RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXX BRANCH OF SERVICE: air force

CASE NUMBER: PD1100222 SEPARATION DATE: 20011105

BOARD DATE: 20120110

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SRA/E-4 (3P051, Security Forces Journeyman), medically separated for seizure disorder*.* After returning from Saudi Arabia the CI reported to sick call for syncopal spells and three months later received a diagnosis of seizure disorder. A temporary profile issued restricted him from carrying his weapon or his rucksack. He was unable to perform within his Air Force Specialty (AFS) was referred for a Medical Evaluation Board (MEB). The condition of seizure activity 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 Informal PEB (IPEB) adjudicated the seizure disorder as a Category II, existed prior to service (EPTS) and has not been permanently aggravated through the military, therefore not currently compensable or ratable but which could be unfitting. The CI appealed to the Formal PEB (FPEB) which adjudicated the seizure disorder condition as a Category I, unfitting condition, relying on the CI’s oral testimony and pediatric medical evidence documenting febrile seizures as a child and adjudged these current seizures were new after entering service. The FPEB rated the seizure disorder at 10% with application of the Department of Defense Instruction (DoDI) 1332.39 and the Veterans’ Administration Schedule for Rating Disabilities (VASRD). He made no further appeals and was then medically separated with a 10% combined disability rating.

CI CONTENTION: The CI states “a) My DOD benefits should be increased due to the worsening of my Epileptic seizures. In addition, I fell twice due to seizures and was subsequently diagnosed with a labral tear and displacement. This condition has since been assessed by the VA and a percentage of impingement has been assigned. My shoulder condition has never been addressed bythe DOD and should be considered. b) I am treating with my primary care physician (Gerald A. Fishman, M.D.), as well as an outside neurologist (J.E. Cames, M.D. of the South Carolina Neurological Clinic). Dr. Carnes has me on Kepra XR (2000 mg. daily). c) In my opinion, my condition has progressively gotten worse.” He also attached the most recent VA rating decision (VARD), a neurology progress noted dated 1 November 2010 and a letter from his primary care doctor dated 27 May 2009.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service FPEB – Dated 20010914** | | | **VA (4 Mo. After Separation) – All Effective Date 20011106** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Seizure Disorder | 8913 | 10% | Juvenile Myoclonic Epilepsy | 8911 | 10%\* | 20020306 |
| ↓No Additional MEB/PEB Entries↓ | | | 0% x1/Not Service Connected x 5 | | | 20020305 |
| **Combined: 10%** | | | **Combined: 10%\*\*** | | | |

\*Subsequently increased to 20% effective 20040218, 40% 20071114 and 60% 20080302

\*\*R shoulder added 20050126 effective 20040218 due to a fall in Feb 2004 after a grand mal seizure

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred seizure 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 military 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 for which the VA has awarded disability. 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 all service connected conditions without regard to fitness 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.

Seizure Disorder. The CI presented to clinic in January 2001 with symptoms consistent seizure disorder confirmed by neurology evaluation, including an abnormal electroencephalogram. Treatment with medication was recommended and driving and weapons handling restrictions advised. VASRD criteria for rating epilepsy are based on the frequency of major or minor seizures. A major seizure is characterized by the generalized tonic-clonic convulsion with unconsciousness. A minor seizure consists of a brief interruption in consciousness or conscious control associated with staring or rhythmic blinking of the eyes or nodding of the head (pure‖ petit mal), or sudden jerking movements of the arms, trunk, or head (myoclonic type) or sudden loss of postural control (akinetic type). Initial evaluation noted seizures with brief loss of consciousness for one to three seconds consistent with minor seizures, and described muscle twitching but no generalized tonic-clonic motor activity (or tongue biting or incontinence) to suggest a major seizure. In subsequent medical documentation including FPEB testimony under oath, the CI denied loss of consciousness or symptoms (generalized tonic-clonic seizure) consistent with major seizures. The 17 April 2001 neurology report records frequency of minor seizures once every two weeks. At that time the CI was not taking anti-seizure medication. The 24 April 2001 MEB narrative summary (NARSUM) examiner assessed the CI currently doing well and has not had any more episodes with or without loss of consciousness was doing well without medication. A 4 September 2001 neurology report indicates the CI was not taking anti-seizure medication and was experiencing brief muscle jerks, usually in the morning, and that he may drop objects as a result. The CI denied generalized tonic-clonic seizures or loss of awareness as in absence type seizures. The neurologist encouraged the CI to take his recommended medication. The 14 September 2001 FPEB rationale records CI report of no seizures for the prior 45 days and that at the time of the FPEB, the CI was not taking anti-seizure medication. A history of seizures as a young pre-school child was noted and expert neurology opinion submitted at the FPEB concluded the childhood seizures were febrile seizures and unrelated to the seizure disorder condition that began three years after entry on active duty. The FPEB rated the seizure at 10%, coded 8913 for diencephalic epilepsy.

The VA Compensation and Pension (C&P) examination was completed five months after separation. The medical examiner documented that he was taking anti-seizure medication, that no further seizure activity had occurred, and that he had not had a generalized tonic clonic seizure at any time. Neurological exam was again normal and the neurologist noted that “the diagnosis of juvenile myoclonic epilepsy” had been established and was under good control. The VA rated the seizure disorder 10%, coded 8911, (petit mal epilepsy). The Board noted that the CI did suffer with grand mal seizures after separation with loss of consciousness leading the VA to increase the rating for his seizure disorder approximately two years after separation. A 10% rating is awarded for a diagnosis of epilepsy or with the use of continuous anti-seizure medications. For a 20% rating, there must be one major seizure in the last two years or two minor seizures in the last six months. For the 40% rating there must be at least 1 major seizure in the last 6 months or 2 in the last year; or averaging at least 5 to 8 minor seizures weekly

At the time of the FPEB, two months prior to separation, the CI reported having had no seizures for 45 days. The neurology report at the same time indicated nearly daily myoclonic jerks, however the CI was not taking recommended medication. Five months prior to the FPEB, evidence demonstrated the CI was having jerking episodes every two weeks. These minor seizures met the 20% rating criteria, having two minor seizures in the last six months prior to separation. The Board discussed if the CI suffered seizure activity consistent with a major seizure. The initial medical record entry in January 2001 noted brief loss of consciousness for one to three seconds without generalized tonic-clonic activity, incontinence or tongue biting. The Board concluded this did not meet the VASRD definition of a major seizure for rating purposes and further noted this was the initial presentation prior to evaluation and treatment recommendations. The Board noted the CI was motivated to remain on active duty and appeared to minimize his symptoms. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 20% for the seizure disorder condition.

Other Contended Conditions: The CI’s application asserts that compensable ratings should be considered for his right shoulder labral tear condition. The right shoulder injury occurred over two years after separation after suffering a grand mal seizure. The Board noted the presence of the shoulder condition as a currently rated condition by the VA, but notes that the scope of its recommendations does not extend to conditions that were incurred after separation or which were not diagnosed or in evidence at the time of medical separation. The Board determined therefore that this condition was not subject to Service disability rating.

Remaining Conditions: No other conditions were noted in the NARSUM, identified by the CI on the MEB physical or found elsewhere in the DES file. Pseudo folliculitis barbae, carpal tunnel syndrome, gastroesophageal reflux disease, left ankle, left wrist, right ankle conditions and several other non-acute conditions were noted in the VA rating decision 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. Even if these condition’s presence in the DES file is conceded, there was no evidence for concluding any interfered with duty performance to a degree that could be argued as unfitting.

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 seizure disorder condition, the Board unanimously recommends a rating of 20% coded 8913 IAW VASRD §4.124a. 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 his prior medical separation:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Seizure Disorder | 8913 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294 dated 20110404, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

XXXXXXXXXXXXXX

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-2011-00222.

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,

XXXXXXXXXXX

Director

Air Force Review Boards Agency

PDBR PD-2011-00222

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 XXXXXXXXXX, be corrected to show that the diagnosis in his finding of unfitness was Seizure Disorder, VASRD Code 8913, rated at 20% rather than 10%.

Director

Air Force Review Boards Agency