RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1001004 SEPARATION DATE: 20091126

BOARD DATE: 20120111

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (11B, Infantry) medically separated for right ankle pain. He was treated, but did not respond adequately to fully perform his military duties or meet physical fitness standards. He underwent a Medical Evaluation Board (MEB). Right ankle pain was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Six other conditions, identified in the rating chart below, were listed on the DA Form 3947 as medically acceptable. The PEB found the right ankle pain unfitting, and rated it 20% IAW the Veterans’ Administration Schedule for Rating Disabilities (VASRD). The CI did not accept the PEB findings, and he submitted a letter of rebuttal requesting an informal appeal. His case was carefully reviewed, and the Board affirmed the decision of the PEB that found him unfit with a disability rating of 20%. The CI made no further appeals and was thus separated with a 20% combined disability rating, IAW applicable Army and DoD regulations.

CI’s CONTENTION: “Issues of PTSD and TBI should be added as unfit conditions to the MEB.”

RATING COMPARISON:

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Army PEB – dated 20090825** | | | **VA (1 mo. Pre Separation) – All Effective 20091127** | | | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | | **Rating** | | **Exam** |
| Right Ankle Pain | 5271 | 20% | Right Ankle Pain | 5271 | | 10% | | 20091015 |
| Right Ankle Stiffness | Not Unfitting | | Right Ankle Scar | 7805 | | 0% | | 20091015 |
| Lumbar Strain | Not Unfitting | | Thoracolumbar Strain | 5237 | | 20% | | 20091015 |
| PTSD | Not Unfitting | | PTSD | 9411 | | 50% | | 20091015 |
| Restless Legs Syndrome | Not Unfitting | | Restless Legs Syndrome | 8199-8103 | | NSC | | 20091015 |
| Hypertension | Not Unfitting | | Hypertension | 7101 | | 0% | | 20091015 |
| Hyperlipidemia | Not Unfitting | | No VA Entry for Hyperlipidemia | | | | | |
| ↓No Additional MEB/PEB Entries↓ | | | TBI with Headaches | | 8100-8045 | | 70% | 20091015 |
| Tinnitus | | 6260 | | 10% | 20091102 |
| **Combined: 20%** | | | **Combined: 90%** | | | | | |

ANALYSIS SUMMARY:

The Board acknowledges the sentiment expressed by the CI, that Service ratings should be considered for other conditions (TBI and PTSD). The Board carefully reviewed all of the CI's medical conditions, to determine if compensation for those conditions would be appropriate.

Right Ankle Pain. The CI injured his right ankle in November 2005, during training. The initial insult was an inversion injury, followed by two other ankle injuries in February and April 2006. He was treated conservatively. Magnetic Resonance Imaging (MRI) showed no significant abnormality, and the CI was cleared to deploy in August 2006. The ankle became worse during deployment. When he returned to the US, he was diagnosed with osteochondral defect and right ankle instability. Repeat MRI showed peroneal tendinopathy, and some stretching of his lateral ligaments. Due to minimal improvement and continued instability, surgical consultation was obtained and he underwent peroneal tendon repair. At first he improved, but then his symptoms returned. The CI had a second surgery in October 2008. Postoperatively, he had better range-of-motion (ROM), stability, and strength. However, the right ankle pain persisted, so an MEB was initiated. At his April 2009 MEB evaluation, seven months prior to separation, the right ankle pain was not better. The CI was requiring narcotics for pain control. He reported occasional “popping” of the ankle with certain movements. On exam, he had no limp and was not using any assistive devices. There was tenderness over the lateral right ankle and some edema; but no instability, atrophy, or redness.

Six months later, at his 15 October 2009 Department of Veterans’ Affairs (DVA) Compensation and Pension (C&P) exam, the CI reported that his right ankle did not “give out” anymore, but it hurt all the time. When it locked up he would need to “pop” it. He also complained of some stiffness and swelling. He was wearing an ankle brace for support. On exam, he had normal gait and no ankle instability. There was some tenderness to palpation over the lateral right ankle, with some edema. Two goniometric ROM evaluations were in evidence, and these exams are shown below.

|  |  |  |
| --- | --- | --- |
| Right Ankle | Separation Date: 20091126 | |
| Goniometric ROM | PT – 9 mo. Pre Sep | VA C&P – 6 wks. Pre Sep |
| Dorsiflexion (20⁰ is normal) | 5⁰ | 10⁰ |
| Plantar Flexion (45⁰ is normal) | 35⁰ | 20⁰ |
| Comments | Pain and stiffness | ROM limited by pain |

The Board carefully examined all evidentiary information available. The Army PEB and the VA used the same VASRD code for the right ankle pain, but assigned different rating percentages. The Board agreed with the VA, that the limitation of ankle motion was best described as “moderate.” After due deliberation and review of all the evidence, and mindful of VASRD §4.3 (Reasonable doubt), the Board unanimously recommends a disability rating of 10% for the right ankle pain. It is appropriately coded 5271, and meets criteria for the 10% rating.

Traumatic brain injury (TBI). In September 2009, the CI was having problems with his memory. He was scheduled to undergo a TBI screen, but then the Fort Drum Behavioral Health Center staff decided that a comprehensive neuropsychological (NP) assessment would be beneficial. On 9 October 2009, six weeks prior to separation, he underwent a full NP assessment. This was done “as part of the MEB process.” Therefore, the NP assessment is clearly within the Disability Evaluation System (DES) file. At that exam, the CI reported that he had been exposed to several explosions while deployed. He denied any loss of consciousness, but stated that he felt dazed and confused after the explosions. The CI was administered the neuropsychological assessment battery (NAB), which showed deficits in attention (moderate-to-severely impaired), memory (mild-to-moderately impaired), and executive functioning (moderately impaired). His total NAB (T-NAB) index was interpreted as “moderately impaired.” The examiner opined that the memory, attention, concentration, executive functioning and other cognitive deficits were significant enough to render the soldier unable to function in the military environment. His Axis I diagnoses included cognitive disorder not otherwise specified (nos), and personality change due to head trauma. The Global Assessment of Functioning (GAF) score was 50. Initiation of neurocognitive rehabilitation was recommended.

One week later, at his VA C&P exam, the CI reported symptoms of headache, memory loss and trouble concentrating. The examiner judged the CI’s memory impairment to be moderate. The cognitive deficits were listed as: decreased attention, difficulty concentrating, difficulty with executive functioning, and moderate conceptual impairment. Instead of repeating the formal neurocognitive testing, the VA used the NP assessment that had been done one week prior. The VA determined that the facet for memory, attention, concentration and executive functions (MACE) was at level three. Under diagnostic code 8045, this equates to a 70% rating IAW VASRD §4.124a. TBI had not been discussed in the April 2009 MEB narrative summary (NARSUM), nor was it listed on the DA Form 3947. However, as noted above, it is appropriate to consider TBI to be in the DES file since the 9 October 2009 NP assessment was done prior to separation “as part of the MEB process.” He had been referred by the Fort Drum Behavioral Health Center staff. TBI was not adjudicated by the Army PEB, but the Board determined that the TBI condition was eligible for a fitness determination.

The Board pays close attention to conditions associated with TBI because it is sensitive to the fact that such cases have been vulnerable in the past to consequences which go unrecognized at separation. The Board must determine if the TBI was separately unfitting. In this case, the NP assessment was completed six weeks prior to separation and carries significant probative value. The examiner felt that the tests were performed with good effort by the CI and were an accurate reflection of his NP status. As mentioned above, the examiner opined that the TBI condition was significant enough to render the CI unable to function in the military environment. In light of the NP testing results, the Board determined that his facet for memory, attention, concentration, and executive functions (MACE) met the criteria for level three impairment. After due deliberation, all Board members agreed that the preponderance of the evidence with regard to his functional impairment favors TBI as an additionally unfitting condition for separation rating. The Board unanimously recommends a rating of 70% for the TBI condition. It is appropriately coded 8045 and meets the VASRD criteria for a 70% rating.

Posttraumatic stress disorder (PTSD). The CI was deployed to Iraq from August 2006 until October 2007, where he was exposed to direct combat experiences such as fire-fights, improvised explosive devices (IEDs), and witnessing casualties. During 2007, he began to have symptoms of insomnia, irritability, and grief. He self-presented to mental health (MH) in early 2008. The CI was started on medication, and he began receiving outpatient MH care. On 6 March 2009, he was evaluated by a psychiatrist at Fort Drum, for his psychiatric MEB examination. His symptoms at that time included re-experiencing, avoidance and hyper-arousal. Although the symptoms occurred daily, the CI reported that they did not cause any functional impairment in terms of duty performance, relationships, or cognitively based pursuits. He was well adjusted and maintained good social functioning. He was in the warrior transition unit (WTU) at the time, but not because of the PTSD symptoms. It was the opinion of the examiner that he would not need to be in the WTU strictly for mental health reasons. On mental status examination (MSE), there were no psychomotor abnormalities except for some increased muscle activity in the form of leg shaking. Thought content was devoid of any suicidal or homicidal ideations, hallucinations, or delusions. Cognition was grossly intact and he demonstrated an appropriate fund of knowledge. He described his mood as "happy.” His affect was very pleasant but mildly anxious. His GAF score was 65-70. PTSD was diagnosed based on intermittent nightmares with themes of killing and death, frequent intrusive thoughts of his traumatic exposures, avoidance of thoughts or cues associated with traumatic exposures, difficulty in crowds, and a somewhat decreased social nature. The severity of symptoms was mild to moderate. The CI was issued an S-2 profile, and it was determined that the PTSD condition met retention standards.

Twelve weeks later, at his follow-up visit on 28 May 2009, the CI reported good efficacy, tolerance and compliance with the sertraline medication he was taking for PTSD. He had some irritability due to the anniversary of losing a few peers during deployment. He was sleeping well, enjoying a harmonious marriage, and was having no functional impairments due to MH issues. He was looking forward to relocating to North Carolina after separation, where he was well supported by friends and family, and planned to pursue career options in law enforcement. His psychiatric review of symptoms was negative and he declined any further individual psychiatric therapy.

The CI failed to show for his scheduled C&P MH examination, so a full psychiatric evaluation was not done at the time of separation. At his NP assessment on 9 October 2009, the examiner reported that the CI’s mood was euthymic, and his affect was congruent. One week later, at his general medical C&P exam, the examiner felt that the CI’s affect, mood and judgment were normal. There were no obsessive behaviors, hallucinations, or delusions. Intelligence was average, and behavior was appropriate.

The Board directed its attention to its fitness recommendation based on the evidence just described. The best source of comprehensive evidence on which to base the permanent PTSD rating recommendation in this case is the information the psychiatrist at Fort Drum, New York. Even though those visits (March-May 2009) were several months prior to separation, they have highly significant probative value since no other comprehensive psychiatric evaluation is more proximate to the date of separation. All Board members agreed that the CI had been diagnosed with PTSD. However, based on the evidence, there appeared to be no significant impact on function. His MH symptoms did not cause any duty performance, functional, relationship or cognitive impairments. He had noted an improvement in his mood with medication. He was well adjusted, and maintained good social functioning. The record contained insufficient evidence that the PTSD hindered the CI's performance, or rendered him unfit for his assigned military duties. After due deliberation, and consideration of all the evidence, and mindful of VASRD §4.3 (reasonable doubt), the Board unanimously recommends that the PTSD was “not unfitting” and therefore not ratable. Furthermore, VASRD §4.129 does not apply in this case.

Other PEB Conditions. Right ankle stiffness, lumbar strain, restless leg syndrome, hypertension and hyperlipidemia were all adjudicated by the PEB as “not unfitting.” None of these conditions were profiled, implicated in the commander’s statement or noted as failing retention standards. All 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 required military duties. All evidence considered, there is not reasonable doubt in the CI’s favor supporting reversal of the PEB fitness adjudication for any of the stated conditions.

Remaining Conditions. Bronchitis, cubital tunnel syndrome, headaches, and several other conditions were also noted in the DES file. None of these conditions were clinically significant during the MEB/PEB period, none carried profiles, and none were implicated in the commander’s statement. They were all 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. Additionally, tinnitus and other conditions were noted in the VA rating decision proximal to separation, but not documented in the 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. In the matter of the TBI condition, the Board unanimously recommends a rating of 70%, IAW VASRD §4.124a. In the matter of the right ankle pain, the Board unanimously recommends a rating of 10%, IAW VASRD §4.71a. In the matter of the PTSD, right ankle stiffness, lumbar strain, restless leg syndrome, hypertension, hyperlipidemia, bronchitis, cubital tunnel syndrome, headaches 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 determination be modified as follows and that the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective as of the date of his prior medical separation.

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Traumatic Brain Injury | 8045 | 70% |
| Right ankle pain (with peroneal tendinopathy) | 5271 | 10% |
| **COMBINED** | **70%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100420, 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

Crystal Drive, Suite 300, Arlington, VA 22202

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for

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 70% 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 70% 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)

CF:

( ) DoD PDBR

( ) DVA