RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: ARMY

CASE NUMBER: PD0900098 BOARD DATE: 20100429

SEPARATION DATE: 20030425

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SUMMARY OF CASE: This covered individual (CI) was an active duty SSG/Patient Administration, medically separated from the Army in 2003 after 17 years of service. The medical bases for the separation were a back condition and obstructive sleep apnea (OSA). He had a 16 year history of worsening back pain without any specific precipitating trauma. This was managed with physical therapy (PT), other conservative measures and temporary profiles. There were occasional left sciatic radicular symptoms, but no clinically established radiculopathies or neurologic abnormalities. A Magnetic Resonance Imaging (MRI) in 2001 demonstrated multi-level degenerative changes with two-level disc disease at L4 - S1. He was not a surgical candidate and conservative measures were continued. He did not respond adequately to perform within his military occupational specialty (MOS) or participate in the Army Physical Fitness Test (APFT), was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). The CI was diagnosed with OSA in 1992. At the time of his MEB, this was treated by CPAP (nocturnal breathing device) and judged to be below retention standards by the MEB pulmonary consultant. Both the lumbar condition and OSA were forwarded for PEB adjudication as medically unacceptable conditions. Five other conditions, as identified in the rating chart below, were forwarded on the DA Form 3947 as medically acceptable conditions IAW AR 40-501. All were covered by specialty addendums to the narrative summary (NARSUM) and are discussed below. Additional conditions supported in the Disability Evaluation System (DES) packet are discussed below, but were not forwarded for PEB adjudication on the DA Form 947. The Physical Evaluation Board (PEB) adjudicated the back condition (rated 10%) and OSA (rated 0%) as unfitting. The remaining conditions were adjudicated as not unfitting. The CI was thus medically separated with a combined disability rating of 10%.

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CI CONTENTION: The CI states: ‘I believe the circumstances of my PEB were influenced by my Troop Commander and Command Sergeant Major and I was deliberately denied a fair evaluation by the PEB.’ He contends for higher ratings for his back condition and OSA, and believes he was unfairly denied a rating for depression (later diagnosed as PTSD by the VA). He notes other VA-rated conditions on the application, but does not specifically contend for service ratings for them.

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RATING COMPARISON:

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| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20030212** | | | | **VA (Pre-Separation) – All Effective 20030426** | | | | |
| **Condition** | | **Code** | **Rating** | **Condition** | | **Code** | **Rating** | **Exam** |
| Lumbar Degenerative Disc Disease… | 5293  5299-5295 | | 10% | Degenerative Disc Disease…L4-5, L5-S1 | | 5293-5295 | 40% | 20030310 |
| Obstructive Sleep Apnea | | 6847 | 0% | Obstructive Sleep Apnea | | 6847 | 50% | 20030310 |
| Hypertension | | Not Unfitting | | Hypertension | | 7102 | 10% | 20030310 |
| Hypothyroidism | | Not Unfitting | | Hypothyroidism | | 7903 | 10% | 20030310 |
| Hearing Loss | | Not Unfitting | | NSC, Hearing Normal for VA Purposes. | | | | 20030310 |
| Depression/Antisocial Traits | | Not Unfitting | | Mood Disorder, NOS | | 9435 | 30% | 20030305 |
| Migraines | | Not Unfitting | | Vascular Headaches | 8199-8045 | | 10% | 20030310 |
| No Additional DA Form 3947 Entries. | | | | Non-PEB X 5 / NSC X 6 | | | | 20030310 |
| **TOTAL Combined: 10%** | | | | **TOTAL Combined (*Includes Non-PEB Conditions*): 90%** | | | | |

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ANALYSIS SUMMARY:

It is noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to the CI’s statements in the application regarding suspected DES improprieties in the processing of his case. 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 Veterans Administration Schedule for Rating Disabilities (VASRD) standards, as well as the fairness of PEB fitness adjudications.

Back Condition. There were three goniometric range-of-motion (ROM) evaluations in evidence which the Board weighed in arriving at its rating recommendation. The only examination completely acceptable by VASRD §4.71a standards was performed by PT for MEB purposes. This specified pain as the end-point of measurement. An additional set of measurements was provided by the NARSUM examiner. It did not specify if a goniometer was used and did not provide a measurement of thoracolumbar extension. It did specify pain as the end-point. It noted ‘minimal’ tenderness and documented no positive (or negative) findings for gait or curvature. The VA examiner gave all measurements by separate thoracic and lumbar segments. His exam stated that extension was not attempted for either segment and gave no lateral flexion values for the thoracic segment. The VA examiner stated the gait was ‘markedly antalgic’, although conversely stated that the curvature was normal and that there was no spasm. All three of these exams are summarized in the chart below.

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| --- | --- | --- | --- |
| Thoracolumbar ROM | PT – 1/14/03 | NARSUM – 1/10/03 | VA C&P – 3/10/03 |
| Flexion | 75⁰ | 60⁰ | T-15⁰/L-25⁰ |
| Combined | 180⁰ | >210⁰ | Incomplete |
| §4.71a Rating | 10% | 20% | 20% |

The PEB and VA chose similar coding options for the condition. The PEB’s DA Form 199 reflected application of the US Army Physical Disability Agency (USAPDA) pain policy for rating, but its 10% determination was consistent with §4.71a standards in regards to the MEB PT examination. The Board cannot assign significant probative value to the VA pre-separation rating examination in arriving at a rating examination in this case. The VA exam does not provide adequate information for an accurate rating IAW §4.71a and would typically be repeated for rating purposes. The VA rating decision for the 40% determination referenced the examiner’s history of the condition and the markedly antalgic gait, rather than ROM measurements which is the usual format. Even if the thoracic and lumbar measurements were added to obtain the thoracolumbar rating values (generating a §4.71a rating of 20%), the missing measurements cannot be reasonably substituted as 0°. Furthermore the gait disturbance and marked ROM impairment reflected in the VA rating examination are not corroborated elsewhere in the record. Neither the NARSUM, MEB physical nor any other provider notes in the service record make note of gait disturbance or marked ROM impairment. These included multiple PT visits and several emergency room (ER) visits. The neurology addendum and the MEB physical, both within two months of the VA examination, documented a normal gait. A physician examined the CI in conjunction with providing medication refills for his terminal leave three weeks after the VA rating exam. This described him as ‘pleasant’ and in no distress, with no tenderness or deformity of the back and with no pain on straight leg raise. A 20% rating recommendation for the back was considered on the basis of the 60° flexion stated in the NARSUM and combined 40° flexion from the VA exam. These were mitigated, however, by conflicting data from the informal examinations just elaborated. The fact remains that there is only one examination in evidence, the MEB PT goniometric examination, which meets VASRD standards. That exam is also credible based on corroborating evidence. There was no evidence of ratable peripheral nerve impairment in this case. There is not reasonable doubt in the CI’s favor, therefore, to justify a Board recommendation for other than the 10% rating assigned by the PEB for the back condition. The Board prefers the VASRD code 5242 (arthritis of the spine) for its simplicity and accurate characterization of the pathology in this case.

Sleep Apnea. IAW DoDI 6040.44, with subsequent legal opinion and precedent, the PEB’s adjudication of OSA as unfitting is not subject to a contrary fitness recommendation on the Board’s part. The PEB’s fitness determination in this case did precede the evolution to current practice by all of the service PEB’s regarding fitness implications of OSA. Routinely OSA is not considered unfitting solely on the basis of field and operational impediments to the use of CPAP. There is no evidence in this case that OSA was associated with any unfitting impairments otherwise; the DA Form 199 fitness rationale states only ‘limits deployability’. Although the PEB’s rating adjudication was acceptable by DoDI 1332.39 standards, the Board is obligated to a rating recommendation compliant with concurrent VASRD standards. As the requirement for CPAP was established, the Board recommends an OSA rating of 50% IAW VASRD §4.100.

Psychiatric Condition. The CI specifically contends and elaborates in his application that his depression was unfitting and that symptoms of PTSD were ignored by the MEB psychiatrist. It is noted that a subsequent diagnosis of PTSD was rendered by the VA. The VA diagnosis was not rendered until a psychiatric examination on August 14, 2007 after an appeals process. The effective date of October 25, 2006 is itself over three years after separation. This is well outside the 12 month window specified in DoDI 6040.44 as a basis for Board recommendations. There is no evidence in the service or VA psychiatric evaluations at the time of separation that PTSD was clinically manifest. Since the CI had no combat exposures, the subsequently documented Criterion A stressors were not readily apparent during the MEB process. The Board therefore cannot make any recommendations premised on a diagnosis of unfitting PTSD at the time of separation. Both the psychiatric addendum to the NARSUM and the VA pre-separation psychiatric rating examination acknowledged the contribution of his unfitting medical conditions to his depressive disorder. The psychiatric component, however, must be unfitting in and of itself to merit a separation rating. The mental status examinations in both evaluations were basically equivalent. The only abnormality was depressed mood and flattened affect. There was no evidence of psychosis or cognitive impairments. The GAF (global assessment of functioning) scores were 65 by the MEB and 70 by the VA. This connotes mild psychiatric symptoms without significant functional impairment. The MEB psychiatrist specifically opined that the condition met retention standards and imposed no assignment limitations. Neither the Commander’s statement nor the enlisted evaluations documented any mental impairment to performance. The physical profile was S1 with no weapon restriction. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the depressive disorder.

Other DA Form 3947 Conditions (Hypertension, Hypothyroidism, Hearing Loss and Migraines). The hypertension was stable on medication and addressed by an Internal Medicine addendum to the NARSUM. It was judged to be within retention standards. The same is true of the hypothyroidism and migraine conditions, addressed by Endocrinology and Neurology addendums. The hearing loss did not meet a compensable threshold under the VASRD and the physical profile was H-1. None of these conditions were profiled and none were implicated by the Commander’s statement.

All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudications for the hypertension, hypothyroidism, hearing loss or migraine conditions.

Other Conditions. In addition to the conditions covered above, the NARSUM identified reactive airway disease, hypogonadism, gastroesophageal reflux disease (GERD), bilateral wrist conditions, septal deviation (nasal deformity) and a ‘sinus tachycardia’ cardiac condition as co-existing medical conditions. Reactive airway disease was not confirmed by pulmonary function testing and was cleared by a Pulmonary addendum to the NARSUM. Hypogonadism was addressed in the Endocrinology addendum. GERD, septal deviation and the tachycardia conditions were addressed by Gastroenterology, ENT and Cardiology addendums. All of these conditions were judged to be within AR 40-501 standards and there is no evidence to the contrary. The bilateral wrist condition (of 5 years duration) was referred to the Hand Clinic and deemed not to be acute or surgical. It was diagnosed as tendinitis by the VA examiner and received separate 10% ratings. There is no link to fitness, however, and the profile was U-1. The CI noted 15 additional conditions or complaints on the MEB physical. All were reviewed but will not be elaborated here and were not relevant for Board consideration as additionally unfitting.

The Board, therefore, has no reasonable basis for recommending any additional unfitting conditions for separation rating.

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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. As discussed above, PEB reliance on the USAPDA pain policy for rating the back condition and on DoDI 1332.39 for rating the sleep apnea condition were operant in this case. These conditions were adjudicated independently of that policy and regulation by the Board. In the matter of the lumbar condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB rating of 10% but a change in VASRD code to 5242. In the matter of the obstructive sleep apnea condition, the Board unanimously recommends a rating of 50% coded 6847 IAW VASRD §4.100. In the matter of the hypertension, hypothyroidism, hearing loss and migraine conditions, the Board unanimously recommends no recharacterization of the PEB adjudication as not unfitting. In the matter of the reactive airway disease, hypogonadism, gastroesophageal reflux disease, bilateral wrist conditions, septal deviation, tachycardia or any other medical conditions eligible for Board consideration; the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation.

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RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows and that the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective as of the date of his prior medical separation.

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Obstructive Sleep Apnea | 6847 | 50% |
| Lumbar Degenerative Disc Disease | 5242 | 10% |
| **COMBINED** | **60%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090130, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

