RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXX BRANCH OF SERVICE: marine Corps

CASE NUMBER: PD1000506 SEPARATION DATE: 20051215

BOARD DATE: 20110128

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Corporal (7051/Aircraft Fire-fighter and Rescue Specialist) medically separated from the Marine Corps in 2005 after 4 years of service. The medical basis for the separation was Post-traumatic Stress Disorder (PTSD). While deployed to Iraq in April 2005 the CI presented with combat stress type symptoms that were not resolved by in-theater treatment and Limited Duty (LIMDU). The CI was medically evacuated from theater to Germany with inpatient treatment for diagnosed PTSD and return to Marine Corps Air Station (MCAS) in Yuma, Arizona (AZ). Criterion A combat stressors were documented and DSM IV criteria for Axis I diagnosis of PTSD were met. The CI was compliant with his medications and other treatment modalities for PTSD; however, he continued with symptoms that impaired his ability to meet the operational requirements of his Medical Occupational Specialty (MOS). He was referred to the Medical Evaluation Board (MEB). The MEB listed PTSD as the only diagnosis on the NAVMED 6100/1. The Informal Physical Evaluation Board (IPEB) adjudicated the PTSD as unfitting rated 10% with likely application of SECNAVIST 1850.4E and/or DoDI 1332.39 (E2.A1.5) which were in effect at the time. The CI made no appeals and was thus medically separated with a disability rating of 10%.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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 CFR4.I29 and DOD policy (continuation) Please see attached list of contentions regarding why the PDBR should make the changes request in Item 3.” He additionally lists all of his VA conditions and ratings as per the rating chart below. Contention for their addition to separation rating is implied. This case is court remanded under the *Sabo et al v. United States* class action suit.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service IPEB – Dated 20051028** | **VA**  |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** | **Effective** |
| PTSD | 9411 | 10% | PTSD  | 9411 | 50% | 20051213 | 20051216 |
| 30% | 20060815 | 20070201 |
| ↓No Additional MEB/PEB Entries↓ | Asthma | 6602 | 30% | 20051209 | 20051216 |
| Cervical Spine DDD | 5237 | 20% | 20051209 | 20051216 |
| Thoracolumbar Spine DDD | 5237 | 10% | 20051209 | 20051216 |
| R Arm … Thoracic Outlet Syn | 8699-8616 | 10% | 20051209 | 20051216 |
| **NSC X 3** |
| **TOTAL Combined: 10%** | **TOTAL Combined: 80% from 20051216; 70% from 20070201** |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

ANALYSIS SUMMARY: The diagnosis of PTSD and adjudication as unfitting from the Service is considered administratively final by the Board. The Board focused on appropriate rating of the CI’s unfitting mental health condition.

PTSD Rating Recommendation: The PEB 10% rating, as described above, was derived from DoDI 1332.39 and preceded the promulgation of the NDAA 2008 mandate for DoD adherence to 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 Duty Retirement List (TDRL). The Board must then determine the most appropriate fit with VASRD, 38 CFR 4.130, criteria at six months for its permanent rating recommendation. The MEB psychiatric evaluation and the pre-separation VA exam under VASRD §4.130 criteria, would rate no higher than 50% and the minimum TDRL rating of 50% applies. The most proximate sources of comprehensive evidence on which to base the permanent rating in this case is a combination of the pre-separation exams [MEB Psychiatric evaluation 6 months pre-separation, Narrative Summary (NARSUM) 5 months pre-separation, Non Medical Assessment (NMA) 4 months pre-separation, VA Special Psychiatric Examination 2 days pre-separation] , the VA Compensation and Pension (C&P) examination 8 months post separation with VA treatment notes and rating information for the 12 months post separation. The combined pre-separation record indicated a rating of 30% to 50% IAW the criteria of §4.130 (absent §4.129) and provides a useful baseline and is assigned relevant probative value in the Board’s efforts to arrive at a fair permanent rating recommendation. The C&P exam performed at eight months post-separation indicated mild improvement of the CI’s symptoms. The CI was employed part time and planning to attend college. The MSE continued to demonstrate anxiety, nervousness, depression and anger. Symptoms of difficulties with concentration and attention were documented, but objective cognitive deficits were not demonstrated on the MSE, aside from remembering only 2 of 3 items. The examiner described the CI’s mood as “anxious, nervous, depressed, angry…had tears in his eyes.” The Minnesota Multi-Phasic Personality Inventory 2 (MMPI 2), indicated atypical test responses, causing the examiner to wonder if this was “a result of either ambivalence, evasiveness, carelessness, lack of sophistication, not caring or some combination of these or other factors.” The examiner did note that “since PTSD was found in the clinical interview, the lack of clear validity on the MMPI2 does not contraindicate a diagnosis of PTSD”. The CI’s assessment of global functioning was in the mild symptoms range (GAF=70; MEB GAF=41-50; Pre-Sep VA GAF=62). Of note, the CI’s symptoms were little changed from pre-separation or subsequent evaluations. The CI continued to endorse symptoms of hyper vigilance, exaggerated startle response, increased arousal and nightmares. The VA rated initially this exam at 10%, however, within two months, the VA retroactively increased the rating to 30% based on a private physician’s input of symptom impact and severity with occupational impairment spanning that period. The VA Integrated Clinical Summary of treatment note at ten months post separation indicated persistent severe symptoms despite psychotherapy and medications, with GAF=50. Subsequent VA exams and evaluations were considered outside of the rating timeframe, but did indicate 50% then 70% VA ratings for PTSD and Major Depression. With regards to the permanent rating recommendation, all members agreed that the §4.130 threshold for a 50% rating was not approached and that the criteria for a 0% rating were well exceeded. The deliberation settled on arguments for a 30% vs. a 10% permanent rating recommendation. The VA proposed 10% rating within the one year post separation was discussed in-depth. There was a single VA examination in which the examiner indicated GAF to be 70 and a mild impairment. However, the VA then reconsidered the rating based on present and subsequent examinations and changed the rating to 30%. This single exam was noted to endorse similar symptoms and disability with overall assessment adjudged to be a clear outlier to other assessments in evidence. In addition to the general descriptions of occupational and social impairment, the §4.130 general formula flushes out each rating description with a list of features or symptoms as examples for this level of impairment. This helps to determine a potential level of psychiatric impairment regardless of how well or poorly the veteran is actually faring with work and social activities at the time. Of the six such descriptors under the 30% rating, the CI had four attributed at the six month period. The Board deliberated if the CI had “occasional occupational and social impairment” or only “mild or transient symptoms.” The 30% description (“occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks”) is a better fit with the occupational functioning in evidence since decreased efficiency can be assumed even though reliability and productivity were not significantly affected. Although the preponderance of the evidence appears to favor a 30% rating IAW VASRD §4.130, an argument remains for a 10% rating. Considering the totality of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a permanent PTSD disability rating of 30% in this case.

Other Conditions (Asthma, Cervical Spine Degenerative Disease, Thoracolumbar Spine Degenerative Disc Disease Right Upper Extremity, Thoracic Outlet Syndrome): Asthma, Cervical Spine Degenerative Disease, Thoracolumbar Spine Degenerative Disc Disease, Right Upper Extremity, and Thoracic Outlet Syndrome were noted by the CI in the DES package. Neither the NMA, nor NARSUM from the MEB identified any conditions other than the CI’s mental health condition as interfering with duty performance. No link to fitness is in evidence for any of them. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of Asthma, Cervical Spine, and Thoracolumbar Spine, Right Upper Extremity or Thoracic Outlet Syndrome conditions as unfitting conditions for separation rating. 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. As discussed above, PEB reliance on SECNAVIST 1850.4E and/or DoDI 1332.39 for rating PTSD appeared operant in this case and the PTSD condition was adjudicated independently of those instructions by the Board. In the matter of PTSD, the Board unanimously agrees 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 Asthma, Cervical Spine, Thoracolumbar Spine, Right Upper Extremity or Thoracic Outlet Syndrome conditions, the Board unanimously agrees that it cannot recommend a finding of unfit for any 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** |
| Post-Traumatic Stress Disorder | 9411 | 50% | 30% |
| **COMBINED** | **50%** | **30%** |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100226, 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 XXXX, 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 December 2005 thru 14 May 2006.

 b. Final separation from naval service due to physical disability effective 15 May 2006 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)