RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1200117 SEPARATION DATE: 20050812

BOARD DATE: 20121010

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (13B20/Artillery Crewman), medically separated for chronic back pain and posttraumatic stress disorder (PTSD). The CI developed back pain after a motor vehicle accident in 2002 and despite treatment his condition continued to worsen over time. His symptoms did abate enough to allow a deployment in 2003 but worsened afterwards. The CI sought help for mental health issues related to his deployment after he returned in 2004 and he was diagnosed with PTSD. A year of intensive treatment with medication and both individual and weekly group therapy brought little relief. Neither condition improved adequately; the CI remained unable to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent L3/S3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded no other conditions for Physical Evaluation Board (PEB) adjudication. The PEB adjudicated the chronic back pain and PTSD conditions as unfitting, rated 10% each, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: “I strongly believe that my 20% rating is too low and that I wasn't fairly rated at the time of my separation from the United States Army.” The CI also stated “I received only 10% for my back and 10% for my PTSD, which comes to a total of 20% after 9 years of service.”

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in the 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 ratings for unfitting conditions will be reviewed in all cases. The unfitting chronic back pain and post traumatic stress disorder conditions meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly 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 Correction of Military Records.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service IPEB – Dated 20050429** | **VA (~2 Months Post-Separation) – All Effective Date 20050813** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Back Pain | 5237 | 10% | Chronic Low Back Strain | 5237 | NSC | 20051031 |
| Post Traumatic Stress Disorder | 9411 | 10% | Post Traumatic Stress Disorder | 9411 | 10% | 20051121  |
| ↓No Additional MEB/PEB Entries↓ | Chronic Cervical Neck Strain | 5237 | 10% | 20051031 |
| 0% X 2 / Not Service Connected x 6 others | 20051031  |
| **Combined: 20%** | **Combined: 20%** |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that the gravity of his condition merits consideration for a higher separation rating. 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. While the DES considers all of the member's medical conditions, compensation can only be offered for those medical conditions that cut short a member’s career, and then only to the degree of severity present at the time of final disposition. However the Department of Veteran Affairs (DVA), operating under a different set of laws (Title 38, United States Code), is empowered to compensate all service-connected conditions and to periodically reevaluate said conditions for the purpose of adjusting the Veteran’s disability rating should his 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 6040.44, 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.

Chronic Back Pain Condition. There were two goniometric range-of-motion (ROM) evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation as summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM | MEB ~4 Months Pre-Separation | VA C&P ~2 Months Post-Separation |
| Flexion (90⁰ Normal) | 90⁰ | 90⁰ |
| Ext (0-30) | Not measured | 30⁰ |
| R Lat Flex (0-30) | 5⁰ | 30⁰ |
| L Lat Flex 0-30) | 5⁰ | 30⁰ |
| R Rotation (0-30) | 20⁰ | 30⁰ |
| L Rotation (0-30) | 20⁰ | 30⁰ |
| Combined (240⁰) | ≥140°, ≤ 170° | 240⁰ |
| Comment | Normal stance and gait; positive paravertebral muscle spasm, tender to palpation and worse in lumbar area; no tenderness over spinous processes. Motor strength 5/5, reflexes 2+ and sensation intact in bilateral lower extremities. Negative Waddell’s criteria. X-rays normal. MRI Feb 2005: mild annular disc bulge at L4-5 without herniation. | Pain at end of all movements. Normal gait and posture and no use of assistive device to ambulate. Normal spinal curvature and no muscle spasm or point tenderness. No further loss of motion with repetitive use. X-rays normal. |
| §4.71a Rating | 10% | 10% |

The Board directs attention to its rating recommendation based on the above evidence. Both the MEB narrative summary (NARSUM) and VA Compensation and Pension (C&P) exams report the same clinical history. The objective findings are similar but not exactly the same. The MEB exam clearly supports the finding of painful motion and as this exam was completed prior to separation, the Board places greater probative value on this examination. The C&P exam supports a finding of painful motion but the evidence is not as strong as the MEB exam. Neither exam supports a rating greater than 10%. The PEB appropriately applied a 10% disability rating. The VA determined the back pain condition was not service-connected and therefore did not determine a disability rating. 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 for the chronic back pain condition.

Posttraumatic Stress Disorder (PTSD) Condition. The severity of the CI’s PTSD condition as evidenced by the MEB evaluation can best be described as serious. At the time of Psychiatric MEB addendum approximately 4 months prior to separation, the CI had been in treatment with medication and individual and group therapy for a year but continued to have significant symptoms and only mild improvement. Despite weekly counseling, the CI also appeared as a walk-in on several occasions because of continued symptoms, and was referred once for immediate evaluation by his commander who was concerned because of the CI’s complaints of nightmares and homicidal ideas. The CI was also actively involved in marriage counseling for marital problems, his wife was supportive. He continued to have flashbacks and nightmares, avoidance symptoms and difficulty engaging in ordinary marital interactions with his spouse, and persistent symptoms of increased arousal, difficulty falling sleep, hypervigilance, and outbursts of anger. The exam did not address the CI’s ability to interact with anyone other than his wife or engage in hobbies. The military psychiatrist assessed a Global Assessment of Functioning (GAF) of 50 for serious symptoms with definitive impairment in social and occupational functioning. He stated the CI was “no longer capable of reliable duty” and had “marked impairment for military duty.” The VA Mental Health C&P exam was completed approximately 7 months after the service exam and approximately 3 months after separation from the Army. The CI reported continued symptoms of nightmares at least twice a month, flashbacks once a week, difficulty being in large crowds, and feeling detached from and having a hard time relating to others. He continued to have an exaggerated startle response and frequent agitation. He continued to attempt to avoid things that reminded him of traumatic events, felt depressed, irritable, and moody as well as having difficulty concentrating and sleeping. The CI also reported being “haunted” by images of dead bodies, both soldiers and civilians. The CI said his treatment while in the military was not helpful; he felt the doctor was just trying to “drug him up” and he was therefore reluctant to see another psychiatrist. No post-military stressors were identified. There is no mention of friends or hobbies, and his relationship with his wife, boss or coworkers is not addressed. Mental status exam noted some agitation when talking about the death of his friends in combat, but he was otherwise calm and euthymic. A GAF of 60 was assessed which was improved over the 50 previously assessed, and it signified continued moderate symptoms. Neither examination noted any difficulties with activities of daily living or routine behaviors.

The PEB rating, as described above, was likely derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act (NDAA) 2008 mandate for strict DoD adherence to VASRD §4.129. IAW DoDI 6040.44 and DoD guidance (which applies the current VASRD §4.129 to all Board cases with a diagnosis of PTSD coded 9411), the Board is obligated to recommend a minimum 50% PTSD 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 post-separation for its permanent rating recommendation.

The MEB Psychiatric Addendum exam clearly supports a 30% rating on its own merit and some elements support a 50% rating such as reduced reliability and productivity. Although the CI appears to have improved by the time of the VA exam, his condition appeared to have continued to surpass the 10% rating criteria. The evidence however does not provide a correlation of acuity with degree of stress. The VA assigned a 10% rating for the PTSD condition based on §4.130 criteria without application of the provisions of §4.129. All Board 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 is applicable.

The most proximate source of comprehensive evidence on which to base the permanent rating recommendation in this case is the C&P exam performed 3 months after separation. While the psychiatric C&P examination was proximate to separation and premature for the 6-month rating benchmark, it reflects some of the stress of transition to civilian life which is intrinsic to the Board’s permanent rating recommendation. The Board therefore considered both the service and VA examinations in reaching its final rating recommendation.

All members agreed that the §4.130 threshold for a 50% rating was not approached. The deliberation settled on evidence supporting a 30% versus a 10% permanent rating recommendation. The VA rater’s rationale for a 10% rating stated the CI was “functioning well enough that you have not have not had to seek any further treatment.” As previously noted, the CI was in active treatment with medication and individual and group therapy during his time on active duty. Despite this, his GAF was 50 at the time of the Psychiatric NARSUM Addendum. The CI sought to enroll in the VA mental health clinic in February 2005 but was not yet eligible. He filed his claim for C&P for PTSD in August 2005, a few days before he actually separated from active duty. His VA C&P exam was performed in November 2005. The CI had moved from Alaska to Alabama during the intervening months. At the time of the C&P exam he continued to report symptoms that were greater than what could be considered mild or transient. The examiner noted “noncompliance with follow-up treatment due to distrust of the medical establishment which has likely contributed to some of his symptoms of pain and migraines as well as his symptoms of posttraumatic stress disorder.” This implies that the lack of seeking care may have been part of the CI’s mental illness and/or lack of faith that treatment would help but this is not a sign that he did not need treatment. The general C&P exam also reported the CI was not taking prescription medication for any of his service-connected physical conditions and it appears that the CI was not receiving care anywhere for any condition. This is consistent with the rest of the mental health examination and the assignment of a GAF of 60. Although the CI did not seek treatment before the C&P examination, there is no evidence that the CI either thought he didn’t need treatment or that he actually did not need treatment. He continued to report symptoms that he relieved by isolating himself until his symptoms abated. The symptoms described and GAF of 60 support a rating greater than 10%. On the other hand, the CI had been working successfully as a truck driver for two months; the available evidence does not demonstrate any significant occupational impairment and it is silent regarding social impairment. Therefore, it is not clear that a 30% rating is warranted. The VASRD §4.7 higher of the two evaluations states that where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned. In this case there simply is not enough evidence without resorting to speculation to support the 30% rating. Although the CI’s condition may have exceeded the 10% rating criteria, based on the totality of the available evidence, his disability picture did not more nearly approximate the 30% rating criteria. After extensive deliberation, the Board recommends 10% as the fair and equitable permanent rating for PTSD 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. In the matter of the chronic back pain condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the PTSD condition, the Board unanimously recommends an initial TDRL rating of 50% in retroactive compliance with VASRD §4.129 as DOD directed and a 10% permanent rating at six months IAW VASRD §4.130. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as unfitting for additional Service disability rating.

RECOMMENDATION: The Board recommends that the CI’s prior separation be modified to reflect that the CI was placed on the TDRL at 60% for a period of 6 months (PTSD at 50% IAW §4.129 and DoD direction) and then permanently separated with severance pay by reason of physical disability with a final 20% rating as indicated below.

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| **TDRL** | **PERMANENT** |
| Chronic Back Pain | 5237 | 10% | 10% |
| Post Traumatic Stress Disorder | 9411 | 50% | 10% |
| **COMBINED** | **60%** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120121, 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 22202-3557

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for XXXXXXXXXXXXXXXXXXXX, AR20120019097 (PD201200117)

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

60% 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 no recharacterization of the individual’s separation or modification of the permanent disability rating of 20%.

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 as follows:

 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 separated with a permanent combined rating of 20% effective the day following the six month TDRL period with no recharacterization of the individual’s separation.

 c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will provide 60% retired pay for the constructive temporary disability retired six month period effective the date of the individual’s original medical separation and adjusting severance pay as necessary to account for the additional TDRL time in service.

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 XXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA

2