RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXX BRANCH OF SERVICE: air force

CASE NUMBER: PD201000119 Date placed on TDRL: 20011127

BOARD DATE: 20110406 DATE REMOVED FROM TDRL: 20030629

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a Major (41A3/Health Services Admin), medically separated from the Air National Guard for chronic low back pain (LBP), status post (s/p) surgical fusion*.* CI initially noted LBP after falling while bowling in 1998 while on temporary duty. X-rays showed L4-5 spondylolysis with grade I spondylolisthesis (possibly congenital) that was confirmed by CT, myelogram and magnetic resonance imaging. Conservative management was initially successful, but eventually he underwent an L4-S1 fusion with instrumentation for constant pain. Complications included uncoupling of the rod from the S1 screw, fracture of one of the screws at L4, and a minimal bone graft across the fusion. A bone simulator improved healing and his symptoms reduced to the point that he was able to work reasonably well. Unfortunately, his pain increased after a motor vehicle accident in January 2001. In February 2001, he underwent a second bone graft, removal of the right sided hardware, infiltration of angiopoietin growth factor (AGF) and revision of the left sided hardware to include placement of an external spine stimulator. He continued to have moderate pain and other symptoms which did not respond adequately to treatment. He was unable to perform within his military specialty or participate in a physical fitness test. He was first placed on incapacitation pay and issued a temporary L4 profile. He was then referred to a Medical Evaluation Board (MEB). Chronic LBP, s/p surgical fusion was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AFI 48-123. Six other conditions, as identified in the rating chart below, were forwarded on the MEB submission as either Category II or III conditions. The informal PEB (IPEB) adjudicated the LBP condition as unfitting, rated 40% with placement on the Temporary Retired Disability List (TDRL). The IPEB next considered the CI in March 2003 for continuation of TDRL. The LBP was determined to be at maximum medical benefit and separation with 20% disability was recommended. Right shoulder pain was added as a new Category II condition while the other Category II and III conditions from TDRL entry were not considered. The CI appealed to the formal PEB (FPEB) which upheld the IPEB adjudication. He did not concur with the FPEB, but no rebuttal was received and he was then medically separated with a 20% disability rating.

CI CONTENTION: The CI did not state a contention. Block #14 of DD 294 lists: Right Knee - 20%, Left Shoulder - 20%, Right Wrist - 10%, Left Wrist - 10%, Coronary Artery Disease - 10% (chg to 30% 20030620), Bilateral Hearing - 0%, Tinnitus – 10%. These are his VA conditions and ratings, listed as per the rating chart below. A contention for their inclusion in the separation rating is implied.

RATING COMPARISON:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Service FPEB – Dated 20030513** | | | | **VA (14 Mos. Pre-Separation) – All Effective 20011127** | | | |
| **Condition** | **Code** | **Rating** | | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20011127** | **TDRL** | **Sep.** | **80% VA Rating at time of TDRL.** |
| LBP, s/p Fusion x2 | 5295 | 40% | 20% | LS Spine - S/P Fusion | 5292 | 40% | 20020430 |
| Bilateral CTS | 8715 | Cat II | - | CTS, Left Wrist | 8515 | 10% | 20020430 |
| CTS s/p CTR, R Wrist | 8515 | 10% | 20020430 |
| R Scaphoid Necrosis | 5215-5299 | Cat II | - |
| Hypertension | 7101 | Cat II | - | No VA entry | | | |
| R Shoulder Pain | 5305 | - | Cat II | No VA entry | | | |
| AMI CHD CABG | 7006 | Cat II | - | CAD s/p CABG | 7005-7017 | 10%\* | 20020430 |
| Hyperlipidemia | Cat III | | - | No VA Entry | | | |
| Tobacco Abuse | Cat III | | - | No VA Entry | | | |
| ↓No Additional MEB/PEB Entries↓ | | | | L Shoulder | 5201 | 20% | 20020430 |
| R Knee DJD | 5261 | 20% | 20020430 |
| Tinnitus | 6260 | 10% | 20020503 |
| 0% x 1/Not Service Connected x 2 | | | |
| **Combined: 20%** | | | | **Combined: 80%** | | | |

\*CAD increased to 30% effective 20030620 from exam of 20031010 (combined 80%)

ANALYSIS SUMMARY: The Board wishes to clarify that, in cases involving a period of TDRL, its recommendations regarding the appropriateness of PEB fitness adjudications must be premised on evidence referable to the time of placement into the TDRL period. The Board acknowledges the sentiment expressed in the CI’s application, i.e., that there should be additional disability assigned for his cardiac condition and for conditions which have worsened over time. It is a fact, however, that the Disability Evaluation System (DES) has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions incurred in service or resulting in medical separation. This role and authority is granted by Congress to the Veterans Administration. The Board’s authority resides in evaluating the fairness of DES fitness decisions and rating determinations for disability at the time of separation and at finalization (exit) from TDRL for permanent rating. Also, the 2001 Veterans Administration Schedule for Rating Disabilities (VASRD) coding and rating standards for the spine was in effect at the time of TDRL entry and the 2003 VASRD was in effect for the TDRL exit rating (the current §4.71a rating standards were adopted on 26 September 2003). The 2001 and 2003 standards for rating based on range of motion (ROM) impairment were subject to the rater’s opinion regarding degree of severity of limited motion, whereas the current standards specify rating thresholds in degrees of ROM impairment. The older VASRD spine criteria also considered pain differently and considered factors other than those specified in the newer rating criteria.

Low Back Pain*.* The initial narrative summary (NARSUM), dictated seven months prior to TDRL, noted that the CI had continued moderate pain and difficulty getting out of a chair. There was slightly decreased sensitivity to touch over the distal right lateral thigh, but the sensory and motor exams were otherwise normal. Deep tendon reflex exam was normal on the right and decreased on the left. There was no limp. ROM was deferred secondary to the recent surgery. A clinical orthopedic note one month later did note that pain was “still improving”, the gait looked good and that he could “flex to knees,” but was slow to straighten. After being on incapacitation pay (apparently from 29 March – 26 November 2001), he was placed on TDRL 27 November 2001 with a 40% disability rating. The initial VA compensation and pension (C&P) exam was 6 months later and 14 months prior to finalization (exit from) TDRL. It noted that the CI continued to have pain, difficulty getting from a seated position and some radiation of pain down the left lateral thigh. He was able to flex 45 degrees and extend to zero. Rotation and lateral bending were both limited as well to 10 and 20 degrees, respectively, bilaterally. DTRs were symmetric and reduced. The VA rated this exam at 40% for severe limitation of the lumbar spine. The TDRL exit exam was accomplished (26 February 2003) four months prior to TDRL finalization by an orthopedic surgeon. The CI had now reached maximum expected medical benefit. The examiner stated:

“Patient had no pain or difficulty with movement of both feet. Anterior tibialis/gastroc/posterior tibialis and extensor hallucis longus strength 5/5. Patient was unable to extend his knees or flex his hips against resistance without excruciating pain from his lower back. Patient did not have any pain radiating into his legs on seated straight leg raise which occurred with this motion. Patient has no sensory deficit in either lower extremity. Patient has moderate focal tenderness over his lower back with radiation towards the sacroiliac joints bilaterally. Patient had extreme difficulty transitioning from a seated to a standing position. Patient slouched and leaned towards his right side as he attempted to stand up. On standing, the patient assumed a posture of flexion at the waist of approximately 45 degrees and required approximately 15-20 seconds to assume a more erect posture. Patient walked slowly and deliberately for the next 2-3 minutes during the examination. Patient is able to stand on his toes and stand on his heels.”

No other ROM was annotated. No incapacitating episodes were documented. No fixed kyphosis was noted (other than at the two level fusions). Goldthwaite’s sign (non specific and no longer used) was not specifically cited in any exam nor was there ever evidence of sacroiliac joint disease in the record. Neither bowel nor bladder dysfunction was documented in the record. The FPEB noted that there had been improvement in the exam and functioning since TDRL entry and adjudicated a 20% rating coded 5295 at finalization (exit) from TDRL. There is no record that the VA ever reconsidered the back condition after the initial C&P exam, 14 months prior to TDRL finalization. There were no VA treatment notes until July 2010 where the CI’s condition had clearly worsened. With regard to the rating for entry into TDRL, the PEB and VA chose different coding and rating options for the low back condition. The PEB assigned a code of 5295 (lumbosacral strain) with 40% for entry into TDRL. The VA used 5292 (lumbosacral limitation of motion) and rated the back at 40%. Neither code is currently used. The Board noted that the 40% rating assigned by the PEB at TDRL entry and by the VA while the CI was in a TDRL status was the highest rating possible for either coding option. Neither coding is predominating for initial TDRL rating. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s 40% rating determination for the LBP condition for entry into the TDRL period. With regard to the rating for exit from TDRL (finalization), the Board considered that the VA C&P exam had a lowered probative value due to its being remote from the TDRL finalization rating timeframe. There were no ROMs from the military exam, and no indication of motor or non-pain radiculopathy. The examiner noted “extreme difficulty transitioning from a seated to a standing position,” temporary abnormal posture after standing, and “unable to extend his knees or flex his hips against resistance without excruciating pain from his lower back.” Additionally, the spine rules in effect at the time did not have the notations for considering pain as the new spine rules state, “With or without symptoms such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease.” The Board considered the different coding options under the VASRD in effect at the time, predominately 5295 (lumbosacral strain), 5292 (spine, limitation of motion of, lumbar), and 5285 (vertebra, fracture of, residuals)--there was no 5241, spinal fusion code or other equivalent in effect at the time of TDRL finalization. The Board did note that the back condition would rate at 20% under the current VASRD spine rule; however, these criteria were not applicable to this case due to the rating timeframe. Code 5295 would rate no higher than 20%; Code 5292 would rate between 20% to 40% (moderate to severe), and the Board considered if multiple surgeries and fusions would meet the criteria for 5285 (vertebra, fracture of, residuals) of, “In other cases rate in accordance with definite limited motion or muscle spasm, adding 10 percent for demonstrable deformity of vertebral body.” After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 30% coded analogously to 5285-5292 (with 20% from 5292 and an additional 10% from 5285) for the LBP condition.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB on entry into TDRL were bilateral carpal tunnel syndrome (CTS), avascular necrosis of the scaphoid, right wrist, hypertension (HTN), myocardial infarction (MI) secondary to coronary heart disease (CHD), status post (S/P) coronary artery bypass graft (CABG). None were on the IPEB or FPEB for exit from TDRL, but right shoulder pain secondary to impingement syndrome was added to the exit PEB. All of these conditions were considered Category II, condition that can be unfitting but are not currently compensable or ratable. Hyperlipidemia and tobacco abuse were considered Cat III conditions that are not separately unfitting and not compensable or ratable, and only present on the TDRL entry IPEB. None of these conditions were profiled, implicated in the commander’s statement or noted as failing retention standards. The MI and CABG happened while the CI was receiving incapacitation pay in a non-duty status. Moreover, the initial recovery was excellent. The right shoulder problems developed while on TDRL status. All were reviewed by the action officer and considered by the Board. There was no indication from the record that any of these conditions significantly interfered with satisfactory duty performance. All evidence considered, there is not reasonable doubt in the CI’s favor supporting re-characterization of the PEB fitness adjudication for any of the stated conditions.

Other Contended Conditions. The CI’s application asserts that compensable ratings should also be considered for right knee, left shoulder, left wrist, bilateral hearing, and tinnitus. 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. No other conditions were noted in the NARSUM, identified by the CI on the MEB physical or found elsewhere in the Disability Evaluation System (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 thus has no 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. In the matter of the LBP condition, the Board unanimously recommends a rating of 30% coded analogously to 5285-5292 (with 20% from 5292 and an added 10% from 5285) IAW VASRD §4.71a. In the matter of the bilateral CTS, right wrist, HTN, MI and right shoulder conditions, the Board unanimously recommends no recharacterization of the PEB adjudications as not unfitting, or for hyperlipidemia and tobacco abuse as not compensable. In the matter of the right knee, left shoulder, left wrist, hearing, and tinnitus 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 recommends that the CI’s prior determination be modified as follows and that the discharge with severance pay be re-characterized to reflect permanent disability retirement, effective as of the date of his prior medical separation:

|  |  |  |  |
| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **TDRL RATING** | **PERMANENT**  **RATING** |
| Chronic Low Back Pain, S/P Surgical Fusion | 5292 | 40% | - |
| 5285-5292 | - | 30% |
| **COMBINED** | **40%** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100210, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

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Deputy Director

Physical Disability Board of Review



