RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1001210 DATE OF PLACEMENT ON TDRL: 20050911

BOARD DATE: 20120321 Date of Permanent SEPARATION: 20070709

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a National Guard Soldier, SSG/E6, 88M, Motor Transport Operator, medically separated for chronic low back pain, status post lumbar fusion and cervical spine degenerative disc disease (DDD) with chronic neck pain. Despite surgical treatment and physical therapy he did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent U3L3S3 profile and underwent a Medical Evaluation Board (MEB). Lumbar laminectomy and fusion with persistent symptoms, cervical spondylosis and posttraumatic stress disorder (PTSD) were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Right supraspinatus tendonitis, bilateral foot fractures, dyspepsia, headache and alcohol abuse as identified in the rating chart below, were forwarded on the initial MEB submission as medically acceptable conditions. The PEB adjudicated the lumbar, neck and PTSD conditions as unfitting, rated 10%, 10% and 10% respectively, with application of the US Army Physical Disability Agency (USAPDA) pain policy, DoDI 1332.39, and Veterans Administration Schedule for Rating Disabilities (VASRD). In June 2005 he was placed on Temporary Disability Retired List (TDRL) with ratings as reflected in the chart below. After two years on TDRL, the PEB found the CI’s PTSD condition no longer unfitting and adjudicated a permanent disability rating of 10% for low back pain and 10% for DDD with chronic neck pain. The CI failed to make an election within the prescribed time limits of the PEB findings and was then medically separated with a 20% combined 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.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Final Service PEB – Dated 20070510** | **VA\* – All Effective Date 20050911** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20050911** |  | **TDRL** | **Sep.** |
| Lumbar Fusion L4-5 Low Back Pain | 5241 | 10% | 10% | Lumbar Spine DDD | 5243 | 40% | 20051115 |
| Neck Pain | 5299-5237 | 10% | 10% | Cervical Spine Spondylosis | 5243 | 30% | 20051115 |
| PTSD | 9411 | 10% | Not unfit | PTSD | 9411 | 30% | 20051210 |
| Right Supraspinatus Tendonitis | Not Unfitting | Right Shoulder | 5099-5019 | 10% | 20051126 |
| Bilateral Foot Fractures | Not Unfitting | Left Foot 5th Metatarsal Fx | 5299-5284 | 0% | STR |
| Dyspepsia | Not Unfitting |  |  |  |  |
| Headaches | Not Unfitting | Headaches | 8100 | NSC | STR |
| ↓No Additional MEB/PEB Entries↓ |  |  |  |  |
| 0% x 2/Not Service Connected x 2 | 20051109 |
| Combined: 20% | Combined: 70% |

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

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 Department of Defense adherence to VASRD §4.129. IAW DoDI 6040.44 and DoD guidance (which applies VASRD §4.129 to all Board cases). The Board is obligated to recommend a minimum 50% PTSD rating for a retroactive 6 month period on the Temporary Disability Retired List (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 held by the Federal court in the Sabo vs. United States class action settlement. In this case, the PEB determined the PTSD had improved sufficiently such that it was no longer unfitting for continued military service and therefore not ratable. The Board must first consider the fitness determination made by the PEB. If the Board does not agree with the PEB, the Board must then determinate the most appropriate fit with VASRD §4.130 criteria at the conclusion of the TDRL interval for its permanent rating recommendation.

Lumbar Condition. In November 2000, 2 years prior to mobilization, the CI had surgery for a herniated disc (L4-L5 laminectomy). He did well after that surgery and returned to work. He mobilized with his unit in February 2003 and deployed to Iraq. While he was deployed to Iraq he developed recurrent back pain with radiation into his legs associated with the strenuous duties as a truck driver. Magnetic resonance imaging (MRI) confirmed recurrent herniated intervertebral disc and he was medically evacuated. He underwent surgery in October 2003 with good result but recurrent symptoms in February 2004 necessitated a more extensive spinal surgery with spinal fusion (L4-5 vertebra). He did not recover sufficiently to return to duty. The MEB narrative summary (NARSUM) examination dated 3 March 2005, recorded persistent back pain with some radicular symptoms. On examination, thoracolumbar flexion was 70 degrees with a combined thoracolumbar range-of-motion (ROM) of 200 degrees. Contemporaneous clinic encounters including neurosurgery document normal gait and intact strength. Electrodiagnostic study (EMG, NCV) on 4 March 2005 was negative for signs of lumbar radiculopathy. The PEB rated the low back pain condition, status post lumbar laminectomy and fusion at 10% based on ROM at the time of placement on the TDRL. The PEB noted the normal EMG and absence of “significant neurologic abnormality” signaling its conclusion there was not a separately unfitting radiculopathy. The VA Compensation and Pension (C&P) examination, two months after separation and placement on TDRL documented a dramatically worsened thoracolumbar ROM (30 degrees flexion, 75 degrees combined ROM) upon which the VA based its 40% rating. A pain clinic encounter two months after the C&P examination recorded a flexion of 60 degrees. Board members agreed that the MEB examination supported the 10% rating adjudicated by the PEB at the time of placement on the TDRL.

The CI underwent TDRL reevaluation 20 March 2007 by orthopedics and physical therapy. The orthopedic examiner recorded CI complaint of radicular pain into both legs with occasional numbness and tingling into both calves. The orthopedist recorded an antalgic gait. Muscle strength sensation and reflexes of the lower extremities were intact. The physical therapy thoracolumbar ROM was flexion of 45 degrees with a combined ROM of 170 degrees; however, it was limited by pain. The gait was indicated to be normal. 6 months previously, a VA C&P examination, 7 October 2006, recorded a thoracolumbar flexion of 60 degrees with a combined ROM of 190 degrees and a normal gait. The PEB adjudicated a 10% rating with apparent application of the USAPDA Pain Policy. With regard to the permanent rating for the lumbar spine condition at the time of removal from the TDRL, the Board noted that the ROM recorded by the physical therapist supports a 20% rating. The C&P examination just prior to the TDRL examination also supports a 20% rating. The Board also considered rating intervertebral disc disease under the alternative formula for incapacitating episodes, but could not find sufficient evidence which would meet even 10% criteria under that formula. The Board also considered if additional disability rating was justified for peripheral nerve impairment due to radiculopathy at the time of placement on or removal from the TDRL. Board precedent is that a functional impairment tied to fitness is required to support a recommendation for addition of a peripheral nerve rating at separation. The pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a. The sensory component in this case has no functional implications and no motor impairment noted. Since no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment. After due deliberation, in consideration of the totality of the evidence, and IAW §4.3 (reasonable doubt), the Board concluded that there was sufficient cause to recommend a permanent rating of 20% for the back condition at the time of removal from the TDRL.

Cervical Condition. In January 2005, the CI was diagnosed with multilevel degenerative disc disease associated with pain and numbness radiating into the right arm. Evaluation by neurosurgery documented intact strength and reflexes but decreased sensation of the right C6 root distribution (thought to be due to ulnar nerve irritation rather than the C6 spinal root by a different neurosurgeon). Electrodiagnostic study (EMG, NCV), 4 March 2005 was negative for signs of cervical radiculopathy. The MEB NARSUM examination, 3 March 2005, recorded cervical spine flexion of 40 degrees, and a combined cervical ROM of 285 degrees. The PEB rated the cervical spine condition 10% based on ROM at the time of placement on the TDRL. The PEB noted the normal EMG and absence of “significant neurologic abnormality” signaling its conclusion there was not a separately unfitting radiculopathy. A 5 April 2005 neurosurgery examination record cervical spine ROM of flexion 45 degrees, extension 60 degrees, lateral flexion of 40 degrees bilaterally, and rotation of 60 degrees bilaterally (combined 230 degrees). A 10 May 2005 neurosurgery evaluation recorded that there was full ROM of the cervical spine. The VA C&P examination, 2 months after separation and placement on TDRL documented a dramatically worsened cervical spine ROM (10 degrees flexion, 160 degrees combined ROM) upon which the VA based its 30% rating. Board members agreed that the MEB examination and the neurosurgery examinations supported the 10% rating adjudicated by the PEB at the time of placement on the TDRL.

The CI underwent TDRL reevaluation 20 March 2007 by orthopedics and physical therapy. The orthopedic examiner recorded CI complaint of neck pain going into both arms, right more than left. Muscle strength, sensation, and reflexes of the upper extremities were intact. The physical therapy cervical spine ROM was flexion of 35 degrees with a combined ROM of 235 degrees. The ROM was limited by pain. 6 months previously, a VA C&P examination, 7 October 2006, recorded a cervical spine flexion of 30 degrees with a combined ROM of 215 degrees. The PEB adjudicated a 10% rating with apparent application of the USAPDA Pain Policy. With regard to the permanent rating for the cervical spine condition at the time of removal from the TDRL, the Board noted that the ROM recorded by the physical therapist supports a 10% rating. The C&P examination just prior to the TDRL examination documented a cervical flexion that just attained the threshold (30 degrees) for the 20% rating while the combined ROM was consistent with the 10% rating. The TDRL examination was more proximal to permanent disposition and Board members agreed the 10% rating was appropriate. The Board also considered rating intervertebral disc disease under the alternative formula for incapacitating episodes, but could not find sufficient evidence which would meet even 10% criteria under that formula. The Board also considered if additional disability rating was justified for peripheral nerve impairment due to radiculopathy at the time of placement on and removal from the TDRL. Board precedent is that a functional impairment tied to fitness is required to support a recommendation for addition of a peripheral nerve rating at separation. The pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a. The sensory component in this case has no functional implications and no motor impairment noted. Since no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment. After due deliberation in consideration of the totality of the evidence, the Board concluded that there was insufficient cause to recommend a change from the PEB’s permanent rating for the cervical spine condition at the time of removal from TDRL.

Posttraumatic Stress Disorder Condition (PTSD). At the time of placement on the TDRL, PTSD was adjudicated as an unfitting condition rated 10% by the PEB. At the time of removal from the TDRL, the PEB concluded the PTSD condition had improved sufficiently such that it was no longer separately unfitting for continued military service and therefore not ratable. First, the Board considered whether a rating higher than 50% was warranted at the time of placement on the TDRL. The CI was diagnosed with PTSD in April 2004 following return from deployment. Symptoms included depressed mood, difficulty sleeping, nightmares, irritability, quick temper, anxiety, and intrusive recollections / flashbacks. He also reported increased alcohol intake. He was treated with medication and psychotherapy with some improvement. At the time of the psychiatry NARSUM, 1 March 2005, the examiner noted that medication was helping him sleep, to be less irritable and to concentrate. Insomnia was partially controlled with medication, and nightmares were “significantly controlled” with medication. Episodes of anxiety were also controlled with medication. He was in a stable marriage and his wife was supportive. He continued to work at the National Guard Armory. On mental status examination, his mood was dysphoric with constricted affect. There was no suicidal or homicidal ideation. Memory was intact with linear, logical goal directed thought processes, without hallucination or delusion. The examining psychiatrist concluded the PTSD condition did not meet Army retention standards and estimated the impairment in civilian social and industrial adaptability as definite. The commander’s statement dated 18 March 2005, mentioned only the physical limitations and noted that the CI was otherwise performing administrative duties. The NCO Evaluation Report ending October 2004 reflected physical limitations but otherwise noted good duty performance. The VA PTSD C&P examination dated 10 December 2005, three months after separation, documented similar symptoms and mental status examination findings. The VA rated the PTSD condition at 30% based on the C&P examination. All Board 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.

The Board next considered the fitness determination made by the PEB at the time of removal from the TDRL. If the Board does not agree with the PEB and concludes that the PTSD condition remained unfitting for military service, the Board must determinate the most appropriate fit with VASRD 4.130 criteria at the conclusion of the TDRL interval for its permanent rating recommendation. The only evidence available proximate to the time of removal from the TDRL was the TDRL psychiatry evaluation dated 20 March 2007. The TDRL examiner recorded that after separation and placement on the TDRL (September 2005), the CI returned to his civilian occupation but was unable to continue to work (July 2006) due to his back and neck conditions. At the time of the examination, he reported symptoms of being moody, irritable with difficulty with anger, experiencing nightmares and dreams about friends who died, and insomnia (although not taking a sleeping aid). He avoided news broadcasts, did not like crowds, and generally stayed at home. He continued to be prescribed medication and receive psychotherapy. Medication helped him feel not as stressed around crowds or family. He attended his children’s athletic events, and went to a friend’s house to watch sports and drink. He liked to play video games including shooting and war games; his favorite game was Gears of War, which simulates a combat environment. On mental status examination (MSE) mood was “okay” with full affect. There was no impairment in memory, attention or concentration. Thought processes were normal without suicidal or homicidal ideation, hallucination, or delusions. Judgment and impulse control were considered good. The psychiatrist concluded the PTSD condition was improved but did not meet Army retention standards. Impairment for social and industrial adaptability was considered mild. In its not unfit determination, the PEB cited the fact that the CI worked in his civilian job from September 2005 and July 2006 (when the PTSD symptoms were more severe that at the time of TDRL evaluation) and enjoyed playing video games that simulated combat. 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 Board considered that the CI’s occupational impairment was due to his back and neck condition, that there was no evidence that his PTSD symptoms significantly interfered with occupational functioning, and the CI enjoyed video games simulating combat. All evidence considered, there is not reasonable doubt supporting overcoming the PEB’s adjudication of the PTSD condition as not unfitting at the time of permanent disability disposition.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were, right supraspinatus tendonitis, bilateral foot fractures (in 1987), dyspepsia, headache (related to neck pain), and alcohol abuse. 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 duty performance. 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. Adjustment disorder and several additional non-acute conditions or medical complaints were also documented in the DES file. Adjustment disorder was subsumed in the consideration of PTSD. None of these other conditions were significantly clinically or occupationally 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.

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 lumbar spine condition the Board unanimously recommends no change in the rating at the time of initial placement on the TDRL and a permanent rating after removal from the TDRL of 20%, coded 5241 IAW VASRD §4.71a. In the matter of the cervical spine condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication at separation or permanently. In the matter of the PTSD condition at the time of placement on the TDRL, the Board unanimously recommends an initial rating of 50% IAW §4.129. In the matter of the PTSD condition at the time of removal from the TDRL, the Board unanimously recommends no change in the PEB adjudication as not unfit. In the matter of right supraspinatus tendonitis, history of bilateral foot fractures), dyspepsia, headache, alcohol abuse, 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, effective as of the date of his prior medical separation:

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| **UNFITTING CONDITION** | **VASRD CODE** | **PERMANENT****RATING** |
| Posttraumatic Stress Disorder | 9411 | Not Unfit |
| Lumbar Fusion with Chronic Low Back Pain | 5241 | 20% |
| Cervical Spine Degenerative Disc Disease | 5243 | 10% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20101013, 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 30% 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 30% 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)