RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXX bRANCH OF SERVICE: air force

CASE NUMBER: PD1100219 SEPARATION DATE: 20051213

BOARD DATE: 20120328

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a Reserve member, TSgt/E-6 (1A2/Loadmaster), medically separated for chronic neck pain associated with degenerative disc disease (DDD) and low back pain (LBP) associated with DDD*.*  Onset of pain began in approximately 2003, attributed to sleeping in tents with substandard bedding during deployment. He was treated primarily with epidural intra-articular steroid injections (ESI). 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 P4T profile and underwent a Medical Evaluation Board (MEB). Severe degenerative disease of the cervical spine, left shoulder, lumbar spine, and left hip were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AFI 48-123. The PEB adjudicated the chronic neck pain associated with DDD and LBP associated with DDD conditions as unfitting, each rated 10%. Degenerative arthritis of the left shoulder and left hip were adjudicated as category II conditions, those which can be unfitting but were not currently compensable or ratable. The CI made no appeals and was medically separated with a 20% combined disability rating IAW Department of Defense Instruction and Veterans Administration Schedule for Rating Disabilities (VASRD) guidelines.

CI CONTENTION: The CI states: “I’m submitting the medical records that accompanied my Line of Duty Determination and that were sent to the PEB. The PEB rated degenerative disc disease in my neck at 10% and the degenerative disc disease in my lower back at 10% for a combined rating of 19%. The PEB determined that the degenerative arthritis in my left shoulder and left hip were not compensable or ratable. The same documentation was submitted to the Department of Veterans Affairs which, based on the same information, granted service connection for the degenerative disc disease in my neck and assigned a rating of 30%. Service connection for the degenerative disc disease in my lower back was granted with an assigned rating of 10%. These two ratings combined would result in a combined rating of 37% (40%). The Department of the Veterans Affairs also granted service-connection for the degenerative arthritis in my left shoulder and left hip and assigning ratings of 40% and 10% respectively.” He continues on item 14 “The rating for the degenerative disc disease in my lower back has been increased to 20%. I have been rated 10% for tinnitus. I have been rated 40% service-connected for degenerative arthritis in my left shoulder. I received a temporary rating of 100% beginning in December of 2009 as I had my left shoulder joint totally replaced. I had a 10% service-connected rating for degenerative arthritis in my left hip which is currently at the temporary rating of 100% due to have my left hip joint replaced in March of 2010. I have a 30% rating for degenerative arthritis of my right shoulder and am waiting on a determination for temporary 100% as I had my right shoulder joint replaced in December 2010. I have a 30% rating for major depressive disorder. I have a 10% rating for degenerative arthritis in my right hip. I would ask that you request from the Department of Veterans Affairs all rating decisions and accompanying medical information for the degenerative disc disease in my neck and low back as well as the rating decisions for the above listed conditions.” The CI also submitted a letter along with his application to the Physical Disability Board of Review (PDBR) stating the Air Force Physical Evaluation Board had rated his conditions based on incapacitating episodes but that the VA had used the General Rating Formula for Diseases and Injuries of the Spine. He opined that IAW with 4.71a the PEB “should have used the General Rating Formula for Diseases and Injuries of the Spine which would have resulted in an overall rating of 40%.”

Rating Comparison:

|  |  |
| --- | --- |
| **Service PEB – Dated 20051014** | **VA (5 Mo. Pre Separation) – All Effective 20051214** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Neck Pain associated with Degenerative Disc Disease | 5243 | 10% | Degenerative Disk Disease of the Cervical Spine | 5242 | 30% | 20050712 |
| Low Back Pain associated with Degenerative Disc Disease | 5243 | 10% | Degenerative Changes in the Lumbar Spine | 5242 | \*10% | 20050712 |
| Degenerative Arthritis Left Shoulder and Left Hip | Cat II | Osteoarthritis of the Left Glenohumeral Joint  | 5003-5201 | \*\*40% | 20050712 |
| Osteoarthritis of the Left Hip  | 5003 | \*\*\*10% | 20050712 |
| ↓No Additional MEB/PEB Entries↓ | Tinnitus | 6260 | 10% | 20050922 |
| 0% x 2\*\*\*\*/Not Service Connected x 4 | 20050712 |
| **Combined: 20%** | **Combined: 70%** |

\*20% from 20081007

\*\*0% from 19960926, 100% from 20091121 (surgery), 20% from 20110101

\*\*\*100% from 20100324 (surgery), 30% from 20110501

\*\*\*\*Right shoulder increased from 0% to 30% 20081007. Temporary 100% awarded for arthroplasty of the left shoulder and hip and right shoulder

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 Disability Evaluation System (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 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 his degree of impairment vary over time. The Board also acknowledges the CI’s 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 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 DVA, operating under a different set of laws (Title 38, United States Code), is empowered to compensate all service-connected conditions and to periodically reevaluate 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.

Chronic Neck Pain Associated with Degenerative Disc Disease. There were four range-of-motion (ROM) examinations in the record available for review. Only two of these were within one year of separation and, of these, only the VA Compensation and Pension (C&P) was accomplished with a goniometer. All are charted below.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Goniometric ROM – Cervical | Ortho 22 Mo. Pre-Sep | Ortho ~ 10.5 Mo. Pre-Sep | VA C&P ~ 5 Mo. Pre-Sep | VA C&P ~ 3 years Mo. Post-Sep |
| Flex (0-45) | ~40⁰ (Within 2 cm of his chest | 35⁰ (80%) | 10⁰ | 10⁰ |
| Ext (0-45) | 20⁰ | 30⁰ (60%) | 15⁰ | 10⁰ |
| R Lat Flex (0-45) |  |  | 20⁰ | 15⁰ |
| L Lat Flex (0-45) |  |  | 20⁰ | 15⁰ |
| R Rotation (0-80) | 30⁰ | 30⁰ (40%) | 15⁰ | 10⁰ |
| L Rotation (0-80) | 50⁰ | 40⁰ (50%) | 15⁰ | 10⁰ |
| COMBINED (340) |  |  | 95⁰ | 70⁰ |
| Comment |  |  | No tenderness | Pain throughout motion |
| §4.71a Rating | 10% | 10% | 30% | 30% |

The CI presented with a history of exacerbation of neck pain over the previous 2 years which he attributed to underlying arthritic changes aggravated from sleeping on cots while deployed. His symptoms were further aggravated by the use of night vision goggles. During the evaluation, the CI noted no history of recent trauma, but endorsed compression injuries to his neck from high school and college football as well as from a bale of hay which landed on his head at the age of 14-15. An MRI conducted on 7 February 2005 showed multilevel cervical DDD, foraminal stenosis and C4-5 facet arthropathy. These were confirmed on a CT scan one month later. He was not thought to be a surgical candidate and primarily treated with activity modification and limitations.

The VA C&P exam was completed 5 months prior to separation. The history was similar to that described above. Again, the CI noted significant pain after an NVG missions and from lifting, bending and any turning of his neck including use of a computer. No tenderness to palpation of the spine or neck muscles was noted. No muscle atrophy was noted and sensory and motor exams were normal except when limited by pain. Deep tendon reflexes (DTRs) were normal.

The MEB narrative summary (NARSUM) examination was dictated two weeks after the VA C&P was accomplished. It notes that he had mild to moderate limitations of cervical ROM and weakness of the left shoulder girdle. The NARSUM did not list ROM measurements but referred to consultants reports. The ROM measurements from midwest spine and orthopedics are reported in the first two columns of the ROM chart above. The reports documented ROM in terms of percentages, not actual goniometric measurements. These percentages were applied to normal measurements noted in the VASRD. The NARSUM examiner recommended consideration for cross-training.

The PEB coded the neck pain as 5243, intervertebral disc syndrome rated at 10%. The VA coded the neck as 5242, degenerative arthritis of the spine and rated the disability at 30%. While the ROM measurements from the orthopedist support a 10% rating, the examiner did not provide a complete ROM examination nor was a goniometer utilized. Rather, it noted percent of normal or inches above the chest for flexion. The VA C&P examination dated 5 months prior to separation did utilize a goniometer and provided a full set of measurements. It is also more proximate to separation than either of the orthopedic examinations. The VA C&P examination is therefore accorded higher probative value in the rating adjudication. Additionally a VA C&P examination completed approximately 3 years after separation documented continued ROM limitation that remained at the 30% disability rating level. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 30% for the neck condition.

Low Back Pain. There were three ROM examinations in the record available for review. Only two of these were within one year of separation and, of these, only the C&P was accomplished with a goniometer. All are charted below.

|  |  |  |  |
| --- | --- | --- | --- |
| Goniometric ROM - Thoracolumbar | Ortho ~ 10.5 Mo. Pre-Sep | VA C&P ~ 5 Mo. Pre-Sep | VA C&P ~ 3 years Mo. Post-Sep |
| Flex (0-90) | ~70⁰ (4” to floor) | 70⁰ | 50⁰ |
| Ext (0-30) | 10⁰ (30%) | 10⁰ | 10⁰ |
| R Lat Flex (0-30) |  | 20⁰ | 20⁰ |
| L Lat Flex 0-30) |  | 20⁰ | 20⁰ |
| R Rotation (0-30) |  | 20⁰ | 20⁰ |
| L Rotation (0-30) |  | 20⁰ | 20⁰ |
| COMBINED (240) |  | 160⁰ | 140⁰ |
| Comment |  | No tenderness | Pain with all motion |
| §4.71a Rating | 10% | 10% | 20% |

As noted above, the CI noted compression injuries while playing high school and college football. Both degenerative joint disease (DJD) and DDD of the lumbar spine were noted. At an orthopedic examination for neck, left upper extremity and left hip pain, the CI was also noted to have limitations in the ROM for his back. The ROM measurements were documented in percent of normal or inches above the floor. Imaging showed significant degenerative changes which were most significant at L4-5 and L5-S1. No specific limitations were noted for the back condition. At an orthopedic examination 10 months prior to separation, sensory, motor and DTR examinations were normal. Straight leg raise was positive at 60 degrees bilaterally when supine. The MEB NARSUM was silent for the back other than to document severe degenerative disease.

The VA C&P examination conducted prior to separation provided no history specific for the low back condition. However, the examination documented that it was straight (it is not clear is this represents reverse lordosis or if it is a comment on normal posture) and had no tenderness to palpation. Sensory, motor and DTRs were all normal. Straight leg was negative bilaterally in the sitting position. It was positive at 45 degrees on the left when supine.

Both the PEB and VA gave a rating of 10% in accordance with VASRD §4.71, but coded 5243 and 5242, respectively. The pre-separation VA C&P examination did utilize a goniometer and provided a full set of measurements. It is also more proximate to separation than either of the orthopedic examinations. The VA C&P examination is therefore accorded higher probative value in the rating adjudication. Additionally a VA C&P examination completed approximately 3 years after separation documented increased ROM limitation showing a worsening of the condition over time and a 20% disability rating was applied. After due deliberation in consideration of the totality of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB adjudication for the back pain condition.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were severe degenerative disease left shoulder and left hip. The CI was left hand dominant. Neither of these conditions was specifically profiled and no commander’s statement is available in the record for review. A progress note from Midwest Spine and Orthopedics dated 11 February 2005, noted a recommendation for restrictions based on his cervical and lumbar spine conditions. It does not mention any restrictions related to his shoulder or hip conditions. Later notes mention increased restrictions but do not specify which conditions lead to the restrictions. The profile only included the initial restrictions mentioned in the 11 February 2005 note. Both the left shoulder and left hip conditions were noted as failing retention standards by the MEB; however, the MEB does not determine whether a condition is unfitting. The PEB determines fitness through a performance-based assessment and it determined that neither condition was unfitting at the time of separation. 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. Both conditions were reviewed by the action officer and considered by the Board. There was no indication from the record that either of these conditions significantly interfered with satisfactory performance of AFS duty requirements. All evidence considered, there is not reasonable doubt in the CI’s favor supporting re-characterization of the PEB fitness adjudication as category II for either of the stated conditions.

Other Contended Conditions. The CI also contended that left and right shoulder conditions, left and right hip conditions, major depressive disorder, and tinnitus should also be rated. The left shoulder and left hip conditions are discussed above. None of the remaining conditions (right shoulder, right hip, major depressive disorder, and tinnitus) were mentioned 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 of these conditions as unfitting for separation rating. Contended conditions which are not eligible for Board recommendations on this basis remain eligible for submission to the Air Force Board for Corrections of Military Records (AFBCMR).

Remaining Conditions. Two other conditions were identified in the DES file: an episode of bronchitis and childhood tonsillectomy. Several additional non-acute conditions or medical complaints were also documented. Neither condition was clinically active during the MEB period, carried an attached profile or was implicated in the commander’s statement. These were reviewed by the action officer and considered by the Board. It was determined that neither could not be argued as unfitting and subject to separation rating. Additionally, lipomata and several other non-acute conditions were noted in the VA rating decision proximal to separation, but were not documented in the DES file. As noted above, 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 neck pain condition, the Board, by simple majority, recommends a permanent service disability rating of 30%, coded 5243 IAW VASRD §4.71a. The single voter for dissent (who recommended rating 10%) did not elect to submit a minority opinion. In the matter of the low back pain condition, the Board unanimously recommends no change from the PEB adjudication. In the matter of the left shoulder and left hip conditions, the Board unanimously recommends no change from the PEB adjudications as category II, conditions that can be unfitting but were not currently compensable or ratable. In the matter of the bronchitis and childhood tonsillectomy, the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation.

RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows and that the discharge with severance pay be re-characterized to reflect permanent disability retirement, effective as of the date of his prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Neck Pain associated with Degenerative Disc Disease | 5243 | 30% |
| Low Back Pain associated with Degenerative Disc Disease | 5243 | 10% |
| **COMBINED** | **40%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110324 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

XXXXXXXXX

Dear XX

 Reference your application submitted under the provisions of DoDI 6040.44 (Title 10 U.S.C. § 1554a), PDBR Case Number PD-2011-00219.

 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 your separation be re-characterized to reflect disability retirement, rather than 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 determined that your records should be corrected accordingly. The office responsible for making the correction will inform you when your records have been changed.

 As a result of the aforementioned correction, you are entitled by law to elect coverage under the Survivor Benefit Plan (SBP). Upon receipt of this letter, you must contact the Air Force Personnel Center at (210) 565-2273 to make arrangements to obtain an SBP briefing prior to rendering an election. If a valid election is not received within 30 days from the date of this letter, you will not be enrolled in the SBP program unless at the time of your separation, you were married or had an eligible dependent child, in such a case, failure to render an election will result in automatic enrollment.

 Sincerely,

Director

Air Force Review Boards Agency

Attachment:

Record of Proceedings

cc:

SAF/MRBR

DFAS-IN

PDBR PD-2011-00219

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 to XXXXXXXXXXXXXXXX, be corrected to show that:

 a.  The diagnosis in his finding of unfitness was Chronic Neck Pain associated with Degenerative Disc Disease, VASRD code 5243, was rated at 30% rather than 10%; and Low Back Pain associated with Degenerative Disc Disease, VASRD code 5243, rated at 10% with a combined disability rating of 40%.

 b.  On 12 December 2005 he elected not to participate in the Survivor Benefit Plan.

 c.   He was not discharged on 13 December 2005; rather, on that date he was released from active duty and on 14 December 2005 his name was placed on the Permanent Disability Retired List.

 Director

 Air Force Review Boards Agency