RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1000450 SEPARATION DATE: 20090327

BOARD DATE: 20120210

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (19K, M1 Tanker), medically separated for intractable back pain and hearing loss. He aggravated a prior back injury while deployed when he fell from a height onto his back under the load of full combat gear. He was diagnosed with old, healed thoracic compression fractures and treated conservatively with medications and physical therapy, but did not respond adequately to fully perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent L3/H3 profile and underwent a Medical Evaluation Board (MEB). Back pain due to vertebral body fracture with acquired kyphosis and hearing loss were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. The PEB adjudicated the vertebral body fracture with secondary kyphosis and hearing loss conditions as unfitting, rated 20% and 0% respectively, with application of Veterans Administration Schedule for Rating Disabilities (VASRD). The CI appealed to Formal PEB (FPEB) and was then medically separated with a 20% combined disability rating.

CI CONTENTION: The CI’s contention, provided by the Disabled American Veterans National Service Office, asserts that the CI’s back pain condition is unfitting and should be appropriately rated 20% by VASRD standards; that the CI’s hearing loss is unfitting but not compensable by VASRD standards; that the CI’s back condition should be awarded an additional 10% rating for compression fracture with 60% loss of vertebral height; and that tinnitus should be added as an additional unfitting condition coded 6260 and rated 10%.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service FPEB – Dated 20081203** | **VA (17 Day. Pre-Separation) – All Effective 20090328** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Vertebral Body Fracture | 5235 | 20% | DDD with Vertebral Fractures | 5010-5242 | 20% | 20090310 |
| Vertebral Fracture | 5235 | 10%\* | 20090310 |
| Hearing Loss | 6100 | 0% | Bilateral Hearing Loss | 6100 | 0% | 20090324 |
| Tinnitus | 6260 | 10% | 20090324 |
| ↓No Additional MEB/PEB Entries↓ | GERD | 7399-7346 | 10% | 20090310 |
| Chronic Kidney Stone | 7508 | 10% | 20090310 |
| 0% x 2 / Not Service Connected x 10 | 20090310 |
| **Combined: 20%** | **Combined: 50%\*** |

\* Due to clear and unmistakable error reduced to 0%, combined 40% effective 20101122.

ANALYSIS SUMMARY:

Back Condition. The CI first complained of mid back pain shortly after beginning basic training, and admitted to a history of fractured spine not noted at his induction physical. There are no other entries for back pain in the service treatment record until he fell from a guard tower while deployed one year later. He was able to complete his deployment. By the time compression fractures were diagnosed radiographically upon redeployment the fractures were too old to be treated with surgery. There were two goniometric range of motion (ROM) evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation.

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM | MEB – 8 Mo. Pre Sep | VA C&P –17 Days Pre Sep |
| Flexion 0-90⁰ normal | 55⁰ | 45⁰ |
| Combined 240⁰ normal | 150⁰ | 170⁰ |
| Comments | Normal gait, no spasm |  |
| §4.71a Rating | 20% | 20% |

The MEB examiner documented tenderness to palpation along the lower thoracic spine with prominent spine protrusions, particularly at T10. No spasm was noted. There was kyphosis of the upper back and a slightly increased lordosis of the lumbar spine. ROM per the chart above showed moderately restricted flexion and combined motion that did not change significantly with repetitions. Neurologic exam of the lower extremities was normal for motor, sensory and spinal reflexes. The CI’s gait was normal. Imaging studies showed a T10 compression fracture with approximately 60 percent anterior vertebral body height loss without retropulsed fragments. At the VA Compensation & Pension (C&P) exam just prior to separation the CI reported no trauma to his back prior to the fall while deployed. The examiner noted a normal gait and recorded mild-to-moderate paraspinal muscular tension bilaterally in the thoracic spine without tenderness. ROM measurements showed similarly restricted motion and no change with repetitions. The motor and sensory exams were again normal. The PEB and VA chose different coding options for the condition, but this did not bear on rating. Both the PEB and VA employed the General Rating Formula for Diseases and Injuries of the Spine to arrive at a 20% rating for the very similar ratable parameters in the MEB and C&P exams. The VA initially conferred an additional 10% rating for the vertebral compression fracture, but later recognized the error and decreased the CI’s ratings accordingly. There was no evidence of ratable peripheral nerve impairment or documentation of incapacitating episodes which would provide for additional or higher rating. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s rating decision for the back pain condition.

Hearing Loss Condition. The CI exhibited moderate hearing loss, left worse than right, on his induction physical. His hearing impairment worsened markedly during his time in service. He was prescribed bilateral hearing aids and issued a permanent H3 profile proscribing exposure to noise above 85 dB without proper hearing protection. There were two audiogram evaluations in evidence which the Board weighed in arriving at its rating recommendation.

|  |  |  |
| --- | --- | --- |
| Audiometer HZ | MEB ~ 11 mos Pre-Sep | C&P 3 Days Pre-Sep |
|  | Left (dB) | Right (dB) | Left (dB) | Right (dB) |
| 500 | 5 | 5 | 20 | 15 |
| 1000 | 10 | 10 | 25 | 20 |
| 2000 | 40 | 15 | 50 | 20 |
| 3000 | 80 | 20 | 75 | 20 |
| 4000 | 85 | 65 | 80 | 70 |
| 1000-4000 Avg | **54** | **28** | **58** | **33** |
| Comments |  |  |  |  |
| § 4.85-4.86 | 0% | 0% | 0% | 0% |

With application of VASRD §4.85-4.86, Tables VI, VIa and VII, both the PEB and VA concluded that the CI’s sensorineural hearing loss did not meet VASRD criteria for a minimal compensable rating. Based on the slightly worsened audiogram data that was obtained by the VA closer to separation, the CI’s left (poorer) ear scored a Numeric Designation of III on Table VI while his right (better) ear scored a Numeric Designation of I. Since speech discrimination scores are available, Table VIa does not apply. The provisions of VASRD §4.86 (exceptional patterns of hearing impairment) do not apply in this case. Per Table VII there is no compensable rating possible with a Numeric Designation of III for the poorer ear. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s rating decision for the hearing loss condition.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for compression fracture with 60% loss of vertebral height and tinnitus. The contention cites the 2009 VA rating decision in support of an additional 10% rating for the thoracic compression fracture, but neglected to mention that in 2010 the VA recognized this rating approach as a “clear and unmistakable error,” and consequently reduced both the CI’s back condition rating and overall rating by 10%. Indeed, VASRD §4.14 (avoidance of pyramiding) states that the “evaluation of the same disability under various diagnoses is to be avoided,” the disability in this case being diminished and painful motion of the thoracolumbar spine. The Board agrees with the latter VA determination that the thoracic lumbar compression fracture condition is subsumed by the rating for back pain with limitation of motion as per the rating recommendation above, and that any additional rating for the back condition would be in contravention to VASRD standards. The 90% speech discrimination (mild impairment) in each ear recorded in the service treatment record and conceded in the CI’s contention effectively negates the argument that the CI’s tinnitus significantly impaired “his overall ability to understand and respond in a combat or work place setting.” The commander’s statement indicated that the CI was able to effectively communicate with others in an office setting. The FPEB concluded that “there is no evidence that the tinnitus prevents him from performance of his duties beyond the difficulties solely attributed to his hearing loss.” The tinnitus condition was reviewed by the action officer and considered by the Board. There was no evidence for concluding that this condition interfered with duty performance to a degree that could be argued as unfitting and any impairment in hearing was subsumed in the rating for hearing loss. The Board determined therefore that none of the stated conditions were subject to service disability rating.

Remaining Conditions. No other conditions were forwarded on the MEB submission or contended by the CI. Anxiety, depression, sleep disturbance and several non-acute conditions or medical complaints were documented in the Disability Evaluation System (DES) file. None of these conditions were significantly clinically or occupationally active during the MEB period, none carried attached profiles, and none were implicated in the commander’s statement. The serial physical profile was S1. The commander’s statement indicated that the CI performed his alternate duties well, worked a full duty day, was able to maintain a level of attention and focus to carry out instructions and complete tasks in a timely manner, and communicated and related to others without difficulty. 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 gastroesophageal reflux disease, kidney stone and several other non-acute conditions were noted in the VA 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.

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 back pain and hearing loss conditions and IAW VASRD §4.71a and §4.85 respectively, the Board unanimously recommends no change in the PEB adjudication. In the matter of the thoracic vertebral fracture and tinnitus conditions, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation. In the matter of the anxiety, depression, and sleep disturbance 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, as follows:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Vertebral Body Fracture | 5235 | 20% |
| Hearing Loss | 6100 | 0% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100421, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans Affairs Treatment Record

 President

 Physical Disability Board of Review

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

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

Deputy Assistant Secretary

(Army Review Boards)