RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXX BRANCH OF SERVICE: MARINE CORPS

CASE NUMBER: PD0900735 SEPARATION DATE: 20071031

BOARD DATE: 20110511

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Cpl/E-4 (1371, Engineer) medically separated for posttraumatic stress disorder (PTSD), and traumatic brain injury (TBI). At his August 2007 Medical Evaluation Board (MEB), three diagnoses (brain condition, headaches and insomnia) were found medically unacceptable IAW NAVPERS 18068F. The CI was referred to the Physical Evaluation Board (PEB) and was found unfit for continued military service due to PTSD and TBI, rated 10% each. Three other conditions (major depression, insomnia, and headaches) were determined to be category II (related to an unfitting condition). The CI accepted the PEB findings, and waived a formal hearing. He was thus medically separated at 20% combined disability, using the Veterans’ Administration Schedule for Rating Disabilities (VASRD) and applicable Navy and DoD regulations.

CI ‘s CONTENTION: “I feel I deserve a higher rating because my VA rating was higher than what the DoD rated me.”

RATING COMPARISON:

|  |  |
| --- | --- |
| **Navy PEB – dated 20070914** | **VA (17 mo. after Separation) All effective 20071101** |
| **Condition** | **Code** | **Rating** | **Date** | **Condition** | **Code** | **Rating** | **Exam** |
| PTSD | 9411 | 10% | 20070914 | PTSD | 9411 | 30% | 20090330 |
| Major Depression  |  | Cat. II | 20070914 |
| TBI, with Cognitive Dysfunction | 8045-9304 | 10% | 20070914 | TBI, with Cognitive Dysfunction | 8045-9304 | 0% | 20090402 |
| Headaches  |  | Cat. II | 20070914 | Headaches | 8199-8100 | 10% | 20090402 |
| Insomnia  |  | Cat. II | 20070914 |  Tinnitus | 6260 | 10% | 20090402 |
| **TOTAL Combined: 20%** | **TOTAL Combined** (*Includes Non-PEB Conditions*): 40% from 20071101 |

ANALYSIS SUMMARY:

Psychiatric Condition. This Marine was deployed to Iraq from August 2005 to March 2006. He was exposed to improvised explosive device (IED) blasts and small weapons fire. In December 2005 an IED exploded near him. He suffered loss of consciousness, followed by ten minutes of amnesia and confusion. He was treated at a combat hospital and returned to his unit. After returning to the U.S. the CI was doing fairly well, until he had a “breakdown” in February 2007. The CI threatened to commit suicide by putting a knife to his throat. He was admitted to an inpatient psychiatric unit, stabilized, and released after several days with a diagnosis of PTSD and depression. He was treated with medications and psychotherapy, and put on limited duty (LIMDU) status, working as an office clerk. Eventually, it was determined that the CI could no longer fulfill his required military duties, so an MEB was initiated. At his PTSD MEB exam in August 2007, the CI reported nightmares, flashbacks, emotional numbness, and irritability. He also stated some concern about carrying a weapon, for fear of self harm. He complained of decreased memory, increased startle response, and difficulty dealing with crowds. On his mental status exam, his affect was congruent, with mixed anxiety and mild malaise. There was no suicidal/homicidal ideation, or evidence of psychosis. Memory appeared intact. Insight was fair and judgment was good. The diagnosis was PTSD (moderate in severity) and major depression (mild to moderate). Global assessment of functioning (GAF) score was 50. The PEB found the PTSD unfitting (coded 9411), and rated it at 10% disabling. Major depression was found to be category II (related to the unfitting PTSD condition).

The September 2007 Navy PEB rating decision described above, was derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act (NDAA) 2008 mandate for Department of Defense (DoD) adherence to VA Schedule for Rating Disabilities (VASRD) §4.129. IAW DoDI 6040.44 and DoD guidance (which applies current VASRD §4.129 to all Board PTSD cases), 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. A full, comprehensive psychological evaluation was not performed right at the six-month point (April/May 2008), so the Board must use the best evidence available. The CI’s first psychological evaluation by the VA was in March 2009 (17 months after separation). The Board must therefore weigh the evidence contained in the MEB records and psychiatric narrative summary (NARSUM), balanced by the VA evidence fairly remote from separation, in order to estimate the ratable impairment at six months after separation. DoDI 6040.44 specifies a 12-month interval for special consideration to VA findings, rendering the probative value of the VA evidence in this case somewhat diminished. However, the delayed VA examination reflects the stress of transition to civilian life which is intrinsic to the core intent of VASRD §4.129. At the VA compensation and pension exam in March 2009, the CI reported that he was working as a diesel mechanic at a large truck company. He had a girlfriend, and he felt close to his family, but did not have many other friends. He reported having nightmares, irritability, crowd avoidance, short temper, increased startle response and depressed mood. The CI reported that he missed about two days of work per month due to high stress levels. His mental status exam was basically normal and his GAF score was 65. The examiner rated the occupational and social impairment (due to PTSD symptoms) as mild. The prognosis was listed as “favorable.”

The Board directed its attention to its rating recommendations based on the evidence just described. All members agreed that the criteria for a rating higher than 50% were not met at the time of separation, and therefore the minimum 50% TDRL rating (as explained above) is applicable. The Board then used interpolation to estimate the CI’s level of psychological impairment at six months following separation. The Board determined that, although the CI was generally functioning satisfactorily (with routine behavior, self-care, and conversation normal) his symptoms caused a moderate degree of occupational and social impairment, with occasional decreases in work efficiency and intermittent periods of inability to perform certain tasks. After considerable discussion and due deliberation, the Board unanimously recommends that the psychiatric condition (PTSD, coded 9411) should be given a permanent separation rating of 30% IAW VASRD §4.130. Furthermore, the Board unanimously agrees that the major depression is related to the PTSD, and is properly adjudicated as part of the psychiatric condition. It is not a separately unfitting psychiatric disorder.

Traumatic Brain Injury. As mentioned above, the CI was exposed to an IED blast in December 2005 that resulted in loss of consciousness, followed by 10 minutes of amnesia and confusion. Since that event he has had problems with headaches, insomnia and short term memory. He also has reported decreased attention span and decreased concentration. The CI was evaluated by neurology in May 2007. Magnetic resonance imaging of the brain was normal. Neuropsychological testing (June/July 2007) showed decreased attention and concentration, as well as mildly impaired memory. Efficiency of processing was poorer than average. High level problem solving (particularly visual-perceptual) was slightly impaired. The PEB rated the TBI with cognitive dysfunction at 10%, and coded it 8045-9304. Insomnia and headaches were found to be category II (related to the TBI with cognitive dysfunction).

The Board carefully examined all of the evidentiary information available. The Board’s rating recommendation for TBI (code 8045) is directly impacted in this case by the following policy (established by firm precedent and prior legal opinion). As an implied extension of the DoDI 6040.44 and NDAA 2008 mandates, the Board will comply with applicable VA disability rating policy changes issued via “FAST” (FL) or training letters (TL) effective at the time of separation. The VA TL07-05 dated 31 August 2007, specifically addressed the need for a more comprehensive rating approach to TBI pending the promulgation of the current VASRD rating formula, FL08-36 effective 23 October 2008. The VA TL07-05 provided for rating TBI by combining separate ratings from each component of the symptom complex. In this case the symptom complex includes decreased attention and concentration, mildly impaired memory, mildly impaired efficiency of processing, mild to moderate impairment of high level problem solving, mild sleep disturbance (insomnia), and headaches. This will entail separate ratings for dementia due to head trauma (coded 8045-9304), and headaches (coded 8045-8100). In effect, this renders each condition as separately unfitting for purposes of the combined disability rating. In considering the level of occupational and social impairment, per the general rating formula for mental disorders, the Board determined that the dementia symptoms were mild or transient, causing occupational and social impairment with decrease in work efficiency and occupational tasks only during periods of significant stress. As for the CI’s head pain, the Board determined that although they were occurring daily, his headaches did not reach the level of “characteristic prostrating attacks” under diagnostic code 8100 (IAW VASRD §4.124a), and therefore the headaches qualify for a rating of 0% (non-compensable). After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board unanimously recommends a rating of 10% for dementia due to head trauma (8045-9304), and 0% for headaches due to head trauma (8045-8100). Furthermore, the Board unanimously agrees that insomnia is related to the TBI, and is properly adjudicated as part of the TBI symptom complex. It is not separately unfitting.

Remaining Conditions. Hepatitis, prostatitis, knee pain, back pain, and several other conditions were also listed in the Disability Evaluation System (DES) file. These conditions were all evaluated by the action officer and considered by the Board. There is no clearly documented evidence that any of these conditions caused a significant adverse effect on the performance of required military duties. These other conditions are all judged by the Board to be not unfitting at the time of separation from service, and are not relevant for disability rating. Tinnitus was also noted by the Board, but was not documented in the DES file. The Board does not have the authority to render fitness or rating determinations for any condition which was not a matter of record in the DES package. Therefore, tinnitus is judged to be outside the scope of this Board. 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. As discussed above, some Board recommendations in this case are IAW application of TL07-05, August 2007 to rating under VASRD code 8045, §4.124a, prior to the VASRD revision for TBI in 2008. In the matter of the psychiatric condition (PTSD), the Board unanimously recommends an initial TDRL rating of 50%, in retroactive compliance with VASRD §4.129, as directed by DoD. The Board unanimously recommends a permanent rating of 30% at six months following separation, IAW VASRD §4.130. In the matter of the TBI, the Board unanimously recommends a rating of 10% for dementia due to brain trauma (coded 8045-9304) and 0% for headaches (coded 8045-8100), IAW VASRD §4.124a. In the matter of the hepatitis, prostatitis, knee pain, back pain, and any other conditions eligible for Board consideration, the Board unanimously agrees that it cannot recommend any findings of unfit for 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% |
| TBI – Dementia due to Brain Trauma | 8045-9304 | 10% | 10% |
| TBI – Headaches | 8045-8100 | 0% | 0% |
| **COMBINED** | **60%** | **40%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20091218, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

 Deputy Director

 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

 (b) PDBR ltr dtd 26 Jul 11

1. I have reviewed the subject case pursuant to reference (a) and approve the recommendation of the PDBR (reference (b)).

2. The subject member’s official records are to be corrected to reflect the following disposition:

 a. Separation from the Naval service due to physical disability rated at 40 percent (increased from 20 percent) with transfer to the Permanent Disability Retired List effective 31 October 2007.

3. Please ensure all necessary actions are taken to implement this decision, including the recoupment of previously paid disability separation pay if warranted, and notification to the subject member once those actions are completed.

 Assistant General Counsel

 (Manpower & Reserve Affairs)