RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1100245 SEPARATION DATE: 20060316

BOARD DATE: 20120126

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a Reserve member, SSG/E-6 (92Y, Unit Supply Specialist), medically separated for cognitive disorder secondary to Traumatic Brain Injury (TBI), chronic low back pain and chronic left shoulder pain*.* The CI suffered a concussion and injuries to his back and left shoulder in a 2004 vehicular accident, while on his way to the airport returning from leave during a deployment tour to Kuwait. Although cleared to return to theater, he was evacuated to Germany for evaluation soon after arriving in Kuwait. He did not respond adequately to treatment of these injuries to fully perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent U3/L3/S3 profile and referred for a Medical Evaluation Board (MEB). Cognitive disorder, chronic low back pain and chronic left shoulder pain were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable conditions IAW AR 40-501. Seven other conditions, as identified in the rating chart below, were forwarded by the MEB as medically acceptable conditions. The Informal PEB (FPEB) adjudicated the cognitive disorder and chronic low back pain conditions as unfitting, rated 10% each IAW the Veterans Administration Schedule for Rating Disabilities (VASRD); and adjudicated the chronic left shoulder pain condition as unfitting, rated 0%, with application of the US Army Physical Disability Agency (USAPDA) pain policy. A Formal PEB (FPEB) affirmed the IPEB findings, and the CI was medically separated with a 20% combined disability rating.

CI CONTENTION: The CI states: “I believe that the decision made over my discharge by the PBR was Unfair and Inaccurate. … Although I properly presented the following conditions to the PEB for their evaluation and consideration before my discharge, the PEB did not even care mention them”. He lists PTSD [post-traumatic stress disorder], cervical strain, left knee condition, and a right knee condition. He also contends that the PTSD condition should be deemed a "combat-related injury". He additionally lists all of his VA conditions and ratings as per the rating chart below. A contention for their inclusion in the separation rating is therefore implied.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service FPEB – Dated 20060123** | | | **VA (2 Mo. After Separation) – All Effective 20060317** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Cognitive Disorder … TBI | 8045-9304 | 10% | Dementia Due to Head Trauma | 9304\* | 50% | 20060525 |
| Adjustment Disorder | Not Unfitting | |
| Low Back Pain | 5243 | 10% | Herniated Nucleus Pulposus | 5295 | 10% | VARD\*\* |
| Left Shoulder Pain | 5099-5003 | 0% | Left Shoulder Strain | 5299-5203 | 0% | 20061130 |
| Bilateral Knee Pain | Not Unfitting | | Left Knee Patellofemoral… | 5257 | 10% | VARD\*\* |
| Right Knee Pain | 5260 | 10% | 20060525 |
| Neck Pain | Not Unfitting | | Cervical Strain | 5237 | 10% | 20060522 |
| Headache | Not Unfitting | | Post Traumatic Headaches | 8199-8100 | 0% | 20061130 |
| Left Wrist Tendonitis | Not Unfitting | | Left Wrist Ganglion Cyst | 5299-5020 | 0% | 20061130 |
| Bilateral Foot Pain | Not Unfitting | | Bilateral Pes Planus | 5276 | 0% | 20061130 |
| Vertigo | Not Unfitting | | No VA Entry | | | |
| No Additional MEB/PEB Entries | | | 0% x 1 / Not Service Connected x 5 | | | 20061130 |
| **Combined: 20%** | | | **Combined: 70%** | | | |

\*Code later changed to 8045-9411. \*\*Awarded from a VA Rating Decision (VARD) following earlier active duty tour (2002).

ANALYSIS SUMMARY: We note that the applicant asks the Board for specific correction of records regarding designating PTSD as a combat-related condition. By law the Board authority is limited to making recommendation on correcting disability determinations. The actual correction of records and consequential entitlement determinations is the responsibility of the applicable Secretary. The applicant's request will of course remain with the application as it is processed. The Board will review all evidence at hand to assess the fairness of PEB rating determinations, compared to VASRD standards, based on severity at the time of separation.

Cognitive Disorder Due to TBI Condition. The Board’s rating recommendation for the cognitive disorder condition in this case - coded as 8045, traumatic brain injury (TBI), and rated analogously to 9304 (dementia) - is subject to the following policy (established by precedent and prior legal opinion). As an implied extension of the DoDI 6040.44 and NDAA 2008 mandates, the Board will comply with applicable VA disability rating policy changes issued via “FAST” or Training Letters effective at the time of separation. The VA Training Letter, TL 06-03 (dated 13 February 2006), specifically addressed the complexity of TBI and allowed for rating under alternate (more favorable) codes. Although TL 06-03 has provided sanction for higher ratings with prostrating headache as the prominent feature of TBI (not applicable to this case), it offers no provisions applicable to this case for specific relief from the rating restrictions contained in §4.124a, namely:

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. 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.

After re-deployment the CI underwent extensive evaluations for brain injury. These included advanced imaging, neuropsychological testing, and neurological and neuropsychiatric assessments. The conclusion was "while it is likely that the patient had experienced a mild traumatic brain injury, the nature and extent of his deficits cannot be quantified at this time due to poor effort on testing.” Over the ensuing months, he reported significant improvement in his symptoms; and, was enrolled in a local university where he attended classes daily, majoring in communications. On mental status exam the MEB psychiatrist noted that the CI had a full affect with predominantly euthymic mood, although his behavior showed marked anxiety that affected his concentration and response time to questions. The examiner diagnosed a mild cognitive disorder augmented by symptoms of anxiety, associated with ‘moderate’ military and ‘slight’ social/industrial impairment; and, additionally diagnosed adjustment disorder/anxiety without military or social/industrial impairment. One week later a clinical psychologist reported results of a psychological assessment that diagnosed PTSD and Major Depressive Disorder “based upon psychological test results without clinical interview.” These diagnoses did not appear on the MEB’s DA Form 3947, and were subsequently challenged by peers in the record. At a VA Compensation & Pension (C&P) exam for PTSD two months after separation, the CI presented with a dysphoric mood and tearful affect. He was alert and oriented, cooperative, and showed normal thought processes. Three days later a C&P examiner for brain injury reported the CI as friendly and cooperative, in no distress, with normal speech and mental status exam. The neurologic exam was also normal. The PEB and VA chose different coding options for the condition. The PEB’s DA Form 199 reflects application of the provisions of VASRD §4.124a in effect at the time of separation. The VA rating of 50% under the 9304 code was not compliant with the VASRD in effect at the time of separation (which must be applied to Board recommendations IAW DoDI 6040.44); although, the VA’s later amendment of the diagnosis and coding to include PTSD brought the rating into VASRD compliance. The Board notes that, although the psychological assessment suggesting a diagnosis of PTSD was conducted after the IPEB decision, the results of this testing were available to the FPEB. There is no indication from available evidence, however, that the diagnosis of PTSD was ever validated by a psychiatrist prior to separation. Moreover, the adjustment disorder with anxiety and depressed mood condition was judged to be associated with no military impairment (medically acceptable). All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s adjudication for the cognitive disorder condition.

Low Back Pain. The CI had a history of back pain dating to 1997, associated with a strain injury in Korea. The orthopedic addendum to the narrative summary (NARSUM) recorded a history of low back pain since the automobile accident, which had not responded to conservative therapy; and, noted that the CI was using a cane for ambulation. There were two goniometric range-of-motion (ROM) evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation. Both of these exams are summarized in the chart below.

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| --- | --- | --- |
| Thoracolumbar ROM | MEB (9 Mo. Pre-Sep) | VA C&P (2 Mo. Post-Sep) |
| Flexion (90⁰ Normal) | 90⁰ | 75⁰ |
| Combined (240⁰) | 220⁰ | 220⁰ |
| Comments | Tenderness; spasm. | No spasm; negative DeLuca. |
| §4.71a Rating | 10% | 10% |

The MEB exam showed near normal ROM with normal motor, sensory, and reflex findings; intact toe and heel walk, negative straight leg raise test, and no mention of abnormal spinal contour. Imaging demonstrated a “small central posterior protrusion and associated annular tear” at L4/5. The VA C&P exam two months after separation recorded a similar ROM with minimal decrease in forward flexion. The exam was negative for spasm, tenderness, or additional loss of ROM with repetitions. The PEB and VA chose different coding options for the condition (due to the VA’s continuation of a rating granted under a prior VASRD coding and rating scheme). The PEB’s DA Form 199 reflected language consistent with §4.71a standards. There was no evidence of ratable peripheral nerve impairment or documentation of incapacitating episodes which would provide for additional or higher rating. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s adjudication of the back pain condition.

Left Shoulder Condition. The orthopedic addendum noted that the CI had been diagnosed with a soft tissue contusion of the left shoulder as a consequence of the automobile accident. The CI complained of pain with overhead activity, but had not had any therapy for the shoulder condition. Imaging studies showed no rotator cuff injury, no biceps injury, but a small amount of degenerative joint disease at the left AC joint. The shoulder condition was added to the CI’s permanent profile during the MEB period. There were two range-of-motion (ROM) evaluations in evidence which the Board weighed in arriving at its rating recommendation. Both of these exams are summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Left Shoulder ROM | MEB (9 Mo. Pre-Sep) | VA C&P (8 Mo. Post-Sep) |
| Flexion (180⁰ Normal) | 90⁰ | 180⁰ |
| Abduction (180⁰) | 90⁰ | 180⁰ |
| Comment | ROM limited by pain. | Tenderness; DeLuca negative. |
| §4.71a Rating | 20% | 0% |

The MEB findings included ROM that “is limited by pain to forward flexion 90 degrees, abduction to 90 degrees at the shoulder. However passively he has full range of motion and he describes the pain as anterior over his acromioclavicular (AC) joint on the left side.” The exam also documented full strength in all rotator cuff muscles and biceps. A Physical Medicine clinic note dated two months prior to the MEB exam recorded normal movement of all extremities, tenderness of the rhomboid muscles, and an otherwise normal shoulder exam. An earlier Physical Medicine note (11 months pre-separation) similarly documented normal ROM of the left shoulder. There is otherwise an absence of outpatient entries during the MEB process, indicating that the shoulder condition was either not a clinically acute problem or was sidelined by other conditions. At the time of the VA C&P exam there was no likewise no evidence of interim or active treatment; and, it was stated, “At the time of pain he can function without medication. He states his condition does not cause incapacitation.” The VA examiner recorded a normal ROM for both shoulders without painful motion or loss of ROM with repetitions. VA radiographs were interpreted as normal. The diagnosis was left shoulder strain.

The Board directed its attention to its rating recommendation for the left shoulder condition based on the evidence just presented. It is obvious that there is a clear disparity between the MEB and VA examinations, with very significant implications regarding the Board's rating recommendation (which must discard the PEB’s application of the USAPDA pain policy). The Board thus carefully deliberated its probative value assignment to these conflicting evaluations. Both examinations are somewhat remote from the separation date, although the VA’s C&P exam was performed a month more proximate. The Board also notes that there were some questions regarding the compliance of the MEB examiner with VASRD §4.46 (accurate measurement), since the recorded ROMs were derived solely from the pain threshold and passive ROM was normal; and, there was no stated evidence that a goniometer was used. There were no such questions pertinent to the C&P evaluation. There was a paucity of corroborating evidence, although the two treatment notes cited above from the Service records were consistent with the normal ROMs evidenced by the C&P examiner. The Action Officer further opined that the minimal pathology in evidence and the mechanism of injury (contusion) were difficult to reconcile with the significantly restricted ROM reported by the MEB examiner. Based on all of these rationales, and no convincing argument for assigning preponderant probative value to the MEB examination, all members agreed that the Board’s rating recommendation should rest predominantly on the VA and service outpatient evidence. A 10% minimal compensable rating premised on VASRD §4.59 (painful motion) or §4.40 (functional loss) was entertained, but all members agreed that these pathways were supportable only by the MEB examination; and, could not be ‘borrowed’ for application to the probative VA evaluation. There was no clinical and/or radiologic evidence 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 alternate shoulder code with higher rating potential. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board cannot find adequate support for recommending a change from the PEB’s adjudication of the left shoulder condition (albeit without concordance with the PEB’s application of the USAPDA pain policy).

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were bilateral foot pain, vertigo, headache, bilateral knee pain, adjustment disorder, neck pain and left wrist pain. None of these 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 recharacterization of the PEB fitness adjudication for any of the stated conditions.

Other Contended Conditions. The CI’s application asserts that a compensable rating should be considered for PTSD. This condition was reviewed by the Action Officer and considered by the Board. As noted above, this condition was not formally diagnosed prior to separation; nor were there any profile restrictions attributable to PTSD (e.g., the CI was not restricted from carrying and firing his assigned weapon); nor were symptoms of PTSD implicated in the commander’s statement as impairing MOS duty. There was no evidence for concluding that this condition interfered with duty performance to a degree that could be argued as unfitting. The Board determined therefore that this condition was not subject to Service disability rating.

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 the USAPDA pain policy for rating the left shoulder was operant in this case and the condition was adjudicated independently of that policy by the Board. Also as discussed above, some Board recommendations in this case are IAW application of TL 06-03 FEB 2006 to rating under VASRD code 8045, §4.124a, prior to the VASRD revision for TBI in 2008. In the matter of the cognitive disorder and IAW VASRD §4.124a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the lumbar spine condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended PTSD condition, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation. In the matter of the bilateral foot pain, vertigo, headache, bilateral knee pain, adjustment disorder, neck pain and left wrist pain 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 therefore recommends that there be no recharacterization of the CI’s disability and separation determination:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Cognitive Disorder Secondary to Traumatic Brain Injury | 8045-9403 | 10% |
| Chronic Low Back Pain | 5243 | 10% |
| Chronic Left Shoulder Pain | 5099-5003 | 0% |
| **COMBINED** | **20%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110330, 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

I have reviewed the enclosed Department of Defense Physical Disability Board of Review (DoD PDBR) recommendation and record of proceedings pertaining to the subject individual. Under the authority of Title 10, United States Code, section 1554a, I accept the Board’s recommendation and hereby deny the individual’s application.

This decision is final. The individual concerned, counsel (if any), and any Members of Congress who have shown interest in this application have been notified of this decision by mail.

BY ORDER OF THE SECRETARY OF THE ARMY:

Encl

Deputy Assistant Secretary

(Army Review Boards)