RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1100338 TDRL EXIT: 20070627

BOARD DATE: 20120319 TDRL ENTRY: 20040721

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty member, PFC/E-3 (13D/Advanced Tactical Data System Operator), medically separated for posttraumatic stress disorder (PTSD). He was diagnosed with PTSD consequent to a deployment to Iraq in 2003. His symptoms began in theater; he was treated at a deployed combat stress control unit, and was medically evacuated to CONUS. 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, outpatient psychotherapy, and a one week psychiatric hospitalization without significant improvement. He did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS). He was issued a permanent S4 profile (with no access to firearms) and underwent a Medical Evaluation Board (MEB). PTSD with history of major depression was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. One other condition, as identified in the rating chart below, was forwarded on the MEB submission as a medically acceptable condition. Other conditions included in the Disability Evaluation System (DES) file are discussed below. The PEB adjudicated the PTSD condition as unfitting, rated 30% (with application of Department of Defense Instruction (DoDI) 1332.39), and the CI was placed on Temporary Disability Retired List (TDRL) with ratings as reflected in the chart below. A second PEB, after over two years of TDRL was convened, but the proceedings were not available in the record. The CI appealed, and the Formal PEB (FPEB) adjudicated the PTSD condition as unfitting, rated 10%, with likely application of DoDI 1332.39. The CI was subsequently medically separated with a 10% 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 CFR 4.129 and DoD policy, to the extent such increase will not adversely affect my total compensation, including but not limited to compensation pursuant to CRSC.”

RATING COMPARISON:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Final Service PEB – Dated 20070523** | | | | **VA – All Effective Date 20040722** | | | |
| **Condition** | **Code** | **Rating** | | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20040528** |  | **TDRL** | **Sep.** |
| PTSD | 9411 | 30% | 10% | PTSD | 9411 | 70%\* | 20040908\*  20061122\* |
| Pes Planus, Mild | Not Unfitting | | | Bilateral Pes Planus | 5276 | NSC | 20040908 |
| ↓No Additional MEB/PEB Entries↓ | | | | Tension Headaches | 8199-8100 | 10% | 20040908 |
| 0% x 1/Not Service Connected x 5 | | | 20040908 |
| **Combined: 10%** | | | | **Combined: 70%\*** | | | |

\* VA rating based on exam most proximate to date of permanent separation; Individual Unemployability effective 20040722; Charted PTSD 9411 exams each rated 70%; PTSD increased to 100%, effective 20081021, based on exam of 20090420.

ANALYSIS SUMMARY: The Board acknowledges that the TDRL narrative summary (NARSUM) and TDRL PEB were referenced but not available in the evidence before it, and could not be located after the appropriate inquiries. Further attempts at obtaining the relevant documentation would likely be futile and introduce additional delay in processing the case. Proceedings of the final formal PEB DA Form 199 would have superseded the PEB. The missing evidence will be referenced below in relevant context, and it is not suspected that the missing evidence would significantly alter the Board’s recommendations.

PTSD Condition. The FPEB rating, as described above, was likely derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act (NDAA) 2008 mandate for DoD adherence to the Veterans Administration Schedule for Rating Disabilities (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 the period on the TDRL. Since the service was in compliance with the §4.129 TDRL period 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 Federal court in 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 Department of Veterans’ Affairs (DVA) psychiatric exam, performed seven months prior to TDRL exit, supplemented by DVA outpatient treatment notes nine months prior to TDRL exit.

With regard to initial rating for the TDRL period, the NARSUM prior to TDRL and profile showed reduced reliability and productivity resulting from PTSD and major depression symptoms, and indicated a rating closest to the 50% criteria level. However, the commander’s statement and VA exam, within two months after TDRL entry, more closely supported the 70% rating criteria.

The CI’s symptoms included depression, anxiety, flashbacks, insomnia (sleeping six hours per night with medications), nightmares, headaches, social withdrawal, discomfort in crowds, anhedonia, difficulty concentrating, avoidance symptoms, and short-term memory loss. There was a one week hospitalization for depression at 5 months pre-TDRL entry. The CI was treated with a five-drug psychotherapeutic regimen at the time of the NARSUM, with some benefit (improved sleep, reduced anxiety), although he had discontinued his antidepressants and psychotherapy by the time of the VA exam, two months after TDRL entry. The CI was never married, and was living with his parents, although that relationship was not further described. The CI reportedly received Article 15 punishment 5 months prior to TDRL entry “for walking away from what he perceived as harassment from one of his sergeants.” Difficulty adapting to stressful circumstances, including work and a work-like setting was evidenced in the commander’s statement, which reported the CI was “mentally unstable and unable to perform even the simplest of administrative duties,” and was “moved to medical holding company, as he cannot even be used to answer phones.” Nevertheless, the NARSUM stated the CI was working in the library, putting away books. Mental status exams (MSEs) were significant for depressed mood and a flat, dysphoric affect. The NARSUM reported the CI scored in the moderate range (18-22) on the Beck depression inventory, and neuropsychiatric testing 6 months prior to TDRL entry revealed symptoms consistent with PTSD, major depression, and a high level of anxiety. Global Assessment of Functioning (GAF) scores were 50 in both the NARSUM and VA exams, indicating serious symptoms or any serious impairment in social, occupational, or school functioning. The MEB examiner diagnosed “PTSD and major depression, single episode, moderate,” while the VA examiner diagnosed “PTSD, chronic, severe,” and “major depressive disorder, recurrent, moderately severe to severe, secondary to PTSD.” The VA rated the CI’s PTSD at 70% based on the VA exam. There was one brief VA outpatient treatment note 9 months prior to separation (TDRL exit) that indicated continued PTSD and depressive symptoms and the assigned GAF was 45, the same (serious) range exams prior to TDRL. No MSE or additional details were provided in that note.

The VA psychiatric exam, 7 months prior to TDRL exit, reported continued (unchanged since last VA exam) chronic severe PTSD symptoms with moderate to severe depressive symptoms deemed secondary to the PTSD condition. His pre-TDRL symptoms persisted, including anxiety, insomnia, headaches, flashbacks, social isolation, avoidance of public places, feeling “jumpy, jittery.” The examiner also noted panic attacks occurring “once every couple of months,” with physiologic effects including “sweating, trembling/shaking, chest pain, nausea, and chills or hot flashes.” The examiner also noted hypervigilance with exaggerated startle, irritability, poor appetite (lost five lbs in past year), and rechecking locks two to three times per night since moving into his own home in 2005. His treatment included outpatient psychotherapy and a three-drug psychotropic regimen. He remained unemployed. The CI reported having good relationships with his parents, two uncles, and two friends, but was otherwise isolated. The CI reported getting into one fight in which he was struck by an acquaintance in 2004, but stated a judge found the acquaintance guilty of assault and harassment charges, and required him to pay medical costs. The CI also reported enjoying leisure pursuits of golfing one to two times per week, as well as skiing, shooting, and going to the movies. MSE revealed “significantly depressed” mood, restricted range of affect, poor eye contact, and the CI was withdrawn. GAF was 55, indicating moderate symptoms or moderate difficulty in social, occupational, or school functioning. The examiner diagnosed PTSD, chronic, severe; and major depressive disorder, recurrent, moderate to severe, secondary to PTSD. The examiner opined that the CI “experiences near continuous depression, which affects his ability to function in social situations in an appropriate and an effective manner. It is presumed that he would experience significant difficulty in adapting to stressful circumstances, including work or a work-like setting.” The VA continued their 70% evaluation of PTSD based on this exam and the aforementioned outpatient treatment note.

Although remote from separation, a VA exam at 22 months after TDRL exit reported the CI was admitted to a psychiatric inpatient facility for 7 days at 17 months after TDRL exit for “suicidal ideation/alcohol detox.” The examiner noted the CI remained unemployed since leaving active duty (2004), and had failed an attempt to work in a Compensated Work Therapy program. The examiner stated the CI’s social activities were “very limited,” and interpersonal relationships were “strained,” although the CI reported getting along “well” with his girlfriend of four months, and getting along “okay” with his immediate family. MSE was significant for dysphoric mood, constricted affect, “fleeting suicidal ideation,” “fair” impulse control, and impaired memory (immediate, recent, and remote). GAF was 50, the same (serious) range as the exams prior to TDRL, and the examiner stated there was total occupational and social impairment due to PTSD. The VA increased the CI’s PTSD rating to 100% based on this exam. This was considered a worsening, not indicative of the CI’s condition at separation.

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 100% rating was not approached and that the criteria for a 30% rating were well exceeded. The deliberation settled on arguments for a 70% vs. 50% permanent rating recommendation. The Board considered all mental disorder symptoms IAW §4.130, and the CI’s axis I major depressive disorder was included in the PTSD rating. The CI’s PTSD-related impairment at the end of his TDRL period had prevented his ability to secure and maintain substantially gainful employment (records indicate that the CI was unemployed since leaving active duty in 2004), and although the CI’s family relations appeared to be good, there was other evidence of significant social impairment. Although not all the data upon which the FPEB relied was available to the Board, the preponderance of evidence suggested the CI’s impairment due to his PTSD and depression prevented his gaining employment, contrary to the FPEB’s statement, that the CI was “unemployed by choice because of concerns that he might lose his medical benefits upon advice from his VA counselor.” The 50% description (“occupational and social impairment with reduced reliability and productivity”) is a better fit with the impairment described at the VA exam proximate to the time of TDRL exit as the CI’s family relations, judgment, and thinking appeared unimpaired.

After due deliberation, considering the totality of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends 50% as the most representative of impairment and the fair and equitable TDRL-entry and permanent separation rating for PTSD in this case.

Other PEB Condition. The other condition forwarded by the MEB and adjudicated as not unfitting by the PEB was pes planus, mild. This condition was not profiled, implicated in the commander’s statement or noted as failing retention standards. It was reviewed by the action officer and considered by the Board. A VA exam two months after TDRL entry noted the condition was asymptomatic and caused no functional impairment. There was no indication from the record that this condition 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 this stated condition.

Remaining Conditions. Other conditions identified in the DES file were left foot contusion, left hip shrapnel wound with residual foreign body in the left gluteal area (VA 0% for scar), chest pains (associated with anxiety, discussed above), and headaches (VA 10%). Several additional non-acute conditions or medical complaints were also documented. The MEB history (DD Form 2807-1) stated the CI’s headaches occurred three to four times per week and resolved with over-the-counter pain medications. No incapacitation due to headaches was described proximate to separation. 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 was likely operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the PTSD condition, the Board unanimously recommends a 50% permanent rating IAW VASRD §4.130. In the matter of the pes planus condition, the Board unanimously recommends no change from the PEB adjudication as not unfitting. In the matter of 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: Permanent combined 50% disability retirement as below.

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **PERMANENT**  **RATING** |
| Posttraumatic Stress Disorder | 9411 | 50% |
| **COMBINED** | **50%** |

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

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110317, 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

1. Under the authority of Title 10, United States Code, section 1554(a), I approve the enclosed recommendation of the Department of Defense Physical Disability Board of Review (DoD PDBR) pertaining to the individual named in the subject line above to recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 50% effective the date of the individual’s original medical separation for disability with severance pay.

2. I direct that all the Department of the Army records of the individual concerned be corrected accordingly no later than 120 days from the date of this memorandum:

a. Providing a correction to the individual’s separation document showing that the individual was separated by reason of permanent disability retirement effective the date of the original medical separation for disability with severance pay.

b. Providing orders showing that the individual was retired with permanent disability effective the date of the original medical separation for disability with severance pay.

c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, and payment of permanent retired pay at 50% 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

Deputy Assistant Secretary

(Army Review Boards)