RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: ARMY

CASE NUMBER: PD1000020 SEPARATION DATE: 20090327

BOARD DATE: 20110721

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (63D, Artillery Mechanic) medically separated for lumbar intervertebral disc syndrome. The onset of the condition followed a motor vehicle accident in 2005 and was not amendable to surgery. The back pain worsened while deployed in 2007. The CI did not respond adequately to a trial of conservative management and was unable to perform within his military occupational specialty (MOS) or meet physical fitness standards. He was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Low back pain, degenerative disk disease and herniated lumbar disk were forwarded to the Physical Evaluation Board (PEB) as separate conditions judged to be medically unacceptable IAW AR 40-501. Three other conditions, as identified in the rating chart below, were forwarded on the DA Form 3847 as medically acceptable conditions. Additional conditions supported in the Disability Evaluation System (DES) file are discussed below, but were not forwarded for PEB adjudication. The PEB appropriately consolidated the three lumbar spine conditions into a single unfitting condition, rated 20% IAW with the Veterans Administration Schedule for Rating Disabilities (VASRD). It was determined that the remaining conditions were not unfitting. The CI did not appeal and was medically separated with a 20% disability rating.

CI CONTENTION: “Some of my conditions were not even rated even when they were in the NARSUM.” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

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| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20090617** | | | **VA (3 Mo. after Separation) – All Effective 20090328** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Intervertebral Disc Syndrome | 5243 | 20% | Intervertebral Disc Syndrome | 5243 | 20% | 20090617 |
| Palpitations | Not Unfitting | | Ventricular Dysrhythmia | 7099-7010 | 10% | 20090617 |
| Bilateral Shoulder Pain | Not Unfitting | | Right Shoulder Bursitis | 5201-5019 | 10% | 20090617 |
| Left Shoulder Separation | 5299-5203 | 10% | 20090617 |
| Obstructive Sleep Apnea | Not Unfitting | | Obstructive Sleep Apnea | 6847 | 50% | 20090617 |
| ↓No Additional MEB Entries↓ | | | Asthma /Chronic Bronchitis | 6600-6602 | 10% | 20090617 |
| 4 x 0% | | | 20090617 |
| **Final Combined: 20%** | | | **TOTAL Combined: 80%** | | | |

ANALYSIS SUMMARY: The Board acknowledges the CI’s contention implying that Service ratings should have been conferred for other conditions documented at the time of separation. The Board wishes to clarify that it is subject to the same laws for Service disability entitlements as those under which the DES operates. While the DES considers all of the service member's medical conditions, compensation can only be offered for those medical conditions that cut short a service member’s career, and then only to the degree of severity present at the time of final disposition. However the Department of Veteran Affairs, operating under a different set of laws (Title 38, United States Code), is empowered to compensate service connected conditions and to periodically re-evaluate said conditions for the purpose of adjusting the veteran’s disability rating should the degree of impairment vary over time.

Back 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.

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| --- | --- | --- |
| Thoracolumbar ROM | PT (7 Mo. Pre-Sep) | VA C&P (3 Mo. Post-Sep) |
| Flexion (90⁰ Normal) | 45⁰ | 60⁰ |
| Combined (240⁰ Normal) | 145⁰ | 190⁰ |
| Comments | Pain is endpoint. | Pain is endpoint. |
| §4.71a Rating | 20% | 20% |

The ROM assessments reported at these two examinations were not significantly different. The narrative summary (NARSUM) examiner noted a normal gait and absence of guarding or paraspinal muscle tenderness. The straight leg raise was negative. The VA compensation and pension (C&P) examiner noted normal posture, gait and spinal contour, but painful motion was evident. Based on the documented limitation of motion and IAW VASRD §4.71a criteria, the 20% rating by the PEB and the VA was appropriate. The Board also considered rating intervertebral disc disease under the alternative formula for incapacitating episodes, but could not find sufficient evidence which would meet even 10% criteria under that formula. The Board is in agreement with the choice of VASRD code 5243 (intervertebral disc syndrome) as the best fit with the pathology and disability. 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 20% rating assigned by the PEB for the back condition.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were palpitations, bilateral shoulder pain and obstructive sleep apnea (OSA). The VA rated premature ventricular contractions (palpitations) at 10%, each shoulder at 10%, and OSA at 50%. The Board’s main charge in respect to these conditions is an assessment of the appropriateness of the PEB’s fitness adjudications. The Board’s threshold for countering DES fitness determinations is higher than the VASRD §4.3 reasonable doubt standard used for its rating recommendations but remains adherent to the DoDI 6040.44 “fair and equitable” standard. Palpitations were first reported by the CI during the MEB process. An evaluation by cardiology led to a diagnosis of largely asymptomatic premature ventricular contractions that were not deemed significant enough to require intervention. Due to the CI’s request, however, a successful ablation procedure was performed. Bilateral shoulder pain was first reported by the CI during the MEB process. The symptom was present for two years and was not associated with an injury. Examination of the shoulders was completely normal except for some left shoulder focal tenderness. A magnetic resonance imaging evaluation was unremarkable. OSA symptoms were first reported after the MEB NARSUM was completed. A subsequent sleep study was not in evidence, but the C&P examiner noted that it showed mild sleep apnea for which continuous positive airway pressure (CPAP) treatment was prescribed. The services do not routinely find OSA, with or without CPAP requirement, unfitting if symptoms are controlled and functioning is unimpaired. The burden of providing CPAP in field and deployment environments is not considered to be a critical factor with the common availability of portable generators and sanitary facilities.

None of these conditions were profiled, implicated in the commander’s statement or noted as failing retention standards. All three were reviewed by the action officer and considered by the Board. There was no evidence for concluding that any of the conditions interfered with duty performance to a degree that could be argued as unfitting. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the palpitations, shoulder pain or OSA conditions.

Remaining Conditions. Other conditions identified in the DES file were asthma, bronchitis, heartburn and allergic rhinitis. Asthma with chronic bronchitis and allergic rhinitis were rated 10% each by the VA. 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 shin splints and plantar fasciitis 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.

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 intervertebral disc syndrome condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the palpitations, bilateral shoulder pain and OSA conditions, the Board unanimously recommends no change from the PEB adjudications 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.

RECOMMENDATION: The Board therefore recommends that there be no recharacterization of the CI’s disability and separation determination.

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Lumbar Intervertebral Disc Syndrome | 5243 | 20% |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100108, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

