RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: ARMY

CASE NUMBER: PD0900237 BOARD DATE: 20100415

SEPARATION DATE: 20051009

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

SUMMARY OF CASE: This covered individual (CI) was a Reserve MSG, CBR Specialist, medically separated from the Army in 2005 after 33 years of combined service. The medical basis for the separation was a back condition. He experienced a sudden onset of back pain while running during preparation for the Army Physical Fitness Test (APFT) at his Reserve site. The question was raised as to whether this incident represented aggravation of a prior injury but was determined to be in Line of Duty. The pain worsened over the following year and an Magnetic Resonance Imaging (MRI) in 2003 showed disc herniation at L2/3 and degenerative changes of the lower lumbar segments. No frank neural compromise was in evidence. There were intermittent bilateral radicular symptoms, but EMG (nerve conduction study) and neurological examinations were normal. A trial of conservative measures, including epidural injections, was undertaken by his civilian physicians without significant improvement. He was unable to perform within his military occupational specialty (MOS) or participate in the APFT, was issued a permanent L3 profile and was referred for a Medical Evaluation Board (MEB). The back condition was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Hypertension, hyperlipidemia and bilateral hearing loss were addressed in the narrative summary (NARSUM) as medically acceptable additional conditions, but were not forwarded to the PEB on the DA Form 3947 for adjudication. Other conditions supported in the Disability Evaluation System (DES) packet are discussed below, but were not adjudicated by the PEB. An informal PEB found the back condition unfitting with a rating of 10%. The rating was raised to 20% by a formal PEB. This was upheld on US Army Physical Disability Agency (USAPDA) appeal and the CI was thus medically separated with a disability rating of 20%.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

CI CONTENTION: The CI states: ‘Inconsistencies between PEB and VA (20% v. 40%) rating. Differences in opinions of severity of injury between medical professionals. Lack of due process...’ He goes on to elaborate contentions regarding procedural irregularities, an incomplete NARSUM, suspected failure of the PEB to apply the Veterans Administration Schedule for Rating Disabilities (VASRD) and lack of familiarity with his case on the part of the formal PEB members. He submits medical statements from his civilian physicians and personal statements from family members and others, stating they are ‘inconsistent with the examining doctor’. He notes his other VA-rated conditions on the application, but does not specifically contend for service ratings for them.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

RATING COMPARISON:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20041018** | | | | **VA (~3 Mo. after Separation) – Effective Dates Variable** | | | |
| **Condition** | | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain… | 5299-5237 | | 20% | Degenerative Disc Disease | 5242 | 40% | 20060121 |
| ↓No Additional DA 3947 Entries↓ | | | | Bilateral Tinnitus | 6260 | 10% | 19980902 |
| Non-PEB X 1 / NSC X 8 | | | 20060121 |
| **TOTAL Combined: 20%** | | | | **TOTAL Combined (*Includes Non-PEB Conditions*): 50%** | | | |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

ANALYSIS SUMMARY:

It is noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions regarding the CI’s numerous statements in the application regarding due process. Likewise the perceived inadequacy of the formal PEB’s preparation or contended omissions from the NARSUM are not relevant to the Board’s deliberation or subject to its opinion. The Board’s role is confined to the review of medical records and all evidence at hand to assess the accuracy of PEB rating determinations compared to VASRD standards, as well as the fairness of PEB fitness adjudications.

The Board deliberated the service connection issue in this case. The sudden onset of back pain while running was repeatedly referred to as an ‘injury’ sustained in service. That was the basis for the Line of Duty decision, the way it was characterized in medical histories and the way it was stated in numerous appeals and letters of support. There was no fall or other trauma associated with the onset of symptoms as related in the history, however. This incident was simply the declaration of pre-existing spinal pathology. Such a history, in fact, is typical of degenerative disc disease. By circumstance the condition surfaced while running in preparation for the APFT, but it was not caused by that activity nor would it have been ultimately avoided by not engaging in that activity. Although the permanent service aggravation factor remains subject to debate, there is a significant element of unacknowledged existing prior to service (EPTS) contribution to this case. Given the long length of Reserve service before separation, the Action Officer opines that service aggravation should be conceded in favor of the CI. DoDI 6040.44, furthermore, precludes a Board recommendation that would lower the combined disability rating in effect.

Back Condition. The PEB’s DA Form 199 invoked the USAPDA pain policy in reference to its rating determination for the back condition. For its VASRD §4.71a derived rating recommendation, the Board has three goniometric range-of-motion (ROM) examinations in evidence. Presumably because of an extended appeals process (the CI also appealed for continuance on active duty), there was a ~1½ year delay between MEB examinations and separation. The NARSUM defaulted to physical therapy (PT) goniometric measurements regarding thoracolumbar ROM in the physical exam. A very comprehensive Functional Capacity Assessment (FCA) examination was performed soon afterwards. This, however, followed American Medical Association (AMA) impairment rating guidelines which do not include rotational measurements and utilized an inclinometer instead of the VASRD-specified goniometer. The AMA-based spine rating was 13% (flexion was 97% of norm), but a VASRD-based rating cannot be derived from this examination. The VA rating examination carries a probative value advantage over the MEB evidence for proximity to separation (three months). Pain was not specified as the end-point of the FCA measurements, but was for the PT and VA exams. All three examinations are summarized in the chart below.

Separation ↓10/09/05

|  |  |  |  |
| --- | --- | --- | --- |
| Thoracolumbar ROM | PT – 4/22/04 | FCA – 5/7/04 | VA C&P – 1/22/06 |
| Flexion | 30⁰ | 58⁰ | 15⁰ |
| Combined | 80⁰ | Incomplete | 45⁰ |
| §4.71a Rating | 40% | 20%\* | 40% |

\*Exam not IAW VASRD.

Given this data set, the Board’s rating recommendation IAW VASRD §4.71a is logically 40%. The VA coding, 5242 for degenerative arthritis of the spine, is a good match with the pathology. Reasonable doubt is resolved in favor of the CI, therefore, in rendering a recommendation for a 40% rating under 5242 for the thoracolumbar condition.

Other Conditions. As noted in the summary, the NARSUM formally addressed hypertension, hyperlipidemia and bilateral hearing loss as conditions meeting AR 40-501 retention standards. Such conditions are generally included on the DA Form 3947 and specifically adjudicated for fitness by the PEB. There is nothing to suggest that a formal PEB adjudication would have been other than not unfitting for any of these, however. Hypertension and hyperlipidemia were chronic, stable and asymptomatic. Neither is relevant for Board consideration as unfitting. The hearing loss was associated with the need for hearing aids and an H2 profile. The Commander’s statement cited the hearing loss, noting that the CI ‘could possibly miss critical orders’. This conclusion is unduly speculative, however, as a basis for Board recommendation as additionally unfitting. Furthermore the VASRD §4.87 rating for the hearing loss was not compensable. The NARSUM also documented a right knee condition. There is no evidence that it was under active treatment at the time of separation and it was not service connected by the VA. It was also not profiled or noted in the Commander’s statement. In his appeal for reconsideration, the CI noted that he suffered from depression, gastroesophageal reflux disease (GERD) and various arthridities as a consequence of his unfitting back condition (GERD linked to anti-inflammatories for back pain). Whether or not related to the back condition, any of these conditions would need to be in themselves unfitting for the Board to recommend them for additional rating. Although the CI eventually obtained a 100% rating from the VA for depression, the claim was initially denied on the basis of his post-separation evaluation. That rating decision stated, ‘Your service medical records do not show any treatment for or diagnosis of depression while in service.’ His physical profile was S1. The Commander’s statement made no mention of psychiatric disorder or impaired mental performance. Neither GERD nor any of the other conditions noted in the appeal were service connected by the VA. There is no evidence that any of them were clinically active during the MEB and none were covered by the physical profile or Commander’s statement. In the MEB physical and in a letter from his civilian physician submitted to the PEB, a recently diagnosed neurocranial condition was elaborated. There were MRI abnormalities and a ‘working diagnosis of possible multiple sclerosis’. The neurological examinations in evidence during the MEB, including the NARSUM, are all normal. Nowhere is there documentation in the outpatient records of any neurologic symptoms other than the radicular ones noted with the back condition and no evidence of any neurologic impairment linked to fitness. Several other relatively minor conditions were elaborated by the CI on his MEB physical, but none of them are relevant for Board consideration as unfitting. Additional conditions claimed to the VA were all denied and all contained a statement in the rating decision that they were not evident in the service medical records.

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

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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 was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the thoracolumbar condition, the Board unanimously recommends a rating of 40% coded 5242 IAW VASRD §4.71a. In the matter of the hypertension, hyperlipidemia, hearing loss, depression, GERD, arthritis, neurological disorder 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.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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.

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Degenerative Disk Disease, Lumbar Spine | 5242 | 40% |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20090310, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

