RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1001022 TDRL enter date: 20040901

BOARD DATE: 20120112

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty LCpl/E-3 (0311, Rifleman), medically separated for posttraumatic stress disorder (PTSD)*.* He did not respond adequately to treatment, was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards and was referred for a Medical Evaluation Board (MEB). PTSD was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. Four other conditions, as identified in the rating chart below, were forwarded on the MEB submission as medically acceptable conditions. The Informal PEB (IPEB) adjudicated the PTSD condition as unfitting, rated 30%, with application of the SECNAVINST 1850.4E, Department of Defense Instruction (DoDI) 1332.39 and Veterans’ Administration Schedule for Rating Disabilities (VASRD), respectively. The CI was placed on Temporary Disability Retired List (TDRL) with ratings as reflected in the chart below. After reassessment the CI made no appeals and was medically separated with a 0% combined disability rating.

CI CONTENTION: “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 CFR 4.129 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 lists all of his VA conditions and ratings as per the rating chart below. A contention for their inclusion in the separation rating is therefore implied.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Final Service IPEB – Dated 20070927** | **VA\* – All Effective Date 20040901** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20040901** |  | **TDRL** | **Sep.** |
| Posttraumatic Stress Disorder | 9411 | 30% | 0%\*\* | Posttraumatic Stress Disorder with Major Depressive Disorder | 9411 | 50%\*\*\* | 20040811 |
| Major Depressive Disorder | 9434 | 30% | CAT II | NO VA Entry |
| Right Sided Sensory- Neural Hearing Loss | CAT III | NO VA Entry |
| Alcohol Dependence | CAT IV | NO VA Entry |
| ↓No Additional MEB/PEB Entries↓ |  Tinnitus | 6260 | 10%  | 20040811  |
| 0% x 0/Not Service Connected x 1 | 20040811 |
| **Combined: 0%** | **Combined: 60%** |

\* VA rating based on exam most proximate to date of permanent separation. \*\* CI was reduced by 10%-10%=0% coming off of TDRL due to noncompliance ref 20070927 IPEB. \*\*\* VA rating for PTSD was increased from 50% to 100% effective 20050311 for hospitalization over 21 days. The rating was decreased to 70% effective 20050901. The rating was continued at 70% 20080118 and increased to 100% effective 20100126.

ANALYSIS SUMMARY:

Posttraumatic Stress Disorder. The CI developed depression and PTSD symptoms soon after his return from Iraq in September 2003. By December 2003 he was diagnosed with PTSD and major depressive disorder (MDD), was started on Lexapro but he discontinued the medication feeling that it exacerbated his symptoms. He had two unauthorized absences after return from Iraq and was admitted on 8 January 2004 after locking himself in a hotel room with intent to kill himself. Symptoms included depressed mood, flat affect, suicidal ideation, anxiety, irritability, psychomotor agitation, and poor insight, judgment and impulse control. Additional symptoms during his inpatient treatment included nightmares, flashbacks, insomnia, auditory and visual hallucinations (AVH), olfactory hallucinations, homicidal ideation, hypervigilance, avoidance behaviors, and disoriented/dissociative episodes. During his prolonged inpatient treatment his symptoms remained difficult to control in spite of psychotherapy and multiple medication regimens. Twice on special weekend liberty he returned intoxicated and would be referred to the alcohol rehabilitation program as well. The narrative summary (NARSUM) on 14 April 2004, five months pre-separation to the TDRL, noted combat related stressors and symptoms as listed above. The Axis I diagnoses were PTSD, chronic and MDD, severe without psychotic features. The Global Assessment of Functioning (GAF) was 41-50 at admission and 51-60 at discharge. Military impairment was determined to be severe and civilian/social was moderate. The non-medical assessment (NMA), three months pre-separation to the TDRL, did not recommend a period of limited duty, noting that he could not fire a weapon or be deployed and was unfit for duty. The VA Compensation and Pension (C&P) PTSD examination on 11 August 2004, one month pre-separation to the TDRL, also reported similar PTSD symptoms as well as chronic anxiety and chest tightness, which was worse in groups or crowds. The CI stated that medications did help with no evidence for noncompliance. The Axis I diagnosis was PTSD and the GAF was 50. The IPEB on 29 June 2004, two months before TDRL placement, adjudicated the PTSD condition, code 9411, and the MDD condition, code 9434, as unfitting, rating each at 30% for a combined 50% TDRL rating. The Board notes this rating schema is not in compliance with the VA’s usual practice of combining all psychiatric diagnoses and rating impairment based on the overall impact on occupational and social impairment. However, the overall impairment determined was equivalent to the 50% rating determined by the VA. The VA rating decision on 5 November 2004, two months after placement on the TDRL, service connected the PTSD with MDD condition, code 9411, with a 50% rating.

The IPEB on 27 September 2007, three years after placement on the TDRL and three months before separation from the TDRL, adjudicated the PTSD condition, code 9411, with a 10% rating with the rating reduced to 0% for noncompliance. MDD was determined to be a related category II condition. Although the IPEB found that the MDD condition was independently unfitting, separating the psychiatric impairment due to PTSD from that due to MDD requires undue speculation and is a moot exercise for practical purposes. The psychiatric impairment from the PTSD and MDD conditions must be combined under a single §4.130 rating unless the symptoms and impairment are distinctly apportioned by the examiner. Since this was not the case, the Board will rate the total psychiatric impairment as if the two conditions were a single unfitting condition under code 9411 for PTSD with MDD. The IPEB rationale noted that the PTSD symptoms were “not too bad” with no medications and current employment. The 10% assigned was apparently reduced to 0% due to noncompliance with medication treatment recommendations. The DoDI 1332.39 prerogative for reducing a rating solely for non-compliance is not applicable to the Board’s recommendations; although, the Board applies the tenants of accepted medical principles (IAW DoDI 1332.38), and may make fundamental deductions consistent with medical facts that are reasonable and logical as to create a virtual certainty that they are correct. Given the mental disorder overlay of PTSD with the CI’s MDD, it is difficult to support a reduced rating due to not following recommended treatment plans which can be considered linked to the mental health aspects of the CI’s condition. Additionally service treatment records indicate substantial symptoms while following treatment recommendations.

The IPEB rating at final separation, 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 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 the 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, as held by the 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. In this case the CI was on the TDRL for three years and three months. The most proximate source of comprehensive evidence on which to base the permanent rating recommendation in this case is the TDRL NARSUM, on 6 June 2007, two years and eight months after being placed on TDRL and seven months prior to permanent separation. It noted current alcohol intake of 60 to 90 beers per week and symptoms of nightmares three times per week, flashbacks one to three times per month, irritability, racing thoughts and decreased concentration. Sleep was stable and he was working as a machinist although he required a flexible schedule to accommodate his episodes of inability to work due to PTSD symptoms. He self-discontinued his medication five months prior to that evaluation. There was no mood disturbance, memory loss, hallucinations or perceptual disturbances.

There were no VA C&P evaluations or treatment notes within one year of separation from the TDRL. However, VA records do include documentation of ongoing treatment in the interim time period. In June 2005 he was admitted for 32 days of inpatient treatment of PTSD, panic disorder, and alcohol dependence with recent onset of suicidal ideation and a GAF of 21 at admission and 31 at discharge. He was also admitted for five days in December 2005 for suicidal ideation with alcohol induced mood disorder, PTSD, and alcohol dependence. His GAF was 21 on admission and 26 upon discharge. Upon release from the hospital he was supposed to enter a substance abuse program. However, a telephone consult with a VA psychiatrist in February 2006 reveals he never entered the rehabilitation program but called the VA for further treatment. He was seen by the psychiatrist later that month and was noted to have been alcohol free for three weeks but had not been taking his medications. His GAF was noted as both 25 and 31. He agreed to restart his medications and resume regular psychiatric care. He was admitted for inpatient treatment of PTSD for 24 days in March and April 2010. His GAF was 45 upon discharge. These records show ongoing significant impairments and a VA C&P examination from 14 May 2010 noted severe symptoms of posttraumatic stress that interfere with his ability to function effectively, socially or occupationally and a GAF of 45. This examination also notes the CI’s employment history with inability to obtain and maintain employment. The machinist job with accommodating hours described above lasted approximately one year. He had to leave a job at Home Depot because he was not able to handle the intellectual requirements. He was not currently working. He reported attending college classes full time but reported difficulty in concentrating well enough to be successful. He had been married for two years but was having marital difficulties. He was in ongoing treatment and felt that while his medications did not control his symptoms, they did help. After this examination his VA disability rating was increased to 100% for an exacerbation of his condition and was not considered permanent. At the time of his separation from the TDRL in 2008 his VA disability rating was 70%.

The Board directs its attention to its rating recommendations based upon the evidence just described. Regarding the permanent rating recommendation, the deliberation settled on arguments for a 30% versus 50% permanent rating recommendation. The social and occupational impairment described in the TDRL NARSUM appeared to the Board to most closely approximate the 50% description IAW VASRD §4.30, with occupational and social impairment with reduced reliability and productivity. After due deliberation, considering the totality of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board unanimously recommends 50% as the most representative of impairment and the fair and equitable permanent rating for PTSD with MDD in this case.

Other PEB Conditions.The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were right sided hearing loss and alcohol dependence. The right side hearing loss condition, which was adjudicated as a category III condition, was not profiled, implicated in the non-medical assessment (NMA) or noted as failing retention standards. It was reviewed by the action officer and considered by the Board. There was no indication from the record that this condition significantly interfered with satisfactory performance of MOS duty requirements. Alcohol dependence was adjudicated as a category IV condition which did not constitute a physical disability. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for either of the stated conditions.

Other Contended Conditions. The CI’s application asserts that compensable rating should be considered for tinnitus. This condition were reviewed by the action officer and considered by the Board. There was no evidence for concluding that the condition interfered with duty performance to a degree that could be argued as unfitting. The Board determined therefore that the tinnitus condition was not subject to Service disability rating.

Remaining Conditions. Other conditions identified in the DES file were hypertriglyceridemia, right testicular mass, and moderate asymptomatic pes planus. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically active during the MEB period, none were the bases for limited duty and none were implicated in the NMA. 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. No other conditions were service connected with a compensable rating by the VA within twelve months of separation or contended by the CI. 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 PTSD condition, the Board unanimously recommends a 50% permanent rating IAW VASRD §4.130. In the matter of the right sided hearing loss, tinnitus, hypertriglyceridemia, right testicular mass, and moderate asymptomatic pes planus conditions, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation. 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 determination be modified as follows and that the discharge with severance pay be recharacterized to reflect permanent disability retirement after removal from TDRL, effective as of the date of his prior medical separation:

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

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100824, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

 President

 Physical Disability Board of Review

MEMORANDUM FOR DEPUTY COMMANDANT, MANPOWER & RESERVE AFFAIRS

 COMMANDER, NAVY PERSONNEL COMMAND

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATIONS

Ref: (a) DoDI 6040.44

 (b) PDBR ltr dtd 12 Jan 12 ICO xxxxxxxxxxxxxxx

 (c) PDBR ltr dtd 4 Jan 12 ICO xxxxxxxxxxxxxxx

 (d) PDBR ltr dtd 22 Dec 11 ICO xxxxxxxxxxxxxxx

 (e) PDBR ltr dtd 19 Jan 12 ICO xxxxxxxxxxxxxxx

 (f) PDBR ltr dtd 12 Jan 12 ICO xxxxxxxxxxxxxxx

1. Pursuant to reference (a) I approve the recommendations of the Physical Disability Board of Review set forth in references (b) through (f).

2. The official records of the following individuals are to be corrected to reflect the stated disposition:

 a. XXX XX 3238: Assignment to the Temporary Disability Retired List with a 60 percent disability rating for the period 31 October 2007 through 30 April 2008 and placement on the Permanent Disability Retired List with a 30 percent rating effective 1 May 2008.

 b. XXX-XX-0919: Placement on the Permanent Disability Retired List with a 30 percent disability rating 5 January 2006.

 c. XXX XX 3246: Placement on the Permanent Disability Retired List at 30 percent effective 15 October 2006.

 d. XXX XX 1973: Placement on the Permanent Disability Retired List with a 50 percent disability rating effective 31 Aug 2011.

 e. XXX XX 2573: Separation from the Naval service due to physical disability rated at 20 percent (increased from 10 percent) effective 1 August 2005.

3. Please ensure all necessary actions are taken to implement these decisions, including the recoupment of disability severance pay, if warranted, and notification to the subject members once those actions are completed.

 Assistant General Counsel

 (Manpower & Reserve Affairs)