RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXX BRANCH OF SERVICE: AIR FORCE

CASE NUMBER: PD1100342 SEPARATION DATE: 20050331

BOARD DATE: 20111122

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSgt/E5 (3POX1, Security Forces) medically separated for chronic low back pain. He initially injured his back after slipping on the stairs while on patrol in February, 2003. Subsequent evaluation revealed non-surgical disc disease (L4/5) without radiculopathy, and the CI failed a protracted course of conservative management which included aggressive doses of narcotic analgesics. He was consequently unable to fully perform within his career field or participate in a physical fitness test; was issued a permanent L4 profile; and, was referred for a Medical Evaluation Board (MEB). Chronic low back pain was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AFI 48-123. An Informal PEB (IPEB) adjudicated the lumbar condition as unfitting, rated 10%; and, the CI appealed to a Formal PEB (FPEB) requesting placement on the Temporary Disability Retired List (TDRL). The FPEB increased the rating to 20%, applying the Veterans Administration Schedule for Rating Disabilities (VASRD), but effected a medical separation.

CI CONTENTION: “I was injured in the line of duty and because of my injury I have a chronic spine condition that has permanently disabled me. I was found to be 70% disabled by the VA effective 1 April 2005. If the PEB would have rated me at 70% I would have been eligible for retirement for the Air Force as an E5. I believe the PEB purposely rated me at 20% so that I wouldn’t meet the minimum disability percentage for retirement of 30%.” Although he does not specifically contend for a cervical spine rating in addition to his lumbar rating, the referenced current VA combined rating encompasses ratings for both spinal segments. This is taken as an implied contention for both lumbar and cervical rating.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service FPEB – Dated 20050222** | | | **VA (Based on Service Treatment Record) – All Effective 20050401** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Low Back Pain | 5237 | 20% | Lumbar Intervertebral Disc Disease | 5243 | 10%\* | STR\*\* |
| ↓No Additional MEB/PEB Entries↓ | | | Cervical Spine Degenerative Disc… | 5242 | 10%\* | STR |
| Not Service Connected x 13 | | | STR |
| **Combined: 20%** | | | **Combined: 20%\*** | | | |

\*Initial VA lumbar rating was increased to 20% after back surgery, effective 20051101. This rating was upheld in VA rating decisions as late as 20080624. A 20091020 DRO ruling increased the Lumbar rating to 40% based on post-surgical data and increased the cervical rating to 30% based on 2009 data, both retroactive to separation. \*\* STR = Service Treatment Record.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred low back condition continues to burden him. It is a fact, however, that the Disability Evaluation System (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 (VA). The Board utilizes VA 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, however, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation. Post-separation evidence is thus probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Low Back Condition. The CI initially injured his back after slipping on the stairs while on patrol in February 2003. He made numerous visits to clinics and emergency rooms for complaints of back pain that radiated to both his lower extremities. He was managed conservatively with analgesics, and pursued rehabilitation with Physical Therapy and Physical Medicine. He was offered steroid intra-articular injections, but declined stating a preference for surgery. He did undergo a laminectomy/discectomy soon after separation. There were two goniometric range of motion (ROM) evaluations in evidence which the Board weighed in arriving at its rating recommendation. Both of these exams are summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM | PT ~6 Mo. Pre-Sep | Phys Med ~6 Mo. Pre-Sep |
| Flexion (90⁰ Normal) | 65⁰ | 40⁰ |
| Combined (240⁰ Normal) | 155⁰ | Incomplete |
| §4.71a Rating | 10% | 20% |

Although the physical therapy ROM was slightly more proximal to separation and did provide measurements in all planes, the Board considered the Physical Medicine exam to be more probative for rating in that it was more comprehensive of ratable parameters and performed by a specialist. That exam revealed tight hamstrings, 2-3/5 Waddell’s signs (without elaboration), and tenderness of the low back. The motor and sensory exam was normal, and there was no clinical evidence of herniated disc or radiculopathy. There was no comment on gait, posture, or spinal contour; although, neither the physical therapy exam nor other outpatient entries provided evidence for §4.71a rating consideration of these parameters. Imaging studies revealed broad-based disc bulging at L4-5. Electrodiagnostic studies were normal. The PEB and VA chose codes rated under the same general schedule, but arrived at different ratings. The VA rating decision, which premised its 10% rating on the 65⁰ MEB ROM’s, also invoked content from a non-goniometric evaluation by a VA contract provider ~four months post-separation. This provider stated, “Patient seems to exaggerate his pain in my office. For example he was limping and grimacing in my office, later when I watched him from a distance he was not limping and his posture was quite natural.” Although this comment (and the Waddel’s entry noted above) does pose some probative value questions, the Board disregarded such speculation in its endorsement of the Physical Medicine exam (more favorable to rating) as most probative for its recommendation. Likewise, the PEB’s AF Form 356 cites thoracolumbar flexion to 40⁰ with the presence of spasm as justification for its 20% rating. There was no evidence of ratable peripheral nerve impairment or documentation of incapacitating episodes which would provide for additional or higher rating. There is not reasonable doubt in the CI’s favor therefore to justify a Board recommendation for other than the 20% rating assigned by the FPEB for the low back condition. The FPEB’s coding choice has no bearing on rating, and is applicable to the case.

Contended Cervical Spine Rating. The CI’s application implies that a compensable rating should be considered for degenerative disc disease, cervical spine. This condition was noted in the VA rating decision proximal to separation, and although discoverable in the service treatment records, it was not documented in the core DES file. By policy and precedent, the Board has limited its jurisdiction for recommending unadjudicated conditions as unfitting and subject to additional separation rating to those conditions which are evidenced in the core DES file. The core DES file consists of the MEB referral document, the PEB adjudication document, the narrative summary (including any addendums or referenced examinations), the MEB physical exam, the commander’s statement, the physical profiles, and any written appeals or internal DES correspondence. Contended conditions which are not eligible for Board recommendations on this basis remain eligible for submission to the Air Force Board for Corrections of Military Records.

Remaining Conditions. Right ankle pain, chest pain and several additional non-acute conditions or medical complaints were identified in the DES file. 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. No other conditions were service connected with a compensable rating by the VA within 12 months of separation or contended by the CI. 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 FPEB 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 FPEB ruling in this case that any prerogatives outside the VASRD were exercised. In the matter of the low back 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 additionally unfitting for rating at separation.

RECOMMENDATION: The Board therefore recommends that there be no recharacterization of the CI’s disability and separation determination, as follows:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Low Back Pain | 5237 | 20% |
| **COMBINED** | **20%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110114, 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 XXXXXXXXXXXX:

Reference your application submitted under the provisions of DoDI 6040.44 (Section 1554, 10 USC), PDBR Case Number PD-2011-00342.

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 appropriate. Accordingly, the Board recommended no re-characterization or modification 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 and their conclusion that re-characterization of your separation is not warranted. Accordingly, I accept their recommendation that your application be denied.

Sincerely,

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Director

Air Force Review Boards Agency