RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1000570 DATE OF PLACEMENT ON TDRL: 20060215

BOARD DATE: 20111028 Date of Permanent SEPARATION: 20070821

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSG/E-6 (89D, Explosive Ordnance Disposal Specialist) medically separated for post-traumatic stress disorder (PTSD)*.* The CI was involved in a car-bomb blast in Kosovo in November 2004 from which he sustained extensive shrapnel wounds. After redeployment, co-workers noted atypical behavior on his part, leading to a command-referred mental health evaluation in June 2005. Criterion A combat stressors were documented and the Diagnostic and Statistical Manual of Mental Disorders (DSM IV) criteria for an Axis I diagnosis of PTSD were met. He did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent S3 profile and underwent a Medical Evaluation Board (MEB). PTSD was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Four other conditions, as identified in the rating chart below, were forwarded on the DA Form 3947 submission as medically acceptable conditions. Other conditions included in the Disability Evaluation System (DES) file will be discussed below. The Informal PEB adjudicated the PTSD condition as unfitting, rated 30% with application of Department of Defense Instruction (DoDI) 1332.39. The remaining conditions were adjudicated as not unfitting. The CI was placed on the Temporary Disability Retired List (TDRL) in February 2006 and was reevaluated in February 2007. Although the reviewing psychiatrist recommended continued TDRL, the PEB determined that the CI’s condition was sufficiently stable for final adjudication. It was determined to be unfitting and rated 10%, with presumptive re-application of DoDI 1332.39. The CI made no appeals and was medically separated with the 10% rating.

CI CONTENTION: The application states “I was assigned less than 50% disability rating by the military for my unfitting PTSD upon discharge from active duty. … assign the highest final disability rating applicable consistent with 38 CFR 4.I29 and DOD policy…” He additionally contends for a change in the fitness adjudications for his other PEB conditions.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Final Service PEB – Dated 20070702** | **VA – Effective Date 20060216** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20060215** |  | **TDRL** | **Sep.** |
| PTSD | 9411 | 30% | 10% | PTSD | 9411 | 50% | STR/VATR\*  |
| Blast Injury to Right Hand | Not Unfitting | R Hand Wound Residuals | 8515-5228 | 0% | 20070407 |
| Low Back Pain | Not Unfitting | Low Back Strain | 5237 | 10% | 20070407 |
| Right Wrist Pain | Not Unfitting | Right Wrist Wound | 8515 | 0% | 20070407 |
| R Wrist Numbness, Tingling | Not Unfitting |
| ↓No Additional MEB/PEB Entries↓ | C-Spine Strain | 5237 | 10% | 20070407 |
| Bilateral Tinnitus | 6260 | 10% | STR\* |
| COPD | 6604 | 10% | STR\* |
| 0% x 4/Not Service Connected x 1 | 20070407 |
| **Combined: 10%** | **Combined: #0%** |

\*No VA C&P examinations - rating evidence from service treatment records (STR) and/or VA treatment records (VATR).

ANALYSIS SUMMARY:

PTSD Condition: The PEB rating, as described above, was derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act (NDAA) 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 on the Temporary Disability Retired List (TDRL). Since the Service was in compliance with the §4.129 TDRL requirement, the Board need not apply a constructive TDRL rating interval in this case; although, the 50% minimum TDRL rating remains applicable. The Board must then determine the most appropriate fit with VASRD 4.130 criteria at the end of the TDRL interval for its permanent rating recommendation. The most proximate source of comprehensive evidence on which to base the permanent rating recommendation in this case is the TDRL narrative summary (NARSUM), performed 12 months after being placed on TDRL and 6 months prior to permanent separation. There was also a VA psychiatric outpatient visit within one month of permanent separation that provided probative evidence.

The severity of the CI’s PTSD condition could best be described as moderate to severe at the time he was placed on the TDRL. The MEB’s NARSUM documented the presence of pervasive exhaustion, inability to concentrate, sleep disturbances, flashbacks, emotional numbing, high irritability without outbursts, and a heightened startle response. Objectively, the mental status exam (MSE) documented appropriate attire, grooming and hygiene; good eye contact; intact orientation; normal attention, although impaired concentration; slowed speech and motor reactions; flat affect; depressed mood; normal thought processes; intact judgment; normal thought content and insight; no homicidal or suicidal ideation; and, above average intelligence. Socially, the CI distanced himself from his family and struggled with intimacy; he did not socialize and displayed clear avoidance; and, he was unable to tolerate crowds. Occupationally, the CI was reported as being “immobilized and unable to make decisions”. He was quoted as saying “I can’t do my job anymore. I can’t function around explosives. I can barely function at all.” The command first sergeant confirmed this impression and stated that the CI was assigned outside his MOS and performing non-demanding tasks. The commander concluded that the CI “would never be able to function as an EOD [Explosive Ordnance Disposal] soldier or in any capacity as a soldier.” The Global Assessment of Functioning (GAF) score assigned by the MEB psychiatrist was 50, which is indicative of serious impairment.

At the time of permanent separation, the TDRL psychiatric examiner documented that the CI was having difficulty with insomnia, nightmares, irritability, and anxiety; and, that his symptoms were creating discord in his marriage. The CI had continued on daily psychotropic medications to treat his condition. An abbreviated MSE documented normal findings, but noted that the CI was intermittently tearful. A more comprehensive MSE done by a VA psychiatrist (proximate to permanent separation) likewise documented normal findings and confirmed good cognitive functioning. There was little evidence at the time of permanent separation specifically addressing the CI’s social interactions. Occupationally, the CI was employed as a military trainer; and, this was the only evidence cited by the PEB which conferred his permanent separation rating of 10%. This position, however, minimized any PTSD triggers; and, was primarily administrative with a flexible work schedule. He occasionally lost work days because of his persistent insomnia. The TDRL evaluation elaborated that the CI’s employer, a veteran himself, clearly accommodated his psychiatric condition. The assigned GAF score at the time of permanent separation was 60, indicative of moderate psychiatric impairment. Despite objective evidence for clinical improvement, the TDRL psychiatrist stated that there had not been significant progress; opining that the condition was not stable and recommending that TDRL be extended.

The Board directs its attention to its rating recommendations based on the evidence just described. All members ultimately agreed that the §4.130 criteria for a TDRL rating higher than 50% for were not met, although some of the less critical criteria for a 70% rating were present and this option was debated. Therefore, the minimum 50% TDRL rating (as explained above) is applicable. As regards the rating at the time of permanent separation, the Board noted that there was sparse evidence relative to social impairment; although, it is clear that there was at least an adverse impact on the CI’s domestic life. Occupationally, he was fully employed; although some need for occupational accommodation should be conceded. It is clear that the MSE was stabilizing and that the GAF was improved. Although the VA conferred a 50% rating based on the same evidence, the rating decision referenced only the GAF assignment as rationale. It is well established in general, and in Board practice specifically, that the GAF assignment is too soft a measure and too widely variable amongst providers to be heavily relied on for §4.130 rating determinations. Members therefore agreed that the 50% rating for the period of TDRL could no longer be supported under VASRD §4.130. The deliberation thus settled on arguments for a 10% versus a 30% permanent rating recommendation. The §4.130 description for a 10% rating is “occupational and social impairment due to mild or transient symptoms which decrease work efficiency … only during periods of significant stress, or; symptoms controlled by continuous medication”; and, that for 30% is “occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily …).” Arguing against a fair rating of 10% are the observations that the GAF assignment, symptom description and clinical course mitigate a characterization of the severity as mild or transient; and, it is clear that symptoms were not completely controlled on medication. The evidence does not provide a correlation of acuity with degree of stress, and that element of the 10% description is thus not relevant. Relative to support for a 30% rating, there is no evidence that there were any periods of inability to function at work; but, decreased efficiency can be imputed from interruption of the work schedule by insomnia and the need for employer accommodation. Also of concern is the TDRL psychiatric opinion that the condition was not sufficiently stable; and, this clinical reservation was validated by the clinical course documented in VA records, i.e., a rapid escalation of symptoms resulting in significant occupational and social impairment within 13 months of permanent separation. After due deliberation, considering the totality of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a permanent PTSD disability rating of 30%.

Other Contended PEB Conditions: The CI’s application asserts that compensable ratings should be considered for low back pain, blast injury to the right hand, right wrist pain, and right wrist numbness and tingling - conditions forwarded by the MEB and adjudicated as not unfitting by the PEB. The Board’s main charge in respect to these conditions is an assessment of the appropriateness of the PEB’s fitness adjudications at the time of placement on TDRL. The Board’s threshold for countering DES fitness determinations is higher than the VASRD §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard. The CI’s back pain dated back to the bomb explosion, was localized to the lower back (without radicular symptoms), and was precipitated by lifting. This condition was not profiled, implicated in the Commander’s statement, or noted as failing retention standards. It was reviewed by the action officer and considered by the Board. There was no indication from the record that this condition significantly interfered with satisfactory performance of his MOS duty requirements. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the low back pain condition.

The blast injury to the right hand, the right wrist pain, and the right wrist neurological symptoms were all interrelated; and, were sequelae of the fragmentation injuries from the Kosovo explosion and consequent surgeries. The orthopedic addendum assessed these conditions and commented specifically on decreased range-of-motion (ROM) of the right thumb (versus the left); and, subjective, but no objective, sensory loss over the back of the right wrist. Evidence in the STR documented an inability to extend/abduct the right thumb past 45⁰. The right thumb ROM deficit was attributed to scar interference with tendon function; and, the orthopedist opined that the thumb remained functional, without need for further intervention. Although the manual dexterity impairment was not profiled or implicated in the commander’s statement, the Board considered that it may have been marginalized by the attention demanded by the PTSD condition. The orthopedist specifically stated that the CI was qualified for continued duty, but it was not clear whether the orthopedist specifically addressed the CI’s qualification for continued duty in terms of his MOS qualifications as an EOD Specialist. As part of the initial qualification, an EOD Specialist must possess a U1 profile with no demonstrable abnormalities, no loss of digits, and no limitation of motion. And, intuitively, it is at least as likely as not that the CI’s inability to fully extend and abduct the right thumb of his dominant hand could interfere with the fine motor skills required for the CI to effectively do his job. All evidence considered, the Board recommends adding the right hand (thumb) condition as an additional unfitting condition for separation rating.

The Board then deliberated an appropriate rating recommendation for the Since the PEB found the condition not unfitting, it was not rated. The VA coded the condition analogously as 8515-5228 (thumb, limitation of motion) and initially rated the condition as 0% based on noncompensable range of motion (ROM), but subsequently increased the rating to 10% based on functional loss due to pain. The primary impairment of the CI’s hand condition is the limitation of motion of the thumb which justifies a noncompensable rating, coded 5228. Alternatively, however, the noncompensable ROM can be coded analogously as 5228-5003 and rated as 10% applying VASRD §4.40 (functional loss). Similar to the VA, the Board considered use of a peripheral nerve code to rate the condition, but this was inconsistent with the orthopedist’s diagnostic impression and offered no rating advantage over the 5228-5003 code. All evidence considered, in the matter of the right thumb condition, the Board recommends that it be added as an additionally unfitting condition for separation rating; coded 5228-5003 and rated 10% IAW VASRD §4.71a.

Remaining Conditions: Other conditions identified in the DES file were sinusitis, knee pain, and gastroesophageal reflux disease (GERD). Several additional non-acute conditions or medical complaints were also documented. None of these conditions were of clinical or occupational significance during the MEB period, none carried attached profiles and none were implicated in the commander’s 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. Additionally chronic obstructive pulmonary disease (COPD), cervical spine strain, tinnitus and several other non-acute conditions 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. As discussed above, PEB reliance on DoDI 1332.39 for rating the PTSD condition was 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 a 30% permanent rating at the time of permanent separation IAW VASRD §4.130. In the matter of the low back pain, right wrist pain, and right wrist numbness and tingling conditions, the Board unanimously recommends no change from the PEB adjudications as not unfitting. In the matter of the blast injury to the right hand (thumb), the Board by a vote of 2:1 recommends that it be added as an additionally unfitting condition for separation rating; coded 5228-5003 and rated 10% IAW VASRD §4.71a. The single voter for dissent (who supported no recharacterization of the PEB fitness adjudication) did not elect to submit a minority opinion. In the matter of the sinusitis, knee pain, and GERD 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.

RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows: A 60% rating for the period of TDRL directed by the Service (IAW §4.129 and DoD direction), followed by a permanent 40% disability retirement as below.

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| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT****RATING** |
| Post-Traumatic Stress Disorder | 9411 | 50% | 30% |
| Residuals, Blast Injury to Right Hand/Thumb  | 5228-5003 | 10% | 10% |
| **COMBINED** | **60%** | **40%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100319, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

 President

 Physical Disability Board of Review

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

1. This memorandum amends my earlier decision pertaining to the individual named in the subject line above to constructively place the individual on the Temporary Disability Retired List (TDRL) at 60% disability for six months effective the date of the individuals original medical separation for disability with severance pay and then following this period recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 40%.

2. Given the individual concerned was on the TDRL in excess of the six month period ordered above, implementation of this decision may negatively impact his pay. As a result, I direct the individual concerned be constructively placed on the TDRL for the period 16 February 2006 to 20 August 2007 at 60% disability and then following this period recharacterize his separation as a disability retirement with a combined disability rating of 40%. All previous directives in this case remain unchanged.

3. I request a copy of the corrections and any related correspondence be provided to the individual concerned, counsel (if any), any Members of Congress who have shown interest, and to the Army Review Boards Agency with a copy of this memorandum without enclosures.

BY ORDER OF THE SECRETARY OF THE ARMY:

Encl

 Deputy Assistant Secretary

 (Army Review Boards)