RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100813 SEPARATION DATE: 20080428

BOARD DATE: 20120525

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (63A, M1 Abrams Systems Maintainer) medically separated for anxiety disorder. The CI was diagnosed with anxiety disorder after two Iraq deployments (12 month tours ending February 2005 and November 2006). There is an alternate diagnosis of post traumatic stress disorder (PTSD) in evidence, and Criterion A combat stressors were documented. The psychiatric condition could not be adequately rehabilitated to meet the operational requirements of his Military Occupational Specialty (MOS). He was consequently issued a permanent S3 profile and referred for a Medical Evaluation Board (MEB). The psychiatric condition, characterized as “anxiety disorder, not otherwise specified”, was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Five other conditions (as identified in the rating chart below) were addressed by the MEB, and forwarded as meeting retention standards. The PEB adjudicated the psychiatric condition as unfitting, rated 10%, citing criteria of the Veterans’ Administration Schedule for Rating Disabilities (VASRD). The remaining conditions were determined to be not unfitting. The CI made no appeals, and was medically separated with that disability rating.

CI CONTENTION: The application is blank regarding any specific contentions or request for consideration of other conditions not rated as unfitting.

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in DoDI 6040.44 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 none of the conditions determined to be unfitting by the PEB are requested for review, only the rated psychiatric condition falls within the Board’s purview; and is addressed below. 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:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20080313** | | | **VA (3 Days Pre-Separation) – All Effective Date 20080425** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Anxiety Disorder | 9413 | 10% | PTSD | 9411 | 50%\* | 20080421 |
| Chronic Low Back Pain | Not Unfitting | | Lumbar Spine DJD | 5242 | 10% | 20080401 |
| Chronic Bilateral Knee Pain | Not Unfitting | | Left Knee RPS | 5260 | 10% | 20080401 |
| Right Knee RPS | 5260 | 10% | 20080401 |
| Chronic Right Shoulder Pain | Not Unfitting | | Right Shoulder Bursitis | 5201-5019 | 10% | 20080401 |
| Hypertension | Not Unfitting | | Hypertension | 7101 | 0% | 20080401 |
| Vertigo | Not Unfitting | | No VA Entry | | | 20080401 |
| Nicotine Dependence | Not Ratable | | No VA Entry | | | 20080401 |
| No Additional MEB/PEB Entries | | | Cervical Strain | 5237 | 10% | 20080401 |
| 0% x 1/Not Service Connected x 0 | | | 20080401 |
| **Combined: 10%** | | | **Combined: 70%** | | | |

\* IAW VASRD §4.129.

ANALYSIS SUMMARY: The PEB rating in this case fell after the effective date of the National Defense Authorization Act (NDAA) 2008 mandate for DoD adherence to VASRD §4.129. Furthermore, IAW DoDI 6040.44 and DoD guidance (which applies VASRD §4.129 to all Board cases), the Board is obligated to consider if the definition of §4.129 is met for any psychiatric condition resulting in medical separation; i.e., “a mental disorder that develops in service as a result of a highly stressful event.” The evidence is clear in this case that all of the elements for application of §4.129 were met. Thus, in compliance with the above directives, the Board must recommend a minimum 50% rating for a retroactive six-month period on the Temporary Disability Retired List (TDRL). The Board must then determine the most appropriate fit with VASRD 4.130 criteria at six months for its permanent rating recommendation. The only sources of comprehensive evidence on which to base either the TDRL or permanent rating recommendations in this case are the psychiatric addendum to the MEB’s narrative summary (NARSUM) and the VA Compensation and Pension (C&P) examination performed three days before separation. There was no relevant VA outpatient or civilian provider evidence providing psychiatric details during the six-month interval of constructional TDRL, or subsequently. The Board made additional inquiries to assure that this evidence does not exist. This deprives the Board of evidence for judging the stress of transition to civilian life which is the key intent of §4.129 and a significant element underlying the Board’s permanent rating recommendation. In cases such as this, the Board out of necessity must base its permanent rating recommendation on the evidence at separation, mitigated (to the extent possible) by the anticipated prognosis at six months. The latter imposes a degree of speculation, and the Board must remain compliant with VASRD §4.3 (reasonable doubt); but, the absence of any continuing psychiatric treatment by the VA (or submitted civilian evidence of same) must logically be interpreted as a favorable post-separation course; this premised on an assumption that an unfavorable course should have resulted in continuing treatment and reevaluation.

Psychiatric Condition. The CI experienced significant stressors during his first deployment, and to a lesser extent during his second deployment. These included life-threatening exposures to numerous convoy attacks, witnessing the deaths of friends, and exposure to carnage. During screening after his second deployment in 2006 he was noted to be irritable and depressed; and, was referred to behavioral health. There he endorsed hyperarousal, suspicion, anger, a high degree of irritability, anxiety, insomnia, nightmares, avoidance, suicidal thoughts, and depressed mood. He disclosed that he had experienced similar symptoms after his first deployment, which included excessive drinking and frequent physical aggression; although, he maintained that his alcohol consumption was under control during the MEB period after the second deployment. Two standard PTSD questionnaires from the Spring of 2007 scored the CI at 45, just under the threshold of 50 for PTSD. It was noted that he would punch walls, yell, curse, and damage his vehicle in order to vent his anger. In the fall of 2007, the CI’s symptoms worsened after he found out that his unit was again ordered to deploy. He was constantly angry and berating to his Sergeant; and, relationships with his girlfriend and close associates were strained. Two outbursts of rage (described as “blackouts”) were documented; which included one during which he was choking a friend, and another marked by a destructive rampage while yelling “I can’t go back;” both requiring physical restraint. The commander’s statement concluded that, “[CI] simply cannot perform duties without severe consequences.” At a psychiatric visit in November 2007, the CI reported contemplating suicide or desertion; but denied active intent for either action. The examining psychiatrist made an Axis I diagnosis of PTSD; and, in December 2007 he was admitted to the warrior transition unit with that diagnosis. At the MEB psychiatric evaluation (four months pre-separation), the CI endorsed continuing irritability, anger, and depression; but, his symptoms were improving with treatment and relief from the threat of the re-deployment. The only psychotherapeutic medication prescribed at separation was fluoxetine (Prozac™). The CI’s clinical course and status at this time is captured in the following excerpt from the MEB’s psychiatric addendum.

In followup today, he reports that since the Medical Board process has begun and he has moved to the warrior transition unit, his irritability is not as severe. He sleeps decently most nights with few nightmares. He is thinking of the future, considering working for either Midas or a garbage company as he has a friend who has a connection with a major garbage company with good pay and benefits. He has limited his alcohol consumption to 1 or 2 beers on a Sunday while watching football and avoids hard alcohol. He has not had any recent command discipline problems, showing up for his formations on time, and getting to all his medical appointments.

The MEB’s mental status examination (MSE) was notable only for avoidance of eye contact, an “irritable” mood, and a “constricted” affect. There was no active suicidal ideation, delusional or hallucinatory symptoms, speech disturbance, objective cognitive impairment, or other abnormality. The Global Assessment of Functioning (GAF) assignment was 51, which is in the serious range of impairment on that scale. The Axis I diagnosis made by the MEB psychiatrist was “anxiety disorder, not otherwise specified”; and, no rationale or differential diagnosis from PTSD was offered.

The VA psychiatric Compensation and Pension (C&P) evaluation on the eve of separation detailed a history of symptoms corroborating the MEB evaluation. The exam documented examples of social avoidance and persistent hyper-startle responses, but no flashbacks or blackouts; and, noted that the Prozac had been “helpful” and that the clinical course was improving. The state of the CI’s condition at the time is reflected in the following excerpt.

He indicated having intrusive thoughts on a daily basis, which has been consistent since his 1st deployment to Iraq. He does report feeling detached from others as well as decreased concentration. [CI name] also reported avoiding driving and stated "I hate driving." … He reported some concerns about his ability to work because of decreased motivation and irritability and anger outbursts. He does intend to try and find employment.

The MSE by the VA psychiatrist noted a “dysphoric” mood and “blunted” affect; but, as per the MEB psychiatrist, was otherwise normal. Detailed cognitive testing was normal. The VA examiner quoted the MEB’s GAF score of 51. The VA psychiatrist made an Axis I diagnosis of PTSD, and stated “It is unclear as to why [CI name] was not diagnosed with PTSD, as it appears as though this medical evaluation board outlines all the criteria.”

The Board directs attention to its rating recommendations based on the above evidence. All members agreed that the §4.130 criteria for a rating higher than 50% were not met at the time of separation, and therefore the minimum 50% TDRL rating (as explained above) is applicable. The original rating decision of the VA assigned a 50% rating for the PTSD condition with specific citation of §4.129 criteria. There is no evidence of record documenting the VA’s disposition regarding the lack of a psychiatric reevaluation, as explicitly mandated by §4.129. A lengthy deliberation ensued regarding the Board’s permanent rating recommendation in this case, given the absence of any hard probative evidence relative to the six-month benchmark (or at any point after separation). It was agreed that a fair §4.130 based rating from the evidence proximate to separation, although exceeding the PEB assigned 10%, was closer to 30% than 50%; and, given that continued improvement was more likely than not, it was agreed that the permanent rating recommendation would not logically exceed 30%. The deliberation thus settled on arguments for a 30% versus a 10% permanent rating recommendation. The §4.130 description for a 30% rating is “occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks;” while that for 10% is “occupational and social impairment due to mild or transient symptoms which decrease work efficiency … only during periods of significant stress, or; symptoms controlled by continuous medication.” The CI clearly was experiencing depressed mood, anxiety, and suspiciousness at the time of separation. Without any evidence from the post-separation period, it cannot be concluded with any certainty that the CI’s condition would have improved enough over the prescribed 6-month interval to satisfy the 10% criteria just cited. While separation and decompression from a military environment could be expected to attenuate the anxiety and behavioral lability, the transition to civilian life would also entail stressors that might conversely exacerbate the symptoms (at least in the shorter term). This could in fact result in interim unemployability resulting from the angry outbursts and irritability, as concerned the CI at the time of his VA exam. Members were reticent to conclude that the CI remained significantly impaired on the occupational front without seeking continued psychiatric care or following through on the VA reevaluation necessary to sustain benefits; but, agreed that it was overly speculative, and in conflict with the principle of reasonable doubt, to apply an assumption of such a favorable course to the prescribed permanent rating interval of 6 months. After due deliberation, considering all of the evidence and conceding VASRD §4.3 (reasonable doubt), the Board recommends a permanent psychiatric disability rating of 30% in this case.

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 PEB ruling in this case that any prerogatives outside VASRD §4.130 were exercised. The PEB did not, however, apply VASRD §4.129 to the CI’s PTSD adjudication as required by NDAA 2008 in effect at the time of final separation, for which the Board provides remedy. In the matter of the psychiatric condition, the Board unanimously recommends an initial TDRL rating of 50% IAW VASRD §4.130; and a 30% permanent rating at six months, coded 9413-9411 IAW VASRD §4.130. There were no other conditions within the Board’s scope of review for consideration.

RECOMMENDATION: In the matter of the Anxiety Disorder/PTSD condition, the Board unanimously recommends an initial TDRL rating of 50% in retroactive compliance with VASRD §4.129 as DOD directed; and, a 30% permanent rating at six months IAW VASRD §4.130.

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| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** | |
| **TDRL** | **PERMANENT** |
| Post Traumatic Stress Disorder | 9413-9411 | 50% | 30% |
| **COMBINED** | **50%** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110825, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

XXXXXXXXX

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 XXXXXXXXXXXXXX, AR20120010170 (PD201100813)

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 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 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 six month 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 six month 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 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 XXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA