RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100950 SEPARATION DATE: 20060825

BOARD DATE: 20120827

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (11B, Infantry) medically separated for cognitive disorder. This resulted from penetrating brain injury incurred in Iraq in 2004, and was complicated by a seizure during the recovery period. Although he enjoyed a favorable course following surgery and rehabilitative efforts, his residual impairments were not compatible with continued duty in his Military Occupational Specialty (MOS). He was consequently issued a permanent P3/S3 profile and referred for a Medical Evaluation Board (MEB). Two conditions were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501: “traumatic brain injury (TBI), with cognitive disorder” and “posttraumatic seizure disorder.” No other conditions were submitted by the MEB. The Informal PEB (IPEB) adjudicated the cognitive disorder as unfitting, rated 10%; citing a criterion of Department of Defense Instruction (DoDI) 1332.39, but rating IAW criteria of the Veterans Administration Schedule for Rating Disabilities (VASRD) in effect for code 8045 (brain disease due to trauma). The seizure disorder was determined to be not unfitting. The CI appealed to a Formal PEB (FPEB), which affirmed the IPEB findings; as did an advisory opinion from the US Army Physical Disability Agency (USAPDA); and, the CI was medically separated with a 10% disability rating.

CI CONTENTION: Via counsel, the CI states “The PEB (1) unfairly and inaccurately rated [CI Name] a mere 10% for cognitive disorder secondary to traumatic brain injury ("TBI"), and (2) found [CI’s] post traumatic seizure disorder ("PTSD") a medically fitting condition.” The application was accompanied by a 20 page legal brief (plus voluminous appended evidence), which was reviewed by the Board and considered in its recommendations.

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.” Both the unfitting cognitive disorder and the seizure condition, adjudicated as not unfitting by the FPEB and requested for review, meet the prescribed criteria for Board purview; and, are addressed below. The CI’s previous application to the Army Board for the Correction of Military Records (ABCMR) dated 21 July 2009 and the ABCMR’s record of proceedings dated 14 January 2010 were reviewed, and the Board agrees that neither the rating for cognitive disorder nor the requested rating for seizure disorder were preempted by those proceedings. Any conditions or contention not requested in this application, or previously considered by the ABMCR, remain eligible for future consideration by ABMCR.

RATING COMPARISON:

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| --- | --- |
| **Service FPEB – Dated 20060505** | **VA (~10 Mo. Post-Separation) – Effective 20060826** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Cognitive Disorder, NOS, Secondary to TBI  | 8045-9304 | 10% | Residuals from TBI, Skull Loss, Seizure, Scars, Bilateral Knee, Low Back, Extremity Weakness and Shrapnel Injuries | 8045-9304 | 100%\* | 20070620 |
| Post-Traumatic Seizure Disorder | Not Unfitting |
| **Combined: 10%** | **Combined: 100%** |

\* Pre-stabilization rating based on individual unemployability; a subsequent VA decision (20071010) separately rated each of 13

 residual conditions, effective 20070620, achieving a combined rating of 100%.

ANALYSIS SUMMARY: It is noted that a good portion of the submitted legal brief is devoted to valid arguments for achieving a higher rating for cognitive disorder under the current VASRD criteria for code 8045 (residuals of TBI), which were not in effect until 23 October 2008. DoDI 6040.44 (enclosure 3, 4.d); however, states that the Board will “use the VASRD in arriving at its recommendations, along with all applicable statutes, and any directives in effect at the time of the contested separation (to the extent they do not conflict with the VASRD in effect at the time of the contested separation).” The Board is thus obligated to apply the VASRD criteria for code 8045 which were in effect on the date of separation (as will be elaborated) to its recommendation. The Board’s recommendations in this case, however, are subject to the following policy (established by precedent and prior legal opinion). As an implied extension of the DoDI 6040.44 and National Defense Authorization Act (NDAA) 2008 mandates, the Board will comply with applicable Department of Veterans’ Affairs (DVA) disability rating policy changes issued via “FAST” or Training Letters effective on the date of separation. The DVA Training Letter, TL06-03, dated 13 February 2006, specifically addressed the complexity of TBI and recommended coding “outside” of code 8045 when a more favorable rating could be achieved under an alternate code; e.g., under 8100 if headache was a dominant complaint, etc. TL07-05, dated 31 August 2007, went further in recommending separate ratings under the applicable codes for each ratable component of TBI in evidence; e.g., headache, tinnitus, dizziness, etc. The latter directive (TL07-05) was quite likely the basis for the DVA’s follow-up rating as footnoted in the rating chart; but, was not yet effective on the date of separation. The Board does have the modest latitude granted by TL06-03, which was in effect at separation; and, this option will be considered in its recommendation.

Cognitive Disorder, Residual of TBI. The CI’s blast injury in August 2004 resulted in multiple penetrating fragments to the left temporal region of the brain. This required prompt neurosurgical intervention for stabilization in theater (leaving an 8 X 7 cm skull defect), and medical evacuation to Landstuhl Regional Medical Center (LRMC) in Germany. Intracranial bleeding requiring emergency operative intervention occurred soon after arrival to LRMC, and he was extubated (removed from ventilator) 5 days after the injury. Significant neurologic and cognitive deficits, including aphasia (inability to form speech), were present when he was transferred stateside; and, he underwent an extensive course of rehabilitation, which included a specialized inpatient program for TBI. Serial neuropsychological testing over the course of treatment documents impressive progress, emerging from a markedly impaired starting point. The summary from the neuropsychological testing most proximate to separation (12 months), and that cited in the FPEB’s DA Form 199, is excerpted below.

The current test profile shows improvement in multiple domains. Measures of attention are generally intact with the exception of some mild distractibiIity and difficulty resisting interference on one measure. Speed of processing was intact. Measures of memory both verbal and visual were fully intact. Measures of language were generally intact. Visual spatial functioning was without difficulty. The only areas of impairment noted on the examination were difficulty on one measure of cognitive flexibility and the ability to shift attentional resources in a flexible way.

The narrative summary (NARSUM) stated, “[CI] sustained a severe traumatic brain injury. He is now functioning at a level where he is independent with all of his activities of daily living, and is ambulating unlimited distances without deficits; however, he has significant cognitive deficits as indicated by his neuropsych testing.” The psychiatric addendum to the NARSUM stated, “It is anticipated that his mild to moderate cognitive deficits will definitely interfere with his ability to function effectively in the military or to sustain employment.” The VA also provided comprehensive neurologic testing 3 months after separation (probatively closer to separation than the service evaluation); and, this documented “persistent deficits with vigilance and complex attention or working memory as well as reduced processing efficiency.” It further identified a higher intellectual functioning on the non-verbal level above that of verbal performance; and, went on to state, “remainder of the exam was normal including general intellectual functions, simple attention, language, visuoconstructional ability, and nonverbal learning and memory, “executive” functions and fine motor speed.”

The Board directs attention to its rating recommendation based on the above evidence. Since, as elaborated above, the interpretation of the 8045 code rating language in effect 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 percent 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 percent 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.

Although there is indisputable evidence that the CI suffered significant residual cognitive impairment from TBI at separation, the trauma was not associated with multi-infarct dementia. Other than seizure disorder (to be addressed), there were no other prominent residual sequeale of TBI which are within the Board’s scope and unaddressed by the preceding ABMCR proceedings. Although TL06-03 (introduction) has provided sanction for higher ratings with prostrating headache as the prominent feature of TBI, it offers no provisions applicable to this case for relief from the restrictions imposed by the explicit rating language of code 8045 in effect at separation. Members deliberated if TL06-03 would provide grounds for coding the cognitive disorder as a strictly psychiatric impairment, allowing the more liberal criteria of the §4.130 general rating formula to attach; but, it was agreed that this constituted an unacceptable breach of the code 8045 language, since §4.130 provides no code specific to cognitive impairment other than the precluded dementia. Furthermore, even TL07-05 opened this door no further than “behavioral/emotional symptoms due to cognitive problems.” Although agreeing that a 10% rating is incongruent with the degree of cognitive impairment in evidence, the members concluded that there was no DoDI 6040.44 and VASRD compliant pathway to a rating recommendation higher than the 10% offered by 8045-9304 as defined above. After due deliberation, considering all 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 cognitive disorder due to traumatic brain injury.

Contended Posttraumatic Seizure Disorder. In July 2005, 13 months prior to separation, the CI suffered a witnessed tonic/clonic seizure lasting several minutes, and was placed on the anticonvulsant Keppra. He suffered no recurrent seizures on active duty, but remained on the anticonvulsant at separation without documented plans to discontinue seizure prophylaxis. The record confirmed that no side effects were reported for Keppra. The seizure disorder was added to the permanent profile which was in effect at separation. The neurologist completing the NARSUM judged that the condition failed retention standards. The commander’s statement (which recommended retention in a different MOS) did not detail the CI’s diagnoses or his specific impairments. Neither the FPEB’s DA Form 199 nor the USAPDA advisory opinion offered a rationale for the determination that the seizure condition was not independently unfitting. Of note, during an attempt to taper the Keppra, the CI suffered a recurrent seizure 2 months after separation and was committed to indefinite treatment with anticonvulsant.

The Board’s main charge with respect to the contended seizure condition is an assessment of the fairness of the PEB’s determination that it was not unfitting. The Board’s threshold for countering 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. Although no performance based evidence of impaired fitness from the seizure disorder or its treatment is on record, the CI was assigned to administrative duties outside his MOS for the duration of the diagnosis. One can make an almost prima facie argument that an unpredictable seizure disorder is not compatible with a combatant MOS. It is true that a longer trial of treatment and successful withdrawal of the anti-convulsant (a trial doomed to failure, judging by events after separation), or continued service in an alternate MOS (as proposed by the commander), would overcome the intrinsic fitness implications; but, neither of these options was pursued. The Board must therefore judge the PEB’s determination on its face; i.e., that a fairly recently diagnosed seizure disorder, with an etiology conducive to further seizures and requiring anticonvulsant management, was not an unfitting impairment for an infantryman. Notwithstanding the separate issue of rating linked to fitness, it must also be acknowledged that an argument exists for interpreting the rating language for 8045 code (quoted in the preceding section) to require additional rating for seizures as part and parcel of the rating for the unfitting TBI condition. Although members did not accept this latter premise as compelling enough to underpin a recommendation, it adds additional weight favoring a rating for the seizure disorder. Considering the preponderance of the evidence, the Board agreed that the logical fitness consequences of the seizure condition relative to the MOS, sustained by the profile limitations and specialty opinion that it failed retention standards, provide ample support for its recommendation as an unfitting condition eligible for disability rating. The appropriate VASRD code for the condition is derived IAW the 8045 rating language quoted above; i.e., 8045-8910 (epilepsy, grand mal). Under the VASRD §4.124a general rating formula for major and minor epileptic seizures, the evidence supports the 20% criterion of “at least one major seizure in the last 2 years.”

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 application of DoDI 1332.39 to its rating for cognitive disorder was operant in this case, and it was adjudicated independently of that Instruction by the Board. In the matter of the cognitive disorder due to TBI, and IAW VASRD §4.124a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the seizure disorder due to TBI, the Board unanimously recommends that it be added as an additionally unfitting condition for disability rating, coded 8045-8910 and rated 20% IAW VASRD §4.124a. 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 and that the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective as of the date of his prior medical separation.

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Cognitive Disorder Secondary to Traumatic Brain Injury | 8045-9304 | 10% |
| Seizure Disorder Secondary to Traumatic Brain Injury | 8045-8910 | 20% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110919, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 XXXXXXXXXXXXXXXXX

 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 XXXXXXXXXXXXXXXXXXXXXX, AR20120016140 (PD201100950)

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 recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 30% effective the date of the individual’s original medical separation for disability with severance pay.

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 permanent disability retirement 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 date of the original medical separation for disability with severance pay.

 c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, and payment of permanent retired pay at 30% effective the date of the original medical separation for disability with severance pay.

 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 XXXXXXXXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA