RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1000928 SEPARATION DATE: 20040616

BOARD DATE: 20111209 Date of placement (entry) on tdrl: 20040617

 DATE OF PERMANENT EXIT TDRL: 20080501

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty PFC (31B, Military Policeman) placed on the Temporary Disability Retired List (TDRL) for posttraumatic stress disorder (PTSD), with multiple symptoms to include depression and generalized anxiety. The CI’s PTSD resulted from combat operations during his deployment to Iraq in 2003. The CI did not respond adequately to treatment and was unable to perform within his military occupational specialty (MOS) as he could not carry a weapon. He was issued a permanent S3 profile and underwent a Medical Evaluation Board (MEB). PTSD, generalized anxiety disorder, and major depressive disorder (MDD) were forwarded to an Informal Physical Evaluation Board (IPEB) as medically unacceptable IAW AR 40-501. The IPEB placed him on the TDRL as his condition was not sufficiently stable for final adjudication. A second PEB in February 2008 adjudicated the CI to be fit for duty. This TDRL evaluation in October 2006 noted that he had had no hospitalizations, was taking no psychoactive medications, and had not sought or received any counseling. The CI was in a stable relationship with a live-in girlfriend and had completed a police academy course, but was unable to find employment in that field. The CI was medically separated for anxiety disorder*.* Two other conditions were forwarded on the MEB submission as medically acceptable conditions. The CI appealed to the Formal PEB (FPEB) and was adjudicated to be unfit for continued duty for anxiety disorder. He was medically separated with a 10% disability rating with application of the Veterans’ Administration Schedule for Rating Disabilities (VASRD).

CI CONTENTION: “I did my separation hearing via tele [sic] / video and my VA rating <50%. I am still unable to work because of my PTSD.”

RATING COMPARISON:

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| --- | --- |
| **Final Service FPEB – Dated 20080403** | **VA\* – Effective Date 20040617** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
|  |  | **TDRL****20040617** | **Separation****20080501** |
| PTSD with multiple symptoms to include Depression and Generalized Anxiety | 94119413 | 30% | 10% | PTSD | 9411 | 50% |  20050521 |
| Flat Feet EPTS | Not Unfitting | Not VA Rated |
| Scoliosis | Not Unfitting | Scoliosis of the Spine | 5299-5237 | 20% | 20071213 |
| ↓No Additional MEB/PEB Entries↓ | Tinnitus | 6260 | 10% | 20071213 |
| Cervical Disc Disease\* | 5243 | 10% | 20071213 |
| 0% x 1/Not Service Connected x 3 | 20071213 |
| **Combined: 10% at Final Separation** | **Combined: 60%, increased to 70% 20071202****Individual Unemployability effective 20071202** |

\* Increase cervical disc disease from NSC to 10% effective date 20071202

ANALYSIS SUMMARY: The Board acknowledges the CI’s contention that suggests service ratings should have been conferred for conditions documented at the time of separation. The Board wishes to clarify that it is subject to the same laws for service disability entitlements as those under which the Disability Evaluation System (DES) operates. While the DES 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 Veterans’ Affairs, operating under a different set of laws (Title 38, United States Code), is empowered to compensate service connected conditions and to periodically re-evaluate said conditions for the purpose of adjusting the veteran’s disability rating should the degree of impairment vary over time.

Mental Health Disorder. The CI witnessed significant trauma while deployed to Iraq and had particular problems dealing with guilt and coping with numerous incidents in which he had witnessed Iraqi people dying either from result of his own actions or another person's actions within his unit. While deployed, he did have symptoms but felt he was dealing with the stress. However, when he returned to the US for leave, his symptoms increased in severity and were also noticed by others. In particular, his father noted significant changes. In the weeks that followed, he began to have significant problems with sleep, serious loss of appetite, and loss of energy. He began to experience flash backs to the time that he had in theater and found himself reliving the situation on numerous occasions. He found it very difficult to think clearly and noted that he was extremely hypervigilant and reacted to any loud noises or sudden movements. He also noted that he was having some visual hallucinations especially at night; he would see people in the room that he had been stationed with overseas. He presented at Fort Irwin, was briefly evaluated there, and sent for a more complete evaluation at Lamar Naval Air Station. After this, he was transferred to Fort Polk where a MEB evaluation was completed.

The MEB examination six months prior to TDRL entry noted symptoms of marked decrease in ability to sleep with significant nightmares at night; loss of appetite with a thirty pound weight loss; significant anhedonia; inability to concentrate; loss of taste; thoughts of harming others without intent of action; alexithymia; jitteriness; feelings that he was about to jump out of his skin; and occasional uncontrolled limb movements. No mental status examination is documented but the provider noted multiple neurovegetative symptoms of depression and generalized anxiety as well as flashbacks, nightmares, and hypervigilance consistent with PTSD. The examiner documented PTSD with a marked impairment of military duty and severe impairment of social industrial adaptability; MDD with a marked impairment of military duty and severe impairment of social industrial adaptability; and generalized anxiety disorder with a severe impairment of military duty and considerable impairment of social industrial adaptability. The global assessment of functioning (GAF) was 50-55, which is consistent with moderate impairment in social, occupational or school functioning. The provider recommended the CI continue with outpatient management including medication management and group psychotherapy both while he remained on active duty and with the VA after separation. His permanent profile was S3 for PTSD with anxiety and major depression and restricted him from carrying or firing a rifle, handling ammunition, and exposure to simulated or live combat. The commander’s statement was signed by the Rear Detachment NCOIC and noted the permanent profile restrictions prevented the CI from performing his required duties.

At the time of the VA compensation and pension (C&P) examination eleven months after TDRL entry, the CI continued to have significant mental health signs and symptoms including insomnia, nightmares, anxiety, nightly panic attacks, self isolation, hyperactive arousal symptoms, hypervigilance, anger, inability to make or maintain friendships inability to enjoy pleasurable activities, and inability to pursue a career. He reported constantly reliving stressful events and inability to tolerate anything that reminded him of his experiences, including watching television. His affect was flat and he was noted to have slight impairment in attention, concentration and immediate recall on mental status examination. The GAF was 55-60, indicating moderate impairment in social, occupational or school functioning. This examination also documented that, due to side effects, the CI had stopped taking the antidepressant he had been prescribed while on active duty. It noted the CI had never received therapy while on active duty or after he entered TDRL. The VA rating decision of 9 August 2005 was based on this examination alone as no service treatment records were available for the VA and a 50% rating was applied for PTSD. As this rating was determined using actual signs and symptoms of mental illness, no follow-up examination was required by VASRD §4.129 and no further VA C&P mental health evaluations are available for review.

The TDRL evaluation exam (25 September 2007) eight months prior to separation from TDRL documented the CI had had no follow-up since 25 January 2004, when he was given a 30-day supply of Citalopram and Zolpidem for sleep. A TDRL evaluation completed on 21 August 2006 is referenced but is not available in the record for review. The 25 September 2007 evaluation noted the CI appealed the findings of the previous evaluation because it only included his PTSD and he wished to have the FPEB also consider his back and feet. The TDRL evaluation of October 2006 was also referenced in the FPEB proceedings of April 2008.

The examiner opined that the Medical Board was “started somewhat prematurely.” The CI was not being followed by psychiatry nor had he taken any medications since January 2004. He had graduated from the Police Academy after having to recycle due to an ankle injury during his training and was not able to find employment in law enforcement. In 2006 his marriage was annulled and he was living with a girlfriend, with a reportedly good relationship. The CI reported he was working at a trucking company for 37 to 40 hours a week and his PTSD symptoms interfered with interactions with coworkers. However, as noted below, both he and his employer reported to the VA that he worked a maximum number of 20 hours per week for approximately 3 months. As the CI reported varying information about his work history, the report by his former employer has more probative value.

The CI did report that he had trouble sleeping and would wake up five or six times nightly; a problem with sustained attention where he would sometimes just space out and a startle response to loud noises, especially at work. The examiner further noted that the CI reported good self esteem, a good appetite, and a mood improved as compared to the last evaluation in 2006. He enjoyed watching television and going out to play pool. Mental status examination was positive only for exaggerated startle response, accompanied by anxiety symptoms. The CI shared a continued interest in working in law enforcement. There was no evidence of psychiatric hospitalizations, no medical care of any type and no mental health counseling since entering TDRL. The examiner opined that the anxiety disorder had a mild impairment for further military duty and social and industrial adaptability. There were no signs of any psychiatric disorder but the CI did endorse some anxiety symptoms and problems with attention. The CI appeared to have recovered from his mild depression. The examiner noted the CI met retention standards but did not desire to return to duty. His current GAF was noted to be 69.

The IPEB determined the CI was fit to return to duty. The CI did not concur with this assessment and requested a formal hearing. The FPEB noted that although the IPEB had determined that he met retention standards, the CI and his girlfriend provided sworn testimony that he remained unfit for military duty and his industrial impairment was best described by periods of mild or transient symptoms (of anxiety), which decreased work efficiency and ability to perform occupationally during periods of stress. The FPEB determined his condition had not improved to the extent that he was fit for duty and recommended separation with a rating of 10% for 9413. The CI had initially entered TDRL under 9411 PTSD with multiple symptoms to include depression and generalized anxiety, requiring psychotropic medication and outpatient psychiatric care. After the TDRL evaluation in 2007, the FPEB determined his predominant diagnosis was now anxiety and they changed the VASRD code to 9413. However, all mental illness diagnoses are rated together under VASRD §4.130 schedule of ratings—mental disorders, and this does not affect the disability rating percentage.

The VA rating decision dated 12 March 2009 noted entitlement to Individual Unemployability effective 2 December 2007, five months prior to separation from TDRL. This was partly based on statements from the CI and his former employer. CI reported he could not work due to his service-connected disabilities, and he was barely surviving. He reported that since leaving the Army he had only worked part time for 4 months from May 2007 to August 2007 with a maximum of 20 hours per week at $9 per hour. His previous employer stated that the CI had worked part time for him from July 2007 to October 2007, maximum of 20 hours per week at $9 per hour as a driver, and that he left the job voluntarily, but seemed a little "out there" like other combat vets he has known. He stated that the CI did not claim disability from the company. The VA made this determination of unemployability based on his service-connected disabilities, considering both his work experience and educational level of a high school diploma.

There is little information in the service treatment record related to PTSD. An outpatient visit note of 30 July 2008 documents continued significant symptoms accompanied by ambivalence toward taking medication as is common with PTSD patients. The treating psychiatrist noted a normal mental status examination. He recommended restarting medication at a low dose and regular follow-up with psychiatry. At a separate visit to a VA psychiatrist for traumatic brain injury (TBI) evaluation on 9 September 2008, the CI was noted to have started treatment with a different VA psychiatrist for PTSD. The TBI evaluation did not show any evidence of TBI.

The PEB rating of 10% was derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act 2008 mandate for 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 6-month period on the 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 as above, and as held by Federal court in the *Sabo v. United States* class action settlement, the Board must determine the most appropriate fit with VASRD 4.130 criteria at the end of the TDRL interval for its permanent rating recommendation. 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 eight months prior to permanent separation. However, the Board must also consider that the CI was granted Individual Unemployability by the VA.

The Board directs its attention to its rating recommendations based on the evidence just described. All members agreed that the §4.130 threshold for a rating higher than 50% were not met at the time of entry onto the TDRL, and therefore, the minimum 50% TDRL rating (as explained above) is applicable.

Regarding the PTSD condition, the CI was not on any medication, nor was he being treated for any mental health condition. However, he was unable to obtain permanent employment and more likely than not, should have been in treatment. Within two months of separating from TDRL, he did enter regular treatment with medication and therapy at the VA. The CI had complaints of poor sleep, startle response to loud noises and difficulty concentrating. Signs of mental illness were noted by his part-time employer. He had also been unable to obtain permanent fulltime employment and had been granted Individual Unemployability effective five months prior to separation.

As regards to the permanent rating recommendation, all members agree that the CI was unfit due to mental illness and met the criteria for a 30% rating under VASRD §4.130. The Board deliberated whether the evidence for the mild anxiety disorder a supported a 30% or 10% rating. After due deliberation, considering the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a permanent rating of 30% for the generalized anxiety disorder condition.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were scoliosis and flat feet. None of these conditions were profiled, implicated in the commander’s statement, or noted as failing retention standards. Both were reviewed by the action officer and considered by the Board. There was no indication from the record that any of these conditions significantly interfered with satisfactory performance of MOS duty requirements. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for any of the stated conditions.

Remaining Conditions. Other conditions identified in the DES file were the following: upper back and neck pain, left ankle pain, left shoulder pain, and insomnia/difficultly falling and remaining asleep. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically active 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. The three conditions, scoliosis of the spine, tinnitus and cervical disc disease, as identified by the VA proximal to separation 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 thus has no basis for recommending any additional unfitting conditions for separation rating.

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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 PTSD, depression, and generalized anxiety 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 IAW VASRD §4.130. In the matter of the flat feet and scoliosis conditions, the Board unanimously recommends no recharacterization of the PEB adjudications as not unfitting. In the matter of the upper back and neck pain, left ankle pain, left shoulder pain, and insomnia/difficulty falling and remaining asleep 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.

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RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows: Permanent 30% disability retirement upon removal from the TDRL as indicated below.

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| **UNFITTING CONDITION** | **VASRD CODE** | **PERMANENT****RATING** |
| Posttraumatic Stress Disorder, Depression and Generalized Anxiety | 9411-9413 | 30% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110817, 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. Under the authority of Title 10, United States Code, section 1554(a), I approve the enclosed recommendation of the Department of Defense Physical Disability Board of Review (DoD PDBR) pertaining to the individual named in the subject line above to recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 30% effective the date of the individual’s original medical separation for disability with severance pay.

2. I direct that all the Department of the Army records of the individual concerned be corrected accordingly no later than 120 days from the date of this memorandum:

 a. Providing a correction to the individual’s separation document showing that the individual was separated by reason of permanent disability retirement effective the date of the original medical separation for disability with severance pay.

 b. Providing orders showing that the individual was retired with permanent disability effective the date of the original medical separation for disability with severance pay.

 c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, and payment of permanent retired pay at 30% effective the date of the original medical separation for disability with severance pay.

 d. Affording the individual the opportunity to elect Survivor Benefit Plan (SBP) and medical TRICARE retiree options.

3. I request that 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)