluation findings of the PEB were very detailed and presented an excellent case summary and the service rationale for their rating determination. The crux of this case is rating the CI’s significant head trauma and residuals IAW the VASRD, in effect at the time. The FPEB ruled that central vertigo and posttraumatic migraines were subjective symptoms that must be rated under 8045-9304, with a maximum of 10% IAW paragraph two of 8045 of the 2004 VASRD. The Board obtained VA Central Office opinion on the historical interpretation of 8045 (Brain disease due to trauma) prior to implementation of Training Letter (TL) TL06-03, TL07-05, and Fast Letter (FL) FL08-36 which are not applicable to this case. The Board recognized the severity of the head injury incurred by the CI and evaluated whether the sequelae of the TBI were potentially unfitting for continued military service, independent of the TBI itself. The Board considered using the VASRD option of rating the CI’s unfitting conditions under alternate codes. If the CI were instead rated under codes for vertigo and headache, the rating would be more favorable to the CI. VASRD §4.7 states that, “Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria for that rating. Otherwise, the lower rating will be assigned.” The Board has the prerogative to use an alternate rating scheme if it better fits the clinical picture of the CI’s disability. To support this approach, there must be evidence in the Disability Evaluation System (DES) that the individual conditions are separately unfitting for continued military service.

Vertigo. There is evidence showing that the vertigo interfered with the CI’s ability to perform his Navy duties related to physical exercise. The inability to participate in physical fitness due to dizziness is mentioned in the non-medical assessment (NMA), 9 March 2004, in which the commander states that the CI cannot participate in group physical exercise due to his medical condition and dizziness. The CI was unable to complete a fitness test after October 2001, was not deployable, and was above the weight limit for his height, due to lack of exercise. The MEB NARSUM mentions that the CI’s vertigo and headaches make it hard for him to exercise” but he is able to do a long walk outside at early dawn.”

There is no VASRD code for vertigo. There are codes that can be used analogously since they involve vestibular disequilibrium, i.e. 6205 Meniere’s syndrome vs. 6204 peripheral vestibular disorders. The use of 6205 would require hearing loss, thus the 6204 code used analogously would match the clinical condition more accurately. While 6204 refers to peripheral vertigo, the code is being used analogously for central vertigo, 6299-6204. In addition, to a diagnosis of central vertigo, the neurology exam of 14 July 2004 stated that there may be a component of peripheral vertigo. (The source of the vertigo does not affect whether or not the condition is unfitting. The code can be used analogously as 6299-6204.) For a 30% rating staggering is required, and that is not documented in the record. Thus the 10% rating that is for occasional dizziness would be a better match. The vertigo occurs with changes in position and thus is occasional. The Board considered the option of rating the vertigo as an unfitting condition under an alternate code of 6299-6204.

Migraines. To give a rating to the CI’s migraines requires that they be demonstrated as unfitting conditions for continued military service. In the C&P neurology exam on 20 July 2004, it is stated that the CI had headaches that were accompanied by photophobia, phonophobia, nausea, and vomiting. The headaches occurred four times per day with a duration of one to four hours. It is documented that the CI was unable to work during these attacks. The headaches were being treated with medications for migraine. The C&P exam of 20 July 2004 documents that the CI experiences insomnia due to the headaches, and this results in fatigue which causes him to miss work at least once per week. The formal PEB on 27 July 2004 documents the occurrence of 3-4 headaches per day lasting 35-40 minutes with more intense headaches with photophobia, nausea, and vomiting lasting hours every 5 to 6 days. The headaches likely contributed to the CI’s inability to perform his duties, and some were prostrating (IAW VASRD definition, but not IAW the DoDI).

The rating of migraine headaches under 8100 has four possibilities. The CI has more than occasional headaches, and thus the 0%, 10%, and 30% ratings do not match the frequency of his attacks. If frequency were the only criterion then the CI would be rated at 50%. For a rating of 10%, 30%, or 50%, the attacks must be prostrating. The question arises as to how many of the attacks were actually prostrating proximate to the time that the CI was discharged in November 2004. To apply a rating of 30% requires documentation of prostrating attacks at least once per month. The CI was missing work at least once per week, was unable to work during the headaches that occurred several times per day and lasted for hours, and the CI required migraine medication for the headaches four times per day. The examiner made note of the fact that there was very frequent medication use, indicating that the attacks are severe. A rating of 50% requires “very frequent, completely prostrating and prolonged attacks” productive of severe economic inadaptability. Although the CI had frequent absences from work, there were times that the CI took medication four times per day with relief. This indicates that the headaches were unlikely to be completely prostrating since they were often ameliorated by medication. Missing work once per week, however, may indicate “economic inadaptability.” The lower rating of 10% requires prostrating attacks, less than once per two months. If the headaches caused the CI to lose enough sleep to miss work once per week they were clearly more frequent than that required for a 10% rating. The 30% rating is most fitting for the frequency and severity of the CI’s migraine headaches. The Board considered the option of rating the migraine headaches as an unfitting condition under an alternate code of 8100.

TBI, Vertigo, Migraines. The Board considered that the unfit finding for TBI was administratively final. The formal hearing evaluation findings of the PEB were considered accurate evaluations of the CI’s condition and coding considerations. The Board adjudged that TBI was the primary unfitting condition, that 8045 coding had to be applied in this case, and that no alternative rating scheme was allowable within the 8045 restrictions in effect at the time of separation. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the formal PEB’s rating decision for the TBI with Category II conditions, vertigo and migraine as 8045-9304, at 10%.

Other Conditions in the DES. Anosmia and ageusia are listed in the DES. Left and right orbital fracture status post reconstructive surgery, cervical strain and degenerative joint disease with associated hypesthesia left upper extremity, lumbar strain, dacryocystorhinostomy status post bilateral blockage of nasolacrimal ducts, and deviated septum with intermittent nasal airway blockage were also listed in the DES, but these conditions were not found by the formal PEB to be unfitting. The Board agrees that there is not sufficient evidence in the record that any of these conditions continued to prevent the CI from performing his military duties after his convalescent period. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the formal PEB fitness adjudication for any of these conditions. The VA rated the CI at 50% for bilateral orbital fractures and reconstructive surgery analogously to 5296 (Skull, loss of part of). However, there was no duty limitation associated with this condition, and no indication that it should have been found unfitting. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of orbital fractures, reconstructive surgery or skull defects as unfitting conditions for separation rating.

Remaining Conditions. The VA identified conditions not present in the DES package: sinusitis, gastroesophageal reflex disease (GERD), scars right arm, strain left hand knuckle, tinea pedis plantaris, strain right wrist hand, strain right elbows, strain left knee, strain right knee, sinusitis, lumbago, herpes simplex. 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.

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BOARD FINDINGS: IAW DoDI 6040.44, provisions of DoD or Military Department regulations or guidelines relied upon by the formal 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. The Board did not surmise from the record or FPEB ruling in this case that any prerogatives outside the VASRD were exercised; however, the option of the use of alternative coding from the VASRD was considered by the Board in an effort to provide a more favorable outcome for the CI. In the matter of the TBI with vertigo and migraines conditions and IAW VASRD §4.124a, the Board by a vote of 2:1 recommends no change in the FPEB adjudication as 8045-9304 at 10%. The single voter for dissent (who recommended migraine headaches coded 8100 at 30% and vertigo coded 6299-6204 at 10%) submitted the addended minority opinion. In the matter of the anosmia, ageusia, lumbosacral strain, and cervical strain conditions, the Board unanimously recommends no recharacterization of the formal PEB adjudications as not unfitting. In the matter of the other conditions listed in the DES; left and right orbital fracture status post reconstructive surgery, and degenerative joint disease with associated hypesthesia left upper extremity, dacryocystorhinostomy status post bilateral blockage of nasolacrimal ducts, deviated septum with intermittent nasal airway blockage and orbital fractures, or reconstructive surgery or skull defects conditions or any other medical conditions eligible for Board consideration, the Board unanimously agrees that it cannot recommend any findings of unfit for additional 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** | **RATING** |
| TBI | 8045-9304 | 10% |
| **COMBINED** | **10%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090921 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 Action Officer recommends separate migraine headaches and vertigo coding and rating in this case regarding the very strong evidence of the migraine headaches and vertigo as separately unfitting conditions. Each condition warrants individual ratings within the VASRD because providing a separate rating will more accurately reflect the level of disability present in the CI at the time of separation from military service, and the symptoms for which he was separated. The primary unfitting nature of the CI’s headaches and vertigo was clearly laid out in the DES, and it is appropriate for the CI to receive compensation for those disabilities. There was no indication that TBI would have been unfitting absent these two conditions (only minor neurocognitive findings).

The Board deliberated between two rating schemes which included the use of TBI-specific coding at the time of separation versus the option of using alternate valid rating coding which more accurately matched the clinical condition of the CI and the severity of his injuries/symptoms that led to separation, and was aligned with the VA coding (with different rating levels) of the same conditions at the time of the CI’s separation. The majority for no recharacterization held that there had been no rating outside the VASRD rules, with strict adherence to the 10% limitations for “subjective symptoms” of 8045-9304, and that no clear formal PEB rating error was in evidence. However, VASRD §4.7 (Higher of two evaluations) and VASRD §4.3 (Resolution of reasonable doubt), were not applied, in favor of a higher rating schema for migraine (30%) and vertigo (10%). The majority vote in this case, with strict adherence to the formal PEB-chosen coding scheme (8045-9304) and its 10% “subjective symptoms” limit does not accurately describe the CI’s level of disability. To say that a 10% rating more accurately reflects the disability picture of the CI, rather than the use of an alternate scheme that rates the individual unfitting conditions of disabling migraine headaches and disabling vertigo is to deny the VA’s interpretation and application of the historical VASRD as used by the VA at the time. This historical VASRD application and rating scheme was confirmed as IAW VASRD tenants in effect in 2004 by current VA staff (VBAVACO).

The AO 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 |
| Migraine headaches | 8100 | 30% |
| Vertigo | 6299-6204 | 10% |
| COMBINED | 40% |

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

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

ICO XXXXX, FORMER USN, XXX-XX-XXXX

Ref: (a) DoDI 6040.44

(b) PDBR ltr dtd 29 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 in 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)