RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXX BRANCH OF SERVICE: MARINE

CASE NUMBER: PD2010-00209 BOARD DATE: 20100902

SEPARATION DATE: 20080215

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SUMMARY OF CASE: This covered individual (CI) was an active duty CPL (MOS, 3531, Motor Vehicle Operator) medically separated from the Marine Corps in 2007 after 6 years of service. The medical basis for the separation was Right Achilles Tendonitis and Delayed Post Traumatic Stress Disorder (PTSD). The CI injured his right leg running on uneven terrain carrying a load. He was treated with various conservative therapies for over 4 years including two short periods of limited duty for his right Achilles tendonitis. He did not respond adequately to perform within his MOS or participate in fitness training or field training. Achilles Bursitis or Tendonitis was the only condition listed on the NAVMED 6100/1 as medically unacceptable. The Medical Evaluation Board (MEB) narrative also noted the CI’s diagnosis of PTSD and a Psychiatric Addendum was obtained. The CI’s date of onset for delayed PTSD was indicated as Jul 2007. Stressors were attributed to the CI’s four combat deployments to Iraq. The predominant symptoms of depression, nightmares, flashbacks, irritability and overwhelming anxiety were only partially reduced following therapy and medications. Delayed PTSD and Achilles Bursitis or Tendonitis was addressed in the Narrative Summary (NARSUM) and the Physical Evaluation Board (PEB) found Delayed PTSD unfitting at 10% and Achilles Tendonitis unfitting at 0%. The CI did not appeal for a formal PEB and was thus medically separated with a 10% combined 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. In accordance with the class action notice, assign the highest final disability rating applicable consistent with 38 CFR 4.129 and DoD policy, to the extent such increase will not adversely affect my total compensation, including but not limited to compensation pursuant to CRSC.” All service conditions are reviewed by the Board as a matter of policy. 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 PEB – Dated 20071130** | **VA (4 Mo. after Separation) – All Effective 20080216\*** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| PTSD | 9411 | 10% | PTSD with MDD | 9411 | 50%\* | 20080605 |
| Right Achilles Tendonitis | 5399-5311 | 0% | Right Achilles Tendonitis | 5399-5310 | 0%\*  | 20080603 |
| Psoriasis | Category III | Psoriasis | 7816 | 0% | 20080603 |
| No Additional Entries | Esophageal Reflux | 7346 | 10% | 20080603 |
| Tinnitus | 6260 | 10% | 20080603 |
| NSCx2 |
| **TOTAL Combined: 10%** | **TOTAL Combined (*Includes Non-PEB Conditions*): 60%\***  |

**\* VA increased PTSD to 70% and Achilles Tendonitis to 10% coded 5310-5271 effective 20081211 for a combined 80% rating**

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ANALYSIS SUMMARY: The CI’s primary duty limiting condition appeared to be the right Achilles tendonitis. The PTSD diagnosis appeared to be added while the CI was undergoing MEB processing and the service treatment record (STR) provided scant documentation of the psychiatric criteria required for the diagnosis. Later VA documentation provided greater details for a PTSD diagnosis and additional mental health diagnosis. The PEB’s unfitting determination under the PTSD diagnosis is considered administratively final for the Board, and the Board focused on adjudicating the CI’s mental health disability under Veterans Administration Schedule for Rating Disabilities (VASRD) coding for PTSD 9411. The possibility of other/alternative mental health diagnoses such as Anxiety Disorder Not otherwise specified (NOS) with Mental Disorder due to a General Medical Condition (Medication use) was not material to the Board’s rating under the General Rating Formula for Mental Disorders.

PTSD Rating Recommendation. The PEB 10% rating, was most likely derived from DoDI 1332.39 as this Instruction was in effect at the time of the PEB adjudication 20071130 and there was no administrative change following promulgation of the NDAA 2008 mandate for DOD adherence to VASRD §4.129 which pre-dates the CI’s separation from service. 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 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 evaluations, 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 the VA examination 4 months after separation, summary of psychiatric hospitalizations in Nov 2008 and Dec 2008 (9 and 10 months after separation) and the VA evaluation exam 12 months after separation. The VA exam 4 months after separation clearly demonstrated worsening of the CI’s mental health condition and included notes from VA treatment of the CI’s PTSD and Major Depressive Disorder (MDD) as “Post traumatic stress disorder with major depressive disorder (also claimed as anxiety)”. The exam was rated by the VA IAW criteria of §4.130 as 50%, but the rating determination also noted wording equivalent to §4.129. The CI was “unemployed as he says no one will hire him and he stopped looking because of medical appts and a sense of defeat/frustration,” was on food stamps and still married. The symptoms and findings identified included: flattened affect; circumstantial, poor impulse control (spending, yelling and hitting things); panic attacks 2x week; sleep impairment; avoidance; anxiety; ritualized behavior; impairment of memory (attributed to medications and subjective only); disturbance of motivation and mood; intrusive recollections; and difficulty establishing/maintaining work/social relationships with marital dysfunction. A Beck depression Scale of 25 was indicative of moderate depressive symptoms aligned with the exam findings and CI’s history. His global functioning was in the range of moderate symptoms (GAF=55) with a contemporaneous clinical note indicating GAF=50. Independently rating of this exam supports a 50% rating IAW §4.130. The CI’s psychiatric hospitalization at 9 months was for “complaints of worsening PTSD and depression in the context of family/marital discord.” “Pt exhibits significant re-experiencing, avoidance, hyper-vigilance, numbing, and erratic sleep patterns. He also reports associated depressed mood, decreased energy, and feeling overwhelmed.” He was noted to be abusing cannabis and was placed on suicide prevention. Following changes in medication and treatment the CI “reported resolution of suicidal thoughts and reported reduction of depressed mood’ and he was discharged to home. The hospitalization at 10 months after separation was for a suicide gesture “he had cut himself on the wrist and tried to overdose on Xanax.” The evaluation at 12 months after separation summarized the hospitalizations and noted: “Vet reports that over the last 8 months stress has increased and he has been unable to find a job, suffered from increased anxiety, depression and had legal trouble following an assault on his wife secondary to PTSD. Vet has had severe depression and anxiety and has attempted suicide (Gesture?) in Dec 08. Vet reports that they are on the verge of getting a divorce (says it was OK until Sept (*7 months post separation*) when he tried to choke her). Vet cannot have unsupervised visits with his kids. Vet will start inpatient PTSD program in a week. Vet isolates, has a loss of energy and loss of interest and has little ability to cope with daily stressors. He has periodical feelings of suicide and is very self critical.” The GAF of 49 was in the serious symptoms range. The VA rater and independent rating provide a 70% evaluation for this exam. All Board members agreed that the record indicated significant increase in the CI’s mental health disability following discharge. The Board agreed that the evaluations surrounding the 6 month rating period were 50% (4 month) and 70% (12 month) under §4.130. The Board deliberated therefore primarily between 50% vs. 70% as the permanent rating recommendation IAW §4.130. Since the 4 month evaluation was closest to the 6 month period, and the assault and suicidal thoughts and actions appeared to have started following the 6 month period, the CI’s condition at six months was adjudged to be closer to the 50% rating than the 70% rating. After due deliberation, the Board agreed that a permanent PTSD rating of 50% is the most representative of impairment and a fair recommendation for permanent separation rating in this case.

Achilles Tendonitis Condition. This condition was long standing (4-5 years) and had failed to resolve under extensive conservative therapy including physical therapy, wearing an immobilization foot boot, electro stimulation, and was not well controlled even on prolonged narcotic pain medications. The chronic narcotic pain medication used for treating this condition could conceivably have either exacerbated or heralded the CI’s mental health disability, but there was no clear linkage in the record and all mental health symptoms were considered in the rating of the CI’s unfitting PTSD condition. Rheumatologic specialty assessment did not link the tendonitis to either the CI’s psoriasis condition or therapy. The patient declined surgery, which was indicated as usually having “a good likelihood of healing following the surgery.” As there was a caveat about “unknown factors are the extent to which the psoriasis, and medications for the treatment of psoriasis, might influence the healing or recurrence of the condition”, the CI’s refusal was not considered unreasonable. The ankle joint imaging was normal and MRI of the lower leg was normal. The CI had slightly decreased dorsiflexion (11° of 20°) and plantar flexion (37° of 45°) with painful plantar flexion of the foot on the formal goniometric range of motion (ROM) examination in the record. He walked without a limp during his MEB evaluations, but some other exams noted a slight limp. The CI was rated at 0% using the muscle code 5399-5311, as slight. At the 4 month VA rating exam the CI was taking morphine (narcotic) and Gabapentin (Neurontin - for neuropathic pain) for his tendonitis. There was no evidence of painful ankle motion. Re-evaluation at 12 months demonstrated painful ankle motion and he had a mildly antalgic gait with tenderness at the same area as documented by military exams. The initial VA 0% rating for this condition using an analogous muscle coding was changed to 10% using 5310-5271, a muscle code with painful motion of the ankle joint based on his 20081211 exam. The Board considered the entire record including exams that would be in the constructive TDRL period for the CI’s mental health condition. It appeared that the CI had longstanding painful right Achilles tendonitis with symptoms waxing and waning. Given that the right ankle had full pain-free ROM following separation, the PEB and initial VA rating of 0% is considered appropriate. The PEB coding of 5399-5311 is not significantly different than the VA coding of 5399-5310 and no recharacterization of the PEB determination for this condition is indicated.

Other Conditions (Psoriasis, Esophageal Reflux and Tinnitus). By inference, the CI contends for every condition listed on the post-separation VARD. Psoriasis was specifically mentioned in the MEB, and the PEB found it not separately unfitting or contributing to the CI’s unfitting diagnoses (Category III). The NARSUM did indicate that medications for treating psoriasis and the restrictions on medications (due to psoriasis) for treating the CI’s other conditions was a potential. There was also the possibility of psoriasis specifically causing or exacerbating the CI’s right Achilles Tendonitis. Rheumatologic consultation did not support a relationship between CI’s tendonitis and psoriasis. The interactions were adjudged to be unrelated to the CI’s psoriasis. There was no evidence that psoriasis restricted the CI’s use of protective gear or interfered with duties. Esophageal Reflux was mentioned in the history and physical (13a.) as well on the DD Form 2697. The CI was on medication for reflux and the condition appeared to be stable. The only documented physical limitations were those attributed to the CI’s unfitting conditions. No link to fitness can be drawn for the psoriasis or esophageal reflux conditions. The tinnitus condition was not mentioned in the DES file and 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 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. The Service did not apply VASRD §4.129 to the CI’s PTSD separation as required by NDAA 2008 in effect at the time, for which the Board provides remedy. In the matter of the right Achilles tendonitis condition the Board recommends by a vote of 2:1, no change of the PEB coding and rating of 0%. The single voter for dissent (who recommended 10% coded 5311-5271) did not elect to submit a minority opinion. 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. 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.

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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 combined 50% disability retirement as below.

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| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT****RATING** |
| Post-Traumatic Stress Disorder and Depression | 9411 | 50% | 50% |
| Right Achilles Tendonitis | 5399-5311 | 0% | 0% |
| **COMBINED** | **50%** | **50%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100309, 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 XXXXX, FORMER USMC, XXX XX XXXX

Ref: (a) DoDI 6040.44

Encl: (1) PDBR ltr dtd 19 Aug 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 15 February 2008 thru 15 August 2008.

 b. Final separation from naval service due to physical disability effective 16 August 2008 with a disability rating of 50 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)