RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1200282 SEPARATION DATE: 20090728

BOARD DATE: 20120912

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (88M10/Motor Transport Operator), medically separated for major depressive disorder (MDD) with onset in Advanced Infantry Training (AIT). He initially was discharged administratively. He later joined the Reserves and transferred to active duty. His symptoms were noted to have been exacerbated by his tour in Iraq by the discharge board. He did not respond adequately to treatment to meet the deployment and weapons access requirements of his Military Occupational Specialty (MOS). He was issued a permanent S3 profile and underwent a Medical Evaluation Board (MEB). MDD was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. One other condition, mild headaches, was forwarded on the MEB submission as medically acceptable. The PEB rated the MDD condition at 10%, with application of the Veterans Administration Schedule for Rating Disabilities (VASRD). An existed prior to service component (EPTS) was noted, but the contribution could not be determined and no deduction was made. The headache condition was adjudicated to be not unfitting. The CI made no appeals and was medically separated with a 10% combined disability rating.

CI CONTENTION: “EVEN THOUGH I WAS MEDBOARDED FOR MAJOR DEPRESSION, I ALSO HAVE TBI AND PTSD AS STATED IN THE ATTACHED PAPERWORK”

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 PEB determined the headache condition to be not unfitting, but these were post-concussive and therefore, the traumatic brain injury (TBI), contention is within the purview of the Board as is the unfitting MDD condition. The other requested condition, posttraumatic stress disorder (PTSD), is 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.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20090610** | | | **VA – All Effective Date 20090729** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| MDD | 9434 | 10% | Major Depression | 9434 | 10%\* | STR |
| Mild HAs | Not Unfitting | | Post Concussion HAs | 8045 | NSC\* | STR |
| ↓No Additional MEB/PEB Entries↓ | | | 0% x #/Not Service-Connected x 4 (includes above) | | | STR |
| **Combined: 10%** | | | **Combined: 10%\*\*** | | | |

\* VARD 20050429: Depression NSC. VARD 20090928 (closest to most recent separation) based 10% rating on the STR because CI failed to report to his scheduled C&P exam. \*\*VARD 20110105 MDDO (and combined) raised to 50% effective 20100714 as well as rating the HAs at 0%.

ANALYSIS SUMMARY: The Disability Evaluation System (DES) is responsible for maintaining a fit and vital fighting force. While the DES considers all of the service member's medical conditions, compensation can only be offered for those medical conditions that cut short a service member’s career, and then only to the degree of severity present at the time of final disposition. 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 nor for conditions determined to be service-connected by the Department of Veterans’ Affairs (DVA), but not determined to be unfitting by the PEB. However the DVA, operating under a different set of laws (Title 38, United States Code), is empowered to compensate all 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’s role is confined to the review of medical records and all evidence at hand to assess the fairness of PEB rating determinations, compared to VASRD standards, based on severity at the time of separation. 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.

Major Depressive Disorder. The CI initially enlisted September 2003 at age 17 and was separated in April 2004 during AIT for the convenience of the government, due to depression and sleep issues. He later joined the Reserves and subsequently re-enlisted in the regular Army and entered active duty in July 2007. In November 2007, he deployed to Iraq for 9 months, returning in August 2008. While the CI was deployed in Iraq, his wife, whom he had married in February 2007, began her third affair since their marriage. She informed the CI of this in October 2008, after his return from deployment which led to a confrontation and homicidal ideation (HI) on the part of the CI. He had significant anger against the man involved. The CI was admitted for 3 days of observation and treatment with significant improvement by discharge. This was the first recorded visit for mental health issues during this period of active duty. The CI began mental health counseling and medications which he continued until separation. There was ongoing marital strife manifested by his wife leaving with the children to stay with her family for 2 weeks, the CI taking her and the children to his parents and consideration of divorce and she noted that she was pregnant a month after the initial altercation. The CI had some suicidal ideation (SI) during the period his wife had left him. The CI continued to work during this period, but his performance was impacted by the need to attend numerous medical appointments. There was also alcohol abuse during this period. The CI did endorse some symptoms of PTSD, but did not meet the diagnostic criteria. In the out-patient notes, he also endorsed depressed mood, lethargy, irritability, poor concentration, disturbed sleep and loss of appetite. The CI’s transportation company commander’s statement, dated 30 December 2008, noted that the CI performed his alternate duty well. The alternate duty was outside his MOS but the commander indicated that it was appropriate to his grade. The CI was working an 8 hour duty day, was able to communicate effectively with others, relate civilly to supervisors and other workers, sustain an ordinary routine without extra supervision, and make basic work related decisions. The CI was able to remember locations, work-like procedures and instructions but did have trouble with tasks that required attention to detail. A subsequent warrior transition unit commander’s statement, dated 26 February 2009, noted that the CI’s performance was not worsening. The mental health MEB narrative summary (NARSUM) was dated 4 February 2009, 5 1/2 months prior to separation. The CI reported irritability, mood lability, poor sleep and impaired memory. He felt “trapped and cloudy minded” and described his mood as “kinda there.” The examiner noted soft-spoken speech, good grooming, slight psychomotor retardation, and a flat affect with depressed mood. His thought processes were linear, logical and goal directed. There was no evidence of cognitive impairment. Insight was minimal and judgment varied. He was thought to have reduced reliability and productivity and difficulty in establishing and maintaining effective work relationships. Recurrent moderate major depression was diagnosed.

A separate NARSUM was dictated and dated 20 April 2009, 3 months prior to separation, which addressed other issues in addition to mental health. It noted that the CI was only sleeping 3 to 4 hours a night, still felt depressed but had improved on medications and with psychotherapy. There was some anhedonia, but no HI/SI was noted. A mini mental status exam was normal with 30/30 responses correct including short term memory. At a neurology examination four days earlier, he stated that things were improving overall and that he was looking forward to moving on. The VA Compensation and Pension (C&P) examination was not performed until 7 October 2007, over 14 months after separation (the CI had failed to report for his initial scheduled examination). The CI stated that he had worked at a car dealership reconditioning cars for 1 to 2 months after separation, but at the time of the examination he had been on unemployment for a year due to a lack of interest in his job. He was also going to school and never requested an accommodation to his schedule since he did not like confrontation. He was taking four courses in college, but his performance was poor secondary to procrastination. The examiner noted that the CI was lethargic and fatigued. Recent memory was subjectively impaired. A global assessment of functioning (GAF) score of 54 was assigned, consistent with “moderate symptoms or moderate difficulty in social, occupational, or school functioning.” He was diagnosed with moderate, recurrent MDD and noted to have reduced reliability and productivity. The Board considered if the provisions of VASRD §4.129 were applicable. PTSD was considered by the examining psychiatrist and specifically excluded as a diagnosis. Although the CI told the MEB examining psychiatrist that he was in the combat zone, there was no traumatic stressor identified and the Board notes that there is no record that the CI was awarded the combat action badge. The post-deployment assessment is not available for review.

The Board also notes that the VA also determined that the underlying diagnosis was not related to his combat experiences. While the CI’s symptoms recurred after return from Iraq, they were specifically tied to marital stress which was manifested by his wife’s affair while the CI was deployed. There were marital difficulties prior to the deployment. After due deliberation, the Board determined that the provisions of VASRD §4.129 were not applicable. The Board then directed attention to its rating recommendation based on the above evidence. The VA and PEB both coded the MDD as 9434 and rated it at 10%. The VA used the service treatment records for the initial rating. The Board noted that at an earlier VA rating decision (VARD), in 2005, the MDD was determined to be not service-connected for the diagnosis made during his initial active duty period, after the chapter 5-17 discharge and prior to his accession to the Reserves. The 2010 VARD, based on the C&P examination over 14 months after separation, increased the rating from 10% to 50% effective 14 July 2010, a year after separation.

The Board considered this evidence. Board members agreed that the criteria for a 50% rating were not approached and deliberations centered on 10% versus 30%. The description for a 30% rating is “occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal).” With regard to a 30% rating, the Board noted symptoms of depression, impaired sleep and subjective memory loss that supported the 30% while anxiety, panic attacks and suspiciousness were absent. However, on testing, memory was intact. The Board noted that the marital difficulties appeared to be aggravating the underlying MDD rather than being caused by it. According to the commander’s statement the CI was satisfactorily performing alternate duty that was commensurate with his grade, although his attention to detail and timeliness was sub-optimal. The Board was unable to ascertain from the record if this represented a change in function. It noted that the homicidal ideation followed his wife’s revelation of her affair was transient. Similarly, the passive suicidal ideation followed her separation from him, taking the children was transient. He denied suicidal ideation at his last mental health visit, 4 months prior to separation and during the April 2009 NARSUM dictated 3 months prior to separation. There are no other records proximate to separation either before or after separation. Although poor sleep was a complaint, the Board noted that this had been a long-standing issue dating to his first enlistment and contributed to his discharge. Additionally, the CI complained of poor sleep during his deployment prior to the onset of his current symptoms proximate to separation. The Board then considered the descriptions of the 10% disability rating “occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or, symptoms controlled by continuous medication.” The Board noted that the ongoing marital strife preceded the onset of depressive symptoms and clearly met the “significant stress” requirement for the 10% rating. There is no indication in the record that he did not meet duty requirements until he was confronted with his wife’s affair. At the time of separation or shortly thereafter, the CI was both working part time and attending college. Although he later quit his job, it appears that this was due to his reluctance to request an accommodation in his schedule rather than an inability to do the work. 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 MDD condition.

Contended PEB Conditions. The contended condition adjudicated as not unfitting by the PEB was the headache condition. The Board’s first charge with respect to these conditions is an assessment of the appropriateness of the PEB’s fitness adjudications. 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. The CI was evaluated for headaches that were attributed to a concussion without loss of consciousness while deployed (dazed when hit by armored vehicle door causing a laceration requiring stitches). The 9 December 2008 neurology evaluation, recorded occasional headache for which the CI did not take any medication. The 16 April 2009 neurology appointment documented mild headaches relieved with Tylenol and rare bad headaches. The headaches were not profiled, implicated in the commander’s statement and specifically noted to meet retention standards. It was reviewed by the action officer and considered by the Board. There was no indication from the record that it significantly interfered with satisfactory duty performance. There were mild memory complaints present which were also associated with his depression and are considered in the §4.130 rating for depression discussed above. After due deliberation in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB fitness determination for the contended headache condition and, therefore, no additional disability ratings can be recommended.

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 MDD condition, the Board by a 2:1 vote recommends no recharacterization IAW VASRD §4.130. The single voter for dissent (who recommended adopting the VA rating 9434 at 30%) submitted the addended minority opinion. 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** |
| Major depressive disorder | 9434 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20120312, 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

MINORITY OPINION: The minority voter noted that there was evidence that supported both the 10% and 30% rating and concluded that the evidence did not clearly favor one over the other. While there was considerable marital difficulty which appeared to be a predominant stressor contributing to the depression symptoms, there was also evidence of occupational impairment as reflected in the commander’s statements. The CI’s commander indicated the CI performed his alternate duties well, but was unable to maintain a level of attention and focus to carry out instructions in a timely manner and indicated the CI required an unreasonable number and duration of rest periods. The C&P examination indicated there were continuing difficulties in the months after separation with performance in college and a part time job related to lack of motivation. Based on reasonable doubt (§4.3) and the higher of two ratings (§4.7), the minority voter concluded the 30% rating was supportable.

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 XXXXXXXXXXXXXXXXXXXX, AR20120016893 (PD201200282)

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 XXXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA