RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXX BRANCH OF SERVICE: air force

CASE NUMBER: PD1100034 SEPARATION DATE: 20041024

BOARD DATE: 20111223

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty member, SSgt/E-5 (3S171, Equal Opportunity & Treatment Craftsman), medically separated for chronic neck and low back pain. The CI had a several year history of neck and upper back pain following a motor vehicle accident in March 2003. She was treated by a civilian chiropractor and responded well to treatment, but subsequently re-injured her back when she fell down a flight of stairs in December 2003. She then developed worsening pain which did not improve adequately with a further trial of conservative management. She was unable to fully perform within her Air Force specialty (AFS) or meet physical fitness standards. She was issued a temporary P4 profile and underwent a Medical Evaluation Board (MEB). The MEB evaluated the CI as well for two medical conditions, renal papillary necrosis and hypertension. The spine (combined neck and back) and renal conditions were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AFI 48-123; the hypertension was judged to be medically acceptable. No other conditions appeared on the MEB’s submission. Other conditions included in the Disability Evaluation System (DES) file will be discussed below. An Informal PEB adjudicated the neck and back pain as a single unfitting condition, rated 10%, with application of the Veterans Administration Schedule for Rating Disabilities (VASRD); and the renal papillary necrosis and hypertension as Category II (conditions that can be unfitting but are not currently compensable or ratable). The CI initially requested, then waived, a Formal appeal; and, was thus medically separated with a 10% disability rating.

CI CONTENTION: The CI states, in part: “… The rating board at the time of my evaluation did not take into consideration additional diagnosis relating to my injuries with residuals. At the time of my PEB decision I wanted to appear before the board, but was instructed by an Air Force attorney, that I should wait until my condition settled down so an accurate picture of my injuries could be evaluated… Within 4 months of leaving the military I ended up having a metal plate (from C4 to C7) installed in my neck from the injuries sustained during the March 2003 accident. This change[d] my life because I will never have an opportunity to come back into the military to finish my 4 years and 4 months of service. I have limited movement in my neck; I cannot rotate it to look over my shoulder left or right. I still suffer from migraines, radiculopathy, decreased kidney function, severe anemia, and chronic hypertension with swelling in legs, sinusitis, back and neck pain on a continuous basis, and depression which all originated in the service. Because of these conditions I have had to alter my quality of life… I believe I should have been given an evaluation equivalent to my evaluation from the Dept. of Veteran Affairs and place[d] on retirement…” She additionally lists all of her 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 IPEB – Dated 20040724** | | | **VA (5 Mo. After Separation) – All Effective 20041025** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Neck And Low Back Pain | 5237 | 10% | Thoracolumbar Paraspinal Tendinitis | 5299-5237 | 10% | 20050316 |
| Cervical C6 Radiculopathy | 5299-5237\* | 10% | 20050316 |
| Hypertension | Category II | | Renal Papillary Necrosis Hypertension | 7538 | 30% | 20050316 |
| Papillary Necrosis … | Category II | |
| ↓No Additional MEB/PEB Entries↓ | | | Migraine | 8100 | 30% | 20050316 |
| Left Bunionectomy | 5276-5280 | 10% | 20050316 |
| Right Bunionectomy | 5276-5280 | 10% | 20050316 |
| 0% x 6 / Not Service Connected x 4 | | | 20050316 |
| **Combined: 10%** | | | **Combined: 70%** | | | |

\*Following cervical fusion the neck condition rating was amended to 5241 at 10% plus 8515 at 10%, both effective 20041025.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which her Service aggravated conditions continue to burden her, as well as her contention that suggests Service ratings should have been conferred for other conditions documented at the time of separation. The Board wishes to clarify that it is subject to the same laws for Service disability entitlements as those under which the Disability Evaluation System (DES) operates. While the 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 (DVA), operating under a different set of laws (Title 38, United States Code), is empowered to compensate all service connected conditions and to periodically re-evaluate said conditions for the purpose of adjusting the Veteran’s disability rating should the degree of impairment vary over time. The Board utilizes DVA 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. With regard to the CI’s assertion that she was misled by the legal advice she received in Service, the Board must note for the record that it has neither the jurisdiction nor authority to scrutinize or render opinions in reference to suspected Service improprieties in the disposition of a case.

Neck/Back Condition. At the time of the MEB, the CI reported daily neck and thoracic back pain aggravated by activity, and improved with rest. She also reported episodes of numbness and tingling in her right arm occurring every few weeks. The service treatment record (STR) indicates that the thoracic and lumbar segments were mildly symptomatic without significant pathology identified. Cervical imaging revealed a mild disc herniation without evidence of nerve root impingement. Five months after separation, the CI underwent a two-level anterior cervical decompression and fusion for worsening radicular symptoms, by the same orthopedist who provided her active duty care. There was one goniometric and one non-goniometric range-of-motion (ROM) evaluation in evidence which the Board weighed in arriving at its rating recommendation. Both of these exams are summarized in the chart below.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Thoracolumbar & Cervical ROM | MEB ~ 4 Mo. Pre-Sep | | VA C&P ~ 5 Mo. Post-Sep | |
| Thoracolumbar | Cervical | Thoracolumbar | Cervical |
| Flexion | --- | Slight limitation. | 90⁰ | 45⁰ |
| Combined | --- | Slight limitation. | 240⁰ | 340⁰ |
| Comment | No distinct exam. | Mild tenderness. | No spasm; negative DeLuca. | |
| §4.71a Rating | --- | 10%\* | 10%\* | 10%\* |

\* Conceding §4.59 (painful motion) as below.

The MEB examiner referenced a recent orthopedic evaluation that recorded slightly diminished cervical range-of-motion (ROM) with mild paravertebral tenderness and spasm. The neurologic exam was notable for mild weakness of the *left* triceps and wrist flexors, and diminished sensation in the *right* C6 dermatome. The VA compensation & pension (C&P) exam, conducted two weeks prior to the CI’s cervical spine surgery, recorded radiating pain with movement; but found no tenderness or spasm in the cervical region. ROM was full with pain only at the extremes of motion. There was no further limitation by pain with repetitive motion. The thoracolumbar spine also had a full ROM with pain at the extremes of motion, no spasm or tenderness, and no signs of radiculopathy. There is no Service or DVA evidence for abnormal or gait or contour.

The Board directs its attention to its rating recommendation based on the evidence just presented. The PEB’s AF Form 356 reflected consolidation of two spinal segments for a single rating. This is not consistent with the VASRD §4.71a general rating formula for the spine which directs “separately evaluate disability of the thoracolumbar and cervical spine segments, except when there is unfavorable ankylosis of both segments, which will be rated as a single disability.” The Board must therefore apply separate codes and ratings in its recommendation since compensable ratings for each segment are achieved IAW VASRD §4.71a. It is possible that there was not separately unfitting thoracolumbar spine pathology, but distinct fitness recommendations are not possible with the complete overlap of symptoms and limitations throughout the evidence. The initial DVA rating decision indicates that the neck and thoracolumbar spinal segments were rated 10% each for normal range of motion with objective evidence of pain but without spasm (noting the ‘radiculopathy’ nomenclature, but the general spine code, applied to the cervical condition). In considering the probative value of the various exams, the Board noted that only the DVA evaluation is compliant with VASRD §4.46 (accurate measurement). There was paraspinal tenderness and spasm documented in the MEB exam (not anatomically distinguished between spinal segments) which introduces 10% ratable criteria, however. Application of these MEB physical findings and/or the painful motion validated in the DVA exam provides support for separate 10% cervical and thoracolumbar ratings. No criteria for higher ratings are in evidence.

The Board next considered the appropriateness of recognizing cervical radiculopathy as a separately ratable condition. 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 sensory component in this case has no functional implications. The motor impairment was either intermittent or relatively minor and cannot be linked to significant physical impairment. Since no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment. Therefore, after due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends separate Service disability ratings for the cervical and thoracolumbar spine conditions, each coded 5237 and rated 10%.

Other PEB Conditions. The other conditions adjudicated as Category II (not unfitting) by the PEB were hypertension and papillary necrosis with mildly decreased kidney function. The Board’s main charge in respect to these conditions is an assessment of the appropriateness of the PEB’s fitness adjudication. The hypertension was mild and well controlled with first line medications. In the narrative summary (NARSUM) the treating nephrologist stated that the CI’s renal function remained stable; and, that there was no evidence of sequelae from the papillary necrosis condition except for mild decrease in kidney function. The permanent profile contains no limitations attributable to the hypertension or kidney conditions except for assignment limitations that provide ready access to nephrology services. The commander’s statement indicated that the CI’s “duty requirements are at times affected due to frequent medical appointments and many unscheduled visits to the hospital that normally result in her being placed on quarters for 24-48 hours.” However, since the hypertension and kidney conditions were stable, the referenced medical care very likely referred to the CI’s neck and back conditions that were the subject of numerous chiropractic and primary care clinic visits. The kidney condition was designated by the MEB as not meeting standards for worldwide deployment, although that fact does not establish whether or not a condition is unfitting. The PEB arrives at fitness determinations through an AFS-specific and performance-based assessment. The Board’s threshold for countering DES fitness determinations is higher than the VASRD §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard. After due deliberation, and in consideration of the totality of the evidence, the Board cannot find adequate justification for recommending either the hypertension or renal condition as additionally unfitting for separation rating.

Other Contended Conditions. The CI’s application implies that a compensable rating should be considered for migraine headache. The STR documents sporadic visits for headaches dating to early service. The NARSUM recognizes a chronic history of headache characterized as migraine “as well as post traumatic headache.” It records ongoing follow-up, but no acute symptoms. To the VA examiner the CI reported recurrence of headache “every 10 days lasting approximately 24 hours.” This was the rationale cited for the VA’s 30% rating, but corroboration of such episodes is not to be found in the STR. The VA examiner further reported that the CI “denies any recent time lost from work” with respect to the headaches. This condition was not profiled, implicated in the commander’s statement, or noted as failing retention standards. It was reviewed by the action officer and considered by the Board. There was no indication from the record that the headache condition significantly interfered with satisfactory duty performance. The Board determined therefore that this condition was not subject to Service disability rating.

Remaining Conditions. Other conditions identified in the DES file were fatigue and foot problems (bilateral bunionectomy). Several additional non-acute conditions or medical complaints were also documented. 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. 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. No other conditions were service connected with a compensable rating by the VA within twelve months of separation. 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 PEB-combined cervical and thoracic spine condition, the Board unanimously recommends that it be rated for two separate unfitting conditions as follows: cervical strain coded 5237 and rated 10%; and, thoracolumbar strain coded 5237 and rated 10%; both IAW VASRD §4.71a. In the matter of the contended cervical radiculopathy and migraine headache conditions, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation. In the matter of the hypertension and papillary necrosis conditions, the Board unanimously recommends no change from the PEB adjudications as not unfitting. 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 her prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Cervical Strain | 5237 | 10% |
| Thoracolumbar Strain | 5237 | 10% |
| **COMBINED** | **20%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110115, 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

Dear XXXXX:

Reference your application submitted under the provisions of DoDI 6040.44 (Section 1554, 10 USC), PDBR Case Number PD-2011-00034.

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-2011-00034

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 XXXXX, be corrected to show that the diagnosis in her finding of unfitness was Cervical Strain, VASRD Code 5237, rated at 10%; and Thoracolumbar Strain, VASRD Code 5237, rated at 10%; with a combined disability rating of 20%; rather than Neck and Low Back Pain, VASRD Code 5237, rated at 10%.

Director

Air Force Review Boards Agency