RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXX. BRANCH OF SERVICE: Army

CASE NUMBER: PD1100334 TDRL EXIT: 20060206

BOARD DATE: 20120224 TDRL ENTRY: 20040515

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty member, SPC/E-4 (31U, Signal Support System Specialist), medically separated for posttraumatic stress disorder (PTSD) and mechanical low back pain (LBP) without radiculopathy. He was diagnosed with PTSD consequent to an Iraq deployment from February to June 2003. Criterion A combat stressors were documented and the diagnostic and statistical manual of mental disorders, fourth edition (DSM-IV) criteria for an axis I diagnosis of PTSD were met. His treatment included medications and outpatient psychotherapy, without significant improvement. The CI’s LBP with occasional left leg radicular symptoms began in August 2003 without significant trauma. MRI revealed a mild disc bulge at L4-5 without significant spinal or neuroforaminal stenosis. His treatment included medications, physical therapy, and chiropractic manipulation. He did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS). The CI was issued a permanent L3/S3 profile and underwent a Medical Evaluation Board (MEB). PTSD and mechanical LBP were 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) file are discussed below. The PEB adjudicated the PTSD and LBP conditions as unfitting, rated 30% and 10% respectively, with application of Department of Defense Instruction (DoDI) 1332.39 and the Veterans’ Administration Schedule for Rating Disabilities (VASRD), respectively. The CI was placed on Temporary Disability Retired List (TDRL) with ratings as reflected in the chart below. A second PEB, after approximately 20 months of TDRL, adjudicated the PTSD and LBP conditions as unfitting, rated 10% each, with likely application of DoDI 1332.39 and the US Army Physical Disability Agency (USAPDA) pain policy respectively. The CI made no appeals, and was medically separated with a 20% combined disability rating.

CI CONTENTION: “I was assigned less than 50% disability rating by the military for my unfitting PTSD upon discharge from active duty. In accordance with the class action notice, assign the highest final disability rating applicable consistent with 38 CFR4.129 and DoD, policy, to the extent such increase will not adversely affect my total compensation, including but not limited to compensation pursuant to CRSC. Change the ratings for these conditions to the highest rating possible.” 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. All service conditions are reviewed by the Board for their potential contribution to its rating recommendations. This case was adjudicated following settlement of the *Sabo v. United States* class action suit.

RATING COMPARISON:

|  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Final Service IPEB – Dated 20060112** | | | | **VA\*** | | | | | |
| **Condition** | **Code** | **Rating** | | **Condition** | **Code** | **Rating** | **Exam** | | **Effective** |
| **On TDRL–20040515** |  | **TDRL** | **Sep.** |
| PTSD | 9411 | 30% | 10% | PTSD | 9411 | 50%\* | 20040401 | | 20040515 |
| 100% | Rx notes | | 20060104 |
| Chronic LBP | 5299-5237 | 10% | 10% | TL Spine, DD … | 5242 | 40% | 20040410 | | 20040515 |
| ↓No Additional MEB/PEB Entries↓ | | | | L. Knee, PFS | 5014-5261 | 0% | 20040410 | | 20040515 |
| 10% |  | | 20040623 |
| 0% x 6/Not Service Connected x 1 | | | 20040401 | | 20040515 |
| **Combined: 20%** | | | | **Combined:** | | | | **70%** | **20040515** |
| **100%** | **20060104** |

\* Initial 9411 30% rating retroactively changed to 50% IAW §4.129 as a clear and unmistakable error by VARD 20091221 (combined 70%); 9411 increased to 100% effective 20060104 (combined 100%)

ANALYSIS SUMMARY:

PTSD Condition. The PEB rating, as described above, was derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act (NDAA) 2008 mandate for DoD adherence to the VASRD §4.129. IAW DoDI 6040.44 and DoD guidance (which applies current VASRD 4.129 to all Board cases), the Board is obligated to recommend a minimum 50% PTSD rating for a minimum six-month period on the Temporary Disability Retired List (TDRL). Since the service was in compliance with the §4.129 TDRL requirement, the Board need not apply a constructive TDRL rating interval in this case; although, the 50% minimum TDRL rating remains applicable as held by the *Sabo vs. United States* class action settlement. The Board must then determine the most appropriate fit with VASRD 4.130 criteria at the end of the TDRL interval for its permanent rating recommendation. The most proximate source of comprehensive evidence on which to base the permanent rating recommendation in this case is the TDRL narrative summary (NARSUM), performed four months prior to TDRL exit.

The pre-TDRL NARSUM, pre-TDRL outpatient notes, commander’s statement, and pre-TDRL Department of Veteran’s Affairs (DVA) exam, show reduced reliability and productivity resulting from PTSD symptoms, and indicate a rating no greater than 50%, so the minimum 50% TDRL rating is applicable. There was a one week hospitalization four months prior to TDRL entry, at the CI’s request due to severe anxiety (CI did not feel safe, unrelated to suicidal/homicidal ideation, which he denied). Outpatient notes suggest his symptoms improved with medications and psychotherapy. Global Assessment of Functioning (GAF) scores ranged from 40 (some impairment in reality testing or communication or major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood) to 59 (moderate symptoms or moderate difficulty in social or occupational functioning) in the pre-TDRL outpatient notes, to 85-90 (absent or minimal symptoms, good functioning in all areas, interested and involved in a wide range of activities, socially effective, generally satisfied with life, no more than everyday problems or concerns) in the one-month pre-TDRL VA exam. The TDRL-exit NARSUM reported the CI “continued to demonstrate significant symptoms of chronic mental illness.” His symptoms included irritability, insomnia, social withdrawal/isolation, distressing recollections of combat experiences, and nightmares. The examiner did not describe the severe anxiety that was a prominent feature of the CI’s pre-TDRL condition, although the CI reported little benefit from his two-drug psychotropic regimen or group therapy. The CI was working full time (40 hours per week) installing equipment in automobiles. He felt he was a good worker, but did not socialize with the other employees, and was suspicious of them. The examiner noted the CI’s relationship with his wife was strained because of his irritability, and he felt distant from his extended family, visiting them infrequently. Mental status exam (MSE) revealed his mood was “emotionless, neither happy nor sad,” and his affect was “distant and restricted.” Insight was “partial” and judgment was “adequate for everyday situations.” There was no suicidal ideation, delusional or hallucinatory symptoms, speech disturbance, cognitive impairment or other abnormalities. The examiner did not provide a GAF score, but summarized the CI’s functioning as, “maintains employment with adequate job adjustment but poor social adjustment.”

The VA rated the CI’s PTSD at 30% effective 15 May 2004, based on evidence from service medical records and a VA Compensation and Pension (C&P) exam one month prior to TDRL-entry; this was retroactively corrected to 50% IAW §4.129. The VA increased the CI’s PTSD rating to 100% effective one month prior to TDRL-exit because the CI was “unable to work due to the symptoms [of PTSD].” VA treatment notes proximate to TDRL exit reported symptoms of anger (without overt violence), insomnia (sleeping four hours per night), and memory problems. The CI had stopped working at Nissan in January 2006, one month before TDRL exit; Upon detailed review, a VA note one month after TDRL exit stated the unemployment was due primarily to the CI’s back condition, while a later note stated it was primarily due to the CI’s PTSD symptoms. The CI continued to have arguments with his wife during this period, but had a good relationship with his children. At one month after separation, the examiner stated the CI’s PTSD had been in full remission one year previously, however the CI’s condition apparently declined over the year, and continued to deteriorate during the period from one to four months after separation period. GAFs declined from 57 to 51 during that period, and medications and psychotherapy was resumed. Additionally, the CI’s previous VA diagnosis of adjustment disorder was changed to depression at four months after separation. Although remote from separation, the VA (temporarily) reduced the CI’s PTSD rating to 30% effective 38 months post-TDRL exit due to missed VA re-evaluation exams, and reinstated the 100% rating retroactively to January 2006 based on a subsequent VA C&P exam, 40 months post-separation and review of the entire record. This exam indicated long-term unemployment with no post-separation school attendance. The CI was married and living with his spouse and children, withdrawn, isolated and had continued nightmares/insomnia, avoidance, and passive suicidal ideations. His diagnoses were PTSD with progression to include major depression disorder and a GAF of 50, in the serious symptom range. The VA rating determination following this exam indicated an earlier clear and unmistakable error to retroactively assign a 50% rating from May 2004, re-instituted the 100% rating from January 2006 (VA decreased for missed exam) and granted individual unemployability from May 2009.

The Board directs its attention to its rating recommendations based on the evidence just described. As regards the permanent rating recommendation, all members agreed that the §4.130 threshold for a 70% rating was not approached and that the criteria for a 10% rating were well exceeded. The deliberation settled on arguments for a 50% vs. 30% permanent rating recommendation. There was some indication that the CI’s PTSD-related impairment at the end of his TDRL period had not prevented his ability to secure and maintain substantially gainful employment during the bulk of the TDRL period. However, there was also an indication that mental health related symptoms affected his behavior at work, particularly with regard to interaction with other employees. Although work reliability and productivity were not specifically addressed, it can be assumed that there was at least occasional or intermittent reduction in work efficiency, given the significant psychiatric symptoms described in the TDRL NARSUM. Records indicate that the CI was unemployed beginning one month prior to TDRL exit. The CI’s mental condition likely contributed to, or caused unemployment, especially if a connection between pain symptoms (LBP) and mental health symptoms is conceded. The record indicated the CI’s long term unemployment began one month prior to separation. There was ample evidence of significant impairment in family and social relationships throughout the TDRL period. The 30% description (“occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal)”) is a better fit with the impairment described at the TDRL NARSUM and at the time of TDRL exit. After due deliberation, considering the totality of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends 30% as the most representative of impairment and the fair and equitable permanent rating for PTSD in this case.

Low Back Pain. There were two spine examinations in evidence proximate to TDRL entry which the Board weighed in arriving at its rating recommendation for TDRL-entry. Both included a goniometric range-of-motion (ROM) evaluation and are summarized in the chart below.

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| --- | --- | --- |
| Goniometric ROM - Thoracolumbar | MEB ~ 3 Mo. Prior to TDRL Entry  (20040217) | VA C&P ~ 1 Mo. Prior to TDRL Entry  (20040410) |
| Flex (0-90) | 90⁰ | 30⁰ |
| Ext (0-30) | 20⁰ | 20⁰ |
| R Lat Flex (0-30) | 30⁰ | 15⁰ |
| L Lat Flex 0-30) | 30⁰ | 15⁰ |
| R Rotation (0-30) | 30⁰ | 15⁰ |
| L Rotation (0-30) | 30⁰ | 15⁰ |
| COMBINED (240) | 230⁰ | 110⁰ |
| Comment:  TDRL entry 20040515 | Posture and gait normal, SLR neg bilat, neuro normal, 1 of 4 Waddell’s, TTP, no spasms | Posture & gait normal; no muscle spasm; no tenderness; neg SLR; additional limitation based on pain, but not fatigue, weakness, lack of endurance or incoordination; x-rays normal; neuro normal, except 1+ reflexes at knees and ankles; no incapacitation |
| §4.71a Rating | 10% | 40% |

The only treatment records to approach the level of VA limited ROM was following two episodes of acute trauma from falls. The VA exam demonstrated normal gait and posture as well as an absence of any other significant findings to align with the disparate ROM goniometric measurements. The Board adjudged the MEB exam to have the highest probative value for rating on TDRL-entry as it was comprehensive, supported by the remainder of the record, and was not in the context of a specified disability exam.

For rating at TDRL-exit, there were two spine examinations in evidence proximate to TDRL exit which the Board weighed in arriving at its rating recommendation. Only one of these included a goniometric ROM evaluation. Both of these exams are summarized in the chart below.

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| --- | --- | --- |
| Goniometric ROM - Thoracolumbar | NARSUM ~ 4 Mos. Pre-TDRL Exit  (20051014) | PT ~ 1 Mo. Pre-TDRL Exit  (20060111) |
| Flex (0-90) | ROM was “good with his fingertips to the levels of his ankles with forward flexion” | (50,50,45) 45⁰ |
| Ext (0-30) | (20,25,25) 20⁰ |
| R Lat Flex (0-30) | (15,15,15) 15⁰ |
| L Lat Flex 0-30) | (15,15,15) 15⁰ |
| R Rotation (0-30) | (15,20,15) 15⁰ |
| L Rotation (0-30) | (15,20,20) 15⁰ |
| COMBINED (240) | 125⁰ |
| Comment:  TDRL exit 20060206 | No midline tenderness; discomfort in paraspinous region; no spasm; “fairly good sitting posture;” neuro normal (motor 5/5, sensation normal in all dermatomes, reflexes 2+); neg SLR; no Waddell sign present | Pain at end range of motion in all directions; “The patient was seen in the MEB clinic (Physical Therapy).” |
| §4.71a Rating | 10% (PEB 10%) | 20% (PEB 10%) |

The TDRL NARSUM, three months prior to the final PEB, noted thoracolumbar ROM was “good with his fingertips to the levels of his ankles with forward flexion.” The examiner also noted “areas of discomfort in the paraspinous region,” and “fairly good sitting posture.” The exam was otherwise normal, with no spasm, negative straight leg raise, normal neurological evaluation, and no Waddell signs present. Radiographs of the lumbar spine were normal. MRI showed an L4-5 disc bulge with no significant neuroforaminal or spinal stenosis. An MEB Clinic (physical therapy [PT]) ROM-only evaluation was performed one day prior to the final PEB. This exam showed significant ROM deficits meeting the 20% criteria under the general rating formula for diseases and injuries of the spine, §4.71a. The examiner also noted pain at end ranges in all directions.

There was no VA spine exam proximate to TDRL exit. VA mental health and treatment notes indicated the CI was unemployed one month pre-TDRL exit due to either his back and/or his mental health symptoms (see above). The PEB rated the CI’s LBP as 5299-5237 with a description that indicated ROM limited by pain which indicates a likely application of the USAPDA pain policy (ROM limited by pain) versus applying VASRD 4.71a. rating criteria.

Neither of the exams reported evidence of incapacitating episodes requiring “bed rest prescribed by a physician and treatment by a physician,” (specifically denied in the pre-TDRL VA exam) so the CI’s condition is most appropriately rated under the general rating formula for diseases and injuries of the spine rather than that using incapacitating episodes under 5243, intervertebral disc syndrome. The only goniometric ROM evaluation proximate to TDRL exit would rate 20% under §4.71a. The Board discussed the significant difference in spine forward flexion indicated by the NARSUM (four months pre-TDRL exit) comments and the MEB clinic (PT one month pre-TDRL exit) goniometric ROM. The NARSUM did not provide a goniometric ROM, although comment of “good with his fingertips to the levels of his ankles with forward flexion” would not likely support the 20% rating criteria based on ROMs. The PT exam was closer to the date of separation, contained a complete ratable goniometric ROM and the Board majority assessed it had the highest probative value for rating. The Board considered coding options, including 5242 (degenerative arthritis of the spine), and 5243 (intervertebral disc syndrome), but the PEB’s analogous 5237 (lumbosacral strain) coding, appeared to be most appropriate. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt) and 4.7 (higher of two evaluations) the Board unanimously recommends a TDRL-entry rating of 10%, and the Board majority recommends a permanent separation rating of 20% for the LBP condition.

LBP Condition (Radiculopathy). There was no evidence of unfitting peripheral nerve impairment in this case. The CI endorsed episodic radiation of his pain into his left leg. Any pain-radiculopathy is considered above under the CI’s primary unfitting lumbosacral condition IAW the general rating formula for diseases and injuries of the spine, “with or without symptoms such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease.” Neurological evaluation proximate to TDRL exit was normal, including motor, sensory, and reflexes. Lower extremity motor function was normal throughout the record, without atrophy or foot drop. Also, nerve conduction studies were normal, with no evidence of lumbosacral radiculopathy. This leaves no grounds for Board recommendation of an additionally unfitting neuropathy. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of any lower extremity radiculopathy as an unfitting condition for separation rating.

Remaining Conditions. Other conditions identified in the DES file were history of hyperactive thyroid (by CI report), bilateral cataracts (by CI report), loss of vision in left eye (by CI report), knee pain (unspecified side), bilateral leg pain due to hamstring contractures, chest pain due to costochondritis, dermatofibromas on right arm, status post herniorraphy, plantar fasciitis, and bilateral shoulder injuries. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were occupationally significant 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. No other conditions were service-connected with a compensable rating by the VA within twelve months of separation or contended by the CI. 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 PTSD and the USAPDA pain policy for rating the back condition were likely operant in this case and the condition was adjudicated independently of that instruction and policy by the Board. In the matter of the PTSD condition, the Board unanimously recommends a 30% permanent rating at exit from TDRL IAW VASRD §4.130. In the matter of the LBP condition, the Board unanimously recommends by a vote of 2:1, a separation rating at TDRL-exit of 20% coded 5299-5237 IAW VASRD §4.71a. The single voter for dissent (who recommended a 10% separation rating at TDRL-exit for the back condition [combined 40%]) submitted the addended minority opinion. In the matter of any other 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 to reflect a a permanent disability retirement as indicated below.

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **PERMANENT**  **RATING** |
| Posttraumatic Stress Disorder | 9411 | 30% |
| Chronic Low Back Pain | 5299-5237 | 20% |
| **COMBINED** | **40%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110308, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

XXXXXXXXXXX

President

Physical Disability Board of Review

MINORITY OPINION:

The majority in this case conceded a permanent separation rating of 20% for the Chronic Low Back Pain condition. The majority vote defaulted to a higher rating recommendation based upon the PT exam from the MEB clinic one month pre-TDRL exit. The majority vote believes the PT Exam has more probative value over the NARSUM exam which was three months pre-PEB and four months pre-TDRL exit. The reasoning behind the majority’s vote using the PT exam as having the higher probative value was due to this exam being closer to the date of separation and containing a complete ratable goniometric ROM.

The minority vote in this case disagrees and believes the NARSUM exam (which was three months pre-PEB and four months pre-TDRL exit) has the highest probative value for the time of the PEB adjudication and the PDBR adjudication. The NARSUM exam supports a 10% rating based upon range of motion limited by pain with no neurologic abnormalities. It does not support a change in the 10% permanent rating as appropriately adjudicated by the final PEB, relying on a competent and well-documented examination by an orthopedic surgeon.

The majority’s opinion that the specialty TDRL re-evaluation “would not likely support the 20% rating criteria” is understated. Flexion of fingertips-to-ankles is 80-90⁰, especially considering the normal body habitus documented on the MEB physical. The absence of spasm or tenderness with normal posture and gait are convincing collateral physical findings compatible with normal, or nearly so, range of motion. Therefore the TDRL orthopedic specialty examination was, beyond any reasonable argument to the contrary, consistent with a §4.71a rating of 10%. The majority assumption would lie with a conclusion that three months later, over the course of a clinically silent period, the range of motion declined to 50% of normal. That conclusion is based on a physical therapist’s (PT) measurements capped at the point of subjective onset of pain (PT documented, “Patient complain for pain at the end range of motion in all directions”), in a context similar to the disparity noted between the MEB and VA C&P examinations at the onset of TDRL. The physical therapist did not document gait, posture, any physical findings, or a neurologic examination. The physical therapist did not provide passive measurements; and, the exam heading allowed substitution of an inclinometer for a goniometer. All of these factors significantly limit the probative value of the TDRL PT exam; and, they undermine any argument that it was the only VASRD compliant examination; since it neither fulfilled §4.46 (accurate measurement) requirements, nor did it provide the complete rating information demanded by VASRD §4.71a. Yet, the majority opinion insists that it superseded the contemporaneous findings of an orthopedic surgeon.

I respectfully submit that the Secretary consider a minority recommendation that the permanent rating for the lumbar spine condition in this case remain at the 10% rating appropriately assigned by the PEB both at TDRL placement and after TDRL re-evaluation. Although this results in no change of the recommended combined ratings, I believe it best reflects reasonable rating principles.

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 XXXXXXXXXXXXX, AR20120004767 (PD201100334)

1. Under the authority of Title 10, United States Code, section 1554(a), I approve, as modified below, 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. In doing so, I accept the majority recommendation for a 30% rating for PTSD but reject the majority opinion, and accept the minority opinion, for a 10% rating for Chronic Low Back Pain.

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.

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:

Encl XXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA