RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: navy

CASE NUMBER: PD1100339 TDRL EXIT DATE: 20080627

BOARD DATE: 20111223 TDRL start date: 20060105

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty HM3/E-4 (8404, Medical Field Service Technician) medically separated for posttraumatic stress disorder (PTSD). He was diagnosed with PTSD consequent to deployments in 2001 and 2003. Criterion A combat stressors were documented and the DSM-IV criteria for an Axis I diagnosis of PTSD were met. His treatment included medications and outpatient psychotherapy, without significant improvement. He did not respond adequately to treatment and was unable to perform within his Rating or meet physical fitness standards. He was placed on limited duty and underwent a Medical Evaluation Board (MEB). PTSD was forwarded to the Physical Evaluation Board (PEB) IAW SECNAVINST 1850.4E. The Informal PEB (IPEB) adjudicated the PTSD as unfitting, rated 30%, with application of DoDI 1332.39. The CI was placed on Temporary Disability Retired List (TDRL), with ratings as reflected in the chart below. A second IPEB, after approximately 18 months of TDRL, adjudicated the PTSD condition as unfitting, rated 10%, with application of DoDI 1332.39. The CI appealed, and the Formal PEB (FPEB) rationale added Traumatic Brain Injury (TBI) as a new category II condition (in addition to major depressive disorder) and reaffirmed a final 10% rating. 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.” He elaborates no specific contentions regarding coding and mentions no additionally contended conditions. All service conditions are reviewed by the Board for their potential contribution to its rating recommendations. This case was part of the *Sabo v. United States* class action settlement.

RATING COMPARISON:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **FPEB – Dated 20080210** | | | | **VA\* – All Effective Date 20060106** | | | |
| **Condition** | **Code** | **Rating** | | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20051013** |  | **TDRL** | **Sep.** |
| PTSD | 9411 | 30% | 10% | PTSD w/ Alcohol Abuse in Remission | 9499-9411\* | 50% | 20041217 |
| Major Depressive Disorder | | Category II | |
| TBI\* | | Category II | | TBI\* | See note\* | | |
| ↓No Additional MEB/PEB Entries↓ | | | | R Shoulder s/p Surgery … | 5203 | 10% | 20041217 |
| Mild Pulmonary Obstruction\* | 6604\* | 10%\* | 20041217 |
| 0% x 9/Not Service Connected x 4 | | | 20041217 |
| **Combined: 10%** | | | | **Combined: 60%\*** | | | |

\* Pulmonary obstruction 6604 changed to OSA w/ mild COPD 6847 and increased to 50% effective 20080729; PTSD 9499-9411 code changed to 9411 and deleted “in remission” in VARD 20081021 with continued 50% (combined 80%); TBI added as a new Cat II condition per FPEB rationale, absent from PEB notification of decision memo; TBI 8045 service connection denied in VARD 20081021: “suffer residuals of TBI, …(however) no evidence condition was incurred or caused” by duty in service treatment records

ANALYSIS SUMMARY:

PTSD with Major Depression and Cognitive Impairment Conditions. 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 Veterans Administration Schedule for Rating Disabilities (VASRD) §4.129. The FPEB determination was after the enactment of the NDAA, but likely prior to service implementation guidance. The Board must t 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 are the TDRL narrative summary (NARSUM), performed eleven months prior to TDRL exit, the FPEB testimony recorded on the FPEB rationale, the VA psychiatric exam performed four months after TDRL exit, and several VA outpatient notes within one year of TDRL exit that contribute to the CI’s impairment picture at final separation.

The pre-TDRL NARSUM, with addenda, as well as the two non-medical assessments and the pre-TDRL VA exam, clearly show reduced reliability and productivity resulting from PTSD symptoms, and would rate no greater than 50%, so the minimum 50% TDRL rating is applicable.

The TDRL NARSUM, 11 months prior to TDRL exit, reported the CI “continued to demonstrate significant symptoms of chronic mental illness.” His symptoms included depression (“somewhat less” than before), anxiety, irritability, insomnia, nightmares, flashbacks, intrusive thoughts, brief dissociative episodes, hypervigilance with increased startle, avoidance of crowds, and increased appetite with weight gain. He had discontinued medications and psychotherapy, as they were of little benefit. The CI had been unemployed until one week prior to the exam, when he took a job with the VA working with veterans. He had taken several college courses, two of which he failed, suggesting possible short-term memory problems. Mental status exam (MSE) revealed his mood “appeared euthymic but some depression and anxiety were reported with irritability.” Cognitive function was not specifically tested. There was no suicidal ideation, delusional or hallucinatory symptoms, speech disturbance, or other abnormalities. Global assessment of functioning (GAF) was 56-60, indicating moderate symptoms or moderate difficulty in social, occupational, or school functioning. The examiner diagnosed major depressive disorder in addition to PTSD, and stated the CI remained unfit for military service and should be either retained on TDRL or permanently retired.

VA outpatient notes proximate to exit from TDRL revealed continued psychiatric impairment, with worsening of depressive and PTSD symptoms related to having three of his friends die within a month’s time (one due to a motorcycle accident). Two outpatient notes reported passive suicidal ideation, without plan or intent. GAFs ranged from 45 (serious range) to 60 (moderate range). Neuropsychological testing revealed deficits in attention and concentration, and the CI was subsequently diagnosed with TBI due to two blast exposures during deployment, without loss of consciousness, and one reported motor vehicle accident in 2002 with loss of consciousness.

The FPEB rationale described telephone input from the CI’s social worker-OIF-OEF case manager. The FPEB considered an emergency room visit following the death of a close friend as an exacerbation of PTSD symptoms following a highly stressful event with contribution from being off of medication for two weeks and having worked a long shift. The case worker described a flexible work schedule to help the CI recover from stressful days, and that, in the case worker’s opinion, the CI “would have difficulty in working a regular, structured, ‘9-to-5’ job.” There was also noted lack of full engagement with therapy and a recent request for referral for therapy. The FPEB considered TBI and mild memory impairment with borderline level of performance involving attention/concentration, and (in their rationale) added TBI as a new category II diagnosis. Major depression was continued as a category II diagnosis.

The VA exam, four months after TDRL exit, described a moderate degree of social and occupational impairment. The CI stated his symptoms continued and had gotten worse, “he avoids more people, he has lost interest and he is more irritable.” He noticed some benefit from his three-drug psychotropic regimen. The CI was working full time (40 hours per week) for the VA as an outreach coordinator for the past year, missing one or two days per month due to psychiatric symptoms. The examiner noted he had some friends, lived alone (was never married), and not a lot of recreational pursuits. MSE revealed mood was “a bit tense but friendly and cooperative.” The examiner also cited previous neuropsychological testing and a diagnosis of cognitive disorder (but did not include that as a formal Axis I diagnosis). GAF was 53, the same (moderate) range as earlier exams. In addition to PTSD, the examiner diagnosed alcohol abuse, and stated it was secondary to his PTSD. IAW DODI 1332.38 substance abuse falls under “conditions and circumstances not constituting a physical disability.” The CI’s alcohol use may have been an attempt to self-medicate for his anxiety and PTSD symptoms. Any diagnosis of alcohol abuse or dependence had no influence on the §4.130 rating, and there was no deduction from the CI’s unfitting PTSD diagnosis for any potential contribution from substance abuse or dependence. Based on this exam and the proximate outpatient notes (discussed above), the VA continued their 50% evaluation coded 9411. As noted above, the VA did not rate TBI. VA rating decision dated 21 October 2008 indicated, “Although you currently suffer from residuals of a TBI there is no evidence that this condition was incurred in or caused by active duty; therefore, service connection is denied.” It was not known if the VA had access to the FPEB documents.

The Board directed its attention to its rating recommendations based on the evidence just described. There were multiple psychiatric diagnoses in the record including PTSD, depressive disorder, and cognitive impairment/TBI. IAW §4.126 (evaluation of disability from mental disorders) all symptoms related to rating IAW §4.130 are considered in the 9411 rating and includes overlapping symptoms of major depression and cognitive impairment (FPEB category II conditions).

With regard to the permanent rating recommendation, all members agreed that the §4.130 threshold for a 50% rating was not approached and that the criteria for a 10% rating were exceeded. The FPEB rationale indicated that some of the CI’s “difficulties seem to be compliance-related” with discontinuance of therapy and medication. However, the Board adjudged that non-compliance could equally be proffered as clinical manifestations of PTSD and/or depression and do not carry the same weight as for non-compliance of non-mental disorder conditions. The DoDI 1332.39 prerogative for reducing a rating for non-compliance is not applicable to the Board’s recommendations; although, the Board applies the tenants of accepted medical principles (IAW DoDI 1332.38), and may make fundamental deductions consistent with medical facts that are reasonable and logical to create a virtual certainty that they are correct.

The deliberation settled on arguments for a 30% versus 10% permanent rating recommendation. The CI’s mental disorder-related impairment proximate to final separation clearly impacted his occupational and school functioning (college course failures, work absences, flexible/accommodative schedule), and the CI had well-documented cognitive impairment, depressed mood, sleep impairment, and avoidance symptoms. 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. 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 with major depression and cognitive impairment in this case.

Remaining Conditions. Other conditions identified in the Disability Evaluation System file were status post right shoulder arthroscopic surgery (VA 10%), bronchitis (VA 10% for chronic pulmonary obstruction), status post partial uvulopalatopharyngoplasty (VA later 50% for obstructive sleep apnea), patellofemoral syndrome, left wrist ganglion cyst, gastroesophageal reflux disease, intermittent rashes, recurrent headache, recurrent cysts on scrotum, and history of back strain. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were significantly occupationally significant during the MEB period, none were the bases for limited duty and none were implicated in the non-medical assessment. 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 12 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. In the matter of the PTSD condition, the Board unanimously recommends a 30% permanent rating at the conclusion of the TDRL period for PTSD with major depression and cognitive impairment IAW VASRD §4.130 and consideration of all diagnoses ratable under §4.130. In the matter of the right shoulder condition, bronchitis, or 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 permanent 30% disability retirement upon removal from the TDRL as indicated below.

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **PERMANENT**  **RATING** |
| Posttraumatic Stress Disorder with Major Depression and Cognitive Impairment | 9411 | 30% |
| **COMBINED** | **30%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110331, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

President

Physical Disability Board of Review

MEMORANDUM FOR DEPUTY COMMANDANT, MANPOWER & RESERVE AFFAIRS

COMMANDER, NAVY PERSONNEL COMMAND

Subj: PHYSICAL DISABILITY BOARD OF REVIEW (PDBR) RECOMMENDATIONS

Ref: (a) DoDI 6040.44

(b) PDBR ltr dtd 12 Jan 12 ICO xxxxxxxxxxxxxxx

(c) PDBR ltr dtd 4 Jan 12 ICO xxxxxxxxxxxxxxx

(d) PDBR ltr dtd 22 Dec 11 ICO xxxxxxxxxxxxxxx

(e) PDBR ltr dtd 19 Jan 12 ICO xxxxxxxxxxxxxxx

(f) PDBR ltr dtd 12 Jan 12 ICO xxxxxxxxxxxxxxx

1. Pursuant to reference (a) I approve the recommendations of the Physical Disability Board of Review set forth in references (b) through (f).

2. The official records of the following individuals are to be corrected to reflect the stated disposition:

a. XXX XX 3238: Assignment to the Temporary Disability Retired List with a 60 percent disability rating for the period 31 October 2007 through 30 April 2008 and placement on the Permanent Disability Retired List with a 30 percent rating effective 1 May 2008.

b. XXX-XX-0919: Placement on the Permanent Disability Retired List with a 30 percent disability rating 5 January 2006.

c. XXX XX 3246: Placement on the Permanent Disability Retired List at 30 percent effective 15 October 2006.

d. XXX XX 1973: Placement on the Permanent Disability Retired List with a 50 percent disability rating effective 31 Aug 2011.

e. XXX XX 2573: Separation from the Naval service due to physical disability rated at 20 percent (increased from 10 percent) effective 1 August 2005.

3. Please ensure all necessary actions are taken to implement these decisions, including the recoupment of disability severance pay, if warranted, and notification to the subject members once those actions are completed.

Assistant General Counsel

(Manpower & Reserve Affairs)