RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXX BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1000709 SEPARATION DATE: 20070915

BOARD DATE: 20110413

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty E-3/LCpl (0311, Rifleman) medically separated from the Marine Corp in 2007 after 2 years of service. The medical basis for the separation was Posttraumatic Stress Disorder (PTSD). The CI’s PTSD symptoms developed one month after an Improvised Explosive Device (IED) detonated 10 feet away from him while he was conducting a foot patrol in the Al Anbar Province of Iraq (20060914). The CI initially sustained multiple fragment wounds resulting in soft tissue injury to his left thigh and right wrist. He was air evacuated to Camp TQ Taqaddum Surgical Unit where he underwent a foreign body removal from his left thigh and then transported to Landstuhl Regional Medical Center (LRMC) enroute to National Naval Medical Center (NNMC) for further surgical and medical treatment. The CI was placed on six month Limited Duty (LIMDU) for left thigh soft tissue and right wrist fragment injuries. He was also placed on convalescent leave for 30 days for recovery from surgery for a left knee arthroscopy and debridement of a meniscal tear. The CI’s PTSD symptoms worsened and he had an involuntary psychiatric admission to the Veteran Administration Medical Center (VAMC). Although the CI was compliant with his medications and other treatment modalities for PTSD, the CI continued with symptoms that impaired his ability to meet the operational requirements of his Military Occupational Specialty (MOS). He was referred to the Medical Evaluation Board (MEB). The MEB listed PTSD and Major Depressive Disorder, Single Episode without Psychotic Features as diagnoses on the NAVMED 6001/1. The informal Physical Evaluation Board (PEB) adjudicated the PTSD as unfitting rated 10% with likely application of SECNAVINST 1850.4E and/or DoDI 1332.39 (E2.A1.5). The PEB adjudicated the Major Depressive Disorder, Single Episode without Psychotic Features as Category II (“Conditions that contribute to the unfitting condition”) and Left Knee Pain as Category III (“Conditions that are not separately unfitting and do not contribute to the unfitting condition(s)”). The CI did not appeal and was thus medically separated with a combined disability rating of 10%.

CI CONTENTION: The CI states: “I was rated at ten percent from the Marine Corps., upon leaving the Marine Corps and going to the VA for medical, I was awarded the rating of 80 percent and found to have more disabilities than the Marine Corps had released me for.”

RATING COMPARISON:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20070709** | | | | **VA (1.5 Mo. Pre- Separation) – Effective 20070915** | | | |
| **Condition** | | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| PTSD | | 9411 | 10% | PTSD | 9411 | 70% | 20070726 |
| - | Major depression, … | Cat II | |
| Left Knee Pain | | Cat III | | Left Knee w/ sl Instability, … Frag wound / Scars | 5257 | 10% | 20070726 |
| ↓No Additional MEB/PEB Entries↓ | | | | Left Thigh, … Frag wound / Scars | 7801-5315 | 10% | 20070726 |
| Tinnitus | 6260 | 10% | 20070726 |
| 0% X 3/Not Service Connected X 1 | | | 20070726 |
| **Combined: 10%** | | | | **Combined: 80%** | | | |

ANALYSIS SUMMARY: The Military Disability Evaluation System (MDES) is responsible for maintaining a fit and vital fighting force. While the MDES considers all of the service member's medical conditions, compensation can only be offered for those medical conditions that cut short a service member's career, and then only to the degree of severity present at the time of final disposition. However, the Department of Veteran Affairs (DVA), operating under a different set of laws (Title 38, United States Code), is empowered to compensate service-connected conditions and to periodically re-evaluate veterans for the purpose of adjusting the veteran’s disability rating should his degree of impairment vary over time.

Mental Health Condition Recommendation. PTSD, Major Depression, Single Episode, Severe without Psychotic Features Conditions. The PEB 10% 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 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, 38 CFR 4.130, criteria at six months for its permanent rating recommendation. The most proximate source of comprehensive evidence on which to base the permanent rating recommendation in this case is a combination of the involuntary VA psychiatric in-patient admission (20070216) seven months prior to separation, the MEB Psychiatric Evaluation three and one half months pre-separation (20070530) and the VA Compensation & Pension (C&P) examination one and one half months pre-separation (20070726). There was no relevant VA or civilian provider evidence covering the six month interval. Treatment notes from July 2008 thru May 2009 were reviewed. The VA C&P Psychiatric examination (20100602) done approximately three years post-separation is used for its historical information relating to the six month rating timeframe. Since the VA exam was still fairly close to separation and removed from the six month rating interval, the MEB evaluation itself provides a useful baseline and is assigned relevant probative value in the Board’s efforts to arrive at a fair permanent rating recommendation. The combined pre-separation record indicated a record of severity at the 30% to 50% criteria level IAW §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 CI had a five day involuntary admission to the VAMC Psychiatric unit seven months pre-separation (20070216) for thoughts of suicidal ideations exacerbated by being advised that his command wanted to send him back to active duty. The CI’s Global Assessment of Functioning (GAF) was assessed in the range of inability to function in almost all areas (GAF=25). Medication adjustments along with intense psychotherapy reduced the CI’s thoughts of self-harm and he was discharged back to the Posttraumatic Stress Residential Rehabilitation Program (PRRP until June 2007). The CI’s MEB psychiatric examination (20070530) was performed three and one half months prior to separation. The examiner noted that the CI had severe anxiety and depressive symptoms to include panic attacks despite the ongoing treatment that had occurred over the prior six months. The Mental Status Examination (MSE) indicates that the CI had hyper vigilance, guarded posture, psychomotor agitation, and an agitated mood state. The examiner further noted that the CI’s impairment in military service was impaired and that the social and industrial impairment was severe. The CI’s global functioning was assessed in the range of serious symptoms (GAF=45). The CI’s VA C&P Psychiatric examination (20070726) was completed one and one half months prior to separation. The CI was continued on medications for insomnia, depression and anxiety; however, the examiner noted that despite all of these medications, the CI continued to struggle with his symptoms. The CI described himself as feeling emotionally numb; feeling alienated from others and was not sure if he would be able to get a job. The MSE showed a fair affect, anxiety and depression, mildly decreased short term memory and fair remote memory with impulse and judgment being only fair. The examiner further noted that the CI went through daily PTSD symptoms of disturbed sleep, startle response, dreams and nightmares; panic attacks a few times a week moderate depression and significant agitation. PTSD was the only AXIS I diagnosis; there was no diagnosis of a depressive disorder. The CI’s GAF was assessed in the range of serious symptoms (GAF=45). The VA assigned a 70% rating for the PTSD condition based on §4.130 criteria without relying on the provisions of §4.129.

VA outpatient notes indicated two emergency room treatments for anxiety attack (initial visit in July 2008). The CI was continuing medication and psychotherapy with a GAF in the 45-50 range. The CI was unemployed and was granted Individual Unemployability effective 9 December 2007 which was three months after separation. Although beyond the six month rating period, the VA C&P Psychiatric examination (20100602) completed approximately three years later continued to show that there had been only slight improvement in the CI’s PTSD symptoms. The CI was still unemployed and still receiving Individual Unemployability. He had taken some college courses and dropped others, was living with his grandfather, was separated with custody issues over his son, and was not undergoing medication or therapy. The GAF was still assessed in the range of serious symptoms (GAF=50) and that the CI never returned to his pre-PTSD level of functioning and there had been no periods of remission. This very delayed post-separation C&P Psychiatric examination deprives the Board of evidence for judging the stress of transition to civilian life at the six month timeframe which is a key intent of §4.129 and generally a significant element underlying the Board’s permanent rating recommendation. In cases such as this, the Board of necessity, must base the permanent rating recommendation on the information at separation and, to a certain extent, on the anticipated (more likely than not) prognosis at 6 months.

The Board majority 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 (as explained above) is applicable. As regards the permanent rating recommendation, all members agreed that the §4.130 threshold for a 100% rating was not approached and that the criteria for a 30% rating were well exceeded. The deliberation settled on arguments for a 50% vs. a 70% permanent rating recommendation. The 50% description (occupational and social impairments with reduced reliability and productivity) is the closest fit with the occupational functioning in evidence since decreased efficiency was documented throughout the record along with decreased reliability and productivity which were significantly affected. Although the preponderance of evidence appears to favor a 50% rating IAW VASRD §4.130, an argument remains for a 70% rating. After this deliberation, considering the totality of the evidence and with deference to VASRD §4.3 (reasonable doubt), the Board recommends 50% as the fair and equitable permanent rating for PTSD in this case.

Left Knee Pain. The PEB found the “Left Knee Pain” as a Category III condition (“Conditions that are not separately unfitting and do not contribute to the unfitting condition(s)”). The CI was placed on LIMDU for the knee and underwent a left knee arthroscopy with debridement of a meniscal tear in December 2006. In the Orthopedic addendum to the MEB exam, May 2007, the examiner documented that the CI stated that he was “able to walk without difficulty for an entire day; however at the end of the day the knee became sore. The examiner noted that the knee was stable to varus and valgus stress, as well as anterior drawer and Lachman test and that the CI had minimal tenderness to palpation over the medial joint line. The left knee Range of Motion (ROM) was 0-135 degrees which the examiner noted “matches the contra lateral side”. All evidence considered there is not reasonable doubt in the CI’s favor, supporting the recharacterization of the PEB fitness adjudication for the Left Knee Pain condition.

Other Conditions: Left Thigh, Tinnitus, Right Upper Extremity; Nose and Left Great Toe conditions. The VA rated the Residuals, Shell Fragment Wound to include Scar, Left Thigh and Residuals To Include Scars, Shell Fragment Wound, Right Upper Extremity conditions at 10% each. These conditions are noted on the MEB exam only without significant mention in treatment notes, medical therapy, or as adversely impacting duty performance. The Tinnitus (rated at 10% by the VA), Nose and left great toe conditions (rated at 0% by the VA) were all mentioned in the DES package; however they did not rise to the level of unfitting. The Board therefore has no basis for consideration of any other conditions eligible for additional rating at separation.

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. In the matter of the PTSD condition, the Board recommends, by a vote of 2:1, an initial TDRL rating of 50% in retroactive compliance with VASRD §4.129 as DoD directed, and a 50% permanent rating at 6 months IAW VASRD §4.130. The single voter for dissent (who recommended a 70% initial TDRL rating and a 70% permanent rating) did not elect to submit a minority opinion. In the matter of the Left Knee condition, the Board unanimously agrees that it cannot recommend any findings of unfit for any additional rating at separation. In the matter of residuals, shell fragment wounds to include Left Thigh, Tinnitus, Right Upper Extremity, Nose and Left Great Toe 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; 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 combined 50% disability retirement as below.

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

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100610, 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 September 2007 thru 14 March 2008.

b. Final separation from naval service due to physical disability effective 15 March 2008 with a disability rating of 10 percent with 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.

Assistant General Counsel

(Manpower & Reserve Affairs)