RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD11-00455 SEPARATION DATE: 20060113

BOARD DATE: 20120821

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an activated National Guard SGT/E-5 (95B20 / Military Police), medically separated for left eye diplopia with optic neuropathy, and traumatic brain injury (TBI) with mild post-concussive syndrome. The conditions began as a consequence of a car bomb explosion while deployed to Iraq in 2003. The CI did not improve adequately with treatment to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent U2E3S3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded diplopia, traumatic brain injury with post-concussive syndrome, left optic neuropathy and right rotator cuff tear to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Four other conditions, identified in the rating chart below, were also identified and forwarded by the MEB. The PEB adjudicated the diplopia of the left eye associated with left optic neuropathy and post-traumatic headaches with migraines secondary to a blast injury conditions as unfitting, rated 10% each. The remaining conditions were determined to be not unfitting. The US Army Physical Disability Agency (USAPDA) administratively corrected the PEB’s DD Form 199 as follows: the headache condition was changed to not unfitting, and traumatic brain injury with mild post-concussive syndrome replaced it as the unfitting condition at 10%. There were no changes to the unfitting left eye condition at 10%, and no change in disposition or combined rating. The CI made no appeals, and was medically separated with a 20% disability rating. The USAPDA confirmed their adjudication, the day prior to the CI’s separation, in a reply to a congressional inquiry.

CI CONTENTION: “My ratings from VA for diplopia, TBI, post traumatic migraines, rotator cuff tear, vertigo, and tinnitus are much higher than the Army rating. Conditions have worsened. I believe the rating from the Army was low and too swift. I was not even recovered yet, but was medically separated. I served 15 years and I feel I deserve to be retired.”

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in DoDI 6040.44, Enclosure 3, paragraph 5.e.(2) is limited to those conditions which were determined by the PEB to be specifically unfitting for continued military service; or, when requested by the CI, those condition(s) “identified but not determined to be unfitting by the PEB.” The ratings for unfitting conditions will be reviewed in all cases. Migraine, vertigo, and tinnitus conditions (as related to TBI), the not unfitting rotator cuff tear condition and the unfitting diplopia and TBI conditions meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. The posttraumatic stress disorder (PTSD) condition is not within the Board’s purview. Any conditions or contention not requested in this application, or otherwise outside the Board’s defined scope of review, remain eligible for future consideration by the Army Board for the Correction of Military Records (ABCMR).

RATING COMPARISON:

|  |  |
| --- | --- |
| **PDA Admin Correction – Dated 20051215\*** | **VA (4 Mos. Post-Separation) – All Effective Date 20060114** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Diplopia Left Eye With Left Optic Neuropathy | 6092-6079 | 10% | Diplopia Left Eye With Left Eye Optic Neuropathy | 6026-6090 | 30%\*\* | 20060518 |
| Traumatic Brain Injury | 8095-9304\* | 10% | Cognitive Disorder With PTSD, Depression, Anxiety | 9411 | 30%\*\*\* | 20041206 |
| Plantar Fascial Fibromatosis | Not Unfitting | Bilateral Plantar Fasciitis | 5299-5276 | 10% | 20060327 |
| Post Traumatic Headaches With Migraine | Not Unfitting | Post Traumatic Migraine Headaches | 8100 | 10%\*\*\*\* | 20041222 |
| PTSD | Not Unfitting | PTSD | 9411 | NSC |  |
| Low Back Pain | Not Unfitting | Low Back Pain Residuals | 5237 | 10% | 19951016 |
| Right Rotator Cuff Tear | Not Unfitting | Right Rotator Cuff Tear | 5201 | 20% | 20060327 |
| ↓No Additional MEB/PEB Entries↓ | Fractured Scaphoid L. Wrist | 5215 | 10% | 19951016 |
| Vertigo | 6204 | 10% | 20041222 |
| Tinnitus | 6260 | 10% | 20040315 |
| Chronic Sinus Discharge | 6513 | 10% | 20040318 |
| Facial Scars | 7800 | 10% | 20040318 |
| Hypoesthesia Left Face | 8207 | 10% | 20040318 |
| 0% X 4 / Not Service-Connected x 6 | 20060327 |
| **Combined: 20%** | **Combined: 90%\*\*** |

\*IPEB conducted 20051104, used 8199-8100; correction PEB changed to 8095 code, which doesn’t exist.

\*\*VA rating decision 20060707 closest to separation initially rated Diplopia at 10% based on STR, increased to 30% based on 20060518 exam. Combined rating closest to separation was 70%, then increased to 90%.

\*\*\*VA rating decision 20080225 added PTSD/depression/anxiety to cognitive disorder, changed code from 8045-9304 to 8045-9411, then to 9411; rating never changed.

\*\*\*\*Post traumatic migraine headaches initially coded 8045, increased to 30% effective 20061113 based on outpatient records beginning 20061113.

ANALYSIS SUMMARY: The Board acknowledges the CI's contention suggesting that service ratings should have been conferred for other conditions documented at the time of separation, some of which were evaluated and determined not to be individually unfitting for continued service. The Board wishes to clarify that it is subject to the same laws for service disability entitlements as those under which the Military Disability Evaluation System (DES) operates. The DES is responsible for maintaining a fit and vital fighting force. While the DES considers all of the service member's medical conditions, compensation can only be offered for those medical conditions that cut short a service member’s career, and then only to the degree of severity present at the time of final disposition. However the Department of Veterans’ Affairs (DVA), operating under a different set of laws (Title 38, United States Code), is empowered to compensate all service connected conditions and to periodically re-evaluate said conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment vary over time. The Board is empowered to evaluate the fairness of service fitness determinations, and to make recommendations for service rating of conditions which it concludes would have independently prevented the performance of required duties (at the time of separation). The Board’s threshold for countering DES fitness determinations is higher than the Veteran’s Administration Schedule for Rating Disabilities (VASRD) §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard. Of special note, the Board must rate the CI’s condition at the time of separation under the VASRD in effect at that date. The special senses criteria for rating the CI’s eye condition are those prior to the VASRD change effective 10 December 2008. The post-concussive syndrome (TBI - 8045) criteria are those prior to the 8045 criteria changes from VA Training Letters TL06-03 (dated 13 February 2006), TL07-05 (dated 31 August 2007), and the Fast Letter implementing the current TBI criteria effective 22 October 2008.

Left Eye Condition. The CI’s eye injury was a result of a suicide car bomb blast on 27 October 2003. Diplopia resulted from nerve injury to eye muscles and muscle entrapment from retained shrapnel. A shrapnel fragment abutting the optic nerve also caused traumatic optic neuropathy. Attempted removal of shrapnel fragments was considered too risky since post-operatively symptoms could worsen. The narrative summary (NARSUM) completed 4 months prior to separation reports that the diplopia was aggravated by rapid movement of his eyes or head movement; this caused him to move his head slowly. Moving his eyes upward to the left caused pain in the left temple. He wore a left eye patch while driving to prevent diplopia. Improvement in diplopia was not expected to occur over time. The NARSUM referred to Goldman visual field testing that was normal in the right eye but showed generalized visual field constriction in the left eye. The actual testing and degree of constriction was not in evidence. Physical examination revealed limited elevation of the left eye and evidence of dysfunctional cranial nerves IV and VI. Concurrent outpatient exams revealed uncorrected visual acuity of 20/20 in the right eye, and between 20/20 to 20/30 (without correction) in the left eye. At the VA Compensation and Pension (C&P) exam completed 4 months after separation, the CI reported that his double vision was stable and that he continued to have a very small area of central vision that was not double. Examination revealed visual acuity of 20/25 uncorrected in each eye. The CI was observed to keep his eyes in primary gaze by head movement to prevent double vision. Perimetry testing on the left eye alone showed visual field constriction in all fields; testing on the right eye showed a normal visual field. Goldmann diplopia visual field testing showed diplopia within 5 degrees superiorly, 30 degrees temporally, 22 degrees inferiorly and 27 degrees nasally.

The Board directs attention to its rating recommendation based on the above evidence. The PEB assigned a 10% rating under code 6092-6079 (diplopia due to limited muscle function and impaired visual acuity). The VA’s 30% rating used 6026-6090 code (optic neuritis and diplopia). The PEB’s coding choice, which requires application of 6090 criteria, was appropriate. That code, however, requires perimetry testing specifically designed to assess severity of double vision. The only such testing in evidence is from the VA exam, which justifies a 30% rating under code 6090 or 6092. The Board notes that a constricted visual field provides an alternate rating pathway under the 6080 code (visual field, impairment of), but determining the rating requires perimetry data not in evidence. However, the highest possible rating via this pathway will not result in a rating higher than 30%. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 30% for the left eye condition. After considering several coding options in this case, the Board agreed that 6092-6074 was the best choice.

Traumatic Brain Injury Condition with Post-Concussive Syndrome. The same event that caused the eye injury resulted in a brief loss of consciousness. Outpatient notes indicate that post-concussive symptoms included dizziness, vertigo, headaches, irritability and difficulty with thinking and memory. Intermittent bilateral tinnitus was also documented. Neuropsychiatric evaluation two years prior to separation showed significant difficulties in sustained attention, some measures of impaired executive functioning and reduced manual speed and dexterity. A neurology evaluation two years prior to separation reported headaches that began one week after the injury. At that time they occurred twice daily and lasted two to twelve hours. Within three months, medication helped reduce headache frequency to three times per week. Memory and thinking were also noted to be improved by this time. Audiologic and vestibular evaluation 2 years prior to separation was negative for objective evidence of vertigo. A C&P exam a year prior to separation provided an Axis I diagnosis of cognitive disorder. The commander’s statement a year prior to separation reported that the CI was a “great asset” in his administrative and logistical role. He arrived at work early and displayed an excellent and willing attitude. An outpatient note 10 months prior to separation reported daily headaches. At a repeat neuropsychological evaluation 7 months prior to separation the CI reported that short-term memory had not improved much and that he still wrote everything down. He expressed difficulty with multitasking, and reported impulsivity and difficulty jogging or climbing due to vertigo. He complained of constant dull headache and a severe headache twice per week. Testing revealed adequate but low average sustained attention and concentration, and an inability to multitask or to process new information in a rapid manner. The examiner considered the residuals from closed head trauma to render the CI unable to function at his rank or in combat. The NARSUM examiner reported that the CI had no headaches prior to the injury in 2003, and that he experienced daily headaches with severe ones occurring twice per week. He occasionally took abortive medication for them. Subsequent evaluation, 16 months after separation, revealed cognitive-communicative functioning that appeared to be borderline mildly reduced. At this time, the CI did not complain of pain. No evaluation in evidence reported the CI needed to seek emergency care for headaches.

The Board directs attention to its rating recommendation based on the above evidence. The PEB’s rationale to code the condition 8045-9304 (traumatic brain injury rated analogous to dementia due to head trauma) was consistent with the VASRD in effect at the time. The Reconsideration PEB’s substitution of the 8095 for 8045 code was probably a typographical error, since there is no 8095 code. Under VASRD §4.124a, for code 8045 effective the CI’s date of separation:

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.

The VA used the same 8045-9304 coding pathway to assign a 30% rating under §4.130 (General Rating Formula for Mental Disorders; “Occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks”). Additional ratings of 10% each for vertigo and headaches were also assigned. The cognitive difficulty demonstrated a steady improvement, and by 1-2 years post-separation was causing no functional problems. The commander’s statement portrayed a performance that was not adversely affected by post-concussive symptoms. The Board also deliberated the other recognized TBI sequelae, namely headaches, vertigo and tinnitus. Under the §4.124a rating restrictions, these symptoms could be rated no higher than 10%, although the PEB elected to adjudicate the headaches as not unfitting. The VA assigned its rating for post traumatic headaches under the 8045 code, separate from cognitive disorder, and concluded that “prostrating attacks averaging one in two months” justified a 10% rating. Based on later exams the rating was increased to 30% under a 8045-8100 code. Board members considered that, if the PEB’s approach is conceded as appropriate, the threshold for countering DES fitness determinations is higher than the VASRD §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard. Board members agreed there was little evidence that the headaches interfered with MOS requirements sufficiently to warrant an “additionally unfit” recommendation. Even if found unfitting, however, under application of the 8045-9304 pathway, a headache rating would be subsumed under the post-concussive symptoms already discussed, and rated at no more than 10%. Likewise regarding the vertigo and tinnitus, there is no evidence supporting their inclusion as additionally unfitting conditions, and the Board agreed that it would be properly accounted for under the PEB’s coding pathway for TBI. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board concluded that there was insufficient cause to recommend a change in the PEB adjudication for the traumatic brain injury condition; and that there was insufficient cause to recommend a change in the PEB fitness determination for the posttraumatic headache condition. The Board concluded that the vertigo and tinnitus conditions were considered under the 8045-9304 subjective symptoms above.

Contended PEB Conditions. The remaining contended condition adjudicated as not unfitting by the PEB was right rotator cuff tear. The Board’s first charge with respect to this condition is an assessment of the appropriateness of the PEB’s fitness adjudication. The Board’s threshold for countering fitness determinations is higher than the VASRD §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard. This condition was not implicated in the commander’s statement, but due to limited range of motion (ROM) the MEB indicated it did not meet retention standards. It was profiled (U2) prior to surgical intervention performed after the MEB and two months pre-separation. Post-operatively, pain and range of motion improved. The CI regularly lifted heavy items in his civilian job, although this caused pain. This condition was reviewed by the action officer and considered by the Board. There was no indication from the record that it significantly interfered with satisfactory duty performance. After due deliberation in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB fitness determination for the right rotator cuff tear condition; and, therefore, no additional disability ratings can be recommended.

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 left eye diplopia with optic neuropathy condition, the Board unanimously recommends a disability rating of 30%, coded 6092-6074 IAW VASRD §4.85. In the matter of the traumatic brain injury condition and IAW VASRD §4.124a, the Board unanimously recommends no change in the PEB adjudication, which includes vertigo and tinnitus in the 10% rating. In the matter of the contended posttraumatic headaches and left rotator cuff tear conditions, the Board unanimously recommends no change from the PEB determinations as not unfitting. There were no other conditions within the Board’s scope of review for consideration.

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** |
| Diplopia Left Eye With Left Optic Neuropathy | 6092-6074 | 30% |
| Traumatic Brain Injury | 8045-9304 | 10% |
| **COMBINED** | **40%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110606, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 XXXXXXXXXXXXXXXXXXXX

 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 22202-3557

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for XXXXXXXXXXXXXXXXXXXXX, AR20120019918 (PD201100455)

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 40% 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 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 XXXXXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA