RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100142 SEPARATION DATE: 20040323

BOARD DATE: 20120529

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a mobilized Reserve member, SSG/E-6, 62N30, Construction Equipment Supervisor, medically separated for chronic neck (cervical) and low back pain (LBP). Pain began following being struck on the head with a tailgate and changing a tire. Spine pain was exacerbated following deployment and he had degenerative changes and disc disease in both spine segments. He did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent profile (U3, L3, S2) and underwent a Medical Evaluation Board (MEB). Cervical/Lumbar spine and headaches were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Two other conditions, as identified in the rating chart below, were forwarded on the MEB submission as medically acceptable conditions. The PEB adjudicated the cervical and the low back conditions each as separately unfitting, rated 10% and 10%, with likely application of the US Army Physical Disability Agency (USAPDA) pain policy and Veterans’ Administration Schedule for Rating Disabilities (VASRD), respectively. Headaches were found to be not unfitting. The CI made no appeals, and was medically separated with a 20% combined disability rating.

CI CONTENTION: “Chronic cervical pain, mild degenerative. Chronic low back pain with mild degenerative joint and disc disease. They just hurry up to process us out. I was diagnosed with Adjustment Disorder while on active duty, never was rated for it.”

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in DoDI 6040.44, Enclosure 3, paragraph 5.e.(2) is limited to those conditions which were determined by the PEB to be specifically unfitting for continued military service; or, when requested by the CI, those condition(s) “identified but not determined to be unfitting by the PEB.” The ratings for unfitting conditions will be reviewed in all cases. The adjustment disorder condition requested for consideration and the unfitting cervical pain and LBP conditions meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. Any conditions or contention not requested in this application, or otherwise outside the Board’s defined scope of review, remain eligible for future consideration by the Army Board for the Correction of Military Records (BCMR).

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20040202** | | | **VA (1 Mo. After Separation) – All Effective Date 20040324** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Cervical Pain | 5237 | 10% | DJD Cervical Spine | 5003 | 10%\* | 20040422 |
| Low Back Pain | 5237 | 10% | DJD/Lumbar Strain | 5237 | 20% | 20040422 |
| Headaches | Not Unfitting | | Cephalagia | 8199-8100 | NSC | 20040422 |
| Adjustment Disorder | Not Unfitting | | Adjustment Disorder | 9434 | 30%\* | 20040422 |
| Noncardiac chest pain | Not Unfitting | | Chest Pain | 7099-7005 | NSC | 20040422 |
| ↓No Additional MEB/PEB Entries↓ | | | 0% x 1/Not Service-Connected x 3 | | | 20040422 |
| **Combined: 20%** | | | **Combined: 50%\*** | | | |

\* Cervical spine changed from 5003 to 5242 and increased to 20% effective 20060919 based on exam of 20070917; 9434 increased to 50% effective 20070116 (combined 60%)

ANALYSIS SUMMARY: The Board acknowledges the CI’s contention that suggests service ratings should have been conferred for other conditions documented at the time of separation, and for worsening of other conditions. 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 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, however, 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.

Cervical and Low Back Pain Conditions: It is incongruent for the Board to assign a higher probative value to one exam in its rating recommendation for one of the conditions and then assign a higher probative value to a different exam for the other condition. Therefore the two goniometric range-of-motion (ROM) evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation; are summarized in the chart below.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Goniometric ROM –Lumbar & Cervical | MEB ~3 Mo. Pre-Sep | | VA C&P ~1 Mo. Post-Sep | |
| Lumbar | Cervical | Lumbar | Cervical |
| Flexion | 30⁰ (? See text) | 15, 20, 20⁰ | 60⁰ | 45⁰ |
| Combined | 140⁰ | 100⁰ | 170⁰ | 235⁰ |
| Comment | +Tenderness; +L. SLR; 3/5 Waddell’s | +Tender, spasm, and Spurling | Painful motion; +SLR bilaterally | Painful motion |
| §4.71a Rating | 20%-40% | 20% | 20% | 10% |

Neck Condition. At the MEB exam, the CI reported severe 10/10 neck pain with little relief from narcotic pain medication and a spasm-like feeling. He noted radiation to the left upper extremity with numbness of the 4th and 5th fingers. The MEB physical exam noted diffuse tenderness with muscle spasm of the left trapezius muscle. Spine contour, gait, motor, reflex and sensory exams were normal. Electrophysiological testing (EMG/NCV) were reported as normal, and imaging demonstrated C4-C5 central disc protrusion which contacted the spinal cord without deformation and left C6-C7 disc protrusion effacing the thecal sac with foraminal narrowing. At the VA Compensation and Pension (C&P) exam after separation, the CI reported a similar history with frequent flare-ups. Exam demonstrated the ROMs charted above, with no spasm, normal contour and normal motor exams.

|  |  |  |
| --- | --- | --- |
| Cervical ROM | MEB ~3 Mo. Pre-Sep | VA C&P ~1 Mo. Post-Sep |
| Flex (45⁰ Normal) | 15, 20, 20⁰ | 45⁰ |
| Ext (0-45) | 10, 15, 15⁰ | 20⁰ |
| R Lat Flex (0-45) | 20, 20, 20⁰ | 20⁰ |
| L Lat Flex (0-45) | 20, 20, 20⁰ | 30⁰ |
| R Rotation (0-80) | 15, 20, 20⁰ | 60⁰ |
| L Rotation (0-80) | 20, 20, 20⁰ | 60⁰ |
| COMBINED (340⁰) | 100⁰ | 235⁰ |
| Comment | Diffuse tender, + spasm; normal contour; normal motor, reflex and sensory exams; +Spurling sign (radiculitis) | Painful motion; normal curve |
| §4.71a Rating | 20% | 10% |

Low Back Condition. At the MEB exam, the CI reported severe 10/10 lower back pain described as “muscle spasm.” Narcotic pain medications were not fully effective. He complained of radiation to the left lower leg (foot in prior notes). The MEB physical exam noted tenderness, normal gait and 3/5 positive Waddell’s signs for non-physiologic findings of axial loading, superficial touch, and hip rotation. There was no spasm noted. The ROMs provided were segmental (T12/L1 and L5/S1) and did not provide a single number for the entire thoracolumbar spine. Imaging demonstrated degenerative disc disease (DDD) with a pattern of mild diffuse foraminal narrowing due to congenitally shortened pedicles without disc bulges or herniation. At the VA C&P exam after separation, the CI reported constant, sharp, stabbing pain rated 10+/10 with medication decreasing the pain to 6/10. He described frequent flare-ups and erectile dysfunction due to the LBP. He stated he could “walk 40-50 yards before the pain forced him to rest.” The exam is charted above and there was no decrease in ROM on repetitive motion.

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| --- | --- | --- | --- |
| Thoracolumbar ROM | MEB ~3 Mo. Pre-Sep | | VA C&P ~1 Mo. Post-Sep |
| Flexion (90⁰ Normal) | 15, 20, 20⁰ T12/L1 | 30⁰(? See text) | 60⁰ |
| 10, 10, 10⁰ L5/S1 |
| Ext (0-30) | 5, 10, 10⁰ | | 10⁰ |
| R Lat Flex (0-30) | 25, 20, 20⁰ | | 20⁰ |
| L Lat Flex 0-30) | 25, 25, 20⁰ | | 20⁰ |
| R Rotation (0-30) | 30, 35, 35⁰ | | 30⁰ |
| L Rotation (0-30) | 35, 30, 35⁰ | | 30⁰ |
| Combined (240⁰) | 140⁰ | | 170⁰ |
| Comment | +Tenderness; no spasm; gait normal; +SLR on L.; +axial loading, superficial touch, and hip rotation tests (Waddell’s +3/5) | | Gait normal; painful motion; +SLR bilaterally; normal motor and reflexes |
| §4.71a Rating | 20%-40% | | 20% |

The Board directs attention to its rating recommendation based on the above evidence. The Board considered both the cervical and thoracolumbar spine exams as paired as discussed above. The PEB thoracolumbar spine forward flexion measurement was added to 30⁰, but was incomplete as it appeared to exclude portions of the thoracic spine (not usually a significant contributor to flexion), as well as possibly missing some lumbar-area flexion which would most likely lead to a total forward flexion over 30⁰. It is obvious that there is a clear disparity between these examinations, with very significant implications regarding the Board's rating recommendation. The Board thus carefully deliberated its probative value assignment to these conflicting evaluations, and carefully reviewed the entire record for corroborating evidence in the 12-month period prior to and following separation. The Board determined that the VA exam had higher probative value as more nearly representative of the CI’s disability picture at the time of separation. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board concluded that there was insufficient cause to recommend a change in the PEB’s 10% adjudication for the cervical spine condition; However, there was sufficient evidence to recommend a disability rating of 20% for the low back condition.

The Board considered whether additional service rating could be recommended under a peripheral nerve code, for the residual arm or leg radicular symptoms at separation. Firm Board precedent requires a functional impairment tied to fitness to support a recommendation for addition of a peripheral nerve rating to service disability in spine cases. The pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a. There was no objective finding of sensory or motor deficits and no evidence of functional implication. Since no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional service rating based on peripheral nerve impairment.

Contended PEB Conditions. The contended condition adjudicated as not unfitting by the PEB was adjustment disorder. IAW DoDI 1332.38, enclosure 5 (E5.1.3.9), adjustment disorder and personality disorder are listed as conditions or circumstances not constituting a physical disability and are not ratable. The Board considered the VA mental health diagnoses after separation was in substantial agreement with the MEB diagnoses. The adjustment disorder met standards, was profiled S2, and was not mentioned in the final commander’s statement. The Board concluded therefore that this condition was not unfitting and could not be recommended for additional disability 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. As discussed above, PEB reliance on the USAPDA pain policy for rating the spine conditions was likely operant in this case and the conditions were adjudicated independently of that policy by the Board. In the matter of the cervical condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the low back condition, the Board unanimously recommends a disability rating of 20%, coded 5237 IAW VASRD §4.71a. In the matter of the contended adjustment disorder condition, the Board unanimously recommends no change from the PEB determination as not unfitting. There were no other conditions within the Board’s scope of review for consideration.

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:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Cervical Pain with Degenerative Joint and Disc Disease | 5237 | 10% |
| Chronic Low Back Pain with Degenerative Joint and Disc Disease | 5237 | 20% |
| COMBINED | 30% |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20040321, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

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President

Physical Disability Board of Review

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency

(TAPD-ZB / ), 2900 Crystal Drive, Suite 300, Arlington, VA 22202

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for XXXXXXXXX, AR20120011849 (PD201100142)

1. Under the authority of Title 10, United States Code, section 1554(a), I approve the enclosed recommendation of the Department of Defense Physical Disability Board of Review (DoD PDBR) pertaining to the individual named in the subject line above to recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 30% effective the date of the individual’s original medical separation for disability with severance pay.

2. I direct that all the Department of the Army records of the individual concerned be corrected accordingly no later than 120 days from the date of this memorandum:

a. Providing a correction to the individual’s separation document showing that the individual was separated by reason of permanent disability retirement effective the date of the original medical separation for disability with severance pay.

b. Providing orders showing that the individual was retired with permanent disability effective the date of the original medical separation for disability with severance pay.

c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, and payment of permanent retired pay at 30% effective the date of the original medical separation for disability with severance pay.

d. Affording the individual the opportunity to elect Survivor Benefit Plan (SBP) and medical TRICARE retiree options.

3. I request that a copy of the corrections and any related correspondence be provided to the individual concerned, counsel (if any), any Members of Congress who have shown interest, and to the Army Review Boards Agency with a copy of this memorandum without enclosures.

BY ORDER OF THE SECRETARY OF THE ARMY:

Encl XXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA