RECORD OF PROCEEDINGS

PHYSICAL DISABILITY REVIEW BOARD

NAME: BRANCH OF SERVICE: ARMY

CASE NUMBER: PD0900020 COMPONENT: ACTIVE

BOARD DATE: 20090609 SEPARATION DATE: 20070930

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SUMMARY OF CASE: This covered individual (CI) was an active duty NCO medically separated from the Army in 2007 after 12 years of service. The medical basis for the separation was cervical disk disease and migraine headache. He injured his neck in 2004 during OIF deployment. He suffered continued pain, was diagnosed with disc disease and underwent surgical fusion for the condition in 2006. There was improvement, but continued pain and profile restrictions resulted in a MEB referral. The CI suffered an increase in chronic migraine headaches associated with the cervical condition. He was placed on chronic medication for them, and the headaches were deemed medically unacceptable by the MEB. Additionally the CI was evaluated by the MEB for obstructive sleep apnea (OSA), requiring a continuous positive airway pressure (CPAP) nocturnal device. The OSA was deemed medically unacceptable by the MEB, citing AR 40-501, 3-41c.

He was referred to the PEB and found unfit for the cervical condition and migraine headaches, rated 10% and 0% respectively. The PEB did not find the OSA unfitting, and the CI was separated at 10% combined disability. He underwent evaluation by the VA one month after separation and received a combined rating of 90%. The cervical condition was rated 20% by the VA, and additional associated peripheral nerve ratings were applied for the radiculopathies associated with primary disc condition. The headaches were rated 30%, and OSA requiring CPAP rated at 50%. The CI, citing the great disparity between the contemporaneous ratings, contends that he was rated unfairly by the PEB and that his additional conditions should have been considered as well.

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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 PDBR to the extent they were inconsistent with the VASRD in effect at the time of the adjudication. There were several elements for consideration by the PDBR in this case.

First, the rating of 10% vs. 20% for the cervical disc disease was examined. Both the PEB and the VA applied the same code and VASRD rating formula. The difference in ratings was a product of different range-of-motion measurements by the Army and by the VA. A common issue with these cases is whether the Army engaged its prerogative of applying the service-specific ‘pain rule’ which tempers its rating vs. the strictly-applied VASRD. Language in the record and in the PEB adjudication raised this question, although there was no clear evidence that it influenced the rating. It was also noted that the VA exam was more proximate to the date of separation than the MEB exam. Given the uncertainty of ‘pain rule’ influence and more closely timed VA exam, reasonable doubt exists as to which decision has the higher probative value. IAW VASRD §4.3, reasonable doubt was resolved in favor of the CI by this Board, resulting in the recommendation below. The PDBR likewise considered whether the associated peripheral nerve ratings for the radiculopathy component of the unfitting cervical disc condition merited addition to the combined separation rating. Several entries in the service treatment record (STR) indicated, however, that the radicular components were clinically silent at the time of separation. The Board judged, therefore, that they were not sufficiently involved with the CI’s unfitting condition to justify separate adjudication or rating by the PEB.

Next, the PDBR evaluated the accuracy of the 0% PEB rating for the migraine headache. The coding and VASRD rating formula cited was equivalent to those applied by the VA in arriving at its 30% rating. The ratings flowed from the frequency of prostrating episodes attributed by each. The PEB specifically cited that its rating was based on ‘less than one prostrating headache each 2 months’. Separate entries in the STR, the MEB examiner’s summary, the CI’s wife and the VA examiner all cite a frequency of at least one prostrating headache per month (=30%). The PEB appeared to rely heavily on ER treatment as the requirement for ‘prostrating’. In patients with established diagnoses of migraine, home treatment with prolonged rest and prescribed rescue medications are commonly recognized as prostrating by the VA and most clinicians. The PDBR, therefore, ascribed a higher frequency of prostrating episodes and applied the commensurate higher VASRD rating in its decision.

Finally, the PDBR considered the appropriateness of the PEB conclusion that the OSA was not separately unfitting. Despite the contrary opinion of the MEB examiner, the PEB conclusion was supported by: a) the CI’s MOS as supply sergeant was unlikely to mandate extremely austere duty conditions, b) the CI’s unit ‘does not deploy’ per commander’s statement and c) general precedent and common practice across the services would not medically separate a member on this basis only. The PDBR, therefore, unanimously concurred with the PEB expertise in the determination that the OSA in this case was not unfitting.

The PDBR membership was unanimous in all of the conclusions noted above, with the exception of one dissenting vote for sustaining the PEB 10% rating of for the neck. This member elected not to submit a minority opinion.

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RECOMMENDATION: The PDBR therefore recommends that the CI’s prior determination be adjusted as follows, effective as of the date of his prior medical separation.

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| **Unfitting Condition** | **VASRD Code** | **Rating** |
| Migraine headaches | 8100 | 30% |
| Neck pain/diskectomy | 5241 | 20% |
| **Combined** | 40% |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090115, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veteran's Affairs Treatment Record.

