RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Marine Corps

CASE NUMBER: PD201000179 SEPARATION DATE: 20070815

BOARD DATE: 20110317

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a Marine Corps LCpl (0311, Rifleman) medically separated in 2007 after nearly three years of combined service. The medical basis for the separation was posttraumatic stress disorder (PTSD). He was diagnosed with PTSD after two Operation Iraqi Freedom (OIF) deployments. During the second deployment the CI had a Gun Shot Wound (GSW) to his right shoulder. He was evaluated and treated for acute PTSD while receiving medical care for his treatment for the GSW. He underwent a trial of medications and outpatient psychotherapy. Although he was able to function in a non-operational setting, he was unable to deploy again with his unit or perform within his military occupational specialty (MOS). The CI was placed on a six-month limited duty (LIMDU) convalescent leave for recovery from his acute stressor disorder and his GSW. The CI then underwent a Medical Evaluation Board (MEB). The MEB listed PTSD and status post (S/P) GSW to left shoulder as diagnoses. The Physical Evaluation Board (PEB) adjudicated the PTSD as unfitting rated 10%, with likely application of SECNAVIST 1850.4E and/or DoDI 1332.39 (E2.A1.5). The PEB adjudicated the S/P GSW to left (*actual right*) shoulder as Category III (conditions that are not separately unfitting and do not contribute to the unfitting conditions). The CI did not appeal, and was medically separated with a combined disability rating of 10%.

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. See item 12 for continuation of this block. Please see the attached list of contentions regarding why the PDBR should make changes I request in item 3.” His application additionally referred to all of his VA conditions and ratings as per the rating chart below. This case is court remanded under the *Sabo et al v. United States* class action suit.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20070417** | | | **VA (3 Mo. Post Separation) – All Effective 20070816** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| PTSD | 9411 | 10% | PTSD | 9411 | 30% | 20071121 |
| S/P GSW to Left (sic-*actual Right)* Shoulder | Not Unfitting | | Residuals, GSW, Right Shoulder | 5302 | 20% | 20071113 |
| ↓No Additional MEB/PEB Entries↓ | | | Tinnitus | 6260 | 10% | 20071120 |
| Low Back, Cervical, and Bilateral Knee Strains | NSC | | 20071113 |
| **TOTAL Combined: 10%** | | | **TOTAL Combined: 60%** | | | |

ANALYSIS SUMMARY:

PTSD. The PEB 10% rating, as described above, was derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act 2008 mandate for 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 cases), the Board is obligated to recommend a minimum 50% PTSD rating for a retroactive six-month period of TDRL. The Board must then determine the most appropriate fit with VASRD, 38 CFR 4.130, criteria at six months for its permanent rating recommendation. The most proximate source of comprehensive evidence on which to base the permanent rating recommendation in this case is the VA Compensation and Pension (C&P) examination performed three months after separation. There was no relevant VA outpatient or civilian provider evidence providing psychiatric details during the six-month interval. The probative value of the VA psychiatric C&P examination is strengthened on the principle that it reflects the stress of transition to civilian life, which is intrinsic to the Board’s permanent rating recommendation. Since the VA exam was still fairly close to separation and removed from the six-month rating interval, the MEB evaluation itself provides a useful baseline and is assigned relevant probative value in the Board’s efforts to arrive at a fair permanent rating recommendation.

The CI’s MEB psychiatric examination on 28 February 2007 was performed about six months prior to separation. The examiner noted the CI had significant hypervigilance and anxiety attacks while in large groups and decreased overall functioning due to his symptoms. The CI experienced daytime flashbacks, decreased concentration, avoidance, became withdrawn, and had relationship difficulties. The CI’s mental status exam (MSE) noted his mood was anxious, cognition was grossly intact with some decreased concentration, and he displayed an increased startle response. Military prognosis was considered extremely poor while civilian occupational prognosis was moderate. Global assessment of functioning (GAF) was assessed in the range of moderate to serious symptoms (GAF = 50-55). The CI’s VA C&P on 21 November 2007 was completed three months post-separation. The CI was not undergoing active treatment or medication for his PTSD. The CI was employed as an order selector at a warehouse; however, other VA exams indicated the CI missed four days of work out of seven weeks for “discomfort in his general overall body because he could not go into work because of the aching.“ He reported that things were getting better as far as his overall PTSD symptomatology. He was happily married with a two-year old son and had a good support system. The C&P examiner noted that the CI had depressive symptoms and panic attacks that were specifically related to thoughts and stressors; affect was not restricted. The CI continued to have nightmares, trouble falling asleep and staying asleep, and intrusive thoughts as well psychological stress with symptoms of tachycardia, increased sweat, and increased edginess. Arousal symptoms were still present, but lessening. He had checking behavior and a mild startle response. The CI had difficulty driving and preferred not to drive because of feelings of rage and intensity, had some trouble trusting, and a diminished ability to enjoy things to some extent. He had a slight detachment issue that the examiner did not feel was clinically significant. From a prognosis standpoint, the examiner stated, “The CI’s PTSD condition should resolve.” His GAF was assessed in the range of mild symptoms (GAF = 61-70). The Board directed its attention to its rating recommendations based on 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 is applicable. With regard to the permanent rating recommendation, all members agreed the §4.130 criteria for a 50% rating were not met in either the MEB or VA examinations. There appeared to be a trend generally toward improvement post-separation as measured by the two psychiatric evaluations. This was reflected in the symptom descriptions, the MSEs and the GAF scores. The MEB examination was most consistent with the general description for a §4.130 rating of 30% (“occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks”), especially considering that the CI did not state that he had any significant work stressors. The VA C&P examination was arguably closer to the general description for a 10% rating (“occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress”).

The Board’s deliberations were centered therefore on arguments for a 10% versus 30% permanent rating recommendation. A strong argument for the 10% rating can be made by the VA examiner’s opinion that the CI’s “PTSD symptoms should resolve” and that “his prognosis was good.” There was no evidence subsequent to the VA exam to either support or contradict the examiner’s favorable prognosis. Arguments for the 30% rating are that the CI had depressed mood that likely overlapped his physical condition with pain as a constant reminder, that he had missed four days of work for non-specific reasons (consistent with depressed mood), and that he continued to have interpersonal trust and relevant social impairment issues that may also have affected the occupational environment. The panic attacks and missed work were considered indicative of occasional occupational impairment. After this deliberation, considering the totality of the evidence and with deference to VASRD §4.3 (reasonable doubt), the Board recommends 30% as the fair and equitable permanent rating for PTSD in this case.

Status Post Gunshot Wound to Right Shoulder. The PEB found the S/P GSW to left (sic) shoulder as a Category III condition (not separately unfitting and does not contribute to the unfitting conditions). The right-handed CI suffered a through and through GSW to the right shoulder with no neuro, vascular or bony involvement. It was predominately a debridement and affected Group Muscle Three. The CI was placed on LIMDU for six months convalescent leave to allow recovery from the GSW in conjunction with his mental health condition, which appeared to be recommended by mental health providers and predominately for the mental health condition. The non-medical assessment noted that the CI’s condition affected his ability to perform his duty with missing 18 hours a week, but did not specify which condition. The narrative summary did not evaluate the shoulder condition aside from noting narcotic pain medication for his GSW and an Axis III indicator of the GSW listing the (incorrect) left shoulder. The MEB physical noted the “GSW to right shoulder – October 2006 – through and through – no neuro-deficits – well-healed.” The VA C&P examination, five months post-separation, indicated complaints of right shoulder endurance problems and 6-7/10 pain. The CI had periods of excruciating pain and was unable to work a full eight-hour day and had occasional numbness and paresthesias in the right arm. There was a large disparity in the post-separation exam of the right shoulder and arm condition; however, predominate complaints were pain. The Board adjudged that the CI’s shoulder condition at the time of separation was not to the level to independently interfere with the performance of duty. Any overlap between the CI’s physical condition and pain with his mood and mental health functioning were considered in rating his unfitting PTSD condition. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of S/P GSW to right shoulder as an unfitting condition for separation rating.

OTHER CONDITION: The Tinnitus, rated by the VA within 12 months of separation, was not mentioned in the Disability Evaluation System (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 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, the PEB reliance on SECNAVIST 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 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 right shoulder (S/P GSW) condition, the Board unanimously recommends no recharacterization of the PEB adjudication as not unfitting. 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 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 permanent combined 30% disability retirement as below:

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

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

MEMORANDUM FOR DEPUTY COMMANDANT, MANPOWER & RESERVE AFFAIRS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

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 15 August 2007 thru 14 February 2008.

b. Final separation from naval service due to physical disability effective 15 February 2008 with a disability rating of 10 percent and entitlement to disability severance pay.

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)