RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXX BRANCH OF SERVICE: ARMY

CASE NUMBER: PD1000945 TDRL FINALIZATION DATE: 20090303

TDRL ENTRY DATE: 20070822

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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 (19D, Cavalry Scout) medically separated from the Army in 2007 after four years of service. The medical basis for the separation was posttraumatic stress disorder (PTSD) and asthma. He was diagnosed with PTSD after an Iraq deployment from June 2004 – 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 when he witnessed the death of superior officer. The CI started treatment in August 2006 with medications and therapy. The CI developed shortness of breath and chest tightness after his return from his Iraq deployment as the weather got cooler. The CI was diagnosed with asthma, which worsened, and he became inhaler/nebulizer dependent. He did not respond adequately to treatment to continue to perform within his military occupational specialty (MOS) and was unable to participate in a physical fitness test due to his exercise-induced asthma. He was issued a permanent P3, S3 profile and underwent a Medical Evaluation Board (MEB). The MEB found PTSD, asthma, exercise-induced, and alcohol abuse as interfering with duty and forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. The CI was initially placed on Temporary Disability Retired List (TDRL) on 16 May 2007 with PTSD rated at 30% and asthma rated at 10% (combined 40%), with likely application of DoDI 1332.39. His final PEB adjudication on 18 February 2009 resulted in PTSD rated at 10% and asthma rated at 10% (combined 20%). The CI did not appeal and was separated with a 20% combined rating.

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CI CONTENTION: “I was assigned less than 50% disability rating by the military for my unfitting PTSD upon discharge from active duty. The PDBR should assign the highest final disability rating applicable consistent with 38 CFR 4.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.”

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RATING COMPARISON:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20090218** | | | | **VA (7 Mo. after Separation) – All Effective 20070823** | | | |
| **Condition** | **Code** | **Rating** | | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL - 20070516** | **TDRL** | **Sep.** | **9 Mo after TDRL finalization** |
| PTSD | 9411 | 30% | 10% | PTSD | 9411 | 50% | 20071018 |
| 50% | 20091215 |
| Asthma | 6602 | 10% | 10% | Asthma | 6602 | 30% | 20071018 |
| Alcohol Abuse | Not Unfitting | | | Not Service Connected x 4 | | | 20071018 |
| **Combined: 20%** | | | | **Combined: 70%** | | | |

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ANALYSIS SUMMARY:

Posttraumatic Stress Disorder. The TDRL PEB 30% rating, as described above, was derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act 2008 mandate for DoD adherence to the VA Schedule for Rating Disabilities (VASRD) §4.129. Although there was an actual TDRL period, the service did not comply with the §4.129 50% minimum TDRL rating. This matter, however, has been resolved pursuant to the United States Court of Federal Claims Settlement Agreement No. 09-899C. The Board’s role is therefore limited to determining the most appropriate fit with VASRD, 38 CFR §4.130 criteria at the end of the CI’s actual TDRL period for its permanent rating recommendation. The most proximate sources of comprehensive evidence on which to base the permanent rating recommendation is the MEB examination two months prior to finalization of TDRL and the VA psychiatric compensation and pension (C&P) rating evaluation two months after TDRL finalization.

At the initial TDRL entry, the MEB examination (8 March 2007) documented the CI continued to drink excessively. Additionally, the CI used cocaine heavily while in Iraq (two to three times per week) and ecstasy two to three times per month. The TDRL C&P exam performed at two months post-TDRL entry indicated some mild improvement. The CI was employed as a carpentry apprentice and attended classes one week every three months. The mental status exam (MSE) demonstrated anxiety, auditory hallucinations, visual hallucinations nervousness and anger. Symptoms of difficulties with concentration were documented, but objective cognitive deficits were not demonstrated on MSE, aside from remembering only two of three items. The examiner described the CI’s mood as having “mild difficulties with irritability in public places, hyper vigilance, and paranoia when walking his dog at night.” The psychological testing documented the CI’s score of 53 was consistent with a diagnosis of PTSD. Moreover, the severity of the symptoms described satisfies criteria B, C and D of the disorder. The CI’s global assessment of functioning (GAF) was in the mild range (GAF=61; MEB GAF = 55-60). Of note, the CI’s symptoms had changed little since the TDRL pre-separation or subsequent evaluations. The CI continued to have hyper vigilance, exaggerated startle response, increased arousal and nightmares. The VA rated this examination at 50% IAW §4.130 criteria.

At the time of the finalization from TDRL and for permanent rating, the MEB examination (approximately two months prior to TDRL final finalization), indicated that the CI reported that he had an exacerbation of his PTSD symptoms in December 2007 which was the anniversary of the officer’s death. The CI was married, living with his wife, and employed full-time as a carpenter’s apprentice. The CI reported crying more, guilt with some irritability, nightmares and flashbacks. The CI further stated that he continued to feel numb, had an increased startle response and hyper vigilance regarding deployment, problems concentrating and avoidance of discussing or thinking about military-type situations. He also had to avoid crowds and Middle Eastern people because of anxiety and feeling tense. The CI was treated with psychotherapy and medications for severe anxiety and insomnia. The examiner documented a marked degree of military/psychiatric impairment with mild impairment for social and industrial adaptability. His GAF was in the moderate range (GAF=55-60).

At the VA C&P examination approximately nine months after finalization of TDRL, the CI was still married and employed. He had missed two weeks of work in the last year due to depressed mood. The examiner documented that the CI had difficulty concentrating when reading or following a conversation. He carried a notebook and took notes at work to keep on task. The CI still complained of insomnia, nighttime anxiety and restlessness, nightmares, hyper vigilance, panic attacks two to three times per week (including accelerated heart rate, hyperventilation and sweating), impulsiveness, avoidance of crowds, and feelings of emotional numbness. The CI reported that stopped the drug abuse and had significantly reduced his alcohol use to one to three beers on weeknights and six to eight beers on weekends. The CI had mildly impaired immediate memory and fair impulse control; described as “…loses his temper over minor matters at work and home.” Psychological testing (Beck Depression Inventory) indicated moderate to severe symptoms of depression. The CI’s GAF was considered mild (GAF=65) and there was no improvement in his symptoms since his initial TDRL entry examinations. The VA rated this examination at 50%. There was an additional treatment note on 2 January 2008 for bipolar disorder II that was not specifically mentioned in the C&P exam or VA rating. The bipolar diagnosis was not part of the VA C&P exam.

The Board primarily considered the above examinations for deliberations. With regard to the TDRL entry rating recommendation, the Board agreed that there was no indication that the CI’s condition exceeded the §4.129 minimum TDRL rating minimum of 50% and recommends a 50% PTSD TDRL rating IAW §4.129. With regard to the permanent rating recommendation, all members agreed that the §4.130 threshold for a 70% rating was not approached and that the criteria for 10% rating were well-exceeded. The deliberations settled on arguments for a 30% or 50% permanent rating recommendation. The Board deliberated if the CI had “only occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks." The 50% description (occupational and social impairment with reduced reliability and productivity) may be a better fit with the functioning in evidence since it can be assumed that even though reliability and productivity were not significantly affected, the CI’s concentration and focusing on tasks was continuously effected by his PTSD. Although the preponderance of evidence appears to favor a 30% rating IAW VASRD §4.130, an argument remains for a 50% rating. Considering the totality of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a permanent PTSD disability rating of 30%.

Asthma. The CI had consistently greater symptoms than his slightly abnormal pulmonary function tests would indicate. Rating by the VASRD alone, the CI’s medication history and use are the crux of the rating deliberations. In its deliberations the Board devoted ample attention to the issue of whether the requirement for daily bronchodilator and/or anti-inflammatory therapy was met in this case, as that is the pivotal criteria between a 10% or 30% rating recommendation. Asthma is a frequently encountered condition by the Board. It is acknowledged that the VASRD is somewhat outdated for asthma since modern treatment has expanded to include many treatment agents not available at the time the standards were promulgated. Contemporary treatment regimens commonly employ daily maintenance use of a variety of inhaled steroids (anti-inflammatory) and/or long-acting inhaled bronchodilators. The VA routinely concedes the 30% rating if there is a prescription for any of these agents. The Board’s precedent has been to follow suit (with the following caveat), although it is clear that this encompasses many cases of relatively mild disease associated with minimal limitations and disability. The Board does take the reasonable position that the evidence in such cases should foster the assumption that the treatment regimen supporting the higher rating is necessary to maintain good control of the condition. That question is only raised in cases where there is evidence that the condition is well-controlled in spite of documented non-compliance or only sporadic use of the medications in question.

From pre-TDRL, through TDRL and post-TDRL finalization, VA records indicated the CI required and used daily inhalational bronchodilator and/or inhalational anti-inflammatory medications (Advair, twice daily) which would support a minimum 30% rating IAW disability code 6602. The record was also examined to determine if the CI met the criteria for the 60% rating of at least monthly visits to a physician for required care of exacerbations or intermittent (at least three per year) course of systemic (oral or parenteral) corticosteroids.” The record indicated less than monthly physician visits for required care for his asthma. The pre-TDRL records indicated that the CI had been on a prolonged course of inhaled corticosteroids (Advair discus). He also had one emergency room visit for asthma. The TDRL-entry PEB indicated "Spirometry was normal. Medication profile supports only intermittent use of medications, for which rated" and the TDRL finalization PEB indicated “Medication profile notes occasional use of medication to control asthma symptoms. Rated 10% for intermittent use of medication, stable for final rating.”

The sources of evidence to base the TDRL entry and permanent rating recommendation following TDRL was a combination of the pulmonary function testing 19 months pre-TDRL entry, the narrative summary allergy consultation for TDRL four months pre-TDRL entry, and treatment records for asthma prior to and proximate to his TDRL finalization. As noted, the clinical records consistently demonstrated prescribed daily asthma medication use to meet the asthma (6602) 30% criteria. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt) and §4.7 (higher of two evaluations), the Board recommends a permanent rating of 30% for the asthma condition.

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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. Furthermore, Army PEB reliance on DoDI 1332.39 may have been operant in this case, and the CI’s condition was adjudicated independently of that instruction by the Board. In the matter of the PTSD, tcoded 9411, the Board, by a vote of 2:1 recommends a permanent rating of 30%, IAW VASRD §4.130. The single voter for dissent who recommended a 70% rating did not elect to submit a minority opinion. In the matter of the Asthma condition, the Board unanimously recommends an initial TDRL and permanent separation rating of 30%. 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.

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RECOMMENDATION: The Board recommends that the CI’s prior separation be recharacterized to reflect that, rather than discharged with severance pay, the CI was placed on the TDRL at 70% (PTSD at 50% IAW §4.129 and DoD direction) and then permanently retired by reason of physical disability with a final 50% rating as indicated below.

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| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Post-Traumatic Stress Disorder | 9411 | 50% | 30% |
| Asthma | 6602 | 30% | 30% |
| **COMBINED** | **70%** | **50%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100806 w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Records

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President

Physical Disability Board of Review

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency

(TAPD-ZB /), 2900 Crystal Drive, Suite 300, Arlington, VA 22202

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for XXXXXXXXXXX, AR20110021165 (PD201000945)

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 70% 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 50%.

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 23 August 2007 to 2 March 2009 at 70% disability and then following this period recharacterize his separation as a disability retirement with a combined disability rating of 50%. 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 XXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)