RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1100721 SEPARATION DATE: 20050527

BOARD DATE: 20120202

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (31B, Military Police), medically separated for exercise induced bronchospasm (asthma). She did not respond adequately to treatment and was unable to perform within her Military Occupational Specialty (MOS) or meet physical fitness standards. She was issued a permanent P3 profile and underwent a Medical Evaluation Board (MEB). Asthma was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Depressive disorder and borderline personality disorder conditions, as identified in the rating chart below, were forwarded on the MEB submission as medically acceptable conditions. The PEB adjudicated the asthma condition as unfitting, rated 30%; with application of Veterans Administration Schedule for Rating Disabilities (VASRD) and the CI was placed on Temporary Disability Retired List (TDRL) at 30%. Upon TDRL reevaluation, the PEB rated the asthma at 10% and her mental health conditions as not ratable and as not unfitting conditions on the original PEB. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: The CI states: “I am 100% disabled due to service related conditions according to the Veterans Administration. I was on the temporary retirement list and then taken off for unknown reasons. I would like to have my records reviewed.” She elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

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| --- | --- | --- | --- | --- | --- | --- | --- |
| **Final Service PEB – Dated 20050527** | | | | **VA\* – All Effective Date 20040805** | | | |
| **Condition** | **Code** | **Rating** | | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20040901** |  | **TDRL** | **Sep.** |
| Asthma | 6602 | 30% | 10% | Reactive Airway Disease/Asthma | 6602 | 10% | 20041124 |
| Depressive Disorder | | Not Unfitting | | Schizoaffective Disorder, Bipolar Type With PTSD | 9211 | 100% | 20041109 |
| Borderline Personality Disorder | | Not A Disability | |
| ↓No Additional MEB/PEB Entries↓ | | | | Hypothyroidism | 7903 | 10% | 20041124 |
| 0% x 1/Not Service Connected x 1 | | | 20041124 |
| **Combined: 10%** | | | | **Combined: 100%** | | | |

\* VA rating based on exam most proximate to date of permanent separation.

ANALYSIS SUMMARY: The Board notes the current VA ratings listed by the CI for all of her service-connected conditions, but must emphasize that its recommendations are premised on severity at the time of separation. The VA ratings which it considers in that regard are those rendered most proximate to separation. The Disability Evaluation System (DES) has neither the role nor the authority to compensate Service members for anticipated future severity or potential complications of conditions resulting in medical separation. That role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA).

Asthma. The unequivocal VASRD code for rating asthma is 6602. There was no evidence for respiratory failure, frequent exacerbations requiring physician intervention, daily use of high dose corticosteroids or immune-suppressive medications, or frequent use of systemic corticosteroids. Therefore the higher 60% or 100% ratings IAW 6602 criteria are not supported. The treatment criteria underpinning the 10% and 30% ratings are the pivotal points for decision in this case. The 10% rating requires “intermittent inhalational or oral bronchodilator therapy;” the 30% rating requires “daily inhalational or oral bronchodilator therapy; or inhalational anti-inflammatory medication.” The initial narrative summary (NARSUM) indicated a confirmed diagnosis of exercise induced asthma (positive methacoline challenge test) with near-normal pulmonary function tests. The CI was on chronic daily inhaled medication (Singulair) and rescue inhaler of Albuterol as needed. The PEB rated asthma at 30% (TDRL) based on this exam. The VA C&P physical exam noted complaints of “dyspnea on exertion if she runs, climbs 2-3 flights of stairs and during periods of stress. She claims seasonal allergies in spring and fall.” The examiner indicated “history of asthma and she is being prescribed albuterol.” Lungs were clear with negative radiographs, pulmonary function testing was normal (see chart), and the CI had no emergent treatment or incapacitating episodes in the last year. The VA rated asthma at 10% based on this exam.

The TDRL NARSUM indicated continued exercise induced shortness of breath, with a final diagnosis of exercise induced bronchospasms. The CI reported stopping her daily inhaled preventive inhaled medication (Advair) “because she felt it did not help with her overall symptomatology,” but “reports using her Albuterol inhaler and usually requires treatment 1-2 times daily.” She reported audible wheezing with attempts to run and that she could also have a significant exacerbation and flare-up of her symtoms on attempts to walk long distances or uphill. Interval pulmonary function testing was within normal limits. The PEB rated this exam at 10% with the disability description stating “placed on TDRL, 1 September 2004, for exercise induced bronchospasm. Discontinued Advair and uses Albuterol only pre-exercise or when symptomatic. Pulmonary function tests remain normal at baseline. Exertional triggers for symptoms precludes return to active service. Medication profile does not support daily use. Rated for intermittent bronchodilator use.” The medication profile listed Albuterol inhaler “as needed for shortness of breath” without specifying the number or frequency of dispensed 90MCG 200D oral inhalers.

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| Exam | ~19 Mo. Pre-Sep  (20031217) | VA C&P ~6 Mo. Pre-Sep  (20041124) | NARSUM ~1 Mo. Pre-Sep  (20050506) |
| FEV1 (% Predicted) | 115% | 97% | 97% |
| FEV1/FVC | 84% | 83% | 80% |
| Meds | Singulair inhaler daily; Albuterol Inhaler (as needed) | Albuterol Inhaler; flares 3-4/month | Albuterol used average 1-2/day |
| Comments | + Methocholine challenge | Unspecified frequency of inhaler use | Albuterol prescribed “as needed”; see text |
| §4.97 Rating | 30% | 10% | 10%-30% (PEB 10%) |

The VA and final PEB 10% ratings were premised on intermittent inhaled medication requirement. There was no pulmonary function testing evidence that would rate greater than 10%. In its deliberations, the Board devoted careful attention to the issue of whether daily inhaled bronchodilator and/or anti-inflammatory therapy was met in this case. Although originally prescribed a daily use inhaled maintenance/preventive medication, the CI elected to discontinue the medication and at final separation there was no indication that a daily-use inhalation preventive medication was used or prescribed. However, the NARSUM indicated the CI used her Albuterol inhaled medication “1-2 times daily.” Although this is not ideal current recommended treatment for asthma, it was within accepted norms and medication profile indicated prescribed Albuterol inhaler as needed. There is a paucity of outpatient clinical notes for the 12-month period preceding separation, and the VA exam did not specify the frequency of use of inhaled medication. The Board considered that the CI may only have required daily use of inhaled bronchodialator medication (Albuterol) seasonally and alternatively that the CI’s daily symptoms and activity limitations indicated poor control. There was no further post-separation VA assessment or treatment notes for asthma in the records. Chronic daily inhalational bronchodilator therapy use would meet the 30% rating criteria, while episodic or seasonal daily use would meet the 10% rating criteria. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s 10% rating decision for the asthma condition.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB was depressive disorder with borderline personality disorder adjudicated as a condition subject to an administrative rather than medical separation, IAW DoDI 1332.38 (14 Nov 96), enclosure 4, para E4.13.1.4. The DoDI paragraph states “These conditions do not constitute a physical disability despite the fact they may render a member unable to perform his or her duties.” The Board’s main charge in respect to the CI’s mental disorder condition(s) is an assessment of the appropriateness of the initial PEB’s fitness adjudication. Although no mental health condition was profiled (3 November 2003) or implicated in the commander’s statement (18 October 2003); both the profile and commander’s statement were dated prior to the CI’s presentation of suicidality (9 January 2004) and psychiatric hospitalizations. The CI was psychiatrically hospitalized twice for suicidal ideation during the DES processing leading up to entry into TDRL for her asthma condition. The MEB addendum (26 March 2004), five months prior to TDRL-entry demonstrated a mental status exam (MSE) with suicidal ideation with a plan, speech soft and slow, poor eye contact, blunted but reactive affect, thought processes generally lininear, and absence of hallucinations or paranoia. Judgement was fair. The NARSUM Axis I depressive disorder and Axis II borderline personality disorder conditions diagnoses was as detailed below:

AXIS I (311) Depressive Disorder Not Otherwise Specified manifested by episodic depressive symptoms directly related to effective instability resulting from her primary AXIS II Borderline Personality Disorder.

AXIS II: (301.83) Borderline Personality Disorder manifested by a pervasive pattern of instability of interpersonal relationships, self image and affects and marked impulsivity beginning in early adulthood as indicated by recurrent suicidal behavior, gestures, threats and self mutilating behavior. effectivee instability due to a marked reactivity of mood, chronic feelings of emptiness, inappropriate intense anger and difficulty controlling anger and transient stress related severe dissociative symptoms.

AXIS III: As per the primary Medical Evaluation Board.

AXIS V: Occupational and family stressors.

AXIS V: 40.

The overall Global Assessment of Functioning (GAF) was 40 in the range of some impairment in reality testing or communication or major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood. There was no numeric specification of AXIS I versus AXIS II attribution of GAF; however, the recommendation section indicated:

… that the CI “has primarily AXIS II psychopathology and does not qualify for a Medical Evaluation Board on the basis of her emotional problems alone. Future suicidal ideation and attempts are likely and should be contributed to the individual's character, behavior and personality structure rather than to any diagnosable AXIS I psychiatric disease. This condition and the problems presented by this individual are not, in the opinion of the examiner, amenable to rehabilitation or reclassification to another type of duty within the military. It is unlikely that efforts to develop this individual in to a satisfactory member of the military will be successful. …”

There was clear indication that the AXIS I and II disorder(s) would significantly interfere with return to military duty. The NARSUM clearly attributed this impairment to the AXIS II personality disorder condition versus the AXIS I diagnosis of depressive disorder.

The VA exam, two months after entry into TDRL, indicated severe mental health symptoms and a diagnosis of schizoaffective disorder, bipolar type and posttraumatic stress disorder (PTSD) rather than depressive disorder. The initially deferred AXIS II diagnosis was determined to be borderline personality disorder. The MSE indicated chronic suicidal thoughts; impaired eye contact; constricted and depressed affect; impaired memory and concentration, insight and judgement; and history of dissociative symptoms and panic attacks. PTSD was attributed to “childhood abuse as well as being exposed to traumatic incidences as an MP (military police) in the service.” Overall GAF was 45 (MEB 40) in the range of serious symptoms or any serious impairment in social, occupational, or school functioning. The VA ratred this exam at 100%. The record indicated the CI was psychiatrically hospitalized (25 January to 10 February 2005) three months prior to the final separation PEB. The TDRL re-evaluation in May 2005 indicated diagnosis #2: “multiple mental health conditions for which the patient is being seen at the VA, to include per patient's history: bipolar disorder; PTSD; schizoaffective personality disorder (VA record indicated schizoaffective disorder); and unspecified memory loss.” The TDRL re-evaluation expressly did not evaluate the CI’s “…extensive mental health evaluation treatment and follow-up … if needed I would defer the patient to a military mental health care provider to make a more formal assessments with these conditions ….”. The PEB determined that “diagnosis #2 is not ratable since it was not considered as an unfitting condition on your original PEB.”

The VA diagnoses of schizoaffective disorder, bipolar type and PTSD rather than depressive disorder were reaffirmed across multiple hospitalizations and VA ratings in 2006 and 2009. A 2011 VA exam indicated continuing severe mental disorder symptoms, consistant GAFs in the range of 45 with continuous outpatient treatment including hospitalizations 2-3 times a year from 2006-2010, and hospitalization for suicide attempt in January 2011. The VA record indicated a continued 100% rating with a slight change in AXIS I diagnoses to schizoaffective disorder, bipolar disorder, and PTSD (with AXIS II borderline personality disorder). The Board’s 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. The CI’s overall functioning was clearly below the level of being able to function in her MOS; however, the focus is if these impairments are due to a compensable AXIS I condition, or a non-compensable (administrative) AXIS II condition. The TDRL-entry NARSUM and PEB determination, absent any VA evidence, was clear on attribution to the AXIS II condition. The Board deliberated if the CI’s change in mental health diagnoses and subsequent re-attribution of symptom from predominately AXIS II to predominately an AXIS I diagnosis impacted the initial TDRL-entry fitness determination. The initial VA exam was closer to the date of TDRL entry and followed a second in-service hospitalization after the MEB psychiatric addendum was completed. The Board also considered that the TDRL-exit PEB did not comprehensively deliberated the validity and correctness of the initial PEB fitness adjudication, but followed the tenants of DoDI 1332.38 for TDRL re-evaluation.

All evidence considered, including evidence not considered by the initial PEB, the Board majority agreed there was a preponderance of the evidence in the CI’s favor regarding the the depressive disorder condition being to the level of being unfitting. The minority voter contended that there was insufficient evidence tying the depressive disorder to the CI’s ability to perform his military duties in a satisfactory manner. The Board, majority therefore, recommends that it be rated as an additionally unfitting condition on TDRL entry. Board precedence is not to change mental health diagnoses from that determined by the PEB and the Board therefore recommends coding depressive disorder/schizoaffective disorder as 9211-9434. The condition did not improve over the TDRL period and was unfitting at the time of permanent separation. The evidence on both entry and exit from TDRL did not support total occupational and social impairment (100%) and the CI was employed for some part of the TDRL period. There was sufficient evidence of severe dissociative symptoms and occupational and social impairment, with deficiencies in most areas to meet the criteria for the 70% rating IAW VASRD §4.130. After due deliberation, the Board majority agreed that the preponderance of the evidence with regard to the functional impairment of the mental health disorder favors its recommendation as an additionally unfitting condition for separation rating. It is appropriately coded 9211-9434 and meets the VASRD §4.130 criteria for a 70% rating on TDRL-entry and at permanent separation.

Remaining Conditions. Other conditions identified in the DES file were hypercholestoralemia, headaches, low back pain, knee pain, sinusitis, hearing loss, difficulty sleeping, worriness, and pseudohypoparathyroidism. Several additional non-acute conditions or medical complaints were also documented. 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. 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 asthma condition and IAW VASRD §4.97, the Board unanimously recommends no change in the PEB adjudication at separation or permanently. In the matter of the mental health (depressive disorder) condition, the Board, by a vote of 2:1 recommends that it be added as an additionally unfitting condition for separation rating, coded 9211-9434 and rated 70% at separation and permanently IAW VASRD §4.130. The single voter for dissent (who contended that there was insufficient evidence tying the depressive disorder to the CI’s ability to perform his military duties in a satisfactory manner) did not elect to submit a minority opinion. In the matter of the borderline personality disorder condition, the Board unanimously recommends no change from the PEB adjudication as not medically unfitting (not a medical disability condition). The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as additionally unfitting for rating at separation.

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 her prior medical separation:

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| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Asthma | 6602 | 30% | 10% |
| Depressive Disorder/Schizoaffective Disorder | 9211-9434 | 70% | 70% |
| **COMBINED** | **80%** | **70%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110822, 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 constructively place the individual on the Temporary Disability Retired List (TDRL) at

80% disability for six months effective the date of the individual’s original medical separation for disability with severance pay and then following this six month period recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 70%.

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 six month TDRL period.

c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, provide 80% retired pay for the constructive temporary disability retired six month period effective the date of the individual’s original medical separation and then payment of permanent disability retired pay at 70% effective the day following the constructive six month 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

Deputy Assistant Secretary

(Army Review Boards)