RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XxXXXX BRANCH OF SERVICE: MARINE CORPS

CASE NUMBER: PD1000254 SEPARATION DATE: 20070515

BOARD DATE: 20110309

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty LCpl (0311, Infantry) medically separated from the Marine Corps in May 2007. The medical basis for separation was posttraumatic stress disorder (PTSD). He developed symptoms during two deployments to Iraq. He did not seek help after the first deployment, but “self-medicated” with alcohol. He was returned early from his second deployment for PTSD symptoms. Criterion A combat stressors including personal wounding were documented and Diagnostic and Statistical Manual of Mental Disorders (DSM IV) criteria for an Axis I diagnosis of PTSD were met. He was treated with medication and counseling, but failed to respond adequately to perform within his military occupational specialty and was referred to the Medical Evaluation Board (MEB). PTSD was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable. The PEB adjudicated the PTSD condition as unfitting (rated 10%) with application of DoDI 1332.39. “Status Post IED Blast” was added as a related Category II condition (a condition that contributes to the unfitting condition). The CI accepted the PEB findings, and was medically separated with a 10% disability rating.

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.I29 and DOD policy (continuation) Please see attached list of contentions regarding why the PDBR should make the changes I request in Item 3.” He requests that the Traumatic Brain Injury (TBI) condition for which he was found ‘fit’ by the military be changed to “unfitting” and assigned the highest possible rating. He additionally lists his VA conditions and ratings as per the chart below. A contention for their inclusion in the separation rating is therefore implied. This case is court remanded under the *Sabo et al v. United States* class action suit.

**\_\_­\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20070323** | | | **VA (2 mo. after Separation) – All Effective 20070516** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| PTSD | 9411 | 10% | PTSD | 9411 | 50% | 20070706 |
| Status Post IED Blast | Category II | | Posttraumatic Headaches | 8199-8100 | 10%\* | 20070726 |
| ↓No Additional MEB Entries↓ | | | Recurrent Lumbosacral Sprain | 5237 | 10% | 20070706 |
| Recurrent Right Ankle Sprain | 5271 | 10% | 20070706 |
| Tinnitus | 6260 | 10% | 20070706 |
| 0% x 1/Not Service Connected x 3 | | | 20070706 |
| **TOTAL Combined: 10%** | | | **TOTAL Combined: 70%** | | | |

\*Code changed to 8045 and rated 40% effective 20081023

**\_\_­\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

ANALYSIS SUMMARY:

PTSD. The March 2007 PEB rating, as described above, was derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act (NDAA) 2008 mandate for Department of Defense (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 PTSD 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 best source of evidence on which to base the permanent rating in this case is the Veterans’ Affairs (VA) compensation and pension (C&P) examination performed two months after separation, with a more remote exam 28 months after separation. DoDI 6040.44 specifies a 12-month interval for special consideration to VA findings, rendering the probative value of the later VA evidence in this case somewhat diminished. The probative value of the two-month 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 this VA exam was still fairly close to separation, 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 symptoms at the time of the MEB exam could best be described as moderate. He endorsed symptoms such as frustration, anxiety, nightmares, increased startle response, increased arousal, irritability, insomnia, social withdrawal, feelings of detachment, and active avoidance of emotional triggers. The commander stated that the CI’s PTSD “precludes him from performing any duties, and his therapy has not corrected any trends.” The CI’s mental status examination (MSE) was remarkable for a depressed mood and anxious affect, but was otherwise normal, without suicidal ideation, delusional or hallucinatory symptoms, cognitive impairment or other abnormalities. The MEB psychiatrist opined that the CI is “suffering from significant symptoms of PTSD,” and assigned a global assessment of functioning (GAF) score of 60-65 (connoting mild symptoms or impairment in social/occupational functioning). At the time of the initial VA examination two months after separation, the CI’s symptoms included poor sleep, outbursts of anger, difficulty expressing affection, concentration problems, social withdrawal, and avoidance of crowded places. He was employed, was not missing time due to PTSD symptoms, but stated he was struggling to perform well. He was living with a girlfriend, but reported that the relationship was stressed due to his symptoms. He had some friends that he saw several times per week, and went out to restaurants a few times per month. He was not currently under treatment for his PTSD, but had a treatment appointment scheduled. The VA examiner did not document a MSE, but mentioned his depressed mood. He also stated that the CI’s “thought processes, particularly memory and concentration, are definitely impaired.” The VA examiner assigned a GAF of 55 (connoting moderate symptoms or impairment). Two years later, at his VA exams 28 months after separation, the CI was unemployed, but enrolled full-time as a college student. He was living with the same girlfriend and continued to describe the relationship as strained.

The Board directs 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 (as explained above) is applicable. The VA rated the CI’s PTSD at 50% based on §4.130 criteria without application of §4.129. 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”), considering that the CI’s symptoms stabilized and slightly improved following psychiatric treatment, and his generally intact social abilities as evidenced by a new relationship with a girlfriend. The VA psychiatric examination was also consistent with the general description for a 30% rating, documenting intact occupational function as well as proven, albeit strained, social function with friends, family, and girlfriend. All members agreed that 70% threshold was not approached. Members deliberated whether the 10% rating criteria for mild, transient, or well controlled symptoms that decrease occupational efficiency only during periods of significant stress could be applicable in this case, but concluded that the CI’s persistent anger and inability to concentrate, among other symptoms, were consistent with his sense of struggling in the workplace, and that the 10% criteria were exceeded. The Board considered that the post-separation VA data could have been rated 30% under §4.130 based on the CI’s stable symptoms, and intact occupational and social function in the post-separation period. This was tempered by the recognition that his true condition at six months was somewhat speculative. After due deliberation, and in consideration of all the evidence and VASRD §4.3 (reasonable doubt), the Board recommends 30% as the fair permanent separation rating for PTSD.

Other Conditions. The other condition adjudicated as Category II by the PEB was status post IED blast. The Board presumes that this diagnosis is equivalent to TBI. The CI’s application asserts that a compensable rating should be considered for TBI. There is no mention of TBI related symptoms in the NARSUM. Headaches are documented in the MEB history. At the VA C&P exam two months after separation he reported memory difficulty, concentration problem, headache three to four times per month, lasting between an hour or two. The VA rated posttraumatic headaches at 10%, though no support for prostrating attacks is in evidence. Neither the headaches nor cognitive difficulties were profiled, implicated in the commander’s statement or noted as failing retention standards. Moreover, the CI’s cognitive symptoms are subsumed by, and support, the rating for the PTSD condition above. The headache and cognitive symptoms conditions were reviewed by the action officer and considered by the Board. There was no indication from the record that these conditions significantly interfered with satisfactory duty performance. The Board acknowledges that the VA increased the CI’s rating for TBI to 40% effective October 2008 even though the C&P examiner stated, “at this time I believe it is less likely than not that the patient is suffering from sequelae related to traumatic brain injury.” All evidence considered, there is not reasonable doubt in the CI’s favor supporting reversal of the PEB fitness adjudication for any of the stated conditions.

Remaining Conditions. Ankle sprain was noted in the DES file. Several additional conditions were also documented. None of these conditions were clinically significant during the MEB period, carried attached profiles or were implicated in the commander’s statement. 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. Additionally back pain, tinnitus and several other conditions were noted in the VA rating decision proximal to separation, but were not documented in the DES file. 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.

**\_\_­\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

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 may have been operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the PTSD, 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 status post IED blast (TBI), ankle sprain, 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.

**\_\_­\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

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** |
| 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

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

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 May 2007 thru 14 November 2007.

b. Final separation from naval service due to physical disability effective 15 November 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)