RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXX BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1000597 SEPARATION DATE: 20080330

BOARD DATE: 20110407

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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 Sgt (0341, Mortarman) medically separated from the Marine Corps in 2008. The medical basis for the separation was traumatic brain injury (TBI) with headaches with mixed features including tension, and posttraumatic stress disorder (PTSD). During the CI’s second deployment to Iraq, he sustained a concussion (mild TBI) due to an improvised explosive device (IED). After returning home, he developed symptoms diagnosed as PTSD. He did not respond adequately to perform within his military occupational specialty and underwent a Medical Evaluation Board (MEB). The TBI, headaches, post-concussive syndrome, PTSD, mood disorder, and disturbed sleep were addressed in the narrative summary (NARSUM) and forwarded to the Physical Evaluation Board (PEB). The PEB found him fit and recommended return to duty; however, the CI requested reconsideration submitting additional evidence. On reconsideration, the PEB adjudicated the PTSD condition and TBI as unfitting, rated 10% each, with likely application of the SECNAVINST 1850.4E and DoDI 1332.39 (E2.A1.5). The CI made no further appeals, and was medically separated with a 20% combined 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. Please see attached list of contentions regarding why the PDBR should make the changes request in Item 3…My TBI has greatly affected my memory (short term and long term) and also brought on headaches which I never used to get before the blast injuries.” This case is court remanded under the *Sabo et al v. United States* class action suit.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service Recon PEB – 20080110** | **VA (6 Mo. Post Separation) – All Effective 20080401** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| TBI | 8045-9304 | 10% | TBI | 8045-9304 | 30% | 20080913 |
| Post concussive synd | Cat 2 |  |
| PTSD | 9411 | 10% | PTSD | 9411 | 30% | 20080828 |
| Mood disorder | Cat 2 |  |
| Disturbed sleep | Cat 2 |  |
| ↓No Additional MEB/PEB Entries↓ | (R) Ankle  | 5271 | 20% | 20080828 |
| Pes planus with Calluses | 5299-5283 | 20% | 20080828 |
| Tinnitus | 6260 | 10% | 20080828 |
| Epidydimalgia | 7599-7525 | 10% | 20080902 |
| (R) knee pain, (L) ankle pain, (B) hearing loss | NSC |  | 20080903 |
| **Total Combined: 20%** | **Total Combined: 80%** |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impact that his service-incurred conditions have had on his quality of life. However, the military services, by law, can only rate and compensate for those conditions that were found unfitting for continued military service based on the severity of the condition at the time of separation and not based on possible future changes. The VA, however, can rate and compensate all service connected conditions without regard to their impact on performance of military duties, including conditions developing after separation that are direct complications of a service connected condition. The VA can also increase or decrease ratings based on the changing severity of each condition over time. The Board’s role is confined to the review of medical records and all evidence at hand to assess the fairness of PEB rating determinations, compared to the VA Schedule for Rating Decisions (VASRD) standards, based on severity at the time of separation. It must also judge the fairness of PEB fitness adjudications based on the fitness consequences of conditions as they existed at the time of separation. The Board’s threshold for countering the Disability Evaluation System (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. Any changes in the VASRD rating criteria following the CI’s separation are not applicable in this case.

PTSD and TBI. The PEB rating, as described above, was derived from DoDI 1332.39 and was within days following the promulgation of the National Defense Authorization Act (NDAA) 2008 mandate for Department of Defense (DoD) adherence to the 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). The Board must then determine the most appropriate fit with VASRD §4.130 criteria at six months for its permanent rating recommendation. By policy and precedent the Board will assess a rating recommendation for the TBI at separation and a permanent rating at six months post-separation (per retroactive application of §4.129 as above) based on the highest probative value information available describing the condition. The Board is required to adhere solely to the VA disability rating guidelines IAW DoDI 6040.44 and the NDAA 2008 which includes adherence to any concurrent applicable disability rating policy changes issued via “FAST” or Training Letters based on the CI’s separation date. The most current rating criteria for TBI became effective 23 October 2008 after the end of the CI’s constructive TDRL period (30 September 2008), thus the rules in effect preceding the current criteria are to be used IAW DoDI 6040.44; in this case TL 06-03 (February 2006) and TL 07-05 (31 August 2007). VA Training Letter, TL07-05, specifically addressed the need for a more comprehensive rating approach to TBI and provided guidance for rating TBI by combining separate ratings from each component of the symptom complex. The PEB rated CI’s TBI and post-concussive syndrome symptoms using VASRD code 8045-9304 (dementia due to head trauma); however, it is not clear if the PEB applied guidance contained in TL 06-03 and TL 07-05, and is presumed to be highly unlikely. The Board concluded that the PEB found the TBI condition unfitting due to the subjective cognitive symptoms because the remaining manifestations of TBI, headache and tinnitus would not have been found unfitting. The most proximate sources of comprehensive evidence on which to base the permanent rating recommendations in this case are the VA psychiatry, TBI, and general medical compensation and pension (C&P) examinations, performed approximately five months after separation. The MEB evaluation and service treatment records retain probative value as a useful baseline in the Board’s efforts to arrive at a fair permanent rating recommendation.

First, the Board considered the ratings for PTSD and TBI entering the constructive TDRL period.

With regard to the TDRL rating for PTSD, all members agreed that the §4.130 criteria for a rating higher than 50% were not met at the time of separation, and therefore the minimum 50% TDRL rating IAW §4.29 is applicable. The CI’s symptoms at the time of the MEB psychiatry NARSUM in October 2007, five months before separation, were mild to moderate. Married in November 2006, the CI reported his marriage was going well. The CI reported problems with irritability at work but was able to perform his assigned duties. The psychiatrist opined a good prognosis for continued improvement. The CI was assigned as a Police Sergeant, duties that were outside his primary military specialty. His commander reported in October 2007 that he was an above average performer in that capacity, was organized, motivated, and professional. By the time of the November and December 2007 Deployment Health Services appointments, CI reported sleep was good, no nightmares, and improving memory with medication. Irritability was recorded as decreased but still present. The PEB initially found the CI fit for duty; however, the CI requested reconsideration by the PEB contending he was not fit, submitting personal statements from himself and his wife.

With regard to the TDRL rating for TBI, the Board concurred with the rating adjudicated by the PEB. The Board noted the neuropsychological (NP) testing in September 2007 showing memory impairment. At that time, the CI reported having an extremely difficult time with online college courses. NP testing concluded there was moderately impaired memory, decreased efficiency of cognitive processing, impaired higher level processing skills and mild verbal impairment. The findings were considered to be consistent with the sequelae of TBI. The Board also considered the commander’s comments reflecting satisfactory performance of duties and evidence in other DES documents regarding the CI’s cognitive complaints. The general NARSUM in October 2007 recorded that, since the head injury, the CI continued to have headaches, tinnitus, irritability, problems with recent memory, and disturbed sleep. Neurologic examination was normal and a magnetic resonance imaging (MRI) of the brain earlier that year was noted to be normal (consistent with mild TBI). Speech was fluent, goal directed, with an appropriate fund of knowledge. The examiner stated that attention, concentration, and recent and remote memory appeared be intact. In the psychiatry NARSUM in October 2007, the psychiatrist wrote, “He is currently taking correspondence courses in psychology through Upper Iowa University. He reports he is doing well in the courses and is not experiencing significant difficulties in studying his assigned material.” The CI scored 27/30 on the mini-mental status examination (tests orientation, attention, calculation, recall, language and motor skills; a score below 20 indicates cognitive impairment). On the MEB history and physical examination (DD Form 2807), the CI checked “no” to the frequent or severe headaches (question 15b), but a report of tinnitus was made. At the November 2007 Deployment Health Services appointment, CI reported improving memory with medication. The Board concluded TBI-related cognitive symptoms were mostly subjective and likely enhanced by the PTSD. After due deliberation, the Board agreed with the PEB rating of 10% for TBI (8045-9304) at the time of separation. IAW TL 07-05, consideration for separate rating from each component of the TBI symptom complex was required, even though the headaches or tinnitus were not individually unfitting. The headaches considered for separate rating did not attain a minimum rating and were considered under the TBI code with the subjective cognitive symptoms. Therefore, the Board recommends a rating of 8045-9304 (subjective cognitive symptoms and headaches) at 10%; and an additional rating of 8045-6260 at 10% (tinnitus) for residuals of TBI for this case for the separation rating under code 8045.

Next the Board turned its attention to the permanent rating recommendations for PTSD and TBI at the end of the constructive TDRL period. At the time of the VA psychiatry C&P examination, five months after separation, the CI reported ongoing symptoms of PTSD. He had discontinued medication and psychotherapy at the time of discharge from the Marines, and therefore had no treatment for five months. He had experienced weight gain he attributed to previous medication treatment. He endorsed persistent symptoms of PTSD including daily intrusive thoughts, irritability, hypervigilance, exaggerated startle response, sleep difficulties, nightmares at least once per week, mild anxiety, moderate depressed feelings, decreased interest in activities, and emotional numbing. He avoided people, places, activities or conversations that aroused unpleasant memories. He felt detached from others except his wife, reported having few friends, and a preference to socially isolate. He was not employed but was taking online college courses with an emphasis in psychology, with a goal to complete his bachelor’s degree in one year (he already had earned an associate’s degree prior to entering military service). He complained that problems with concentration, focus and memory impaired his ability to study and he was earning poor grades. There was no reported substance abuse or panic attacks. On mental status examination, the CI was alert, oriented in all spheres, appropriately dressed and groomed with normal speech, thought processes, judgment and insight. There was no suicidal or homicidal ideation, hallucinations, delusions, or abnormal psychomotor activity. The CI reported his mood as irritable and grumpy. The examiner noted the mood to range from anxious to normal, with appropriate and full range of mood congruent affect. The examiner indicated that there were no cognitive or memory deficits noted during the mental status examination. The examiner concluded the CI’s PTSD was chronic and moderate in severity with a global assessment of functioning of 55 (for moderate symptoms). At the time of the general C&P, five months after separation, the CI reported daily headaches, difficulty with concentration and short term memory, as well as symptoms of PTSD. The examiner observed the CI was friendly, cooperative, in no acute distress, with appropriate and broad affect and mood. His behavior, speech, thought processes and insight were normal. The examiner recorded, “Memory is good for immediate, recent, and remote events,” and “Attention and concentration are good.” The CI underwent TBI C&P examination five and one half months after separation. He reported headaches and short term memory problems with poor retention of recently read material. He stated that his wife had to help him to remember appointments and that he required a Palm Pilot to compensate for his memory problem. Long term memory was reported as intact. The CI stated he was a full time student with a goal of pursuing a career as lawyer (a goal that was incongruent with the reported severity of his cognitive symptoms and poor grades). The mini-mental status examination, which includes tests of concentration and recall memory, was completely normal with a score of 30/30 (a score below 20 indicates cognitive impairment). The neurologic examination was normal. Tinnitus occurring once a day and lasting several seconds to several minutes in the right ear was reported in the hearing C&P examination.

The various examination reports recorded overlapping symptoms for both TBI and PTSD, particularly irritability, cognitive problems, and disturbed sleep. In particular, the Board noted the prominence of subjective cognitive complaints associated both with TBI and PTSD. Difficulties with concentration and memory can be due to both PTSD and mild TBI with the former aggravating symptoms due to the latter. Although the CI’s cognitive symptoms were attributed to TBI, the Board also noted that service treatment records reflected a direct temporal relationship between the onset of PTSD symptoms and cognitive complaints. IAW VA rating guidance for TBI (TL 07-05), more than one rating cannot be assigned for the same symptoms (i.e. a rating for PTSD and a rating for TBI that each are based on the same cognitive symptoms): “Evaluate each residual disability separately and combine under §4.125 as long as the same signs and symptoms are not used to support more than one evaluation. Symptoms of cognitive impairment and mental disorders such as depression and PTSD often overlap. In such cases, a single evaluation taking into account both conditions may be the most appropriate way to evaluate them.” Therefore, due to the marked overlapping and intertwined symptoms, and IAW VA guidance in the VASRD and TL 07-05, the Board concluded that the symptoms of TBI, particularly the cognitive complaints, were most appropriately rated in combination with the symptoms of PTSD as a single evaluation (9411-8045) using the general rating formula for mental disorders.

As regards to the permanent rating recommendation, all members agreed that the §4.130 criteria for a 10% rating were exceeded and the threshold for a 70% rating was not met. The deliberation turned to discussions for a 30% versus 50% permanent rating recommendation. With regard to a 50% evaluation, “occupational and social impairment with reduced reliability and productivity,” reduced reliability and productivity could be surmised from some of the documented symptoms including the CI’s disturbances of mood, irritability, and avoidance. While these symptoms may have interfered with work and social relationships, it was not clear that they represented a barrier to establishing and maintaining such relationships that arose to the 50% rating level. Board members considered the evidence of the C&P examinations with regard to the severity of the CI’s cognitive complaints concluding the objective examination evidence more nearly approximated a mild severity. The Board noted the absence of other symptoms that would otherwise support a 50% evaluation including flattened affect; circumstantial, circumlocutory, or stereotyped speech; impaired judgment; or impaired abstract thinking. Board also noted that there was no mention of marital relationship difficulties, and that the symptoms appeared to be stable compared to the time of the MEB when he was performing job duties satisfactorily. Considering the CI’s conditions of TBI and PTSD separately would be rated at 10% for PTSD, 10% for TBI-cognitive and subjective symptoms, and 10% for TBI-tinnitus (combined 30%); however, with consideration of the combined symptoms of PTSD and TBI on occupational and social impairment, the PTSD plus TBI would rate at 30%. Therefore, coding which considered the combined mental disorder rating aspects of both TBI and PTSD provided a predominate coding schema in favor of the CI and that better described his level of disability. After due deliberation considering the totality of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a permanent combined PTSD-TBI (8045-9411) disability rating of 30% and a TBI-tinnitus (8045-6260) disability rating of 10% in this case.

Remaining Conditions. Additional conditions, were noted in the VA rating decision, but were not documented in the DES file including right ankle condition, epidymalgia, and pes planus with plantar callouses. The CI’s tinnitus was not separately unfitting and was considered in his rating for TBI. Service treatment records show care for sprained right ankle in 2005 and sprain left ankle in 2006-2007; however, these conditions were not a focus of clinical attention during the MEB period and, along with the foot condition, were not indicated as causing symptoms at the time of the MEB examination. CI sought care for epidydimalgia in 2006 and 2007; however, the condition was not identified as a condition that did not meet medical retention standards or interfering with performance of duties. 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, some Board recommendations in this case are IAW application of TL07-05, issued 31 August 2007, to rating under VASRD code 8045 prior to promulgation of the current standards effective 23 October 2008. In the matter of the PTSD condition, the Board unanimously recommends an initial TDRL rating of 50% in retroactive compliance with VASRD §4.129 as DOD directed. In the matter of the constructive TDRL-entry rating for TBI and IAW VASRD §4.124a, the Board unanimously recommends no change in the PEB rating of 8045-9304 at 10% (with subjective headaches), but with the addition of tinnitus (8045-6260) at 10% IAW §4.87a and TL 07-05. In the matter of a permanent rating for PTSD and TBI, the Board unanimously agreed that IAW TL 07-05, the symptoms of PTSD and TBI were most appropriately evaluated in combination (8045-9411) and recommends a 30% permanent rating and continuation of the rating for tinnitus (8045-6260) at 10% IAW §4.87a. 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: TDRL at 60% for six months following CI’s prior medical separation (PTSD at minimum of 50% IAW §4.129 and DoD direction) and then a permanent 40% disability retirement as below:

|  |  |  |  |
| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT****RATING** |
| Posttraumatic Stress Disorder | 9411 | 50% | - |
| Traumatic Brain Injury | 8045-9304 | 10% | - |
| PTSD with TBI | 8045-9411 | - | 30% |
| Tinnitus as residual of TBI | 8045-6260 | 10% | 10% |
| **COMBINED** | **60%** | **40%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100517, 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 XXXXX, 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 60 percent for the period 30 March 2008 thru 29 September 2008.

 b. Final separation from naval service due to physical disability effective 30 September 2008 with a disability rating of 40 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)