RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1001039 DATE OF PLACEMENT ON TDRL: 20070124

BOARD DATE: 20120309 Date of Permanent SEPARATION: 20080815

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 posttraumatic stress disorder (PTSD). He was treated, but did not respond adequately to fully perform his military duties. The CI was issued a permanent profile and underwent a Medical Evaluation Board (MEB). PTSD and major depressive disorder (MDD) were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR40-501. Six other conditions (alcohol abuse, narcissistic personality, insomnia, hip pain, ankle pain, and smoking) were listed on the DA Form 3947 as medically acceptable. The PEB found the CI unfit, due to PTSD with MDD. The other six MEB conditions were all adjudicated as not unfitting. The CI was placed on the Temporary Disability Retired List (TDRL) at 30%. In July 2008, a second PEB convened, and the unfitting mental condition was found to be stable for final rating at 10%. The CI made no appeals, and was medically separated with a permanent 10% 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. See Item 12 for continuation.” He additionally lists 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 Army PEB – dated 20080719** | | | | **VA – All Effective 20070125** | | | |
| **Condition** | **Code** | **Rating** | | **Condition** | **Code** | **Rating** | **Exam** |
|  |  | **TDRL** | **Sep.** |
| PTSD | 9411 | 30% | 10% | PTSD, and MDD | 9411 | 50% | 20070403 |
| Depression (MDD) | Not Separately Rated | | |
| Narcissistic Personality | | Not Unfitting | | No VA Entry for Narcissistic Personality | | |  |
| Chronic Left Ankle Pain | | Not Unfitting | | Chronic Left Ankle Sprain | 5271 | 10% | 20070403 |
| Chronic Right Hip Pain | | Not Unfitting | | Right Femoral Stress Fracture | 5252 | 10% | 20070403 |
| Alcohol Abuse | | Not Unfitting | | No VA Entry for Alcohol Abuse | | |  |
| Smoking | | Not Unfitting | | No VA Entry for Smoking | | |  |
| ↓No Additional MEB/PEB Entries↓ | | | | 0% x 1 / Not Service Connected x 14 | | | 20070403 |
| **Combined: 10%** | | | | **Combined: 60%** | | | |

ANALYSIS SUMMARY:

Mental Condition. The National Defense Authorization Act (NDAA) of 2008 mandated DoD adherence to the Veterans’ Administration Schedule for Rating Disabilities (VASRD) §4.129, for cases involving PTSD. IAW DoDI 6040.44 and DoD guidance (which applies VASRD §4.129 to all PTSD cases), the Board is obligated to recommend a minimum 50% rating for a period on the TDRL. After the TDRL period, the Board must then determine the most appropriate fit with VASRD §4.130 criteria for its permanent rating recommendation. Since the CI was put on TDRL, the Board need not apply a constructive six-month rating interval in this case. However, the minimum TDRL rating of 50% still applies as held by the Federal court in the Sabo vs. United States class action settlement.

The CI has had a long history of mental problems and behavioral issues. In 2003, after returning home from Iraq, he developed symptoms of insomnia, nightmares, hyper-vigilance, flashbacks, and isolation. He began drinking alcohol excessively. The CI separated from the Army and became a police officer in Tampa, FL. He re-enlisted in September 2004 and shortly thereafter was sent back to Iraq. Following his return to the US in August 2005, his symptoms of insomnia, irritability, social isolation and heavy drinking returned. The CI was seen by mental health (MH) in September 2005, and was started on medication. In spite of treatment, his mental problems continued. The CI was issued a permanent S3 profile and an MEB was initiated. At the September 2006 MEB exam, he reported irritability, insomnia, depression, loss of appetite, hyper-vigilance, difficulty concentrating, avoidance behavior and panic attacks. The examiner noted that the CI was married to his fourth wife but “tends not to love his wives.” The CI admitted that “he has difficulty committing himself emotionally to other people.” The CI was working at his unit in the rear detachment. He was not suicidal at that time, but had made three attempts in the past. The CI was attending psychotherapy and taking one medication. On mental status examination (MSE) his mood was anxious and his affect was appropriate. There were no delusions, hallucinations, cognitive impairments or other abnormalities. The Global Assessment of Functioning (GAF) score was 32. The examiner opined that there was definite impairment for social and industrial adaptability due to both the PTSD and the depressive disorder. As noted above, the November 2006 PEB found the CI unfit due to PTSD with MDD. The MDD was not separately rated due to overlap of symptoms.

At the April 2007 VA Compensation and Pension (C&P) examination, the CI’s symptoms included insomnia and depression. The CI was working as a bank security agent working on credit card fraud, and was studying to be a paramedic. He was married to his fifth wife. The CI denied any disciplinary problems in the military. The examiner noted that the CI had told other examiners that he had been physically and sexually abused as a child, but did not mention this to the C&P examiner. The examiner also noted that the details of his previous suicide attempts were in significant variance with the details provided to other examiners. The CI was not taking medication or attending psychotherapy. On MSE, the mood was cheerful and the affect was full. There was no suicidal ideation, delusional or hallucinatory symptoms, speech disturbance, objective cognitive impairment or other abnormalities. The CI frequently gave information “that is inconsistent and at variance with that which is documented in his chart.” The examiner opined that several of the patient’s symptoms, including getting into fights and pulling a gun on his ex-wife’s old boyfriend, were as consistent with a personality disorder as with PTSD. The examiner stated, “what is manifest and overwhelming is that the vague nature of his responses, the inconsistencies and actual distortions are much more consistent with a character disorder,” and “there are no obvious signs in today’s examination that [the CI] suffers any avoidance symptoms as a result of post-traumatic stress disorder that might be related to military experience.” While courting his fifth wife, he was eating nightly at restaurants and going to the movies. The examiner gave a diagnosis of PTSD, but felt it was compounded by his childhood abuse, and “in any event, the symptoms causing any impairment due to PTSD are minimal.” The examiner also diagnosed bipolar II disorder, alcohol abuse (“not secondary to PTSD”) and personality disorder (“from his youth”). The examiner assigned a GAF of 85 (absent or minimal symptoms) for PTSD, a GAF of 70 (mild symptoms) for bipolar II disorder, a GAF of 70 for alcohol abuse, and a GAF of 55 (moderate symptoms) for the personality disorder.

After 17 months on TDRL, the CI had a psychiatric re-evaluation in June 2008. At that time, the CI reported insomnia, nightmares, flashbacks, irritability, hypervigilance, depression, difficulty concentrating, memory problems, social isolation and avoidance behaviors. He was not working, but was attending school full time. He had quit his bank job because he was moved into an area with lots of other people and this made him anxious. He went to school to be a paramedic, but quit because he “became overwhelmed with the carnage he saw.” He was a gate guard for three months but was let go from that job when it was discovered he had PTSD. His employers didn’t want him carrying a gun with that diagnosis. The CI was separated from his fifth wife. The CI said he did not have any friends left in the area anymore and he did not either like or trust new people. On MSE, the mood was anxious and depressed. Affect was full. There was no suicidal ideation, delusional or hallucinatory symptoms, speech disturbance, objective cognitive impairment or other abnormalities. The examiner diagnosed chronic PTSD, recurrent MDD, and narcissistic personality disorder. The GAF was 51 (moderate symptoms). As noted above, the July 2008 PEB found the PTSD stable for final rating, and the CI was permanently separated from the Army with a 10% disability rating.

There are also some VA outpatient treatment notes which contain useful information. On 17 March 2008, the CI complained of severe anxiety, especially going out of his house. He told the examiner he had to quit two jobs because of the anxiety. He was having poor sleep and nightmares. The examiner opined that the CI “seems widely impaired in relationships and with ability to work.” A VA note from May 2008 states that the CI had been working for his brother in computer design, but was “forgetting everything.” His affect was cheerful and he was not depressed. The examiner noted that “he did not, however, relate information in a way that was entirely consistent with what he told [the C&P examiner] one year ago.” A screening test for psychological problems suggested “a person who is experiencing significant depression and anxiety. He appears to worry a great deal.” A VA progress note dated 30 June 2008 recorded that the CI was taking three college classes. He was avoiding crowds, felt best when alone, and felt detached from his wife.

The Board directed its attention to its rating recommendations based on the evidence just described. As regards the permanent rating recommendation, the best source of comprehensive evidence on which to base the permanent rating recommendation is the June 2008 MH evaluation. Also, as mentioned above, there were some VA psychiatric outpatient notes that were useful and relevant. All members agreed that the §4.130 threshold for a permanent 70% rating was not approached, and that the criteria for a 10% rating were exceeded. The deliberation settled on arguments for a 50% vs. 30% permanent rating recommendation. IAW VASRD §4.130, a 50% rating (“occupational and social impairment with reduced reliability and productivity”) relies on an inference that the acuity of reported symptoms could reasonably be expected to result in impaired occupational reliability and productivity. There was substantial objective confirmation that this was indeed the case. The CI had been in and out of jobs, and was unemployed at the time of the June 2008 MH examination. Socially, the CI was separated from his fifth wife, felt distant from his family, avoided the public, and had no close friends. In total, the evidence supports an argument for impairment with reduced reliability and productivity (50%). Furthermore, his impairment did not cause just occasional decreases in work efficiency, or intermittent periods of inability to perform tasks. His impairment was more than that. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends by majority decision (2:1 vote) a permanent disability rating of 50%.

The Board also deliberated the matter of the MDD. The November 2006 PEB decided that MDD would not be separately rated due to overlap of symptoms. The Board determined that this was entirely appropriate. Attempting to separate the impairment due to PTSD from that due to MDD would require undue speculation, and would be a moot exercise for all practical purposes. The impairment from both conditions must be combined under a single §4.130 rating, unless the symptoms and impairment are distinctly apportioned by the MH examiner. Such was not the case, and the Board must rate the two axis I diagnoses as a single unfitting condition. The Board unanimously recommends no change to the PEB adjudication of the MDD.

Other PEB Conditions. Narcissistic personality disorder, left ankle pain, right hip pain, alcohol abuse, insomnia, and smoking were all adjudicated by the November 2006 PEB as not unfitting and therefore not ratable. None of these conditions were profiled, or implicated in the commander’s statement. 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 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. Metacarpal fracture of left hand, otitis media, otitis externa, and several other conditions were also noted in the Disability Evaluation System (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. 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, alopecia areata and other conditions were noted in the VA file, but were 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 PTSD, the Board unanimously recommends an by majority decision (2:1 vote) a 50% permanent rating following the TDRL period, IAW VASRD §4.130. The single voter for dissent (who recommended a 30% permanent rating following TDRL) did not elect to submit a minority opinion. In the matter of the MDD, the Board unanimously recommends no change to the PEB adjudication. In the matter of the narcissistic personality disorder, left ankle pain, right hip pain, alcohol abuse, insomnia, smoking, fracture of left hand, otitis media, otitis externa, 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 changed to reflect a permanent 50% disability retirement upon removal from the TDRL as indicated below.

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

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100810, 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

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

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 50% 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 50% 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)