RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXX BRANCH OF SERVICE: ARMY

CASE NUMBER: PD1000081 SEPARATION DATE: 20040811

BOARD DATE: 20110812

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT (11C, Mortar Crewman) medically separated for a lumbar spine condition and bilateral hip arthritis. The back condition began in 2000 as a result of a parachute landing and was not associated with a surgical indication. The hip condition was not a consequence of injury and was not amenable to surgical intervention. 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 P3/L3 profile and underwent a Medical Evaluation Board (MEB). Chronic back pain and chronic bilateral hip arthritis were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Other conditions included in the Disability Evaluation System (DES) file will be discussed below. The Informal PEB (IPEB) adjudicated the back and hip conditions as unfitting, rated 10%, each with application of AR 635.40. This finding was upheld by a Formal PEB (FPEB) and the CI was separated with a service disability rating of 20%.

CI CONTENTION: “I went to war and it worsened my condition and has not gotten better.” No additionally contended conditions are in evidence.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service FPEB – Dated 20040422** | **VA (2 Wk after Separation) – All Effective 20040812** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Back Pain | 5299-5237 | 10% | Lumbar Disc Disease | 5243 | 10% | 20040827 |
| Bilateral Hip Arthritis | 5003 | 10% | Left Hip Arthritis | 5252 | 10% | 20040827 |
| Right Hip Arthritis | 5252 | 10% | 20040827 |
| ↓No Additional MEB Entries↓ | Obstructive Sleep Apnea (OSA) | 6847 | 50% | 20040827 |
| Posttraumatic Stress Disorder (PTSD) | 9411 | 30% | 20040720 |
| 2 x 0% / 7 x Not Service Connected | 20040827 |
|  **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 duty performance, 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 VA Schedule for Rating Disabilities (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. 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. Furthermore, the 12-month window specified in DoDI 6040.44 is appropriate for rating comparisons but not for new developments after 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.

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| --- | --- | --- |
| Goniometric ROM - Thoracolumbar | MEB ~ 7 Mo. Pre-Sep | VA C&P ~ 2 Wk. After Sep |
| Flexion 0-90⁰ normal | 100⁰ | 68⁰ |
| Combined 240⁰ normal | Not recorded | 168⁰ |
| Comments | No tenderness | Slow gait, bent forward |
| §4.71a Rating | 10%\* | 10% |

 \*Conceding painful motion

The narrative summary (NARSUM) examination showed no spine tenderness, and was silent regarding gait, contour, tenderness and muscle spasm. Computed tomography (CT) scan showed L4-5 bilateral spondylolysis and mild disc bulge at L5-S1. The VA compensation and pension (C&P) examiner noted posture to be slightly bent forward, with exaggerated lumbar lordosis and a slow non-antalgic gait. There was likewise no mention of tenderness or muscle spasm, but the CI needed assistance to rise from a supine position. The PEB and VA chose different coding options for the condition, but this did not bear on rating (both are based on the VASRD general rating formula for diseases and injuries of the spine). The PEB’s DA Form 199 reflected application of AR 635-40, but the 10% rating was consistent with §4.71a standards for non-compensable limitation of motion. Although the C&P exam was more complete and more proximal to separation than the NARSUM exam, the documented limitation of motion did not support a rating higher than 10%. The Board considered whether the exaggerated lumbar lordosis or altered gait described by the C&P examiner supported a 20% rating under the VASRD spine formula. The Board notes that no prior service exam or subsequent C&P exam showed the lordosis abnormality and that compensable spinal contour abnormalities are due to severe muscle spasm or guarding, which were absent in this case. Additionally, the slow gait was non-antalgic and not the result of muscle spasm or guarding. The consensus was therefore that these findings do not support a higher 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 to justify a recommendation for other than the 10% rating assigned by the PEB for the back condition.

Bilateral Hip Condition. There were two goniometric ROM evaluations in evidence which the Board weighed in arriving at its rating recommendation, as below.

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| Goniometric ROM – Left Hip | FPEB ~ 4 Mo. Pre-Sep  | VA C&P – 2 Wk After Sep |
| Flexion 0-125⁰ normal | 125⁰ | 108⁰ |
| Extension 0-cross legs normal | 40⁰ | Not recorded |
| Abduction 0-45⁰ normal | 60⁰ | 30⁰ |
| Adduction 0-45⁰ normal | Not recorded | Not recorded |
| External rotation 0->15⁰ normal | 80⁰ | 30⁰ |
| Comments |  | Pain on abduction |
| §4.71a Rating | 10%\* | 10% |

|  |  |  |
| --- | --- | --- |
| Goniometric ROM – Right Hip | FPEB ~ 4 Mo. Pre-Sep  | VA C&P – 2 Wk After Sep |
| Flexion 0-125⁰ normal | 95⁰ | 90⁰ |
| Extension 0-cross legs normal | 20⁰ | Not recorded |
| Abduction 0-45⁰ normal | 42⁰ | 30⁰ |
| Adduction 0-45⁰ normal | Not recorded | Not recorded |
| External rotation 0->15⁰ normal | 50⁰ | 30⁰ |
| Comments |  | Pain on abduction |
| §4.71a Rating | 10%\* | 10% |

 \*For bilateral hip arthritis

The PEB rated bilateral hip pain as one condition under an arthritis code (5003), whereas the VA applied separate ratings for each hip. The NARSUM examiner noted tenderness to palpation of the posterior hip areas. A Childress test demonstrated the ability of the CI’s hips and knees to tolerate walking in a squat position. Per the NARSUM, x-rays showed degenerative arthritis of both hips. The PEB’s DA Form 199 reflected application of AR 635.40, but its 10% rating for both hips under 5003 was consistent with §4.71a standards. The C&P examination of the hips noted pain on abduction at endpoints. The VA’s separate 10% ratings were based on painful motion (§4.59). The Board considered separate ratings for each hip under 5252 (limitation of flexion) and 5253 (limitation of abduction). Although the C&P examination recorded pain at end motion end points, the NARSUM documentation of the ability to walk in squatted position without report of hip pain (did experience back pain) does not support providing separate ratings for the right and left hip using painful motion. The Board consensus was that VASRD criteria for application of §4.59 (painful motion) were not met, and that VASRD code 5003 was accurately and reasonably applied in this case. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board concluded that there was insufficient cause to recommend a change in the PEB adjudication for the bilateral hip condition.

Remaining Conditions. Other conditions identified in the DES file were difficulty sleeping due to snoring and bad dreams with mood changes. Several additional non-acute conditions or medical complaints were also documented.

OSA was diagnosed near the time of the MEB as the cause of the sleeping difficulty with snoring. A sleep study showed mild OSA for which a trial of continuous positive airway pressure (CPAP) machine was recommended, but not accomplished prior to separation. The VA subsequently assigned a 50% disability rating. 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. The CI’s OSA condition did not carry an attached profile and was not implicated in the commander’s statement. This condition was reviewed by the action officer and considered by the Board. It was determined that it could not be argued as unfitting and subject to separation rating.

PTSD was diagnosed by the VA near the time of separation as the cause of the CI’s mood changes and bad dreams, and was rated 30%. Although the DES file states the CI was being seen in the behavioral health clinic for dreams and mood changes, there are no copies in evidence for review. There was no referral by mental health providers for evaluation in the DES and no service treatment record evidence of symptoms that would support interference with performance of duty to the extent of a finding of unfit. This condition and the additional non-acute conditions noted in the DES file, did not carry an attached profile and were not implicated in the commander’s statement. They 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 right knee meniscal tear 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.

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 AR 635-40 for rating the lumbar spine and bilateral hip arthritis 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 rating of 10%. In the matter of the bilateral hip arthritis condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the OSA and PTSD conditions 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 therefore recommends that there be no recharacterization of the CI’s disability and separation determination.

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Back Pain | 5299-5237 | 10% |
| Bilateral Hip Arthritis | 5003 | 10% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20091219, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

 XXXXXXXXX

 President

 Physical Disability Board of Review

SFMR-RB

**DEPARTMENT OF THE ARMY**

ARMY REVIEW BOARDS AGENCY

1901 SOUTH BELL STREET 2ND FLOOR

ARLINGTON, VA 22202-4508

30 SEPT 2011

MEMORANDUM FOR Commander, US Army Physical Disability Agency

(TAPD-ZB / WRAMC, Building 7, Washington, D.C. 20307-5001

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for AR20110019230 (PD201 000081)

I have reviewed the enclosed Department of Defense Physical Disability Board of

Review (DoD PDBR) recommendation and record of proceedings pertaining to the

subject individual. Under the authority of Title 10, United States Code, section 1554a,

I accept the Board's recommendation and hereby deny the individual's application.

This decision is final. The individual concerned, counsel (if any), and any Members of

Congress who have shown interest in this application have been notified of this decision

by mail.

BY ORDER OF THE SECRETARY OF THE ARMY:

Encl

CF:

( ) DoD PDBR

( ) DVA

/Deputy Assistant Secretary

(Army Review Boards)

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