RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxx BRANCH OF SERVICE: Army

CASE NUMBER: PD1100128 SEPARATION DATE: 20070619

BOARD DATE: 20111212

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (42L, Administrative Specialist) medically separated for major depressive disorder (MDD) and a left wrist condition*.* The CI initially fractured his left wrist during physical training, which required surgical intervention (partial scaphoidectomy) and did not respond favorably to attempts at rehabilitation. He was also treated for MDD prior to being deployed to Afghanistan in 2005 and again following redeployment. He was unable to fully perform within his military occupational specialty (MOS) or meet physical fitness standards. He was issued permanent U3/S3 profiles, and referred for a Medical Evaluation Board (MEB). Traumatic arthritis of the left wrist, MDD and posttraumatic stress disorder (PTSD) were forwarded to the Physical Evaluation Board (PEB) as separate medically unacceptable conditions IAW AR 40-501. Five other conditions, as identified in the rating chart below, were forwarded on the MEB submission as medically acceptable conditions. Other conditions included in the Disability Evaluation System (DES) file will be discussed below. A PEB adjudicated the MDD as unfitting rated 10% with application of DoDI 1332.39 and the left wrist condition as unfitting, rated 0% with likely application of the US Army Physical Disability Agency (USAPDA) pain policy. The PTSD condition was adjudicated as not unfitting. The CI made no appeals and was medically separated with a 10% combined disability rating.

CI CONTENTION: “PTSD, lumbar strain, osteoarthritis and bursitis infrapatellar, left knee, malunion of fracture carpol [sic] bones scaphoid left, tinnitus, hearing loss, migraine headaches, sinusitis, TBI, high blood pressure … Please help me get my retirement.” He elaborates no specific contentions regarding rating or coding. He additionally lists all of his VA conditions and ratings as per the rating chart below, with contention implied.

RATING COMPARISON:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20070307** | | | | **VA (4 Mo. After Separation) – All Effective 20070620** | | | |
| **Condition** | **Code** | | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| MDD | 9434 | | 10% | PTSD w/MDD | 9411 | 50% | 20071031 |
| PTSD | Not Unfitting | | |
| Traumatic Arthritis Left Wrist | 5010 | 0% | | Left Wrist Condition | 5010-5215 | 10% | 20071106 |
| Left Knee Osteoarthritis | Not Unfitting | | | Left Knee Condition | 5010-5260 | 10% | 20071106 |
| Hypertension | Not Unfitting | | | Hypertension | 7101 | 0% | 20071106 |
| Allergic Rhinitis | Not Unfitting | | | Allergic Rhinitis | 6522-6513 | 0% | 20071106 |
| Hyperlipidemia | Not Unfitting | | | Not Service Connected | 7099-7005 | --- | 20071106 |
| Nicotine Dependence | Not Unfitting | | | No VA Entry | | | 20071106 |
| ↓No Additional MEB/PEB Entries↓ | | | | Lumbar Strain | 5237 | 20% | 20071106 |
| Bilateral Pes Planus | 5276 | 10% | 20071106 |
| Tinnitus | 6260 | 10% | 20071102 |
| 0% x 2 / Not Service Connected x 7 | | | 20071106 |
| **Combined: 10%** | | | | **Combined: 70%** | | | |

ANALYSIS SUMMARY: The Board acknowledges the CI’s contention which suggests that service ratings should have been conferred for other conditions documented at the time of separation. The Board wishes to clarify that it is subject to the same laws for service disability entitlements as those under which the Disability Evaluation System (DES) operates. While the DES considers all of the service member's medical conditions, compensation can only be offered for those medical conditions that cut short a service member’s career, and then only to the degree of severity present at the time of final disposition. However, the Department of Veteran Affairs (DVA), operating under a different set of laws (Title 38, United States Code), is empowered to compensate service connected conditions and to periodically re-evaluate said conditions for the purpose of adjusting the veteran’s disability rating should the degree of impairment vary over time. 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

Psychiatric Conditions (MDD/PTSD). The PEB rating, as described above, was derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act 2008 mandate for DoD adherence to Veterans Administration Schedule for Rating Disabilities (VASRD) §4.129. The VA rating decision did not reflect application of §4.129, nor did it stipulate the attendant follow-up evaluation within six months. A salient question before the Board is whether the CI’s psychiatric condition meets the §4.129 definition of “a mental disorder that develops in service as a result of a highly stressful event [that] is severe enough to bring about the veteran’s release from active military service.” Should the Board decide that §4.129 is applicable in this case, then, IAW DoDI 6040.44 and DoD guidance the Board is obligated to recommend a minimum 50% §4.129 rating for a retroactive 6-month period on the Temporary Disability Retired List (TDRL). Linked with this decision is the Board’s assessment regarding the appropriateness of the PEB’s determination that PTSD was not, itself, 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.In drawing its conclusions regarding these aspects of this case, the Board considered the evidence as elaborated below.

The psychiatric addendum to the MEB narrative summary (NARSUM) was written four months prior to separation. The severity of the CI’s overall psychiatric condition at the time of this addendum could best be described as moderate. The CI’s history of depression dated to three years prior to separation, associated with an interpersonal conflict with a supervisor. He was treated with outpatient counseling and an antidepressant, which he discontinued prior to a subsequent deployment to Afghanistan. During this deployment he was exposed to the carnage of war, family health concerns at home, and an in-flight emergency on an aircraft which resulted in recurrence of psychiatric symptoms. These included nightmares related to the above events, social avoidance and withdrawal, restlessness, irritability, hypervigilance, and anxiety. Following redeployment, he endorsed symptoms of dysphoria, decreased concentration, anhedonia, lack of interest, insomnia, decreased energy and hopelessness. He resumed outpatient counseling and pharmacotherapy, without significant improvement. The examiner noted that there had been a distinct decline in the CI’s duty performance due to “his decline in energy and concentration.” Several negative evaluations reflected his inability to perform at his regular pace and the commander’s statement labeled the CI a “good NCO,” but cited an inability to concentrate on his tasks. Previous evaluations had cited superior performance. The CI was in a stable marriage of 15 years and denied legal or substance abuse problems. The mental status exam (MSE) documented mild psychomotor restlessness, dysphoric mood, congruent affect, and cognitive findings of poor concentration and attention. The exam was otherwise normal, without suicidal or homicidal ideations or signs of psychosis. The examiner diagnosed severe recurrent MDD and chronic PTSD, both with DoDI 1332.39 defined “mild” impairment for social and industrial adaptability and assigned a global assessment of functioning (GAF) of 50, connoting moderate to serious symptoms or impairment in social or occupational functioning. At the time of the VA compensation and pension (C&P) exams five months after separation, the CI remained married with some strain in the relationship, but enjoyed a “wonderful” relationship with his three young children. He was unemployed, apparently having quit a job after just two days due to inability to concentrate. He had made no new friends since separation, but maintained friendships from prior duty stations. He endorsed continued symptoms of depression, some suicidal thoughts, re-experiencing, increased arousal, and numbing. To this examiner, the CI related a several year history of panic attacks, two to three times per week and associated with physiologic symptoms; although there is no corroboration of such attacks in the service file. The CI further stated that he avoided crowds and had difficulty driving due to reminders of convoy operations. On MSE, he had a flat affect with an anxious and depressed mood. The exam was otherwise unremarkable. The examiner confirmed the diagnoses of depression and PTSD and assigned a GAF of 52, connoting moderate symptoms. Conversely, a non-psychiatric C&P exam the following day noted symptoms of anxiety but normal mood and affect. Specifically denied (via a template exam format) were panic attacks and other symptoms endorsed the previous day to the psychiatric rating examiner as elaborated above.

The Board directs its attention to the question of §4.129 applicability, the separate fitness determinations, and it rating recommendations based on the evidence just described. The PEB’s DA Form 199 rationale in regards to its PTSD decision is excerpted below.

The soldier's symptoms are consistent with major depressive disorder. The additional diagnosis of PTSD, based upon exposure to combat casualties during duty as a 42L Administrative Specialist assigned to the 249th General Hospital at Bagram Air Field, Afghanistan from February 2005 to February 2006 without corroborated exposure to combat, is not appropriate.

The Board considered that the MEB and VA psychiatrists made an Axis I diagnosis of PTSD, implying that they believed that Criterion A stressors were present. The Board did surmise, however, that the CI’s MOS duty impairment was completely accounted for by symptoms typical of his longstanding MDD predating his deployment and could not confidently identify any symptoms typical of PTSD that led to the PEB’s finding of unfitness. The Board concludes therefore that the PEB’s fitness determinations for MDD and PTSD were acceptable. Regarding its recommendation in regard to §4.129 applicability, the Board must note that the VA elected not to apply it. The Board also points to two collateral issues which mitigate any practical import of applying §4.129 to this case. One such issue is that, although the fitness implications of each psychiatric disorder can be differentiated, the §4.130 ratable impairment from MDD and PTSD cannot be separated without undue speculation, nor does the VASRD allow for separate ratings of co-existent psychiatric conditions. The Board’s rating recommendation will therefore encompass a *de facto* rating for PTSD regardless of fitness adjudication or §4.129 application. The additional issue is that the Board’s permanent rating recommendation was §4.129 to be followed, would rest on the VA’s C&P evaluation which is already significantly probative to the Board’s separation rating recommendation. The Board therefore sees neither firm support for, nor significant practical value to, application of §4.129 in the circumstances of this case.

Turning attention to the permanent rating recommendation, all members agreed that the §4.130 threshold for a 10% rating was easily exceeded and that the 70% threshold was not approached. The Board’s deliberations were centered therefore on arguments for a 30% versus 50% permanent rating recommendation. The Board agreed that the MEB psychiatric evaluation could justify a §4.130 rating of 50% (occupational and social impairment with reduced reliability and productivity) based on the distinct evidence for declining duty performance due to the pervasive symptoms of depression. There is, however, also an argument for a 30% rating (occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks), considering the CI’s generally intact interpersonal functioning and the fact that his occupational impairment was co-mingled with separately ratable physical impairment. The VA evidence clearly demonstrated that the CI was in a stormy occupational period, although his family interactions were described in a more favorable light than depicted by the MEB exam. The VA examiner, in fact, cited §4.130 language for a 50% rating in his opinion. However, all members agreed that the psychiatric acuity documented by the VA examiner was mitigated somewhat by probative value concerns raised by the contradictory evidence noted above. After due deliberation, and in consideration of the totality of evidence and VASRD §4.3 (reasonable doubt), the Board recommends 30% as the fair permanent separation rating for MDD.

Left Wrist Condition. The CI was left with significantly impaired range of motion (ROM) of his wrist after failure to respond to post-operative rehabilitation or a subsequent carpal tunnel release. There were two goniometric evaluations in evidence which the Board weighed in arriving at its rating recommendation. Both of these exams are summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Wrist ROM | MEB ~ 4 Mo. Pre-Sep | VA C&P ~ 5 Mo. Post-Sep |
| Dorsiflexion/Extension (0-70) | 40⁰ | 45⁰ w/ pain at 0⁰ |
| Palmar Flexion (0-80) | --- | 65⁰ w/ pain at 0⁰ |
| Comment | Painful motion. | Painful motion. |
| §4.71a Rating | 10%\* | 10%\* |

\* Conceding §4.59 (painful motion).

The MEB narrative summary included a history of daily left wrist pain that impaired the CI’s ability to perform activities of daily living. ROM measurements were limited by pain, to include no measured palmar flexion due to pain. An orthopedic consultant reported that left grip strength was roughly half that measured for the right hand. At the VA C&P exam, however, the CI was able to palmar flex to 65⁰ (albeit with pain throughout full ROM), and there was no reported impact on activities of daily living. There was no additional loss of motion with repetitive use. Radiographs showed post-surgical and degenerative changes consistent with the clinical history. The PEB and VA chose different coding options for the condition, but this did not bear on rating. The PEB’s DA Form 199 reflected likely application of the USAPDA pain policy for rating, and its 0% determination was not consistent with §4.71a standards. There is not compensable ROM impairment under the single §4.71a code for limitation of motion at the wrist (5215). Application of §4.59 (painful motion) is required to achieve the minimal compensable rating (10%) under either that code or any analogous coding defaulting to 5003 (degenerative arthritis) criteria, i.e. the 5010 (traumatic arthritis) code. There was no evidence of ankylosis or availability of any alternate codes which would support a rating higher than 10%. After due deliberation, considering all of the evidence, the Board recommends a separation rating of 10% for the left wrist condition. The action officer prefers the 5215 code given the significant, albeit non-compensable, ROM limitations.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were left knee osteoarthritis, hypertension, allergic rhinitis, hyperlipidemia, and nicotine dependence. The left knee condition carried a L2 profile and was mentioned in the commander’s statement, but not specifically implicated as a cause of MOS duty impairment. Evaluation revealed a full ROM, no instability, and minimal degenerative changes on imaging studies. The condition was judged to meet retention standards by the MEB. None of the other 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 a change from the PEB fitness adjudication for any of the stated conditions.

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 the USAPDA pain policy for rating the left wrist and on DoDI 1332.39 for rating depression was operant in this case and the conditions were adjudicated independently of that policy and regulation by the Board. In the matter of the MDD condition, the Board unanimously recommends a rating of 30%, coded 9434 IAW VASRD §4.130. In the matter of the left wrist condition, the Board unanimously recommends a rating of 10%, coded 5215 IAW VASRD §4.71a. In the matter of the PTSD, the Board unanimously recommends no change from the PEB adjudication as not unfitting. In the matter of the left knee osteoarthritis, hypertension, allergic rhinitis, hyperlipidemia, and nicotine dependence 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:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Major Depressive Disorder | 9434 | 30% |
| Surgical Residuals, Left Wrist Fracture | 5215 | 10% |
| **COMBINED** | **40%** |

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

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110322, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

xxxxxxxxxx

President

Physical Disability Board of Review

SFMR-RB

**DEPARTMENT OF THE ARMY**

ARMY REVIEW BOARDS AGENCY

1901 SOUTH **BELL** STREET 2ND FLOOR

ARLINGTON, VA 22202-4508

**05 JAN 2012**

MEMORANDUM FOR Commander, US Army Physical Disability Agency

(TAPD-ZB / , 2900 Crystal Drive, Suite 300, Arlington, VA 22202

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for AR20110024591 (PD201100128)

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 40% 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

40% 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.

SFMR-RB

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for AR2011 0024591 (PD2011 00128)

3. I request that a copy of the corrections and any related correspondence be provided

to the individual concemed, 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 T

Encl

CF:

( ) 000 PDBR

( ) OVA