RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100291 SEPARATION DATE: 20041216

BOARD DATE: 20120222

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Army SPC/E-4 (63W/wheeled vehicle repairer), medically separated for major depressive disorder (MDD) with dysthymia. Despite appropriate therapy he did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS). The CI was issued a permanent S3 profile restricting him from carrying and firing a weapon and underwent a Medical Evaluation Board (MEB). Dysthymia/chronic depression was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions appeared on the MEB’s submission. Other conditions included in the Disability Evaluation System (DES) packet will be discussed below. The PEB adjudicated the CI’s condition as MDD with dysthymia, unfitting, rated 10%, with application of Veterans’ Administration (VA) Schedule for Rating Disabilities (VASRD) and DoDI 1332.39. The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: “Since being discharged in December 2004, I have had continuous care and treatment with the VA. During this time my VA disability rating has been increased to a combined rating of 60% due to re-evaluation. I have been prescribed numerous anti depression medication with not much success either to it not working or side effects. I am still trying to find ways to cope with everyday life and find it difficult.”

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20041115** | | | **VA (9 Mo. After Separation) – All Effective Date 20041217** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Major Depressive Disorder with Dysthymia | 9434 | 10% | Post Traumatic Stress Disorder with Panic Disorder | 9411 | 30%\* | 20050422 |
| ↓No Additional MEB/PEB Entries↓ | | | Tinnitus | 6260 | 10% | 20050425 |
| 0% x 3/Not Service Connected x 6 | | | 20050504 |
| **Combined: 10%** | | | **Combined: 40%** | | | |

\*Previous 9412 panic disorder with associated depression rated at 10% from 20030102 to 20030225 after deployment to Iraq rating changed to 9411 and increased to 30%, VA rating based on exam most proximate to date of permanent separation. The rating was later increased to 50% effective 20100503.

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 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 VA evidence proximal to separation in arriving at its recommendations; and, DoDI 6040.44 defines a 12-month interval for special consideration of after separation evidence. The Board’s authority as defined in DoDI 6040.44, 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.

Mental Health Condition. Neither the PEB nor the VA elected to apply VASRD §4.129, with its minimum rating and stipulation for a follow-up evaluation within six months, to the CI’s unfitting mental health condition. The first question that came before the Board is whether this 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.” While there was an historical account of an IED blast that was not personally threatening, in both the narrative summary (NARSUM) and the VA Compensation and Pension (C&P) exam, there were no other service treatment records (STRs), administrative records, awards, to corroborate this historical account. Also, the worsening of the CI’s mental health condition after deployment could not be conclusively linked to this event. After considerable deliberation, a Board majority concluded the record available for review did not contain sufficient evidence to determine the CI’s mental health condition developed as a result of a highly stressful event. The Board concluded therefore that VASRD §4.129 is not applicable to this case.

The CI first developed symptoms of depression in January 2002. He was treated with medication and counseling until his honorable discharge in January 2003. He filed a claim at the VA and was awarded a 10% rating for 9412 panic disorder with associated depression. The CI reenlisted in February 2003 and did not disclose his history of mental illness or disability claim and compensation on his enlistment history and physical dated 29 January 2003. He subsequently deployed to Iraq from February 2003 through April 2004. He had discontinued his medication and did not seek mental health treatment until he returned from Iraq in April 2004. After his return he sought mental health treatment and maximized care with counseling and medications with a gradual improvement in his symptoms. However, his treating psychiatrist diagnosed dysthymic disorder and determined that the CI could no longer function in a combat environment. The CI was assigned a permanent S3 profile and a medical evaluation board was initiated.

At the MEB NARSUM evaluation, three months prior to separation, the examiner documented a mental health history which included a resurgence of depressive symptoms while in Iraq, including irritability, tired, angry, difficulty concentrating, poor sleep and frequent episodes of anxiety. He also stated he had violent nightmares, isolated himself, and avoided driving due to fears of IED’s. “In Iraq an IED blew up a few yards in front of his vehicle and killed a nearby Iraqi who was driving a POV.” He was shocked by the event yet he did not feel personally threatened. “One symptom he could not shake was an intense and nearly paralyzing fear of returning to Iraq.” He still complained of moderate feelings of depression most of the time. His family life was going well. The CI was being treated with two medications and counseling with some improvement in his depression symptoms. The mental status examination (MSE) documented sad facial expression, slow, soft speech which was coherent, depressed mood, mood-congruent affect, and normal thought process without suicidal or homicidal intent. The examining psychiatrist diagnosed dysthymia, chronic depression, treated and improved, and assigned a Global Assessment of Function (GAF) of 60 (moderate symptoms). In November 2004 the PEB deemed dysthymia as rarely unfitting and requested a clarification of the diagnosis. The examining psychiatrist promptly responded and clarified the CI’s diagnoses as; 1.) Major depression, single episode, with marked impairment for military duty and definite impairment for social and industrial adaptability and 2). Dysthymia (chronic depression), treated and improved, with marked impairment for military duty and slight impairment for social and industrial adaptability. Subsequently, the IPEB, IAW DoDI 1332.39, found the CI unfit at 10% due to major depressive disorder with dysthymia, noting that “Soldier’s impairment for social and industrial adaptability is more accurately described as mild, not definite.”

At the VA C&P evaluation, five months after separation, the examiner noted that he had previously diagnosed the CI with a mild panic disorder in November 2002, and the CI received a 10% rating for this condition (VA code 9412). The CI’s current symptoms included nightmares, flashbacks associated with Arab-Americans or loud noises, sleep impairment, intrusive recollections, marked hypervigilance, social isolation, difficulty driving, difficulty concentrating, mild irritability, mild anger and anxiety with panic attacks in public places. There was no history of hospitalizations, suicide attempts, substance abuse or legal difficulties. He was not taking medications but desired to resume medications and psychotherapy. He was married for the second time, with two children from his first marriage and a step-child from his second. He was living with his in-laws and his family relationships were described as good. The CI was working full time in a warehouse. The CI reported some trouble with focusing and concentration on his work-related tasks and at times his supervisors have to remind him to "get back to work.”

On mental status examination his mood was anxious and the affect was constricted. Speech was underproductive and shaky. There was no suicidal ideation, delusional or hallucinatory symptoms, objective cognitive impairment or other abnormalities. The examiner did note psychic numbing, marked hypervigilance, an exaggerated startle response, and loss of pleasure in daily activities. Criterion A stressors were documented relating to the CI’s time in Iraq, to include improvised explosive device (IED), small arms and mortar attacks. The examiner diagnosed post-traumatic stress disorder of recent onset, moderate and panic disorder, mild and assigned a GAF of 58. The examiner stated the symptoms supporting the diagnosis of posttraumatic stress disorder (PTSD) was clearly and unmistakably noted in the CI’s service treatment records and he could not determine why PTSD was not diagnosed in service. The examiner further opined his current level of personal and social adjustment was moderately impaired and his work performance was mildly impaired and opined the prognosis to be fair to good with treatment. The examiner concluded that “what used to be a simple and mild panic disorder has now become a full-fledged moderate post-traumatic stress disorder due to recent combat experiences.” The VARD of 13 September 2005 assigned a 30% rating for PTSD with panic disorder, VA code 9411 (increased from 10% for panic disorder with associated depression, VA code 9412). This rating was later increased to 50% effective 3 May 2010 (more than five years later) based on worsening symptoms and occupational impairment over time.

The Board directs its attention to its rating recommendations based on the evidence just described. There was no in-service diagnosis of PTSD and the VA made the diagnosis of PTSD five months after separation; however, there was not medical certainty of any clear error in PEB diagnosis and all mental health diagnoses are rated IAW the same criteria of VASRD §4.130. The Board adjudged that the PEB diagnosis of MDD with dysthymia and coding using 9434 was considered administratively final. As regards to the permanent rating recommendation, all members agreed that the §4.130 threshold for a 50% rating was not approached. The deliberation settled on arguments for a 10% vs. a 30% permanent rating recommendation. The Board noted the CI honorably separated in 2003 and was rated 10% by the VA for panic disorder and reenlisted one month later without disclosing his mental health condition. While there is speculation as to why the CI did not fully disclose his mental health rating, he reenlisted at the height of the Iraq conflict with a high likelihood of deploying. He was not on medication upon reenlistment nor did he seek treatment while he was in theater. He completed his entire tour and did not fully manifest his worsening mental health symptoms until his NARSUM examination five months after redeployment, a typical elapse of time for manifesting worsening mental health disease. The Board considered a deduction for a mental health condition that existed prior to service (reenlistment) but agreed this would be a 0% deduction which would not impact the final rating recommendation. The Board noted worsening of the mental health disease after deployment which resulted in a weapon restriction profile and was corroborated by the VA examiner who had examined the CI both before and after deployment. The GAF assignments of 60 and 58, symptom description, and clinical course argue against a characterization of the severity as mild or transient, and it is clear that symptoms were not completely controlled on medication. The evidence does not provide a correlation of acuity with degree of stress, and that element of the 10% description is thus not relevant. The 30% description (“occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks”) is a better fit with the occupational functioning in evidence since decreased efficiency can be assumed even though reliability and productivity were not affected. While his occupational impairment was characterized as mild, he took a position below his capabilities, he demonstrated a constricted affect and had moderate mental health symptoms and therefore fit the 30% descriptor. After due deliberation, considering the totality of the evidence and mindful of VASRD §4.3 (reasonable doubt), a Board majority recommends a permanent MDD disability rating of 30% in this case.

Remaining Conditions. Other conditions identified in the DES file were genital warts, dog bite left hand, and recurrent back pain. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically active during the MEB period, none carried attached 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 tinnitus, left index and middle finger scars, left and right knee pain, left ankle pain, right ear hearing loss, 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 DoDI 1332.39 for rating the mental health condition was operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the MDD, the Board by a vote of 2:1 recommends 30% permanent rating IAW VASRD §4.130. The single voter for dissent (who recommended adopting the PEB rating 9434 at 10 %) did not elect to submit a minority opinion. In the matter of the genital warts, dog bite left hand and recurrent back 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 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.

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Major Depressive Disorder with Dysthymia | 9434 | 30% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110418, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

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President

Physical Disability Board of Review

SFMR-RB

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 XXXXXXXXXXXXXXXXXXX, AR20120004079 (PD201100291)

1. 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 reject the Board’s recommendation and hereby deny the individual’s application. There is insufficient justification to support the Board’s recommendation in accordance with Army and Department of Defense regulations. According to the Medical Evaluation Board (MEB), the applicant had a mental health history and experienced a resurgence of symptoms while in Iraq. In spite of those symptoms he performed well in Iraq and although he saw some graphic exhibitions of war, he “did not feel personally threatened” and successfully completed his deployment. At the time of his MEB he did have an “intense and nearly paralyzing fear of returning to Iraq.” Although he continued to have some symptoms of depression, his social and industrial adaptability rating was determined to be 10% disabling. At the applicant’s Veterans Affairs (VA) exam he was no longer taking medications, was fully employed and married without family problems. The PDBR opined that a 30% rating for Major Depression with Dysthymia is more appropriate than 10%. They noted that although his occupational reliability and productivity were not affected, “decreased efficiency can be assumed.” This assumption does not overcome the findings of the PEB.

2. 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 XXXXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA