RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXX BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1000163 SEPARATION DATE: 20060415

BOARD DATE: 20101029

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SUMMARY OF CASE: This covered individual (CI) was an active duty, right-handed Marine CPL/E4 (0311, Riflemen) medically separated from the Marine Corp in 20060415 after 3 years 11 months of service. The medical basis for the separation was Post Traumatic Stress Disorder (PTSD) and Right Radial Neuropathy following a gunshot wound (GSW) to the right forearm -Right Upper Extremity (RUE). The CI sustained multiple GSWs to include the right chest and RUE while deployed to Afghanistan in Aug 2005. He was evacuated to Germany, treated with a chest tube and returned to Afghanistan. He developed chest and lung symptoms [pain and shortness of breath (SOB)] and was evacuated to Germany with a lung infection (empyema) requiring a repeat chest tube and prolonged antibiotics with recovery in the US. The CI was placed on Limited Duty (LIMDU) on 20050908 for the GSW to the chest and RUE. Following treatments the CI’s RUE had persistent decreased sensation and grip strength of the right hand including the first three fingers (thumb), and the CI had persistent chest pain and complaints of shortness of breath and decreased exercise tolerance. The CI developed “severe anxiety attacks” and symptoms of PTSD following, and related to, his injury event which was an ambush where multiple Marines were killed and injured. Criterion A combat stressors were documented and criteria for an AXIS I diagnosis of PTSD were met. The CI was treated with psychotherapy and medications with slight decrease in symptoms. The CI was hospitalized for an opiate intoxication and withdrawal; however, this was determined to be inadvertent and due to his pain medications without any suicidal intent. The CI was unable to maintain his physical readiness requirements consistent with being an active duty Marine Corp Rifleman and he was referred to a Medical Evaluation Board (MEB). The MEB listed PTSD, anterior chest wall pain and radial neuropathy S/P (after) gunshot as diagnoses on the NAVMED 6001/1. The informal Physical Evaluation Board (PEB) adjudicated the PTSD (with Personality Disorder with Cluster B Traits), as unfitting rated 10%; and Right Radial Neuropathy status post (S/P) Gunshot Wound to Right Forearm (with Chronic Pain) as unfitting rated 10%, with likely application of SECNAVINST 1850.4E and/or DoDI 1332.39 (E2.A1.5) for the PTSD rating. The PEB adjudicated the S/P Multiple GSWs in Anterior Chest Wall with persistent pain as Category III (“Conditions that are not separately unfitting and do not contribute to the unfitting condition(s).”). The CI did not appeal and was thus medically separated with a combined disability rating of 20%.

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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 CFR4.I29 and DOD policy to the extent such increase will not adversely affect my total compensation, including but not limited to compensation pursuant to CRSC”. The CI also specifically requests the highest rating possible for his RUE and a request to have his chest/respiratory condition found unfit and additionally rated. This case is court remanded under the *Sabo et al v. United States* class action suit.

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RATING COMPARISON:

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| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20060208** | | | **VA (3 Days after Separation) – All Effective 20060416** | | | | | |
| **Condition** | **Code** | **Rating** | **Condition** | | | **Code** | **Rating** | **Exam** |
| PTSD and Personality Disorder | 9411 | 10% | PTSD | | | 9411 | 50% | 20060419 |
| ADD | 9499-9410 | | | NSC | 20060419 |
| Right Radial Neuropathy | 8714 | 10% | Radial Nerve (R) Wrist … + median | | | 8515 | 30% | 20060419 |
| Anterior Chest Wall Pain | Not Unfitting | | Respiratory … GSW to Chest | | | 6843 | 60% | 20060419 |
| ↓No Additional MEB Entries↓ | | | Tinnitus | | | 6260 | 10% | 20060419 |
| Cervical Spine… Thoracic Spine… | | | 5242 | 10% | 20060419 |
| Lumbar Spine… | | | 5242 | 10% | 20060419 |
| Scar, GSW (R) Wrist | | | 7805 | 0% | 20060419 |
| Scar, GSW OF (R) Chest | | | 7805 | 0% | 20060419 |
| Bilateral Hearing Loss | | 6100 | | NSC | 20060419 |
| Broken Nose … | 6599-6819 | | |
| Asbestos Exposure | | | 6833 |
| **TOTAL Combined: 20%** | | | **TOTAL Combined: 90%** | | | | | |

\*Traumatic Brain Injury (TBI) added @40% effective 20081117

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ANALYSIS SUMMARY:

PTSD Rating Recommendation. The PEB 10% rating, as described above, was likely derived from SECNAVINST 1850.4E and/or DoDI 1332.39 and preceded the promulgation of the NDAA 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 is obligated to recommend a minimum 50% PTSD rating for a retroactive 6 month period of Temporary Duty Retirement List (TDRL). The Board must then determine the most appropriate fit with VASRD, 38 CFR4.130, criteria at six months for its permanent rating recommendation. The MEB psychiatric evaluation, under §4.130 criteria, would rate no higher than 50% and the minimum TDRL rating of 50% applies. The most proximate source of comprehensive evidence on which to base the permanent rating recommendation in this case is a combination of the VA psychiatric rating evaluation 3 days post-separation, 5 VA clinical and management notes through 5 months post-separation, and the VA PTSD rating exam 14 months post-separation. At his immediate post separation exam the CI had a diagnosis of PTSD, Depressive Disorder (NOS), and Attention Deficit Disorder (by history). Symptoms were slightly worse than those documented at the MEB (5 months prior to separation) and included depression, concentration difficulty, nightmares (3-4/wk), significant startle response, avoidance, re-experiencing, problems with sleep, slight paranoia short of psychotic symptoms. The CI had normal thought process and content without suicidal or homicidal ideations. He had a limited affect and moderate blunting of mood. Global functioning (GAF) was assessed in the range of moderate to serious symptoms (GAF=52; MEB GAF=51-60). The VA rated this exam at 50% by criteria of §4.130 without using §4.129. The VA notes indicate that the CI continued to have symptoms and had episodic employment. He had a significant increase in mental health symptoms proximate to breaking up with his girlfriend. The CI was awarded VA Individual Unemployability on a VA Rating Determination of 20061005 that was effective 20060416. Although the VA evaluation 14 months post separation is remote from the date of separation, it is within one year of the six month constructive TDRL period required by application of §4.129, and provided a very detailed analysis of the CI’s history of symptoms, employment, and addressed physical conditions impacting mental health functioning that were indicative of the CI’s functioning during the rating period. The CI’s diagnoses were PTSD and Mood disorder due to chronic pain (with depressive features), and Attention Deficit Disorder (ADD) (by history). The CI had moderate blunting of mood, limited intonation and speech and decreased psychomotor activity. He endorsed continued nightmares, flashbacks, avoidance and arousal symptoms that were assessed as “associated with the stress and impairment in social/familial and vocational functioning.” The examiner stated “A degree of increase in PTSD and depressive symptoms is found although there is no evidence of delusional beliefs or generalized impairment of cognitive function. …his daily functioning has declined, mostly because of his physical issues, so the rating of his functioning (GAF Score) has been reduced only slightly as the psychological issues are secondary.” GAF was 50 and the VA continued the CI’s 50% rating for PTSD. All Board members agreed that the record was insufficient to support a 70% rating under §4.130 based on this evidence and two evaluations, and that the 10% threshold was well exceeded. The Board deliberated therefore primarily between 50% vs. 30% as the permanent rating recommendation IAW §4.130. The Board could not deduct for, or exclude, symptoms that may have been attributable to Personality Disorder, ADD, or Mood Disorder diagnoses. The Board considered that the significant stressors of separation from service may have transiently increased the CI’s mental health disability picture at his first VA evaluation; however all records in evidence indicate a fairly stable level of symptoms and disability through the rating period. The CI demonstrated consistent “occupational and social impairment with reduced reliability and productivity” more nearly than “occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks” throughout the post separation record. Although the preponderance of the evidence appears to favor a 50% rating IAW VASRD §4.130, an argument remained for a 30% rating, only if portions of the CI’s disability picture were speculatively apportioned to his physical conditions. After due deliberation, and giving consideration to the tenants of §4.3 reasonable doubt, the Board agreed that a permanent PTSD rating of 50% is the most representative of impairment and a fair recommendation in this case.

Right Upper Extremity (RUE: Right Radial/Median Neuropathy): All records indicate that the CI was right-handed (“Major” or “Dominate” IAW VASRD). The Board focused on the level of and severity of nerve injury and disability of the CI’s RUE for rating. The CI’s GSW to the forearm was characterized by scars 6 cm above the wrist joint with 1 cm entrance wound and 1 cm exit wound 1 cm apart overlying the radial bone indicative of a through-and-through injury. The CI’s symptoms included decreased sensation (light touch and temperature) on the thumb, index and middle finger on the palmar and dorsal surface that extended above the wrist, and complaint of decreased grip strength and fine motor control. Electrodiagnostic studies (NCV/EMG of 20060428) showed mild to moderate entrapment of the median nerve at the wrist [consistent with carpal tunnel syndrome (CTS)] and minimal right superficial radial sensory neuropathy and no muscle weakness. Earlier military exams documenting right wrist weakness were overcome by exams closer to separation demonstrating no objective wrist weakness, but possible decreased pincer grip of the fingers. There was no indication in the military or VA records that the RUE scars contributed additionally to the CI’s disability. The Board considered that the CI’s primary disability was sensory and pain (Neuritis and/or Neuralgia) rather than subjective partial paralysis, and applied the tenets of VASRD §4.123 Neuritis and §4.124 Neuralgia for limiting the rating severity as a “maximum equal to moderate incomplete paralysis.” The Board also considered the general guidance of VASRD §4.124a and the Disease of The Peripheral Nerves caveat that “When the involvement is wholly sensory, the rating should be for the mild, or at most, the moderate degree.” The PEB rated the CI’s RUE as 8714 [VASRD Neuralgia, The musculospiral nerve (radial nerve)] at 10% for right radial neuropathy status post GSW to right forearm with chronic pain; However, the VASRD does not have a 10% rating level for 8714 and “Mild” is 20%. The VA rated the RUE as 8515 [VASRD Paralysis, Incomplete of, The median nerve] at 30% (“Moderate”) for right radial and median nerve involvement. The Board examined the CI’s disability picture at separation and at the six month post separation “constructive TDRL” rating period for PTSD, and considered codes 8514, 8614 and 8714 (radial nerve), and 8515, 8615, and 8715 (median nerve) as well as the levels for mild or moderate for severity. The CI’s disability was predominately due to the radial nerve, but there were objective findings of median nerve abnormalities attributable to his GSW. The CI’s disability was best coded using 8714 coding [Neuralgia, The musculospiral nerve (radial nerve)], and the disability picture for the RUE was closer to “Mild” than to “Moderate.” After due deliberation, considering all of the evidence the Board recommends a separation rating of 20% for the RUE condition both on entrance to, and exit from the constructive TDRL period.

Chest Condition [Anterior Chest Wall Pain Condition (Restrictive Respiratory Disease as a result of GSW to the Right Chest)]: The PEB found the “Status Post Multiple Gun Shot Wounds in Anterior Chest Wall Now with Persistent Anterior Chest Wall Pain” as a Category III condition (Not separately unfitting). However, the Non-Medical Assessment (NMA) stated that the CI’s “wounds prevent him from returning to a full duty service. (The CI)’s lung is causing him the most amount of grief as it’s not performing the way it should.” The CI had also been on LIMDU for this condition. The CI was believed to have reached optimal medical recuperation and at the MEB Pulmonary exam the CI complained of dyspnea on activity (shortness of breath-SOB), chest discomfort at site of injury, and chest pain on deep breathing and walking. The examiner stated that Pulmonary Function Tests (PFTs) were limited as “technician comments reveal patient unable to perform acceptable and reproducible spirometry due to an inability perform maneuver correctly. His expiratory time was <6 seconds. He was also not able to inspire 90% of his FVC for DLCO maneuver.” [NOTE: DLCO represents movement of oxygen from the air to the bloodstream, by using a single breath, in-and-out of carbon monoxide]. Chest Computed Tomography (CT) demonstrated a small area of fluid collection in the fissure and scarring. The examiner recommended exercise testing if further objective testing was required (no evidence in record). The chest wall was well healed and there was no objective evidence of lung tissue (parenchyma) disease. The corrected DLCO was reported as normal (DLCO/VA is diffusion capacity of the lung corrected for volume). The VA PFT assessment indicated better effort with improved lung functions (FEV1 and FEV1/FVC). The examiner stated: “DLCO (uncorrected) is moderately reduced” and “DLCO/VA is reduced”, but no DLCO/VA number was specified. The VA 60% rating used the uncorrected DLCO (uncorrected) of 55 which, given the CI’s reduced lung volume measurements, would greatly overstate the level of the CI’s lung/chest disability. The PEB’s worksheet (JDETS) indicated that the PFT’s were invalid due to poor effort and that the PEB could not rate the CI’s subjectively decreased exercise tolerance. The level of effort and subjective nature of shortness of breath and decreased exercise tolerance was discussed in depth by the Board. The logically reasoned PEB determination of Category III (not unfitting ) for the chest condition raises the bar for an adjudication of unfitting. All evidence considered, the Board cannot find enough strength in the record to overcome the PEB’s “not unfit” adjudication for the chest condition. The Board therefore has no reasonable basis for recommending the chest condition as additional unfitting conditions for separation rating.

Scars from GSW Right Wrist and Right Chest: The General Surgery consult note 20051017 indicated well healed wounds in the chest and right upper extremity. The VA evaluation demonstrated no tenderness and no functional limitation to either the right wrist scars or chest scars. The Board therefore has no reasonable basis for recommending any scars as additional unfitting conditions for separation rating.

Other Conditions (Tinnitus; Cervical, Thoracic and Lumbar Spine Segments). The Tinnitus; Cervical, Thoracic and Lumbar Spine Conditions were not mentioned in the DES package. 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. The Tinnitus; Cervical, Thoracic and Lumbar Spine Conditions and any contended conditions not covered above remain eligible for Board for Correction of Naval Records (BCNR) consideration. The Board, therefore, has no reasonable basis for recommending any additional unfitting conditions for 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 SECNAVINST 1850.4E and/or DoDI 1332.39 for rating PTSD appeared operant in this case and the PTSD condition was adjudicated independently of those instructions by the Board. In the matter of the Post-Traumatic Stress Disorder condition, the Board unanimously recommends an initial TDRL rating of 50% in retroactive compliance with VASRD §4.129 as DOD directed; and a 50% permanent rating at 6 months IAW VASRD §4.130. In the matter of the right forearm condition, the Board, by a vote of 2:1, recommends a rating of 20% coded 8714 IAW VASRD §4.124a. In the matter of the Anterior Chest Wall pain condition, the Board, by a vote of 2:1, agrees that it cannot recommend a finding of unfit for additional rating at separation. The single voter for dissent (who recommended adopting the VA rating 8714 at 30%, and adding the chest condition as unfitting coded 5321 at 20% in addition to the 50% 9411 rating) submitted the addended minority opinion. In the matter of the Scars of the Right Wrist and Right Chest conditions, the Board unanimously agrees that it cannot recommend a finding 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 60% for 6 months following CI’s prior medical separation (PTSD at minimum of 50% IAW §4.129 and DoD direction) and then a permanent combined 60% disability retirement as below.

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| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Post-Traumatic Stress Disorder | 9411 | 50% | 50% |
| Right Radial Neuropathy S/P GSW | 8714 | 20% | 20% |
| **COMBINED** | **60%** | **60%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100225, 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 (AO) recommended addition of the chest condition as separately unfitting rated as 5321 at 20% as well as rating the right wrist condition (8714) as moderate (30%) versus mild (20%), in addition to the PTSD rating of 50% for TDRL and 50% for permanent rating.

Chest Condition. There is sufficient evidence suggesting that the Chest condition interfered significantly with MOS performance. Although the PEB adjudication and the Board majority recommendation are defensible, the AO was not persuaded during Board deliberation that the balance of the evidence was unfavorable to the CI. Given the NMA’s specific statement regarding the CI’s chest condition as the most problematic, the consistent statements of decreased ability to run (long standing complaints of SOB, exercise intolerance, and chest pain with lifting or pulling) and the PEB’s apparent agreement of the CI’s decreased exercise tolerance, it is exceptionally unlikely that the CI could have performed as a rifleman due to this chest condition, were there no other unfitting conditions. The Board discussed the interpretation of the CI’s Pulmonary Function Tests (PFTs) and the difficulty of interpretation given that the examiner stated that PFTs were limited as “technician comments reveal patient unable to perform acceptable and reproducible spirometry due to an inability perform maneuver correctly.” The PEB worksheet summarized this as “PFT – invalid due poor effort”, which although medically and technically correct, portrays a much different picture to the non-physicians on the PEB. The PEB worksheet additionally stated “cannot rate decreased exercise tolerance” and noted “no objective evidence of impairment, but testing may not be representative anyway”. Given detailed scrutiny of the source PFTs, pulmonary notes and addendum, the AO adjudged that the “poor effort” was most likely due to pain on chest wall/lung motion. Either chest-wall muscle or pleural (lung lining to chest wall lining) etiology is frequently seen in GSW to the chest or infections of the lung involving the pleura. The CI had a prolonged infection and (at least) two chest tube penetrations of his chest wall and pleural space. The Board discussed the overlap between mental health conditions and physical conditions with pain limits as their principle disability, and the majority adjudged that the CI’s PTSD materially changed his presentation of his chest condition. However, this rationale was not convincing to the AO. In light of the evidence of impairment indicated by the numerous treatment notes for chest pain (also see the PTSD condition with chest pain as a contributor), the NMA statement, and the post-separation continued disability due to the chest condition, the CI’s chest condition should be recharacterized as a separate unfitting and ratable disability at the time of separation.

Regarding rating the chest condition, as discussed above, the VA rating appeared to use an uncorrected DLCO which overstated the CI’s level of disability. The Board closely examined the record of pulmonary consultations and multiple PFTs and determined that there was insufficient evidence of a significantly reduced corrected DLCO (DLCO/VA) on PFTs to support the VA rating as discussed above. Given that the thoracic and chest wall component of restriction was reproducible and predominant in the CI, The predominate rating code is 5321 [Group XXI. Function: Respiration. Muscles of respiration: Thoracic muscle group]. IAW §4.56 “Factors to be considered in the evaluation of disabilities residual to healed wounds involving muscle groups due to gunshot or other trauma”, the CI was at the “Moderately severe” level with history of through and through wound (plus deep penetration via chest tubes), entrance and exit scars, prolonged infection, hospitalization for a prolonged treatment of wound, record of consistent complaint of lowered threshold of fatigue and fatigue-pain (endurance), and NMA evidence of inability to keep up with work requirements. All evidence considered, the AO could not find enough strength in the PEB, or Board majority positions to overcome a good deal of reasonable doubt in the CI’s favor regarding the fitness adjudication for the chest condition. The AO, therefore, recommends that it be rated as an additionally unfitting condition coded 5321 at 20% both on initial separation and following the constructive TDRL period for PTSD.

Wrist Condition. Rating under peripheral nerve codes entails a judgment call regarding the severity of incomplete paralysis, especially the mild vs. moderate distinction. The CI had documented neuropathy of both the right radial (musculospiral) and median nerves with repeated documentation of a weakened pincer grip (thumb to fingers; motor loss). Given two nerves involved and proven sensory and motor deficit, the CI’s RUE neuropathy, with application of VASRD §4.3 (reasonable doubt), should be rated as 8714, moderate, at 30%.

Recommended Minority Opinion Rating:

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| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Post-Traumatic Stress Disorder | 9411 | 50% | 50% |
| Right Radial Neuropathy S/P GSW | 8714 | 30% | 30% |
| Anterior Chest Wall Pain S/P GSW | 5321 | 20% | 20% |
| **COMBINED** | **70%** | **70%** |

MEMORANDUM FOR DEPUTY COMMANDANT, MANPOWER & RESERVE AFFAIRS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

ICO XXXXX, FORMER USMC, XXX XX XXXX

Ref: (a) DoDI 6040.44

Encl: (1) PDBR ltr dtd 16 Sep 10

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 disposition:

a. Separation from the naval service due to physical disability with placement on the Temporary Disability Retired List with a disability rating of 60 percent for the period 15 April 2006 thru 14 October 2006.

b. Final separation from naval service due to physical disability effective 15 October 2006 with a disability rating of 60 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.

Principal Deputy

Assistant Secretary of the Navy

(Manpower & Reserve Affairs)