RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: army

CASE NUMBER: PD0900051 COMPONENT: guard

BOARD DATE: 20090617 SEPARATION DATE: 20080424

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SUMMARY OF CASE: This covered individual (CI) was an activated Army Guard E4 Tanker medically separated from the Army in 2008 after. The medical basis for the separation was back pain (herniated disc - HNP at L5-S1). CI originally injured his back in Iraq during action in 2004. Significant symptoms led to surgical correction in 2005. CI reinjured his back during pre-deployment training in May 2007. Imaging showed recurrent HNP at the same level with scaring and nerve root involvement. Despite multiple treatments, back pain and leg symptoms persisted. CI was referred to the PEB for HNP, Anxiety disorder NOS, hypertension (HTN), lipids and a kidney stone. CI was found unfit only for HNP and separated at 20% disability. The PEB originally rated the HNP at 10%; however, the PDA made an administrative change to 20% IAW the changes required by the NDAA which took effect following the PEB and before CI’s service separation. The VA rated the HNP at 40%, diagnosed and rated Post Traumatic Stress Disorder (PTSD) at 50% (in place of Anxiety disorder), and also rated CI’s left shoulder at 20% and Migraine headaches at 30% for a combined VA rating of 80%. The CI contends that the new NDAA rules were not applied, and that the VA rated the same condition (HNP) higher at 40% and determined surgery (spinal fusion) was needed. CI also contended that ‘PEB said another surgery would increase rating by 10% and if done w/in 3 years, he should present evidence to the BCMR for review.’

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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 Board to the extent they were inconsistent with the VASRD in effect at the time of the adjudication. The Board clearly noted that the Army PDA administratively changed the PEB’s original 10% determination to 20% IAW NDAA. The Army-diagnosed and adjudicated ‘Anxiety Disorder, NOS’ was listed as ‘rule out PTSD’ in many notes; However, the PEB, STR notes, CC memo and CI do not indicate that PTSD should be added as an unfitting condition. HTN, Hyperlipidemia and kidney stones were all found not unfitting. The focus of this case is CI’s lower back problem and residuals. The Army PA re-rating appeared to be due to removal of the ‘pain rule’ for limited lumbosacral flexion. The PEB Disability Description (8b of DA Form 199) listed ‘parasthesias in the lower extremities’, but neither coded or rated them separately. There was discussion regarding the probative values of the various ROM determinations. The NARSUM appeared to use the evaluation of 20070824 which was pre-NDAA. The pre-discharge VA exam (Feb 2008) demonstrated a much more pain-limited thoracolumbar flexion. It was opined that the exam was closer to the time of discharge, was detailed, and aside from flexion nearly mirrored the Army measured ROMs which added credence to the VA examination. There was not a detailed peripheral neuromuscular VA exam and the VA did not consider or rate lower extremity parasthesias. The mild lower extremity parasthesias and radicular pain were noted as markers of increased severity of the spine disease, but the Board determined that they should not be rated at a compensable level separately. The Board determined that the CI’s HNP rating should be increased to 40% using the more current and complete ROMs from the VA exam.

The single voter for dissent (recommended no recharacterization) and elected not to submit a minority opinion.

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

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| Unfitting Condition | VASRD Code | Rating |
| HNP, s/p diskectomy lumbar spine | 5243-5242 | 40% |
| Combined | 40% |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090121, w/atchs.

Exhibit B. Service Treatment Record.

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

