RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXX BRANCH OF SERVICE: MARINE CORPS

CASE NUMBER: PD1000732 SEPARATION DATE: 20070630

BOARD DATE: 20111122

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty LCpl/E-3 (0341, Mortarman), medically separated for cognitive disorder, not otherwise specified (NOS). In July 2006, the CI received a concussion injury from an improvised explosive device (IED). He was treated, but did not respond adequately to fully perform his military duties. The CI was placed on limited duty (LIMDU) and underwent a Medical Evaluation Board (MEB). Post-concussion syndrome (PCS) and posttraumatic stress disorder (PTSD) were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. The PEB found him unfit due to cognitive disorder NOS, and assigned a disability rating of 10%. Four other conditions (identified in the rating comparison chart below) were adjudicated as Category II (related to the unfitting cognitive disorder). Mega cisterna magna was found to be Category III (not separately unfitting and not contributing to the unfitting condition). The CI made no appeals, and was medically separated with a 10% disability rating.

CI’s CONTENTION: “Initially, the military rated me at 10% for a condition they termed post concussion syndrome. This condition, as I was told, should not have affected me greatly or for a long period of time. After being discharged I was evaluated by the VA which rated me at 50% for severe PTSD symptoms and 10% for other issues, including Traumatic brain injury. My PTSD was and still is the greatest problem I have suffered and affects me on a daily basis. I feel that the discharge board that reviewed my condition perhaps focused on the simplest reason that I could be discharged and rated for after being wounded in combat instead of looking at the issues that affected me the worst or even the most. Through dealing with the Veterans affairs and these conditions on a daily basis I have come to the conclusion that I was rated unfairly as to the severity and worst of my conditions, such as PTSD. Due to the discrepancies between the ratings I believe that the military board should take the time to review again my file.”

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Navy PEB – dated 20070501** | | | **VA (7 mo. After Separation) – All Effective 20070701** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Cognitive Disorder NOS | 8045-9304 | 10% | Postconcussion Syndrome | 8045-9304 | 10% | 20080207 |
| Postconcussion Syndrome | Category II | |
| Grade III Concussion | Category II | |
| Traumatic Daily Headaches | Category II | |
| Status Post IED | Category II | |
| Mega Cisterna Magna | Category III | | No VA Entry for Mega Cisterna Magna | | | 20080207 |
| ↓No Additional MEB/PEB Entries↓ | | | PTSD | 9411 | 50% | 20080207 |
| Tinnitus | 6260 | 10% | 20080209 |
| Not Service Connected (NSC) x 1 | | | 20080207 |
| **Combined: 10%** | | | **Combined: 60%** | | | |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed by the CI regarding the significant impairment with which his PTSD continues to burden him. As noted above, the CI stated, “My PTSD was and still is the greatest problem I have suffered and affects me on a daily basis.” He also contends, “I have come to the conclusion that I was rated unfairly as to the severity and worst of my conditions, such as PTSD.” Therefore, the Board determined to examine very carefully, all evidentiary information available, with regard to the PTSD condition.

Posttraumatic Stress Disorder (PTSD). After returning from Iraq, the CI began having symptoms of irritability, jumpiness, insomnia and nightmares. He was referred to division psychiatry. On 4 January 2007, he was seen by Dr. XXX (a psychiatrist). Two months later, he was evaluated again by mental health (MH) on 1 March 2007. At that exam, he reported a good relationship with his wife. He was not abusing alcohol or drugs. He denied intrusive or daytime thoughts of combat. He denied symptoms of avoidance or hyper-arousal. He denied any problems consistent with mania, depression, anxiety, psychosis, or substance abuse. He denied any prior history of hospitalization or suicide attempts. On mental status examination (MSE) he was alert and cooperative, and made good eye contact. He showed no psychomotor agitation or retardation. Speech was normal. His mood was happy with a euthymic full range congruent affect. His thought process was linear, logical, and goal directed. He showed no disorder of thoughts, including no psychotic symptoms or suicidal/homicidal thoughts. He had fair insight and judgment. There were no delusions, hallucinations, speech disturbances or other abnormalities. The examiner stated, “History and some thoughts of Iraq appeared mild and did not appear to meet criteria for posttraumatic stress syndrome. No further mental health treatment was warranted at the time of the evaluation.” The examiner made no Axis I or Axis II diagnoses. Global assessment of functioning (GAF) score was 71 (transient symptoms, no more than slight impairment). The examiner stated, “This patient does not require psychiatric care at this time; however, he is still at risk...and may require further mental health care in the future.”

The Board deliberated at length with regard to the presence or absence of unfitting PTSD at the time of separation. The psychological symptoms of traumatic brain injury (TBI) may be difficult to separate from those of other MH disorders. In March 2007, the neuropsychologist listed PTSD in her assessment. However, Division Psychiatry in January 2007 had found sub-threshold symptoms, and the MH doctor on 1 March 2007 determined that the CI did not meet criteria for PTSD. After lengthy discussion and due deliberation, and mindful of the Veterans’ Administration Schedule for Rating Disabilities (VASRD) §4.3 (reasonable doubt), the Board determined by majority decision (2:1 vote) that the preponderance of evidence with regard to functional impairment of PTSD favors its recommendation as an additionally unfitting condition for separation rating.

IAW DoDI 6040.44 and DoD guidance (which applies current VASRD §4.129 to all PTSD 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. The most proximate source of evidence on which to base the permanent rating recommendation in this case is the February 2008 Department of Veterans’ Affairs (VA) mental health compensation and pension (C&P) examination performed seven months after separation. At that evaluation, the CI complained of irritability and nightmares. He had occasional flashbacks when driving. He had difficulty concentrating on tasks and was easily distracted. The CI noted his marriage was not working well and he was considering divorce. He was working at a department store but was concerned that his memory problems and headaches might cause him to be fired. On MSE, the CI’s affect conveyed frustration and hopelessness. There was no suicidal ideation, delusions, hallucinations, speech disturbances, or other abnormalities. The examiner stated, “He seems to be in a very strong downward spiral, focused on negative ideation, with little sense of what he can do to promote real hopeful outcomes for himself in the future.”

The Board directed its attention to its rating recommendation based on the evidence just described. 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 (as explained above) is applicable. As regards the permanent rating recommendation, the deliberation settled on arguments for a 10% versus 30% rating recommendation. The Board determined that the CI exhibited signs of impairment due to mild or transient symptoms which decreased his efficiency and ability to perform certain tasks only during periods of significant stress. After due deliberation, considering all of the evidence, the Board recommends by majority decision (2:1 vote) a permanent PTSD rating of 10%.

Traumatic brain injury (TBI). The CI suffered a closed head injury from an IED blast while driving a vehicle on 8 July 2006. Symptoms after the injury included headaches, nausea, dizziness, blurred vision, tinnitus, and disrupted sleep. The CI also noticed decreased mental quickness, loss of attention, and memory difficulties. Initially, it appeared that his symptoms had resolved. However his symptoms returned and he was seen in the Concussion Clinic in October 2006. Magnetic resonance imaging (MRI) of the brain on 2 October 2006 was normal except for mega cisterna magna (MCM), a benign condition. Neurology evaluation on 22 November 2006 noted daily headaches lasting minutes to hours, with phonophobia. The CI’s blurred vision and dizziness occurred predominantly with the headaches. Neurological examination was normal. The CI was treated with several medications for the headaches but failed to improve significantly, so an MEB was initiated in January 2007.

At the 25 January 2007 MEB evaluation, six months prior to separation, the CI complained of daily headaches with associated blurred vision, dizziness, and nausea. The headaches were aggravated by physical activity and stress. Once again, neurological examination was normal. The neurologist diagnosed grade III concussion, postconcussion syndrome, and posttraumatic headaches. He stated that the CI “has developed chronic headaches which are refractory to treatment, and cognitive issues which preclude him from performing his duty as a Marine.” Neuropsychological testing in March 2007 revealed “…mildly impaired motor and psychomotor processing speed. Memory is generally within normal limits…Anything that contains a timed or speeded component taxes his processing.”

The Board’s rating recommendation for TBI in this case is subject to the following policy (established by precedent and prior legal opinion). As an implied extension of the DoDI 6040.44 and NDAA 2008 mandates, the Board must comply with applicable VA disability rating policy changes issued via training letters, effective at the time of separation. The VA Training Letter 06-03 (TL 06-03)dated 13 February 2006 specifically addressed the complexity of TBI, and provided rating considerations. Based on the constraints of the VASRD in effect at the time of the CI’s separation, and with the application of TL 06-03, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s rating decision for the TBI condition. The Board unanimously recommends an initial rating of 10% for the TBI condition. It is appropriately coded 8045-9304, and meets criteria for the 10% rating. After six months of TDRL, the TBI condition must be re-evaluated. The best source of evidence on which to base the permanent TBI rating in this case is the 7 February 2008 VA C&P examination.

At that evaluation, seven months after separation, the CI complained of daily headaches with light and sound sensitivity. Nausea occurred with the headaches twice a week. Dizziness, vertigo and blurred vision occurred when the headaches were severe. The CI also reported tinnitus, left-sided numbness and tingling, fatigue, occasional confusion, memory difficulties, poor concentration and slowness of thought. He was working part time as a sales associate. He had missed 10-15 days of work due to knee pain, but there was no mention of lost work due to headaches or other neurological symptoms. Neurological exam and mini-mental status exam were both normal.

As with the PTSD condition, the Board must assess a permanent rating recommendation for the unfitting TBI condition based on the relevant evidence at six months post-separation. At that point in time (30 December 2007), the VA TL 07-05 was in effect. TL 07-05 dated 31 August 2007 recommends separate ratings under the applicable codes for each ratable component of TBI in evidence; e.g., headache, tinnitus, etc. In this case, that allows separate ratings for cognitive deficit, tinnitus and headaches; rendering each in effect as separately unfitting conditions for purposes of the Service combined disability rating. The Board unanimously recommends a permanent rating of 10% for the TBI-related cognitive deficit. It is appropriately coded 8045-9304 and meets the VASRD §4.130 criteria for a 10% rating. The tinnitus also warrants a 10% rating, IAW VASRD §4.87. With regard to the head pain, the Board found that there was insufficient evidence of characteristic prostrating attacks. Therefore, the headaches do not rise to the level of being compensable. The headaches are appropriately coded 8045-8100, and meet the VASRD §4.124a criteria for a 0% rating.

Other PEB Conditions. The Navy PEB had adjudicated post-concussion syndrome, Grade III concussion, and status post (s/p) IED as Category II (related to the unfitting condition). The Board unanimously agreed that these three conditions were indeed related to the unfitting TBI condition. Due to overlap of symptoms, these three other PEB conditions are subsumed by the unfitting TBI condition and do not constitute separately unfitting, separately ratable conditions.

In addition, Mega cisterna magna (MCM) was found by the PEB to be Category III (not separately unfitting, and not related to the unfitting condition). This condition was an incidental finding on MRI. It was reviewed by the action officer and considered by the Board. There was no indication from the record that MCM caused any significant interference with satisfactory performance of military duties. The Board unanimously agreed that MCM was indeed not unfitting, was unrelated to the unfitting condition, and did not constitute a separately ratable condition. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change in the PEB adjudication of the MCM condition.

Remaining Conditions. The left knee was rated at 10%, in a VA Rating Decision dated 11 April 2008. However, the CI denied knee trouble on his MEB evaluation, and knee trouble is not documented elsewhere in his Disability Evaluation System (DES) file. The Board does not have the authority 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 TL 06-03 (dated 13 February 2006) and TL 07-05 (dated 31 August 2007).

In the matter of the mental condition, the Board by 2:1 vote recommends an initial TDRL rating of 50% in retroactive compliance with VASRD §4.129, and a 10% permanent rating at 6 months IAW VASRD §4.130. The single voter for dissent (who recommended against the addition of the mental condition as unfitting) submitted the attached minority opinion.

In the matter of the neurological injury condition and IAW VASRD §4.124a, the Board by 2:1 vote recommends an initial 10% rating for 6 months of TDRL. After the TDRL period, the Board recommends by 2:1 vote a permanent separation rating of 10% for dementia due to head trauma, 10% for tinnitus, and 0% for headaches. The single voter for dissent (who recommended no change in the PEB adjudication) submitted the attached minority opinion.

In the matter of the MCM, or any other conditions eligible for 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 separation be modified to reflect that the CI was placed on the TDRL at 60% for a period of six months, and then a permanent combined 30% disability retirement as below.

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| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Posttraumatic Stress Disorder (PTSD) | 9411 | 50% | 10% |
| TBI – Cognitive disorder | 8045-9304 | 10% | 10% |
| TBI – Tinnitus | 8045-6260 |  | 10% |
| TBI – Posttraumatic Headaches | 8045-8100 |  | 0% |
| **COMBINED** | **60%** | **30%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100625, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

President

Physical Disability Board of Review

MINORITY OPINION:

After a thorough review of all the available information, I cannot find sufficient evidence that his mental disorder (PTSD) made him unfit to be a Marine. In my opinion, the only unfitting condition at separation was the neurological disorder: traumatic brain injury (TBI).

On 1 March 2007, the CI was seen by Mental Health (MH). At that visit, it was determined that he did not meet criteria for PTSD. He reported a good relationship with his wife. He was not abusing alcohol or drugs. He denied intrusive or daytime thoughts of combat. He denied symptoms of avoidance or hyper-arousal. He denied any problems with mania, depression, anxiety, psychosis, or substance abuse. He denied any prior history of hospitalization or suicide attempts. On mental status examination (MSE) he was alert and cooperative, and made good eye contact. He showed no psychomotor agitation or retardation. Speech was normal. His mood was happy, with a euthymic full range congruent affect. His thought process was linear, logical, and goal directed. He showed no disorder of thoughts, including no psychotic symptoms or suicidal/homicidal thoughts. He had fair insight and judgment. There were no delusions, hallucinations, speech disturbances or other abnormalities. The examiner stated, “History and some thoughts of Iraq appeared mild...No further mental health treatment was warranted at the time of the evaluation.” The examiner made no Axis I or Axis II diagnoses. Global assessment of functioning (GAF) score was 71 (transient symptoms, no more than slight impairment). The examiner stated, “This patient does not require psychiatric care at this time.”

Two weeks later, on 14 March 2007, the CI was seen by a neuropsychologist, Dr. XXX. In her clinical note, Dr. XXX opines that psychologically, the CI's presentation was consistent with PTSD. However, the opinion of Dr. XXX (a neuropsychologist) does not “trump” the findings of the MH doctor. That would be like having a psychiatrist interpret the neuropsychological testing. I agree with the PEB’s adjudication. My recommendation would be no re-characterization of the CI’s disability and separation determination, as follows:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| TBI – Cognitive Disorder | 8045-9304 | 10% |
| **COMBINED** | **10%** |

MEMORANDUM FOR DIRECTOR, SECRETARY OF THE NAVY COUNCIL OF REVIEW

BOARDS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

ICO XXXXX, FORMER USMC, XXX XX XXXX.

Ref: (a) DoDI 6040.44

(b) PDBR ltr dtd 19 Dec 11

I have reviewed the subject case pursuant to reference (a) and non-concur with the

recommendation of the Physical Disability Board of Review as set forth in reference (b). Therefore, Mr. XXXX’s records will not be corrected to reflect a change in either his characterization of separation or in the disability rating previously assigned by the Department of the Navy’s Physical Evaluation Board.

Principal Deputy

Assistant Secretary of the Navy

(Manpower & Reserve Affairs)