RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: marine corps

CASE NUMBER: PD201000317 SEPARATION DATE: 20060715

BOARD DATE: 20110329

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SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Cpl (3531, Motor Vehicle Operator) medically separated from the Marines in July 2006 after three years of service. The medical basis for the separation was posttraumatic stress disorder (PTSD). After returning from deployment in Iraq (March 2005 to September 2005), CI developed symptoms diagnosed as PTSD and major depressive disorder (MDD), single episode. He received treatment with medication and therapy. Subsequently, the CI was placed on limited duty and underwent a Physical Evaluation Board (PEB). PTSD and MDD were addressed in the narrative summary (NARSUM) and PTSD was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable. Additional conditions supported in the Disability Evaluation System (DES) packet are discussed below, but were not forwarded for PEB adjudication. The commander’s non-medical assessment (NMA) indicated that the CI was satisfactorily performing duties in his military specialty; however, the CI, in a personal statement to the PEB, reported problems with ability to focus on his work and anger. The PEB adjudicated the PTSD condition as unfitting, rated 0% with MDD as a category 2 (contributing, but not separately unfitting) condition with application of SECNAVINST 1850.4E and DoDI 1332.39 (E2.A1.5). The CI made no appeals and was medically separated with a 0% 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 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. See item 12 for continuation. Please see attached list of contentions regarding why the PDBR should make the changes request in Item 3.” 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 20060522** | | | **VA (29 Mo. After Separation) – All Effective 20071024** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Posttraumatic Stress Disorder- Major Depressive Disorder | 9411 | 0% | Posttraumatic Stress Disorder | 9411 | 30% | 20081217 |
| ↓No Additional MEB/PEB Entries↓ | | | 0% x 1/NSC x 1 |  |  | 20081217 |
| **Combined: 0%** | | | **Combined: 30%** | | | |

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ANALYSIS SUMMARY:

PTSD and MDD: The PEB rating, as noted above, was derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act 2008 mandate for DOD adherence to the 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 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. There is no VA outpatient or civilian provider evidence providing comprehensive psychiatric details during the six-month interval following separation; however, there are VA outpatient treatment records at 2 months, and 11 to 15 months after separation. The VA outpatient notes reflect the stress of transition to civilian life, which is intrinsic to the permanent rating recommendation. These therefore carry relative probative value in the Board’s pursuit of a fair permanent rating recommendation while the MEB evidence serves as a useful reference point in estimating the psychiatric impairment at the six-month interval for which there is no comprehensive evidence. A VA compensation and pension (C&P) examination performed 29 months after separation is well outside the DoDI 6040.44 specified a 12-month interval for special consideration to VA findings, rendering the probative value of this examination in this case diminished. The Board must therefore weigh the evidence contained in the MEB psychiatric NARSUM balanced by the VA evidence approximately one year from separation, in order to extrapolate an estimation of the ratable impairment at six months after separation.

All Board members agreed that the §4.130 criteria for a rating higher than 50% were not met at the time of separation, and therefore IAW §4.129 the minimum 50% TDRL rating is applicable. The severity of the CI’s symptoms at the time of the MEB psychiatric NARSUM three months prior to separation was documented as moderate by the examiner. Criterion A stressors while deployed were recorded and the CI manifested symptoms of PTSD including recurrent intrusive distressing recollections of events, flashbacks triggered by sounds and odors (military environment, artillery, air traffic), and avoidance of stimuli associated with his war experiences. He reported nightly recurrent distressing nightmares, hypervigilance, exaggerated startle responses, and irritability with outbursts of anger. He reported a “number of encounters with fellow Marines” (not reflected in the NMA). He had moderate depressed mood associated with loss of interest in usual activities, sleep disturbance, fatigue, feelings of guilt, difficulty concentrating, and detachment from others. He denied use of alcohol or drugs. He denied suicidal ideation, but had thoughts of hurting others. On mental status examination, he appeared chronically fatigued and on the verge of tearfulness with a mixed depressed and angry mood. He was oriented with intact memory and absence of disordered thought processes. The examining psychiatrist assigned a global assessment of functioning (GAF) of 55-65, connoting mild to moderate symptoms. The NMA reported that the CI was working in his specialty as a motor vehicle operator and performing satisfactorily, without apparent negative impact from his condition. He had not missed work and was considered to have “good potential for continued service in his present physical and mental condition.” The CI provided a personal statement rebutting the NMA and reporting he missed work due to two medical sessions per week, problems with irritability and anger with associated thoughts of violence, along with difficulty focusing on his job, making mistakes, and avoidance of interacting with co-workers. The PEB, noting the NMA rated the mental health conditions 0% (the primary diagnosis was PTSD with a secondary diagnosis of MDD, classified as Category II, a condition that contributes to the unfitting condition). IAW VASRD principles §4.126, evaluation of disability from mental disorders, mental health diagnoses are rated together as one condition under the primary diagnosis due to overlapping symptoms and impairments.

At a VA social work clinic entry, two months after separation on September 21, 2006, the CI reported he was a full-time student (carrying 17 credits), sharing a house with four friends, and had a girlfriend (presumed to be the same as while on active duty). He reported PTSD symptoms including social withdrawal, irritability, anger, and avoidance of crowds. A PTSD psychiatry evaluation 11 months after separation, recorded similar symptoms of PTSD as reported in the NARSUM including irritability, mood swings, sleep problems, social anxiety, and trouble with short-term memory and focusing. He lived with his girlfriend for two years and was a full-time business student. He denied alcohol abuse. The examiner assigned a GAF of 55 connoting moderate symptoms. No relationship problems were recorded; however, psychological testing on June 5, 2007 indicated some difficulties. On traumatic brain injury screening on June 1, 2007, the CI reported exposure to explosions while deployed with loss of consciousness (“knocked out”), being dazed, confused or seeing stars, and not remembering the event. He reported experiencing multiple symptoms afterwards including headaches, memory problems, balance problems or dizziness, irritability and sleep problems. At the time of the MEB history and physical examination seven months after returning from deployment, the CI checked “no” to questions regarding head injury, memory loss or amnesia, periods of unconsciousness or concussion, and frequent or severe headaches or dizziness.

An October 22, 2007 psychiatry evaluation 15 months after separation records similar symptoms. At the exam, CI reported that treatment with medication (bupropion) was very effective in treating his mood, anger and agitation (at the time had run out of medication with increase in symptoms and the medication was restarted). No detail regarding social and occupational function was provided. On mental status examination, CI was pleasant, cooperative and oriented. His mood was “depressed/anxious/euthymic” with congruent affect. His speech and thought processes were normal. There was no suicidal or homicidal ideation, delusions, or hallucinations. The VA rating decision in April 2008 cited a statement provided by the CI, summarized as: “You stated you now work for your dad at his pizza shop because you can't hold a job down anywhere else due to your anger and patience problems. You also reported that your nightmares are almost every night and sometimes you get so overwhelmed with your dreams that you wake up in a cold sweat and sometimes vomit.” A December 2008 VA C&P examination 29 months after separation documented continued moderate symptoms, but with reported worsening due to panic attacks and increased social isolation. During this examination, the CI reported a history of sustaining three concussions and a shrapnel wound to the shoulder. The rating decision in January 2009 granted a service-connected rating for PTSD of 30% based on service and VA treatment records and the December 2008 C&P examination.

Next, the Board considered its recommendation for a permanent rating for PTSD based on the most appropriate fit with VASRD §4.130 criteria at six months following separation. The Board members noted that at the time entering the constructive TDRL period, the preponderance of evidence (including the NARSUM, NMA, and CI’s personal statement) supported a 10% rating (impairment with decreased work efficiency), with some symptoms supporting a 30% rating, but not a 50% rating. Similarly, Board members agreed that VA mental health documentation in the 11 to 15 month post-separation timeframe did not approach the 50% rating level. Therefore, the Board’s deliberations were centered on determining whether the CI’s condition more nearly approximated a 10% or 30% evaluation for a permanent rating recommendation. With regard to a 30% rating, occupational and social impairment with occasional decrease in work efficiency could be surmised from symptoms in both the NARSUM and VA treatment records including the CI’s depressed mood, chronic sleep impairment, and complaint of problems with memory and concentration. Anxiety was present in the post-separation documentation. Pre-separation documentation records satisfactory performance of duties, and VA evidence 11 to 15 months post-separation reflects status as a full-time student (the later C&P examination in December 2008 documented CI report of difficulties with school due to his symptoms). Evidence until 15 months post-separation generally reflected a stable relationship with his girlfriend and having friends. Probative value concerns regarding the CI’s accounts of his symptoms were raised based on his report of traumatic brain injury and associated symptoms at the time of VA examination 11 months after separation that are not corroborated by evidence of the service treatment records or DES documents. The Board considered that the CI’s accounts of his post-separation symptoms and their severity, which constitute much of the psychiatric evidence, were subject to a reasonable reduction in their probative value weight. All of the evidence, bolstering and reducing support for the higher rating, was debated. Any symptoms attributed to the CI’s MDD, single episode, moderate in severity were considered in the overall §4.130 rating for PTSD. As many conflicting opinions as possible were resolved in favor of the CI when it was reasonable to do so. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a permanent rating of 30% for the PTSD condition.

Remaining Conditions. Right knee strain and hearing loss were identified in the DES file. None of these conditions were significantly clinically active during the MEB period. The right knee limited duty period expired over a year prior to separation (February 2005) and a two-week light duty expired in January 2006. There were no limitations associated with hearing and none were implicated in the NMA 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.

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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. 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 knee and hearing conditions 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 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** |
| Posttraumatic Stress Disorder | 9411 | 50% | 30% |
| **COMBINED** | **50%** | **30%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100322, 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

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 July 2006 thru 14 Jan 2007.

b. Final separation from naval service due to physical disability effective 15 January 2007 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)