RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: ARMY

CASE NUMBER: PD1001207 TDRL ENTRY DATE: 20070709

BOARD DATE: 20110113 SEPARATION DATE: 20090210

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Army SGT/E-5 (11B, Infantryman) medically separated for posttraumatic stress disorder (PTSD) related to combat experiences while deployed to Iraq in 2006. Symptoms included insomnia, nightmares, flashbacks, irritability, aggression, depressed mood and emotional detachment. 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 did not respond adequately to treatment. He was not deployable and could not meet the operational requirements of his Military Occupational Specialty (MOS). The CI was issued a permanent S-3 profile resulting in a Medical Evaluation Board (MEB). PTSD was addressed in the narrative summary (NARSUM) and forwarded to the Physical Evaluation Board (PEB) on the DA Form 3947 as medically unacceptable IAW AR 40-501. Six other conditions, as identified in the rating chart below, were forwarded on the DA Form 3947 as medically acceptable conditions IAW AR 40-501. The PEB adjudicated the PTSD condition as unfitting, rated 30% with application of Department of Defense Instruction (DoDI) 1332.39 and the Veterans Administration Schedule for Rating Disabilities (VASRD) and the CI was placed on Temporary Disability Retired List (TDRL). Subsequent evaluation determined that the PTSD condition had stabilized and assigned a 10% permanent disability rating. The CI made no appeals and was medically separated with a 10% permanent 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. In accordance with the class action notice, assign the highest final disability rating applicable consistent with 38 CFR4.I29 and DOD policy to the extent such increase will not adversely affect my total compensation, including but not limited to compensation pursuant to CRSC. Please see attached list of contentions regarding why the PDBR should make the changes request in Item 3.” No list of contentions was present in the record available for review. The CI was contacted and he confirmed he did not submit a separate list of contentions. 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 PEB – Dated 20090130** | | | | **VA\* – All Effective Date 20070709** | | | |
| **Condition** | **Code** | **Rating** | | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20070529** |  | **TDRL** | **Sep.** |
| PTSD | 9411 | 30% | 10% | PTSD | 9434 9411 | 50% | 20080114 |
| Chronic Right Shoulder Pain | | Not Unfitting | | Right Biceps Tendonitis | 5024 5201 | 20% | 20080114 |
| Painful Lower Extremity Scarring | | Not Unfitting | | Painful Lower Extremity Scarring | 7820 7804 | 10% | 20080114 |
| Chronic Intermittent Headaches | | Not Unfitting | | Cluster Headaches | 8100 | 0% | 20080114 |
| GERD | | Not Unfitting | | GERD | 7346 | 0% | 20080114 |
| Overweight | | Not Unfitting | | Not VA Rated | | | |
| Hyperglycemia | | Not Unfitting | | Not VA Rated | | | |
| Hyperlipidemia | | Not Unfitting | | Not VA Rated | | | |
| ↓No Additional MEB/PEB Entries↓ | | | | Right Posterior Tibial Tendonitis | 5299 5262 | 10% | 20080114 |
| Left Posterior Tibial Tendonitis | 5299 5262 | 10% | 20080114 |
| 0% x 1 / NSC =None | | | 20080114 |
| **Combined: 10%** | | | | **Combined: 70%** | | | |

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

ANALYSIS SUMMARY:

PTSD Condition. The CI’s PTSD could best be described as moderate to severe at the time he was placed on TDRL in September 2007. At the MEB psychiatric examination, five months prior to placement on the TDRL, the CI’s PTSD was “manifested by moderate to severe irritability, severe persistent sleep disturbance with nightmares, daily flashback memories of Iraq experiences, emotional detachment, daily moderate depressed mood, trouble concentrating, and daily episodes of anxiety and hyper-arousal.” The CI grew up in an abusive household with an alcoholic father. He had a history of substance abuse, including alcohol and methamphetamine two years prior to joining the Army, but denied any current substance abuse. He had also been charged with accessory to theft and had anger management problems prior to service, but had no disciplinary actions while in the service. The CI was first diagnosed with PTSD in February 2007 and treated with medication and counseling. He was admitted for seven days in March 2007 for inpatient treatment due to homicidal thoughts towards his chain of command; and, treated with four medications and counseling. The CI was able to complete “garrison-type NCO duties at a minimum standard.” He was married with two children. On mental status examination the CI was “moderately depressed, anxious, and angry.” There was no suicidal ideation, delusional or hallucinatory symptoms, speech disturbance, cognitive impairment or other abnormalities. The examiner assigned a Global Assessment of Functioning (GAF) of 55, and opined there was marked impairment for further military duty and definite impairment for social and industrial adaptability.

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.

At the 14 January 2008 VA Compensation and Pension (C&P) examination, seven months after TDRL entry and thirteen months prior to final separation, the CI noted improvement in his symptoms with therapy and medications, but he still had difficulties. The examiner noted continued intrusive and distressing recollections and flashbacks. Although the CI reported better anger control, he continued to have irritability and had trouble concentrating at work. He had been working as a receiving clerk since October 2007. He reported enjoying playing pool, watching football on television, and spending time with his family. Mental status exam documented intrusive recollections of the military trauma. The examining psychiatrist stated the CI met criteria for both PTSD and depressive disorder, not otherwise specified and that symptoms could not be separated. The overall GAF was 60, slightly higher than that of the MEB examination of April 2007. Although the VA rating decision (VARD) noted a 50% rating was required by VASRD §4.129, it also determined that a 50% rating was warranted based on the CI’s significant disturbances in motivation and mood with irritability impacting his social and occupational functioning at work and at home.

The most proximate source of comprehensive evidence on which to base the permanent rating recommendation in this case is the MEB TDRL NARSUM examination performed one month prior to separation from the TDRL. At that TDRL psychiatric examination on 9 January 2009, the CI was somewhat improved. Since being on TDRL he had continued psychiatric treatment with the VA. He was taking three different psychiatric medications but was not attending therapy due to distance. There was no indication of substance abuse, and there had been no inpatient treatment. The CI stated he “has good days and bad days,” but continued to have sleep problems, nightmares, irritability, hypervigilance, and frequent flashbacks. He avoided the news and talking about his experiences. The CI was working full time as a department store shift supervisor and was attending school part time to be a mechanic. His job did not require direct contact with the public. This was not the same job described on his VA C&P examination one year prior and there is no information about why he left the previous job. While he was married with children, he had no friends and was not involved in any leisure activities. He was unable to attend his children’s sporting events or play with them outside the house. He also had extreme difficulty when his normal routine was disrupted by unforeseen events such as a sick child or car problems. On mental status examination his mood was irritable and his affect was restricted. The examiner noted “he was clearly uncomfortable in the waiting room” and “appeared clearly uncomfortable and on guard” during the mental status examination. There was no suicidal ideation, delusional or hallucinatory symptoms, speech disturbance, cognitive impairment or other abnormalities. The examiner noted “He seemed to perseverate on ways he could control his environment so he could remain safe.” The examiner assigned a GAF of 65, and recommended that the CI continue on TDRL “due to the high possibility his situation will decompensate.” The examiner opined that:

“Although he is working and going to school, his life is otherwise extremely limited by his psychological symptoms. He remains unable to perform even the basic duties of a Soldier. It would be unsafe for him to have access to weapons. He would totally decompensate and require inpatient hospitalization if he was ever placed in a combat situation again. The patient described himself as a man who is haunted by his combat experiences, which is certainly consistent with his presentation.”

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 separation 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 Board disagreed with the PEB’s determination that the CI’s symptoms were well controlled with medication, given his persistent flashbacks, poor sleep, anxiety, and social isolation. The deliberation settled therefore 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. 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 right shoulder pain, painful lower extremity scarring, intermittent headaches, gastroesophageal reflux disease (GERD), overweight, hyperglycemia and hyperlipidemia. 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 left shoulder pain, bilateral knee pain, left ankle pain, bilateral upper extremities tingling and numbness, bilateral lower extremity cramps and numbness, and a right thumb injury. 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 bilateral tibial tendonitis, right knee patellofemoral syndrome and several other non-acute conditions were noted in the VARD 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 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 a separation rating after TDRL of 30% coded 9411 IAW VASRD §4.130. In the matter of the right shoulder pain, painful lower extremity scarring, intermittent headaches, GERD, overweight, hyperglycemia and hyperlipidemia conditions, the Board unanimously recommends no recharacterization of the PEB adjudications as not unfitting. In the matter of the left shoulder pain, bilateral knee pain, left ankle pain, bilateral upper extremities tingling and numbness, bilateral lower extremity cramps and numbness, and right thumb injury conditions 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 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 | 30% |
| **COMBINED** | **30%** |

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20101005, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

D:\READING room\10-1207_Page_1.tiff

D:\READING room\10-1207_Page_2.tiff