RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: marine corps

CASE NUMBER: PD0900715 SEPARATION DATE: 20080215

BOARD DATE: 20111019

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SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Major (0202, Marine Air/Ground Task Force (MAGTF) Intelligence Officer) medically separated from the Marine Corps in 2008 after 13 years of service. The medical basis for the separation was posttraumatic stress disorder (PTSD). After an extensive convalesce and therapeutic period, the CI did not respond adequately to perform the duties and responsibilities of a Marine Corps officer and underwent a Medical Evaluation Board (MEB). PTSD was addressed in the narrative summary (NARSUM) and forwarded to the Physical Evaluation Board (PEB) on the NAVMED 6100/1. Additional conditions supported in the Disability Evaluation System (DES) packet are discussed below, but were not forwarded for PEB adjudication. The PEB adjudicated the PTSD condition as unfitting, rated 10%; with application of the SECNAVINST 1850.4E and DoDI 1332.39 (E2.A1.5), respectively. The CI made no appeals, and was then medically separated with a 10% combined disability rating.

CI CONTENTION: The CI states: ‘’I was separated with a 10% disability rating as indicated by the 19 November 2007 Physical Evaluation Board finding. I was found unfit for PTSD, which was determined to have been incurred as a direct result to combat. Upon discharge I was evaluated by the Department Veterans Affairs and rated at 50% disabled for PTSD. Subsequently I was reevaluated by the DVA and determined to still suffer from PTSD and continue to be rated as 50% disable due to PTSD. Due to the DVA’s repeated rating at 50% disabled for the same condition that resulted in my separation from the Marine Corps, I respectfully request that my physical evaluation board finding be adjusted to reflect the same rating as the DVA specifically request that I be rated as 50% disabled for PTSD.”

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service FPEB – Dated 20071119** | | | **VA (2 Mo. Post Separation) – All Effective 20080216** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| PTSD | 9411 | 10% | PTSD and Major Depressive Disorder | 9411 | 50%\* | 20071119 |
| Major Depressive Disorder, Single Episode, in Partial Remission | Category 2 | |
| ↓No Additional MEB / PEB Entries↓ | | | Sinusitis with Eustachian Tube Dysfunction | 6512 | 10% | 20071119 |
| **0% x 6 / NSC x None** | | | |
| **Combined: 10%** | | | **Combined: 60%** | | | |

\*Initial VA Rating based on application of §4.129

ANALYSIS SUMMARY:

Posttraumatic Stress Disorder. In December 2006, at the end of his deployment to Iraq the CI developed symptoms of depression in response to a variety of duty related stressors. Initial mental health evaluations upon redeployment in January and February 2007 diagnosed major depressive disorder. In March 2007 he endorsed symptoms of PTSD and mental health professionals recorded DSM-IV Criterion A stressors meeting the diagnosis of PTSD. The MEB NARSUM, 16 August 2007 reflected improving symptoms and the PEB returned the CI to duty. The CI requested reconsideration, contending he was unfit for duty, and submitted letters from his military and civilian mental health providers in support of his contention. After reconsideration, the PEB found the CI unfit due to his mental condition.

The PEB rating, as described above, was likely derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act 2008 mandate for DoD adherence to Veterans Administration Schedule for Rating Disabilities (VASRD) §4.129. IAW DoDI 6040.44 and DoD guidance (which applies current VASRD 4.129 to all Board cases), the Board must consider if the tenant of §4.129 (mental disorders due to traumatic stress) was applicable. The salient question before the Board is whether the CI’s psychiatric condition meets the §4.129 definition of “a mental disorder that develops in service as a result of a highly stressful event [that] is severe enough to bring about the veteran’s release from active military service.” Should the Board decide that §4.129 is applicable in this case, then, IAW DoDI 6040.44 and DoD guidance, the Board is obligated to recommend a minimum 50% PTSD rating for a retroactive six-month period on the 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 Board considered the DSM-IV Criterion A stressors for PTSD leading mental health providers to diagnose PTSD. After considering the evidence, the Board concluded that the circumstances were sufficient for application of §4.129 in consideration of §4.3 (reasonable doubt to the member). With regard to the rating at the time of placement on TDRL IAW §4.129, all members agreed that the §4.130 criteria for a 70% rating (occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood) were not met at the time of separation, and therefore the minimum 50% TDRL rating is applicable. The most proximate source of comprehensive evidence on which to base the permanent rating recommendation at the time of removal from the TDRL in this case is the VA compensation and pension (C&P) examination performed seven months after separation. Especially since the C&P examination also reflects the stress of transition to civilian life, which is a core intent of §4.129, it carries the preponderance of probative value in the Board’s assessment of a fair permanent rating recommendation.

At the time of the VA PTSD C&P examination on 17 September 2008, seven months after separation, the CI was working full time, remained on medication, and was in treatment for his mental health condition. He reported continued “daily symptoms consistent with post-traumatic stress disorder and some daily symptoms of depression but they seem to be somewhat improved relative to what he was diagnosed with.” Reported symptoms included depression and anxiety symptoms daily (anxiety comes and goes); occasional (sometimes) sleep impairment due to intense dreams, but sleep is for the most part restful; vigilance symptoms at night that come and go; and hyperarousal with loud noises. There were no flashbacks and there were no panic attacks. “The patient states he is feeling better. He states that he feels he is doing well and states that his depression has improved.” Although he reported continued symptoms,

He has not lost any time from work and he is doing well. He is married and has one five-year-old child. He states this is his only marriage and he is happy. He gets along well with the wife and child. He has a large circle of friends. He is a native of San Diego. His leisure activities include basically "helping troops" and exercising. He does not drink or use drugs. He does not have a history of violence. He is not suicidal and basically he appears on my examination to be a functional individual who channels a lot of his energy into helping other people. He has a happy home life and he is not drinking or using drugs.

On mental status examination, the CI was pleasant, oriented, with good eye contact, and good hygiene. There was no memory loss, and no obsessive or ritualistic behavior. Rate and flow of speech were normal. There were no delusions, hallucinations, or impairment of thought process. There was no suicidal or homicidal ideation. The examiner estimated the global assessment of functioning at 65 for some mild symptoms for both PTSD and depression. The examiner concluded that:

At this point the patient appears to be doing reasonably well and is stable. He 'is very compliant and he finds his work to be fulfilling…His psychosocial functioning status and quality of life appear to have improved a bit since he was here last time. His posttraumatic stress disorder symptoms do lead to some avoidant behaviors and certainly subjective distress. Alcohol and drug abuse are not a problem. I think his prognosis overall is good and, as noted, he is competent…In my opinion I would say generally he has good functioning at this time; however, there is occasional decrease in work efficiency and possibly intermittent periods of inability to perform occupational tasks when he is under severe stress but for the most part this is a functional individual.

The Board directs its attention to its permanent rating recommendation at the end of the six-month constructive TDRL period based on the evidence just described. All members agreed that the §4.130 threshold for a 50% rating was not approached and the deliberation settled on arguments for a 10% versus a 30% permanent rating recommendation. Social and occupational impairment consistent with a 30% evaluation (occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks…), could be surmised from some of the documented symptoms at the time of the post-separation C&P examination including depression and anxiety symptoms (anxiety comes and goes), occasional sleep disturbance impairment due to intense dreams, hypervigilance symptoms at night that come and go, and hyperarousal with loud noises. Although there was sleep disturbance, sleep was for the most part restful. Depressive and anxiety symptoms were mild, and hypervigilance and startle symptoms were not characterized as impairing. There was no irritability, social withdrawal, memory and concentration problems, panic attacks, or suspiciousness. The CI had good social relationships and was working full time.

The Board noted the CI elaboration on combat stressors that was not corroborated by service records (e.g., the CI reported to have been on patrols during his first deployment to Iraq in 2005; however, the post-deployment health assessment completed by the CI on 4 May 2005 indicated the CI was mainly deployed on a ship and he checked “no” in response to questions 7, 8, and 9 regarding exposure to combat). Thus, the Board is left to consider that the CI’s accounts of his symptoms and their severity, which constitute much of the psychiatric evidence, are subject to a reasonable reduction in their probative value weight. In its assignment of probative value to the elements of the examination, the Board must acknowledge that VA C&P examinations may predispose a heightened symptom reporting since the examinee is generally quite aware that the severity of symptoms is directly correlated with the resulting rating and financial gain. Clinicians routinely accept and report statements of history given by patients, with scant ability by the examiner to objectively confirm symptom severity and related impairment. The Board will remain adherent to §4.130 standards as the measure of disability for its permanent rating recommendation, but exercises its prerogative to judiciously scrutinize the probative value and applicability of the evidence to which the §4.130 criteria are applied. All of the evidence, bolstering and reducing support for the higher rating, was debated. As many conflicting opinions as possible were resolved in favor of the CI when it was reasonable to do so. Even without the concerns of probative value just discussed, Board members agreed that the C&P examination most nearly described the 10% rather than the 30% rating. After due deliberation, considering the totality of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board concluded that the CI’s PTSD severity more nearly approximated the 10% evaluation for a permanent rating.

Remaining Conditions. Other conditions identified in the DES file included sinusitis, eustachian tube dysfunction, right elbow pain, neck pain, shoulder neuralgia, right elbow bursitis, fractured finger, hemorrhoids, tinea pedis, syncope with blood draws, history of concussion, history trauma to chest wall, occasional chest pain, symptoms of palpitations, and hypertension. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically or occupationally significant during the MEB period, none were the basis for limited duty and none 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.

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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. As discussed above, PEB reliance on DoDI 1332.39 for rating PTSD was likely operant and the condition was adjudicated independently of that instruction by the Board. 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 10% permanent rating at six months IAW VASRD §4.130. In the matters of the sinusitis with eustachian tube dysfunction, right elbow bursitis, hemorrhoids, tinea pedis, occasional chest pain, symptoms of palpitations, hypertension, 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 recommends that the CI’s prior determination be modified as follows: TDRL at 50% for six months following CI’s prior medical separation (PTSD at minimum of 50% IAW §4.129 and DoD direction) and then a separation rating of 10% as below:

|  |  |  |  |
| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Posttraumatic Stress Disorder | 9411 | 50% | 10% |
| **COMBINED** | **50%** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20091207, 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

COMMANDER, NAVY PERSONNEL COMMAND

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATIONS

Ref: (a) DoDI 6040.44

(b) PDBR ltr dtd 17 Oct 11 ICO xxxxxxxxxxxxxxxx

(c) PDBR ltr dtd 25 Oct 11 ICO xxxxxxxxxxxxxxxx

(d) PDBR ltr dtd 27 Oct 11 ICO xxxxxxxxxxxxxxxx

(e) PDBR ltr dtd 27 Oct 11 ICO xxxxxxxxxxxxxxxx

(f) PDBR ltr dtd 20 Oct 11 ICO xxxxxxxxxxxxxxxx

1. Pursuant to reference (a) I approve the recommendations of the Physical Disability Board of Review set forth in references (b) through (f).

2. The official records of the following individuals are to be corrected to reflect the stated disposition:

a. xxxxxxxx: Placement on the Permanent Disability Retired List with a 30 percent disability rating (increased from 10 percent) effective 15 January 2006.

b. XXX xxxxx: Separation from the Naval Service due to physical disability rated at 20 percent (increased from 10 percent) effective 1 December 2002.

c. XXX-XX-XXXX: Separation from the Naval Service due to physical disability rated at 10 percent (increased from 0 percent) effective 15 November 2004.

d. XXX XX XXX: Placement on the Temporary Disability Retired List at 50 percent from 15 February 2008 through 14 August 2008 with final disability separation on 15 August 2008 with a 10 percent disability rating.

e. XXX XX XXX: Separation from the Naval Service due to physical disability rated at 20 percent (increased from 10 percent) effective 30 March 2009.

3. Please ensure all necessary actions are taken to implement these decisions and the subject members are notified once those actions are completed.

Assistant General Counsel

(Manpower & Reserve Affairs)