RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100470 DATE OF PLACEMENT ON TDRL: 20030725

BOARD DATE: 20120305 Date Finalized from TDRL/Final SEP: 20041105

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 (97E, Intelligence Collector), medically separated for migraine and mixed type headaches. The CI developed recurrent headaches without aura in November 2001. Neurology diagnosed combined vascular and muscle contraction headaches and placed the CI on medications for acute and prophylactic treatment of headaches. Despite multiple trials of medications, the CI’s headaches increased in frequency and severity. He did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS). He was issued a permanent P3 profile and underwent a Medical Evaluation Board (MEB). Recurrent, refractory and incapacitating migraine headaches 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) packet will be discussed below. The PEB adjudicated migraine headaches (prostrating, resistant to therapy) as unfitting but not sufficiently stable for final adjudication. The CI was placed on the Temporary Disability Retired List (TDRL) with a rating of 30%. At time of reevaluation in June 2004, the CI’s condition was determined to be sufficiently stable for final adjudication. The PEB adjudicated the migraine and mixed type headaches condition as unfitting, rated 10% IAW Department of Defense Instruction (DoDI) 1332.39. The CI appealed to the Formal PEB (FPEB) and initiated a Congressional Inquiry. He subsequently withdrew his demand for the Formal PEB and was medically separated with a 10% combined disability rating.

CI CONTENTION: “My initial rating from the Army was 30% and there was no improvement in my condition that justified a change in my status. The medical examiner at Great Lakes recommended I remain on retirement rolls. Furthermore, the VA gave me a rating of 50% for the same condition. Additionally, I have been rated on several other service-connected disabilities that have pushed my overall rating to 80%.” In an attached statement, the CI also identifies the conditions of degenerative joint disease in his hips, fainting spells, and depression. A contention for their inclusion in the separation rating is therefore implied.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Final Service PEB – Dated 20040909** | **VA – All Effective Date 20030726** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20030527** |  | **TDRL** | **Sep.** |
| Migraine and Mixed Type HAs | 8100 | 30% | 10% | Migraine Headache | 8100 | 50% | 20030619 |
| ↓No Additional MEB/PEB Entries↓ | DJD, Right Hip | 5010-5252 | 10% | 20030619 |
| 0% x 1\*/Not Service Connected x 0 | 20030619 |
| **Combined: 10%** | **Combined: 60%\*** |

\*Left hip DJD, 5010-5252, increased from 0% to 10% effective 20090311 (combined 60%); Depression, secondary to headache and DJD, 9434, added at 50% effective 20100719 (combined 80%).

ANALYSIS SUMMARY: The Board acknowledges the CI’s argument that his PEB TDRL rating changed, but that the perceived severity of his condition did not. The Board takes the position that subjective improvement or worsening during the period of TDRL should not influence its coding and rating recommendation at the time of permanent separation. The Board’s relevant recommendations are assigned in assessment of the service’s permanent separation and rating determination, and the TDRL rating assignment is not considered a benchmark. It is recognized, in fact, that PEB’s across the services sometimes apply an overly generous initial rating in order to meet the DoD requirement of 30% disability for placement on TDRL. This is in the member’s best interest at the time and does not mean that a final lower rating is unfair, even if perceived as incongruent with subjective severity from one rating to the next. Thus the sole basis for the Board’s permanent disability recommendation is the optimal VASRD rating for disability at the time the CI is permanently separated at exit from TDRL. The Board also acknowledges the CI's contention suggesting that service ratings should have been conferred for other conditions documented at the time of separation and for conditions not diagnosed while in the service (but later determined to be service-connected by the Department of Veterans’ Affairs (DVA)). 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. In TDRL cases, the Board must also adhere to the DES standard that only those conditions which were present and unfitting at the time of temporary retirement may be considered for compensation and rating at the time of permanent separation or retirement. The DVA, however, operating under a different set of laws (Title 38, United States Code), is empowered to compensate 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 PEB determinations reflected application of DoDI 1332.39 (E2.A1.4.1.4), (since rescinded), which defined “prostrating” as “the service member must stop what he or she is doing and seek medical attention.” The VASRD §4.124a rating schedule for 8100 (migraine) rests heavily on the frequency of ‘prostrating’ attacks. VA guidance uses the clear English definition of prostrating and significantly differs from the DoDI 1332.39 (E2.A1.4.1.4) in that seeking medical attention is not required. By precedence the Board requires evidence only that an attack forces notable abandonment of work or activity at hand to seek relief (which includes self-medication and/or sleep), or to escape noxious stimuli in the immediate environment, in order for it to be characterized as prostrating.

Migraine and Mixed Type Headaches. The MEB narrative summary (NARSUM), 2 months prior to placement on the TDRL, documented a history of sharp, throbbing headaches starting at the apex of the skull and radiating to the bilateral frontal lobes since November 2001. The headaches were accompanied by visual scotoma, photophobia and nausea. The CI reported that the headaches occurred four times per week, with each episode lasting in excess of 2 hours, and only resolving with sleep. Treatment with medications (to include Zomig, Depakote, propranolol, Midrin, Pamelor, and Xanax) had not been successful in decreasing the frequency or severity of the headaches. The physical exam was reported as “entirely within normal limits.” The NARSUM examiner noted that a March 2003 MRI had documented no abnormalities other than the absence of the right posterior communicating artery and a small left communicating artery, which were likely normal variants.

The commander’s statement noted that “during a migraine attack, Specialist is completely disabled from accomplishing any soldier’s skill task or MOS specific task.” The commander also commented that the headaches occurred at least four times per week and resulted in the CI being sent home to rest and recover. The profile limitations noted that the CI was unable to think coherently during migraine attacks. The PEB noted migraine headaches that were prostrating and resistant to therapy and placed the CI on the TDRL with a 30% rating.

The VA Compensation and Pension (C&P) exam, 1 month prior to placement on the TDRL, documented headaches occurring four times weekly and lasting for 7 to 8 hours. The exam did not specify the presence or frequency of prostrating headaches. The examiner noted triggers of noise, light and peanut butter. On exam, the CI had a normal gait and did not require an assistive device for ambulation. The neurologic exam was listed as “grossly intact.” The VARD referenced the MEB documentation of disabling attacks occurring four times a week and assigned a rating of 50%.

Following placement on the TDRL, the CI sought treatment for his headaches from civilian providers and the VA health clinics. He had some temporary improvement in his headache symptoms immediately after separation from the service, however, the headaches later increased in frequency. The CI was evaluated by a civilian neurologist in October 2003 for treatment of headaches occurring every 2 to 3 days and lasting up to 8 hours. The neurologist diagnosed medication overuse as the most likely etiology of the CI’s headaches, and he advised the CI to discontinue all of his current medications (to include Nortriptyline, Midrin and Celebrex; due to possible medication over-use headaches). The CI was given a different medication (Maxalt-MLT) samples to use in case of headaches that were “more migraine-like.” An April 2004 VA clinic treatment note documented some improvement in the CI symptoms after cessation of the migraine medications. At that time, the CI’s headaches were still occurring 4 to 5 times per week; however, he was only having 1 to 2 debilitating headaches per month.

At the service TDRL re-evaluation exam, the CI endorsed debilitating headaches occurring 3 days per week. The examiner noted the CI’s previous failed medication trials as well as the civilian neurologist’s recommendation to stop all medications. The exam documented a normal gait, normal coordination, and a normal motor and sensory exam. It was noted that the CI had not worked since placement on the TDRL. The examiner concluded that “the prognosis for recovery is poor” and assessed “the degree of civilian, social and occupational impairment is moderate.” The PEB noted that the CI had not required any unscheduled appointments, emergency room visits, injectable medications or hospitalizations, and concluded that the CI was “averaging one prostrating headache in 2 months over the past year.” The PEB additionally commented that “non-prostrating headaches still occur with sufficient frequency to keep the Soldier unfit.”

Considering rating upon TDRL entry, the PEB TDRL rating of 30% was based on substantially the same data as the VA 50% rating determination, which predominately considered the MEB documentation. The VA rated based upon the frequency of prostrating attacks documented at the pre-TDRL service exam, noting that the CI’s disability picture more closely related to a 50% rating. The initial PEB adjudication was likely with application of DoDI 1332.39 (E2.A1.4.1.4), as the NARSUM and commander’s statement both indicated VASRD-defined prostrating attacks 3 to 4 times per week requiring the CI “is sent home to rest and recover” are considered prostrating IAW the VASRD, but not considered prostrating IAW DoDI 1332.39 (see ANALYSIS SUMMARY above). The prostrating headache frequency exceeded the 30% criteria of “characteristic prostrating attacks occurring on an average 1 time a month over last several months” and was more closely aligned with “very frequent completely prostrating and prolonged attacks” and was likely productive of severe economic inadaptability.

The final (permanent separation rating) PEB 10% rating for “averaging one prostrating headache in 2 months over the past year” clearly reflected application of DoDI 1332.39 (E2.A1.4.1.4) as the documentation of the MEB examiner reflected debilitating headaches 3 days per week and the requirement to rest when he has a headache. The treatment records covering the TDRL period all documented frequent headaches, but not all specified the frequency of prostrating headaches. The Board evaluated the documentation of daily headaches that “make it difficult for him being a father, husband and student,” and “headaches are 4 to 5 times a week with 1 or 2 a month being debilitating” (treatment note of 28 June 2004, proximate to the NARSUM at TDRL exit); and considered these headaches of sufficient severity to meet the VASRD threshold as prostrating. The frequency of “prostrating” headaches documented in the TDRL timeframe treatment records exceeded the criteria for the 30% rating’s “with characteristic prostrating attacks occurring on an average 1 time a month over last several months.” The Board deliberated if the CI’s condition more closely reflected the 30% rating criteria or the 50% criteria of “very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability” at exit from TDRL. The headache frequency was slightly less than that documented upon TDRL entry; however, the Board also noted that the CI had “… not worked or sought work since placement on the TDRL” and the NARSUM indicated “civilian, social, and occupational impairment is moderate.” The Board deliberated whether or not this constituted evidence of “severe economic inadaptability.” After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a TDRL entry rating of 50% and a separation rating of 30% for the migraine and mixed type headaches condition.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for degenerative joint disease in his hips, fainting spells, and depression. The CI presented with complaints of right hip pain after doing yard work in April 2003. Plain radiographs noted possible mild early degenerative changes involving the superior acetabular rims bilaterally. Bilateral hip MRIs were unremarkable. The condition of bilateral hip degenerative joint disease did not result in any duty limitations, was not permanently profiled and was not implicated in the commander’s statement. This condition was reviewed by the action officer and considered by the Board. There was no evidence for concluding that the bilateral hip degenerative joint disease conditions interfered with duty performance to a degree that could be argued as unfitting. The conditions of fainting spells and depression 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 determined therefore that none of the stated conditions were subject to service disability rating.

Remaining Conditions. Several non-acute conditions or medical complaints were documented on the MEB history and physical. None of these conditions were significantly clinically or occupationally 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. 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 headache condition was operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the migraine and mixed type headaches condition, the Board unanimously recommends an initial TDRL rating of 50% and a permanent service disability rating of 30%, coded 8100 IAW VASRD §4.124a. In the matter of the bilateral hip degenerative joint disease 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: TDRL at 50% for the CI’s prior TDRL period, and then a combined 30% permanent disability retirement effective as of the date of his prior exit from TDRL.

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| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT****RATING** |
| Migraine and Mixed Type Headaches | 8100 | 50% | 30% |
| **COMBINED** | **50%** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110323, 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

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 XXXXXXXXX, AR20120005746 (PD201100470)

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 constructively place the individual on the Temporary Disability Retired List (TDRL) at

50% disability rather than 30% disability for the period 25 July 2003 to 11 November 2004 April 2004 and then following this period recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 30%.

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 temporary disability 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 day following the TDRL period.

 c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, provide 50% retired pay for the constructive temporary disability retired period effective the date of the individual’s original medical separation and then payment of permanent disability retired pay at 30% effective the day following the constructive TDRL period.

 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 XXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)