RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXX BRANCH OF SERVICE: NAVY

CASE NUMBER: PD201000173 SEPARATION DATE: 20061205

BOARD DATE: 20101029

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SUMMARY OF CASE: This covered individual (CI) was an active duty Navy E5/HM2 (8404 Field Medical Service Technician) medically separated from the Navy in 2006 after 7 years of service. The medical basis for the separation was Post Traumatic Stress Disorder (PTSD) associated with deployment to Iraq in 2003. Criterion A combat stressors were documented and DSM IV criteria for an Axis I diagnosis of PTSD were met. Symptoms began aboard ship during redeployment from Iraq, and persisted over the following year, including insomnia, nightmares, flashbacks, hyperarousal, and anger outbursts. In December 2005, he was seen at the Mental Health Clinic acutely by referral from his primary care provider for persistent insomnia and anxiety. His treatment included outpatient psychotherapy with medications started following a panic attack in June 2006. The CI did not respond adequately to perform within his military occupational specialty and underwent a Medical Evaluation Board (MEB), with PTSD as the only diagnosis listed for Limited Duty (LIMDU). His PTSD, in addition to Subacute Thyroiditis, and three left knee diagnoses were addressed by the MEB narrative summary and addendum (NARSUM) and forwarded to the Physical Evaluation Board (PEB) on the NAVMED 6100/1. The informal PEB adjudicated PTSD as the single unfitting condition, rated 10%, with likely application of SECNAVINST 1450.4E or DoDI 1332.39 (E2.A1.5). Five other conditions, as identified in the rating chart below, were forwarded as not separately unfitting (Category III) conditions. The CI made no appeals, and was thus medically separated with a 10% disability rating.

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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. The PDBR should assign the highest final disability rating applicable consistent with 38 CFR 4.129 and DOD policy.” Although not specifically noted on his DD 294 Application, contention is implied for the highest rating possible for all other conditions supported in his Disability Evaluation System (DES) file and separation VA rating decision (VARD). This case is court remanded under the *Sabo et al v. United States* class action suit.

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RATING COMPARISON:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20060830** | | | **VA (2.8 Mo. after Separation) – All Effective 20061206\*** | | | | |
| **Condition** | **Code** | **Rating** | **Condition** | | **Code** | **Rating** | **Exam** |
| Post Traumatic Stress Disorder | 9411 | 10% | Post Traumatic Stress Disorder | | 9411 | 30%\* | 20070228 |
| Left Chronic Patellar Tendinitis | Not Unfitting | | Left, Patella Tendonitis | | 5258 | 20% | 20070228 |
| Left Lateral Meniscus Tear | Not Unfitting | |
| Left … PFS | Not Unfitting | |
| Alcohol Abuse – By History | Not Unfitting | |  | |  |  |  |
| Subacute Hyperthyroidism | Not Unfitting | | Hyperthyroidism | | 7900 | NSC | 20070228 |
| ↓No Additional PEB Entries↓ | | | Right Knee Strain | | 5024 | 10% | 20070228 |
| Tinnitus | | 6260 | 10% | 20070228 |
| TMJ (jaw/dental) | | 9905 | 10% | 20070228 |
| Lumbar Strain | | 5237 | 0%\* | 20070228 |
| Maxillary Sinusitis | | 6513 | 0%\* | 20070228 |
| Sleep Disorder … | 6899-6847 | | 0% | 20070228 |
| Hearing, Hemorrhoids, GERD, UTI, HSV, Eczema … | | | | NSC X9 |
| **TOTAL Combined: 10%** | | | **TOTAL Combined: 60%\*** | | | | |

\*PTSD to 50%, Lumbar Strain to 20%, Maxillary Sinusitis to 10% (combined 80%) effective 20091029

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ANALYSIS SUMMARY:

PTSD. As noted above, the PEB rating for PTSD was likely derived from SECNAVINST 1450.4E and/or DoDI 1332.39 and preceded the NDAA 2008 mandate for DOD adherence to VASRD §4.129. IAW DoDI 6040.44 and DOD guidance (which applies current Veterans Administration Schedule for Rating Disabilities (VASRD) §4.129 to all Board cases), the Board is obligated to recommend a minimum 50% PTSD rating for a retroactive six month period of 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 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 evaluations performed at 2.8 months and 3 years after separation. Overall, the post-separation exams are fairly similar regarding level of functioning and psychiatric symptoms, showing a slight decline from the MEB evaluation over the 3 year period. The detailed VA psychiatric rating examination performed approximately 2.8 months after separation indicated that the CI was unemployed and “working on completing his BS degree.” He was undergoing continued psychotherapy and on multiple medications with “minimal” response. There was a history of childhood stressors and abuse. The CI manifested depressed mood, flattened affect, detachment, “communication is grossly impaired,” anxiety, panic attacks more than once a week with physiologic changes, suspiciousness, and “difficulty understanding complex commands,” disturbance of motivation, and chronic sleep impairment. Judgment and thought processes were normal, and there were no psychotic features or suicidal or homicidal ideations. The examiner stated, “The substance abuse disorder is due to the primary service-connected mental disorder of PTSD. Claimant uses alcohol to manage symptoms of PTSD.” The CI’s global assessment of functioning (GAF) was assessed in the range of mild symptoms (GAF=65; MEB GAF was 55-60—moderate symptoms) which did not align with the more moderate symptoms noted in the remainder of the exam; additionally, the examiner also stated that the CI’s “current psychiatric symptoms cause occupational and social impairment with reduced reliability and productivity.” The VA rated this exam at 30% by VASRD §4.130 criteria without application of §4.129. Although the VA psychiatric evaluation at 3 years post-separation is remote from the six month rating timeframe, it provided some insight and history into how the CI may have been functioning at six months post separation. The CI had additional diagnoses of Major depressive disorder recurrent moderate and Cocaine dependence in remission. The CI was continuing on medication and therapy, was employed (since approximately August 2008) with “concentration difficulties at work” as well as missing work due to PTSD symptoms, and had worsened symptoms of intrusive thoughts, depression, anxiety, short-term memory problems, avoidance, and hyperarousal. He endorsed suicidal ideations without a plan or intent. His Beck Depression Inventory II score of 41 was in the severe range. His GAF of 52 coincided with the moderate symptoms indicated in the remainder of the exam. The examiner stated the CI’s “reexperiencing intrusive thoughts, avoidance, and hyperarousal are significantly and persistently impairing his current functioning.” There was no separation of substance abuse symptoms from PTSD symptoms and no basis for concluding that substance abuse was not linked to PTSD. There is no defensible basis for applying or means of measuring any deduction which might be considered. The Board must therefore disregard the influence of either alcohol/substance abuse or non-compliance on ratable symptoms for its permanent rating recommendation. The VA examiner at the 3 year evaluation went so far as to state that “regarding substance use it appears that the (CI) has reduced…; however, the (CI) still does use alcohol on a regular basis, which is likely reducing his symptoms of PTSD somewhat. Therefore, the symptoms observed currently may indeed worsen if the (CI) becomes completely sober without proper treatment.” Independently rating the CI’s 2.8 month post separation VA evaluation, the disability and symptoms were closer to 30% than 10%. The 3 year post separation VA evaluation clearly indicated worsening and warranted a rating of 50%. There was insufficient evidence to indicate that the CI’s worsening of symptoms, as noted at 3 years, were of rapid onset proximate to the six month rating timeframe. The CI had no periods of clear remission of PTSD symptoms, and it is reasonable to extrapolate a six month status fairly similar, but slightly worse, than the 2.8 month exam. After due deliberation, all evidence considered, the Board agreed that reasonable doubt favors the CI in support of a recommendation of 30% as the permanent PTSD disability rating in this case.

Left Knee Conditions. Three left knee conditions (lateral meniscus tear, chronic patellar tendinitis and patellofemoral dysfunction) were noted on the PEB as not unfitting, as there was no evidence of interference with military performance. The Non-Medical Assessment (NMA) statement noted the CI was able to take the physical fitness test, and last passed it in April 2006, approximately four months prior to the MEB. The NARSUM noted he “tries to channel his hyperarousal into exercise, staying at the gym 3-4 hours daily,” and his 2009 Primary Care notes indicated that he “runs to calm himself down,” and participates in daily aerobic exercise. The CI himself noted in his December 2009 Statement in Support of Claim, that “I am an avid runner, I exercise regularly….” Although the VA examinations noted he did experience pain with running and wore a knee brace, ranges of motion were normal except for extension (10⁰); he was awarded 20% due to his meniscal tear and associated symptoms (locking and effusion), diagnostic code 5258, “Cartilage, semilunar [meniscal], dislocated, with frequent episodes of ‘locking,’ pain, and effusion into the joint.” The meniscal tear was noted on the MEB orthopedic addendum, and arthroscopy was recommended. The Board cannot find any evidence to support an opinion that the knee conditions had risen to the level of an unfitting impairment at the time of separation. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB adjudication for the knee conditions as not unfitting.

Alcohol Abuse – by History. The PEB specifically addressed this collateral Axis I condition. IAW DODI 1332.38 this diagnosis falls under “conditions and circumstances not constituting a physical disability.” This condition cannot be adjudicated as separately unfitting, and there was no deduction from the CI’s unfitting PTSD diagnosis for any potential contribution from alcohol abuse.

Subacute Hyperthyroidism. The MEB noted this diagnosis, which dates from June 2006, and included symptoms of weight loss, heat intolerance, increased stool frequency, palpitations, insomnia, and increased anxiety (likely intensifying the CI’s PTSD symptoms). At an Endocrinology follow-up in September 2006, the CI was felt to be in the second (euthyroid) phase of subacute thyroiditis, and was prescribed medication with the expectation that the third (hypothyroid) phase would occur in the near future. No subsequent follow-ups were present, and primary care notes did not mention the diagnosis. This diagnosis without residual symptoms is not unfitting, and the CI did not display any resultant duty limiting manifestations. The VA evaluated the CI’s thyroid condition with no evidence of disability in February 2007 and did not rate the thyroid condition (NSC). All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the thyroiditis.

Other Conditions. Only Right Knee Strain, Tinnitus, and Temporomandibular Joint (TMJ) Dysfunction were rated at 10% or higher by the VA within one year following separation. All three conditions were noted in the MEB history and physical (including DD Form 2697), without any physical restrictions or limitations in duty. They were not under active treatment during the MEB period and were not profiled or noted in the Commander’s statement. No link to fitness is in evidence for any of them. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of any of these as unfitting conditions for separation rating. In the MEB physical, the CI noted a number of conditions, including sinusitis, hearing loss, seborrheic dermatitis, eczema, bleeding hemorrhoids, left ankle pain, left arm ulnar sensory neuropathy, a history of hypertension, potential gastroesophageal reflux disease (GERD), and potential traumatic brain injury (TBI) with an episode of loss of consciousness in 2000. These are therefore eligible for Board consideration as additionally unfitting conditions subject to rating at separation. No evidence in the service treatment record or DES file supported any resultant physical limitations or duty restrictions. None of these conditions appeared to have been profiled, and the CI was able to take and pass the physical fitness test according to the NMA. No link to fitness is in evidence for any of them. Of all the DES-reported conditions, only sinusitis was judged to be service connected by the VA, rated 0% from the time of separation. The other conditions noted in the MEB physical were not service connected by the VA and likewise do not meet any unfitting criteria for Board consideration. Back pain was not reported in the DES file; it was reported to the VA examiner three months post separation and rated at 0% for lumbar strain. 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 back pain and any contended conditions not covered above remain eligible for Board for Corrections 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 DoDI 1332.39 for rating PTSD was likely in this case 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 30% permanent rating at 6 months IAW VASRD §4.130. In the matter of the left knee conditions (Lateral Meniscus Tear, Chronic Patellar Tendinitis and Patellofemoral Dysfunction), Alcohol Abuse – by History, and Subacute Hyperthyroidism, the Board unanimously recommends no recharacterization of the PEB adjudications as not unfitting. In the matter of Right Knee Strain, Tinnitus, TMJ pain, 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 6 months following CI’s prior medical separation (PTSD at minimum of 50% IAW §4.129 and DoD direction) and then a permanent 30% disability retirement as below.

|  |  |  |  |
| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Post-Traumatic Stress Disorder | 9411 | 50% | 30% |
| **COMBINED** | **50%** | **30%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100227, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

Deputy Director

Physical Disability Board of Review

MEMORANDUM FOR COMMANDER, NAVY PERSONNEL COMMAND

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

ICO XXXXX, FORMER USN, XXX-XX-XXXX

Ref: (a) DoDI 6040.44

Encl: (1) PDBR ltr dtd 4 Nov 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 50 percent for the period 5 December 2006 thru 4 June 2007.

b. Final separation from naval service due to physical disability effective 5 June 2007 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.

Principal Deputy

Assistant Secretary of the Navy

(Manpower & Reserve Affairs)