RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100188 SEPARATION DATE: 20050528

BOARD DATE: 20120907

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSG/E6 (91J, Medical Logistics) medically separated for a lumbar spine condition. He developed back pain with left leg radiation after a vehicular mishap during a 2003 deployment to Iraq, and required medical evacuation. He was diagnosed with lumbar disk disease and underwent surgical intervention. Post-operatively the condition could not be adequately rehabilitated to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was consequently issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The lumbar spine condition and “sciatica pain in left lower limb” were forwarded to the Physical Evaluation Board (PEB) as separate medically unacceptable conditions IAW AR 40-501. Depression was also addressed by the MEB and forwarded on the DA Form 3947 as a medically acceptable condition. The informal PEB adjudicated the lumbar spine condition as unfitting, rated 20%, citing criteria of the Veterans Administration Schedule for Rating Disabilities (VASRD). The sciatic pain was subsumed in the lumbar rating, with language indicating that it was not unfitting. The depression was not specifically adjudicated per the PEB’s DA Form 199; but, the Board judged that this was likely an erroneous omission and should be assumed to constitute a *de facto* determination that the condition was not unfitting. The CI made no appeals, and was medically separated with a 20% Service disability rating.

CI CONTENTION: “Never seen or rated for Mood disorder, not otherwise specified (previously rated as depression with insomnia) while active duty.” He does not elaborate further or specify a request for Board consideration of any additional conditions.

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in Department of Defense Instruction (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 rating for the unfitting lumbar spine condition (and the subsumed sciatic neuropathy) is addressed below. The mood disorder requested for consideration is considered equivalent to depression as identified by the MEB, with an implied (elaborated above) PEB determination of not unfitting. Thus it is judged to meet the criteria prescribed in DoDI 6040.44 for Board purview, and is 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.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20050401** | | | **VA\* – Effective 20050529** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Low Back Pain w/o Neurologic Abnormality | 5299-5242 | 20% | Low Back Pain … w/o Neurologic Abnormality | 5010-5243 | 20% | STR\* |
| Depression | Not Unfitting | | Depression w/ Insomnia | 9434 | 30% | STR\* |
| No Additional MEB/PEB Entries | | | 0% X 3 / Not Service Connected x 1 | | | STR\* |
| **Combined: 20%** | | | **Combined: 40%** | | | |

**\***Rating from Service treatment record (STR); no VA rating exam proximate to separation.

ANALYSIS SUMMARY: The Board acknowledges the CI’s contention for rating of his psychiatric condition determined to be not unfitting; and notes that its recommendation in that regard must comply with governance for the Disability Evaluation System (DES). While the DES considers all of the service member's medical conditions, compensation can only be offered for those medical conditions that cut short the member’s service career; and the Board’s assessment of fitness determinations is premised on the MOS-specific functional limitations in evidence at the time of separation. The Department of Veteran Affairs, 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 his degree of impairment vary over time.

Lumbar Spine Condition. The CI’s injury (May 2003) in Iraq resulted from a vigorous bounce of his truck, with hyperextension of his spine when landing back on the seat. His symptoms were immediate and severe, forcing evacuation from theater. Magnetic resonance imaging (MRI) in June 2003 reported “degenerative disk changes of L4-L5 and L5-S1” without “significant disk herniation”. He suffered persistent back and left leg radicular pain, was administered epidural injections without improvement, and continued to fail all conservative measures. In January 2004 he underwent an L4-L5 diskectomy, which was complicated by an epidural hematoma requiring repeat surgery. His back and radicular pain did not respond to the surgery or subsequent intensive rehabilitation efforts. An electrodiagnostic (EMG) study (6 months pre-separation) was normal, as were detailed neurologic exam findings at that time. A repeat MRI showed usual post-operative findings without disk herniation or neural encroachment. The narrative summary (NARSUM) noted intractable pain of “moderate intensity” (rated 3-4/10) with 75% of it referred to the radicular distribution. Sensory symptoms (paresthesias) were also documented. It was noted that social and activities of daily living were unaffected, but that pain interfered with sleep; and that the CI was unable to walk two miles in battle gear. The NARSUM exam documented that the CI was ambulating with a “left limp”. An outpatient note a month later documented a more exaggerated limp and moaning in the examiner’s presence, but not present when observed surreptitiously. The same provider, who continued to follow the CI 2 months after separation, documented, “Previous severe gait abnormality requiring use of cane for last 12 months completely resolved on today’s visit - no limp today and not using cane.” The NARSUM exam did not comment on spinal spasm and tenderness. Significant neurologic findings included asymmetric Achilles’ reflex favoring the right; and the following, “Motor strength of the patient's right lower limb is grade 5 over 5 (normal) on detailed testing. Motor strength in his left lower limb revealed obvious give-way weakness of his left hip flexors, left quadriceps and left hamstring grade 4 over 5 - with give-way weakness. He has normal motor grade 5 over 5 for the left [lists all flexor and extensor groups of the lower leg].” Sensory findings were not specifically recorded, but were characterized as “non-anatomic” in the diagnostic conclusions. Range-of-motion (ROM) measurements provided for the MEB by physical therapy were 60⁰ active flexion and 225⁰ combined, without comment on painful motion. As footnoted in the rating chart, there is no comparison VA rating evidence proximate to separation in this case.

The Board directs attention to its rating recommendation based on the above evidence. The PEB’s DA Form 199 accurately referenced antalgic gait in support of its 20% rating, although the flexion of 60⁰ is itself a 20% criterion IAW the VASRD §4.71a general rating formula for the spine. There was no documentation of incapacitating episodes in this case which would provide for a higher rating under that formula. Thus the intrinsic spine rating was appropriately assigned as 20% by the PEB.

The Board carefully considered whether additional rating for sciatic radiculopathy was appropriately recommended in this case. As previously noted, a separate sciatic condition (judged medically unacceptable) was forwarded to the PEB for adjudication. The PEB’s DA Form 199 read, “[Disk Condition] without neurologic abnormality even in the face of left lower extremity “give-way” weakness. Electrodiagnostic study normal.” Firm Board precedence requires a functional impairment tied to fitness to support a recommendation for addition of a peripheral nerve rating to disability in spine cases. The pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a, “with or without symptoms such as pain (whether or not it radiates)”. Therefore even though the radiculopathy contributed the lion’s share of the CI’s pain, this will not underpin a separate rating. The sensory component in this case had no functional implications. The most deliberable issue is whether there was motor weakness sufficient to interfere with the performance of MOS requirements. The finding of give-way weakness is an equivocal sign of diminished strength, since it is not infrequently caused by pain response or voluntary withdrawal of effort rather than rapid fatigability. In light of the normal EMG and previously normal neurologic testing, and the cited evidence for suspected psychological overlay; members agreed that the probative value of the evidence for give-way weakness was not enough to confirm functionally significant motor weakness. Although the existence of a peripheral neuropathy is undeniable, its functional consequences were unlikely to have impinged on fitness. There is thus insufficient evidence of separately ratable disability from the residual radiculopathy which would support a Board recommendation for additional rating on this basis.

Contended Psychiatric Condition. VA records well after separation document an onset of depression in the military related to “combat stress”, although service treatment records at hand are devoid of any documentation of deployment-related psychiatric symptoms. A diagnosis of depression appears in summary notes around December 2004, and the CI was maintained on an antidepressant (Desyrel) through to separation; but, no diagnostic evaluation addressing psychiatric illness is on record. There are sporadic complaints of insomnia related to back pain, and a request for a referral to Behavioral Health 2 months prior to separation; but, no record of follow through. The NARSUM provided a diagnosis of depression without elaboration, and stated, “Medically acceptable because patient is taking low dose of an antidepressant.” The psychiatric profile was S1. The commander’s statement was confined to the back condition and its physical limitations. There is no evidence in the file of any emotional or behavioral issues, or mental impairment, which interfered with the performance of duties.

The Board’s main charge with respect to the depression/mood disorder condition is an assessment of the fairness of the PEB’s determination that it was not unfitting. The Board’s threshold for countering 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. The condition was reviewed by the action officer and considered by the Board. After due deliberation in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB fitness determination for the depression/mood disorder condition; thus no additional disability rating can be recommended.

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 and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the sciatic neuropathy associated with the spine condition, the Board unanimously agrees that it cannot recommend it for additional disability rating. In the matter of the contended mood disorder, the Board unanimously agrees that it cannot recommend a finding of unfit for additional disability rating. There were no other conditions within the Board’s scope of review for consideration.

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

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Lumbar Disk Disease without Functional Neurologic Abnormality | 5299-5242 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110328, 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 XXXXXXXXXXXXXXXXXXXXXXX, AR20120017697 (PD201100188)

I have reviewed the enclosed Department of Defense Physical Disability Board of Review (DoD PDBR) recommendation and record of proceedings pertaining to the subject individual. Under the authority of Title 10, United States Code, section 1554a, I accept the Board’s recommendation and hereby deny the individual’s application.

This decision is final. The individual concerned, counsel (if any), and any Members of Congress who have shown interest in this application have been notified of this decision by mail.

BY ORDER OF THE SECRETARY OF THE ARMY:

Encl XXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA