RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100976 SEPARATION DATE: 20030905

BOARD DATE: 20120918

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (14S, Avenger Crewmember) medically separated for cognitive disorder. He suffered a traumatic brain injury (TBI) in a vehicular accident in 2002, which resulted in cognitive impairment followed by the onset of psychiatric symptoms. The residual impairments did not improve sufficiently with treatment to meet the requirements of his Military Occupational Specialty (MOS). He was consequently issued a permanent S4 profile and referred for a Medical Evaluation Board (MEB). Cognitive disorder and TBI were forwarded to the Physical Evaluation Board (PEB) as separate medically unacceptable conditions IAW AR 40-501. Also identified by the MEB and forwarded on the DA Form 3947 (in psychiatric axis format) were depressive disorder as medically unacceptable, post traumatic stress disorder (PTSD) as medically unacceptable and existing prior to service (EPTS), and personality disorder as medically acceptable and EPTS. The PEB appropriately consolidated the cognitive disorder and TBI as a single unfitting condition, rated 10% IAW the Veterans Administration Schedule for Rating Disabilities (VASRD). Depressive disorder, PTSD, and personality disorder were determined to be not unfitting. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “For the same condition and what caused the condition. I was rated from the German Government 50% disabled for life. I struggle with many things to this day. It has effected (*sic*) my prior jobs and the job I have know (*sic*). When I arrived at Walter Reed it was a madhouse. I was somewhat rehabilated (*sic*) then sent on my way after my Grandmother did a congressional iquiry (*sic*) into my case. I feel they never really addressed the problem and did everything they could to prove it was not the Armys (*sic*) fault. The fact is I was hurt when traveling to my duty station. This triggered many conditions and many life threating (*sic*) stuff. Everyone I know can tell you before the accident I was fine. My life changed after that day, I joined the US ARMY to serve my country but feel I was let down and thrown out like some used toy.” Addended as a hand written note at the end was, “Also PTSD and many other things.”

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.” The rating for the unfitting cognitive disorder/TBI condition is addressed below. Although the application does not specify which other conditions constitute the “many other things” (in addition to PTSD) which the CI believes were not appropriately considered by the Service; the members judged that it was properly within the purview of the Board to assess the ratability of the three additional psychiatric conditions which were determined to be not unfitting by the PEB. Any other conditions intended in request for Board consideration, or any condition or contention outside the Board’s defined scope of review, remain eligible for future consideration by the Army Board for Correction of Military Records.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service IPEB – Dated 20030630** | **VA (From STR\*) – Effective 20030906** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Cognitive Disorder a/w TBI | 8045-9304 | 10% | Cognitive Deficits, 2⁰ to TBI | 8045-9304 | 10% | STR |
| Depressive Disorder | Not Unfitting | No VA Diagnosis | STR |
| Post-Traumatic Stress Disorder | Not Unfitting | PTSD | 9411 | NSC | STR |
| Personality Disorder | Not Unfitting | Personality Disorder | 9499-9403 | NSC | STR |
| No Additional MEB/PEB Entries | 0% x 1 / Not Service Connected (NSC) x 9 | STR |
| **Combined: 10%** | **Combined: 10%** |

\* STR = Service Treatment Record. No VA physician evaluations were performed in this case until 2011; thus there is no

 probative VA evidence. The VA combined rating of 10% remained in place until raised to 80%, effective 20100326.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the gravity of his condition and the significant impairment with which his service-connected conditions continue to burden him. The Board wishes to clarify that it is subject to the same laws for disability entitlements as those under which the Disability Evaluation System (DES) operates. The 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 Veteran Affairs (DVA), operating under a different set of laws (Title 38, United States Code). The Board evaluates DVA evidence proximate to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of fitness decisions and rating determinations for disability at the time of separation.

The Board must consider the significant interval (over 10 years) between the date of separation and the first DVA evaluation. The Board did receive in evidence the records of German disability proceedings and attendant medical evaluations dated 6 October 2005 (over 2 years post-separation); and, these were likewise reviewed. DoDI 6040.44 specifies a 12-month interval for special consideration of DVA and other post-separation findings. Neither the DVA nor German clinical evidence and medical opinions were disregarded; but, in matters germane to ratable disability and fitness determinations at the time of separation, the evidence in the CI’s record must be assigned almost exclusive probative value as a basis for the Board’s recommendations.

The Board further acknowledges the CI’s contention for ratings for other conditions which arose in service, and notes that its recommendations in that regard must comply with the same governance. While the DES considers all of the service member's medical conditions, compensation can only be offered for those medical conditions that cut short the member’s service career; and then only to the degree of severity present at the time of final disposition. The DVA, however, 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.

Finally, the Board acknowledges the CI’s assertions that his disability disposition was rushed and unfair; but, must note for the record that it has neither the jurisdiction nor authority to scrutinize or render opinions in reference to such allegations. The Board’s role is confined to the review of medical records and all evidence at hand to assess the fairness of service rating and fitness determinations at separation, as elaborated above.

Cognitive Disorder/TBI Condition. In August 2002, on the German autobahn, the CI was a passenger in a towed vehicle subjected to a rear-end collision. He suffered a head injury with transient loss of consciousness, was discharged from a local emergency room after evaluation, and was returned to base. After assignment to quarters, he was counseled by his commander for occupying a towed vehicle (and/or missing formations; accounts vary); and, promptly became despondent and took an overdose of over-the-counter medications. After a 24-hour psychiatric admission, he was evaluated and treated by the Neurology and Psychiatric services. He manifested persistent headaches of significant severity, dizziness and various subjective symptoms; and, cognitive impairments with attention, concentration, and memory were documented. Brain imaging, electroencephalography, and sequential neurologic examinations were normal. Repeat formal neuropsychological testing was performed 5½ months prior to separation. This noted “impaired attentional functioning, impaired verbal learning, reduced lexical retrieval, and poor visual-spatial organization and planning solving;” but, noted “variable and sometimes poor effort” producing measurements “not consistent with the expected pattern of recovery from an injury of this type.” The examiner concluded, “The results may represent a ‘cry for help’ and are likely more reflective of his subjective experience of his functioning than they are of objective cognitive impairment, though the latter is probably also present… These results are not consistent with the ability to return to full duty at this time.” The Neurology addendum to the psychiatric narrative summary (NARSUM) noted the CI’s reports of daily headaches rendering him “moderately to severely incapacitated”, difficulties with concentration, “feelings of sadness and hopelessness”, and “slowness of speech with occasional slurring.” Neurologic findings (comprehensive exam) were normal. Cognitive assessment was deferred pending results of the neuropsychological testing which is described above, but the neurologist assigned a general assessment of functioning (GAF) score of 60 (at the cusp of moderate and mild impairment). The psychiatric NARSUM (to be further elaborated) assessed the DoDI 1332.39-defined social and industrial impairment for the Axis I diagnosis of cognitive disorder as ‘mild’. The commander’s statement was cursory and did not address performance.

The Board directs attention to its rating recommendation based on the above evidence. The PEB’s and VA’s post-separation rating (derived from service evidence) were driven by the VASRD in effect for TBI (subsuming cognitive impairment) in 2003, which the Board must also apply IAW DoDI 6040.44; although, the contemporary VASRD (under which the CI is currently rated) allows considerably more favorable rating. The applicable VASRD §4.124a rating language in effect 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 the cumulative disability on all fronts following the CI’s head injury is arguably more than is reflected by the 10% rating mandated under the VASRD in effect at separation, DoDI 6040.44 is unequivocal on this score. 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 the cognitive disorder/TBI condition.

Contended Psychiatric Conditions (Depressive Disorder, PTSD, Personality Disorder). The admission note for the CI’s initial brief psychiatric admission after the overdose documented, “Pt. [Patient] stated that he has had suicide ideation all of his life; but most recently due to flash backs from his childhood. Pt. stated that he was molested by a family friend from age 5 to 6½*.*” No further suicide attempts/gestures or acute psychiatric admissions ensued prior to separation. The NARSUM documented that the CI had undergone a two week partial psychiatric hospitalization program “in which it was found that he mostly concentrated on his past sexual abuse occurring as a child. He felt the traumatic incident of the car accident triggered the tragic memories of his abuse.” The NARSUM noted a “mild depressed feeling” with sleep and appetite disturbance, anhedonia, and guilt. The PTSD symptoms noted were “poor sleep, recurrent dreams, fear of riding in motor vehicles for fear of accidents, recurrent thoughts of past sexual abuse as a child.” Psychotherapeutic medications were trazodone, Serzone™, and clonazepam. The NARSUM documented the CI’s current status as, “He continues to be followed in outpatient therapy and appears to be stable, although he continues to report his concentration is poor.” The mental status examination documented an “extremely nervous and sad” mood with congruent affect. There was no active suicidal ideation, delusional or hallucinatory symptoms, speech disturbance, or other abnormality. The NARSUM psychiatrist’s GAF assignment was 70 (at the cusp of mild slight impairment). For the Axis I diagnoses of depression and PTSD, the assessment of social and industrial impairment was ‘mild’. The PTSD condition was attributed to childhood sexual abuse, and was judged to be EPTS and not incurred in the line of duty (LOD). Although the NARSUM and DA Form 3947 made no comment regarding permanent service aggravation, the post-separation VA rating decision denying service connection for PTSD stated, “There is no evidence that the condition permanently worsened as a result of service.” The Axis II diagnosis of personality disorder from the NARSUM is excerpted below.

Personality disorder not otherwise specified, with dependent features, manifested by an immature personality structure that is unable to function as a soldier, requiring a strong ego strength in order to maintain an appropriate affective response, even under the stress of routine daily activities. Impairment for further military duty, marked; impairment for social and industrial adaptability, definite. LOD: No, EPTS.

The Board directs attention to its rating recommendation based on the above evidence. The Board’s initial charge with respect to all three of the psychiatric conditions is an assessment of the PEB’s determination that they were not unfitting. Since the unfitting TBI related cognitive impairment is hopelessly intertwined with the psychiatric symptoms and the underlying personality disorder, it is difficult to surmise how the PEB could identify solely psychiatric impairment to assess as not unfitting. The MEB neuropsychologist in fact argued that it was more likely the psychiatric overlay than the intrinsic cognitive impairment which rendered the CI incapable of continued military service. There is a paucity of performance based evidence before the Board on which to judge fitness, and the S4 profile encompassed depression and PTSD as well as cognitive disorder. Notwithstanding the PEB’s fitness adjudications, however, the barriers to a recommendation for additional rating for any of the separate psychiatric diagnoses are formidable. First, there is the issue of whether the psychiatric symptoms can be split off from code 8045 for additional rating under the VASRD §4.130 general rating formula for mental disorders. The 8045 description does not include psychiatric symptoms (‘insomnia’ notwithstanding) 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. Prior to promulgation of the current TBI rating formula, but well after this case, the VA in fact issued a training letter (TL07-05) which specifically authorized additional rating for TBI associated psychiatric conditions. That would indicate that in 2003 such liberties with code 8045 were counter to the VASRD. Secondly, even if conceded as unfitting and conceded as VASRD eligible for additional rating, there remain serious questions with the eligibility of the psychiatric conditions for service rating. Personality disorder is unequivocally not subject to service rating via DoDI 1332.38 (E5.1.3) and by VASRD §4.9 (congenital or developmental defects). This fact, in its own right, undermines any convincing support for extra psychiatric rating; since personality disorder (as per the neuropsychological evaluation and psychiatric NARSUM) was the most implicated condition with fitness and made the greatest contribution to psychiatric disability. The PTSD condition is also ineligible for service rating unless an argument for permanent service aggravation is defended. The only remaining condition of depression would have much weight to bear as independently unfitting, ratable outside of 8045, and warranting a compensable rating if these issues were conceded and its contribution to the psychiatric disability somehow separated from the ineligible conditions.

After protracted deliberations, all members agreed on the following conclusions. Regardless of fitness or service ratability determinations, VASRD §4.124a in effect does not offer the latitude of rating TBI associated psychiatric impairment outside of 8045-9304; although, both PTSD and personality disorder are arguably not in that category. Regarding the depressive disorder, even if the VASRD latitude for separate rating were conceded, the attached impairment was not separately unfitting. Regarding PTSD, the natural course of resurfacing childhood sexual abuse outside the context of the other psychiatric impairment is not consistent (to >50% likelihood) with separately unfitting psychopathology. Even so, members agreed that PTSD was EPTS without permanent service aggravation; and, thus not eligible for service rating. Regarding personality disorder, members agreed that separately unfitting impairment could be conceded; but, the condition is neither service ratable by DoD and VASRD standards, nor is it proper grounds for medical (vs. administrative) separation. The PEB’s fitness determinations, although moot for the most part, are thus supported. After due deliberation in consideration of the preponderance of the evidence, the Board recommends no change in the PEB’s adjudication of the depressive disorder, PTSD, and personality disorder conditions.

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 cognitive disorder secondary to traumatic brain injury and IAW VASRD §4.124a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the depressive disorder, post-traumatic stress disorder and personality disorder, the Board unanimously recommends no change from the PEB determinations as not unfitting. 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** |
| Cognitive Disorder Secondary to Traumatic Brain Injury | 8045-9304 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111020, 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 XXXXXXXXXXXXXXXXXXXXX, AR20120017693 (PD201100976)

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