RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1000469 SEPARATION DATE: 20060731

BOARD DATE: 20110209

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Lance Corporal [5811, Military Policeman (MP)] medically separated from the Marine Corps in 2006 after three years of service. The medical basis for the separation was Post-traumatic Stress Disorder (PTSD). He did not respond adequately to perform within his military occupational specialty and underwent a Medical Evaluation Board (MEB). PTSD was addressed in the narrative summary (NARSUM) and forwarded to the Informal Physical Evaluation Board (IPEB) on the NAVMED 6100/1. No other conditions appeared on the MEB’s submission. There were other conditions included in the NARSUM and Disability Evaluation System (DES) File which will be discussed below but were not forwarded for IPEB adjudication. The IPEB adjudicated the PTSD condition as unfitting, rated 10%; with application of the SECNAVINST 1850.4E and DoDI 1332.39 (E2.A1.5) respectively. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “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”. This case is court remanded under the *Sabo et al v. United States* class action suit.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service IPEB – Dated 20060607** | **VA (~3 Mo. after Separation) – All Effective 20060801** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Post-Traumatic Stress Disorder (PTSD) | 9411 | 10% | Post-Traumatic Stress Disorder (PTSD) | 9411 | 50% | 20061016 |
|  | MEB H&P | Residuals, Right Knee Strain | 5099-5019 | 10% | 20060906 |
|  | MEB H&P | Residuals, Left Knee Strain | 5099-5019 | 0% | 20060906 |
|  | MEB H&P | Spondylolysis, L5 | 5299-5239 | 10% | 20060906 |
|  | MEB H&P | Hearing Loss, Left Ear | 6100 | 0% | 20060906 |
|  | MEB H&P | Hearing Loss, Right Ear | 6100 | NSC | 20060906 |
|  | MEB H&P | Myopia With Astigmatism | 6099-6009 | NSC | 20060914 |
|  | Not in DES | Bilateral Tinnitus | 6260 | 10% | 20060906 |
| **TOTAL Combined: 10%** | **TOTAL Combined (*Includes Non-PEB Conditions*): 60%** |

ANALYSIS SUMMARY:

PTSD Condition. The CI’s PTSD symptoms began in October 2005 after two deployments to the Al Asad region of Iraq. Following his tours in Iraq, he returned and was stationed in Camp Lejeune until his separation from active duty on 31 Jul 06. On 27 Jan 06the CI was initially evaluated for symptoms of PTSD and Depression at the Mental Health Clinic at Camp Lejeune. He also had enuresis, occurring 3-4 times per week, after returning from Iraq with a negative genitourinary workup completed prior to his mental health evaluation. PTSD symptoms reported by the CI included frequent sad mood, anxiety, insomnia, difficulty concentrating, restlessness, fatigability, social withdrawal, decreased libido, and anhedonia. The CI’s major combat stressor occurred after pulling his best friend out of a vehicle that was hit by an IED. The CI stated that he witnessed several injuries and that his wife, who is also a Marine, was about to deploy to Iraq. He specifically denied any recent major change in weight/appetite, irritability, spontaneous panic attacks, symptoms suggestive of bipolarity, delusions, hallucinations (apart from the flashbacks), suicidal or homicidal ideation, or past or present substance abuse. His Mental Status Examination (MSE) revealed no gross motor abnormalities, significant cognitive or memory deficits, or evidence of formal thought disorder. He was anxious with affect constricted but appropriate to thought content. He was alert and oriented with good insight and judgment by history. He received individual and group therapy and was placed on psychotherapeutic medications. His Global Assessment of Functioning (GAF) at the time of this exam was 40, indicating major impairment in several areas with impairment of reality testing or communication. He was placed on six months of Limited Duty, effective 31 Jan 06, with little improvement. Limitations from full duty were; must have day work hours between 0730- 1700, no 24 hour duties, no deployments, no access to firearms or weapons training, and no field operations. He must be within 50 miles of a military treatment facility, must be in a low stress environment, and must be able to attend all treatment appointments. By April 2006, after several months of medication and psychotherapy, the CI’s PTSD condition had failed to respond adequately to psychiatric treatment and the MEB referred the condition as unfitting to the PEB for final adjudication.

The Commander’s Statement of 11 May 06 noted that the CI was unable to handle the stress of continued service. If he was forced to function in a law enforcement status or had orders to deploy as an MP to a combat zone, he would not be able to handle the stress of combat or law enforcement operations. The Commander recommended separation from the Marine Corps for the safety and welfare of the Marine, the Marines around him, and for the good of his unit. The CI’s MEB Psychiatric Examination on 2 May 06 (approximately 3 months prior to separation) documented PTSD symptoms of depressed mood, irritability, insomnia, nightmares, flashbacks during the day, anhedonia, extreme difficulty with memory and concentration, hypervigilance, anxiety, decreased appetite, intense psychological and physiological response to certain stimuli (panic attacks), and exaggerated startle response. It also noted his complaint of enuresis since returning from Iraq but does not address this condition further. The MSE revealed difficulty with recall and memory, irritable mood and anxious affect; however attention, concentration, speech, thought, insight, and judgment were normal. His expressions were constricted. He demonstrated no hallucinations or suicidal or homicidal ideation. The CI had been married for eight months and reported that his relationship with his wife was good. He was maintained on two medications for PTSD, Lunesta and Prozac. The MEB Examiner also noted that the CI’s prognosis for continued military service was poor and his prognosis for civilian employment was guarded. The examiner noted that his condition would present severe interference with social and civilian industrial adaptability. His psychiatric diagnosis of PTSD was considered to be severely disabling with evidence of depression and severe panic and would require continued psychiatric care. His current GAF was 50, however with a stable environment and medication was estimated to be approximately 65.

The CI’s VA Compensation and Pension (C&P) examination was completed on 16 Oct 06, approximately 2.5 months post separation. The CI’s medications included Prozac, Seroquel, and Desyrel, with good response to these medications. He still required continuous treatment to control this chronic condition and, over the past year, he had received psychotherapy for his mental condition as often as weekly. He had not been admitted to a hospital for psychiatric reason and had not been required to make any emergency room visits for this condition. The CI stated that he was not employed at the time of his examination nor has he looked for work. Although not mentioned in this evaluation, the VA General Medical examination one month prior to this evaluation noted that he was a student at East Carolina University. He reported that his relationship with his wife was good although he stated that he was socially withdrawn. He reported that he had insomnia with persistent nightmares every night as well as persistent recollections of his friend’s traumatic injury once or twice per day. He reported that he had exaggerated startle reflex and overreacted to loud noises, did not like to socialize, was hypervigilant, had difficulty concentrating, and had persistent irritability and outbursts of anger. He stated that he avoided going out and no longer talked with his friends. Other symptoms included depression, flashbacks associated with panic attacks at times, and avoidance of crowds and stimuli that trigger symptoms. Obsessional rituals, such as always checking the side of the road for IEDs, were present and were severe enough tointerfere with routine activities. Panic attacks were noted to occur twice daily. Hallucination history was present intermittently, including hearing gunshots when he tried to sleep. His MSE revealed no evidence of thought disorder, current hallucinations, or suicidal or homicidal ideation. His thought processes and judgment were not impaired although the VA Examiner noted impaired abstract thinking and mildly impaired short term memory. Affect and mood were abnormal with findings of extreme anxiousness, sadness, and flatness. The CI’s affect was flattened and he appeared to be on the verge of tears. The CI stated he had difficulty concentrating. The Axis I diagnosis met the diagnostic criteria of PTSD, according to DSM IV, with clear documentation of appropriate diagnostic criteria for criteria A, B, C, and D. The VA examiner noted that the best description of the CI's current psychiatric impairment was “psychiatric symptoms cause occupational and social impairment with occasional decrease in work efficiency and intermittent inability to perform occupational tasks although generally functioning satisfactorily with routine behavior, self-care and normal conversation.” This statement describes occupational and social impairment at the 30% rating level. The GAF was 50 indicating serious symptoms with impairment of occupational or social functioning*.*

The PEB determined the PTSD condition to be unfitting (code 9411) with a 10% rating. The VA Rating Decision of 24 Jan 07 service connected his PTSD condition with a rating of 50%. The PEB rating, as noted above, was derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act (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. There was no VA evaluation performed at the six month snapshot or beyond. In this case the most proximate source of evidence on which to base the permanent rating recommendation is the VA psychiatric rating evaluation 2.5 months after separation. This VA psychiatric evaluation carries more probative value than the MEB psychiatric evaluation 3 months before separation since it was closer to the six month rating point and reflects the stress of transition to civilian life which is intrinsic to the permanent rating recommendation. The MEB evaluation still serves as a useful reference point and also carries relevant probative value.

The Board directs its attention to the permanent rating recommendation for the PTSD condition based on the evidence just described. All members agreed that the §4.130 criteria for a 100% rating were not met in either the MEB or VA examinations. There was no evidence of “total occupational and social impairment” referenced in that rating and, none of the seven referenced descriptors at the 100% rating level were manifested by the CI. The MEB examination was most consistent with the general descriptionfor a §4.130 rating of 30%, demonstrating “occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks.” All six descriptors at the 30% level are manifested in the MEB examination and the VA C&P examination 2.5 months after separation. Four of nine descriptors at the 50% level are noted in the MEB examination: constricted expressions, memory impairment, disturbances of mood and motivation, and symptoms of PTSD that were so severe and refractory that they impaired his social and occupational functioning. The VA C&P examination documented a summary statement by the examiner noting that “psychiatric symptoms cause occupational and social impairment with occasional decrease in work efficiency and intermittent inability to perform occupational tasks although generally functioning satisfactorily with routine behavior, self-care and normal conversation.” Again, this indicated impairment at the 30% level. The VA examination did document manifestation of six out of the nine descriptors for impairment at the 50% level. This included flattened affect, panic attacks more than once per week, memory impairment, impaired abstract thinking, disturbances of mood and motivation, and difficulty establishing and maintaining social relationships. At the 70% level the VA documented two of the nine descriptors. These were obsessional rituals (always checking for IEDs along the road when driving) and impaired impulse control (persistent irritability with outbursts of anger). The CI’s fear of driving interfered with performance of activities of daily living and his ability to search for and sustain employment. It does not however document Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood. He was attending college and judgment and thought processes are consistently documented as normal.

Occupational and social impairment at the 10% level is clearly exceeded however impairment at the 70% level is not supported. The Board’s deliberations were centered therefore on consideration for a 30% vs. 50% permanent rating recommendation. A strong argument for a minimum 30% rating can be made by the MEB examination and the VA examiner’s opinion that the CI’s PTSD symptoms resulted in occupational and social impairment with occasional decrease in work efficiency and intermittent inability to perform occupational tasks although generally functioning satisfactorily with routine behavior, self-care and normal conversation. Arguments for the 50% rating are that the presence of four out of nine descriptors on the MEB examination and six out of nine descriptors on the VA C&P examination, which is the most proximate in time to the six month post separation date. The Board deliberated at length the relative merits of a 30% versus 50% permanent rating. After careful consideration of all available evidence for 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 6 months IAW VASRD §4.130.

Other Conditions noted in the DES File. Residuals, Right Knee Strain; Residuals, Left Knee Strain; Spondylolysis, L5; Hearing Loss, Left Ear; Hearing Loss, Right Ear; and Myopia With Astigmatism are all noted in the MEB separation physical of 14 Mar 06. The VA granted a 10% rating for the Residuals, Right Knee Strain condition and the Spondylolysis L5 condition. A rating of 0% was granted for the Residuals, Left Knee Strain condition and the Hearing Loss, Left Ear condition. The Hearing Loss, Right Ear condition and the Myopia with Astigmatism condition were not service connected. Only the mental health condition (PTSD) was identified as an impairment in the Commander’s statement. The initial military mental health treatment note of 27 Jan 06 (six months before separation) noted that he was in good general health and runs for 30 minutes three times each week. That same month he passed the physical readiness test according to his Commander’s Statement. There is no evidence in the service treatment records or the DES File that any of the conditions noted above were unfitting at the time of separation. The Board therefore has no basis for consideration of any of these conditions as eligible for additional rating at separation.

Other Conditions not noted in the DES File. Bilateral Tinnitus was not noted in the DES File and was first noted in the VA C&P examination of 6 Sep 06. The VA did service connect this condition with a 10% rating. 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 Bilateral Tinnitus condition remains eligible for Board for Corrections of Naval Records (BCNR) consideration.

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. PEB reliance on DoDI 1332.39 and SECNAVINST 1850.4E for rating the PTSD condition were operant in this case, however the Board adjudicated independent of these policies. After careful consideration of all available information, the Board unanimously recommends an initial TDRL rating of 50% for PTSD 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 Residuals, Right Knee Strain; Residuals, Left Knee Strain; Spondylolysis, L5; Hearing Loss, Left Ear; Hearing Loss, Right Ear; and Myopia With Astigmatism conditions, the Board finds that none of these conditions were unfitting at the time of separation, therefore there is no basis for consideration of any of these conditions as eligible for additional rating at separation. In the matter of the Bilateral Tinnitus condition, the Board does not have the authority under DoDI 6040.44 to render fitness or rating recommendations for this condition which was not considered by the DES however it remains eligible for Board for Corrections of Naval Records (BCNR) consideration.

RECOMMENDATION:

The Board recommends that the CI’s prior separation be modified to reflect that the CI was placed on the TDRL at 50% for a period of 6 months (PTSD at 50% IAW §4.129 and DoD direction) and then permanently retired with a permanent combined 30% disability retirement as indicated below.

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| --- | --- | --- | --- |
| **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 20100413, 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 31 July 2006 thru 30 January 2007.

 b. Final separation from naval service due to physical disability effective 31 January 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)