RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXX BRANCH OF SERVICE: army

CASE NUMBER: PD1100310 SEPARATION DATE: 20030515

BOARD DATE: 20120307

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a mobilized Reserve member, SFC/E-7 (38A, Civil Affairs) medically separated for chronic low back pain. The condition began in 1993, worsened while deployed in 2002 and was not associated with a surgical indication. He did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Episodic recurrent low back pain and pre-existing degenerative lumbar spondylosis were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions appeared on the MEB’s submission. Other conditions included in the Disability Evaluation System (DES) file will be discussed below. The PEB adjudicated the chronic low back pain secondary to degenerative disc and joint disease of the lumbosacral spine condition as unfitting, rated 10% with application of the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI appealed to a Formal PEB (FPEB), and was then medically separated with a 10% disability rating.

CI CONTENTION: The CI indicates that his back condition began in the 1990’s while on active duty and resulted in a 40% VA disability rating. He was re-injured while deployed to Kuwait in 2002 and spent three weeks in a Kuwait armed forces hospital. He states that the PEB did not have his prior hospitalization and treatment records, did not review his VA records and was not concerned with his previous injury, but only the injury that occurred in Kuwait. The CI contends that because of his age, the severity of his injury, the worsening of his injury over time, his length of service, the previous 40% VA rating and non-deployable status, the current VA 70% rating for two conditions, and the absence of previous records for PEB review, he should be medically retired. He elaborates no further specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

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| --- | --- | --- | --- | --- | --- | --- |
| **Service FPEB – Dated 20030331** | | | **VA (7 Mo. After Separation) – All Effective 20030516** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5295 | 10% | Lumbar Spine Herniated Disc | 5243-5293 | 60% | 20031212 |
| ↓No Additional MEB Entries↓ | | | Not Service Connected x 2 | | | 20040506 |
| **Combined: 10%** | | | **Combined: 60%\*** | | | |

\*Increased to 70% effective 24 August 2004 with addition of left lower extremity radiculopathy rated 20%

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application that there should be additional disability assigned for conditions which will predictably worsen over time. It is a fact, however, that 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. This role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA). 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 6040.44, 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. The Board further acknowledges the CI’s contention that suggests service ratings should have been conferred for left lower extremity radiculopathy not diagnosed while in the service (but later determined to be service-connected by the DVA). 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. 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 CI contends PEB impropriety due to lack of medical records from the original injury in 1993, lack of medical records from Kuwait, and failure to consider the prior VA rating in 1999. However the clinical history of prior injuries is well summarized in the medical documentation and the spine pathology at the time of the MEB was well documented by contemporaneous examinations, imaging, and EMG study. The severity of the condition prior to the MEB is not a consideration in the rating, which is based on the evidence of examinations at the time of evaluation in the DES.

Low Back Condition. The 2003 Veteran Administration Schedule for Rating Disabilities (VASRD) coding and rating standards for the spine, which were in effect at the time of permanent separation, were changed to the current §4.71a rating standards following the CI’s permanent disability disposition (23 September 2003). The pre-2004 ratings were based on a judgment as to whether the disability was mild, moderate or severe. The 2004-to-current standards are grounded in range-of-motion (ROM) measurements. IAW DoDI 6040.44, this Board must consider the appropriate rating for the CI’s back condition at separation based on the VASRD standards in effect at the time of separation (i.e. pre-2004 standards). The CI first injured his low back while on active duty status in 1993 and experienced multiple subsequent episodes of pain. He was placed on a permanent L3 profile in 1995, and in 2000 received a 40% disability rating from the VA. In March 2002, at his request, his profile was changed so he could mobilize. His commander noted that he exercised daily by running, doing pushups and participating in strenuous weight training. He easily lifted items exceeding 70 pounds several times during deployment. While deployed in August 2002 he experienced acute low back pain radiating to the left leg while lifting boxes, and was hospitalization in Kuwait for 11 days for diagnosis and treatment. He was subsequently medically evacuated from the theater. The narrative summary (NARSUM) examiner (4 November 2002, six months prior to separation) observed a marked antalgic gait. Moderate tenderness of L5-S1 paraspinal areas was present, but muscle spasm was absent. Deep tendon reflexes (DTR), muscle strength and sensation were normal. Straight leg raise testing (SLR) was negative. Examination inconsistencies included increase of pain with mild cephalic pressure and exaggerated pain response to lumbar palpation. ROM measurements obtained on 8 October 2002 (approximately two months after injury) were considered to be of limited quality due to marked subjective pain response. A Physical Medicine evaluation on 12 December 2002 reported severe throbbing low back pain that occasionally radiated to the left posterior and medial thigh with rare shooting pains to the ankle. Symptoms were improving since the August 2002 flare-up. Numbness of the entire left lower extremity could occur with prolonged sitting. Examination documented a gait that was intermittently slow and labored. Poor effort was made for toe or heel walking, but standing on toes was possible with coaxing. Lumbar ROM was very slow, with reduction of flexion and extension by 70% and 50% respectively. However, during casual conversation and when changing into and out of a gown, movements were much quicker and ROM was improved. Strength was difficult to assess because of diffuse bilateral breakaway with poor effort, but when the CI was distracted strength appeared improved. Sensation was intact and DTRs were normal. SLR testing was negative. Superficial spine tenderness was observed as well as significant low back pain with axial head compression, signs suggesting non-anatomic pain. On 13 December 2002 an electrodiagnostic study (EMG) was normal. Lumbar MRI performed October 2002, showed degenerative joint changes, mild central spinal canal stenosis at L3 through L5, mild foraminal narrowing at bilateral L3-L4 regions and mild to moderate foraminal narrowing at bilateral L4-5 regions. The changes reported on this MRI were essentially the same as those reported on a prior MRI performed three years before in November 1999. The VA Compensation and Pension (C&P) examiner (12 December 2003, seven months after separation) reported that the CI experienced constant pain that worsened with sitting longer than 20 minutes or with coughing. He also complained of daily but intermittent pain that radiated down the left posterior thigh to the arch of the foot, sometimes associated with numbness and tingling of the lateral foot. He was able to walk one-quarter mile on a treadmill. Examination noted pain when moving in and out of a chair and pain with coughing. He ambulated with a 10% forward flexion. There was tenderness to palpation of the lumbar spine region. ROM showed flexion of 35⁰ (normal to 90⁰) and combined ROM of 150⁰ (normal to 240⁰). The left ankle DTR was absent and sensation of the left lateral calf and dorsal and lateral left foot was diminished. Extension and flexion strength of both great toes was reduced, with the left somewhat weaker than the right. X-ray showed probable degenerative changes of lumbar intervertebral discs and minor healed compression fractures of T12 and L3.

The Board must correlate the above clinical data with the 2003 rating schedule. The PEB and VA chose different coding options for the condition, but this did not bear on rating. The PEB determined the condition existed prior to service, but with service-aggravation; therefore no deduction in the final rating was made on this basis. The PEB’s 10% rating under the 5295 code reflected a judgment that “characteristic pain on motion” was present. The MEB examination documented a marked degree of limited motion, and it is possible the PEB discounted this because of inconsistencies in the examination. In a 21 April 2000 decision, the VA rated the CI’s condition at 40% using the 5010-5293 code, which under the 2000 VASRD indicated a “severe” condition, with “recurring attacks with intermittent relief.” However, the CI was clearly able to return to active duty status subsequent to that decision and was performing his duties with no evident impairment until re-injury in August 2002. In its 30 January 2004 decision, the VA assigned a 60% rating and appeared to base its rationale on the VASRD criteria in effect at the time of the original 2000 decision. Using the 2004 VASRD ROM criteria, the highest rating justified was 20% for impaired flexion, while combined ROM supported a 10% rating. The Board considered that the MEB ROM examination was performed two months after the injury and may not have reflected a maximum state of improvement, an observation supported by the significantly improved motion present at the later VA examination. All members agreed that ROM limitations noted in the C&P examination did not meet the 40% requirements under the 2003 VASRD 5292 or 5295 codes. Although there was no muscle spasm (an element of the 20% rating), the Board debated if the lateral rotation ROM recorded by the C&P examiner met the requirement for the “loss of lateral spine motion” under the 20% level, or if any of the documented ROM limitations met the requirements for the 20% level under the 5292 code. The Board noted there was no evidence of significant change in the MRI findings over the preceding three years and with those same pathologic findings the CI was able to engage in strenuous activity prior to the lumbar strain. The nature of the lumbar strain was not different from prior episodes of acute, chronic back pain experienced by the CI and from which significant recovery occurred in the past and would reasonably be expected. Board members deliberated the examiners non-organic examination findings. The Board must acknowledge that compensation spine examinations may predispose a lowered pain threshold since the examinee is generally quite aware that the severity of symptoms and pain tolerance on ROM is directly correlated with the resulting rating and financial gain. The measurement of ROM reflecting pain with motion is dependent on the examinee’s reported pain with scant ability by the examiner to objectively confirm it. Upon deliberation the Board agreed in this case that the PEB rating was more consistent with the anticipated severity suggested by the clinical pathology and less vulnerable to the undue influence just elaborated. The Board therefore does not find adequate reasonable doubt in the CI’s favor for recommending a higher rating for the low back level degenerative disk disease condition. The Board also examined support for a higher rating under the 5293 code. There was no evidence of “bed rest prescribed by a physician” after the CI returned from deployment. While still in Kuwait, he was placed on quarters for 48 hours and was given restricted duty. If the hospitalization in Kuwait was conceded to represent prescribed bed rest, this amounted to less than two weeks. This would support a 10% rating under the 5293 code. The Board further deliberated if additional disability was justified for radiculopathy in this case. The VA assigned a 20% rating for left lower extremity radiculopathy, but this was effective greater than one year after separation. While an MRI prior to separation showed some neuroforaminal narrowing, actual nerve involvement was absent, as evidenced by a normal EMG. The presence of functional impairment with a direct impact on fitness is the crucial factor in the Board’s decision to recommend any condition for rating as additionally unfitting. The lower extremity pain components in this case have no functional implications. Service treatment notes reflected back pain as the dominant symptom with occasional radiation of pain. There was no motor impairment that could be linked to any functional deficit or limitation of specific physical requirements. The Board therefore concludes that additional disability rating for radiculopathy was not justified on this basis. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board concluded that there was insufficient cause to recommend a change in the PEB adjudication for the chronic low back pain condition.

Remaining Conditions. Other conditions identified in the DES file were degenerative joint disease, external hemorrhoid and pes planus. 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 left hand weakness and actinic keratosis 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.

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 chronic low back pain condition and IAW VASRD §4.71a, the Board, by a vote of 2:1, recommends no change in the PEB adjudication. The single voter for dissent (who recommended a rating of 20%) did not elect to submit a minority opinion. In the matter of the left lower extremity radiculopathy condition, the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation. In the matter of the degenerative joint disease, external hemorrhoid and pes planus conditions or any other medical conditions eligible for Board consideration, the Board unanimously agrees that it cannot recommend any findings 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 therefore recommends that there be no recharacterization of the CI’s disability and separation determination.

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Low Back Pain | 5295 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110420, 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 XXXXXXXXXXXXXXXXXXXXXX, AR20120004759 (PD201100310)

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 XXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA