RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXX BRANCH OF SERVICE: marine corps

BASE NUMBER: PD1000016 SEPARATION DATE: 20080731

BOARD DATE: 20110901

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSgt/E-6 (0369/Infantry Unit Leader) medically separated for traumatic brain injury (TBI), post concussion syndrome with headaches, and posttraumatic stress disorder (PTSD). He did not respond adequately to treatment and was unable to perform within his military occupational specialty (MOS) or to meet physical fitness standards. He was placed on limited duty and underwent a Medical Evaluation Board (MEB). Concussion, unspecified; post concussion syndrome; PTSD; lumbago; headaches syndromes and shoulder sprain acromioclavicular (AC) joint were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. Other conditions included in the Disability Evaluation System (DES) packet will be discussed below. The PEB adjudicated the TBI, post concussion syndrome with headaches, and PTSD as unfitting, rated 0% respectively, with application of the SECNAVINST 1850.4E and DoDI 1332.39. The CI appealed to a Formal PEB, and was then medically separated with a 0% combined disability rating.

CI CONTENTION: “The process for my combined disability rating was unfair. The board that reviewed my documents made a mistake and never corrected the mistake. Instead they changed it but never reevaluated the combined disability rating. They left it at 0%.”

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB (Relook) – 20080306** | | | **VA (4-9 Mo. After Separation) – All Effective 20080801** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| TBI | 8045-9304 | 0% | TBI (Claimed Post Concussive Synd) | 8045 | 40% | 20090122 |
| Post Concussion Synd w/Headaches | CAT II | |
| PTSD Chronic | CAT II | | PTSD | 9411 | 30% | 20081201 |
| Lumbago | CAT III | | L & T Strain (Claimed Lumbago) | 5237 | 10% | 20090410 |
| R Shoulder 2nd Degree AC Injury | CAT III | | DJD of AC of the R Shoulder | 5010 | 10% | 20090410 |
| ↓No Additional MEB/PEB Entries↓ | | | L Ankle Fx S/P 2 Repairs | 5271 | 10% | 20090410 |
| Tinnitus | 6260 | 10% | 20090122 |
| 0% x 2/Not Service Connected x 1 | | | 20090410 |
| **TOTAL: 0%** | | | **TOTAL: 70%** | | | |

ANALYSIS SUMMARY:

TBI/Post Concussion Syndrome/Headaches. 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 DoDI 6040.44 and National Defense Authorization Act 2008 mandates, the Board will comply with applicable VA disability rating policy changes issued via “FAST” or Training Letters effective at the time of separation. The CI’s separation date (31 July 2008) falls within the effective dates for TL07-0531 dated 31 July 2007 to 23 October 2008. TL07-0531 provided for rating TBI by combining separate ratings from each component of the symptom complex. In this case the Board must provide separate ratings for cognitive dysfunction and headaches, in effect rendering each as separately unfitting for purposes of the Service combined disability rating. The VA rating decision of 7 May 2009 utilized the current criteria which are different, evaluating the facets of cognitive impairment and other residuals of TBI not otherwise classified, and assigned a 40% rating for level two impairment documented in two facets.

Cognitive Disorder Due to TBI/PTSD. The Board pays close attention to conditions associated with TBI because it is sensitive to the fact that such cases have been vulnerable in the past to consequences which go unrecognized at separation. The service treatment record clearly demonstrates the onset of cognitive dysfunction and some degree of occupational and social impairment following the improvised explosive device blast injury on 14 December 2006. Neuropsychology testing on 30 October 2007, nine months before separation, showed improved cognitive functioning compared to earlier testing, but he continued to have deficits of attention (low average to borderline impaired), working memory (low average to borderline impaired), visual memory (borderline to severely impaired), and emotional functioning. It had been eleven months since his blast injury and it was the opinion of the psychologist that most of his recovery of cognitive functioning had already occurred. Due to the pattern and severity of the deficits, he was considered cognitively unfit for full duty. The PEB also considered PTSD to be present, but not separately unfitting from the cognitive deficit. It must also be noted that cognitive impairment is inextricably bound with the psychiatric condition and rated with it. Since cognitive deficits due to PTSD or TBI cannot be distinguished, the cognitive deficit must be rated under the criteria for a mental condition. Since the CI was diagnosed with PTSD, the provisions of VA Schedule for Rating Disabilities (VASRD) 4.129 must be applied to rate this condition. 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 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 most proximate source of comprehensive evidence upon which to base the permanent rating recommendation in this case is the VA compensation and pension (C&P) examination performed close to six months after separation in January of 2009. This C&P examination reflects the stress of transition to civilian life which is a core intent of §4.129, and carries the preponderance of probative value in the Board’s assessment of a fair permanent rating recommendation. The MEB evaluation nevertheless serves as a useful reference point and retains relevant probative value.

The Board directs its attention to its rating recommendations based upon the evidence just described. All members agreed that the §4.130 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 VA assigned a 30% rating for the PTSD condition based on §4.130 criteria without relying on the provisions of §4.129. At the VA examination, the CI was found to have anhedonia, severe avoidance, insomnia, irritability with anger outbursts, and psychomotor agitation. His global assessment of functioning was 53. The Board agreed that the 30% descriptor, “occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal)” was the most appropriate fit for the CI’s mental condition which includes his cognitive impairment. The Board determined that the 50% criteria were not met and the 10% criteria were clearly exceeded. After due deliberation in consideration of all the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends 30% as the fair permanent separation rating for PTSD in this case.

Headache Condition Due to TBI. The DES File clearly documents the CI’s ongoing complaints of intermittent headaches since his TBI. The headaches were initially described as sharp and severe, lasting only three to five seconds, and occurring four to eight times per day. The neurology note of 16 January 2008, six months pre separation, noted that treatment with Lyrica had decreased the frequency of headaches, and he was found fit for duty from the headache standpoint. There were no prostrating attacks described in the treatment records or the DES package. The VA rated this condition as part of the TBI (also claimed as post-concussive syndrome) using current criteria, not the VA TL 07-05, which was effective at the time of separation. The PEB determined that the post-concussive syndrome with headaches condition was a category II condition related to his TBI, but not separately unfitting. After careful consideration of all available information, the Board decided unanimously that in compliance with VA TL 07-05, effective 31 July 2007, this condition is rated separately as residual of TBI (code 8045-8100, headaches due to TBI). Since there was no evidence of prostrating attacks, a 0% rating is applied.

Tinnitus Condition. Tinnitus is noted as an intermittent complaint in the service treatment records going back to June 2004, prior to his TBI. The DES file makes no mention of tinnitus. Therefore, the Board finds no basis for consideration of tinnitus as a separately unfitting residual of TBI.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were lumbago and right shoulder second degree AC injury. Neither of these conditions were profiled, implicated in the non-medical assessment (NMA), or noted as failing retention standards. Both were reviewed by the action officer and considered by the Board. There was no indication from the record that either of these conditions significantly interfered with satisfactory performance of MOS duty requirements. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for either of the stated conditions*.*

Remaining Conditions. Other conditions identified in the DES file were two left ankle surgeries and right knee pain. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically active during the MEB period, none were the basis for limited duty, and none were implicated in the NMA. 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. 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. In the matter of the cognitive disorder due to TBI/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 six months IAW VASRD §4.130. In the matter of the headache condition due to TBI, the Board unanimously recommends that this condition be considered separately as a residual of TBI (code 8045-8100, headache condition due to TBI) with a rating of 0%. 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 separation be modified to reflect that the CI was placed on the TDRL at 50% for a period of six months (PTSD at 50% IAW §4.129 and DoD direction) and then a permanent combined 30% disability retirement as follows.

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| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Cognitive Disorder Due to TBI/PTSD | 8045-9411 | 50% | 30% |
| Headache Condition Due to TBI | 8045-8100 | 0% | 0% |
| **COMBINED** | **50%** | **30%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100108, 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

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

ICO XXXXXX, FORMER USMC, XXX XX XXXX

Ref: (a) DoDI 6040.44

1. I have reviewed the subject case pursuant to reference (a). The subject member’s official records are to be corrected to reflect the following retroactive disposition:

a. Separation from the naval service due to physical disability with placement on the Temporary Disability Retired List with a disability rating of 50 percent for the period 31 July 2008 thru 30 January 2009.

b. Final separation from Naval Service due to physical disability effective 31 January 2009 with a disability rating of 30 percent and placement on the Permanent Disability Retired List.

2. Please ensure all necessary actions are taken to implement this decision, including the recoupment of previously paid funds if appropriate, and notification to the subject member once those actions are completed.

Assistant General Counsel

(Manpower & Reserve Affairs)