RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100807 SEPARATION DATE: 20051103

BOARD DATE: 20120801

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E4 (31B, Military Police) medically separated for cognitive disorder (associated with a mood disorder), secondary to traumatic brain injury (TBI) from a motorcycle accident in March 2004. The condition could not be adequately rehabilitated to meet the operational requirements of his Military Occupational Specialty (MOS); he was issued a permanent P3/S3 profile; and, he was referred for a Medical Evaluation Board (MEB). The MEB forwarded TBI and “mood and cognitive disorder” to the Physical Evaluation Board (PEB) as separate conditions, each medically unacceptable IAW AR 40-501. No other conditions were submitted by the MEB. The PEB combined the MEB submissions as a single unfitting condition, “cognitive disorder, NOS [not otherwise specified]”, rated 10% IAW the Veterans Administration Schedule for Rating Disabilities (VASRD) in effect. The CI waived an initial request for a Formal PEB (FPEB), and was medically separated with a 10% disability rating.

CI CONTENTION: “The Medical Evaluation Board did not acknowledge my PTSD [post-traumatic stress disorder], nor my bipolar disorder. After my traumatic brain injury I was placed in a Medical Holding Unit and the psychologist ordered me to remain at home and not to report to the unit. Because I was ordered to stay at home I have a limited Medical History from this period. However, my ex-wife and mother saw my deficiencies first hand. These issues included suicidal thoughts/behavior, violent outbursts, extreme irritability and rapid weight gain (at the time of my arrest I weighed over 330 lbs). Due to these disorders, I have become a danger to myself and others.” He elaborates no further specific contentions, but lists all of the VA conditions noted in the chart below.

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in Department of Defense Instruction (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.” Since the contended specific conditions of posttraumatic stress disorder (PTSD) and bipolar disorder were not submitted by the MEB or adjudicated by the PEB, they do not fall within the DoDI 6040.44 defined purview of the Board; and, cannot be addressed as specific psychiatric conditions. The Board does judge, however, that the mood disorder forwarded by the MEB and subsumed in the PEB’s adjudication will be considered in the Board’s recommendation. The psychiatric diagnosis (or multiple diagnoses) is moot to rating under VASRD §4.130, as it is to the assessment of whether or not there was unfitting psychiatric impairment. Only the Army Board for the Correction of Military Records (ABCMR), however, may consider whether the specifically contended psychiatric conditions are eligible for disability rating. Any other conditions or contention not requested in this application also remain eligible for future consideration by the ABMCR.

RATING COMPARISON:

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| --- | --- |
| **Service PEB – Dated 20050613** | **VA (3 Mo. Pre-Separation) – All Effective 20051104** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Cognitive Disorder NOS | 8045-9304 | 10% | Mood/Cognitive Disorder …  | 9304-9435 | 50% | 20050817 |
| No Additional PEB Entries | Seizure Disorder | 8045-8910 | 20% | 20050817 |
| Residual Headaches (2⁰ to TBI) | 8045-5296 | 10% | 20050817 |
| Tinnitus | 6260 | 10% | 20050829 |
| Scar (Scalp Incision)  | 7800 | 10% | 20050817 |
| Scar ( Scalp Incision #2) | 7800 | 10% | 20050817 |
| 0% X 7 / Not Service-Connected x 5 | 20050817 |
| **Combined: 10%** | **Combined: 70%** |

ANALYSIS SUMMARY:

TBI Associated with Cognitive and Mood Disorder. The CI’s 2004 head injury was severe; resulting in intubation, a period of coma, a seizure, and a requirement for neurosurgical evacuation of an epidural hematoma. He had no preceding history of psychiatric or cognitive disease. His initial cognitive and neurological deficits were fairly severe, but at the time of the MEB’s narrative summary (NARSUM) he had responded “remarkably well” to extensive rehabilitation. He had suffered no recurrent seizures and was being weaned off an anticonvulsant; and, residual headaches were well controlled. There were no focal neurologic signs or symptoms in evidence at the time of separation. Neuropsychological testing suggested poor motivation and possible embellishment of symptoms on validity scales, but did demonstrate reduced processing speed and short term memory impairment. The associated psychiatric symptoms were interpreted as per the following excerpt.

The patient has a mild cognitive disorder. He reports personality changes as a result of his injury. He specifically reports problems with his temper and with frustration. We have no way of verifying this information. Assuming his report is true he would meet the criteria for a personality change due to TBI. Mild impairment in social and occupational functioning is expected when considering mildly impaired cognitive functioning and personality change due to TBI. These two conditions taken together are disqualifying from continued duty within the military.

As noted in the contention, the CI had been given medical clearance to remain at home during the MEB proceedings; as he reported intolerable distractions with the ringing of telephones and presence of other people when assigned to administrative duties. The psychiatric addendum to the NARSUM yielded diagnoses of 1) “personality change described as difficulty with temper and frustration, secondary to above injury [TBI];” 2) “mild cognitive change;” and, 3) “psychiatric disturbance to include possible PTSD, anxiety disorder and panic attacks.” The NARSUM’s mental status examination (MSE) was normal except for “low” mood and “distracted” thought processes. It was specifically noted as “without evidence of current suicidal or homicidal ideations or perceptual disturbances.” The Global Assessment of Functioning (GAF) score was 60 (at the cusp of mild to moderate social and occupational impairment). At the VA Compensation and Pension (C&P) psychiatric evaluation, prior to separation, the CI reported “mood swings where he punches holes in the wall,” “several panic attacks per week” (documented as “approximately once per month” by the MEB psychiatrist) and “daily crying spells.” It was also noted that “his ability to concentrate and pay attention is diminished secondary to mood swings secondary to being in the military.” The MSE noted no observed mood or affect disturbance, but stated that he “speaks in a blocked manner.” Specifically denied were hallucinations, delusions, and homicidal/suicidal ideation. Fairly comprehensive testing of gross cognitive and memory performance was documented as normal. The VA examiner’s GAF assignment was 50 (at the cusp of moderate and serious impairment), with an axis I diagnosis of “bipolar disorder secondary to being in the military;” although, the action officer opines that diagnostic and statistical manual of mental disorders (DSM IV) criteria for bipolar disorder were unambiguously absent in the history provided. The examiner specifically documented “There is no evidence of PTSD that is military related.”

The Board directs attention to its rating recommendation based on the above evidence, which must accommodate the DoDI 6040.44 requirement that its recommendations be premised on the VASRD in effect at the time of separation. The only available code for rating TBI in 2005 was code 8045 (brain disease due to trauma). Since its interpretation is a fundamental consideration in this case, it is excerpted below.

Purely neurological disabilities, such as hemiplegia, epileptiform seizures, facial nerve paralysis, etc., following trauma to the brain, will be rated under the diagnostic codes specifically dealing with such disabilities, with citation of a hyphenated diagnostic code (e.g., 8045–8207).

Purely subjective complaints such as headache, dizziness, insomnia, etc., recognized as symptomatic of brain trauma, will be rated 10% 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% 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 evidence clearly shows that the CI’s ratable disability, including the psychiatric symptoms, was a direct consequence of TBI. The core issue in this case is whether the psychiatric symptoms, characterized as mood disorder by the MEB, can be split off from code 8045 for additional rating under the VASRD §4.130 general rating formula for mental disorders. The code 8045 description does not include psychiatric symptoms (“insomnia” not withstanding) in its examples of “purely subjective complaints;” but, it requires a leap of faith to assume that psychiatric manifestations are thereby not subsumed in the mandated 10% rating. Given the explicit prohibitions for achieving a rating higher than 10% for associated disabilities other than “purely neurological” ones, and the fact that the latter were explicitly carved out in the rating language; one would conversely assume that similar provisions to those for neurological manifestations of TBI would have been provided for psychiatric manifestations if so intended. In fact, the VA did not authorize separate ratings for TBI associated conditions until its “FAST” or Training Letter (TL07-05) dated 31 August 2007; and, TL07-05 explicitly included psychiatric conditions in that ruling. Furthermore, the VA did not authorize alternative rating for TBI under a more favorable code (e.g., the VA’s choice of code 9304-9435 in this case) until TL06-03 dated 13 February 2006. Although the Board, by precedent and legal opinion, may apply concurrent “FAST” letter authorizations to its recommendations; neither TL06-03 nor TL07-05 was in effect on the date of separation. The Board therefore deliberated whether it had the latitude to “unbundle” the cognitive disorder and mood disorders (with attendant determinations regarding whether the latter was separately unfitting and whether VASRD §4.129 provisions would attach); or, whether it was bound by DoDI 6040.44 and 2005 VASRD constraints to concur with the 10% rating under code 8045-9304 as conferred by the PEB. After protracted deliberation, all members agreed that the psychiatric disability could not be separately rated, or invoked to achieve a higher rating under code 8045, and remain in conformance with the VASRD in effect. This was concluded because the explicit language under the only applicable code does not lend itself to that latitude; and, because the subsequent VA “FAST” letters made it clear that such latitude was not authorized prior to their promulgation. Considering the totality 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 of the TBI (with cognitive and mood disorder) condition.

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. The Board did not surmise from the record or PEB ruling in this case that any prerogatives outside the VASRD were exercised. In the matter of the TBI (with cognitive and mood disorder) condition and IAW VASRD §4.124a, the Board unanimously recommends no change in the PEB adjudication. There were no other conditions within the Board’s scope of review for consideration.

RECOMMENDATION: The Board, therefore, recommends that there be no recharacterization of the CI’s disability and separation determination, as follows:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Traumatic Brain Injury with Cognitive Impairment | 8045-9304 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110920, 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

SFMR-RB

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 XXXXXXXXXXXXXXXXXXXXXXXXXX, AR20120014281 (PD201100807)

I have reviewed the enclosed Department of Defense Physical Disability Board of Review (DoD PDBR) recommendation and record of proceedings pertaining to the subject individual. Under the authority of Title 10, United States Code, section 1554a, I accept the Board’s recommendation and hereby deny the individual’s application.

This decision is final. The individual concerned, counsel (if any), and any Members of Congress who have shown interest in this application have been notified of this decision by mail.

BY ORDER OF THE SECRETARY OF THE ARMY:

Encl XXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA