RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxx BRANCH OF SERVICE: Army

CASE NUMBER: PD1200178 SEPARATION DATE: 20060316

BOARD DATE: 20120514

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (19D20 / Cavalry Scout), medically separated for posttraumatic stress disorder (PTSD). He did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent E2/S4 profile and underwent a Medical Evaluation Board (MEB). PTSD was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Nine other conditions, as identified in the rating chart below, were forwarded on the MEB submission as medically acceptable conditions. The PEB adjudicated the PTSD condition as unfitting, rated 10% with likely application of DoDI 1332.39. The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: “My initial rating for unfitting PTSD should be 50% under 38 CFR 4.129 and it should permanently continue at 50% under 38 CFR 4.130.” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

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 service ratings for unfitting conditions will be reviewed in all cases. 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 (BCMR).

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20060208** | | | **No VA Exams – All Effective Date 20060317** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| PTSD | 9411 | 10% | PTSD to Include Depression | 9411 | 0% | No VA Exam |
| Depressive Disorder | Likely EPTS | |
| Personality Disorder | Not Unfitting | | No VA Entry | | | |
| Shrapnel Wound from RPG attack | Not Unfitting | | Residual Scarring Shrapnel Wound | 7805 | 0% | No VA Exam |
| Chronic Intermittent Neck Pain | Not Unfitting | | Chronic Neck Pain | 5237 | NSC | No VA Exam |
| Chronic Intermittent Low Back Pain | Not Unfitting | | Chronic Low Back Pain | 5299-5242 | NSC | No VA Exam |
| Seasonal Headaches | Not Unfitting | | Headaches | 8199-8100 | NSC | No VA Exam |
| History of Elevated BP | Not Unfitting | | Elevated BP | 7199-7101 | NSC | No VA Exam |
| Allergic Rhinitis | Not Unfitting | | Allergic Rhinitis/Sinusitis | 6513-6522 | NSC | No VA Exam |
| History of Bilateral Bunions | Not Unfitting | | Bilateral Bunions | 5299-5284 | NSC | No VA Exam |
| Smoking | EPTS | | No VA Entry | | | |
| ↓No Additional MEB/PEB Entries↓ | | | 0% x 2/Not Service-Connected x 7 | | | No VA Exam |
| **Combined: 10%** | | | **Combined: 0%** | | | |

ANALYSIS SUMMARY: The PEB rating, as described above, was derived from DoDI 1332.39 and preceded the promulgation of the National Defense Authorization Act (NDAA) 2008 mandate for DoD adherence to Veterans Administration Schedule for Rating Disabilities (VASRD) §4.129. The CI participated in the *Sabo et al v. United States* class action lawsuit and has received a 50% PTSD rating for a retroactive 6-month period on the Temporary Disability Retired List (TDRL) in accordance with the settlement agreement. Since the CI received a PTSD rating of less than 30% from the PEB, and the VA also rated PTSD less than 30%, he was given a choice of accepting the rating assigned by the VA as a permanent rating or submitting applications to either the PDBR or BCMR. The Board must determine the most appropriate fit with VASRD 4.130 criteria at 6 months for its permanent rating recommendation. The CI did not report for a VA compensation and Pension (C&P) examination scheduled 5 months after separation, and there were no other VA outpatient or civilian provider evidence providing psychiatric details following separation. This deprives the Board of evidence for judging the stress of transition to civilian life, which is a key intent of §4.129, and generally a significant element underlying the Board’s permanent rating recommendation. In cases such as this, the Board, of necessity, must base the permanent rating recommendation on the information at separation and, to a certain extent, on the anticipated (more likely than not) prognosis at 6 months.

Posttraumatic Stress Disorder. The CI was deployed to Iraq in 2004. On 16 June 2004 his vehicle was struck by an RPG and he sustained flesh wounds of the right arm near the elbow and the left leg. X-rays performed following the incident were negative for any retained shrapnel and no further documentation of treatment was present in the service treatment record (STR). The CI was referred for physical therapy in August 2004 for chronic neck and back pain following the motor vehicle crash associated with the RPG attack. On the post-deployment health assessment form completed by the CI on 23 July 2004 he endorsed experiencing nightmares, intrusive thoughts, being on guard or easily startled, and feeling numb or detached. He checked no to symptoms of depression. He checked 'Yes' regarding concerns about conflict with his spouse and losing control. While deployed in 2004, his wife left him and they were divorced. The STR is silent with regard to psychological complaints until a year later in June 2005. The CI was promoted in rank effective May 2005 indicating duty performance sufficient to support the advancement in responsibilities. While on training in May 2005, the CI accidently discharged a pellet gun striking another soldier for which he received non-judicial punishment. At the advice of his legal counsel, the CI sought mental health care services in June 2005 leading to diagnosis and treatment of PTSD. According to the narrative summary (NARSUM) the CI was experiencing sleep disturbance with violent nightmares, irritability, depressed mood, hypervigilance, and social avoidance. He also admitted to having anger management and temper control problems. A clinic record dated 9 August 2005, documents that medications were working well without side effects. A 15 September 2005 mental health clinic encounter records a report of problems with anger and rage resulting in incidents where he set fire to an officer’s sleeping bag with a flare gun, physical altercations with his First Sergeant, and taking two swings at his Battalion commander with the Company Guidon during formation. With this report, the CI was referred to an MEB by the mental health provider. The psychiatry MEB NARSUM dated 27 September 2005, recorded problems with violent fantasies and nightmares, with fears of losing control including sadistic fantasies towards Iraqi natives and fear of losing control when armed. On mental status examination the CI’s mood was moderately depressed and irritable. Thought processes were logical and goal directed without hallucinations, delusions or suicidal ideation. Memory and abstract thinking were intact. The psychiatrist rendered a diagnosis of PTSD with definite social and industrial adaptability impairment. The CI was also diagnosed with personality disorder not otherwise specified manifested by persistent and enduring pattern of self aggrandizement, callous disregard for the rights of others with a lack of empathy, impulsivity, impaired interpersonal functioning, and anger management difficulties. The social and industrial adaptability impairment due to personality disorder was assessed as definite.

At a 6 October 2005 mental health clinic encounter, the CI was “doing somewhat better” with medication adjustment, but the CI described continuing hostile interactions with a platoon sergeant. The MEB NARSUM dated 17 January 2006 prepared by the CI’s family physician was consistent with the psychiatry NARSUM. There was no suicidal ideation and the physician was optimistic for improvement after removal from the Army environment but noted the homicidal ideation was not compatible with military service. The NARSUM physician noted the commander’s statement reflecting good duty performance. The significant problems with interpersonal conflict at work described in the psychiatry NARSUM and mental health appointments were not corroborated by the commander’s letter. The commander’s statement dated 17 January 2006, reported that the CI’s duty performance was excellent except for an incident of an accidental discharge of a pellet gun in June 2005 for which he was disciplined. “Since that time he has been watched closely by his leadership at all levels and we have unanimously concluded there is nothing wrong with him, and the incident was an isolated accident.” The commander concluded that the CI was fully capable of performing all duties of his MOS, and that the only problem his unit noted was difficulty sleeping. After he was made aware of homicidal ideation by mental health providers, the commander provided an updated statement dated 9 February 2006 which reiterated that the CI was fully capable of performing all duties of his primary MOS but due to the issues of homicidal ideation he could not trust the CI with a weapon. The PEB adjudicated a 10% rating for PTSD. The CI did not report for a VA C&P examination scheduled for 23 August 2006, 5 months after separation. Due to his failure to report for examination and submit any evidence, a 0% rating was assigned by the VA by rating decision dated 5 December 2006.

With regard to permanent rating at the time of removal from the 6-month period of constructive TDRL, all Board members agreed the evidence of the examinations did not approach the 50% rating; therefore Board deliberations centered on a 10% versus a 30% rating at the time of removal from TDRL. Social and occupational impairment consistent with a 30% evaluation (occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks…) could be surmised from some of the symptoms recorded in the NARSUM examinations including sleep disturbance with violent nightmares, irritability, anger, depressed mood, hypervigilance, and social avoidance. The Board considered §4.126 which states that a rating is based on all the evidence of record that bears on occupational and social impairment rather than solely on the examiner’s assessment of the level of disability at the moment of the examination. Further, when evaluating the level of disability, the extent of social impairment is considered but a rating is not adjudicated solely on the basis of social impairment. The VASRD is intended as a guide for rating impairment in civil occupations not military. Other than not being trusted to carry a weapon and deploy to Iraq, the CI’s duty performance was reported by his commander to be excellent over a prolonged period of time. The Board concluded that symptoms were sufficiently controlled such that there was no general occupational impairment. No other details regarding social impairment were noted. The marital problems leading to divorce predated deployment and are attributed to long standing difficulties associated with personality disorder, a non-ratable and non-compensable developmental condition. After due deliberation and in consideration of all evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends 10% as the fair permanent separation rating for PTSD at the time of removal from the 6-month constructive period of TDRL.

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 PTSD condition, the Board recommends a 10% permanent rating at 6 months IAW VASRD §4.130 following the initial TDRL rating of 50% in retroactive compliance with VASRD §4.129 and Sabo class action lawsuit settlement agreement. There were no other conditions within the Board’s scope of review for consideration.

RECOMMENDATION: The Board recommends that there be no recharacterization of the CI’s permanent disability and separation determination, upon removal from the TDRL as follows:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **PERMANENT**  **RATING** |
| Posttraumatic Stress Disorder | 9411 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120131, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans Affairs Treatment Record.

XXXXXXXXXXX

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 XXXXXXXXXXX, AR20120009501 (PD201200178)

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 no recharacterization of the individual’s separation or modification of the permanent disability rating of 10%.

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 10% 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 50% 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 XXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA