RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: ARMY

CASE NUMBER: PD1000036 SEPARATION DATE: 20050812

BOARD DATE: 20110816

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a mobilized National Guard SGT (12B, Combat Engineer) medically separated for low back pain and left foot pain. His back was injured during an explosion in Iraq in 2003. While still deployed in 2004, he dropped a heavy container on his left foot, fracturing the second and third metatarsals. Neither condition was associated with a surgical indication. He did not respond adequately to treatment and was unable to perform within his military occupational specialty (MOS) or meet physical fitness standards. He was issued a permanent L3/H2/S1 profile and underwent a Medical Evaluation Board (MEB). Foot pain and low back pain were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Sensorineural hearing loss and adjustment disorder were also identified and forwarded 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 adjudicated the low back condition and left foot condition as unfitting, rated 10% each, with application of the US Army Physical Disability Agency (USAPDA) pain policy. The CI made no appeals, and was medically separated with a 20% combined disability rating.

CI CONTENTION: “As you can see from my VA rating, there was far more wrong with me physically and mentally than what I was separated from the Army for. The VA determined that I was exposed to chemical agents while in the Army, which resulted in my having cancer of the spine. I am currently rated at 100% through the VA for injuries and illnesses that should have been part of my physical disability rating from the military. I feel that I was rushed out of the military without being properly diagnosed at the time. As a result I was medically discharged when I feel I should have been placed on the disability retirement list.” He additionally lists all of his VA conditions and ratings as per the rating chart below. A contention for their inclusion in the separation rating is therefore implied.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20050712** | | | **VA (1 Mo. after Separation) – All Effective 20050813** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Low Back Pain | 5237 | 10% | Lumbar Degenerative Disease | 5242 | 10% | 20050909 |
| Left Foot Pain | 5099-5003 | 10% | Left Foot Injury Residuals | 5013-5283 | 10% | 20050909 |
| Sensorineural Hearing Loss | Not Unfitting | | Bilateral Hearing Loss | 6100 | 10% | 20050903 |
| Adjustment Disorder | Not Unfitting | | PTSD | 9411 | 50% | 20050903 |
| ↓No Additional MEB Entries↓ | | | Gastroesophageal Reflux | 7327-7346 | 10% | 20050909 |
| Left Wrist Strain | 5215 | 10% | 20060822 |
| Cervical Degenerative Disease | 5242 | 10% | 20050909 |
| Tinnitus | 6260 | 10% | 20050903 |
| 1 x 0% / 3 x Not Service Connected | | | 20050909 |
| **Combined: 20%** | | | **Combined: 80%** | | | |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impact that his service-incurred conditions have had on his quality of life. However, the military services, by law, can only rate and compensate for those conditions that were found unfitting for continued military service based on the severity of the condition at the time of separation and not based on possible future changes. The VA, however, can rate and compensate all service connected conditions without regard to their impact on performance of military duties, including conditions developing after separation that are direct complications of a service connected condition. The VA can also increase or decrease ratings based on the changing severity of each condition over time. 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 the VA Schedule for Rating Disabilities (VASRD) standards, as well as the fairness of PEB fitness adjudications at the time of separation. 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 assertions of improper diagnosis or suspected DES improprieties in the processing of his case.

Lumbar Spine Condition. There were three goniometric range of motion (ROM) evaluations in evidence which the Board weighed in arriving at its rating recommendation, as summarized below.

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| --- | --- | --- | --- |
| Goniometric ROM -Lumbar | PT ~ 6 Mo. Pre-Sep | MEB ~ 5 Mo. Pre-Sep | VA C&P ~ 1 Mo. After-Sep |
| Flexion 0-90⁰ normal | 80⁰ | 35⁰ | 75⁰\* |
| Combined 240⁰ normal | 160⁰ | 190⁰ | 165⁰ |
| Comments |  |  | Tenderness, mild spasm |
| §4.71a Rating | 10% | 20% | 10% |

\*VA C&P examination: flexion 50⁰ with goniometer, 75⁰ observed.

The narrative summary (NARSUM) examination was silent regarding gait, spinal contour, tenderness or spasm, although the use of cane was noted. A magnetic resonance imaging (MRI) showed central disc protrusion at L4-5, with a possible annular tear; X-rays showed mild spurring at L2-3. The VA compensation and pension (C&P) examiner noted erect posture and normal gait with a cane carried in the right hand. Although tenderness of the lumbar spine with mild muscle spasm was noted, spinal curvature was normal. The C&P examiner’s estimated 75⁰ of flexion (while the CI painlessly bent over to remove his shoes) was the basis for the VA’s 10% rating. Similarly, the NARSUM examiner observed the CI bending forward on the exam table to untie his shoe, inconsistent with the 35° value. At the time of the MEB history and physical examination on June 22, 2005 the examiner recorded forward flexion with fingertips reaching the ankles, an essentially normal flexion. A February 23, 2005 examination, two weeks before the examination cited in the NARSUM, recorded 80° of flexion, also consistent with the MEB examination in June 2005 and the C&P examination in September 2005. The PEB’s 10% rating required application of the USAPDA pain policy since §4.71a yields a 20% rating based upon the ROM recorded in the NARSUM. Given the proximity to separation, detailed physical examination findings, and the similarity with two of the three pre-separation examinations, the Board relied more heavily on the C&P evaluation in its rating recommendation. The preponderance of evidence in this case supports a 10% rating under the VASRD spine formula. The PEB and VA chose different coding options for the condition, but this did not bear on rating. After due deliberation in consideration of the totality of the evidence, the Board concluded that there was insufficient cause to recommend a change from the PEB fitness adjudication for the lumbar spine condition. 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.

Left Foot Condition. The NARSUM examiner reported tenderness over the mid-foot. X-rays showed healing metatarsal fractures. The C&P examiner reported tenderness over the second and third metatarsals. No functional limitations on standing or walking were noted, although objective evidence of pain was present. While both examiners reported some limitation in ankle motion, this is of questionable significance since there was no history or complaint of an ankle condition. The PEB’s DA Form 199 reflected application of the USAPDA pain policy for rating, but its 10% determination was consistent with §4.71a standards. Pain with use (§4.40) and painful motion (§4.59) were both evident, and clearly supported a 10% rating. The Board considered other options but could identify no rational coding choice that would lead to a rating higher than 10%. After due deliberation in consideration of the totality of the evidence, the Board concluded that there was insufficient cause to recommend a change from the PEB fitness adjudication for the left foot condition.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were sensorineural hearing loss and adjustment disorder. Bilateral hearing loss was a consequence of acoustic trauma sustained in the same 2003 explosion that caused the back condition, and hearing aids were subsequently required. The condition was profiled (H-3) in 2004. Although the medical holding company commander’s statement, written eight months prior to the MEB, expressed concerns that the hearing restrictions prevented the CI from engaging in basic soldiering and MOS-related tasks, the language of the profile (“caution assigning this soldier to duties that require acute listening ability”) does not appear to be as restrictive as the he believed. There was no documentation that hearing problems significantly interfered with performance of duties for the remainder of time the CI was deployed. Subsequently, the profile was changed to H-2 at the time of the MEB based on an updated audiology examination demonstrating good speech recognition scores. The NARSUM indicated improved hearing with aides which are not disqualifying for continued service. In the VA C&P audiology evaluation one month post separation, the examiner commented on a strong indicator in the record of a nonorganic component to the hearing loss. This observation was supported by better hearing test results at the C&P exam compared to the pre-MEB results. Although the VA subsequently assigned a 10% rating, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the hearing loss condition.

Adjustment disorder was diagnosed after return from deployment to Iraq in 2004, when the CI complained of not sleeping well and having “combat stress symptoms.” He attended weekly combat stress groups and was treated with sleeping medication; an antidepressant medication was later added. Psychological testing performed for the MEB could not be interpreted due to an indiscriminant and exaggerated response pattern. The opinion of the NARSUM psychiatrist was that, during examination, the CI attempted to confuse the interviewer and that his behavior was not sincere. The CI also related numerous traumatic events that the mental health providers could not verify. The conclusion was that the CI had difficulty in coping, complicated by alcohol consumption, but that retention requirements were met. The VA C&P examiner, one month post separation, opined that symptoms of mild posttraumatic stress disorder (PTSD) were present, noted that he was functioning fairly well, had meaningful interpersonal relationships and that his symptoms did not preclude meaningful employment. The adjustment disorder condition was not profiled, implicated in the commander’s statement or noted as failing retention standards. It was reviewed by the action officer and considered by the Board. There was no indication from the record that it significantly interfered with satisfactory performance of MOS requirements. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for the adjustment disorder condition.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for gastroesophageal reflux disease, diverticulosis of the colon, tinnitus, and residuals of rib fracture. All of these conditions 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. The Board determined therefore that none of the stated conditions were subject to service disability rating.

Remaining Conditions. Other conditions identified in the DES file were astigmatism, left wrist pain and headaches. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically or occupationally significant 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 degenerative disc disease of the cervical spine was noted in the VA rating decision proximal to separation, but was not documented in the DES file. Approximately two years after separation, the CI was diagnosed with multiple myeloma and was advised to be observed without treatment due to the early stage of the disease. 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. As discussed above, PEB reliance on the USAPDA pain policy for rating lumbar spine and left foot conditions was operant in this case and the conditions were adjudicated independently of that policy by the Board. In the matter of the lumbar spine condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the left foot condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the bilateral hearing loss condition and adjustment disorder condition, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation. 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** |
| Low Back Pain | 5237 | 10% |
| Left Foot Pain | 5099-5003 | 10% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100115, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

