RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: MARINE CORPS

CASE NUMBER: PD201001101 SEPARATION DATE: 20060817

BOARD DATE: 20110310

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty LCpl (0311, Rifleman) medically separated from the USMC in 2006. The medical basis for the separation was Posttraumatic Stress Disorder (PTSD) incurred while in combat at Fallujah in November 2004. The CI was placed on limited duty (LIMDU) for PTSD. Psychotherapy and medication did not eliminate his symptoms. The CI was also placed on multiple light duty periods (no lifting over 25 lbs, no physical fitness training, and light duty) for low back pain (lumbago) that began while running in 2005. Both of these conditions affected the CI’s ability to perform within his military occupational specialty (MOS). The CI was referred to the Medical Evaluation Board (MEB) and prolonged PTSD and lumbago were addressed in the narrative summary (NARSUM) and forwarded to the Physical Evaluation Board (PEB). Additional conditions supported in the Disability Evaluation System (DES) packet are discussed below, but were not forwarded for PEB adjudication. The PEB adjudicated the chronic PTSD as the only unfitting condition, rated 0%; with application of the SECNAVINST 1850.4E and/or DoDI 1332.39 (E2.A1.5), which was in effect at the time. Mechanical LBP, chronic was adjudicated as Category III, not unfitting. The CI requested reconsideration of the PEB determination citing his “definite” impairment in social/industrial adaptability. Upon reconsideration, the PEB increased his PTSD disability rating to 10%. The CI made no further appeals and was medically separated with a 10% disability rating.

CI CONTENTION: The CI states, “I was assigned less than 50% disability rating by the military for my unfitting PTSD upon discharge from active duty. The PDBR should assign the highest final disability rating applicable consistent with 38 CFR 4.129 and DOD policy.” The CI also specifically contended his back condition should be found unfitting and rated on his application to the PDBR. This case is court remanded under the *Sabo et al v. United States* class action suit.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service Reconsideration – Dated 20060504** | | | **VA (7 Mo. after Separation) – All Effective 20060816** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| PTSD, Chronic | 9411 | 10% | PTSD, Chronic | 9411 | 30% | 20070315 |
| Mech. LBP, Chronic | Not unfitting | | Back Condition | 5243 | 20% | 20070412 |
| ↓No Additional MEB Entries↓ | | | L/ Knee Instabil. w/ PFS… | 5257 | 10% | 20070308 |
| L Knee Patello-Femoral Syn … | 5010-5260 | 10% | 20070308 |
| Tinnitus | 6260 | 10% | unk |
| 1 X NSC (Bilateral Hearing Loss) | | | |
| **TOTAL Combined: 10%** | | | **TOTAL Combined (*Includes Non-PEB Conditions*): 60%** | | | |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

ANALYSIS SUMMARY:

Posttraumatic Stress Disorder. The PEB rating was derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act 2008 mandate for DOD adherence to VA 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 therefore obligated to recommend a minimum 50% PTSD rating from the time of separation through a six-month period of Temporary Disability Retired List (TDRL). The Board must then determine the most appropriate fit with VASRD §4.130 criteria at six months for its permanent rating recommendation. There was no evidence that the CI’s condition was greater than 50% at the time of separation, and the minimum 50% TDRL rating is recommended. The most proximate source of comprehensive evidence upon which to base the permanent rating recommendation in this case is the VA psychiatric compensation and pension (C&P) evaluation rating seven months after separation (15 March 2006). Especially since the C&P examination also reflects the stress of transition to civilian life, which is a core intent of VASRD §4.129 and is proximate to the six-month rating timeframe, it carries the preponderance of probative value in the Board’s assessment of a fair permanent rating recommendation.

The severity of the CI’s PTSD condition, as evidenced by the C&P evaluation, could best be described as moderate to severe. He was not employed and was no longer enrolled in school, as documented below:

“He attempted to take some classes at NYIT. He reports that he did one semester but then stopped going stating that there was a lot of people around and he did not feel comfortable. … He became distressed when others asked him about Iraq … He reports that he also had difficulty concentrating at school, as he spends much time thinking about Iraq when he was at school or sitting in class. The veteran reports that he has chosen to take this semester off because of his PTSD symptoms.”

The CI was engaged, but the examiner opined that, “[PTSD] symptoms have significantly negatively impacted upon relationships with his family, pursuing education, and leisure.” The CI endorsed panic attacks with flashbacks three to five times per week, depressed and anxious mood, impaired impulse control demonstrated by lashing out verbally, significant sleep impairment, nightmares, intrusive recollections of war, irritability, hypervigilance, exaggerated startle response, guilt, disillusionment, feelings of detachment from others, and avoidance of thoughts, feelings, and memories of war. Short-term memory was indicated as impaired with normal long-term memory, but there was no objective testing in evidence. Thought processes were normal, with no evidence of psychosis. His Global Assessment of Functioning (GAF) score was 55 (MEB GAF=55), connoting moderate impairment. The VA assigned a 30% rating for the PTSD condition based on VASRD §4.130 criteria, without applying the provisions of VASRD §4.129.

As regards to the permanent rating recommendation, all members agreed that the VASRD §4.130 threshold for a 70% rating was not approached, and that the criteria for a 10% rating were exceeded. The deliberation settled on arguments for a 50% versus 30% permanent rating recommendation. The CI’s VA exam noted panic attacks that were not described in the NARSUM; however, the GAFs and other symptoms were fairly similar between the military and VA exams. The CI had indicators that he could fit the clinical picture of the 50% criteria of “occupational and social impairment with reduced reliability and productivity,” as he was not employed or able to continue school due to his symptoms. The CI’s panic attacks were multiple times per week, and there was no clear indicator that his decreased functioning was only “occasional” rather than being a persistent decrease in occupational functioning. The 30% description (“occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks”) may also fit, given the level of symptom severity described in the exam, and that the CI did not exhibit impaired abstract thinking, judgment, long-term memory, difficulty in understanding complex tasks, or difficulties with communication.

The Board deliberated whether or not the frequent panic attacks, unemployment, and inability to attend school supported a 50% rating recommendation, although the preponderance of the hard evidence favors a 30% rating strictly IAW 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.

Low Back Pain. The CI specifically contends in his application that his back condition should be changed to unfitting and assigned the highest rating possible. Although the MEB’s judgment that a condition does not meet retention standards is but a factor in the PEB’s fitness determination, it raises the bar for an adjudication of not unfitting. The Board’s main charge in respect to this condition is an assessment of the appropriateness of the PEB’s fitness adjudication as not separately unfitting, and not contributing to the unfitting condition. 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.

The CI had non-traumatic low back pain for over a year prior to separation. The low back pain limitations persisted in spite of muscle relaxants, stretches, chiropractic visits, back school, and rest. The service treatment record indicates multiple episodes of light duty due to low back pain (12 October 2005, 14 days; 8 November 2005, number of days not indicated; 12 December 2005, 3 days; and 20 December 2005, 30 days). These limitations stopped two months before the MEB. However, there were no LIMDUs for the back condition itself. The non-medical assessment indicated, that “the MRO claims to have back problems which prevent him from performing certain duties” and also indicated that the CI was currently unable to perform a fitness test, and that the last time he had completed one was in 7 June 2005. In the MEB physical exam, the CI mentioned back pain and radicular symptoms, but there was no detailed back examination. There is mention of the back condition in the NARSUM which was performed by a psychiatrist, again with no back examination. Review of the treatment record indicates that the CI’s pain was intermittent. At times there were radicular symptoms and findings of pain shooting down his left leg, pain on straight leg-raising, with tenderness of the left sciatic notch. X-ray indicated narrowing of the L4-L5 disc space and examination at times was also indicative of spasm in the lumbar muscles. The CI was diagnosed with lumbosacral strain and sciatica. Several examinations indicated limitation of lumbar spine motion due to pain, but none of these examiners indicated the actual degree of limitation via goniometry (8 November 2005, 12 December 2005, and 15 December 2005). The comprehensive goniometric VA examination eight-month post-separation included range of motion (ROM) determinations, showing limitation of motion due to pain, with worsening on repetitive motion and quadriceps muscle weakness (not quantified), with no sensory deficits (flexion 20°/combined 120°). While the CI clearly had a documented back condition causing intermittent symptoms, the preponderance of the evidence does not indicate that the back condition limited his ability to perform the duties of his MOS at the time of separation. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the low back condition.

Other Conditions. Symptoms of left knee injury (instability and patellofemoral syndrome) was noted in the MEB physical and are therefore eligible for Board consideration as additionally unfitting conditions subject to rating at separation. There were no significant physical findings noted on the MEB examination for any of these symptoms. They were not under active treatment during the MEB period, were not cited on the LIMDU at the time of separation, or were noted in the non-medical assessment statement. No link to fitness is in evidence for any left knee condition. Tinnitus was rated at 10% by the VA, but was not mentioned in the DES, and 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. There were no other conditions contended or rated by the VA at 10% or higher within 12 months of separation. 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 unanimously recommends an initial TDRL rating of 50% in retroactive compliance with VASRD §4.129 as DOD directed and a 30% permanent rating at six months IAW VASRD §4.130. In the matter of the low back pain condition, the Board unanimously recommends no recharacterization of the PEB adjudication as not unfitting. In the matter of the two left knee conditions, tinnitus, or any other medical conditions eligible for Board 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 modified as follows; TDRL at 50% for six months following CI’s prior medical separation (PTSD at minimum of 50% IAW §4.129 and DoD direction) and then a permanent combined 30% disability retirement as below.

|  |  |  |  |
| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Posttraumatic Stress Disorder | 9411 | 50% | 30% |
| **COMBINED** | **50%** | **30%** |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100615, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

Deputy Director

Physical Disability Board of Review

MEMORANDUM FOR DEPUTY COMMANDANT, MANPOWER & RESERVE AFFAIRS

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATION

Ref: (a) DoDI 6040.44

1. I have reviewed the subject case pursuant to reference (a). The subject member’s official records are to be corrected to reflect the following retroactive disposition:

a. Separation from the naval service due to physical disability with placement on the Temporary Disability Retired List with a disability rating of 50 percent for the period 17 August 2006 thru 16 February 2007.

b. Final separation from naval service due to physical disability effective 17 February 2007 with a disability rating of 30 percent and placement on the Permanent Disability Retired List.

2. Please ensure all necessary actions are taken to implement this decision, including the recoupment of previously paid funds if appropriate, and notification to the subject member once those actions are completed.

Principal Deputy

Assistant Secretary of the Navy

(Manpower & Reserve Affairs)