RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1001024 DATE OF PLACEMENT ON TDRL: 20040922

BOARD DATE: 20111128 Date of Permanent SEPARATION: 20060619

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a member of the Army National Guard, SSG/E-6 (92G, Food Service Specialist), medically separated for chronic low back pain and posttraumatic stress disorder (PTSD)*.*  The CI suffered lower back pain with left radicular symptoms, after falling 10-15 feet from a guard tower, associated with active combat in Iraq in November 2003. He was evacuated and found to have bulging discs with no spinal stenosis. Electrodiagnostic studies were negative, and he was determined not to be a surgical candidate. Despite conservative therapy, the CI did not improve adequately to fully perform within his military occupational specialty (MOS) or meet physical fitness standards. He was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). At this point, the CI first presented to Behavioral Health. He was diagnosed with PTSD and issued an S3 profile without restrictions. The MEB forwarded chronic low back pain and PTSD to the Physical Evaluation Board (PEB) as medically unacceptable conditions IAW AR 40-501. Other conditions included in the Disability Evaluation System (DES) file will be discussed below. A PEB adjudicated the lumbar and PTSD conditions as unfitting, rated 20% and 10%, respectively, and placed the CI on the Temporary Disability Retired List (TDRL). After a 21-month TDRL period, the PEB adjudicated a permanent separation rating of 10% for PTSD, with application of DoDI 1332.39 and a rating of 0% for chronic low back pain, with application of the US Army Physical Disability Agency (USAPDA) pain policy. The CI appealed, but waived a formal hearing, and was medically separated with a combined disability rating of 10%.

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. Change the ratings for these conditions to the highest rating possible: Lumbosacral or cervical strain.”

RATING COMPARISON:

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| --- | --- |
| **Final Service PEB – Dated 20060428** | **VA – All Effective 20040923** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| **TDRL** | **Sep.** |
| Chronic Low Back Pain | 5299-5237 | 20% | 0% | Lumbar Disc Disease…Sciatica | 5242 | 20% | 20050216 |
| PTSD | 9411 | 10% | 10% | PTSD | 9411 | 30% | 20050216 |
| No Additional MEB/PEB Entries | DJD, L Hip | 5003 | 10% | 20050216 |
| 0% x 3 / Not Service Connected x 3 | 20050216 |
| **Combined: 10%** | **Combined: 50%** |

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 Veterans Administration 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 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. Although a minimum TDRL rating of 50% remains applicable as above, and as held by Federal court in the *Sabo v. United States* class action settlement, the Board must 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 narrative summary performed five months prior to termination of TDRL, reflecting the stress of transition to civilian life which is intrinsic to the Board’s permanent rating recommendation. A VA compensation and pension (C&P) performed 15 months prior to the end of the TDRL period (five months after initiation of TDRL) is relevant to the 4.129 rating interval, but was too remote from final separation to carry significant probative value relative to a permanent rating recommendation.

Posttraumatic Stress Disorder. The CI’s symptoms at the time of the MEB exam three months prior to TDRL can best be described as mild to moderate. He first presented for behavioral health evaluation and care during the MEB period. He reported symptoms of sleep disturbance with nightmares, anxiety, irritability, and difficulty negotiating crowds. He had not yet begun a trial of medications for his symptoms. The commander’s statement, written just prior to the appearance of PTSD on the CI’s profile, called the CI a “good soldier” and mentioned only low back pain as interfering with duty performance. The S3 addition to the CI’s profile carried no new duty restrictions, including no weapon restrictions. On mental status exam (MSE), he had a mildly irritable affect, but an otherwise unremarkable exam, without signs of psychosis or suicidal thoughts. The DoDI 1332.39-defined impairment was assessed as “mild” for social and industrial adaptability and “marked” for military duty. The CI later began treatment with group therapy and two psychoactive medications. Several months later, just prior to entering TDRL, clinic notes indicated that he was doing much better. He reported that his sleep had improved, that his nightmares were rare, and that he was benefitting from the medications. At a VA C&P exam five months into the TDRL period, the CI reported continued sleep disturbance, twice weekly nightmares, flashbacks, and emotional distancing. He was employed fulltime in a job he had held for 28 years at an industrial plant. He denied unplanned work loss, legal problems, substance abuse, and behavioral lability; although, he admitted to a recent argument on the job, without consequence. He was in a stable long term marriage, and had “occasional social relationships, activities and leisure pursuits.” On MSE, he was noted to have a depressed mood, but the exam was otherwise unremarkable. There was no suicidality, delusional or perceptual symptoms, panic attacks, or cognitive impairment. The examiner characterized the CI’s PTSD condition as “moderate” and assigned a global assessment of functioning (GAF) score of 60 (connoting mild to moderate functional impairment). At the TDRL examination proximate to permanent separation, the CI reported continued nightmares, insomnia, loss of interest in activities, avoidance of social situations, and occasional irritability. His marriage remained healthy, but his relationship with his children was sometimes hampered by his withdrawal and irritability. He had initially sought group counseling at the local VA, but could not continue with it due to conflicts with his work schedule. He remained employed at the industrial plant but stated that the physical requirements were very difficult for him to fulfill. The MSE, equivalent to that described at the interim C&P evaluation, was remarkable only for mood disturbance. Specifically lacking were cognitive or memory deficits, flashbacks, panic attacks or other features with acute occupational impact. No GAF score was assigned but the examiner opined that the condition was stable; that chronic medications were required; and that the CI exhibited “adequate employment and social adjustment.” Also helpful in clarifying occupational functioning at the time of permanent separation was a memorandum to the PEB from the CI’s employer, in which he was described as “a good and faithful employee and one of our best workers for the whole time he has been here.” It was further stated that the CI’s job duties required “a lot of lifting and bending and long hours of standing and walking. Since [CI’s] injury in Iraq, he has had a lot of trouble doing his job” due to “the pain he is in on a day to day basis.”

The Board directs its attention to its rating recommendations based on the evidence just described. As regards to the permanent rating recommendation, all members agreed that the §4.130 threshold for a 50% rating was not approached and that the criteria for a 0% rating were exceeded. The VA rating decision assigned a 30% rating without application of §4.129, based on exam findings 15 months prior to final separation. The TDRL evaluation proximate to final separation was consistent only with the social aspects referenced in the general description for a §4.130 rating of 30%, “occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal).” There was some evidence of social withdrawal and relationship difficulties, but the only occupational impairment in evidence was attributed to the CI’s physical limitations. The 10% rating “occupational and social impairment due to mild or transient symptoms which decrease work efficiency … only during periods of significant stress, or; symptoms controlled by continuous medication” can be considered applicable based on the CI’s stabilization and improvement of symptoms with treatment, his limited but intact social functioning, and the apparent absence of psychiatric occupational difficulties. The deliberation was thus focused primarily on a 10% versus 30% permanent rating recommendation. In debating the appropriate permanent disability rating, the Board noted that the evidence in this case best fit a 10% final separation rating recommendation based on the TDRL examination; that his symptoms appeared to have stabilized; and his overall social and occupational functioning (with respect to PTSD symptoms) was intact; although the 30% rating is arguable by invoking some continuation of symptoms and evidence of mild social difficulties outside of family. After due deliberation and in consideration of all the evidence and reasonable doubt, the Board recommends 10% as the fair permanent separation rating for PTSD in this case.

Back Condition. The only complete and formal goniometric range of motion (ROM) evaluation in evidence was performed at the original MEB prior to placement on TDRL. It was appropriately rated by the PEB and the DA Form 199 invoked the VASRD §4.71a criterion of antalgic gait to support a 20% rating going into TDRL. The rating interval on which the Board must base its recommendations is 21 months after that evaluation at the time of permanent separation. The VA C&P exam data 16 months prior to final separation was similar in ratable parameters to the initial MEB exam but fell outside of the DoDI 6040.44 specified 12-month interval for special consideration to VA findings. Additionally, a VA physical therapy exam was recorded, but was so discordant with all other data in evidence that it could be given no probative weight. There were no repeat formal goniometric evaluations in evidence during the probative rating period and the Board was consequently compelled to apply the two non-goniometric evaluations to its permanent rating recommendation. The two probative non-goniometric assessments and the baseline MEB goniometric evidence are summarized in the chart below.

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| Thoracolumbar ROM | MEB ~ 5 Mo. Pre-TDRL | MEB ~2 Mo. Pre-Sep | Chiropractic ~1 Mo. Pre-Sep |
| Flexion 90⁰  | 70⁰ | ‘mid tibia’ | ‘40% of normal’ |
| Combined 240⁰  | 205⁰ | ---⁰ | ---⁰ |
| Comments | Antalgic gait, spasm. | Normal gait. | Abnormal gait. |
| §4.71a Rating | 20%\* | Not VASRD ratable. | 20%\* |

\* Based on gait disturbance for 1st MEB, and, gait (as below) + calculated ROM for chiropractic exam.

At the TDRL MEB examination, the CI reported continued back pain with radicular symptoms. He was unable to walk or run without pain. He also reported, and his employer confirmed, that his back pain was impairing his occupational functioning. He was using anti-inflammatory and narcotic medications. The examiner recorded a normal gait, flexion limited to “mid tibia” (≥80⁰, depending on body habitus), normal lateral bending, and a normal motor and neurologic exam. In a rebuttal to the PEB, the CI submitted a clinical exam from his civilian chiropractic provider. This examiner recorded a “mildly wide-based” gait, marked left para-vertebral tenderness producing an “antalgic lean” (spasm prohibiting upright posture), “extreme difficulty” with toe and heel walking, and ROM limited to 40% of forward flexion (36⁰ with normal of 90⁰), left lateral flexion, and 25% of extension and right lateral flexion. He also noted “fatigue and weakness” suggestive of additional DeLuca limitations. The PEB and VA chose different coding options for the condition, but this did not bear on rating. The PEB’s DA Form 199 reflected application of the USAPDA pain policy for rating, and its 0% determination was not consistent with §4.71a standards. Neither of the probative examinations are compliant with VASRD §4.46 (accurate measurement), but the chiropractic evaluation is more complete regarding ratable data. The Board must note, however, that the chiropractic examination was performed in the context of refuting the TDRL examination and the CI’s circumstances with his civilian employment was such that an immediate civilian retirement was contingent on permanent military retirement. Given the significantly disparate clinical pictures portrayed by the military and private evaluations, this circumstance may easily have engendered some loss of objectivity in the context of the chiropractic evaluation. The chiropractic examiner, however, documented an ample number of “hard” findings consistent with a fairly severe degree of spine impairment and it is difficult to dispute the probative value of that examination to any great degree. In deliberating a fair and equitable rating for the lumbar spine condition, the Board concluded that the preponderance of evidence demonstrated only modest (at best) improvement over the course of TDRL and that the preceding baseline and §4.46-compliant examinations accurately documented 20% rating criteria. There was no evidence of ratable peripheral nerve impairment or documentation of incapacitating episodes which would provide for additional or higher rating. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 20% for the back pain condition. The more clinically specific VASRD code is 5242 (degenerative spine).

Remaining Conditions. Other conditions identified in the DES file were chronic hypertension, kidney stones, and early Peyronie’s disease (penile pathology). Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically active during the MEB period, none carried attached profiles, and none were implicated in the commander’s statement. 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. Additionally, degenerative joint disease of the left hip and several other non-acute conditions were noted in the VA rating decision proximal to separation, 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. As discussed above, PEB reliance on the USAPDA pain policy for rating back pain and on DoDI 1332.39 for rating PTSD was operant in this case and the conditions were adjudicated independently of that guidance by the Board. In the matter of the lumbar spine condition, the Board unanimously recommends a permanent rating of 20%, coded 5242, IAW VASRD §4.71a. In the matter of the PTSD condition, the Board unanimously recommends a 10% permanent rating IAW VASRD §4.130. 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 to reflect permanent disability retirement with a combined disability rating of 30% as indicated below.

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| **UNFITTING CONDITION** | **VASRD CODE** | **PERMANENT****RATING** |
| Posttraumatic Stress Disorder | 9411 | 10% |
| Degenerative Arthritis/Disc Disease, Lumbar Spine | 5242 | 20% |
| **COMBINED** | **30%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100809, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

