RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXX BRANCH OF SERVICE: air force

CASE NUMBER: PD1100290 SEPARATION DATE: 20060417

BOARD DATE: 20110124

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSgt/E-5 (3C051, Communications-Computer Systems Supervisor), medically separated for a lumbar spine condition. The CI injured her back while doing sit-ups in basic training and, after failing conservative measures, underwent surgery in 2002. She continued to have low back pain, and was unable to fulfill the physical demands of her Air Force Specialty (AFS) or meet physical fitness standards. She was issued a permanent P4 profile and referred for a Medical Evaluation Board (MEB). Chronic low back pain was forwarded to the Informal Physical Evaluation Board (IPEB) 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) file will be discussed below. The IPEB adjudicated the back pain condition as unfitting, rated 0%, with application of the Veterans Administration Schedule for Rating Disabilities (VASRD). Intermittent right knee pain was also adjudicated by the IPEB as a Category II – a condition that can be unfitting but is not currently compensable or ratable. The CI appealed to the Formal PEB (FPEB), contending for a higher rating (conceding that she did not qualify for medical retirement), but then requested a waiver to withdraw her formal hearing request. The FPEB declined her request and affirmed the IPEB findings, resulting in medical separation with a 0% disability rating.

CI CONTENTION: The CI states: “After years of going to the base clinic and having the doctors claim they didn’t see anything wrong with my back, … suddenly they saw I had a severe herniated disc. Once that was discovered, I was prescribed many different medications, that didn’t help, an order was put in to TRICARE for me to see a civilian doctor to get three steroid injections into my back. The first shot seem to help a little but the second is what caused my migraines. After that I was put on quarters because the civilian doctor said I ended up getting a spinal headache. This is why I continue to have migraines today. … I would have loved to stay in the military but the MEB decided otherwise. So not only did they end my career but also decided to rate me at 0% which ended my medical privileges that I most definitely still needed to continue. … I continue to have back and head pains as well as others but during my MEB I believe they only focused on my back which didn’t make much sense. …” She additionally lists other VA conditions and ratings as per the chart below.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service FPEB – Dated 200600224** | | | **VA (20 Mo. Post-Separation) – All Effective 20071025** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5243 | 0% | Lumbosacral Degenerative Disc … | 5243 | 40%\* | 20071203 |
| Right Knee Pain | Cat. II | | Right Knee Patellofemoral Syn. | 5261 | 20%\*\* | 20071203 |
| ↓No Additional MEB/PEB Entries↓ | | | Left Shoulder Subacromial Bursitis | 5201 | 20% | 20071203 |
| Migraine Headaches | 8100 | 10% | 20071203 |
| 0% x 3 / Not Service Connected x 2 | | | 20071203 |
| **Combined: 0%** | | | **Combined: 70%** | | | |

\*Decreased to 20% effective 20090301. \*\*Increased to 30% 20090610

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which her service-incurred condition continues to burden her. The Board wishes to clarify that it is subject to the same laws for Service disability entitlements as those under which the 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 DVA 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 further acknowledges the CI’s contention for Service ratings for other conditions documented at the time of separation, and notes that its recommendations in that regard must comply with the same governance. 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 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 must consider the significant interval (21 months) between the date of separation and the CI’s earliest subsequent DVA evaluations. DoDI 6040.44, under which the Board operates, specifies a 12-month interval for special consideration to DVA findings. This does not mean that the DVA information was disregarded, as it was a valuable source for clinical information and opinions relevant to the Board’s evaluation. In matters germane to the severity and disability at the time of separation, however, the information in the service record was assigned proportionately more probative value as a basis for the Board’s rating recommendations.

The Board further acknowledges the CI’s assertions that medical care for her back condition was delayed, may have been inappropriate, or may have caused other medical conditions. It is noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to the CI’s statements in the application regarding suspected Service medical errors in her treatment; or, of the asserted procedural improprieties with her disposition and disability rating. The Board’s role is confined to the review of medical records and all evidence at hand to assess the fairness of PEB rating determinations, compared to VASRD standards, based on severity at the time of separation. It must also judge the fairness of PEB fitness adjudications based on the fitness consequences of conditions as they existed at the time of separation.

Lumbar Spine Condition. The CI reported first experiencing low back pain with minor radiation while playing basketball at the age of fourteen. During basic training in 1999, she experienced a sudden exacerbation of low back pain with some radiation down the left thigh. The pain was exacerbated by repeated physical activities. Magnetic resonance imaging (MRI) completed in April 2001 revealed “disc desiccation and a moderately large left paracentral disc protrusion at L5-S1, which could result in a left S1 radiculopathy.” The CI was treated with epidural steroid injections, which she reported did not help. In January 2002, a partial hemi-laminectomy and discectomy at L5-S1 was performed with good results. Left radicular pain was relieved. Six months after surgery; however, the CI reported recurrent back pain (without radiculopathy). An MRI in 2004 revealed a subtle annular bulge and degenerative disc disease (DDD) at L5-S1, but did not show any evidence of recurrent or residual disc herniation. There were three range of motion (ROM) evaluations in evidence, with documentation of ratable physical findings, which the Board weighed in arriving at its rating recommendation; although, the delayed VA evaluation is minimally probative as elaborated above. These exams are summarized in the chart below.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Thoracolumbar ROM | MEB Ortho ~7 Mo. Pre-Sep | NARSUM ~5 Mo. Pre-Sep | VA C&P ~20 Mo. Post-Sep | |
| Flexion (90⁰ Normal) | > 90⁰ | > 90⁰ | <30⁰ |  |
| Combined (240⁰) | > 240⁰ | Incomplete | <120⁰ |  |
| Comment | Painful motion and/or tenderness on all exams; normal gait and contour. | | | |
| §4.71a Rating | 10%\* | 10%\* | 40% | |

\* Conceding §4.59 (painful motion) as below.

At the pre-separation MEB exam, the CI reported mild low back pain. This was aggravated by activity. The CI also reported pain radiating to the right buttock, but only during occasional episodes that occurred 3-4 times a year. On physical examination, the MEB physician noted good mobility with a full ROM. A thorough and well documented exam by an orthopedic surgeon during the same period revealed similar findings. At the VA Compensation and Pension (C&P) exam almost two years after separation, the CI reported weakness, stiffness, fatigability and lack of endurance. The examiner noted a slight postural abnormality and a drastically limited ROM with severe pain and spasms. The diagnosis was lumbosacral DDD, which had a “moderate effect on the veteran’s ability to perform her occupational … and usual daily activities.” The markedly worse ROM values reported in the VA examination are not explained by any documented recurrent injury or other development, although if there were such aggravating factors, they are not probative for the Board’s recommendation as already reiterated. Although the MEB measurements provided in the narrative summary (NARSUM) were incomplete and not compliant with VASRD §4.46 (accurate measurement); the MEB examination, when taken together with the §4.46-compliant orthopedic specialty examination, meets the VASRD §4.1 (essentials of evaluative rating) requirement for “accurate and fully descriptive medical examinations … with emphasis upon the limitation of activity imposed by the disabling condition.” The MEB evidence is proximate to the date of separation and provides the best measure of disability for Service rating at separation. The PEB’s AF Form 356 cited application of the VASRD for rating, but its 0% determination did not concede §4.59 (painful motion), which all members agreed was supported by NARSUM exam findings; albeit associated with non-compensable ROMs. Conceding §4.59, a minimum 10% rating is achieved IAW VASRD §4.71a. There are no findings for abnormal gait or contour, or evidence for incapacitating episodes, which would support a higher rating. There is additionally no evidence of ratable peripheral nerve impairment in this case. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 10% for the lumbar spine condition. The Board agrees with the 5243 (intervertebral disc syndrome) code applied by the PEB and VA, but recommends analogous designation to subsume purely painful motion.

Other PEB Conditions. Intermittent right knee pain was not forward by the MEB, but was adjudicated by the PEB as a Category II condition. The Boards’ main charge in respect to this condition is an assessment of the appropriateness of the PEB’s fitness adjudication. 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. Right knee pain was noted in the NARSUM, but was not further examined or deemed medically unacceptable. In an examination seven months pre-separation, the physician recorded right knee pain “when she stands or walks long periods of time.” This condition precipitated a temporary L2 profile; but, was not permanently profiled, implicated in the commander’s statement, or noted as failing retention standards. The condition was reviewed by the action officer and considered by the Board. There was no indication from the record that this condition significantly interfered with satisfactory performance of AFS duty requirements. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change in the PEB fitness adjudication for the right knee condition.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for migraine headaches and left shoulder bursitis. The NARSUM recorded “occasional headaches,” but did not elaborate further or refer the condition to the PEB for adjudication. The left shoulder condition was not mentioned in the NARSUM. The CI made no in-Service appeal for rating of either condition. The service treatment record (STR) contains entries for evaluation and treatment of headaches four years prior to the MEB process, with the headaches consistently described as mild and non-debilitating. In 2003; however, an aeromedical summary stated, “this examinee does not meet medical standards for Space Operations duties IA W AFI 48-123 A5.4.5 (headaches, except mild…). She has been on three different unsuccessful medical regimens and has been poorly compliant over her DNIF [duty not involving flying] period of 200 days. This is a request for SMOD [space and missile operations duty] disqualification.” Migraine headaches did not appear to be clinically active during the MEB process nor occupationally disabling within her AFS at the time of separation; nor was there evidence of urgent treatment for headache which would constitute ratable ‘prostrating’ episodes. The left shoulder condition dated to a motor vehicle accident in 2000, but there were no STR entries for several years preceding separation referencing any sequelae. Neither of these conditions was profiled at separation, implicated in the commander’s statement, or judged to fail retention standards. Both were reviewed by the action officer and considered by the Board. There was no evidence for concluding that either of the conditions interfered with duty performance to a degree that could be argued as unfitting. The Board determined therefore that neither of the stated conditions was 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. 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. 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, the Board unanimously recommends a rating of 10% coded 5299-5243 IAW VASRD §4.71a. In the matter of the right knee condition, the Board unanimously recommends no change from the PEB adjudication as not unfitting. In the matter of the contended migraine headache and left shoulder conditions, the Board unanimously agrees that it cannot recommend any finding of unfit for additional rating at separation. 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 her prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Degenerative Disc Disease, Lumbar Spine | 5299-5243 | 10% |
| **COMBINED** | **10%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110329, 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

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-2011-00290.

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,

XXXXX

Director

Air Force Review Boards Agency

PDBR PD-2011-00290

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 XXXXXXXXXXX, be corrected to show that the diagnosis in her finding of unfitness was Degenerative Disc Disease, Lumbar Spine, VASRD Code 5299-5243, rated at 10%; rather than Chronic Low Back Pain, VASRD 5243, rated at 0%.

XXXXXXXXXXX

Director

Air Force Review Boards Agency