RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1100356 SEPARATION DATE: 20080702

BOARD DATE: 20120109

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty member, SPC/E-4 (94P, MLRS Technician), medically separated for cervical disc disease. The CI first injured his cervical spine while participating in combat in 2005. He was treated with medications, physical therapy, and chiropractic care with no improvement. An MRI in 2006 found severe multi-level degenerative disc disease (DDD). The soldier opted out of surgical intervention; and, did not respond adequately to conservative measures to fully perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent U3 profile and underwent a Medical Evaluation Board (MEB). Cervicalgia, C3-4 cervical disc protrusion, and cervical radiculitis were forwarded to the Physical Evaluation Board (PEB) as separate medically unacceptable conditions IAW AR 40-501. Low back pain was also forwarded by the MEB, as a medically acceptable condition. An informal PEB adjudicated the cervical discopathy (appropriately combining the 3 inter-related conditions forwarded by the MEB, and affirming the absence of a separately ratable radiculopathy) as a single unfitting condition, rated 20%, with application of the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: “The VA has determined the following service connected condition has worsened, and awarded an increase. The evaluation of cervical spine, bulging and stenosis/intervertebral disc syndrome, cervical spine has increased to 20% (from 10%) disabling effective January 12, 2010. At the time of MEB SM was released from armed services awarded with 20% for the same unfitting condition, now it has been increased via VA.” The CI continues with an elaboration of ratable VA evidence, as presented below. 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 PEB – Dated 20080227** | **VA (5 Mo. Pre Separation) – All Effective 20080703** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Disc Protrusion @ C3-4 and Disc Bulging @ C4-5/C5-6 | 5299-5243 | 20% | Cervical Spine … | 5299-5243 | 10%\* | 20080209 |
| Radiculopathy, LUE  | 8799-8714 | 20% | 20080209 |
| Low Back Pain  | Not Unfitting | Thoracolumbar Spondylosis | 5299-5242 | 10% | 20080209 |
| ↓No Additional MEB/PEB Entries↓ | Pseudofolliculitis Barbae | 7813-7806 | 60%\*\* | 20080209 |
| Chronic Sinusitis | 6599-6513 | 30% | 20080209 |
| Migraine Headaches | 8100 | 30% | 20080209 |
| Right Ankle Sprain | 5299-5271 | 10% | 20080209 |
| Tinnitus | 6260 | 10% | 20080206 |
| Hiatal Hernia | 7399-7346 | 10% | 20080209 |
| Left Elbow Tendonitis | 5299-5206 | 10% | 20080209 |
| 0% x 4 / Not Service Connected x 2 | 20080209 |
| **Combined: 20%** | **Combined: 90%** |

\* VA increased rating to 20% effective 20100112 based on C&P performed 20100326 (20 mo. post-separation).

\*\* Rating criteria derived from use of *systemic* corticosteroids; medication log reflects only *topical* corticosteroids.

ANALYSIS SUMMARY: The Board acknowledges the sentiment implied in the CI’s application, i.e., that there should be additional disability assigned for conditions which will predictably worsen over time. The Board also acknowledges the CI’s contention that suggests service ratings should have been conferred for other conditions documented at the time of separation. 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 Department of Veterans’ Affairs (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 his degree of impairment vary over time.

Cervical Spine Condition. Imaging studies showed degenerative changes and a “large left paracentral and foraminal disc extrusion at C3-4 with... mild-to-moderate posterior displacement of the left side of the spinal cord at the level of the disc extrusion.” Electrodiagnostic (EMG) studies prior to separation were consistent with C6-7 cervical radiculopathy on the left, but a repeated study six months after separation was interpreted as normal. The CI submitted a rebuttal to the MEB regarding the effect of radiculitis on all of his extremities. The MEB physician responded with acknowledgement of the prior EMG finding, with subsequent resolution, and noted the absence of any concurrent outpatient complaints of extremity pain. There were 2 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. An orthopedic surgery consultation three months after separation documented similar findings.

|  |  |  |
| --- | --- | --- |
| Cervical ROM | MEB ~5 Mo. Pre-Sep | VA C&P ~5 Mo. Pre-Sep |
| Flexion (45⁰ Normal) | 20⁰ | 45⁰ |
| Combined (340⁰ Normal) | 70⁰ | 340⁰ |
| Comments | Tenderness w/o spasm. | Pain at limits of motion. |
| §4.71a Rating | 20% | 10%\* |

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

The MEB evaluation and VA Compensation and Pension (C&P) exam were performed nine days apart. The MEB physician noted a ROM significantly limited by pain. There was tightness and tenderness to palpation of the left paracervical musculature without frank spasm. There was no muscle atrophy of the paraspinal cervical or thoracic musculature, nor of the shoulder or upper extremities. The sensory and motor exams of the upper extremities were normal. The C&P examiner documented a normal posture and gait, but noted cervical muscle spasm. The ROM was full with pain at the extremes of motion, and there was no decrement with repetitions. There were no motor or sensory deficits. The Board first considered the VA’s rating of 10% under 5243 (intervertebral disc syndrome). Without any documentation of incapacitating episodes, a rating under this code is only warranted based on the ROM in evidence. The VA’s rating of 10% is justified based on the full but painful ROM recorded in the VA exam with application of §4.59 (painful motion). The PEB’s 20% rating under this code is supported by the ROMs submitted by the MEB. IAW DoDI 6040.44, the Board does not have the latitude to recommend a lower rating than conferred by the PEB; thus, probative value assignment to these contemporary examinations is moot. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s adjudication of the cervical spine condition.

The Board further considered whether an additional rating for peripheral neuropathy was warranted in this case, as per the CI’s rebuttal noted above and acknowledging the VA’s additional rating for a left cervical neuropathy. 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. The pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a. There was no motor impairment or sensory deficit component in this case that could be linked to significant physical impairment. Since no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment.

Other PEB Conditions. The other condition forwarded by the MEB and adjudicated as not unfitting by the PEB was low back pain. This condition was not profiled, implicated in the commander’s statement or noted as failing retention standards. It 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 duty performance. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB fitness adjudication for this condition.

Remaining Conditions. Other conditions identified in the DES file were migraine headaches, right ankle sprain, hiatal hernia and pseudofolliculitis barbae. 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 permanent 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, bilateral pes planus, hearing loss, traumatic nasal septal deviation, erectile dysfunction, a scar on the upper left leg and several other non-acute conditions were noted by the VA 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 cervical disc condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the low back condition, the Board unanimously recommends no change from the PEB adjudication as not unfitting. In the matter of the migraine headaches, right ankle sprain, hiatal hernia, pseudofolliculitis barbae 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, as follows:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Degenerative Disc Disease, Cervical Spine | 5243 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110426, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans' Affairs Treatment Record

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency

Crystal Drive, Suite 300, Arlington, VA 22202

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation for (PD201100356)

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

CF:

( ) DoD PDBR

( ) DVA