RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXX BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1000329 SEPARATION DATE: 20071130

BOARD DATE: 20111019

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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 GySgt (3537, Motor Transport Operation Chief) medically separated from the Marine Corps in 2007. The medical basis for the separation was obstructive sleep apnea (OSA) and panic disorder without agoraphobia. He did not respond adequately to perform within his military occupational specialty (MOS) and underwent a Medical Evaluation Board (MEB). Essential hypertension and unspecified hyperlipidemia were addressed in the narrative summary (NARSUM) and were forwarded to the Physical Evaluation Board (PEB), but were not found to be unfitting conditions. Other conditions included in the Disability Evaluation System (DES) packet will be discussed below. The Informal PEB (IPEB) adjudicated the OSA as fit for continued active duty; this finding was upheld on reconsideration. The CI appealed to the Formal PEB (FPEB) who found him unfit for the combined effect of OSA and panic disorder without agoraphobia, rated 0%, with application of SECNAVINST 1850.4E and DoDI 1332.39. He was then medically separated with a 0% combined disability rating.

CI CONTENTION: “It is my opinion at the time and is my opinion now that there should be some consistency between the Service Board determination and the VA determination when it comes to disability. When I sat on my Service Board it was explained to me that the Service Board did not rate the same as the VA. It did not make sense to me how the Service Board could find me as UNFIT at 0% disabled and the VA finds me at 60% disable using the same VASRD [VA Schedule for Rating Disabilities) manual. I spent 17½ years in the Marine Corps and loved being a Marine. I just don’t understand how we say we take care of each other and there is so much inconsistency in the manner in which we rate our service men and women. I spent my whole adult life as a US Marine only to be cut short of retirement by a year and a half and to have to completely start over because the Service Board and the VA rating systems are so different is unfair. Thank you for recognizing that this system has it flaws.”

RATING COMPARISON:

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| --- | --- |
| **Service FPEB – Dated 20071023** | **VA (6 Mo. Pre-Separation) – All Effective 20071201** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| OSA | Combined effect | 0% | OSA | 6847 | 50% | 20070516 |
| Panic Disorder w/o Agoraphobia | Panic disorder w/ Agoraphobia | 9412 | 10% | 20070517 |
| Essential Hypertension | Cat III |  | Hypertension | 7101 | 0% | 20070516 |
| Unspecified Hyperlipidemia | Cat IV |  | No VA Entry |
| ↓No Additional MEB Entries↓ | Thoracolumbar Degenerative Arthritis | 5242 | 10% | 20070516 |
| GERD Hiatal Hernia | 7327 7346 | 10% | 20070506 |
| 0% x 1 / NSC x 3 |
| **TOTAL Combined: 0%** | **TOTAL Combined (*Includes Non-PEB Conditions*): 60%** |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that there should be additional disability assigned for his other conditions and for the gravity of his condition and predictable consequences which merit consideration for a higher separation rating. While the DES considers all of the service member's medical conditions, compensation can only be offered for those medical conditions that cut short a service member's career, and then only to the degree of severity present at the time of final disposition. However, the Department of Veterans Affairs, operating under a different set of laws (Title 38, United States Code), is empowered to periodically re-evaluate veterans for the purpose of adjusting the disability rating should the degree of impairment vary over time.

Obstructive Sleep Apnea. The CI was diagnosed with OSA in 2003. Subsequent medical specialty evaluation deemed him not a surgical candidate. The CI has been using a continuous positive airway pressure (CPAP) machine since 2005. The MEB referred the OSA condition to the PEB primarily due to his non-deployable status. The NARSUM on 14 February 2007 nine months pre separation noted, “his condition of sleep apnea requiring the use of a continuous positive airway pressure machine makes him unable to deploy as a reliable power source is not always available in austere environments.” It further states that, “he has a good prognosis for his sleep apnea as long as ongoing therapy with continuous positive airway pressure machine is available.” The most current sleep study on 17 April 2007 seven months pre-separation was conducted with treatment using CPAP at 12 cm H20. The study demonstrated good treatment of OSA/hypopnea with AHI of 2.3/hr and oxygen saturation remained within normal limits with a Nadir of 92%. A low frequency of respiratory events occurred in the supine position. The VA compensation and pension (C&P) examination on 16 May 2007 six months pre separation noted that, “the veteran reports that he has no difficulty staying awake during the daytime hours. However, he feels somewhat tired. He has breathing assistance from the CPAP machine. He reports that he awakens several times during the night. He feels tired by 10:00 PM. He denies any functional impairment as a result of this condition.” Spirometry and chest x-ray were both normal. The FPEB on 21 August 2007 found the CI unfit due to the combined effect of OSA and panic disorder without agoraphobia, rated at 0%. OSA alone was not considered unfitting. The VA rating decision on 13 February 2008, two months post-separation, rated the conditions separately with the OSA condition, code 6847 (sleep apnea syndromes), rated 50%.

The Board reviewed the evidence for the sleep apnea condition as to fitness. The non-medical assessment noted, “SNM [service member] has been medically evaluated and found to be non-deployable due to obstructive sleep apnea and cannot be counted on to carry out his duties in the global theater. SNM is repeatedly late for work due to oversleeping, which is caused by the sleep apnea and the resulting inability to get a restful night's sleep.” The Board noted that CI clearly has OSA which does require treatment with CPAP, meeting the VASRD §4.100 criteria for a 50% rating. The Board then considered whether OSA, having been de-coupled from the combined FPEB adjudication, remained independently unfitting as established above. After due deliberation the Board, by simple majority, found that evidence does support a conclusion that OSA, as an isolated condition, would have rendered the CI incapable of continued service within his MOS, and accordingly recommended a separate service rating, coded 6847, with a 50% rating IAW VASRD §4.97.

Panic Disorder without Agoraphobia. The CI initially sought treatment for headaches, dizziness, palpitations and anxiety on 5 August 2002. He was diagnosed with panic attacks and was placed on Zoloft. The NARSUM (mental health addendum) on 13 August 2007 three months pre separation noted that, by 2007, he continued to report frequent episodes of panic, which he was able to quickly avert by using distraction and relaxation techniques. His Zoloft was increased from 50mg to 100mg daily in February 2007 with good control of his panic symptoms. The mental status examination was unremarkable and a global assessment of functioning (GAF) was 71. The NARSUM noted that he still had panic attacks approximately once per month and “the patient's recurrent panic attacks, accompanied by persistent concerns about having additional attacks and worry about the implications of the attacks make him incapable of performing in Active Duty.” He had “received maximum benefit of military medical treatment, and that this has not restored the patient to full duty status.” Impairment for service and civilian industrial capacity was considered moderate. The MEB recommended referral to the PEB. The VA C&P examination (psychiatry) six months pre-separation on 17 May 2007 also noted anxiety episodes that occurred approximately once per month, which were not severe. The CI stated that he avoided crowded places so the diagnosis became panic disorder with agoraphobia. Mental status exam was normal and the GAF was 70. The IPEB and PEB for Reconsideration did not consider the panic disorder condition. The FPEB on 21 August 2007 found the CI unfit due to the combined effect of OSA and panic disorder without agoraphobia, rated 0%. The VA rating decision two months post-separation on 13 February 2008 rated the conditions separately, with the panic disorder with agoraphobia condition, code 9412 (panic disorder and/or agoraphobia), rated at 10%.

The Board carefully considered the evidence of the panic disorder condition in relation to fitness. The best descriptor for the condition is “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, or; symptoms controlled by continuous medication.” This is consistent with the 10% rating assigned by the VA. The Board then considered whether the panic disorder condition, having been de-coupled from the combined FPEB adjudication, remained independently unfitting as established above. The Board majority based upon the evidence the panic disorder without agoraphobia merits a separate service rating, coded 9412, meeting the VASRD §4.130 criteria for a 10% rating.

Other PEB Conditions. The other conditions were adjudicated as not unfitting by the PEB were essential hypertension and unspecified hyperlipidemia. Neither of these conditions were profiled, implicated in the non-medical assessment, or noted as failing retention standards. Both were reviewed by the action officer and considered by the Board. There was no indication from the record that either of these conditions significantly interfered with satisfactory performance of MOS duty requirements. All evidence considered there is not reasonable doubt in the CI’s favor supporting re-characterization of the PEB fitness adjudication for either of the stated conditions.

Remaining Conditions. Other conditions identified in the DES file were heart burn/gastroesophageal reflux disease (GERD), obesity, inguinal hernia operation with scar, hiatal hernia, left hamstring injury, tear of the left tympanic membrane and diverticulosis. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically active during the MEB period, none were the basis for limited duty and none were implicated in the non-medical assessment. 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, thoracolumbar degenerative arthritis, peptic ulcer, and right calf strain 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. 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. In the matter of the OSA condition, the Board, by simple majority, recommends a rating of 50%, coded 6847 IAW VASRD §4.97. The single voter for dissent (who opined that the condition was not unfitting) elected to submit a minority opinion. In the matter of the panic disorder without agoraphobia the Board majority recommends a rating of 10%, coded 9412. In the matter of the essential hypertension, unspecified hyperlipidemia, heart burn/GERD, obesity, inguinal hernia operation with scar, hiatal hernia, left hamstring injury, tear of the left tympanic membrane and diverticulosis, the Board unanimously agrees that it cannot recommend a finding of unfit for additional ratings at separation. 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 and that the discharge with severance pay be re-characterized to reflect permanent disability retirement, effective as of the date of his prior medical separation:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| OSA | 6847 | 50% |
| Panic Disorder without Agoraphobia | 9412 | 10% |
| **COMBINED** | **60%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294 dated 20100330, w/atchs.

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

 President

 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 XXXXX

Ref: (a) DoDI 6040.44

1. I have reviewed the subject case pursuant to reference (a) and direct the subject member’s official records be corrected to reflect the following disposition:

 a. Separation from the naval service due to physical disability rated at 10 percent (increased from 0 percent) with entitlement to disability severance pay effective 30 November 2007.

2. Please ensure all necessary actions are taken to implement this decision including notification to the subject member once those actions are completed.

 Principal Deputy

 Assistant Secretary of the Navy

 (Manpower & Reserve Affairs)