RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1100261 SEPARATION DATE: 20040415

BOARD DATE: 20120402

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a mobilized National Guard member, SGT/E-5 (95B, Military Police), medically separated for a lumbar spine condition. He suffered an onset of back pain with right leg radiation in 2002, which was ultimately diagnosed as L5/S1 disc disease. He underwent fusion surgery in 2008 but could not be adequately rehabilitated to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was thus issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The lumbar spine condition was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions were submitted by the MEB. The PEB adjudicated the lumbar spine condition as unfitting, rated 20%, citing criteria of the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with that service disability rating.

CI CONTENTION: “I am trying to have my rating changed from a medical separation to medical retirement. I had my back hurt in training at Ft Knox getting ready for deployment for Iraq. I had a spine fusion on my back at Walter Reed Oct 20, 2003 on L5 S1 area. They put two rods in the area of the breaks. I served 10 years and was only given a medical separation. I feel that I should have been medical retired. There was others soldiers get retirement with less injuries.” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20040316** | | | **VA (2 mo. After Separation) – All Effective Date 20040416** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Low Back Pain s/p L5-S1 Fusion | 5299-5237 | 20% | Low Back Fusion | 5243 | 20% | 20040604 |
| No Additional MEB/PEB Entries | | | 0% X 2 | | | 20040604 |
| **Combined: 20%** | | | **Combined: 20%** | | | |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that the gravity and predictable consequences of his condition which merit consideration for a higher service disability rating. 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 Veteran Affairs (DVA), operating under a different set of laws (Title 38, United States Code). 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.

Lumbar Spine Condition. The service file reflects an onset of low back pain during an active duty tour in 2002, associated with the prolonged standing required of his MOS. X-rays demonstrated chronic spondylolysis (degenerative disease at the articulations of the vertebrae) without fracture. There was right leg radiation, but no radiculopathy. Symptoms improved with physical therapy. Following a mobilization in 2003, the CI reported a “pop” during sit-ups. At this time there were radiographic findings of spondylolisthesis (vertebral slippage as a consequence of spondylosis) with congenital bilateral pars defect at L5 (posing a predisposition to spondylolisthesis). Although no neurologic deficits were present, symptoms progressed until surgery was recommended. In October, 2003 the CI underwent a transforaminal lumbar interbody fusion (TLIF) with rod fixation at L5/S1. Post-operative notes reflect an uncomplicated recovery, but pain-limited restriction of motion persisted and satisfactory rehabilitation could not be achieved. There were 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; as summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM | MEB ~2 Mo. Pre-Sep | VA C&P ~2 Mo. Post-Sep |
| Flexion (90⁰ Normal) | 35⁰ | 60⁰ |
| Combined (240⁰) | 205⁰ | 185⁰ |
| Comments | Slight antalgic gait. | Painful motion. |
| §4.71a Rating | 20% | 20% |

The MEB examiner confirmed the history just elaborated and reported resolution of radicular symptoms with surgery, and “expected” pain rated 4/10. X-rays showed appropriate hardware alignment with no fracture or other acute findings. Tenderness around the operative site and normal neurologic findings were documented on the MEB physical exam, along with the ROMs charted above. At the VA Compensation and Pension (C&P) exam, after separation, a history of “two fractures” and a back injury in Kuwait was recorded; although, only the course of events detailed above is corroborated by the service file in evidence. The VA physical exam documented normal posture and gait without assistive devices, normal neurologic findings, and the ROMs charted above. The VA examiner also stated, “he complained of being tight and sore after his limited ROM on this examination so no additional repetitive motion was attempted.”

The Board directs attention to its rating recommendation based on the above evidence. The flexion measurements noted above lie at opposite ends of the range meeting 20% criteria IAW the VASRD §4.71a general rating formula for the spine. The PEB’s DA Form 199 quoted the MEB ROMs in its rating rationale. It cited an EPTS (existed prior to service) contribution to the pathology, but confirmed that no deduction was applied. The MEB and VA applied different VASRD codes which did not affect rating. There was no evidence of ratable peripheral nerve impairment or documentation of incapacitating episodes in this case which would provide for additional or higher rating. 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 adjudication for the lumbar spine condition.

Remaining Conditions. Other conditions identified in the core DES file were a history of sinusitis and hemorrhoids. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were significantly clinically or occupationally active during the MEB period; none carried attached profiles; and, none were implicated in the commander’s statement. These conditions were reviewed by the action officer and considered by the Board. It was determined that none could be argued as unfitting and subject to separation rating. Additionally, hypertension was noted the VA rating decision proximate to separation, but was not documented in the core DES file. The VA C&P exam documented the diagnosis and initiation of treatment for hypertension on the eve of separation, thus it was service-connected. It was controlled on a first-line medication and non-compensable. 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. 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. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as unfitting for additional service disability rating.

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** |
| Chronic Back Pain and Surgical Residuals, Lumbar Fusion | 5299-5237 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110804, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans Affairs Treatment Record

President

Physical Disability Board of Review

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

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

Deputy Assistant Secretary

(Army Review Boards)