RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: ARMY

CASE NUMBER: PD1000005 SEPARATION DATE: 20091016

BOARD DATE: 20110628

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a Reserve SPC/E-4 (21W, Carpentry and Masonry Specialist) medically separated from the Army for lower back pain due to degenerative arthritis of the spine. He became symptomatic shortly after being deployed to Iraq in 2003 and worsened prior to a second deployment to Iraq in 2007. He was not a surgical candidate and did not respond adequately to conservative management to perform within his military occupational specialty (MOS) or meet physical fitness standards. He was consequently issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Refractory low back pain (degenerative disk disease) was forwarded to the Physical Evaluation Board (PEB) as a medically unacceptable condition IAW AR 40-501. One other condition, sleep apnea was forwarded as medically acceptable. Additional conditions supported in the Disability Evaluation System (DES) file are discussed below, but were not forwarded for PEB adjudication. The PEB adjudicated the spine condition as unfitting, rated at 10% IAW the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI withdrew an initial appeal and was medically separated with a 10% disability rating.

CI CONTENTION: “The outside doctor from Springfield Neurological Spine Institute said that my pain could be taken away by performing a rhizotomy to burn my nerves that are causing the pain. Once I returned to my resident state (Kentucky) I went to Dr. David Rouben at River City Orthopedics there I underwent the test that I should have had. I was given another MRI to include a discogram, nerve block and EMG Test. The doctors from SNSJ had my disc level location wrong and it was not my nerves that were causing my pain. It was found to be that the pain is caused by my L-3 disc. The determination was a result of the discogram that was performed on 23 Dec 09. The reason why I am pursuing this action is because I wasn't given a second opinion on my diagnosis, none of the test[s] in block 3 were given to me before my MED board started. My levels of disc were not accurate…” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

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RATING COMPARISON:

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| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20090719** | | | **VA (1 Mo. After Separation) – All Effective Date 20091016** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Degenerative arthritis spine | 5242 | 10% | Lumbar Disc Disease | 5242 | 40% | 20091201 |
| Sleep Apnea | Not Unfitting | | Obstructive Sleep Apnea | 6847 | 50% | 20091201 |
| ↓No Additional MEB/PEB Entries↓ | | | Left Shoulder Instability | 5201 | 10% | 20091201 |
| Tinnitus | 6260 | 10% | 20091201 |
| Scar | 7800 | 10% | 20091201 |
| 0% x 5 / Not Service Connected x 4 | | | 20091201 |
| **Combined: 10%** | | | **Combined: 80%** | | | |

ANALYSIS SUMMARY: The Board acknowledges the CI’s assertions that the actual level (L-3 vs. L-4) of his lumbar disc disease was mischaracterized prior to separation and that other potential inaccuracies in DES documents might exist. Although none of these alleged irregularities will have any bearing on the disability rating for the unfitting lumbar spine condition, 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 VASRD standards based on severity at the time of separation. It must also judge the fairness of PEB fitness adjudications based on the fitness consequences of conditions as they existed at the time of separation.

Lumbar Spine Condition. There were two goniometric range of motion (ROM) evaluations in evidence which the Board weighed in arriving at its rating recommendation. Both of these exams are summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM | MEB (5 Mo. Pre-Sep) | VA C&P (1 Mo. Post-Sep) |
| Flexion (90⁰ Normal) | 90⁰ | 30⁰ |
| Combined (240⁰ Normal) | 225⁰ | 115⁰ |
| Comments | No spasm. | Nl gait, contour; no spasm. |
| §4.71a Rating | 10% | 40% |

The MEB examiner documented a non-tender back exam with no spasm, and a normal neurologic exam. Imaging studies showed degenerative disc disease at L4-5. A civilian neurosurgeon was consulted who suggested that the CI might benefit from L3-4 rhizotomy (selective cutting of nerve roots), but the MEB examiner opined that “given [the CI’s] physical exam, I do not believe this will ameliorate [his] pain. If the [CI’s] exam was more consistent with muscle spasm, then a rhizotomy may be beneficial. I believe his refractory low back pain is due to degenerative disc disease and not spasticity.” The ROM values reported by the VA examiner one month after separation are significantly worse than those reported by the MEB dated five months before separation. Although there is no evidence of further injury or other adverse events in the interim, the record indicates that the CI had been treated the day before the VA exam with a L2-3 nerve block as a possible explanation of the marked impairment reflected by the VA measurements, even though the CI reported some improvement with this treatment. The Board also considered that the values documented were derived from reported pain threshold with motion during an exam performed in the context of expressly providing a basis for disability rating; thus subject to loss of objectivity. Moreover, the absence of objective findings on examination such as spasm or loss of spinal contour is incongruent with the ROM deficits reported. Upon deliberation the Board agreed in this case that the MEB examination was more consistent with outpatient notes, more reflective of the anticipated severity suggested by the clinical pathology and less vulnerable to the undue influence just elaborated. The Board therefore assigns a higher probative value to the MEB data as a basis for its recommendations. The PEB and VA chose the same coding option, 5242 (degenerative arthritis of the spine) for the condition, which fits the underlying pathology. 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.

Other PEB Conditions. One other condition, sleep apnea was forwarded by the MEB and adjudicated as not unfitting by the PEB. This condition was not profiled, implicated in the commander’s statement or noted as failing retention standards. The condition was reviewed by the action officer and considered by the Board. There was no indication from the record that this condition significantly interfered with satisfactory performance of MOS duty requirements. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the sleep apnea condition.

Remaining Conditions. Other conditions identified in the DES file were history of left shoulder surgery, asthma, history of ingrown toenail, and history or repaired umbilical hernia. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically active during the MEB period, none carried attached profiles and none were implicated in the commander’s statement. These conditions were reviewed by the action officer and considered by the Board. It was determined that none could be argued as unfitting and subject to separation rating. Additionally tinnitus, scars, sinusitis, left shoulder instability and several other non-acute conditions were noted in the VA rating decision proximal to separation, but were not documented in the DES file. The Board does not have the authority under DoDI 6040.44 to render fitness or rating recommendations for any conditions not considered by the DES. 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. The Board did not surmise from the record or PEB ruling in this case that any prerogatives outside the VASRD were exercised. In the matter of the lumbar condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the sleep apnea condition, the Board unanimously recommends no change from the PEB adjudication as not unfitting. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as additionally unfitting for rating at separation.

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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** |
| Degenerative Arthritis, Lumbar Spine | 5242 | 10% |
| **COMBINED** | **10%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20091215, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

