RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXX BRANCH OF SERVICE: army

CASE NUMBER: PD1100135 SEPARATION DATE: 20060912

BOARD DATE: 20120120

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a National Guard E-4/SPC (92G/Food Service Specialist), medically separated for chronic neck pain. The CI injured his neck during an improvised explosive device (IED) attack while deployed to Iraq in October 2003. He did not respond well to treatment, to include medications and physical therapy, and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent P3/U3/S3 profile and underwent a Medical Evaluation Board (MEB). Cervicalgia, posttraumatic stress disorder (PTSD), non-insulin diabetes mellitus and bilateral shoulder pain were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. The PEB adjudicated the chronic neck pain as the sole unfitting condition, rated 0%, with application of the US Army Physical Disability Agency (USAPDA) pain and Department of Defense Instruction (DoDI) 1332.39. The CI made no appeals, and was medically separated with a 0% combined disability rating.

CI CONTENTION: “Posttraumatic Stress Disorder 70%, Residual R. Shoulder Injury 30%, Tendonitis R. Knee 30%, Cervical Spine Strain 20%. When the Military Released Me, I don’t think they properly took care of all my medical needs, they did not look at all my service connected injuries or illnesses, the VA rated me 100% disabled and Unemployable and I think I should be given the same rating with the military because these things happened to my (sic) while I was defending my country. The Good old U.S.A.”

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20060714** | | | **VA (3 Mo. Pre Separation) – All Effective Date 20060913** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Neck Pain Radiating to the Right Shoulder, Range of Motion Limited by Pain | 5299-5242 | 0% | Cervical Spine Strain | 5237 | 20% | 20061116 |
| Right Shoulder Injury | 5099-5024 | 10%\* | 20061116 |
| PTSD | Not Unfitting | | PTSD | 9411 | 30%\*\* | 20061024 |
| Diabetes Mellitus | Not Unfitting | | Diabetes Mellitus | 7913 | NSC | 20061019 |
| ↓No Additional MEB/PEB Entries↓ | | | Tendonitis Right Knee | 5024-5260 | 10%\*\*\* | 20061116 |
| Scar Left Hand | 7804 | 10% | 20061116 |
| Tinnitus | 6260 | 10% | 20061211 |
| Residuals, Carpal Tunnel Syndrome, status post Release, Right Wrist | 8599-8515 | 0%\*\*\*\* | 20061116 |
| 0% x 2/Not Service Connected x 5 | | |  |
| **Combined: 0%** | | | **Combined: 60%\*\*\*\*\*** | | | |

\*Increased to 30% effective 20081008. \*\*Increased to 100% effective 20080815 due to hospitalization, and then decreased to 70% effective 20081001. The 70% rating was continued after repeat VA C&P examination 20090804. \*\*\* Increased to 30% effective 20081008 and code changed to 5261. \*\*\*\*Increased to 10% effective 20081008 \*\*\*\*\*\*100% effective 20080815 and 90% effective 20081001.

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. 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. The 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. That role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA), operating under a different set of laws (Title 38, United States Code). The Board evaluates DVA evidence proximal to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of DES fitness decisions and rating determinations for disability at the time of separation. The Board also acknowledges the CI’s contention for Service ratings for other conditions documented at the time of separation, and notes that its recommendations in that regard must also comply with the same governance. 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. The VA, however, 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.

PTSD Condition. The CI began mental health treatment in March 2004 after returning from Iraq. He was treated with medications and psychotherapy for adjustment disorder with depressed mood. In January 2005 the CI began seeing a civilian counseling service which diagnosed him with PTSD. By 1 December 2005 his PTSD was deemed severe, with a Global Assessment of Functioning (GAF) of 42 (serious symptoms). By March 2006 his GAF had improved to 50, but his symptoms were interfering with his civilian job as a corrections officer. No psychiatric evaluation was done at the time of the MEB narrative summary (NARSUM). An outpatient mental health evaluation on 20 March 2006, six months prior to separation, is the psychiatric evaluation most proximate to the time of the MEB. At that examination, the CI was married and living with two children from a previous marriage. He was working full time as a prison security officer, but the job was upsetting because of the threat of violence. The CI was irritable and having sleeping problems. On mental status examination (MSE) his mood was depressed and the affect was constricted. Insight was limited. There was no suicidal ideation, delusional or hallucinatory symptoms, speech disturbance, objective cognitive impairment or other abnormalities. The GAF was 50. The CI was given a permanent S3 profile on 28 March 2006 for PTSD, with no carrying or firing weapons. At a VA Compensation and Pension (C&P) examination on 24 October 2006, one month after separation, the CI complained of insomnia, intrusive thoughts, nightmares and flashbacks. He was irritable and complained of memory and attention difficulties. The CI was taking two psychotropic medications which he said gave limited improvement. The CI was working full time for the Department of Corrections and had not missed any work because of his PTSD symptoms. He was married, with three children to include a five week old baby. On mental status examination his mood was dysphoric and the affect was constricted. There was no suicidal ideation, delusional or hallucinatory symptoms, speech disturbance, objective cognitive impairment or other abnormalities. The GAF was 45 (serious symptoms). The examiner diagnosed PTSD with moderate impairment in social and occupational functioning.

The Board directs its attention to its rating recommendations based on the evidence just described. The PEB adjudicated the PTSD condition as not unfitting because “the soldier reports to work and performs within the limits of his shoulder and neck pain limitations….His unfitting condition is related to his shoulder/neck, not his posttraumatic stress disorder.” The Board noted that the commander’s statement does not mention PTSD as interfering with the performance of duties. The Board also noted that the CI was restricted from carrying or firing weapons which is a necessary duty for any soldier. All evidence considered, the Board cannot find enough strength in the PEB position to overcome a good deal of reasonable doubt in the CI’s favor regarding the fitness adjudication for the PTSD condition. The Board, therefore, recommends that it be rated as an additionally unfitting condition.

The Board next addressed if the tenant of §4.129 (Mental disorders due to traumatic stress) was applicable. 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%. The permanent rating should be based on the CI’s functioning six months following separation. The Board noted that the CI was wounded in combat and had received a Purple Heart and concluded therefore that the application of §4.129 is appropriate to this case.

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 separation, and therefore the minimum 50% TDRL rating (as explained above) is applicable. As regards the permanent rating recommendation, all members agreed that the §4.130 threshold for a 50% rating was not approached. The Board’s deliberation settled therefore on arguments for a 30% versus a 10% permanent rating recommendation. Social and occupational impairment consistent with a 30% evaluation “occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks…” could be surmised from some of the documented symptoms at the time of the C&P examination including irritability, chronic sleep impairment, social withdrawal, and mild memory and concentration problems. There was no anxiety, panic attacks, or suspiciousness. At the time of the October 2006 C&P examination, although there were reported problems with irritability in social functioning, intact friendship and family relations were indicated. The CI was fully employed though he was anxious about the possible violence attendant to his job as a corrections officer. An argument for a 10% permanent rating can be sustained by the §4.130 description for that rating, i.e., “occupational and social impairment due to mild or transient symptoms which decrease work efficiency… only during periods of significant stress, or; symptoms controlled by continuous medication.” The CI was taking his psychiatric medication at the time of the October 2006 C&P examination and was able to function pretty well as evidenced by his growing family and full employment. All of the evidence, bolstering and reducing support for the higher rating, was debated. As many conflicting opinions as possible were resolved in favor of the CI when it was reasonable to do so. After due deliberation, considering the totality of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board unanimously recommends a permanent PTSD disability rating of 10%, coded 9411.

Chronic Neck Pain Condition: The CI developed neck pain after an improvised explosive device (IED) detonated near his truck on 14 October 2003. He was treated for burns to his hands. Since the explosion, the CI has had intermittent right sided neck pain involving the scapular and supraclavicular areas. An MRI in February 2006 found a C5-6 herniated disc, mildly asymmetrical to the left, with minimal impingement and mild bilateral foraminal narrowing. A neurology evaluation in March 2006 found painful neck movements and some subjective right shoulder weakness in abduction. An electromyogram (EMG) and nerve conduction study was normal, without evidence of cervical radiculopathy. The CI was given a permanent P3/U3/S3 profile on 28 March 2006. At the MEB NARSUM evaluation on 16 May 2006, four months prior to separation, there was right sided neck tenderness, some decreased range of motion (ROM) in his shoulder, and questionable right trapezius and wrist extensor weakness. An addendum to the MEB on 16 June 2006 found significantly limited neck motion, as in the chart below. The IPEB found the CI unfit at 0% for chronic neck pain radiating to the right shoulder.

At the VA C&P on 16 November 2006, two months after separation, the CI complained of daily neck pain and spasm, but no incapacitating episodes requiring prescribed bed rest. The CI was employed as a full-time corrections officer but was limited in his assignments. The examiner noted neck tenderness with muscle spasm and limited cervical motion, as per the chart below. Neurological examination was normal with full strength, intact sensation, and normal reflexes. Radiographs showed some straightening of the cervical spine but no other abnormalities. There was no evidence of a peripheral neuropathy and signs of intervertebral disc syndrome were not present. In the treatment record, two goniometric ROM evaluations were in evidence, which the Board weighed in arriving at its rating recommendation. These two exams are summarized in the chart below.

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| --- | --- | --- |
| Goniometric ROM – Cervical | MEB ~ 5 Mo. Pre-Sep | VA C&P ~ 2 Mo. After-Sep |
| Flex (0-45) | 30⁰ | 20⁰ |
| COMBINED (340) | 105⁰ | 85⁰ |
| Comment | >15⁰ But ≤30⁰ | >15⁰ But ≤30⁰  Muscle spasm resulting in abnormal spinal contour. |
| §4.71a Rating | 20% | 20% |

The Board carefully reviewed all evidentiary information available. The PEB’s DA Form 199 reflected application of the US Army Physical Disability Agency (USAPDA) pain policy for rating, and its 0% determination was inconsistent with §4.71a standards. The Board noted that both the MEB and VA C&P examinations fit the VASRD criteria for a 20% rating based on forward flexion and combined cervical range of motion. The VA C&P examination also meets the 20% rating based on muscle spasm severe enough to result in an abnormal spinal contour. There was no evidence that the CI was having incapacitating pain episodes that would warrant a higher rating under the code 5243 (intervertebral disc syndrome). There was no evidence of ratable peripheral nerve impairment in this case. After due deliberation, considering all of the evidence, the Board recommends a separation rating of 20% for the chronic neck pain condition. The record available for review does not include any evidence of improvement of this condition after separation. Therefore, the Board recommends 20% as the permanent disability rating for this condition.

The CI also complained of pain radiating down into his right shoulder area and altered sensation in his right arm. However, examinations consistently documented normal sensory examinations with normal deep tendon reflexes. There was questionable right trapezius and wrist extensor weakness and an MRI showed minimal impingement and mild bilateral foraminal narrowing. However, he also had a normal EMG in March 2006. Therefore there is insufficient evidence to support a separate rating for radiculopathy. 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 possible motor impairment, if present, was intermittent and relatively minor and cannot be linked to significant physical impairment. Since no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment.

Right Shoulder Pain Condition. The CI developed right shoulder pain after the October 2003 IED explosion. The pain occurred with certain movements and heavy lifting. Radiographs showed some acromioclavicular joint arthritis. In spite of medication and physical therapy, the pain continued. An MRI in June 2004 showed a lipoma, shoulder impingement. a partial thickness rotator cuff tear, and a possible labral tear. In September 2004 he underwent arthroscopy of the right shoulder with subacromial decompression and distal clavicle excision. He continued to have pain post-operatively that improved somewhat with physical therapy. At the MEB examination, four months prior to separation, the CI complained of intermittent right shoulder pain in the trapezius muscle that was interfering with work. He had pain in the trapezius muscle, and limited right shoulder motion, per the chart below. At the C&P examination, two months after separation, the CI complained of constant shoulder pain and stiffness, worse with lifting activities. Exam showed no laxity. Impingement tests were negative. ROM was limited, as per the chart below. Radiographs were consistent with prior surgery for rotator cuff impingement and acromioclavicular joint arthritis. In the treatment record, two goniometric ROM evaluations were in evidence, which the Board weighed in arriving at its rating recommendation. These two exams are summarized in the chart below.

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| --- | --- | --- |
| Goniometric ROM – Right Shoulder | MEB ~ 4 Mo. Pre-Sep | VA C&P ~ 2 Mo. After-Sep |
| Flexion (0-180) | 125⁰ | 90° active with pain, 96⁰ passive |
| Abduction (0-180) | 85⁰ | 90° active with pain, 98⁰ passive |
| Comment | Above shoulder level | Above shoulder level |
| §4.71a Rating | 10% painful motion | 10% painful motion |

The Board carefully reviewed all evidentiary information available. The PEB combined the chronic neck pain and right shoulder pain as a single unfitting condition, coded analogously to 5242 (degenerative arthritis of the spine) and rated 0%. The Board first evaluated the PEB coding approach of combining the conditions under the single analogous 5242 code. The PEB may have relied on AR 635.40 (B.24 f.) or invoked the USAPDA pain policy for not applying separately compensable VASRD codes. In either case the Board must apply separate codes and ratings in its recommendation, since compensable ratings for each condition are achieved IAW VASRD §4.71a. This is consistent as well with the VA rating decision. The Board must first consider the issue of a fitness determination for the right shoulder pain condition, having de-coupled it from the rating for the unfitting chronic neck pain pathology. The PEB inferred that it was unfitting by including it as part of the unfitting condition. In analyzing the intrinsic impairment for appropriately coding and rating the neck pain condition, the Board has a solid basis for arguing that the right shoulder pain component was indeed separately unfitting. While not independently mentioned on the permanent profile, the CI’s restriction of lifting only 10 pounds certainly reflects limitations caused by his right shoulder condition. The commander’s statement clearly mentions the right shoulder condition as contributing to the CI’s inability to perform the duties of a soldier in his MOS. The Board unanimously agreed that the right shoulder pain should be considered as a separately unfitting condition. In reaching its rating determination, the Board noted that the motion documented in both the VA C&P and MEB examinations failed to reach the VASRD criteria for a rating based on VA Code 5201 (limitation of arm motion), since the CI was able to lift the arm above shoulder level.

The Board explored all shoulder joint coding options that would achieve a higher rating; but, there was no clinical and/or radiologic evidence in the examinations done proximate to separation that suggested ankylosis, loss of the humeral head, nonunion, malunion, fibrous union, deformity, nonunion or dislocation of the scapula, or recurrent dislocations of the humerus that would have justified any code with higher rating potential. After due deliberation, the Board agreed that the preponderance of the evidence with regard to the functional impairment of the right shoulder pain favors its recommendation as an additionally unfitting condition for separation rating, appropriately coded 5099-5003. Considering the totality of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board unanimously recommends a rating of 10% for painful motion at the time of separation. However, the Board majority recommends a permanent separation rating of 0% based on the limited amount of functional impairment due to pain. The CI did have pain but it was mild and intermittent and was relieved with the use of medication. As the joint was not actually painful for a majority of the time, VASRD §4.59 painful motion does not apply.

Other PEB Conditions. The other condition forwarded by the MEB and adjudicated as not unfitting by the PEB was non-insulin dependent diabetes mellitus. This condition was profiled and implicated in the commander’s statement. However, in the NARSUM diabetes addendum, the examiner found the diabetes to be well controlled on oral medication and no evidence of diabetic complications. The examiner’s only recommended restriction was for assignment to locations with access to a diabetic diet and oral medications, and opined “It is reasonable to retain him in the Army National Guard.” The commander’s concern about the CI’s diabetes was specifically due to the need to eat military rations during operations when a diabetic diet would not be available. The diabetes was reviewed by the action officer and considered by the Board. There was no indication from the record that this condition significantly interfered with satisfactory performance of MOS duty requirements. The Board noted the PEB historical precedence that assignment limitations alone are not sufficient to render a condition unfitting. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the non-insulin dependent diabetes mellitus condition.

Remaining Conditions. Other conditions identified in the DES file were right knee pain, hypertension, and tinnitus. None of these conditions were clinically active during the MEB period, none carried attached profiles, were the basis for limited duty 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 scar, left hand and several other non-acute 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 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 the USAPDA pain policy for rating the chronic neck pain condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the PTSD condition, the Board unanimously recommends an initial TDRL rating of 50% in retroactive compliance with VASRD §4.129 as DOD directed; and a 10% permanent rating at six months IAW VASRD §4.130. In the matter of the chronic neck pain with radiation into the right shoulder condition, the Board unanimously recommends that it be rated for two separate unfitting conditions as follows: chronic neck pain coded 5299-5242 and rated 20% during the initial TDRL period and 20% permanent rating at six months; and, right shoulder pain, coded 5099-5003. The Board unanimously recommends the right shoulder pain be rated 10% during the initial TDRL period and by a vote of 2:1 recommends a 0% permanent rating at six months; both IAW VASRD §4.71a. The single voter for dissent (who recommended a 10% permanent rating at six months) did not elect to submit a minority opinion. In the matter of the non-insulin dependent diabetes mellitus, right knee pain, hypertension and tinnitus conditions 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: TDRL at 70% for six months following CI’s prior medical separation (PTSD at minimum of 50% IAW §4.129 and DoD direction) and then a permanent combined 30% disability retirement as below.

|  |  |  |  |
| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Posttraumatic Stress Disorder | 9411 | 50% | 10% |
| Chronic Neck Pain | 5299-5242 | 20% | 20% |
| Right Shoulder Pain | 5099-5003 | 10% | 0% |
| **COMBINED** | **60%** | **30%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110324, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

President

Physical Disability Board of Review

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 XXXXXXXXXXXXXXXXXXXXXXX (PD201100135)

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 Reserve retirement and then following this six month period recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 30%.

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 temporary disability effective the date of the original medical separation for disability with Reserve retirement.

b. Providing orders showing that the individual was retired with permanent disability effective the day following the six month TDRL period.

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 then payment of permanent disability retired pay at 30% effective the day following the constructive six month TDRL period.

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:

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA