RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1001025 TDRL EXIT DATE: 20050713

BOARD DATE: 20110113 TDRL EnTRANCE Date: 20040630

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an National Guard SGT/E-5 (11B20, Infantryman), medically separated for posttraumatic stress disorder (PTSD)*.* He was diagnosed with PTSD consequent to a deployment to Iraq in 2003. Criterion A combat stressors were documented and the Diagnostic and Statistical Manual of Mental Disorders (DSM IV) criteria for an Axis I diagnosis of PTSD were met. The CI was treated with medications and outpatient therapy, but failed to improve adequately to meet the operational requirements of his Military Occupational Specialty (MOS). He was 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. Four other conditions, as identified in the rating chart below, were forwarded on the MEB submission as medically acceptable conditions. The PEB adjudicated the PTSD condition as unfitting, rated 30%, with application of the Veterans Administration Schedule for Rating Disabilities (VASRD), and the CI was placed on the Temporary Disability Retired List (TDRL). Upon TDRL re-evaluation, the PEB adjudicated the PTSD condition as unfitting, rated 10%. The CI appealed to a Formal PEB (FPEB) and was then medically separated with a 10% disability rating.

CI CONTENTION: The CI stated: “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 CR.SC. See Item 12 for continuation.” However, no continuation page was present in the record. The CI was contacted and he stated he did not submit a continuation page as part of his application.

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RATING COMPARISON:

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| --- | --- | --- | --- | --- | --- | --- | --- |
| **Final Army FPEB – Dated 20050708** | | | | **VA\* – All Effective Date 20040701** | | | |
| **Condition** | **Code** | **Rating** | | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20040630** |  | **TDRL** | **Sep.** |
| PTSD | 9411 | 30% | 10% | PTSD | 9411 | 100% | 20040810 |
| Bilateral Subjective Tinnitus | | Not Unfitting | | Tinnitus | 6260 | 10% | 20040810 |
| Retropatellar Pain Syndrome | | Not Unfitting | | Retropatellar Pain Syndrome | 5260 | Deferred | 20040810 |
| Psychosocial Stressor | | Not Unfitting | | No VA Entry | | | 20040810 |
| Traumatic Tooth Loss, | | Not Unfitting | | No VA Entry | | | 20040810 |
| ↓No Additional MEB/PEB Entries↓ | | | | 0% x 0/Deferred x 4 additional conditions | | | 20040810 |
| **Combined: 10%** | | | | **Combined: 100%** | | | |

\* VA rating based on exam most proximate to date of permanent separation.

ANALYSIS SUMMARY: The CI sustained facial injuries from a rocket-propelled grenade on 25 June 2003 while deployed to Iraq. Within a few days the CI was experiencing insomnia, nightmares, and anxiety. Loud noises or other cues that resembled the event became incapacitating and the CI was unable to continue his current activity. He began medication and counseling in October 2003 and his nightmares and insomnia improved. At the 24 March 2004 MEB narrative summary (NARSUM) exam, three months prior to being placed on TDRL, the CI’s symptoms could best be described as ‘moderate.’ He was having nightmares once or twice a week. “He has altered his lifestyle in an attempt to avoid stimuli associated with the trauma by trying to stay busy, as idle time allows for the memories to return.” The CI was isolated, with no pleasurable activities and distant from his wife. The CI had several episodes of violence and felt pervasive anger. He was jumpy with an exaggerated startle response. “He has severe excessive hypervigilance. His efforts to ensure safety consume significant time and energy and involve extensive safety and checking behaviors.” The examiner noted that the CI had stopped drinking alcohol in October 2003. Family history revealed that a brother had committed suicide. The CI was married with seven children. Psychiatric treatment included three psychotherapeutic medications and outpatient counseling with which he was compliant and he had not been hospitalized. He was undergoing pain management for his war injuries. Mental status exam noted an anxious mood and a flat affect. There was no suicidal ideation, delusional or hallucinatory symptoms, speech disturbance, cognitive impairment or other abnormalities. The examiner diagnosed PTSD and assigned a Global Assessment of Function (GAF) of 45 (serious symptoms). The examiner noted the CI was “slightly improved with medications and psychotherapy,” with a fair prognosis but severe impact on duty. The examiner opined that the CI “will require weekly access to a US Armed Forces medical center for the next 5 years.”

The PEB 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.

The most proximate source of comprehensive evidence on which to base the permanent rating recommendation in this case is the TDRL NARSUM performed ten months after being placed on TDRL and three months prior to the FPEB hearing. There was also a VA Compensation and Pension (C&P) examination completed within 12 months and a psychiatric outpatient visit within two months of the FPEB hearing that provided probative evidence. At the 18 April 2005 TDRL evaluation, the CI complained of continued insomnia and irritability. He had no pleasurable activities and felt worthless. He continued to have excessive worry and anger, and was “verbally abusive to his family at times.” He had racing thoughts, difficulty concentrating, and was nervous and edgy. “He worries about everything and everyone.” The CI had weekly suicidal thoughts after being placed on TDRL. He reported he was drinking a fifth of liquor a week (2 to 4 shots a day) and was taking narcotic pain medication for his facial wounds, but denied illicit drugs. He was being treated with weekly counseling and taking two psychotherapeutic medications, with good compliance. The CI was unemployed, and vocational rehab had told him “he is unemployable because he says that he gets lost and cannot find his way around town.” Mental status examination noted an angry mood and a sullen and irritable affect. “He tended to ruminate about his OIF (Operation Iraqi Freedom) experience.” Judgment was adequate but insight was marginal. There was no suicidal ideation, delusional or hallucinatory symptoms, speech disturbance or cognitive impairment. The examiner diagnosed PTSD and opined that “These symptoms are probably exacerbated by alcohol and daily narcotics use.” He also diagnosed alcohol abuse and narcotic dependence which “are probably interfering with his treatment for his combat stress symptoms.” The examiner assigned a GAF of 55 (moderate symptoms) and assessed moderate impairment for military duty and definite impairment for social and industrial adaptability. The examiner opined that the condition was “deeply ingrained and likely to be persistent” and the prognosis was poor. The PEB of 31 May 2005 found the CI unfit for PTSD, VA Code 9411, but stated that the CI was “non-compliant with refusal to discontinue excessive alcohol and narcotic usage.” The PEB removed him from TDRL and assigned a 10% final disability rating stating, “rating apportioned downward for non-compliance.” The CI appealed for a FPEB. The FPEB of 8 July 2005 concurred with the PEB and the CI was permanently separated at 10% for PTSD, VA Code 9411.

A VA C&P examination was completed 10 August 2004 within twelve months of the FPEB in July 2005. This examination documented a similar degree of PTSD symptoms as the MEB NARSUM of March 2004 but noted a GAF of only 36 for major impairment in most areas. Based on this examination, the VA applied a 100% disability rating based on the severity of symptoms and low GAF. The VA rating decision (VARD) stated his impairment fell between the 70% and 100% ratings but more closely approximated the 100% rating. This was not a permanent rating and a future review exam was projected for September 2007. The CI entered regular therapy at the VA after this evaluation. No further psychiatric C&P examinations or VARD’s related to PTSD are in the record available for review.

A VA treatment note dated 16 May 2005, two months prior to permanent separation, notes that the CI’s mood and anger had improved with a medication change. The CI stated “I’m not thinking about blowing my brains out every day.” He was continuing to experience nightmares and was having significant side effects from his medication including decreased libido and dry mouth. Mental status exam noted “affect with slightly more range” and no suicidal ideation or other abnormalities. The examiner noted “clearly responding well to Prozac in terms of treating target symptoms, but side effects of sexual dysfunction unacceptable.” VA treatment notes ranging from September 2004 through May 2005 document weekly therapy sessions as well as intermittent group sessions. The CI was very compliant with both therapy and medications. However, throughout these sessions the CI remained unable to cope with the everyday stresses of life and parenting and he frequently lost control. He continued to be prescribed narcotics even though this was most likely making his post-traumatic headaches worse. Methadone was tried but was discontinued and narcotic prescriptions resumed. There is no evidence that the CI attempted to obtain narcotics outside the prescriptions from his primary care provider. No VA notes document CI any significant alcohol intake and letters to the FPEB from the CI’s mother-in-law and pastor refute excessive use of alcohol. The reason for this discrepancy from the CI’s self-report on the TDRL evaluation is not clear.

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 rating higher than 50% were not met at the time of TDRL entrance, and therefore the minimum 50% TDRL rating (as explained above) is applicable. As regards the permanent rating recommendation, all members agreed that the §4.130 threshold for a 70% rating was not approached and that the criteria for a 10% rating were well-exceeded. The deliberation settled on arguments for a 30% versus a 50% permanent rating recommendation. The general description in §4.130 for a 50% rating is “occupational and social impairment with reduced reliability and productivity.” A 50% rating IAW §4.130 would rely on an inference that the acuity of reported symptoms could reasonably be expected to result in impaired occupational reliability and productivity, without objective confirmation that this was indeed the case. The 30% description “occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks” is a better fit with the occupational functioning in evidence since decreased efficiency can be assumed even though reliability and productivity were not demonstrably affected. The Board deliberated whether the CI’s suicidal ideation supported a 70% rating recommendation, although the preponderance of the hard evidence favors a 30% rating strictly IAW VASRD §4.130. The “deficiencies” referenced in the 70% rating are not defined as to severity but typical markers for the 70% rating are under-employment, persistent suicidal ideation, sporadically incapacitating symptoms, serious cognitive impediments and the need for occasional psychiatric admissions. There was Board consensus that the significant threshold indicators for the 70% rating were not evidenced in this case. The Board specifically noted that the VA treatment note two months prior to separation documented a reduction in his suicidal ideation with a change in medication. A relevant issue confronted by the Board was whether the PEB adjudication of a deduction for alcohol abuse was justifiable in this case. The fact that alcohol and/or substance abuse is one of the Diagnostic and Statistical Manual of Mental Disorders (DSM IV) criteria for the diagnosis of PTSD constitutes a ready challenge to the PEB’s judgment that alcohol abuse could be divested from PTSD as a non-compensable impairment. The available record contains conflicting evidence as to the presence of alcohol abuse as an active condition as described above. The action officer opines in this case that: 1) if there was any residual impairment from the alcohol abuse condition at the time of separation, it could not be clinically separated from the unfitting PTSD under DSM-IV; and 2) even if it were, any psychiatric impairment from alcohol could not be separated from the psychiatric impairment from PTSD without undue speculation; and, therefore could not be grounds for any deduction from the overall impairment under VASRD §4.130. After due deliberation, considering the totality of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a permanent PTSD disability rating of 30% in this case.

Other PEB Conditions: The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were bilateral subjective tinnitus, traumatic tooth loss dental type II, and retropatellar pain syndrome. 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 MOS duty requirements. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for any of the stated conditions.

Remaining Conditions: Other conditions identified in the DES file were mouth injury with dental work, bony prominences of the left foot, gastroesophageal reflux disease, headaches and low back pain. 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. No other conditions were service connected with a compensable rating by the VA within 12 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. As discussed above, PEB reliance on DoDI 1332.39 for rating PTSD was operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the PTSD condition, the Board, [by a vote of 2:1] recommends a permanent separation rating of 30%, after removal from the TDRL, coded 9411 IAW VASRD §4.130. The single voter for dissent (who recommended a permanent separation rating of 50%) did not elect to submit a minority opinion.

RECOMMENDATION: The Board recommends that the CI’s prior determination be modified to reflect permanent disability retirement after removal from TDRL, effective as of the date of his prior medical separation:

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

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100812, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

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