RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1100381 SEPARATION DATE: 20080819

BOARD DATE: 20120120

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (19D, Calvary Scout), medically separated for a lumbar spine condition. The CI complained of an insidious onset of low back pain, without trauma, in 2005. He was not a surgical candidate and did not improve adequately with conservative measures to fully perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). Chronic low back pain secondary to lumbosacral spondylolysis and spondylolisthesis was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. A left shoulder condition was also evaluated by the MEB and forwarded as a medically acceptable condition. The PEB adjudicated the low back condition as unfitting, rated 10%, with application of the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “I was given a 10% disability rating from the military and was discharged from the military after 13 years of service. I feel that this decision was wrong due to the fact that I wanted to stay in the military and retire. While going through my medical board proceedings I was informed of many service members receiving retirement who had less time in service as well as less or equal pay grade status. In addition I was also denied compensation for a hernia that I was diagnosed with, it was repaired through surgery. It took four years for the TMC to finally realize that what I had was a hernia. All though it was repaired through surgery I still experience sporadic moments of pain in the area in which the hernia was located. I was also required to obtain a waiver upon re-entering service in 2005 for my hearing difficulties. I was informed that my hearing loss was not due to military service. I would argue differently due to the fact that I was a 19D and consistently placed in loud environments due to the nature of my MOS, and I never had hearing difficulties before serving in the military.” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20080204** | | | **VA (2 Mo. Pre-Separation) – All Effective 20080820** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Low Back Pain | 5299-5237 | 10% | Lumbar Strain … | 5237 | 10% | 20080627 |
| Left Shoulder Injury | Not Unfitting | | Left Shoulder Strain | 5201-5024 | 10% | 20080627 |
| ↓No Additional MEB/PEB Entries↓ | | | Right Shoulder Strain | 5201-5024 | 10% | 20080627 |
| Bilateral Tinnitus | 6260 | 10% | 20080627 |
| Anxiety Disorder … | 9413 | 10% | 20080630 |
| 0% x 2 / Not Service Connected x 2 | | | 20080627 |
| **Combined: 10%** | | | **Combined: 40%** | | | |

ANALYSIS SUMMARY: The Board acknowledges the CI’s contention suggesting that 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 the degree of impairment vary over time.

The Board further notes the CI’s understanding that he was denied retirement based on time in service and pay grade relative to fellow soldiers; although, it is suspected that the latter were on the basis of medical retirements; which are, of course, dependent upon the unfitting medical conditions and assigned disability ratings. By law, the Board’s authority is limited to making recommendations for correcting disability determinations. The actual correction of records and consequential entitlement determinations, based on length of service and pay grade, is the responsibility of the applicable Secretary and Accounting service. The applicant's request will of course remain with the application as it is processed. The Board will review all evidence at hand to assess the fairness of PEB rating determinations, compared to VASRD standards, based on severity at the time of separation.

Lumbar Spine Condition. The CI had pre-existing scoliosis with a history of back pain throughout his life. He first complained of low back pain in the military when he wore full body armor while on duty in December 2005. The pain was more significant when he carried heavy loads. The pain distribution was low thoracic and lumbar, with occasional radiation to the right posterior thigh. Imaging revealed thoracic levocurvature (leftward scoliosis) and spondylolisthesis (vertebral slippage) with spondylolysis (facet degeneration) and disc space narrowing at L5-S1 and T12-L1. Electrodiagnostic studies were normal (no peripheral nerve deficits). The CI was treated with chiropractic care, physical therapy, a spine stabilization course, activity restrictions, and medications; all with minimal relief. There were two goniometric range of motion (ROM) evaluations and one non-goniometric ROM evaluation in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation. These are summarized in the following chart.

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| --- | --- | --- | --- |
| Thoracolumbar ROM | PT ~10 Mo. Pre-Sep | MEB ~9 Mo. Pre-Sep | VA C&P ~2 Mo. Pre-Sep |
| Flexion (Normal 90⁰) | 70⁰ | Full AROM | 90⁰ |
| Combined (240⁰) | 210⁰ | Full AROM | 240⁰ |
| Comments | Pain-limited motion. | No painful motion. | Pain at end-ROM. |
| §4.71a Rating | 10% | 10%\* | 10%\* |

\* Conceding §4.59 (painful motion).

At the MEB exam, the CI reported a chronic constant dull tightness and pain in his low back. The pain was exacerbated by running, sit-ups, push-ups, repetitive bending, carrying heavy weights and wearing body armor. The examiner observed that the CI had not shown signs of improvement since the onset of this condition, and that surgery was not indicated. On examination mild tenderness to palpation of the paravertebral musculature in the lumbar spinal region was noted on the left side. The ROM was “full” with no additional pain noted with motion. The examiner documented a normal gait, normal neurological findings, and made no note of scoliosis. Physical therapy ROM was not measured beyond the onset of pain, and was therefore not VASRD compliant. At the pre-separation VA exam, the CI continued to report daily pain, although he could function with medication. There was no history of lost work time or physician-prescribed bed rest for the condition. The examiner noted normal gait and posture, no radiating pain with motion, and no spasm. Pain was noted only at the extremes of an otherwise full ROM. The Board noted that the VA exam was the only fully VASRD compliant exam, and was also performed closest to the time of separation; therefore, it was assigned the predominant probative value. The PEB and the VA both chose code 5237 (lumbosacral strain) and arrived at the same 10% rating. The PEB’s DA Form 199 implies application of VASRD §4.59 (painful motion) to achieve a minimal compensable rating in the presence of a full ROM; and, the VA rating decision specifically cited painful motion in support of its rating. There was no evidence of ratable peripheral nerve impairment or documentation of incapacitating episodes which would provide for additional or higher rating. Although the baseline scoliosis raised the question of abnormal curvature as a 20% criteria under VASRD §4.71a, the physical findings did not support the “muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour” description for application of that criteria. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change from the PEB’s rating decision for the low back condition.

Other PEB Conditions. One other condition, a left shoulder injury, was forwarded by the MEB and adjudicated as not unfitting by the PEB. The CI had a remote history of shoulder dislocation managed conservatively. This condition was clinically inactive throughout the MEB period; the most recent outpatient treatment note was 14 months prior to separation. At that time, the pain was described as “intermittent;” active ROM was normal; and, “no present instability” was documented. The VA pre-separation Compensation and Pension examination documented full ROM of both shoulders without instability or other significant findings. The MEB physical documented a normal upper extremity examination. This condition was not profiled or implicated in the commander’s statement; and, it was judged by the MEB to meet 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 the shoulder condition(s).

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for a hernia repair and hearing loss. Neither of these conditions was significantly clinically or occupationally active during the MEB period; neither carried attached profiles; and, neither was implicated in the commander’s statement. Both of these conditions were reviewed by the action officer and considered by the Board. The Board determined therefore that neither of the stated conditions was subject to service disability rating.

Remaining Conditions. Several additional non-acute conditions or medical complaints were also documented 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. Additionally right shoulder strain, tinnitus, anxiety disorder and several other non-acute conditions were noted in the VA exam 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 and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the left shoulder condition, the Board unanimously recommends no change from the PEB adjudication as not unfitting. In the matter of the contended inguinal hernia and hearing loss conditions, 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** |
| Low Back Pain | 5299-5237 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110527, 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 (PD201100381)

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