RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1100107 SEPARATION DATE: 20070313

BOARD DATE: 20120215

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a mobilized National Guard SPC/E-4 (25U, Signal Support Systems) medically separated for major depressive disorder (with additional Axis l diagnoses as noted below) and left knee pain. He was treated, but did not respond adequately to fully perform his military duties or meet physical fitness standards. He underwent a Medical Evaluation Board (MEB). Major depressive disorder (MDD), posttraumatic stress disorder (PTSD), panic disorder, insomnia, and left knee pain were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Two other conditions (neck pain & headaches) were listed on the DA Form 3947 as medically acceptable. The PEB found the mental condition and the left knee condition unfitting, rating them 10% and 0% respectively. The CI made no appeals, and was thus separated with a 10% combined disability rating.

CI’s CONTENTION: The CI makes no contention in Block 3 of DD Form 294.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Army PEB – dated 20070130** | | | **VA (3 mos. After Separation) – All Effective 20070314** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Major Depressive Disorder | 9434 | 10% | Adjustment Disorder, with Mixed Anxiety and Depression | 9440 | 10% | 20070628 |
| PTSD |  |  |
| Panic Disorder |
| Insomnia |
| Chronic Left Knee Pain | 5099-5003 | 0% | Left Knee ACL Tear | 5257 | 0% | 20070723 |
| Neck Pain | Not Unfitting | | Cervical Spine Strain | 5237 | 10% | 20070723 |
| Headaches | Not Unfitting | | No Separate VA Entry for Headaches (Assoc. with Cervical Strain) | | | |
| ↓No Additional MEB/PEB Entries↓ | | | 0% x 3 / Not Service Connected x 0 | | |  |
| **Combined: 10%** | | | **Combined: 20%** | | | |

ANALYSIS SUMMARY:

Mental Condition. The CI was deployed to Kuwait in 2005. He was shot at while on patrol, and he witnessed the decapitation of a civilian. Upon return to the US, he discovered that his wife was seeing another man, and the CI fought for visitation rights to see his children. He then went through a very difficult divorce. The CI began to have flashbacks, nightmares, insomnia, anger, hypervigilance, crowd avoidance, anxiety and depression. It appears that he was not evaluated or treated for these symptoms prior to the MEB/PEB process. On 30 November 2006, 15 weeks prior to separation, he was seen by a psychiatrist (Dr. G.) at the Soldiers’ Assistance Center, Tripler Army Medical Center, Hawaii. On mental status exam (MSE), there were no delusions or suicidal ideation. His affect was anxious, and he had some paranoia about others trying to hurt him. The CI was diagnosed with chronic PTSD (moderate severity), MDD (recurrent, moderate), panic disorder, and agoraphobia. His mental condition was rated as “moderate” in severity. Psychotherapy was recommended, and he was started on medication.

In January 2007, the Army PEB found him unfit due to “MDD with onset during the post deployment period...following a divorce.” The DA Form 199 goes on to say, “The soldier also has axis I diagnoses of PTSD (unverified stressors), panic disorder, and primary insomnia which cannot be separately rated due to overlap of symptoms but are considered in the overall rating.” The PEB decision in this case preceded the promulgation of the NDAA 2008 mandate for DoD adherence to VASRD §4.129. IAW VASRD §4.129, when a mental disorder that develops in service as a result of a highly stressful event is severe enough to bring about the CI’s release from active military service, the rating agency should assign an evaluation of not less than 50 percent for a period of at least six months. The CI was exposed to combat while deployed, but his primary stressful event was discovering that his wife was unfaithful, and then going through a highly stressful divorce. Based on his psychological condition at the time of separation, the Board unanimously recommends retroactive placement on the Temporary Disability Retired List (TDRL) for a period of six months with an initial 50% rating for the mental condition in compliance with VASRD §4.129. The permanent rating should be based on the CI’s level of functioning six months following separation. A full, comprehensive psychological evaluation was not performed right at the six month point (13 September 2007), so the Board must use the best evidence available. The best source of comprehensive evidence upon which to base the permanent rating recommendation in this case is the Department of Veterans’ Affairs (DVA) psychiatric Compensation and Pension (C&P) exam on 28 June 2007. At that exam, the CI reported that he was having anxiety attacks about 2-3 times per month. The medication had been helping him, but he stopped taking it after leaving the Army. He denied symptoms of depression or PTSD. He reported not missing any work over the previous year due to mental health (MH) issues. The examiner felt that the CI had experienced adjustment problems after returning home from Kuwait, but had fully recovered except for his anxiety. The examiner opined that the CI’s anxiety would continue to diminish as he settled into his new life and his employment stabilized. The diagnosis was adjustment disorder with mixed anxiety and depression, in partial remission. The Global Assessment of Functioning (GAF) score was 72, and the examiner reported no social or occupational impairment.

The Board directed its attention to its rating recommendations based on the evidence just described. As noted above, 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% temporary disability retirement list (TDRL) rating is applicable. In regards to the permanent rating recommendation, the June 2007 VA psychiatric C&P exam, as elaborated above, is the source of evidence which has greatest probative value. The Board determined that the CI appeared to be in partial remission at the time of the C&P exam. He still was having occasional anxiety attacks, but had not missed any work. His GAF was 72. After due deliberation, all Board members agreed that based on the evidence, 10% was an appropriate permanent rating recommendation. The Board determined that the CI’s symptoms would decrease his efficiency and ability to perform certain tasks, during periods of significant stress. Considering all the evidence, the Board unanimously recommends a permanent disability rating of 10% for the mental condition (MDD, PTSD, panic disorder, agoraphobia, and insomnia). IAW VASRD §4.130, it is appropriately coded 9434-9411 and meets criteria for the 10% rating level.

Left Knee Pain. The CI injured his left knee in January 2006. He jumped off a truck and his left knee buckled laterally. He was first sent to physical therapy (PT), but due to persistent pain he was referred to orthopedics. Magnetic resonance imaging (MRI) in February 2006 revealed an anterior cruciate ligament (ACL) tear, and a non-displaced tibial plateau fracture. It was decided to let the fracture heal before repairing the ACL. The CI had ACL reconstruction done in June 2006. The knee stability improved, but the pain persisted, and an MEB was initiated. At his November 2006 MEB exam, 15 weeks prior to separation, the CI reported knee pain with stiffness and occasional swelling. The pain was worse with walking, sitting, or prolonged standing. He denied instability or giving way, but reported that it did “lock up” once. On exam the CI had a normal gait, and no medial or lateral instability. He had a positive Lachman’s, positive medial McMurray’s and a five millimeter anterior Drawer test. Neurological exam was normal and he had no muscle atrophy. Range-of-motion (ROM) is shown in the chart below.

At the July 2007 general medical C&P exam, the CI reported occasional flare-ups of left knee pain that occurred after squatting, prolonged standing, or walking more than a quarter mile. The pain resolved with rest, and occasionally he would apply ice. He denied weakness, giving way, instability, or locking. On exam, he had a normal gait and no instability. Lachman’s, McMurray’s and anterior/posterior drawer tests were all normal. He had a negative patellar grind and no joint line tenderness. His two goniometric ROM exams are summarized below.

|  |  |  |
| --- | --- | --- |
| Goniometric ROM  Left Knee | MEB – 15 weeks Pre-Sep (20061128) | VA C&P – 19 weeks Post-Sep  (20070723) |
| Flexion (140⁰ is normal) | 105⁰ | 120⁰ |
| Extension (0⁰ is normal) | 2⁰ | 0⁰ |
| Comment | ROMs limited by pain | No mention of pain |
| §4.71a Rating | 10%\* | 0% |

\*10% based on §4.40 (Functional loss), §4.45 (The joints), and §4.59 (Painful motion)

The Board carefully reviewed all evidentiary information available. The PEB and the VA chose different coding options for the left knee condition, but both had assigned a rating of 0%. The left knee limitation of motion was essentially non-compensable based on VASRD §4.71a knee and leg ROM codes (5260 and 5261). However, IAW VASRD §4.40, §4.45, and §4.59; a 10% rating is warranted when there is satisfactory evidence of functional limitation due to painful motion of a major joint. The CI clearly had pain with motion, as reported in his history and during the November 2006 MEB exam, and therefore qualifies for a 10% rating. The Board then directed its attention to the issue of joint instability. Review of the treatment record shows that at the November 2006 MEB exam, there was evidence of possible ligamentous laxity. However, the CI denied a history of instability or giving way. Eight months later, at his July 2007 C&P exam, the VA examiner found no objective signs of ligamentous laxity. Lachman’s, McMurray’s and anterior/posterior drawer tests were all normal. The Board determined that there was insufficient evidence of significant, unfitting joint instability. The laxity detected at the MEB exam was more likely than not a residual from the ACL reconstruction surgery. It did not constitute a disabling, unfitting joint condition, and therefore does not justify a separate rating. After due deliberation, and mindful of VASRD §4.3 (Reasonable doubt), the Board unanimously recommends a rating of 10% for the left knee at separation from service. The Board also unanimously recommends 10% for the left knee at six months following separation.

Other PEB Conditions. Neck pain and headaches were adjudicated by the PEB as not unfitting. Neither of these conditions were profiled, implicated in the commander’s statement or noted as failing retention standards. Both were reviewed by the action officer and considered by the Board. There was no indication from the record that either 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 either of the stated conditions.

Remaining Conditions. Tibial stress fractures, pilonidal cyst, axillary abscess, 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, several other conditions were noted in the VA rating decision proximal to separation, 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 mental condition, the Board unanimously recommends an initial TDRL rating of 50% in retroactive compliance with VASRD §4.129. The Board unanimously recommends a permanent rating of 10% at six months following separation, IAW VASRD §4.130.

In the matter of the left knee condition and IAW VASRD §4.40, §4.45, §4.59, and §4.71a, the Board unanimously recommends an initial TDRL rating of 10%. The Board unanimously recommends a permanent rating of 10% at six months following separation.

In the matter of the neck pain, headaches, tibial stress fractures, pilonidal cyst, axillary abscess, 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 separation be recharacterized to reflect that, rather than discharge with severance pay, the CI was placed on the TDRL at 60% for a period of 6 months (IAW VASRD §4.129) and then separated with severance pay by reason of physical disability with a final 20% rating as indicated below.

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| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Major Depressive Disorder and PTSD | 9434-9411 | 50% | 10% |
| Chronic Left Knee Pain | 5099-5010 | 10% | 10% |
| **COMBINED** | **60%** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110126, 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 constructively place the individual on the Temporary Disability Retired List (TDRL) at 60% disability for six months effective the date of the individual’s original medical separation for disability with severance pay and then following this six month period no recharacterization of the individual’s separation with modification of the permanent disability rating from 10% to 20%.

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 as follows:

a. Providing a correction to the individual’s separation document showing that the individual was separated by reason of temporary disability effective the date of the original medical separation for disability with severance pay.

b. Providing orders showing that the individual was separated with a permanent combined rating of 20% effective the day following the six month TDRL period with no recharacterization of the individual’s separation.

c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will provide 60% retired pay for the constructive temporary disability retired six month period effective the date of the individual’s original medical separation and adjusting severance pay as necessary to account for the additional TDRL time in service.

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)