RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXX BRANCH OF SERVICE: air force

CASE NUMBER: PD1100316 SEPARATION DATE: 20060524

BOARD DATE: 20120124

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a Reserve TSG/E-6 (2T271, Air Transportation Craftsman), medically separated for lumbar disc disease. He injured his back in 2004 during deployment to Kuwait, and was subsequently diagnosed with (non-surgical) lumbar disc disease. He did not respond adequately to treatment to meet the physical demands of his Air Force Specialty (AFS) or pass physical fitness standards. He was issued a permanent L4 profile and underwent a Medical Evaluation Board (MEB). Lumbar radiculitis 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) file will be discussed below. The PEB adjudicated the lumbar condition as unfitting, rated 0%, with application of the Veterans Administration Schedule for Rating Disabilities (VASRD). Following waiver of a Formal PEB, but subsequent review by the Air Force Board for Correction of Military Records (AFBCMR), the CI was medically separated with a 0% disability rating.

CI CONTENTION: The CI states: “The PEB gave me 0% for lumbar radiculitis and degenerative disease. The VA gave me 60% for radiculitis and 20% for degenerative disease. How could they be that far apart? I have a doctor statement saying I should retire and not work. In fact I am not able to work. During this whole process I was not given any assistance or advice on how to go about this. I was on my own. I took people at their word. I was told the only way I could retire would be through the AFR, under Title 10. Although I was on active duty, I felt the AF and not the AFR should handle this. The AFR told me that I could retire. All I had to do was get the AF to release me and they would start my retirement process. I did this, and was discharged from both the AF, and AFR on same day. I received a letter telling me that I could not retire because, and I quote, "Unfortunately, TSgt M--- is not eligible for early retirement under title 10, U.S.C. 12731b because his medically disqualifying condition was found to be (In The Line of Duty) and Title 10 limits early retirement to medically disqualifying conditions (NOT incurred in the line of duty)." … And if I had known I would not be able to work due to my injuries, I sure would have kept fighting for my active duty retirement. He additionally lists all of his VA conditions and ratings as per the rating chart below. A contention for their inclusion in the separation rating is therefore implied.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20060124** | | | **VA (10 Mo. After Separation) – All Effective 20060525** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Lumbar Radiculitis a/w Mild Degenerative Disease | 5299-5242 | 0% | Residuals, Lumbar Spine Injury | 5237 | 20% | 20070315 |
| Lumbar Radiculopathy | 8520\* | 10% | 20070330 |
| ↓No Additional MEB/PEB Entries↓ | | | Residuals, Left Wrist Injury | 5215 | 10% | 20050302 |
| Tinnitus | 6260 | 10% | 20050222 |
| 0% x 4 / Not Service Connected x 2 | | | 20070315 |
| **Combined: 0%** | | | **Combined: 40%\*** | | | |

\* 24 September 2008 Decision Review Officer (DRO) increased 8520 to 60%, combined 70% effective 20060525.

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 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 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.

The Board also acknowledges the CI’s assertions that he was not fully informed of the MEB process and that he was misinformed regarding AF retirement benefits under Title 10. It is noted for the record that the Board has neither the jurisdiction nor authority to scrutinize or render opinions in reference to asserted service improprieties in the disposition of a case. 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. These notwithstanding, the CI’s appeal for remedy regarding his retirement eligibility was addressed in an AFBMCR decision of 10 April 2007; and, is consequently not eligible for reconsideration by this Board. The CI’s appeal for correction of records and consequential entitlement determinations regarding retirement benefits is the responsibility of the applicable Secretary and accounting service. The fairness of the CI’s lumbar spine disability rating IAW VASRD standards, and consideration of Service ratings for additionally contended conditions, remain eligible for Board recommendations IAW DoDI 6040.44.

Lumbar Spine Condition. The CI suffered an onset of radiating back pain while handling cargo during his deployment. Imaging studies showed multi-level disk bulges (L3 – S1) with minimal foraminal narrowing bilaterally. Other studies included discography that was essentially normal, and electrodiagnostic studies reported as normal. The CI underwent a full range of conservative therapy for his back and radicular pain without significant improvement and was then referred to a civilian neurosurgeon for evaluation. The neurosurgeon’s evaluation appears to have served as the narrative summary (NARSUM) for the MEB/PEB proceedings. There were two goniometric and one non-goniometric range of motion (ROM) evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation.

|  |  |  |  |
| --- | --- | --- | --- |
| Thoracolumbar ROM | VA C&P~14 Mo. Pre-Sep | MEB~11 Mo. Pre-Sep | VA C&P~10 Mo. Post-Sep |
| Flexion (Normal 90⁰) | 45⁰ | “not particularly compromised” | 40⁰ |
| Combined (240⁰) | 150⁰ | 180⁰ |
| Comments | No spasm; stiff gait; DeLuca positive. | “limp” | Antalgic gait; no spasm; DeLuca negative. |
| §4.71a Rating | 20% | Not Ratable\* | 20% |

\*IAW VASRD §4.46 (accurate measurement); rated 0% by PEB.

The neurosurgeon completing the NARSUM evaluation did not provide measured ROMs, although he commented, “low back range of motion is not particularly compromised.” He noted a “mild limp favoring the right lower extremity” (not directly linked to spine by exam; therefore not ratable IAW §4.71a), normal response to straight leg raise, and normal reflexes. He affirmed that the CI was not a surgical candidate. Three months prior to this more cursory NARSUM evaluation, the CI underwent a VA Compensation & Pension (C&P) exam. At this exam the CI reported back pain that radiated down the right leg in a sciatic distribution, worsened by walking or standing. He denied incapacitating episodes, weakness, or bowel/bladder dysfunction. He was noted to have a stiff but steady gait, and normal spinal contour. There was no muscle atrophy or weakness of the lower extremities. ROM was limited by pain and guarding, with evidence of pain radiating to the right foot with flexion. There was an increase in pain and decrease in forward flexion with DeLuca repetitions. At the VA C&P evaluation 10 months after separation, the CI gave a markedly different account of his injury from that described elsewhere in the record; the examiner stated that “he was crushed under a heavy load.” The exam was notable for an antalgic gait, symmetrical musculature, and pain limited flexion. The ROM was essentially normal in all other planes, and there was no decrement with DeLuca repetitions. The examiner noted decreased strength on the (asymptomatic) left lower extremity, but normal strength on the right. At a contemporaneous C&P neurologic evaluation, the examiner recorded a history of right leg paresthesia; and, noted that the CI “states at times he will drag his foot.” That exam was notable for full, normal strength in both lower extremities with “give way” weakness in his right leg. Reflexes were normal, but sensation was decreased in the S1 distribution on the right. At this time electrodiagnostic studies were suggestive of a S1 radiculopathy on the right.

The Board directs its attention to its rating recommendation based on the evidence detailed above. The PEB and VA chose different coding options for the condition, but this did not bear on rating. The PEB’s AF Form 356 cited application of the VASRD for rating, but its 0% determination was not compliant with VASRD standards for a ratable evaluation as footnoted on the preceding chart. The Board noted that the two VA C&P exams provided the only VASRD compliant ratable data, although these exams bracketed the date of separation; but, the evidence in these exams was sufficiently similar to yield the same 20% rating based on measured ROM’s. Furthermore, the Board makes note that both of these exams documented gait disturbance linked to the spine pathology; itself a 20% criterion under §4.71a. All members were therefore in agreement with a 20% rating recommendation for the lumbar spine condition. The action officer prefers the 5242 (degenerative arthritis of the spine) code for its clinical fit with the pathology.

The Board also considered whether an additional rating for sciatic radiculopathy, as conferred by the VA, was appropriate in this case. Board precedent is that a functional impairment tied to fitness is required to support a recommendation for addition of a peripheral nerve rating at separation. Although radiating radicular pain was well documented, the pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a; i.e., that rating encompasses “symptoms such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease.” The sensory component in this case (radiating pain, numbness, tingling) has no functional implications. Prior to separation there was consistently and explicitly no physical finding of motor weakness by any examiner and electrodiagnostic confirmation of normal nerve innervation. The first subjective complaint of right leg weakness appears in the VA C&P exam 10 months after separation and is accompanied by normal motor findings on physical exam; although, there was electrodiagnostic data suggestive of sciatica. The VA appropriately rated these findings at 10%. The DRO decision two years after separation to increase the rating under 8520 to 60% cites data that did not exist prior to separation or even at the 10 month post separation C&P and clearly represents natural progression of the disease. At the time of separation, all evidence suggests that a motor impairment was not present, or was subclinical, and could not be linked to significant functional impairment. All members agreed; therefore, that a recommendation for additional Service rating based on peripheral nerve impairment was not supported.

Remaining Conditions. One other condition, a history of wrist fracture, was identified in the DES file. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically 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, tinnitus 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.

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 20% coded 5242 IAW VASRD §4.71a. In the matter of the associated sciatic radiculopathy, the Board unanimously agrees that it cannot recommend a 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 his prior medical separation:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Lumbar Degenerative Spine and Disc Disease | 5242 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110412, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans Affairs Treatment Record

XXXXXXXXXXXX

President

Physical Disability Board of Review

SAF/MRB

1500 West Perimeter Road, Suite 3700

Joint Base Andrews MD 20762

Dear XXXXXXXXXXX:

Reference your application submitted under the provisions of DoDI 6040.44 (Title 10 U.S.C. § 1554a), PDBR Case Number PD-2011-00316.

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,

XXXXXXXXXXXX

Director

Air Force Review Boards Agency

PDBR PD-2011-00316

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 his finding of unfitness was Lumbar Degenerative Spine and Disc Disease, VASRD Code 5242, rated at 20%; rather than Lumbar Radiculitis a/w Mild Degenerative Disease, VASRD Code 5299-5242, rated at 0%.

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Director

Air Force Review Boards Agency