RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1100469 SEPARATION DATE: 20030203

BOARD DATE: 20120208

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SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty member, SPC (91A, Medical Equipment Repairer), medically separated for chronic lower back pain (LBP). In March 1998, the CI developed left hip pain with some radiation down to the left knee. In July 1999 an MRI revealed a significant herniation of the L5-S1 disk, and the CI underwent a laminectomy in August 1999. In April 2001 the CI was involved in a motor vehicle accident which aggravated his low back problems. Over the next two years he did not respond adequately to extensive physical therapy and steroidal injection treatment and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. The CI was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). The MEB forwarded “chronic LBP, herniated nucleus pulposus, status post (S/P) spinal surgery, recurrent low back pain, recurrent disk herniation” to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Two other conditions, as identified in the rating chart below, were forwarded on the MEB submission as medically acceptable conditions. The PEB adjudicated the chronic LBP condition as unfitting, rated as 10%, with application of the Veterans’ Administration Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: The CI stated “During the medical board process, several people - including the examining doctor - told me to just ‘go to the VA and get a rating from them.’ They also told me that ‘if I tried to challenge the findings, that the process would be dragged out for months or even years.’ This despite the fact that I was having moderate to severe mobility issues and was in severe pain, which required high doses of narcotic medication. The Army also put me on orders to PCS to Germany during this process, even though I was already going through the medical board process.” 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 IPEB – Dated 20021122** | | | **VA (5 Mo. After Separation) – All Effective Date 20030204** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Lower Back Pain | 5293-8720 | 10% | Herniation of L5-S 1; S/P Lumbar Diskectomy | 5293 | 10%\* | 20030717 |
| Major Depressive Disorder | Not Unfitting | | Depressive Disorder | 9434 | 10%\*\* | 20030717 |
| Borderline Hypertension | Not Unfitting | | Hypertension | 7101 | NSC | 20090717 |
| ↓No Additional MEB/PEB Entries↓ | | | Left Ingrown Great Toenail | 7899-7804 | 10% | 20030717 |
| 0% x 2 / Not Service Connected x 14 | | | 20030717 |
| **Combined: 10%** | | | **Combined: 30%\*\*\*** | | | |

\*Rating increased to 40% effective 20090520. \*\* Rating increased to 50% effective 20090520. \*\*\*70% Effective 20090520.

Analysis Summary: The Board 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 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 Veterans’ Affairs (DVA), operating under a different set of laws (Title 38, United States Code). The Board evaluates VA 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 service 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.

The 2002 Veterans’ Administration Schedule for Rating Disabilities (VASRD) coding and rating standards for the spine, which was in effect at the time of separation, was updated effective 26 September 2003, subsequent to the CI’s separation. The CI’s VA rating determination was dated 23 February 2004 (after the VASRD change) and the narrative and coding indicate VA application of the newer 2003 VASRD criteria for the spine. The Board is required to base its rating on the VASRD in effect at the time of separation from service and not on subsequent changes to the VASRD or on post-separation changes in the CIs condition. Therefore the Board must apply the 2002 VASRD in its rating recommendation.

Chronic Low Back Pain. There was one goniometric range-of-motion (ROM) evaluation and one non-goniometric ROM evaluation in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation.

|  |  |  |
| --- | --- | --- |
| Goniometric ROM - Thoracolumbar | MEB ~4 Mo. Pre-Sep | VA C&P ~ 5 Mo. After-Sep |
| Flex (0-90) | No goniometrics | 50⁰ out of 80° with pain |
| Ext (0-30) | No goniometrics | 30⁰out of 30° with pain |
| R Lat Flex (0-30) | No goniometrics | 30⁰ |
| L Lat Flex 0-30) | No goniometrics | 30⁰ |
| R Rotation (0-30) | No goniometrics | 30⁰ |
| L Rotation (0-30) | No goniometrics | 30⁰ |
| COMBINED (240) |  | 200⁰ |
| MRI L4-5 broad disc bulge with annular tear; EMG Left lower extremity no radiculopathy | Tenderness to palpation (TTP) L2 spinous process; full ROM with forward flexion to reach fingertips within 3 inches of toes; negative straight leg raise; motor 5/5 bilateral; reflexes 2+ bilateral; decreased sensation of left lateral thigh, lateral calf, and lateral foot | Pain limited flexion/extension; Radiation of pain to left leg and ankle; normal gait; straight leg raise positive at 65° bilaterally; negative Lasegue’s sign; normal x-rays except narrowing of L5-S1 disc space |
| §4.71a Rating of 5293 (2002) | 10% | 10% |
| §4.71a Rating of 5292 (2002) | 10% (painful motion) | 20% if moderate; 40% if severe |

The MRI done in July 19999 revealed L5,S1 disc herniation. The CI underwent an L5-S1 laminectomy in August 1999 which resulted in significant pain relief. The CI was pain free until December 2000 when the low back pain recurred with pain in the posterior aspect of the left foot. As time progressed, the pain began to radiate down the left leg to the back of the knee and some numbness was noted in the plantar aspect of the left foot and lateral aspect of the left foot. Based on the severity of the symptoms, the CI was referred to physical therapy for stretching and strengthening exercises. The CI was placed on a temporary profile to lessen the chance of a re-injury and allow healing time. In April 2001, the CI was involved in a motor vehicle accident (MVA) which precipitated a flare-up of the LBP. The CI was referred to Physical Medicine for a trial of medications to alleviate the pain which provided minimal relief. The CI had a second referral to neurosurgery (approx Aug 2001), however no further surgery was recommended due to the CI’s age and inherent risk and he was referred to pain management clinic. A second MRI done at this time indicated epidural enhancing material on the lateral aspect of the thecal sac and the media aspect of the left S1 nerve root along with a broad disc bulge at L4-5 with annular tear and a focus of enhancement at the annular tear. An electromyelogram (EMG) done in July 2001 was normal. The CI received two epidural steroid injections with the first being in October 2001 and the second in November 2001; however, he developed muscle spasms and this treatment was deemed unsuccessful. In January 2002, the CI went to sick call for a LBP flare and was confined to quarters for forty-eight hours. Six days later, pain medicine performed ramus blocks of L3-4, L4-5 and L5-S1 bilaterally without benefit. A third MRI was performed in February 2002 and no significant changes were noted. The epidural steroid injections were restarted in April 2002 but after a third epidural steroid injection was given, this was noted to be ineffective and the injections were stopped. The patient was evaluated by neurosurgery in September 2002 who again determined that further surgery was not indicated. The MEB narrative summary (NARSUM) examination four months prior to separation noted that the CI’s pain level was eight out of ten with ten being the worst. The pain was constant and stabbing and originated from the L5-S1 disc level with radiation in a sciatic distribution to the left foot. There was worsening pain with prolonged standing, sitting, running, walking and forward flexion of the back. The functional impairment was documented as an inability to lift greater than thirty pounds; required avoidance of heavy labor; inability to wear a back pack; and inability to work on medical equipment due to his continued requirement for strong narcotic medication (Darvocet). The commander’s statement in October 2002 indicated that the CI was limited in his ability to perform his MOS because of his pain medication causing drowsiness and inability to walk to reach the machinery needing to be repaired.

While neither the MEB NARSUM exam of 5 October 2002 nor the MEB History and Physical of 29 August 2002 included goniometric measurements, the MEB physical did note decreased ROM, left greater than right. The NARSUM examination noted full ROM but did nto record actual measurements. The VA C&P examination five months after separation did include the goniometric measurements recorded in the chart above. It also noted fairly constant back pain mostly on the left side with radiation to the left leg and ankle; inability to bend over to pick up anything; and pain rated at seven out of ten. Both work and activities of daily living were somewhat affected by the back pain. This exam noted no evidence of radiculopathy but no neurologic examination was noted. The VA did later increase the disability rating for the CI’s back condition to 40%. This was effective 20 May 2009, more than six years later, and was based on worsening symptoms over time.

The NARSUM and C&P examinations are approximately equidistant from the date of separation with the NARSUM examination four months prior and the C&P examination five months post separation. The C&P examination does have goniometric measuresments but does not include a neurologic examination. However, the examiner did note there was no evidence of a radiculopathy. The NARUSM examination does not have goniometric measurements but does include a complete neurologic evaluation. The Board considered both exams to have approximately equal probative value.

The PEB rated this condition at 10% for loss of sensation under 5293 (intervertebral disc syndrome) - 8720 (sciatic nerve neuralgia). However, the CI’s functional limitations were secondary to back pain, not decreased sensation in his left leg and foot. His permanent profile noted he could not run, march, bicycle, perform airborne operations, do pushups, do situps, wear a backpack, or lift more than 30 pounds. These limitations would not be warranted based on decreased sensation in the left foot and the rating should reflect the condition that renders the CI unfit for continued service. Also, an EMG done in July 2001 showed no evidence of radiculopathy. In this case rating under either 5293 intervertebral disc syndrome or 5292 spine, limitation of motion of, lumbar would be appropriate. The VA did rate the condition as 5293 interveterbral disc syndrome, also at 10%.

The 2002 VASRD coding and rating standards for the spine, which was in effect at the time of separation, was updated effective 26 September 2003, subsequent to the CI’s separation. The CI’s VA rating determination was dated 23 February 2004 (after this VASRD change) and the narrative and coding indicate VA application of the newer 2003 VASRD criteria for the spine. The VA applied a 10% rating for incapacitating episodes having a total duration of at least one week but less than two weeks during the past 12 months. An incapacitating episode is a period of acute signs and symptoms due to intervertebral disc syndrome that requires bed rest prescribed by a physician and treatment by a physician. The Board notes there is no evidence in the available record to determine the frequency of incapacitating episodes.

The Board is required to base its rating on the VASRD in effect at the time of separation from service and not based on subsequent changes in the VASRD or post-separation changes in the CI’s condition. Therefore the Board must apply the 2002 VASRD in its rating recommendation. The 2002 VASRD did not include the specific time periods of incapacition or the definition of incapacitating episode that is present in the 2003 VASRD. The 2002 rating criteria are shown here:

5293 Intervertebral disc syndrome:

Pronounced; with persistent symptoms compatible with sciatic neuropathy with characteristic

pain and demonstrable muscle spasm, absent ankle jerk, or other neurological findings appropriate to site of diseased disc, little intermittent relief ....…..… 60

Severe; recurring attacks, with intermittent relief ………………..….…... 40

Moderate; recurring attacks ..................................…………………...…… 20

Mild ................................................................................................... 10

Postoperative, cured ........................................................................... 0

Under these rating criteria, the CI’s condition could be considered either mild or moderate, recurring attacks. Based on the available evidence, the CI did have constant back pain with radiation but did not have constant neurological findings with little or no intermittent relief and the criteria for a higher rating rating are not met. However, as noted above, the record does not have sufficient information to determine actual frequency of recurring attacks.

The Board also considered rating the CI’s condition based on limition of motion of the spine. The 2002 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 the reader’s convenience, the 2002 rating criteria for 5292 spine, limitation of motion of, lumbar are excerpted below.

5292 Spine, limitation of motion of, lumbar:

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

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

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

With the ROM limitations noted on the VA C&P examination, the CI’s limitation of motion could be considered as either slight or moderate. Under current criteria, a rating of 20% would be warranted for lumbar flexion greater than 30° but not more than 60°. This correlates to a moderate limitation in the 2002 criteria.

The Board discussed whether it should rate the CI’s condition as 5293 intervertebral disc syndrome or as 5292 Spine, limitation of, lumbar and noted the maximum rating resulting from either course of action would be 20%. As the available record did not contain information about the specific frequency of attacks sciatic neuropathy, the Board determined that 5292 would be the appropriate code to apply. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 20% for the back condition coded as 5292.

The rating criteria for 8720 sciatic nerve neuralgia in effect at the time of separation has not been changed and is noted here for convenience:

Sciatic nerve

8520 Paralysis of:

Complete; the foot dangles and drops, no active movement possible of muscles below the knee, flexion of knee weakened or (very rarely) lost .......................... 80

Incomplete:

Severe, with marked muscular atrophy ………………………………. 60

Moderately severe .................................................................. 40

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

Mild ......................................................................................... 10

8620 Neuritis.

8720 Neuralgia.

The CI symptoms included pain and sensory abnormalities and the 2002 VASRD notes: When the involvement is wholly sensory, the rating should be for the mild, or at most, the moderate degree. If the condition were rated under 8720, as the PEB did, the maximum rating would be 20%.

The Board discussed whether 8720 could be considered as separately unfitting and it determined that the evidence of record did not support rating the back condition and sciatica as two separately unfitting conditions. The functional limitations experienced by the CI cannot be attributed to both the back condition and the decreased sensation of the left leg and foot. There does not appear to be any functional limitations attributable to the sensory deficits as described above. 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. As 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 conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were major depressive disorder and borderline hypertension. Neither of these conditions were profiled, implicated in the commander’s statement, or noted as failing retention standards. Both were reviewed by the action officer and considered by the Board. There was no indication from the record that either of these conditions 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 either of the stated conditions.

Remaining Conditions. Other conditions identified in the DES file were bilateral great toe ingrown toenails, mild irritable bowel syndrome-antibiotic induced, mild proteinuria, hay fever,and erectile dysfunction. None of these conditions were significantly clinical 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 left elbow lateral epicondylitis and several other non-acute conditions were noted by the VA proximal to separation. but none of these were 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 chronic LBP condition and IAW VASRD §4.71a, the Board unanimously recommends rating the condition as 5292 at 20%. In the matter of the major depressive disorder and borderline hypertension conditions, the Board unanimously recommends no change from the PEB adjudications as not unfitting. In the matter of bilateral great toe ingrown toenails, mild irritable bowel syndrome-antibiotic induced, mild proteinuria, hay fever, and erectile dysfunction the Board unanimously agrees that it cannot recommend a finding of unfit for additional rating at separation.

RECOMMENDATION:

The Board recommends that the CI’s prior determination be modified as follows, effective as of the date of his prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Low Back Pain | 5292 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110613, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans Affairs Treatment Record

President

Physical Disability Board of Review

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

1. 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 to modify the individual’s disability rating to 20% without recharacterization of the individual’s separation. This decision is final.

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.

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

Deputy Assistant Secretary

(Army Review Boards)