RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: marine corps

CASE NUMBER: PD1100114 DATE OF PLACEMENT ON TDRL: 20050730

BOARD DATE: 20120221 Date of Permanent SEPARATION: 20070809

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SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty member, Sgt/E-5 (0311, Rifleman), medically separated for traumatic brain injury (TBI). The CI was serving in Iraq in July 2004, when he suffered a shrapnel wound to the temporal region as a result of an improvised explosive device (IED) blast.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 placed on limited duty (LIMDU) and underwent a Medical Evaluation Board (MEB). TBI was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW SECNAVINST 1850.4E. Two other conditions, as identified in the rating chart below, were forwarded on the MEB submission as medically unacceptable conditions. The PEB adjudicated the TBI condition as unfitting, rated 60%, with application of the SECNAVINST 1850.4E. The CI was placed on Temporary Disability Retired List (TDRL) with ratings as reflected in the chart below. The CI made no appeals, and was medically separated with a 20% combined disability rating.

CI CONTENTION: The CI states: “I was originally given a rating of 60% and released to temporary medical retirement; 18 months later that rating was reduced to 20% with no change in my medical condition. I still suffer from debilitating migraine headaches and sensitivity to noise and light caused by massive head trauma which included a piece of shrapnel penetrating 3 inches into my brain and major brain surgery.” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

Rating Comparison Chart:

|  |  |
| --- | --- |
| **Final Service IPEB – Dated 20070504** | **VA\* – All Effective Date 20050730** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20050730** |  | **TDRL** | **Sep.** |
| Traumatic Brain Injury |  |
| Epilepsy, grand mal | 8045-8910 | 40% | 10% | Post-Traumatic Seizure | 9304-8911 | 10% | 20071203 |
| Dementia Due to Head Trauma | 8045-9304 | 30% | 10% | NO VA ENTRIES |  |
| Cognitive Disorder | CAT II |
| Status Post Craniotomy with Debridement and Removal of Shrapnel…. | CAT II | Status Post Craniotomy with Debridement And Removal Of Shrapnel …with residual Craniotomy Defect and Encephalomalacia, Right Temporal Area | 8045-5296 | 10% | 20071203 |
| Skull, Loss of Part of, Both Inner and Outer Tables | Not addressed |
| Encephalomalacia |
| Migraine Headaches | CAT II | Posttraumatic Migraines Headaches | 8045-8100 | 10% | 20071203 |
| Cerebral Contusion and Seizures | CAT II | NO VA ENTRY |  |
| ↓No Additional MEB/PEB Entries↓ | Tinnitus | 6260 | 10% | Unk |
| Retained Metallic Foreign Bodies Right Mandible | 5325 | 10% | 20071203 |
| Residual Scar, Right Side Of Face | 7800 | 30% | 20071203 |
| 0% x 2/Not Service Connected x 7 | 200711172007072720071203 |
| **Final Combined: 20%** | **Combined: 60%** |

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

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred condition continues to burden him. It is a fact, however, that the Disability Evaluation System (DES) has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions resulting in medical separation. This role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA). The Board utilizes DVA evidence proximal to separation in arriving at its recommendations; and, DoDI 6040.44 defines a 12 month interval for special consideration to post-separation evidence. The Board’s authority as defined in DoDI 6044.40, however, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Traumatic brain injury. The CI suffered a shrapnel wound to the temporal region as a result of an IED blast in Iraq on 7 July 2004. He was medevaced to Baghdad where he underwent craniotomy and shrapnel removal, debridement of necrotic brain tissue, evacuation of a small hematoma and cranioplasty. Other injuries included multiple shrapnel wounds to the right face and arm and mastoid fractures with fluid in the air cells of the mastoid bone. Since the injury he suffered from headaches and one isolated seizure in October 2004. Initially he was treated with Keppra for seizure prophylaxis but was changed to Topamax and has been seizure free since then. His headaches improved in frequency but not in severity. They were located behind the eyes, associated with nausea and photophobia. He also had constant pain over the injury site. Given the severity of his injury and the fact that he was at increased risk for a seizure disorder due to the penetrating nature of his TBI, he was considered unsuitable for continued military service.

The initial PEB on 7 June 2005, two months prior to separation to the TDRL, rated TBI-combat related, using code 8045-8910 (epilepsy, grand mal) at 40% and code 8045-9304 (dementia due to head trauma) at 30%, for a combined TDRL rating of 60%. Cognitive disorder, status post (S/P) craniotomy with foreign body removal, migraine headaches and cerebral contusion with isolated seizure were all adjudicated as related category II conditions. The final PEB on 4 May 2007, three months prior to separation from the TDRL, rated TBI-combat related, using code 8045-8910 (epilepsy, grand mal) at 10% and code 8045-9304 (dementia due to head trauma) at 10%, for a combined rating of 20%. Cognitive disorder, S/P craniotomy with foreign body removal, migraine headaches and cerebral contusion with isolated seizure were again adjudicated as related category II conditions. The VA Rating Decision on 26 August 2005, one month after separation to the TDRL, service-connected post-traumatic seizure, coded 9304-8910, with a 10% rating and post-traumatic migraine headaches, coded 9304-8045, also at 10%. Residual scar on the right face was rated at 30%, code 7800, and a subsequent VA Rating Decision on 29 October 2007, three months after final separation from the TDRL, service-connected S/P craniotomy with foreign body removal and debridement with residual defect, coded 8045-5296 (for the skull defect) with a 10% rating.

The Board considered at length both the TDRL rating and the final rating recommendations at separation from the TDRL. The VASRD in effect at separation in 2005 stated that “purely subjective complaints such as headache, dizziness, insomnia, etc., recognized as symptomatic of brain trauma, will be rated 10 percent and no more under diagnostic code 9304 (dementia due to brain trauma). This 10 percent rating will not be combined with any other rating for a disability due to brain trauma. Ratings in excess of 10 percent for brain disease due to trauma under diagnostic code 9304 are not assignable in the absence of a diagnosis of multi-infarct dementia associated with brain trauma.” VA training letter, TL06-03 (dated 13 February 2006), was in effect at the time of final separation and specifically addressed the complexity of TBI, serving as an educational tool for understanding the nature and causes of TBI, diagnosis and symptoms associated with the condition, complications resulting from TBI, and general rating considerations. Understanding TL07-05, effective 31 August 2007, recommended separate ratings under the applicable codes for each DES-eligible condition which is a direct sequela of TBI in evidence (e.g., headache, tinnitus, dizziness, etc.) and was not in effect at the time of separation on 9 August 2007. The current VASRD criteria, effective 23 October 2008 are also not applicable to this case. The Board thus considered separate ratings, coding “outside” of 8045 when a more favorable rating could be achieved under an alternate code, for his DES-eligible sequela of the TBI which included headaches, cognitive impairment, and an isolated seizure.

Regarding the headaches, the TDRL narrative summary (NARSUM) on 26 February 2007, five months before final separation, stated that “he still suffers from frequent HA's that occur weekly. They are severe and he has difficulty functioning.” Symptoms associated with his headaches have included photophobia, nausea and dizziness, with the treatment records indicating that he had to take medication and lie down in a dark room for the headache to resolve. These would appear to be prostrating attacks that did not allow him to continue current activities and the condition could be considered unfitting. 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. After due deliberation, the Board agreed that the preponderance of the evidence with regard to the functional impairment of headaches favors its recommendation as an additionally unfitting condition for separation rating. After careful consideration of all available information, the Board decided, by simple majority, that while headaches can result from a TBI, this CI’s headaches may have resulted secondary to his penetrating brain injury and not his TBI. This condition is therefore rated separately from TBI as headaches (code 8100, migraine). As there was evidence of prostrating attacks on a weekly basis, a 30% rating is applied for both the TDRL disability rating and the final disability rating IAW VASRD §4.124a.

Regarding the cognitive impairment, the PEB on 4 May 2007 rated his dementia due to head trauma, coded 8045-9304, at 10%. The neuropsychological testing on 22 April 2005, three months prior to separation to the TDRL, noted “fairly intact levels of overall functioning,” with some focal impairments including memory, verbal learning and processing visual/spatial information. It stated that these impairments were significant enough to negatively impact his functional abilities in a competitive workplace though he was able to use compensatory strategies to improve his recall. The TDRL NARSUM five months prior to final separation noted that he was “doing well without cognitive difficulties.” His cognitive impairments were subtle and not likely to be readily apparent during routine mental status examinations. This condition is rated utilizing the general rating formula for mental disorders IAW VASRD §4.130. The social and occupational impairment described in the NARSUM and VA Compensation and Pension (C&P) exam appeared to the Board to most closely approximate the 10% description IAW VASRD §4.30. The Board agreed that the 10% descriptor, “occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress,” was the most appropriate fit for the CI’s cognitive impairment due to TBI. After careful consideration of all available information, the Board decided unanimously that his cognitive impairment is rated separately, code 8045-9304, (dementia due to head trauma) with a 30% TDRL rating and a 10% final rating.

Regarding the seizure disorder condition the records document one witnessed isolated seizure in October 2004. He was placed on anti-seizure medications and has not had any subsequent seizures. The initial PEB on 7 June 2005 adjudicated the seizure condition due to TBI, coded 8045-8910 (epilepsy, grand mal), with a 40% rating. The final PEB on 4 May 2007 adjudicated the same condition with a 10% rating. The JDETS notes documented that he was off seizure medications and had no seizures since October 2004. Code 8910 assigns a 10% rating for a confirmed diagnosis of epilepsy with a history of seizures. With no major seizures in the previous two years a 20% rating would not be appropriate. After careful consideration of all available information, the Board decided unanimously that his seizure disorder due to TBI is rated separately, code 8045-8910 (epilepsy, grand mal), and recommends a 40% TDRL rating and a 10% final rating.

Other PEB Conditions. The other conditions adjudicated as category II conditions related to the TBI were cognitive disorder, status post craniotomy with debridement and removal of shrapnel, migraine headaches and cerebral contusion and isolated seizures. The status post craniotomy with debridement and removal of shrapnel condition did result in a tender scar and a skull defect that were subject to VA ratings but was not considered to be separately unfitting by the PEB. The Board considered at length whether the status post craniotomy for shrapnel removal with residual skull defect was in fact unfitting. The condition is clearly a sequela of a very significant cranial wound that itself does raise doubts as to his continued fitness for duties as an active duty Marine. As stated above, 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. After due deliberation, a majority of the Board agreed that the preponderance of the evidence with regard to the functional impairment of the skull defect favors its recommendation as an additionally unfitting condition for separation rating. The VASRD does allow for a 10% rating for the cranial defect and the Board, by simple majority, recommends addition of this condition as unfitting, coded 5296, with a 10% TDRL rating and a 10% final rating. The other conditions are addressed above, in compliance with VASRD and VA TL06-03, effective 13 February 2006, for separate ratings under the applicable codes for each DES-eligible condition.

Remaining Conditions. Other conditions identified in the DES file were; scars, left foot, posterior neck, right arm, and from varicocele repair; hearing loss; sleeping problems; broken bones; and depression. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were significant clinically or occupationally during the MEB period, none were the bases for LIMDU and none were implicated in commander’s non-medical assessment (NMA). 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 retained foreign bodies to mandible, left eye condition, infertility, learning dysfunction, tinnitus 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. In the matter of the seizure disorder the Board decided unanimously that his seizure disorder is rated separately, code 8045-8910 (epilepsy, grand mal), with a 40% TDRL rating and a 10% final rating. In the matter of the cognitive disorder due to TBI the Board decided unanimously that the cognitive impairment is rated separately, code 8045-9304 (dementia due to head trauma) with a 30% TDRL rating and a 10% final rating. In the matter of the headache condition the Board decided, by simple majority, that the condition should be rated separately, code 8100 (migraine) with a 30% rating for both the TDRL and final ratings. The single voter for dissent (who recommended a 10% TDRL rating and a 10% final rating, code 8045-8100) submitted the addended minority opinion. In the matter of the status post craniotomy with residual skull defect the Board, by simple majority, recommends a rating of 10% for both the TDRL and final ratings, coded 5296. The single voter for dissent did not feel that the condition was separately unfitting, and addressed the subject further in the addended minority opinion. In the matter of the status post craniotomy with debridement and removal of shrapnel, residual scar right face, scars, left foot, posterior neck, right arm, and from varicocele repair; hearing loss; sleeping problems; broken bones; depression or any other medical condition eligible for Board consideration; the Board unanimously agrees that it cannot recommend a finding 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:

|  |  |  |  |
| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT****RATING** |
| Seizure Disorder Due to TBI | 8045-8910 | 40% | 10% |
| Cognitive Disorder Due to TBI | 8045-9304 | 30% | 10% |
| Headache Condition | 8100 | 30% | 30% |
| Status Post Craniotomy for Shrapnel Removal with Residual Skull Defect | 5296 | 10% | 10% |
| **COMBINED** | **70%** | **50%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110316, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

 President

 Physical Disability Board of Review

MINORITY OPINION: The minority voter agrees with the majority on the seizure and cognitive disorder coding and rating as recommended above. However, in the matter of the headache condition, it should be rated as a subjective complaint associated with TBI and evaluated at 10 percent in accordance with VA training letter 06-03. There is no evidence to support that the headaches were secondary to his penetrating brain injury as the majority argued, and undue speculation would be required to attribute the posttraumatic headaches to it. In the interest of consistency and fairness to other service members who separated for TBI during the same time period, the most accurate and equitable way to rate the headache condition would be to limit it to 10 percent per the VASRD and VA training tetter, for purely subjective complaints coded 8045-8100 at the TDRL rating and a 10 percent final rating. This would also be consistent with the way that the VA coded and rated it on their April 2008 rating decision.

In the matter of the status post craniotomy for shrapnel removal with residual skull defect, the minority voter recommends a finding of not unfitting. The documentation in the CI’s record does not provide any factual evidence to support an unfitting condition. It should not be assumed that having the condition warrants it as unfitting. Furthermore, there is no evidence in the record showing the condition interfered with the CI’s ability to perform within his MOS. Therefore, there is not reasonable doubt in the CI’s favor for a finding of unfitting for the status post craniotomy for shrapnel removal with residual skull defect.

The minority voter respectfully recommends the determination be modified as follows and the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective the date of the CI’s prior medical separation:

|  |  |  |  |
| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT****RATING** |
| Seizure Disorder Due to TBI | 8045-8910 | 40% | 10% |
| Cognitive Disorder Due to TBI | 8045-9304 | 30% | 10% |
| Headache Condition | 8045-8100 | 10% | 10% |
| Status Post Craniotomy for Shrapnel Removal with Residual Skull Defect | Not unfitting |
| **COMBINED** | **60%** | **30%** |

MEMORANDUM FOR DEPUTY COMMANDANT, MANPOWER & RESERVE AFFAIRS

 COMMANDER, NAVY PERSONNEL COMMAND

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATIONS

Ref: (a) DoDI 6040.44

 (b) PDBR ltr dtd 19 Mar 12

 (c) PDBR ltr dtd 15 Mar 12

 (d) PDBR ltr dtd 22 Mar 12

 (e) PDBR ltr dtd 22 Mar 12

1. Pursuant to reference (a) I approve the recommendations of the Physical Disability Board of Review set forth in references (b) through (e).

2. The official records of the following individuals are to be corrected to reflect the stated disposition:

 a. Placement on the Temporary Disability Retired List with a 70 percent disability rating for the period 31 August 2005 through 27 February 2006 followed by placement on the Permanent Disability Retired List with a final rating of 50 percent effective 28 February 2006.

 b. Placement on the Temporary Disability Retired List with 60 percent disability rating for the period 5 August 2008 through 4 February 2009 followed by assignment to the Permanent Disability Retired List with a 40 percent disability rating effective 5 February 2009.

 c. Disability separation with entitlement to disability severance pay with a rating of 20 percent (increased from 10 percent) effective 30 April 2002.

 d. Disability separation with entitlement to disability severance pay with a rating of 10 percent (increased from zero percent) effective 18 January 2002.

3. Please ensure all necessary actions are taken to implement these decisions, including the recoupment of disability severance pay, if warranted, and notification to the subject members once those actions are completed.

 Assistant General Counsel

 (Manpower & Reserve Affairs)