RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXX BRANCH OF SERVICE: air force

CASE NUMBER: PD1001249 SEPARATION DATE: 20090130

BOARD DATE: 20120106

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Capt/O-3 (33S, Communications and Information Officer) medically separated for low back pain. The CI’s back pain began as a strain injury in 1998 and did not respond to ongoing conservative management; ultimately resulting in a series of three surgeries. Residual symptoms included localized back pain and radicular pain with numbness in the left lower extremity (LLE). He did not respond adequately to treatment and was unable to perform within his Air Force specialty (AFS) or meet physical fitness standards. He was issued a duty limiting condition (AF Form 469) and underwent a Medical Evaluation Board (MEB). The condition was forwarded to the Physical Evaluation Board (PEB) as lower back pain with radiculopathy, determined to be medically unacceptable IAW AFI 48-123 and 44-113. No other conditions appeared on the MEB’s AF IMT 618 submission. Other conditions included in the Disability Evaluation System (DES) file will be discussed below. An informal PEB adjudicated the lumbar condition as unfitting, rated 10%, with application of Veterans Administration Schedule for Rating Disabilities (VASRD). The CI made no appeals and was medically separated with a 10% disability rating.

CI CONTENTION: The CI states: “I have had constant pain/numbness in my left leg and constant lower back pain since my last spine surgery (08'). I cannot perform any physical activity without concern for my back going into spasm and "going out." I was denied a medical retirement because it wasn't documented that I bad [sic] enough days on bed rest before surgery. Unfortunately, I didn't always to [sic] to the doctor when I was in pain, as I tried my best to complete the mission. … I understand that spine/back issues are difficult to classify, but the life-changing events following my last round of surgeries have had a terrible impact on my life that preclude me from enjoying normal activities. Please review my history and find that I am indeed eligible for a medical retirement. Thank you for your time and consideration.” He additionally lists all of his VA conditions and ratings as per the rating chart below. A contention for their inclusion in the separation rating is therefore implied.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20081205** | | | **VA (2 Mo. Pre-Separation) – All Effective Date 20090131** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Low Back Pain s/p Diskectomies X 3 | 5243 | 10% | Lumbar Laminectomy … | 5243 | 20% | 20081209 |
| L Lower Extremity Radiculitis | 8520 | 10% | 20081209 |
| ↓No Additional MEB/PEB Entries↓ | | | R Knee Retropatellar Pain | 5260-5024 | 10% | 20081209 |
| L Knee Retropatellar Pain | 5260-5024 | 10% | 20081209 |
| 0% x 4/Not Service Connected x 1 | | | 20081209 |
| **Combined: 10%** | | | **Combined: 40% (Incorporating BLF)** | | | |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service aggravated condition continues to burden him. It is a fact, however, that the 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 Department of Veterans' Affairs (DVA). The VA, operating under a different set of laws (Title 38, United States Code), is empowered to compensate service connected conditions and to periodically re-evaluate said conditions for the purpose of adjusting the veteran’s disability rating should his degree of impairment vary over time. The Board utilizes VA evidence proximal to separation in arriving at its recommendations; and, DoDI 6040.44 defines a 12 month interval for special consideration to post-separation evidence. The Board’s authority as defined in DoDI 6044.40, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Lumbar Spine Condition. The CI apparently followed a favorable post-operative course in 1999 and was able to resume his military career for some time. His 2008 surgical interventions were an L4/5 left microdiscectomy performed February 29, 2008 and a re-exploration of same on May 20, 2008. The surgeon suggested that fusion surgery should remain a future option. Evidence at the time of separation reflects significant functional restrictions, a shortened work day, and frequent requirement for narcotic analgesics. There were two goniometric range-of-motion (ROM) evaluations in evidence which the Board weighed in arriving at its rating recommendation. Both are are summarized in the chart below:

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM | NARSUM ~ 4 Mo. Pre-Sep | VA C&P ~ 2 Mo. Pre-Sep |
| Flexion (0-90⁰) | 80⁰ | 65⁰/52⁰ by DeLuca |
| Combined (240⁰) | 180⁰ | 200⁰ / Indeterminate by DeLuca |
| Comment | No comment re: gait, spasm or contour. | Abnormal Contour. |
| §4.71a Rating | 10% | 20% |

The Board also noted ROM evaluations done by physical therapy (PT) nine months and three months prior to separation that correlated better with the more severe ROM impairment documented by the VA’s pre-separation measurements. Regarding abnormal contour (a §4.71a criterion for 20%), the VA examiner stated, “moderate lumbar curve reversal to complete reversal curve was noted.” As noted above, the MEB examiner was silent regarding this ratable finding; although, the PT note three months prior to separation also stated “gait and transition movements guarded” (itself a 20% criterion) and “decreased lordosis noted.”

With this evidence in mind, the Board deliberated its rating recommendation for the lumbar spine condition. It was agreed that the preponderance of the evidence favored assignment of the greater probative value to the ROMs and evidence from the pre-separation VA compensation and pension (C&P) examination. This correlated better with corroborating evidence and was more consistent with the overall pathology and clinical picture. The VA evaluation was additionally more proximate to separation and more compliant with VASRD requirements, specifically the recorded DeLuca deductions. The Board is mindful of the CI’s opinion that he may have achieved a higher rating by rating for incapacitating episodes had he been knowledgeable of the implications; but, obviously such a concession would be entirely too speculative to serve as a basis for a higher rating recommendation from the Board. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 20% for the lumbar spine condition. The action officer agrees with the PEB’s and VA’s 5243 (intervertebral disc syndrome) code selection.

Lumbar Radiculopathy. The CI’s contention implies that his LLE symptoms should be rated, and the VA conferred a 10% rating for sciatic nerve impairment. There is no doubt that a left sciatic neuropathy was diagnosed and clinically evident in this case. It should also be noted that the narrative summary (NARSUM) diagnosis was “chronic lower back pain with left leg radiculopathy despite three lumbar surgeries;” although, the PEB adjudication did not incorporate a radiculopathy. It was presumably considered, but the AF Form 356 did not provide a rationale for denying an additional rating. 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. Also a mild lower extremity sensory deficit has no relevant fitness implications, assuming propioception (necessary for balance) is unaffected as in this case. Motor weakness, however, does have ratable Service disability consequences if it is significant enough to impose functional limitations beyond those intrinsic to the spine condition itself. There were documented motor deficits recorded in the NARSUM: 4/5 hip extension, diminished tendon reflex, “slight abnormal tip-toe with weakened left walk,” and “unable to hop on left foot and normal right foot.” The pre-separation VA examiner recorded a “feeble” ankle jerk and stated that “medial hamstring is also diminished;” although, he concluded that the diagnostic picture was a “dominant sensory radiculitis.” Both examiners made clear that there was no foot drop, atrophy or other gross motor disturbance. Outpatient notes proximate to separation are somewhat conflicting. A spine clinic note four months pre-separation stated “no radicular symptoms and has complete improvement in his lower extremity pain.” A family practice note two weeks later, stated “still having weakness on L-lower leg that he had prior to surgery.” A subsequent pre-separation PT note (two weeks later and three months pre-separation) recorded diminished reflexes, but motor weakness only with repetitions. The treating neurosurgeon in a follow-up entry six months post-separation stated, “patient has no radicular symptoms and has complete improvement in his lower extremity pain.”

In light of the evidence, the Board surmised that the intermittently documented motor deficits, specifically weighed against the CI’s AFS demands; and, give a clear trend toward resolution of any significant motor disability toward separation. There was inadequate support for a conclusion that the LLE radiculopathy was a significant additional impediment to AFS performance. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of a peripheral code rating for sciatic radiculopathy unfitting and eligible for separate Service rating.

Bilateral Knee Condition. The CI’s application suggests that compensable ratings should be considered for bilateral knee retropatellar pain. The bilateral knee pain was first noted in the mid 1990’s, and was diagnosed in 1995 as an overuse syndrome. There was very little in the service treatment record proximate to the time of separation related to the knees. The pre-separation VA C&P examination documented normal bilateral knee ROMs and physical findings; stating that the CI could sit, stand, walk and do all activities; but, that he had to guard against overuse of his knees. The knees were not subject to profile limitations or implicated in the commander’s statement. The condition was reviewed by the action officer and considered by the Board. There was no evidence for concluding that it interfered with duty performance to a degree that could be argued as unfitting. The Board determined therefore that the bilateral knee condition did not warrant a Service disability rating.

Remaining Conditions. The only other condition identified in the DES file was peri-rectal abscess. This condition was not of clinical or occupational significance during the MEB period, it did not carry an attached profile, and it was not implicated in the commander’s statement. This condition, too, was reviewed by the action officer and considered by the Board. It was determined that it could not be argued as unfitting and subject to separation rating. No other conditions were service connected with a compensable rating by the VA within 12 months of separation or contended by the CI. 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 lumbar spine condition, the Board unanimously recommends a rating of 20% coded 5243 IAW VASRD §4.71a. In the matter of the left sciatic radiculopathy condition, the Board unanimously agrees that it cannot recommend it for additional rating at separation. In the matter of the contended bilateral knee retropatellar pain condition, the Board unanimously agrees that it cannot recommend a finding 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 recommends that the CI’s prior determination be modified as follows, effective as of the date of his prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Lumbar Disc Disease | 5243 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20101011, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans Affairs Treatment Record

XXXXXXXXXXXXXXX

President

Physical Disability Board of Review

SAF/MRB

1500 West Perimeter Road, Suite 3700

Joint Base Andrews MD 20762

Dear XXXXXXXX:

Reference your application submitted under the provisions of DoDI 6040.44 (Title 10 U.S.C. § 1554a), PDBR Case Number PD-2010-01249.

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 modification of your assigned disability rating without re-characterization of your 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 direct that your records be corrected as set forth in the attached copy of a Memorandum for the Chief of Staff, United States Air Force. The office responsible for making the correction will inform you when your records have been changed.

Sincerely,

Director

Air Force Review Boards Agency

PDBR PD-2010-01249

MEMORANDUM FOR THE CHIEF OF STAFF

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

The pertinent military records of the Department of the Air Force relating XXXXXXXXXXX, be corrected to show that the diagnosis in his finding of unfitness was Lumbar Disc Disease, VASRD Code 5243, rated at 20% rather than Low Back Pain s/p Diskectomies X 3, VASRD Code 5243, rated at 10%.

Director

Air Force Review Boards Agency