RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXX BRANCH OF SERVICE: army

CASE NUMBER: PD1100430 SEPARATION DATE: 20020521

BOARD DATE: 20120419

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Soldier, SGT, E-5 (67T/Helicopter Repairman) medically separated for mechanical low back pain (LBP). The PEB also identified that the CI had radicular pain without motor, sensory or reflex changes that occurred primarily in the left leg. The CI’s injury occurred in March 2001 while lifting a litter onto a helicopter. He did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS). He was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Mechanical LBP with muscle strain was 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) packet will be discussed below. The PEB adjudicated the mechanical LBP, with radicular pain (without motor, sensory or reflex changes) primarily in the left leg as unfitting, rated 10%, with application of the Veterans’ Administration Schedule for Rating Disabilities (VASRD). The CI did not concur with the PEB and submitted a written appeal. The PEB and US Army Physical Disability Agency (USAPDA) reviewed the CI’s appeal and concluded that the case was properly adjudicated. The CI was then medically separated with a combined 10% disability rating.

CI CONTENTION: The CI states: “1. Initial VA rating for Chronic Back Strain was for 20% and increased to 30%with an overall combined rating of 60% effective May 21, 2004. 2. Physical Evaluation Board Proceedings (PEB) recommended the Mechanical Low Back Pain percentage to be 10%. 3. PEB did not look or review medical records which indicated other serious medical disabilities. 4. I was never informed of the option of a continuance when I had expressed a great concern regarding missing medical documents from my records. (AR 635-40) 5. After informing the PEB that my records were incomplete they did not respond or suggest a continuance. (AR 635-40, 4-18(a)) 6. I was persuaded to sign DA Form 199 under the false pretense that I would have another opportunity to appeal. 7. The PEB forwarded my case to the next level without contacting the PEBLO first to find out my intensions (AR 635-40, 4-20 e (3)) 8. How could an accurate and fair decision have been made from the PEB without reviewing my medical records (AR 635-40, 4-18(a))a. If after I sent copies of records indicating proof of symptoms that the PEB said I did not have, why was there no response regarding the symptoms instead of a "no change response" if the PEB is really a "fact finding board" (AR 635-40, 4-17 a (3), c) 9. Why did the PEB respond with a "no change" answer, indicating that even with the above mentioned, I received a full and fair hearing, and not affording me the opportunity of a formal hearing when I requested one?” He mentions no additionally contended conditions. The CI also submitted a letter addressed to the Board requesting the reviews requested above but also expressed concerns about his condition worsening over time and his rank at the time of separation.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service PEB – Dated 20020211** | **VA (6 Mo. After Separation) – All Effective Date 20020604** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Mechanical Low Back Pain with Left Lower Extremity Radicular Pain | 5295 | 10% | Chronic Back Strain | 5292 | 20%\* | 20021114 |
| ↓No Additional MEB/PEB Entries↓ | Tinnitus | 6260 | 10% | 20021114 |
| Raynaud’s Disease | 7117 | 10% | 20021114 |
| Carpal Tunnel, Left Wrist | 8615 | 10% | 20021114 |
| Carpal, Tunnel, Right Wrist | 8616 | 10% | 20021114 |
| Decreased Sphincter Tone with Occasional Incontinence | 7332 | 10% | 20021114 |
| 0% x 3/Not Service-Connected x 10 |
| **Combined: 10%** | **Combined: 50%\*\*** |

\*Increased to 30%, with combined rating increased to 60%, effective 20040521

\*\*Includes bilateral factor of 1.9% for Wrists

ANALYSIS SUMMARY: The Board acknowledges the issues documented in the CI’s contention but 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 also acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred condition continues to burden him. The Board wishes to clarify that it is subject to the same laws for service disability entitlements as those under which the DES operates. 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. That role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA), operating under a different set of laws (Title 38, United States Code). The Board evaluates DVA evidence proximal to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of DES fitness decisions and rating determinations for disability at the time of separation. The Board further acknowledges the CI’s contention for ratings for other conditions documented at the time of separation, and notes that its recommendations in that regard must comply with the same governance. 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. The DVA, however, 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 the degree of impairment vary over time. Issues concerning rank are outside the scope of this Board and may be addressed to the Army Board for Correction of Military Records (ABCMR).

Mechanical low back pain following lifting injury with radicular pain. The CI injured his low back on 17 March 2001 while lifting a litter onto a helicopter. His symptoms included LBP radiating into both legs, worse on the left, left groin pain and episodes of paresthesias in the legs. Conservative treatment with medications and physical therapy failed to allow him to return to his full military duties. Surgical consultations documented no indications for surgical treatment. He was issued a P3 profile and his commander’s statement recommended separation from active service since he was unable to perform the required duties of his MOS. There were two lower back examinations in evidence which the Board weighed in arriving at its rating recommendation. Both of these exams are summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Goniometric ROM - Thoracolumbar | MEB ~ 6 Mo. Pre-Sep20011101 | VA C&P ~ 5.5 Mo. After-Sep20021114 |
| Flex (0-90) |  | 30⁰ |
| Ext (0-30) |  | 10⁰ |
| R Lat Flex (0-30) |  | 20⁰ |
| L Lat Flex 0-30) |  | 15⁰ |
| R Rotation (0-30) |  | 30⁰ |
| L Rotation (0-30) |  | 60⁰ |
| COMBINED (240) |  | 165⁰ |
| Comment | No ROM done, is only able to flex down and touch his knees with his hands, gait is antalgic as is his toe and heel gait; motor 5/5 bilateral with give way strength; DTR 2+ bilateral; grossly intact light touch sensation; SLR positive radiation bilaterally; tender to palpation to left of L3; 5/5 Waddell’s; x-rays normal; EMG normal; MRI normal | SLR positive on right at 50 degrees and on left at 40 degrees; Minor changes noted on x-ray; no mention of Waddell’s  |
| 2001 §4.71a Rating 5295 | 10% | 10% |
| 2001 §4.71a Rating 5292 | 20% if moderate, 40% if severe | 20% if moderate, 40% if severe |
| Today’s §4.71a Rating | 20% for guarding with antalgic gait | 40% (flexion 30 degrees or less) |

The MEB narrative summary (NARSUM) examination on 1 November 2001, 6 months prior to separation, noted symptoms of LBP radiating to the left leg to the foot, the left groin and the right leg to the knee. He also reported episodes of paresthesias in the legs. The examination documented antalgic gait, normal reflexes and, although he had good strength, he had “give way strength symmetrically.” Straight leg raise test were positive bilaterally and there was tenderness at L3. Goniometric range-of-motion (ROM) is not addressed however he was able to forward flex only to touch his knees. The PEB on 11 February 2002, 3 months prior to separation, found the mechanical LBP condition to be unfitting, code 5295 (for lumbosacral strain), with a 10% rating. Under code 5295 a 10% rating is assigned for lumbosacral strain with characteristic pain on motion. A 20% rating requires muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral, in standing position, and a 40% rating requires severe lumbosacral strain with listing of whole spine to opposite side, positive Goldthwaite’s sign, marked limitation of forward bending in standing position, loss of lateral motion with osteoarthritic changes, or narrowing or irregularity of joint space, or some of the above with abnormal mobility on forced motion. The PEB rationale noted that he had characteristic pain on motion with 10% being the appropriate rating under this code. The CI rebutted the finding and the case was reviewed by USPDA who upheld the 10% rating. No FPEB was requested or convened.

The VA Compensation and Pension (C&P) examination on 14 November 2002, 6 months after separation, noted that his LBP was a constant 6/10 with lower thoracic and lumbar tenderness. The ROM was limited, as noted in the table above, with only minor x-ray changes. The VA Rating Decision (VARD) service-connected the chronic back strain condition, code 5292 (for limitation of motion, lumbar), with a 20% rating utilizing the VASRD in effect at separation. Under code 5292 a 10% rating is assigned for slight limitation of lumbar motion, 20% for moderate and 40% for severe. The VA rationale noted that 20% was assigned for moderate limitation of motion.

The 2001 VASRD coding and rating standards for the spine, which were in effect at the time of separation, were modified on 23 September 2002 to add incapacitating episodes (5293 intervertebral disc syndrome), and then changed to the current §4.71a rating standards on 26 September 2003. The 2001 standards for rating based on ROM impairment were subject to the rater’s opinion regarding degree of severity, whereas the current standards specify rating thresholds in degrees of ROM impairment. When older cases have goniometric measurements in evidence, the Board reconciles (to the extent possible) its opinion regarding degree of severity for the older spine codes and ratings with the objective thresholds specified in the current VASRD §4.71a general rating formula for the spine. This promotes uniformity of its recommendations for different cases from the same period and more conformity across dates of separation, without sacrificing compliance with the DoDI 6040.44 requirement for rating IAW the VASRD in effect at the time of separation. For convenience, the 2001 rating codes under discussion in this case are excerpted below.

5292 Spine, limitation of motion of, lumbar:

Severe........................................................................................................... 40

Moderate...................................................................................................... 20

Slight............................................................................................................. 10

5295 Lumbosacral strain:

Severe; with listing of whole spine to opposite side, positive

 Goldthwaite's sign, marked limitation of forward bending in

 standing position, loss of lateral motion with osteoarthritic

 changes, or narrowing or irregularity of joint

 space, or some of the above with abnormal mobility on forced

 motion........................................................................................................ 40

With muscle spasm on extreme forward bending, loss of lateral

 spine motion, unilateral, in standing position............................................ 20

With characteristic pain on motion................................................................. 10

With slight subjective symptoms only............................................................. 0

The PEB and VA chose different coding options for the condition under the VASRD in effect at separation. Both the NARSUM and VA examinations note limitation of motion. The VA examination is more comprehensive with goniometric ROM documented and it is therefore afforded a higher probative value. Additionally, the MEB NARSUM examination noted 5/5 positive Waddell’s signs and therefore this exam has questionable validity. The VA examiner made no comments that would raise any doubts as to the validity of the C&P examination. The ROM limitation noted on the VA C&P examination was clearly more than slight and moderate limitation of motion easily supported for the 20% VA rating. However, the Board also discussed the severity of flexion limited to 30 degrees at length. Furthermore, the Board policy (discussed above) of reconciling recommendations under the older 5292 rating schedule with current §4.71a based recommendations (when reasonable to do so) was also considered. If today’s VASRD criteria were applied, the VA C&P exam supports a 40% rating for flexion limited to 30 degrees or less. If 30 degrees of flexion is considered severe, a 40% rating would be appropriate under the 2001 VASRD criteria. The Board opines that as 30 degrees is only one third of the total possible ROM, it is reasonable to consider this a severe limitation of motion. The rating that results from this determination is identical to the rating that would result if today’s VASRD was used. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a rating of 40% for severe limitation of motion, coded 5292, for the chronic radiating LBP condition IAW VASRD §4.71a of 2001.

The Board also considered the bilateral lower extremity radiculopathy condition as a potentially separate unfitting and ratable condition. 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. Radiculopathy is not specifically noted in the commander's statement. The NARSUM examination on 1 November 2001, 6 months prior to separation, noted symptoms of LBP radiating to the left leg to the foot, the left groin, and the right leg down to the knee. He also reported episodes of paresthesias in the legs. The VA C&P examination on 14 November 2002, 6 months after separation, reports a bilateral positive straight leg raise test but a complete neurologic exam was not documented. However, strength as measured in great toe flexion was noted to be 5/5 on the right and 4/5 on the left. No sensory or reflex examination is noted. The Board finds no convincing evidence of any functional impairment due to peripheral nerve impairment at the time of separation in this case. The CI provided additional information indicating that his condition did progress after separation from service and required a left lateral discectomy on 8 November 2011. Based on an exam performed in July 2004, the VA increased the rating for the back condition to 30% with 20% continued for the limited ROM and 10% added for pain and subjective complaints of radiculopathy. This examination documented flexion limited to 50 degrees and extension limited to 10 degrees as well as negative straight leg raise tests, normal sensory exam, and a second normal EMG in January 2004. The CI also had an MRI in October 2003 which showed a diffuse bulge at L4-L5 and a mild annular bulge at L1-L2. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of the bilateral lower extremity radiculopathy condition as an unfitting condition for separation rating.

Remaining Conditions. Other conditions identified in the DES file were swollen and painful temporomandibular joint and bilateral ankle, hand, knee and elbow joints, sinus headaches, loss of hearing, tinnitus, sinusitis, shortness of breath, occasional chest pain, stomach problems, ankle fractures, left foot paresthesias, nerve pain in the lower extremities, frequent colds and excessive bleeding with dental procedures. 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 Raynaud’s disease, decreased rectal sphincter tone with occasional incontinence, otalgia with Eustachian tube dysfunction, bilateral carpal tunnel syndrome and several other non-acute conditions were noted in the VARD 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. In the matter of the mechanical LBP following lifting injury with radicular pain condition, the Board unanimously recommends rating of 40% coded 5292 IAW VASRD §4.71a. In the matter of the bilateral lower extremity radiculopathy, painful temporomandibular joint and bilateral ankle, hand, knee and elbow joints, sinus headaches, loss of hearing, tinnitus, sinusitis, shortness of breath, occasional chest pain, stomach problems, ankle fractures, left foot paresthesias, nerve pain in the lower extremities, frequent colds, and excessive bleeding with dental procedures; the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation.

RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows and that the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective as of the date of his prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Mechanical Low Back Pain after lifting injury with radicular pain | 5292 | 40% |
| **COMBINED**  | **40%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110516, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 XXXXXXXXXXXX

 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 XXXXXXXXXXXX, AR20120008657 (PD201100430)

1. Under the authority of Title 10, United States Code, section 1554(a), I approve the enclosed recommendation of the Department of Defense Physical Disability Board of Review (DoD PDBR) pertaining to the individual named in the subject line above to recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 40% effective the date of the individual’s original medical separation for disability with severance pay.

2. I direct that all the Department of the Army records of the individual concerned be corrected accordingly no later than 120 days from the date of this memorandum:

 a. Providing a correction to the individual’s separation document showing that the individual was separated by reason of permanent disability retirement effective the date of the original medical separation for disability with severance pay.

 b. Providing orders showing that the individual was retired with permanent disability effective the date of the original medical separation for disability with severance pay.

 c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, and payment of permanent retired pay at 40% effective the date of the original medical separation for disability with severance pay.

 d. Affording the individual the opportunity to elect Survivor Benefit Plan (SBP) and medical TRICARE retiree options.

3. I request that a copy of the corrections and any related correspondence be provided to the individual concerned, counsel (if any), any Members of Congress who have shown interest, and to the Army Review Boards Agency with a copy of this memorandum without enclosures.

BY ORDER OF THE SECRETARY OF THE ARMY:

Encl XXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA