RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100447 SEPARATION DATE: 20060905

BOARD DATE: 20120906

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a mobilized National Guard member, SSG/E6 (91W, Health Care Specialist), medically separated for a lumbar spine condition. He was medically evacuated from Iraq in 2005 for back pain which was diagnosed as degenerative disc disease (DDD). No surgery was indicated, and the condition could not be adequately rehabilitated to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was consequently issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The back condition was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. A cervical spine condition and depressive disorder were addressed by the MEB, and also forwarded as medically unacceptable. The PEB adjudicated the lumbar spine condition as unfitting, rated 10%, citing criteria of the Veterans Administration Schedule for Rating Disabilities (VASRD). The cervical and depressive conditions were determined to be not unfitting. The CI made no appeals, and was released from active duty with a 10% disability rating; he elected to be transferred to the Retired Reserve in lieu of discharge with severance pay.

CI CONTENTION: The CI states, “I consider that conditions were under rated.” He additionally attached a two page statement to his application which was reviewed by the Board and considered in its recommendation. The attached statement leads with the assertion that “multiple conditions” rendered him unable to continue serving his country; and, elaborates the current disabilities and employment limitations associated with “all my service-connected conditions.”

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in Department of Defense Instruction (DoDI) 6040.44 (Enclosure 3, paragraph 5.e.2) is limited to those conditions which were determined by the PEB to be specifically unfitting for continued military service; or, when requested by the CI, those condition(s) “identified but not determined to be unfitting by the PEB.” The rating for the unfitting lumbar spine condition is addressed below. Although the letter attached to the application does not specify which other conditions the CI believes rendered him incapable of further service, the members judged that it was properly within the purview of the Board to assess the appropriateness of the PEB’s determination that the two identified conditions (cervical spine and depression) were not unfitting and recommend ratings if indicated. Any other “service-connected conditions” which were referred to in the letter were not identified by the PEB and thus do not meet the prescribed criteria for Board purview. Those conditions, or any condition or contention not requested in this application, remain eligible for future consideration by the Army Board for the Correction of Military Records.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20060707** | | | **VA (~9 Mos. Post-Separation) – Effective 20060906** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Low Back Pain…Spondylosis | 5242 | 10% | Lumbar Levoscoliosis, Early DDD | 5242 | 10% | 20070606 |
| Neck Pain | Not Unfitting | | No VA Rating\* | | | 20070606 |
| Major Depressive Disorder | Not Unfitting | | Depressive Disorder, NOS | 9434 | 30% | 20070615 |
| No Additional MEB/PEB Entries | | | Tendon Tear, Right Shoulder | 5299-5003 | 10% | 20070606 |
| DJD, Right Knee | 5003-5257 | 10% | 20070606 |
| 0% X 1 / Not Service Connected x 8 | | | 20070606 |
| **Combined: 10%** | | | **Combined: 50%** | | | |

\* Not identified as separate condition for rating, but addressed as upper back condition by VA examiner (20070606).

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred conditions continue to burden him. The Board wishes to clarify that it is subject to the same laws for disability entitlements as those under which the Disability Evaluation System (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 Veteran Affairs (DVA), operating under a different set of laws (Title 38, United States Code). The Board evaluates DVA evidence proximate to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of fitness decisions and rating determinations for disability at the time of separation. DoDI 6040.44 specifies a 12-month interval for special consideration to DVA findings. The Board further acknowledges the CI’s contention for ratings for his neck condition and depression which were adjudicated as not unfitting by the PEB, 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 the member’s service career; and the Board’s assessment of fitness determinations is premised on the MOS-specific functional limitations in evidence at the time of separation. 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 his degree of impairment vary over time.

Lumbar Spine Condition. Although there are some remote clinical entries for back pain in the service treatment record (STR), the condition was not clinically active until the CI’s deployment to Iraq. He was medically evacuated from theater in May 2005 for intractable back pain, with bilateral radiation (left > right). Magnetic resonance imaging (MRI) from March 2006 demonstrated “mild lumbar spondylosis [degenerative changes] and facet arthropathy [L3-S1] producing spinal canal stenosis and neural foramina narrowing [L4-S1].” Electrophysiologic testing was normal with no “evidence of a left lumbar radiculopathy.” Surgery was not recommended by the neurosurgical consultant; and, although an epidural block in July 2005 effected some improvement, continued physical therapy and conservative measures failed to provide satisfactory resolution. The narrative summary (NARSUM) noted back pain rated 8/10 with left leg radiation, exacerbated by “driving and reading.” The physical exam documented paraspinal spasm and tenderness, with normal neurological findings. At the VA Compensation and Pension (C&P) evaluation (performed 9 months after separation), the CI reported pain rated 10/10 radiating down both thighs and aggravated by “sitting and standing up movements.” The VA physical exam noted spasm and painful motion and reported sluggish but symmetric lower extremity reflexes with 5/5 muscle strength of all groups. There were two goniometric range-of-motion (ROM) evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation as summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM | MEB ~6 Mo. Pre-Sep | VA C&P ~9 Mo. Post-Sep |
| Flexion (90⁰ Normal) | 70⁰ | 65⁰ |
| Combined (240⁰) | 175⁰ | Extension deferred, but still 175⁰. |
| Comments | Normal gait/contour. | Decreased ROM with repetition.\* |
| §4.71a Rating | 10% | 10%\* |

\* DeLuca derived rating of 20% (flexion < 65⁰) is thus arguable, but not applied by VA.

The Board directs attention to its rating recommendation based on the above evidence. The PEB’s 10% rating was consistent with the VASRD §4.71a criteria which it cited. Although a higher rating with application of DeLuca, as footnoted above, may be defensible based on the VA evidence, that exam was fairly remote from separation, and there is no corroborating evidence from the MEB period adding probative weight to the VA evaluation. There was no evidence of ratable peripheral nerve impairment or documentation of incapacitating episodes in this case which would provide for additional or higher rating. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board concluded that there was insufficient cause to recommend a change in the PEB adjudication of the lumbar spine condition.

Contended Cervical Spine Condition. The CI’s cervical symptoms began during the Iraq deployment (precipitated by the same load bearing demands), but the medical evacuation was specifically for “lumbago.” Although a few entries documented concurrent neck pain, the majority of clinical encounters evidenced in the STR were directed at the lumbar condition. An MRI for the cervical spine showed multilevel (C5-7) spondylosis without cord compression. There were radicular symptoms (pain and paresthesias), but no positive neurologic exam findings. There is no evidence of neurosurgical consultation in the STR. The condition did result in a U3 profile issued 5 months pre-separation; and, it was judged to fail retention standards by the MEB physician. The commander’s statement acknowledged the condition, although did not specify the specific physical limitations related to either the lumbar or cervical conditions. The PEB’s DA Form 199 rationale for its fitness determination stated, “There is no evidence that his cervical spondylosis adversely impacts the performance of his duties. The soldier was medevac’d for his back pain. The majority of records refer to his low back pain.”

The Board’s main charge with respect to this condition is an assessment of the fairness of the PEB’s determination that it was not unfitting. The Board’s threshold for countering fitness determinations is higher than the VASRD §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard. The established DES principle for fitness determinations is that they are performance-based; the Board is confronted in this case with the lack of any evidence that cervical spine limitations prohibited the performance of those duties required of the MOS. Although it is acknowledged that the late evolution of the condition in the CI’s career did not provide for a significant trial of MOS performance after the diagnosis, members agreed that there was no citable evidence which would challenge the PEB’s fitness conclusion; there were no clinical features or specific functional limitations which would render the condition inherently unfitting. After due deliberation in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB fitness determination for the cervical spine condition, thus no additional disability rating can be recommended.

Contended Depressive Disorder. The CI was treated for anxiety in 1975 with no entries in the STR for psychiatric issues after that, until after redeployment from Iraq. The psychiatric addendum to the NARSUM documents an initial evaluation 7 months prior to separation and two follow-up visits. No inpatient treatment was necessary, but an antidepressant (Effexor) was prescribed. The Axis I diagnosis of “major depressive disorder, severe, single episode” was considered to fail retention standards, and resulted in an S3 profile. The commander’s statement documented the psychiatric diagnosis, but noted that the CI was assigned to a collateral administrative position (library maintenance and customer service) with “satisfactory” performance. The post-separation VA psychiatric evaluation documented a detailed cognitive exam without impairment, and specifically stated that there was no occupational impairment. The PEB’s DA Form 199 rationale for its fitness determination stated, “The date of the psychiatry evaluation was 17 Feb 06 and was the first contact with a psychiatrist. There is no evidence that this condition has adversely impacted the performance of his duties.” As previously discussed, the Board must identify performance based evidence from which to conclude that psychiatric impairment prohibited performance within the MOS; no such evidence is in the record. As with the cervical spine condition, there was no trial of MOS performance after the diagnosis, although the commander’s statement confirms that mental/behavioral functioning was intact and this was corroborated by the VA evidence. After due deliberation in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB fitness determination for the depressive disorder.

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 cervical spine condition and depressive disorder, the Board unanimously recommends no change from the PEB determinations as not unfitting. There were no other conditions within the Board’s scope of review for consideration.

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/Lumbar Spondylosis | 5242 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110506, 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

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 XXXXXXXXXXXXXXXXXXXXXXXXXXXXX, AR20120017746 (PD201100447)

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 XXXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA