RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXX BRANCH OF SERVICE: air force

CASE NUMBER: PD1001281 DATE OF PLACEMENT ON TDRL: 20051019

BOARD DATE: 20110120 Date of Permanent SEPARATION: 20090821

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty member, SRA/E-4 (4J0X2, Physical Medicine Technician), medically separated for posttraumatic stress disorder (PTSD) with associated psychiatric conditions*.* The CI was first seen for mental health care in 2003. She reported experiencing depression and anxiety. Her symptoms worsened in 2004 after experiencing a sexual assault. She did not respond adequately to treatment to fully perform within her Air Force Specialty (AFS) or meet physical fitness standards; was issued a permanent S4 profile; and, was referred for a Medical Evaluation Board (MEB). Dysthymic disorder and generalized anxiety disorder were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable conditions IAW AFI 48-123. No other conditions appeared on the MEB’s submission. Other conditions included in the Disability Evaluation System (DES) file will be discussed below. The PEB adjudicated the dysthymic/anxiety disorder as unfitting, rated 30% with application of Department of Defense Instruction (DoDI) 1332.39; and, placed the CI on the Temporary Disability Retired List (TDRL). After 46 months on TDRL, the CI’s psychiatric condition was considered to be stable and in remission. She was removed from TDRL in 2009 and permanently separated, without appeal, with a 10% disability rating IAW the Veterans’ Administration Schedule for Rating Disabilities (VASRD).

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 CFR4.129 and DOD policy, to the extent such increase will not adversely affect my total compensation, including but not limited to compensation pursuant to CRSC. Please see attached list of contentions regarding why the PDBR should make the changes request in Item 3.” She additionally requests that her fitness determinations be reversed and that she receive ‘the highest rating possible’ for all of her PEB and VA conditions. This case is court remanded under the *Sabo et al v. United States* class action suit.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Final Service IPEB – 20090304** | | | **VA (5 Mo. Post-Separation) – Effective 20090814** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL - 20051019** | **On TDRL - 20051019** |
| Dysthymic Disorder associated with Generalized Anxiety Disorder | 9433 | 30% | Dysthymic Disorder with Generalized Anxiety Disorder | 9400-9433 | 0% | No Show |
| **Medical Separation - 20090801** | **Code** | **Rating** |  | **Code** | **Rating** | **Exam** |
| PTSD with Dysthymic and Generalized Anxiety Disorders, all in remission | 9411 | 10% | PTSD | 9411 | 30% | 20090908 |
| No Additional MEB/PEB Entries | | | Not Service Connected X 15 | | | |
| **Final Combined: 10%** | | | **TOTAL Combined: 30%** | | | |

ANALYSIS SUMMARY: The PEB rating at the time of entry on TDRL 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 a retroactive six-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 interval in this case. A minimum TDRL rating of 50% remains applicable IAW DoD direction, and as held by 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 sources of comprehensive evidence on which to base the permanent rating recommendation in this case are the TDRL MEB exam performed 9 months prior to permanent separation and the Department of Veterans’ Affairs (DVA) Compensation and Pension (C&P) examination performed 1 month after permanent separation.

Psychiatric Condition. The CI first reported mental health symptoms of depression and anxiety in 2003. She sought help and was treated with counseling and medication. In 2004, the CI was raped, and her mental health declined. She experienced increased sensitivity and anxiety, feelings of worthlessness, insomnia, decreased interest and appetite, mood swings, and irritability. She was unable to properly perform her duties and her commander stated that she was often seen crying at work, and had to have long breaks to regain her composure. Her only Axis I diagnosis at this time was dysthymic disorder with generalized anxiety disorder, with a Global Assessment of Functioning (GAF) assignment of 71-80. She underwent a MEB and the IPEB placed her on TDRL in October of 2005 with a 30% disability rating for the dysthymic/anxiety disorder. Although PTSD had appeared as a “rule-out” diagnosis during her initial MEB period (rape as the Criterion A stressor), she first received a formal Axis I diagnosis of PTSD at her TDRL re-evaluation in 2007. Nine months prior to permanent separation, the severity of the CI’s PTSD condition (as evidenced by the final TDRL psychiatric evaluation) could best be described as slight to nonexistent. During the TDRL period she had divorced, had started dating again, and had a stable full-time job. She had not sought any mental health treatment since 2006, indicating “I didn’t think I needed it.” She related only symptoms of insomnia and said overall, “I’m doing well.” The mental status exam (MSE) was completely normal. The TDRL psychiatrist stated, “There is no current evidence by her report now that she meets criteria for any psychiatric disorder…. However, she is at some risk for recurrence given her history of anxiety and depression.” It was noted that the CI was interested in returning to active duty status at this time, but the examiner opined she was still unfit for duty with a 30% chance of relapse in a military environment. The MEB examiner assigned a GAF score of 65 (connoting mild impairment in social and occupational functioning). During the 9 months between the MEB exam and the VA exam, however, the CI had a serious exacerbation of symptoms. In May 2009, she was hospitalized for 6 days for severe recurrent major depressive disorder and PTSD, with suicidal ideation and an admission GAF of 20. No details of precipitating factors leading to admission are contained in the discharge summary, but a drug screen was positive for opioids without evidence of valid medical indications or prescription. The MSE at discharge showed a sad and depressed mood and affect, but was otherwise unremarkable. At this time the CI did not exhibit suicidal ideation or any evidence of psychosis or other acute features. The examiner noted that “she showed a noticeable improvement in affect and mood and was optimistic for the future,” and assigned a GAF of 40 (connoting major functional impairment, but which the action officer opines is incongruent with the relatively benign examination and symptoms as documented). At the VA examination for mental disorders (not PTSD) one month after permanent separation, the CI continued to have insomnia, mood swings, poor sustained attention, and anxiety; but these symptoms were improving. She stated that she had been fired from her job because of her condition. Some social withdrawal was evidenced at this time, but she was living with her boyfriend. She was taking antidepressant and anti-anxiety medications. On MSE she appeared fatigued and tense, with an anxious, depressed mood and constricted affect. The exam was otherwise normal with no suicidal or homicidal ideations, obsessive behaviors or psychotic features. The examiner assigned GAF score of 60, connoting moderate symptoms, and opined that the CI’s condition was an obstacle to her ability to manage gainful employment productively. The examiner did not make an Axis I diagnosis of PTSD, but rather recommended that the CI be evaluated for PTSD. The CI cancelled a subsequent C&P exam for PTSD and did not reschedule. The VA rating decision (VARD) of 27 May 2010 (the last VARD of record) which conferred a 30% rating for PTSD cited only the admitting diagnosis from May 2009 as a basis for the diagnosis.

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 placement, and therefore the minimum 50% TDRL rating (as explained above) is applicable. Board consensus was that the VA C&P exam one month post-separation carried the most probative value in this case since it best demonstrates the CI’s occupational and social functioning at the time of actual separation. As regards the permanent rating recommendation, all members agreed that the CI’s marked improvement after the acute hospitalization provided little support for a §4.130 rating of 50% and that the criteria for a 0% rating were clearly exceeded. The deliberation settled therefore on arguments for a 10% versus a 30% permanent rating recommendation. The Board noted that for the entire period of TDRL, prior to the point of hospitalization, the CI’s condition could reasonably have been rated 0%; since, she was fully socially and occupationally functional without medications. The Board considered that the hospitalization, likely precipitated by some unspecified stressor, appeared to represent an isolated setback in an otherwise stable condition; and that the apparently steady decrease in symptoms with treatment were consistent with a trajectory to recovery to baseline functioning. Since the CI declined further VA C&P evaluation, this assessment is somewhat speculative. Conversely, the Board noted that at the time of the post-separation C&P there was clear evidence of the “occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily…)” that supports a 30% rating. 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.

Remaining Conditions. No other conditions were noted in the NARSUM, identified by the CI on the MEB physical or found elsewhere 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 its TDRL rating of PTSD was operant in this case, and the PEB did not apply the VASRD §4.129 minimum rating; for which the Board provides remedy. In the matter of the dysthymic/anxiety disorder, the Board by a 2:1 vote recommends an initial TDRL rating of 50% in retroactive compliance with VASRD §4.129 as DOD directed, and a 30% permanent rating (with a change in diagnosis to posttraumatic stress disorder, code 9411) IAW VASRD §4.130. The single voter in dissent (who recommended a 10% permanent rating for PTSD, assigning preponderant probative value to the final Service TDRL psychiatric reevaluation) submitted the appended minority opinion. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as additionally unfitting for 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 (dysthymic/anxiety disorder at minimum of 50% IAW §4.129 and DoD direction) and then a permanent 30% disability retirement as below.

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| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Dysthymic/Anxiety Disorder | 9433 | 50% | --- |
| Post-Traumatic Stress Disorder | 9411 | --- | 30% |
| **COMBINED** | **50%** | **30%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20101112, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

President Physical Disability Board of Review

MINORITY OPINION:

As regards to its permanent rating recommendation, the Board deliberated at length the probative value considerations for the markedly disparate Service TDRL and VA inpatient/psychiatric C&P evidence. The majority recommendation is premised on assigning the preponderant probative value to the latter, rather than the former. The majority defends that position based on the conclusion that since the Air Force did not promptly separate the CI, it retained responsibility for the disability which arose during that administrative lapse. Given that premise, I am in agreement with the recommendation; but, I remain in adamant disagreement with the premise. The Board must consider that the PEB decision to terminate TDRL and render its final rating preceded the developments during the administrative interval effecting permanent separation; and, that there is no evidence that the CI made any Service appeal or made the Service aware of said developments. The ensuing psychiatric admission and lability in psychiatric severity would not represent a realistic endpoint for a trial of TDRL had it been recognized by the Service; and, does not serve as a valid measurement for permanent psychiatric disability, which should reflect the severity of the condition in a more stable and treated state. The probative value of the evidence between the final PEB and administratively permanent separation is also clouded by the possibility of unratable substance abuse (difficult to link as a symptom of PTSD given the very stable period during which it was detected) and the CI’s non-compliance (as provided by evidence, at least) with any subsequent psychiatric treatment or evaluation. Since the Board’s charge is to provide a fair assessment of the applicant’s permanent Service connected disability, it is quite speculative to conclude that the abrupt developments, very atypical for the >5 year period which preceded it, represented more than temporary circumstances; further to conclude that no unratable factors precipitated the atypical variance; and, further yet, to premise a Service disability rating on circumstances which occurred after an appropriate and far lengthier period of Service applied TDRL than the 6 month DoD-prescribed application of §4.129; especially, since this occurred apparently unbeknownst to the Service during the administrative period following Service compliance with a fair period of TDRL. The psychiatric evidence at the time of the PEB and clinical (vs. administrative) conclusion of TDRL was clearly consistent with a maximum 10% rating IAW VASRD §4.130; and, all members agreed with that rating based on that premise. I respectfully suggest that the Secretary consider the following minority recommendation.

|  |  |  |  |
| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Dysthymic/Anxiety Disorder | 9433 | 50% | --- |
| Post-Traumatic Stress Disorder | 9411 | --- | 10% |
| **COMBINED** | **50%** | **10%** |

SAF/MRB

1500 West Perimeter Road, Suite 3700

Joint Base Andrews MD 20762

Dear XXXXXXXX:

Reference your application submitted under the provisions of DoDI 6040.44 (Title 10 U.S.C. § 1554a), PDBR Case Number PD-2010-01281.

After careful consideration of your application and treatment records, the Physical Disability Board of Review determined that the rating assigned at the time of final disposition of your disability evaluation system processing was not appropriate under the guidelines of the Veterans Administration Schedule for Rating Disabilities. Accordingly, the Board recommended your separation be recharacterized to reflect disability retirement, rather than separation with severance pay.

I have carefully reviewed the evidence of record and the recommendation of the Board. I concur with that finding, accept their recommendation and direct that your records be corrected as set forth in the attached copy of a Memorandum for the Chief of Staff, United States Air Force. The office responsible for making the correction will inform you when your records have been changed.

Sincerely,

Director

Air Force Review Boards Agency

PDBR PD-2010-01281

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Physical Disability Board of Review and under the authority of Title 10, United States Code, Section 1554a (122 Stat. 466) and Title 10, United States Code, Section 1552 (70A Stat. 116) it is directed that:

The pertinent military records of the Department of the Air Force relating to XXXXXXXXXX, be corrected to show that:

a. Upon final Temporary Disability Retired List (TDRL) disposition, the diagnosis in her finding of unfitness was Posttraumatic Stress Disorder, VASRD code 9411, rated at 30% rather than PTSD with Dysthymic and Generalized Anxiety Disorders, all in remission, VASRD code 9411, rated at 10%

b.  On 21 August 2009, she was not discharged with disability severance pay; rather, on that date her name was placed on the Permanent Disability Retired List.

Director

Air Force Review Boards Agency