RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: AIR FORCE

CASE NUMBER: PD1000668 SEPARATION DATE: 20040920

BOARD DATE: 20111115

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an Active Duty SrA/E-4 (2W151, Aircraft Armament Systems Journeyman), medically separated for chronic lower back pain with cauda equina syndrome. He underwent lumbar L5-S1 fusion and decompression in August 2002, followed by rehabilitation, but was unable to perform within his Air Force specialty (AFS). He was referred to a Medical Evaluation Board (MEB) which listed cauda equine syndrome and/or dysfunction secondary to pain inhibition, severe lumbar pain with left lower extremity radicular pain as the single diagnosis forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AFI 48-123. The Informal PEB (IPEB) added obesity as a category III unfitting condition that is not compensable. The IPEB adjudicated the back condition as unfitting rated 20% coded 5243 IAW DoDI 1332.39 and the Veterans’ Administration Schedule for Rating Disabilities (VASRD). The CI appealed to the Formal PEB (FPEB) for placement on the Temporary Disability Retirement List (TDRL) at 30%. The FPEB upheld the decision of the IPEB. The CI made no further appeal and was medically separated with a 20% disability rating.

CI CONTENTION: “Due to my active duty injury I have been diagnosed with degenerative disc disease, which I have had 2 failed back surgeries to try and correct. My injury has caused many other medical conditions through the years to include TBI, chronic pain in my back, neck, and leg, PTSD, migraines, left leg weakness/numbness which causes me to walk w/a cane, sleep apnea, and most recently started having seizures. I am unable to sit, stand or walk for long periods of time. These conditions all related to my original injury have caused me to be unemployable.” He elaborates no specific contentions regarding rating or coding. As a matter of policy, all service conditions are reviewed by the Board for their potential contribution to its rating recommendations.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service FPEB – Dated 20040607** | | | **VA (1 Mo. After Separation) – All Effective Date 20040921** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| LBP Assoc w/Cauda Equina Synd | 5243 | 20% | S/P Diskectomy & Fusion L5-S1 | 5237 | 40%\* | 20041026 |
| LLE Radiculopathy | 8521 | 10% | 20041026 |
| Obesity | Cat III | | No VA Entry | | | |
| ↓No Additional MEB/PEB Entries↓ | | | Migraine Headaches | 8100 | 10%\* | 20041026 |
| OSA | 6847 | 50% | 20041026 |
| Adj. D/O w/Mixed Emotional Features & Depression | 9440 | 30% | 20041026 |
| Trochanteric Tendonitis R Hip | 5024-5252 | 10% | 20041026 |
| Hypertension | 7101 | 10% | 20041026 |
| GERD | 7399-7346 | 10% | 20041026 |
| Tender Scar on Back | 7804 | 10% | 20041026 |
| 0% x 0/Not Service Connected x4 | | | 20041026 |
| **Combined: 20%** | | | **Combined: 90%\*** | | | |

\* Increased back (5237) to 100% effective 20051116, then decreased to 40% effective 20060201 (combined 90%); Increased HA (8100) to 50% effective 20061214 (combined 100%)

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that there should be additional disability assigned for his other conditions and for the gravity of his condition and predictable consequences which merit consideration for a higher separation rating. While the Disability Evaluation System (DES) considers all of the service member's medical conditions, compensation can only be offered for those medical conditions that cut short a service member's career, and then only to the degree of severity present at the time of final disposition. However, the Department of Veterans’ Affairs (VA), operating under a different set of laws (Title 38, United States Code), is empowered to periodically re-evaluate veterans for the purpose of adjusting the disability rating should the degree of impairment vary over time, and to compensate for all service connected conditions without tie to fitness.

Chronic LBP Assoc w/Cauda Equina Syndrome: The CI injured his low back in March 2002 when a roof collapsed on his head and back, resulting in low back pain and left lower extremity pain. He underwent lumbar L5-S1 fusion and decompression in August 2002, followed by extensive physical therapy, epidural steroid injections, multiple pain medications including narcotics and neuropathic pain medication, and physical medicine and rehabilitation including a back brace, all without relief of symptoms. In September 2003, the physical medicine and rehabilitation consultant noted a history of bladder and bowel urgency, along with mild erectile dysfunction, stating that these symptoms could reflect a mild cauda equina syndrome. By November 2003 he felt that these symptoms were likely due to apprehension or mild nerve dysfunction, doubting that he had cauda equina syndrome. There is only one goniometric range of motion (ROM) evaluation in evidence which the Board weighed in arriving at its rating recommendation. This VA compensation and pension (C&P) examination, one month post-separation, is summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Goniometric ROM – Cervical | MEB ~ 7 Mos. Pre-Sep | VA C&P ~ 1 Mo. After-Sep |
| Flex (0-45) | No measurements  (Ortho-Trac brace) | Less than 10⁰ (painful) |
| Ext (0-45) | Less than 10⁰ (painful) |
| R Lat Flex (0-45) | 0⁰ |
| L Lat Flex (0-45) | 0⁰ |
| R Rotation (0-80) | 0⁰ |
| L Rotation (0-80) | 0⁰ |
| COMBINED (340) | 20⁰ |
| Comment | Antalgic gait using cane. Normal straight leg raise. Ortho-Trac brace. Left leg pain and weakness -gives away. Abnormal sensation | Straight leg raise positive bilaterally. Uses a brace and cane at all times. Pain constant. Left lower extremity radiculopathy w/daily giving way and fatigability |
| §4.71a Rating | 40% (FPEB 20%) | 40% |

The IPEB found the low back pain condition unfitting with a 20% rating, using code 5243 for intervertebral disk syndrome. The VA rated the S/P diskectomy and fusion L5-S1 condition at 40%, coded 5237 for lumbosacral strain. Both codes refer to the general rating formula for diseases and injuries of the spine, thus offering no advantage to the CI related to choice of code. There was no evidence in the record of significant periods of physician prescribed bed rest to warrant application of ratings for incapacitating episodes under the formula for rating intervertebral disc syndrome based on incapacitating episodes. The VA rating of 40% is supported by the forward flexion of 10 degrees. The FPEB found the member unfit at 20% and remarked on “member’s level of functionality” and not meeting a 30% rating level which is not applicable to rating IAW the general rating formula for diseases and injuries of the spine (no 30% rating level for the thoracolumbar spine).

The narrative summary (NARSUM) and DES file did not contain any goniometric evaluations on which to base a rating. Service treatment records prior to the NARSUM note significant limitation of thoracolumbar motion. The PEB noted that, despite his symptoms, he was working nine hour duty days as a computer operator with minimal work-arounds. Based upon his level of functionality, his condition was rated 20%. The VA additionally rated the low back surgical scar 10% for tenderness with palpation. The surgical scar was not linked to fitness. By precedent, the Board does not recommend separation rating for scars unless their presence imposes a direct limitation of fitness. The VA examination was more comprehensive and the most proximal to separation. It is also the only examination that documents goniometric ROM and is appropriately granted higher probative value. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board unanimously recommends a separation rating of 40%, coded 5243 (intervertebral disc syndrome), for the low back pain condition, IAW VASRD §4.71a.

The Board also considered the left lower extremity radiculopathy condition as a potentially separate unfitting and ratable condition. The CI mentioned left leg weakness/numbness in his contention. Board precedent is that a functional impairment tied to fitness is required to support a recommendation for addition of a peripheral nerve rating at separation. The pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a.

The NARSUM, seven months pre-separation, noted that the CI’s complaint of radicular pain in the left leg was associated with weakness, limping, and required use of a cane for ambulation. However, physical findings were of “decreased sensation in the left lateral leg and foot, with give-way weakness but no significant neurological weakness.” These symptoms and functional impairments, if adjudged due to the radiculopathy, would be clearly linked to fitness, preventing the CI from performing the duties of an Aircraft Armament Systems Journeyman. The commander’s Statement noted that the CI’s medical condition restricted him from performing all required tasks, but did not specify limitations due to low back pain versus radiculopathy. The VA C&P examinations, one month post-separation, noted “There is a little slight weakness in the toe dorsiflexors and some of wasting of the extensor digitorum brevis, but not wasting of the larger L5 muscles, such as the tibialis anterior. There is a sensory loss that seems to cover good portions of the L5-S1 and other dermatomes as well through the ankle and foot area.” Gait was antalgic and “he really could not even walk without the cane.” The orthopedist stated “suggested slight weakness of extension of the left knee.” Subsequent electrodiagnostic testing, 11 months post-separation, verified a mild chronic L5-S1 radiculopathy. The VA rated the left lower extremity radiculopathy condition, code 8521 (external popliteal [common peroneal] nerve), at 10% for mild symptoms.

The sensory component in this case had no functional implications. The Board deliberated on the etiology of the symptom of leg give-way. The service exam clearly attributed leg give-way as due to pain, rather than being a motor weakness. The VA exams documented minimal weakness, but continued leg give-way. As discussed above, pain (whether or not it radiates) is considered under the above back coding and rating. The Board therefore adjudged that the motor impairment was relatively minor, and cannot be linked to significant physical impairment. Since no evidence of functional impairment due to peripheral nerve impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment. All evidence considered there is not reasonable doubt in the CI’s favor supporting addition of the left lower extremity radiculopathy condition as an unfitting condition for separation rating.

Other PEB Conditions: No other conditions were forwarded by the MEB and adjudicated as not unfitting by the PEB; however, obesity was added by the IPEB as not separately unfitting and not compensable. The Board finds no reasonable basis for recommending obesity as an additional unfitting condition at separation.

Other Contended Conditions: The CI’s application asserts that compensable ratings should be considered for TBI, chronic neck pain, PTSD, sleep apnea, migraines, and seizures. The left leg weakness and numbness was discussed in the back and peripheral nerve discussion above. Insomnia and psychotropic medication use were noted in the DES file. Both of these conditions were reviewed by the action officer and considered by the Board. There was no evidence for concluding that either a sleep or mental health disorder condition interfered with duty performance to a degree that could be argued as unfitting. TBI, PTSD, neck pain, and seizures were not mentioned 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. 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 hypertension, and dyslipidemia. None of these conditions carried attached profiles or 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 adjustment disorder, trochanteric tendonitis right hip, GERD, right knee pain, bilateral hearing loss and tinnitus 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. 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. In the matter of the chronic low back pain condition, the Board unanimously recommends a rating of 40% coded 5243, IAW VASRD §4.71a. In the matter of the left lower extremity radiculopathy, insomnia/sleep and mental health 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 recharacterized to reflect permanent disability retirement, effective as of the date of his prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Low Back Pain | 5243 | 40% |
| **COMBINED** | **40%** |

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100514, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

President

Physical Disability Board of Review

SAF/MRB

1500 West Perimeter Road, Suite 3700

Joint Base Andrews MD 20762

Reference your application submitted under the provisions of DoDI 6040.44 (Section 1554, 10 USC), PDBR Case Number PD-2010-00668.

After careful consideration of your application and treatment records, the Physical Disability Board of Review determined that the rating assigned at the time of final disposition of your disability evaluation system processing was not appropriate under the guidelines of the Veterans Administration Schedule for Rating Disabilities. Accordingly, the Board recommended your separation be re-characterized to reflect disability retirement, rather than separation with severance pay.

I have carefully reviewed the evidence of record and the recommendation of the Board. I concur with that finding, accept their recommendation and determined that your records should be corrected accordingly. The office responsible for making the correction will inform you when your records have been changed.

As a result of the aforementioned correction, you are entitled by law to elect coverage under the Survivor Benefit Plan (SBP). Upon receipt of this letter, you must contact the Air Force Personnel Center at 1-800-531-7502 to make arrangements to obtain an SBP briefing prior to rendering an election. If a valid election is not received within 30 days from the date of this letter, you will not be enrolled in the SBP program unless at the time of your separation, you were married or had an eligible dependent child, in such a case, failure to render an election will result in automatic enrollment.

Sincerely,

Director

Air Force Review Boards Agency

Attachment:

Record of Proceedings

cc:

SAF/MRBR

DFAS-IN

PDBR PD-2010-00668

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Physical Disability Board of Review and under the authority of Section 1554, Title 10, United States Code (122 Stat. 466) and Section 1552, Title 10, United States Code (70A Stat. 116) it is directed that:

The pertinent military records of the Department of the Air Force relating to xxxxxxxxxxx, be corrected to show that:

a.  The diagnosis in his finding of unfitness was Chronic Low Back Pain, VASRD code 5243, rated at 40% rather than Low Back Pain, Associated w/Cauda Equina Syndrome, VASRD code 5243, rated at 20%.

b.  On 19 September 2004, he elected not to participate in the Survivor Benefit Plan and on that same date, his spouse xxxxxxxx concurred with his election.

c.  He was not discharged on 20 September 2004; rather, on that date he was released from active duty and on 21 September 2004 his name was placed on the Permanent Disability Retired List.

Director

Air Force Review Boards Agency