RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1000452 SEPARATION DATE: 20050924

BOARD DATE: 20120223

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty member, E4/SPC (88M, Motor Transport Operator) medically separated for chronic low back pain and post concussive syndrome with headaches. He did not respond adequately to treatment and was unable to perform fully 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 low back pain and post concussive syndrome with headaches were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions appeared on the MEB’s submission. Other conditions included in the Disability Evaluation System (DES) packet will be discussed below. The PEB adjudicated the chronic back pain and post concussive syndrome with headaches as unfitting, rated 10% and 10% respectively, with application of the Department of Defense Instruction (DoDI) 1332.39 and Veterans’ Administration Schedule for Rating Disabilities (VASRD), respectively. The CI made no appeals, and was medically separated with a 20% combined disability rating.

CI CONTENTION: “I realized I was not suppose (*sic*) to bend my knees when asked to bend over and touch my toes. Once I got with the VA doctor and I am thinking that is why these ratings came up differently.” Refer to DD form 149 for other reasons. He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service IPEB – Dated 20050727** | **VA (3-4 Mo. After Separation) – All Effective Date 20051019** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5299-5237 | 10% | Lumbar Strain | 5237 | 20% | 20060112 |
| Post concussive syndrome with headaches | 8045-9304 | 10% | Post concussive syndrome with headaches | 8045 | 10% | 20060112 |
|   |  | PTSD  | 9411 | 50% | 20060120 |
|  |  | Bilateral Hearing Loss | 6100 | 0% | 20060107 |
|   |  | Tinnitus | 6260 | 10% | 20060107 |
|  |  | Cervical Sprain | 5257 | 0% | 20060112 |
| ↓No Additional MEB/PEB Entries↓ |  |  |  |  |
| 0% x 4/Not Service Connected x 1 | 20060112 |
| **Combined: 20%** | **Combined: 70%** |

\* VA rating based on exam most proximate to date of permanent separation.

ANALYSIS SUMMARY: The Board acknowledges the CI’s assertions that there was an error regarding the method of examination that impacted the rating. It is noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to asserted service improprieties in the disposition of a case. 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 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.

Chronic Low Back Pain. The CI was involved in a convoy attack in Iraq in October 2003 when a roadside bomb exploded and expelled him from the vehicle. His injuries included multiple abrasions; mid and lower back pain, bilateral wrist pain and right leg, foot and ankle pain. He was initially treated with intravenous fluids and pain medications and was referred to physical therapy with thoracic and lumbar strains. Thoracic spine x-rays in November 2003 were normal and lumbar x-rays in August 2004 showed transitional vertebra at the lumbosacral junction with evidence for slight reverse subluxation of L5 on S1. In September 2004 he had a lumbar spine MRI which was normal. His low back pain would be refractive to treatment with medications, physical therapy, home exercises, trigger point injections and electrical stimulation. In March 2005 he had a pain clinic evaluation with epidural steroid injections recommended but these were not performed prior to separation. There were two goniometric range-of-motion (ROM) evaluations in evidence which the Board weighed in arriving at its rating recommendation. Both of these examinations are summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Goniometric ROM - Thoracolumbar | NARSUM ~ 4 Mo. Pre-Sep20050520 | VA C&P ~ 4 Mo. After-Sep20060119 |
| Flex (0-90) | 85⁰ (Pain at 60⁰) | 60⁰ (Pain at 60⁰) |
| Ext (0-30) | 30⁰ (Pain at 25⁰) | 20⁰ (Pain at 20⁰) |
| R Lat Flex (0-30) | 30⁰ (Pain at 30⁰) | 20⁰ (Pain at 20⁰) |
| L Lat Flex 0-30) | 30⁰ (Pain at 30⁰) | 20⁰ (Pain at 20⁰) |
| R Rotation (0-30) | 30⁰ (No pain) | 25⁰ (No pain) |
| L Rotation (0-30) | 30⁰ (Pain at 30⁰) | 20⁰ (Pain at 20⁰) |
| COMBINED (240) | 235⁰ | 165⁰ |
| Comment | Mild muscle spasm; gait wnl |  no DeLuca |
| §4.71a Rating | 10% | 20% |

The narrative summary (NARSUM) recorded active forward flexion to 85 degrees with pain appearing at 60 degrees. “Some spasm” of the lumbar paraspinous muscles was present but gait was normal. Spinal contour is not addressed. The Department of Veterans’ Affairs (DVA) Compensation and Pension (C&P) examination also noted active forward flexion of 60 degrees with no spasm or tenderness. The gait was antalgic. The PEB adjudicated the chronic low back pain condition, coded 5299-5237 (analogous for lumbosacral strain) with a 10% rating. The DVA chose the same code but with a 20% disability rating.

The Board considered coding options noting that PEB and the VA appropriately used the same code (5237) for the lumbar strain condition but arrived at different ratings. Under this code a 20% rating requires forward flexion of the thoracolumbar spine greater than 30 degrees, but not greater than 60 degrees; or, the combined range of motion of the thoracolumbar spine not greater than 120 degrees; or, muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis. The VA rating of 20% is supported by the thoracolumbar flexion of 60 degrees. Muscle spasm was not present and the reported antalgic gait was secondary to acute knee pain. The NARSUM findings support only the minimal compensable rating. No evaluation in evidence supports a 40% rating which would require forward flexion of the thoracolumbar spine 30 degrees or less; or, favorable ankylosis of the entire thoracolumbar spine.

It is obvious that there is a clear disparity between these proximate examinations, with very significant implications regarding the Board's rating recommendation. The Board thus carefully deliberated its probative value assignment to these conflicting evaluations, and carefully reviewed the service file for corroborating evidence in the 12-month period prior to separation.

Extensive review of the record reveals two additional evaluations of the spine condition which provide clarity to the Board, both occurring antecedent to separation. Spinal examination performed 26 July 2004 recorded “no asymmetry, no muscle spasm, normal curvature and full range of motion.” A second evaluation performed nine months prior to separation noted normal appearance and motion, with no abnormalities or muscle spasm. Upon deliberation the Board agreed in this case that the MEB examination was more consistent with outpatient notes, and more reflective of the anticipated severity suggested by the clinical pathology. The Board is, therefore, relying more heavily on the MEB measurements with 85 degrees of flexion. The Board explored other pathways for higher rating for the CI. Given the evidence in the record no higher than minimal compensatory rating could be achieved through application of 5243 (incapacitating disc), §4.59 (painful motion), §4.40 (functional loss) or §4.45 (DeLuca). All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s rating decision the spine condition.

Post-concussive syndrome with headaches. The CI did have a traumatic brain injury (TBI) associated with the roadside bomb that expelled him from the truck. Initial treatment notes state that there was no loss of consciousness (LOC) but later treatment records report LOC of varying lengths. The Board pays close attention to conditions associated with TBI because it is sensitive to the fact that such cases have been vulnerable in the past to consequences which go unrecognized at separation. In this case the CI had complaints of memory loss and headaches. Neuropsychological testing in April 2005 showed that his scores on multiple tests fell within normal limits and did not suggest significant neuropsychological impairment. Taken together, the scores indicated that he was generally functioning cognitively within normal limits. There did not appear to be evidence of “significant cognitive impairment, other than, perhaps, subtle difficulty with concentrated attention.” The examiner attributed this to his “emotional difficulties.” The Neurology note on 5 April 2005, five months prior to separation, noted that his headaches had improved over time and occurred three days per week, a couple times each day. The NARSUM, four months prior to separation, noted that he described his headaches as a sharp pain. His headaches improved in the past with Tylenol but he was currently not taking any medications for the headaches. He reported the headaches did not require him to leave work and were not incapacitating.

The PEB adjudicated the post-concussive syndrome with headaches condition as unfitting, coded 8045-9304 (residuals of TBI-dementia due to brain trauma), with a 10% rating. The VA Rating Decision (VARD) on 19 June 2006, nine months after separation, service-connected the post-concussive syndrome with headaches condition with a rating of 10%. The VASRD in effect at separation in 2005 stated that “purely subjective complaints such as headache, dizziness, insomnia, etc., recognized as symptomatic of brain trauma, will be rated 10 percent and no more under diagnostic code 9304 (dementia due to brain trauma). This 10 percent rating will not be combined with any other rating for a disability due to brain trauma. Ratings in excess of 10 percent for brain disease due to trauma under diagnostic code 9304 are not assignable in the absence of a diagnosis of multi-infarct dementia associated with brain trauma.” The VA training letter, TL06-03, dated 13 February 2006, which specifically addressed the complexity of TBI and recommended coding “outside” of 8045 when a more favorable rating could be achieved under an alternate code (e.g., analogous to migraines 8100 versus 8045-9304 if headache was present) and TL07-05, dated 31 August 2007, which went further in recommending separate ratings under the applicable codes for each ratable component of TBI in evidence (e.g., headache, tinnitus, dizziness, etc.) were not in effect at the time of separation. The Board considered a rating analogously under code 8100 (migraines) but since his headaches did not cause prostrating attacks the rating is noncompensable. After due deliberation in consideration of all the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends that there be no recharacterization of the CI’s disability and separation determination for the post-concussive syndrome with headaches condition, coded 8045-9304 (residuals of TBI-dementia due to brain trauma), with a 10% rating.

Remaining Conditions. Other conditions identified in the DES file were thoracic back pain, knee pain, ankle pain, asthma, tinnitus, hearing loss, nasal fracture, right foot pain, paresthesias in lower extremities, sexually transmitted disease, and chest pain with palpitations. 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 PTSD, left foot pain and cervical strain were noted in the VA rating decision proximal to separation, but were not documented in the DES file. The CI did have some PTSD symptoms prior to separation and the neuropsychological testing in April 2005 noted a diagnosis of rule out PTSD; however, the diagnosis of PTSD was not established prior to separation and there was no specific treatment for or profiles relating to PTSD. 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 low back pain condition, the Board unanimously recommends no change in the PEB adjudication. In the matter of the post-concussive syndrome with headaches condition, the Board unanimously recommends no change in the PEB adjudication. In the matters of the thoracic back pain, knee pain, ankle pain, asthma, tinnitus, hearing loss, nasal fracture, right foot pain, paresthesias in lower extremities, sexually transmitted disease and chest pain with palpitations conditions, the Board unanimously agrees that it cannot recommend any findings 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, as follows:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Low Back Pain | 5299-5237 | 10%  |
| Post Concussive Syndrome with Headaches | 8045-9304 | 10% |
| **COMBINED** | **20%**  |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100427, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

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 President

 Physical Disability Board of Review

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency

(TAPD-ZB / ), 2900 Crystal Drive, Suite 300, Arlington, VA 22202

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation for XXXXXXXXXXXXXXXXXXXX, AR20120004081 (PD201000452)

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 XXXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA