RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: AIR FORCE

CASE NUMBER: PD 201000874 SEPARATION DATE: 20030501

BOARD DATE: 20110318

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Technical Sergeant (3C171, Radio Communications Systems Craftsman) medically separated from the Air Force in 2003 after 16 years of service. The medical basis for the separation was a lumbar condition. His back pain began after two lifting injuries in 1991 and 1995. In September 2001, his low back pain worsened and the CI was placed on limited duty, medication, rest, epidural steroid injections, and physical therapy. The CI did not respond adequately to perform within his Air Force Specialty or to meet physical fitness standards. He was consequently issued a permanent L-4 profile and underwent a Medical Evaluation Board (MEB). The lumbar and associated radiculopathy conditions were forwarded to the Physical Evaluation Board (PEB) as unacceptable IAW DoDI 1332.39. The PEB adjudicated the back condition as unfitting, rated 10% with presumptive application of DoDI 1332.39; hypertension as Category II; and tobacco abuse and hyperlipidemia as Category III. The CI made no appeals and was medically separated with a 10% disability rating.

CI CONTENTION: “I was found unfit and medically discharged with 10% disability due to lower back injury. Since my discharge, I have had two different surgeries; and I have paralysis of the sciatic nerve. I am 80% disabled, according to VA, but 100% due to unemployability; and I am now on Social Security Disability.” A contention for rating of the left S1 radiculopathy in addition to the degenerative disc disease (DDD) of the lumbar spine is therefore implied. The CI further contends for a rating for sleep apnea.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – 20030225** | | | **VA (3 Mo. After Separation) – All Effective 20030502** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Low Back Pain, Chronic | 5295 | 10% | DDD Lumbar Spine | 5010-5292 | 40% | 20030811 |
| Left S1 Radiculopathy | 8599-8520 | 10% | 20030811 |
| Hypertension | Not unfitting | | Hypertension | 7101 | 10% | 20030811 |
| Tobacco Abuse | Not unfitting | | No VA rating | | | |
| Hyperlipidemia | Not unfitting | | No VA rating | | | |
| ↓No Additional MEB/PEB Entries↓ | | | Sleep Apnea | 6847 | 50% | 20030811 |
| GERD | 7399-7346 | 0% | 20030811 |
| Scars: RUE, R Shoulder RLE | 7805 | 0% | 20030811 |
| **TOTAL Combined: 10%** | | | **TOTAL Combined: 80%** | | | |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that there should be additional disability assigned for conditions which will predictably worsen 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 resulting in medical separation. This role and authority is granted by Congress to the Veterans Administration. The Board evaluates VA evidence proximal to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of DES fitness decisions and rating determinations for the level of disability present at the time of separation.

Lumbar Condition. The 2003 Veteran Administration Schedule for Rating Disabilities (VASRD) coding and rating standards for the spine, which were in effect at the time of separation, were changed to the current §4.71a rating standards in 2004. The 2001 standards for rating based on range of motion (ROM) impairment were subject to the rater’s opinion regarding degree of severity, whereas the current standards specify rating thresholds in degrees of ROM impairment. When older cases have goniometric ROM measurements in evidence, the Board reconciles (to the extent possible) its opinion regarding degree of severity for the older spine codes and ratings with the objective thresholds specified in the current §4.71a general rating formula for the spine. This promotes uniformity of its recommendations for different cases from the same period and more conformity across dates of separation, without sacrificing compliance with the DoDI 6040.44 requirement for rating IAW the VASRD in effect at the time of separation. For the reader’s convenience, the 2003 rating codes are found below:

**5295** Lumbosacral strain:

Severe; with listing of whole' spine to opposite side, positive

Goldthwaite's sign, marked limitation of forward bending in

standing position, loss of lateral motion with osteo-arthritic

changes, or narrowing or irregularity of joint space, or some

of the above with abnormal mobility on forced motion ………………….…... 40

With muscle spasm on extreme forward bending, loss of lateral spine

motion, unilateral, in standing' position ……………...…………..………….. 20

With characteristic pain on motion ………………………………..……...…….…. 10

With slight subjective symptoms only ……………………...……………………... 0

**5292** Spine, limitation of motion of, lumbar:

Severe ………………………………………………………..……….……….….... 40

Moderate …………………………………….……………….…….…………....…. 20

Slight ………………………………………………………..…………………....... 10

The MEB examiner’s final assessments were “low back pain with left lower extremity radiculopathy” and “secondary facet arthropathy and myofascial pain.” These were combined as the single unfitting condition of chronic low back pain by the PEB. There was no goniometric ROM examination of the spine in the NARSUM or elsewhere in the treatment record. There was a VA goniometric examination three months after separation which documented a flexion of 20⁰ (only 22% of normal flexion) and a combined ROM of 90⁰ (only 37% of normal combined ROM). The remainder of the VA spine examination was fairly cursory. The absence of bony tenderness or deformity and a normal gait were documented. The only NARSUM comment on ROM was “increased pain with hyperflexion.” It documented “mild paralumbar tenderness,” a positive left straight leg raise, and a normal gait. Older outpatient records noted ROM impairment with no indication of severity, and there were no useful entries within a year of separation. The NARSUM examination was six months prior to separation. The VA examination is somewhat more precise, given the goniometric measurements and is somewhat more proximate to separation, relative to probative value considerations. Under the 5295 code chosen by the PEB, the 10% rating is justified since the 20% criteria, as noted above, were not met. Under the 5292 code for limitation of motion, as applied by the VA, the severe characterization for a 40% rating is justified by the severe degree of impairment reflected in the goniometric ROM measurements. The other elements of the VA examination (no documented spasm, no tenderness, normal gait) and the overall examination documented by the MEB examiner are somewhat contradictory to the marked severity of the ROM measurements. Since the ROM values are based on reported pain with motion, the Board considers the possibility of a secondary gain bias which is an inherent vulnerability of VA rating examinations for the joints and spine. There is, however, no proximal outpatient evidence in the service file or contradicting ROM measurements elsewhere in evidence which would overcome a reasonable doubt concession to the severity of the ROM impairment documented by the VA examiner. It is more likely that the disparity between the clinical pictures drawn in the NARSUM versus the VA exam reflect a “good day-bad day” difference since the overall course was clearly a negative trend. With the limitation of motion as severe as documented, the VA coding choice is preferable as mandated by VASRD §4.7 (higher of two evaluations). The Board accepted the 5292 code as the fairest choice and deliberated whether the moderate (premised on the mitigating probative value issues with the VA ROM measurements) or severe characterizations should be applied to its rating recommendation under that code. The Board policy of reconciling recommendations under the older 5292 rating schedule with current VASRD §4.71a-based recommendations (when reasonable to do so) was considered, noting that 20⁰ flexion is well within the 40% parameters of the current spine formula. After due deliberation and considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board agreed that the severe categorization was most applicable and thus recommends a separation rating of 40% for the low back condition under the VASRD code 5292.

The Board considered additional separation rating for the peripheral nerve impairment for the documented sciatic neuropathy (as rated by the VA). 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 the neuropathy is subsumed under the general spine rating. The sensory component in this case had no functional implications and there was no demonstrated motor component. Since no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment.

Sleep Apnea Condition. The CI’s application asserts that Service rating should be considered for obstructive sleep apnea (OSA). This condition surfaced in the Service record only as inclusion of the diagnostic sleep study two months prior to the separation date. It was not contended while in Service. 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.

Remaining Conditions. Other conditions identified in the DES file were hypertention, tobacco abuse, hyperlipidemia, and hematemasis. 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.

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 that they were inconsistent with the VASRD in effect at the time of the adjudication. As discussed above, PEB reliance on DoDI 1332.39 for rating the low back condition was operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the lumbar spine condition, the Board unanimously recommends a rating of 40% coded 5292 IAW VASRD §4.71a. The contended sleep apnea condition is not eligible for Board consideration. 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 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** |
| Arthropathy and Degenerative Disc Disease, Lumbar Spine | 5292 | 40% |
| **COMBINED** | **40%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20100717, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans' Affairs Treatment Record.

Deputy Director

Physical Disability Board of Review

SAF/MRB

1535 Command Drive, Suite E-302

Andrews AFB, MD 20762-7002

Reference your application submitted under the provisions of DoDI 6040.44 (Section 1554, 10 USC), PDBR Case Number PD-2010-00874.

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-2010-00874

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, are corrected to show that:

a.  The diagnosis in his finding of unfitness was Arthropathy and Degenerative Disc Disease, Lumbar Spine, VASRD code 5292, rated at 40%; rather than Low Back Pain, Chronic, VASRD code 5295, rated at 10%.

b.  On 1 May 2003, he elected not to participate in the Survivor Benefit Plan (SBP).

c.  He was not discharged on 1 May 2003; rather on that date he was relieved from active duty and on 2 May 2003 his name was placed on the Permanent Disability Retired List.

Director

Air Force Review Boards Agency