RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXX BRANCH OF SERVICE: NAVY

CASE NUMBER: PD1000416 SEPARATION DATE: 20051223

BOARD DATE: 20101028

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SUMMARY OF CASE: This covered individual (CI) was an active duty E-5 (CS2/Culinary Specialist), medically separated from the Navy in 2005 after over 9 years of combined service. The medical basis for the separation was Post-Traumatic Stress Disorder (PTSD). The Criterion A stressor was from a ferry boat mishap in 1991 that led to 19 deaths including 5 shipmates, and the CI being in the water for 2.5 hrs awaiting rescue. The CI was monitored in the ICU for 24hrs. The CI was also undergoing a family crisis due to a premature infant and non-coping spouse. The CI returned stateside and went on unauthorized leave for 90 days and had onset of anger and panic attacks. The CI was given a hardship discharge in 1991. The CI began having nightmares, difficulty staying focused and panic attacks and sought treatment in 1992. The CI was diagnosed with PTSD and Depression with anxiety and started medications and counseling. The CI was receiving treatment from 1992-1998, with decrease in symptoms from 1996-1998. The CI re-enlisted in the Navy in 2000 and served without difficulty until an Emergency Room visit for anxiety in 2003 potentially linked to the acute stressors of an impending divorce. In early 2005, the CI became depressed with sleep impairment and re-experiencing the boating event. Despite medications and therapy, he did not respond adequately to perform within his military occupational specialty (MOS) and underwent a Medical Evaluation Board (MEB). PTSD, Depressive disorder, and Neurotic disorder were addressed in the narrative summary (NARSUM) and forwarded to the Physical Evaluation Board (PEB) on NAVMED 6100/1. The informal PEB adjudicated the PTSD condition as unfitting with associated (CAT II) Anxiety, Partner relational problem, and chronic depressive disorder conditions, rated 10%; with likely application of SECNAVINST 1850.4E and/or DoDI 1332.39. The CI made no appeals, and was thus medically separated with a 10% 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. 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 table located on next page.

RATING COMPARISON:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20050921** | | | **VA (3 Mo. Prior to Separation) – All Effective 20051224** | | | | |
| **Condition** | **Code** | **Rating** | **Condition** | | **Code** | **Rating** | **Exam** |
| PTSD | 9411 | 10% | PTSD | | 9411 | 50% | 20050908 |
| Anxiety | CAT II | |
| Partner Relational Problem | CAT II | |
| Chronic Depressive Disorder | CAT II | |
| Right Knee, PFS | Not Unfitting | | Right Knee, PFS | 5299-5260 | | 10% | 20050909 |
| ↓No Additional MEB Entries↓ | | | Tinnitus | | 6260 | 10% | 20050919 |
| Hearing Loss, Left Ear | | 6100 | 0% | 20050919 |
| **TOTAL Combined: 10%** | | | **TOTAL Combined: 60%** | | | | |

ANALYSIS SUMMARY:

PTSD Rating Recommendation: The PEB rating, as noted above, was derived from DoDI 1332.39 and preceded the promulgation of the NDAA 2008 mandate for 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 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 psychiatric evaluation (four months prior to separation: independent rating 10%-30%) and VA pre-separation examination (three months prior to separation: independent rating 50%), would rate no higher than 50% under §4.130 criteria, and the minimum TDRL rating of 50% applies. Since the comprehensive VA Compensation and Pension (C&P) Initial PTSD examination was accomplished three months prior to separation, the most proximate source of evidence on which to base the permanent rating recommendation in this case are the VA mental health outpatient treatment notes from 20060626 to 20060814 (separation was 20051223). During the psychiatric exam six months post separation (VA Psychiatric Diagnostic Interview/Mental Health Consult, 20060626), the CI was on medications, was separated from his wife and child, lived with his parents, was “mostly unemployed” with a new job x2-3 weeks, and was not abusing alcohol. The CI reported intrusive thoughts; frequent nightmares; problems relating and socializing with others; three failed marriages since the trauma; poor job performance/history; and poor academics. The CI also endorsed depressed mood, irritability, anhedonia, feelings of worthlessness, guilt and failure. The examiner noted nervous fidgeting with hands and gazing at the floor. Global functioning (GAF) was assessed in the range of serious symptoms to major impairment (GAF=40; decreased from MEB GAF of 60). The examiner’s impression was “poor social and work performance, markedly impaired by PTSD and depression.” Response to medical treatment was assessed as incomplete and medication was changed. Diagnosis was “PTSD, severe and chronic; MDD (*major depressive disorder*), recurrent.” On note of 20060717 depressed mood remained, with slight improvement and GAF=42. Follow-up on 20060814 demonstrated minor improvements; the CI was employed, “lives fairly isolated existence”, no longer living with his parents, mildly depressed mood “still with limited spontaneity and animation of speech” with a GAF of 42. The Board could not separate-out any disabilities from the CI’s Category II diagnoses of Anxiety, Partner Relational Problem, and Chronic Depressive Disorder and all mental health disabilities were considered under the CI’s unfitting PTSD diagnosis. All members agreed that the 10% threshold was well exceeded and that the 70% threshold was not met at the six month post-separation timeframe. The deliberation was focused on a 30% to 50% permanent rating recommendation. The VA treatment record demonstrated post-separation worsening of the CI’s mental health conditions that was well documented at the six month post-separation note and persisted through the remainder of the VA treatment notes in the record (last evidence 20060814). After due deliberation, considering all of the evidence, the Board agreed that a permanent 9411 PTSD rating of 30% is the most representative of impairment and a fair recommendation in this case.

Right Knee Condition. The CI had right knee pain since Feb 2004 following a fall. He was treated with physical therapy and non-narcotic pain medication. Magnetic Resonance Imaging (MRI) of the knee was normal and the diagnosis was Patello-Femoral syndrome. The CI had a waiver due to his knee for Physical Fitness Assessments (PFA), with his last PFA being Mar 2003. His right knee showed no instability, but crepitus and painful motion at 118° of flexion (normal 140°). Gait and posture were normal. The Non Medical Assessment (NMA) noted that the CI was working in his rating with little adverse affect from his medical treatment. There may have been some overlap with the CI’s primary unfitting mental health condition and his perception of pain, but that is speculative. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the Right Knee condition.

Other Conditions (Tinnitus and Hearing Loss). By inference, the CI contends for every condition listed on the post-separation Veterans Administration Rating Decision (VARD). The Tinnitus and Hearing Loss conditions were mentioned in the Disability Evaluation System (DES) file, but no symptoms rose to the level of being unfitting. There were no LIMDU periods or mention in the NMA relating to any adverse impact on performance of duty due to these conditions. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of Tinnitus or Hearing Loss as unfitting conditions for separation rating. 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. As discussed above, PEB reliance on SECNAVINST 1850.4E or DoDI 1332.39 for rating Post Traumatic Stress Disorder was likely operant in this case and the condition was adjudicated independently of that instruction by the Board. 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 on a vote of 2:1 a 30% permanent rating at 6 months IAW VASRD §4.130. The single voter for dissent (who recommended adopting the VA rating 9411 at 50%) did not elect to submit a minority opinion. In the matter of the Right Knee condition, the Board unanimously recommends no recharacterization of the PEB adjudication as not unfitting. In the matter of the Tinnitus and Hearing Loss conditions, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation for either condition. 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 30% disability retirement as below.

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

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100412, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

Deputy Director

Physical Disability Board of Review

MEMORANDUM FOR COMMANDER, NAVY PERSONNEL COMMAND

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

ICO XXXXXX, FORMER USN, XXX-XX-XXXX

Ref: (a) DoDI 6040.44

Encl: (1) PDBR ltr dtd 3 Nov 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 23 December 2005 thru 23 June 2006.

b. Final separation from naval service due to physical disability effective 24 June 2006 with a disability rating of 50 percent and placement on the Permanent Disability Retired List.

3. 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)