RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXX BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1000946 SEPARATION DATE: 20060430

BOARD DATE: 20110316

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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 SSGT (2846, Ground Radio Repairman) medically separated from the Marine Corps in 2006 after over nine years of service. The medical basis for the separation was posttraumatic stress disorder (PTSD). The CI’s symptoms developed after being hit by mortar fire in Iraq in 2004. He was hospitalized for three weeks after undergoing several surgeries and treatment for multiple lower extremity shrapnel fragmentation wounds and tissue loss. The CI’s PTSD symptoms, however, became more prominent, despite counseling, medication and psychotherapy, including Eye Movement Desensitization and Reprocessing (EMDR). He was placed on limited duty for eight months for his right knee medial meniscus tear. The CI was unable to maintain his physical readiness requirements, and he was referred to the Medical Evaluation Board (MEB). An initial MEB was submitted in 2005, but expired. He subsequently underwent another MEB in 25 January 2006 for PTSD. The MEB listed prolonged PTSD as the only diagnosis. The Physical Evaluation Board (PEB) adjudicated the PTSD as unfitting rated 0%, with likely application of SECNAVINST 1850.4E and/or DoDI 1332.39. The CI made no appeals and was separated at 0% disability.

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CI CONTENTION: The CI states: “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.” He additionally requests that he be found “unfitting” and receive ‘the highest rating possible’ for ankle, knee, lower leg, scars, leg muscle injury, plantar fasciitis, Achilles tendonitis, chronic headaches and traumatic brain injury (TBI). This case is court remanded under the *Sabo et al v. United States* class action suit.

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RATING COMPARISON:

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| **Service IPEB – Dated 20060301** | | | **VA (8 Mo. after Separation) – All Effective 20060501** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Posttraumatic Stress Disorder | 9411 | 0% | Posttraumatic Stress Disorder | 9411 | 30% | 20061220 |
| ↓No Additional MEB/PEB Entries↓ | | | Left Knee Instability … ACL … | 5257 | 10% | 20061220 |
| Other X 2/ NSC X 1 |  |  |  |
| **TOTAL Combined: 0%** | | | **TOTAL Combined: 40%** | | | |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that there should be additional disability assigned for conditions which were connected with his shrapnel wound injuries and the gravity of his condition and predictable consequences which merit consideration for a higher separation rating. It is a fact, however, that the Disability Evaluation System (DES) has neither the role nor the authority to compensate service members for conditions that did not impair duty performance or for potential post-separation complications of conditions that did result in a medical separation. This role and authority are granted by Congress to the Veteran’s Administration (VA). This case specifically focuses on the CI’s symptoms of PTSD. The VA evaluates on service-connectedness without regard to fitness for duty.

Posttraumatic Stress Disorder. The PEB 0% 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 VA 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 the VA psychiatric compensation and pension (C&P) rating evaluation eight months after separation on 22 December 2006. Especially since the C&P examination also reflects the stress of transition to civilian life, which is a core intent of VASRD §4.129; it carries the preponderance of probative value in the Board’s assessment of a fair permanent rating recommendation. The MEB evaluation nevertheless serves as a useful reference point and retains relevant probative value.

The severity of the CI’s PTSD condition as evidenced by the MEB evaluation could best be described as mild to moderate. He related symptoms of frequent nightmares, flash backs, poor sleep, anxiety, intrusive thoughts, problems concentrating, avoidance, suspiciousness and hyper-vigilance. The MEB examiner documented that the CI had an Axis I diagnosis of “PTSD, Chronic, with Delayed Onset, Did Not Exist Prior to Enlistment.” The non-medical assessment (NMA) reflected strong performance prior to and after the CI’s deployment to Iraq. The NMA indicated the CI “is capable of performing his duties and being a good Marine, but he has allowed numerous personal problems to negatively affect his value to the Marine Corps,” was not motivated to remain a Marine, and also opined that the CI might be improperly applying PTSD in an attempt to receive a medical retirement. However, the CI’s PTSD symptoms are very clearly documented by the MEB examiner. Some social avoidance was documented, and the CI stated that he lost interest in participating in family and social activities. The family noted that his affect had become restricted and that he was often isolative. He was prescribed a single anti-anxiety medication. He had undergone psychotherapy with EMDR which he acknowledged was very helpful; however, he did not return for this therapy. The CI’s impairment for military service was “severe” and his impairment in a civilian industrial capacity was “mild.” The examiner further opined that the CI would require treatment and close follow-up for his condition. The NMA indicated the CI was on permissive temporary duty to be with his family due to his grandfather and father passing away and his wife undergoing back surgery. The PEB adjudged that the CI had stopped therapy, was taking only Seroquel for sleep, and had transient increase in symptoms following the CI’s father’s death from cancer in August 2005.

At the time of the VA psychiatric rating examination eight months after separation, the CI’s symptoms were slightly increased, but remained in the mild to moderate range. The CI was recently employed as a federal corrections officer at a federal penitentiary since June 2006, and indicated that “his job got to him at times” and that he was having increased difficulties with sleeping. He was on medications for sleep difficulties. He was married, with two children. He endorsed symptoms of hyper-vigilance, sleep disturbance, nightmares and periods of irritability and anger. The CI primarily spent his leisure time by staying at home and being with his family. On mental status examination (MSE) his mood was mildly euthymic with appropriate affect. There was no suicidal ideation, delusional or hallucinatory symptoms, or speech disturbance, and the CI was well-groomed. Irritability, anger, jumpiness, and difficulty concentrating were noted in the MSE, but were not clearly objective findings versus patient reports. Psychometric testing at this examination indicated that the CI had chronic feelings of anxiety, tension, fearfulness, inability to be assertive and feelings of inadequacy. The examiner opined that, “although the veteran is exhibiting signs and symptoms of PTSD, he is also and probably more predominantly focused on his physical problems.” The examiner noted generally mild PTSD symptoms except for “significant irritability and/or sleep disturbance. This undoubtedly is affecting his quality of life to some degree.” Reintroduction to therapy was recommended. The global assessment of functioning of 67 was in the mild symptom range. The VA assigned a §4.130 rating of 30% based on this examination, independent of §4.129.

The Board considered the rating on the data above. Regarding the rating for entry into the constructive TDRL period, the MEB exam would independently rate between 10% and 30%, with the confounder of an administratively final diagnosis of unfitting PTSD and the NMA indicating concern over the CI’s diagnosis and possible motivation, confirming occupational impairment. A DoDI 1332.9 derived rating of 10% for mild social/industrial impairment would be justified, although a fair rating under VASRD §4.130 would have approximated 30%, with considered decreased motivation attributed to his PTSD condition. Therefore, the minimum 50% TDRL rating IAW §4.129 is appropriate.

With regard to the permanent rating at six months, there was slight worsening social impairment and indication of job stress at the VA evaluation. All members agreed that the 0% threshold was exceeded and that the 50% threshold was not approached. The Board’s deliberation was primarily focused on a 30% versus 10% permanent rating recommendation. The Board deliberated the extensive shrapnel injury condition affecting his psychological condition as noted in the VA psychometric testing. The general description in VASRD §4.130 for a 30% rating (“occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks”) is the closest fit to the impairment evidenced by the VA evaluations. After this deliberation, considering the totality of the evidence and with deference to VASRD §4.3 (reasonable doubt), the Board recommends 30% as the fair and equitable permanent rating for PTSD in this case.

Other Conditions. The left knee instability condition was rated by the VA at 10% within 12 months of separation. It was noted on the MEB in the DES package that the CI had a past history of multiple bilateral leg shrapnel injuries; however, the left knee condition was never specifically mentioned or assessed. The PEB notes indicated that the mortar injuries showed a “full recovery.” Although the CI was given an eight-month limited duty, this was for a right knee meniscal tear and not for a left knee condition. Furthermore, the NMA stated that if the CI “expressed a sincere desire to remain on active duty, I would recommend retention.” The Board therefore has no eligible 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 the PTSD, the Board unanimously recommends an initial TDRL rating of 50% in retroactive compliance with VASRD §4.129 as DOD-directed; and by a 2:1 vote a 30% permanent rating at six months IAW VASRD §4.130. The single voter for dissent (who recommended a 10% permanent rating) submitted the addended minority opinion. In the matter of the left knee condition or any other medical conditions eligible for Board consideration, the Board unanimously agrees that it cannot recommend any findings of unfit for any additional rating at separation.

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RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows: TDRL at 50% for six months following CI’s prior medical separation (PTSD at minimum of 50% IAW §4.129 and DoD direction) and then a permanent 30% disability retirement as below.

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| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Posttraumatic Stress Disorder | 9411 | 50% | 30% |
| **COMBINED** | **50%** | **30%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100727, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

Deputy Director

Physical Disability Board of Review

Minority Opinion:

In my opinion, the CI’s social and occupational impairment at eight months post-separation appeared to be mild. He was married with two children, and spent his leisure time at home with his family. He was working as a corrections officer since June 2006 at a federal penitentiary, a highly stressful job that I believe would be difficult or impossible to perform if his occupational impairment was more than mild. Also, his GAF of 67 was in the mild symptom range.

In my mind, reasonable doubt was not overcome by the facts above, which favor a 10% mental health disability rating at the approximately six-month post-separation mark.

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| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Posttraumatic Stress Disorder | 9411 | 50% | 10% |
| **COMBINED** | **50%** | **10%** |

MEMORANDUM FOR DEPUTY COMMANDANT, MANPOWER & RESERVE AFFAIRS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

ICO XXXXXX, FORMER USMC, XXX XX XXXXX

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 30 April 2006 thru 29 October 2006.

b. Final separation from naval service due to physical disability effective 30 October 2006 with a disability rating of 30 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 that subject member is notified once those actions are completed.

Principal Deputy

Assistant Secretary of the Navy

(Manpower & Reserve Affairs)