RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: bRANCH OF SERVICE: Army

CASE NUMBER: PD1001020 DATE OF PLACEMENT ON TDRL: 20050706

BOARD DATE: 20111214 Date of Permanent SEPARATION: 20070927

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty member, SPC/E-4 (21B, Combat Engineer), medically separated for posttraumatic stress disorder (PTSD)*.* While deployed to Iraq in 2003 and 2004, the CI experienced significant combat stressors and was treated for psychiatric symptoms in theater. He met diagnostic and statistical manual of mental disorders (DSM IV) criteria for an Axis I diagnosis of PTSD upon further evaluation after re-deployment. He did not respond adequately to a trial of psychotherapy and medications, and was unable to perform within his military occupational specialty (MOS). He was consequently issued a permanent S3 profile and referred for a Medical Evaluation Board (MEB). PTSD was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. A right hand condition was also evaluated by the MEB and forwarded as a medically acceptable condition. Other conditions included in the Disability Evaluation System (DES) file will be discussed below. An Informal PEB adjudicated the PTSD condition as unfitting, rated 30%, with application of Department of Defense Instruction (DoDI) 1332.39. The right hand condition was determined to be not unfitting. The CI was placed on the Temporary Disability Retired List (TDRL) in May 2005; re-evaluated in May 2006; and underwent his final re-evaluation in August 2007. At that time, the PEB found that PTSD was sufficiently stable; but, remained unfitting. It was rated 0%, with application of the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI made no appeals and was medically separated with that rating.

CI CONTENTION: “The application states “I was assigned less than 50% disability rating by the military for my unfitting PTSD upon discharge from active duty. … assign the highest final disability rating applicable consistent with 38 CFR 4.I29 and DOD policy…” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Final Service IPEB – Dated 20070910** | | | | **VA – All Effective Date 20050505** | | | |
| **Condition** | **Code** | **Rating** | | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20050505** |  | **TDRL** | **SEP** |
| PTSD | 9411 | 30% | 0% | PTSD | 9411 | 50%\* | 20050706 |
| Right Hand Pain | Not Unfitting | | | Right Hand Trauma | 5299-5230 | NSC | 20050706 |
| No Additional MEB/PEB Entries. | | | | LS Strain w/ Scoliosis | 5237 | 10% | 20050706 |
| 0% x1/Not Service Connected x 4 | | | 20050706 |
| **Combined: 0%** | | | | **Combined: 60%** | | | |

\* Increased to 70% (VARD dtd 20100205) retroeffective to separation, but based on an exam dated 20100125 (28 months after

permanent separation).

ANALYSIS SUMMARY: The PEB rating, as described above, was derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act (NDAA) 2008 mandate for DoD adherence to 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 on the TDRL. Since the Service was in compliance with the §4.129 TDRL requirement, the Board need not apply a constructive TDRL interval in this case. A minimum TDRL rating of 50% remains applicable IAW DoD direction, and as held by Federal court in the *Sabo v. United States* class action settlement. 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 Re-evaluation performed 25 months after being placed on TDRL and 1 month prior to permanent separation. There were two Department of Veterans’ Affairs (VA) compensation and pension (C&P) examinations in evidence. One was performed the same month that the CI was placed on TDRL (26 months prior to permanent separation); and, the other was performed 28 months after permanent separation. Since both of these evaluations fall well outside the 12-month window specified in DoDI 6040.44 regarding Board consideration of post-separation VA evidence, the Board assigns little probative value to them relative to its permanent rating recommendation. The VA C&P evaluation performed proximate to the Service’s TDRL placement is, of course, probative for the Board’s TDRL rating recommendation; and, the VA exam done 28 months after permanent separation contained a probative occupational history as referenced below.

Posttraumatic Stress Disorder. The severity of the CI’s PTSD condition at the time that he was placed on TDRL could best be described as moderate. The MEB narrative summary (NARSUM) documented insomnia, nightmares, flashbacks, anhedonia, and depression that were related to traumatic events in theater and concurrent domestic issues. The mental status exam (MSE) was normal except for depressed mood and constricted affect. There was no suicidal ideation, delusional or hallucinatory symptoms, speech disturbance, objective cognitive impairment, or other abnormalities. Socially, the CI’s platoon leader stated that the CI had “become noticeably less social with other members of the platoon.” Additionally, the CI was experiencing significant marital and financial problems. Occupationally, the commander’s statement documented, “As a Combat Engineer, [CI] is consistently … late for, or missing formations and training events due to his condition. He gets frustrated easily and his performance is sub-par … his mental condition creates a burden for others in his company, severely reducing readiness. Simply stated, he is totally incapable of performing his 21B MOS duties.” The CI was under treatment with an anti-depressant; and, the Global Assessment of Functioning (GAF) score assigned by the MEB psychiatrist was 60, indicative of moderate difficulty in social or occupational functioning. The VA C&P psychiatric evaluation at the time documented similar symptoms and severity. The MSE was equivalent and the MEB psychiatrist’s GAF assignment was referenced. The VA examiner stated, “He has become socially withdrawn and feels uncomfortable in crowds. He has become irritable. There are multiple triggers and startle responses.” No occupational details were provided, but it may be assumed that the CI had not yet commenced civilian occupational pursuits. Treatment at that time was confined to counseling. The interim TDRL examination performed 10 months later documented similar, but improving, symptoms. Socially, the CI was in a significant and stable relationship with his girlfriend, although his outside social life remained constrained. He had held two jobs, the longest lasting two months, and had lost one of them for oversleeping. That examiner stated that the CI’s “condition seemed slightly improved over the last year but he remains a significantly impaired person. He has not been able to be employed or to engage in much life outside of his own home. Motivation to correct this is questionable, although he seems invested in trying to go to school. This soldier continues to have significant symptoms and significant impairment in vocational and social engagement. He has only recently reengaged in medication management and has shown some improvement since he did start back on medications. Condition has not stabilized. It is recommended that he stay on TDRL status for another 12-18 months.”

The final TDRL psychiatric evaluation, proximate to permanent separation (and most probative to the Board’s permanent rating recommendation), documented substantial improvement over the interim evaluation a year earlier. Residual, but milder and less frequent, symptoms of insomnia, nightmares, hypervigilance, irritability, difficulty concentrating, and avoidance were documented; but, the CI stated that “I’m learning to deal with it and to go on with my life.” The CI was no longer taking psychiatric medication and had recently discontinued VA outpatient therapy, stating; “I have found other ways to cope with stress and irritability and I prefer not to be on medication.” Socially, he continued in the stable partner relationship described above with plans to marry. Outside social activities with his fiancée were documented, but generic social functioning was not elaborated. Occupationally, the CI had been successfully employed and had just completed an associate’s degree in automotive technology. His grades were excellent (3.5 GPA), and employment in that field had been secured. The examiner documented that the CI felt more purpose in life and was optimistic when looking at his future. The MSE was completely normal with no cognitive deficits and the previous mood and affect disturbance was no longer present. Surprisingly, the GAF assignment (50) was unchanged from the previous evaluation, with no rationale elaborated. Especially given the clear improvement along all parameters, the action officer opines that this GAF assignment is significantly lower than can be supported by the concomitant history and MSE as documented. No occupational details such as personal interactions, etc., were documented by the TDRL examiner, but the VA C&P evaluation, performed 28 months later, documented a detailed occupational history which covered this time period. That evidence suggests that the CI had suffered an ongoing adverse occupational impact from his psychiatric symptoms. Issues with punctuality, friction with co-workers and supervisors, and occasional loss work days were noted. These descriptions, however, were not temporally concise for accurate assignment to the probative rating period.

The Board directs its attention to its rating recommendations based on the evidence just described. All members agreed that the §4.130 criteria for a TDRL rating higher than 50% at the time of placement on TDRL were not met; and, therefore the minimum 50% TDRL rating prescribed by §4.129 is applicable. As regards its permanent rating recommendation, the Board notes that the rating interval encompassed a period of dramatic clinical improvement with a paucity of evidence for any social or occupational impairment. It was agreed by all members that no permanent rating recommendation over 30% could be supported in this circumstance; but, §4.130 ratings of 0%, 10% and 30% were deliberated. The PEB concluded that the VASRD criteria for a 0% rating were met, i.e., “A mental condition has been formally diagnosed, but symptoms are not severe enough either to interfere with occupational and social functioning or to require continuous medication.” The members agreed, however, that the presence of active and significant symptoms as documented by the TDRL examiner (notwithstanding the cessation of medication at that point) were sufficient to overcome a conclusion that 0% was the appropriate rating. The deliberations settled therefore on assigning this impairment as 10% (occupational and social impairment due to mild or transient symptoms which decrease work efficiency) or 30% (occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks).

Although the TDRL evaluation did not provide documentation for any “decrease in occupational efficiency,” it could be argued from the subsequent occupational history (albeit obtained much later) that “intermittent periods of inability” were still operant despite the fact that they were not captured in the snap shot encompassed by the highly probative TDRL evaluation. After these deliberations, in the face of the real time evidence that the CI was not significantly impaired at all during the DoDI 6040.44 prescribed rating interval, it was concluded that an unacceptable degree of speculation was required to support an assumption that any impairment more than “mild or transient symptoms which decrease work efficiency” would have been present. It is clear from subsequent evidence that the CI did not maintain the high functioning reflected in the probative evidence, but it was ultimately agreed by all members (after lengthy discussion) that application of that ‘crystal ball’ evidence was overly speculative, too far astray of DoDI 6040.44 mandates, and too inconsistent with the DES entitlements defined by law. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 10% for the PTSD condition.

Other PEB Conditions. The remaining condition forwarded by the MEB and adjudicated as not unfitting by the PEB was chronic right hand pain. The Board’s main charge in respect to this condition is an assessment of the appropriateness of the PEB’s fitness adjudication. The Board’s threshold for countering DES fitness determinations is higher than the VASRD §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard. There was little related to this condition in the Service treatment record, and it was not identified by the CI as an issue on the MEB discharge physical. It was mentioned by the MEB’s NARSUM examiner that an orthopedic evaluation would be obtained, but there is no evidence that this was done. The VA examiner proximate to TDRL placement commented that there was insufficient evidence to warrant a specific diagnosis; and, the VA therefore did not rate or Service-connect the condition. The condition was not profiled, implicated in the commander’s statement, or noted as failing retention standards; and, the CI successfully completed the Army Physical Fitness Test during the MEB period. This condition was reviewed by the action officer and considered by the Board. There was no indication from the record that it significantly interfered with satisfactory performance of MOS duty requirements. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change in the PEB fitness adjudication for the right hand condition.

Remaining Conditions. No other conditions were noted in the NARSUM, identified by the CI on the MEB physical or found elsewhere in the DES file. Lumbosacral strain, gastroesophageal reflux disease, and several other non-acute conditions were noted in the VA rating decision proximal to TDRL placement, but 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, 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. Although the PEB invoked DoDI 1332.39 language for its TDRL rating of PTSD, no prerogatives outside the VASRD were exercised for its permanent rating determination. In the matter of the posttraumatic stress disorder, the Board unanimously recommends a 10% permanent rating at the time of permanent separation IAW VASRD §4.130. In the matter of the right hand condition, the Board unanimously recommends no change from the PEB adjudication as not unfitting. 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.

RECOMMENDATION:

The Board recommends that the CI’s prior separation be modified to reflect permanent separation with severance pay by reason of physical disability with a final rating of 10%, upon removal from the TDRL, as indicated below.

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

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100815, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

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