RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100855 SEPARATION DATE: 20060928

BOARD DATE: 20120727

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (11B20 / Infantryman), medically separated for major depressive disorder (MDD), in partial remission, with onset of depressive symptoms in 2004, worsening after arrival at Ft Lewis (WA) in late 2005. The CI had depression, anxiety hallucinations, nightmares, and suicidal ideation with intent and was psychiatrically hospitalized for approximately 6 months. The CI’s psychiatric condition did not respond adequately to treatment and the CI was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent S4 profile and underwent a Medical Evaluation Board (MEB). MDD, single episode, severe with self reported psychotic features of auditory hallucinations and visual illusions, in partial remission with depressed mood, anhedonia, initial and middle insomnia, low self esteem, low energy, difficulty concentrating, increased appetite with weight gain, and a past history of suicidal ideation was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Three other conditions, left shoulder pain, low back pain (LBP), and right ear sensorineural hearing loss, as identified in the rating chart below, were forwarded on the MEB submission as medically acceptable conditions. The PEB adjudicated the MDD condition as unfitting, rated 10%, with application of Department of Defense Instruction (DoDI) 1332.39. Additionally, the left shoulder pain, LBP, and right hearing loss conditions were adjudicated as not unfitting. The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: “The diagnosis of the Primary Condition rated by the Physical Evaluation Board (Major Depressive Disorder) was not the same condition I was diagnosed with (PTSD), resulting in an inappropriate disability rating and percentage. The attached VA Rating Decisions not only confirm that my disabling condition was actually Post Traumatic Stress Disorder (with depression), but that the condition by itself was 70% disabling and has greatly affected my ability to find any suitable employment since my discharge, resulting in a rating of 100% for Individual Unemployability, and is considered ‘Permanent and Total’ disability for VA compensation purpose.”

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. The MDD condition as requested for consideration meets the criteria prescribed in DoDI 6040.44 for Board purview and is addressed below. The remaining conditions rated by the VA after separation and listed on the DD Form 294 are 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:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20060804** | | | **VA (6 Mo. After-Separation) – All Effective Date 20060922** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Major Depressive D/O … with Mixed Cluster B & C Traits and Psychosocial Stressors | 9434 | 10% | PTSD w/ Depression | 9434-9411 | 70% | 20070329 |
| Lt Shoulder Pain | Not Unfitting | | Lt CTS | 8515 | 0% | 20070329 |
| LBP | Not Unfitting | | Low Back Strain | 5237 | 0% | 20070329 |
| Rt Ear … Hearing Loss | Not Unfitting | | Tinnitus | 6100 | 10% | 20070329 |
| ↓No Additional MEB/PEB Entries↓ | | | 0% x 3 (Includes above)/Not Service-Connected x 2 | | | 20070329 |
| **Combined: 10%** | | | **Combined: 70%\*** | | | |

\* VARD dated 20070822 granted Individual Unemployability effective 20060922; also added Rt CTS @ 10% and increased the combined rating to 80% effective 20060922.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-aggravated condition continues to burden him. It is a fact, however, that 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. This role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA). The DVA, 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 Board utilizes DVA evidence proximal to separation in arriving at its recommendations; and, DoDI 6040.44 defines a 12-month interval for special consideration to post-separation evidence. The Board’s authority as defined in DoDI 6044.40, however, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation. Although there was a disparity in diagnoses between the service (MDD on MEB and PEB) and the DVA (posttraumatic stress disorder (PTSD)), the Board adjudged that it was outside the Board’s scope to change the CI’s mental health diagnosis; however, the coding and rating of the CI’s mental health disorder was adjudicated IAW VASRD rules and criteria in effect at the time of the CI’s separation. Both mental health diagnoses are rated IAW the same general rating formula for mental disorders IAW VASRD §4.130.

Major Depressive Disorder Condition. The PEB rating, as described above, was derived from DoDI 1332.39. The narrative summaries (NARSUMs) and record indicated the service diagnosis of MDD with initial complaints of nightmares related to his deployment to Iraq and fall from a Bradley vehicle and other deployment-related events. He became suicidal and was admitted to the inpatient psychiatric unit (41 days) then transferred as a psychiatric inpatient to a VA hospital for 5 months. Therapy including multiple trials of different medications did not resolve the CI’s symptoms. The CI had multiple medication reactions including torticollis with dystonia, and priapism (requiring urologic intervention x2, with resultant erectile dysfunction due to corporal fibrosis), which limited the medication management of the CI’s mental disorder condition.

The CI was discharged from the VA hospital to intensive outpatient care on 6 July 2006 with discharge mental health diagnoses included PTSD, psychosis (NOS), and depressive disorder. His Global Assessment of Functioning (GAF) was 38 on discharge (improved from admit GAF of 25) indicating very serious symptoms with some impairment in reality testing or communication or major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood.

The NARSUM, dated 12 July 2006, within a week of hospital discharge and 2 months prior to separation, noted continued symptoms of depressed mood, auditory hallucinations, visual illusions, anhedonia, sleep impairment, and difficulty concentrating. The NARSUM indicated an interview descriptive of symptoms. However, there was no formal mental status exam assessing affect; understanding commands; or impairment of memory, judgment or thinking. Mood was depressed and the examiner stated the CI was not motivated for improvement or continued service. The CI was taking antidepressant (Mirtazapine) and sleep medications (Temazapam). He was living with his wife and children off-post. The diagnoses were axis I MDD, single episode, severe; and axis II mixed cluster B and C traits. The CI’s GAF was assessed at 60 (hospital discharge GAF=38) which is at the upper range indicating moderate symptoms.

The severity of the CI’s mental disorder condition as evidenced by the VA Compensation and Pension (C&P) evaluation, 6 months after separation, could best be described as severe. The CI was unemployed, living with his spouse and children, but with marital and family difficulties. He related symptoms of frequent nightmares, sleep impairment, anxiety, intrusive thoughts, avoidance, paranoid ideation, panic attacks (with chest pain), and auditory and visual hallucinations. Social avoidance was documented, and his medications were in transition due to side-effects. His mental status exam (MSE) showed a tense, anxious and apprehensive affect, with an anxious and depressed mood. Immediate memory was mildly impaired, and thinking was concrete with inability to interpret proverbs. The examiner indicated depressed mood with feelings of hopelessness, helplessness and inadequacy. Mood was labile with severe problems in adjusting to daily functions, and a guarded prognosis due to his previous adverse effects to medications. GAF score was assessed at 50 (hospital discharge=38; MEB=60), connoting serious impairment. The examiner stated that symptoms resulted in deficiencies in the areas of judgment, thinking, family relations, work, mood and school. The VA assigned a §4.130 rating of 70% based on this examination. A remote VA exam, 31 months after separation, indicated continued unemployment, mental disorder symptoms that were less severe, and a GAF of 55. The VA 70% rating was continued as sustained improvement had not been definitively established.

The Board directs attention to its rating recommendation based on the above evidence. The MEB and PEB indicate a diagnosis of major depressive disorder with prolonged hospitalization within weeks of PEB adjudication and within 2 months of separation. The Board first deliberated if the tenants of VASRD §4.129 (mental disorders due to traumatic stress) applied to this case. The PEB did not list PTSD or disability code 9411 on the PEB form; however, the preponderance of the record indicated the CI’s mental disorder developed in service as a result of a highly stressful event that was severe enough to bring about his release from military service. Therefore, the Board adjudged that §4.129 was applicable, and that a minimum 50% mental disorder rating for a retroactive 6-month period on the Temporary Disability Retired List (TDRL) is warranted.

The hospital discharge mental health diagnoses included PTSD, psychosis (NOS), and depressive disorder. All of the CI’s mental health diagnoses and symptoms are rated under the “general rating formula for mental disorders” IAW VASRD §4.130. The hospital discharge evaluation appeared to meet the 70% rating criteria for occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood. However, the service evaluation portrayed an exam more consistent with a 30%-50% disability picture. The service exam was a snapshot in time within one week of a prolonged hospitalization and the Board majority adjudged that the hospital discharge evaluation had a high probative value for rating at the time of separation, and recommends a 70% constructive TDRL rating IAW VASRD §4.129 and §4.130.

Regarding a permanent separation rating at the end of the 6 month constructive TDRL period, the C&P examination was at the 6-month timeframe which reflected the stress of transition to civilian life, which is a core intent of §4.129, and it carries the preponderance of probative value in the Board’s assessment of a fair permanent rating recommendation. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt) and §4.7 (higher of two evaluations), the Board majority recommends a disability rating of 70% for the MDD 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. As discussed above, PEB reliance on DoDI 1332.39 for rating MDD was operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the MDD condition, the Board by vote of 2:1, recommends a 6 month constructive TDRL period with a disability rating of 70%, and then a permanent separation rating of 70% coded 9434 IAW VASRD §4.129 and §4.130. The single voter for dissent (who recommended a TDRL entry and permanent rating of 50%) did not elect to submit a minority opinion. 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: TDRL at 70% for 6 months following CI’s prior medical separation (IAW §4.129 and §4.130) and then a permanent combined 70% disability retirement as below.

|  |  |  |  |
| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** | |
| **TDRL** | **PERMANENT** |
| Major Depressive Disorder | 9434 | 70% | 70% |
| **COMBINED** | **70%** | **70%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111003, 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 XXXXXXXXXXXXXXXXXXXXXXXXXXX, AR20120013949 (PD201100855)

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

70% 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 70% 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 XXXXXXXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA

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