RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXX BRANCH OF SERVICE: Air Force

CASE NUMBER: PD11000036 SEPARATION DATE: 20090527

BOARD DATE: 20120320

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

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a Reserve MSgt/E-7 (1A271/ Loadmaster), medically separated for low back pain (LBP) status-post radiographic arthrodesis. He did not respond adequately to conservative treatment or surgical measures nor was he able to perform within his Air Force Specialty (AFS) and meet physical fitness standards. He was issued a temporary P4 profile and underwent a Medical Evaluation Board (MEB). Persistent lumbago despite successful radiographic arthrodesis was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AFI 48-123. 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 LBP status-post arthrodesis condition as unfitting, rated 20% with application of and Veterans Administration Schedule for Rating Disabilities (VASRD). The CI appealed, in turn, to a Formal PEB (FPEB) and to the Secretary of the Air Force Personnel Council (SAFPC). Both upheld the PEB adjudication. The CI made no further appeals and was then medically separated with a 20% disability rating.

CI CONTENTION: “On Feb 12th 2009, I met with the Formal Physical Evaluation Board (FPEB). I believe this hearing resulted in an incorrect and unfair assessment of my current position. Prior to the FPEB the ADC assigned to me told me not to make any additional comments during the interview with the Board. I believe the ADC was not looking out for my best interest. This situation with my back and other related issues is a result from something that happened while on AD supporting Operation Iraqi and Enduring Freedom, it did not accrue off duty or by any neglect on my part. The VA has evaluated me and rated me with a 60% disability: 40% for degenerative disc disease & degenerative joint disease post lumbar fusion (formerly DC 5242-5237, degenerative disk disease lumbar spine L4-S1), 10% for tinnitus, 10% hypertension and 10% right knee status arthroscopy. The rating of 40% based on the ROM accomplished during the physical administer at a Clinic. I have had 4 ROM tests, with various degrees of movement. The PEB judgment of 20% is based on latest ROM, further note while the physical therapies was measuring my ROM, I informed her at the point of pain, they she proceeded to push to where I was in severe pain. At that point she made the measurement. These ROM are being tested while taking Pain Meds, Motrin, Tramodol and Vicodine. This is not reflect my daily restrictions due to pain. With the addition to these concerns, some side effects of taking these meds is constipation and has to be relieved with the max amount of Senna taken 2 to 3 times each and every day. Other side effects are low Iron/anemia (low Ferritin). Which I have had a colonoscopy 2 times, upper GI 2 upper GI 2 and serious of x-rays while taking Barium. To locate the blood loss in my system. These tests have resulted in negative results.” 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. Spelling and grammar errors left intact. Note: the ADC is the area defense counsel.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service FPEB – Dated 20090212** | **VA\* (13 Mo. After Separation)** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** | **Effective** |
| LBP S/P Radiographic Arthrodesis | 5241 | 20% | DDD & DJD Status Post Lumbar Fusion | 5242-5237 | 40%\*\* | 20100630\*\*\* | 20070901 |
| ↓No Additional MEB/PEB Entries↓ | Residuals Right Knee Status Post Arthroscopy and Medial Meniscetomy | 5259 | 10% | 20050301 | 20040729 |
| Tinnitus | 6260 | 10% | 20100629 | 20040629 |
| Hypertension | 7101 | 10% | 20100630 | 20040729 |
| Major Depression Associated with DDD Status Post Lumbar Fusion | 9434 | 50% | 20100721 | 20100628 |
| Not Service Connected x 1 (Two deferred)  |
| **Combined: 20%** | **Combined: 80%\*\*** |

\*VA rating (20110304) most proximate to date of permanent separation.

\*\*10% from 20040729, 40% from 20050927, 100% from 20070627 date of back surgery, and 40% from 20070901

\*\*\*VA Spine exam 13 months after separation

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred condition continues to burden him. 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. 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. That role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA), operating under a different set of laws (Title 38, United States Code). 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 disability at the time of separation. The Board also acknowledges the CI’s contention suggesting that service ratings should have been conferred for other conditions documented at the time of separation. 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. The DVA, however, 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 the degree of impairment vary over time. It is also noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to the CI’s statements in the application regarding medical care or suspected DES improprieties in the processing of his case.

Low Back Pain status post Radiographic Arthrodesis. The CI initially injured his back while activated in 2003. He was initially able to meet full duty requirements as a Guard technician. The VA did grant him disability pay, though, initially 10% effective 29 July 2004, the day his active tour ended, and then raised to 40% effective 27 Sep 2005. He was rated at 100% for post-surgical recovery from 27 June through 1 September 2007, but then returned to a 40% rating. There were four goniometric range-of-motion (ROM) evaluations in evidence which the Board weighed in arriving at its rating recommendation. The 5 September 2008 measurements were documented in the service treatment record (STR) as the average of three measurements made with a goniometer, but the individual measurements were not recorded. Board precedent, IAW VASRD §4.71a and congruent with VA rating practice, is to round to the nearest five degrees and to utilize the lowest of multiple measurements for rating purposes.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| ROM - Thoracolumbar | PT Exam, p. 904~17 Mo. Pre-Sep(December 11, 2007) | STR Exam, p. 42~13 Mo. Pre-Sep(April 22, 2008) | MEB (DGMC), p. 320~8 Mo. Pre-Sep(September 5, 2008) | VA C&P p. 489~13 Mo. After-Sep(June 30, 2010) |
| Flex (0-90) | 35⁰ (34,35,35) | 35⁰ (34, 35, 36) | 50⁰ | 0-45⁰ |
| Ext (0-30) | 5⁰(5,7,8) | 5⁰ (5,7,8) | 5⁰ | 0-20⁰ |
| R Lat Flex (0-30) | 10⁰ (8,10,11) | 10⁰ (11,12,11) | 10⁰ (12⁰) | 0-25⁰ |
| L Lat Flex 0-30) | 10⁰(11,12,11) | 10⁰ (8,10,11) | 15⁰ | 0-25⁰ |
| R Rotation (0-30) | 15⁰(15,15,17) | 15⁰(15,15,17) | 20⁰ | 0-30⁰ |
| L Rotation (0-30) | 15⁰(13,15,14) | 15⁰ (13,15,14) | 20⁰ (18⁰) | 0-30⁰ |
| COMBINED (240) | 90⁰ | 90⁰ | 120⁰ | 175⁰ |
| CommentSurgery 20070627 | 2 Waddells signs |  | Average of 3 active measurements were recorded, individual measurements were not recorded | No incapacitation; DeLuca negative |
| §4.71a Rating | 20% | 20% | 20% | 20% (VA retained 40%) |

The CI was first seen for LBP in February 2004 when he complained of a 7 to 8 month history of pain since he had pulled up on a cargo strap. He was treated with chiropractic and conservative management and able to return to full duty including flight status as a loadmaster. He was reinjured in a motorcycle accident in the summer of 2005 and had recurrent and worsened pain. An MRI showed multi-level degenerative disc disease (DDD). The CI had persistent pain despite conservative management and medications. An aeromedical waiver was requested and the CI was found disqualified for flight status effective 26 October 2005. The CI then requested an MEB on 10 Feb 2006. The MEB was accomplished 9 May 2006 and on 14 July 2006 the PEB determined he was fit and returned the CI to duty. However, his pain persisted and he was treated with increasingly more aggressive modalities including physical therapy, lumbar medial branch blocks and radiofrequency ablation, trigger point injections, epidural steroid injections (ESIs), nucleoplasty, and facet blocks. While many of these provided temporary relief, none were sufficient for him to return to full duty. In June 2007, he underwent L4-5 arthrodesis with iliac crest allograft. Although he enjoyed good results from the arthrodesis on radiographs, pain persisted. One year after surgery, the neurosurgeon determined that the CI had exhausted all conservative measures and further improvement was unlikely. He was referred to a second MEB. The MEB examination was 15 July 2008, 10 months prior to separation. The examiner noted that the CI denied bowel or bladder complaints. No incapacitation was documented. Gait and stance were normal as were the sensory, motor and deep tendon reflex (DTR) exams. The incision was noted to be well healed. Imaging with flexion and extension views showed good repair of the arthrodesis with good lordotic alignment. ROM was accomplished two months later and is noted above. The VA Compensation and Pension (C&P) exam most proximate to the date of separation was on 30 June 2010, 13 months after separation. Daily pain was noted as moderate to severe, but no incapacitating episodes had been present the previous 12 months. Subjective weakness, stiffness and spasm were present, but the CI denied numbness, paresthesias, and bowel or bladder incontinence. No aids to ambulation were noted. On exam, gait was non-antalgic; sensory, motor and DTR exams were normal. The scar was non-tender. Some straightening of the normal lumbar lordosis was noted, but no spasm was documented. DeLuca criteria were negative. ROM is noted above. Straight leg test was positive bilaterally at 30 degrees. Imaging was not repeated.

The PEB rated the back condition at 20% coded 5241, spinal fusion. The VA coded the back at 40% and coded it 5242-5237, degenerative arthritis of the back and lumbosacral strain. The Board notes that the CI non-concurred with the PEB and FPEB and requested review by SAFPC. The Board carefully considered these records and the CI rebuttals to them. It noted that the ROM measurements show a trend towards improvement over the three years of measurements after the arthrodesis. It also notes that the VA initially awarded 10% disability for the back and later increased it to 40% in the 9 February 2006 decision based on the 27 September 2005 examination. This was performed 2 years prior to the arthrodesis and almost 4 years prior to separation. The Board specifically notes that the VA stated in the 1 October 2008 rating decision “although recent evidence shows some improvement in the condition, sustained improvement has not been definitively established.” In the 4 March 2011 decision, the VA noted that “the results of your examination more closely meet criteria for a 20% evaluation. We have continued the current evaluation because it more closely approximates your total disability picture.” However, the rating decision does not state its reasoning. Rather, it noted mild pain and stiffness with normal sensory and motor exams without the presence of DeLuca criteria. The action officer notes that the VA frequently does not decrease disability ratings until sustained improvement is noted on serial examinations. The action officer further opined that the sequential examinations after the arthrodesis do support “sustained improvement” from the initial 40% disability adjudication by the VA. The Board must evaluate the available evidence to determine a fair and equitable disability rating based on the CI’s condition at the time of separation. The MEB ROM exam of 5 September 2008 and the VA C&P exam of 30 June 2010 show similar amounts of improvement after surgery and both support a 20% rating. After due deliberation in consideration of the totality of the evidence, the Board concluded that there was insufficient cause to recommend a change from the PEB fitness adjudication for the low back pain condition.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for constipation, anemia, right knee status post arthroscopy condition, tinnitus, hearing loss, and hypertension. The right knee status post arthroscopy, hearing loss, and hypertension conditions were reviewed by the action officer and considered by the Board. There was no evidence for concluding that any of these conditions interfered with duty performance to a degree that could be argued as unfitting. The Board determined therefore that none were subject to service disability rating. Constipation, anemia, and tinnitus 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.

Remaining Conditions. Hyperlipidemia was also identified in the DES file. This condition is a laboratory finding and not subject to disability rating. It 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. Additionally major depression and hemorrhoids were noted in the VA 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 no change from the PEB adjudication. In the matter of the right knee status post arthroscopy, hearing loss, and hypertension conditions, the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation.

RECOMMENDATION: The Board, therefore, recommends that there be no recharacterization of the CI’s disability and separation determination, as follows:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Low Back Pain Status-Post Radiographic Arthrodesis  | 5241  | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20101219, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans Affairs Treatment Record

 XXXXXXXXXXX

 President

 Physical Disability Board of Review

SAF/MRB

1500 West Perimeter Road, Suite 3700

Joint Base Andrews MD 20762

Dear XXXXXXXXX

 Reference your application submitted under the provisions of DoDI 6040.44 (Title 10 U.S.C. §  1554a), PDBR Case Number PD-2011-00036

 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 appropriate. Accordingly, the Board recommended no re-characterization or modification 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 and their conclusion that re-characterization of your separation is not warranted. Accordingly, I accept their recommendation that your application be denied.

 Sincerely,

Director

Air Force Review Boards Agency