RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1100496 SEPARATION DATE: 20040620

BOARD DATE: 20120216

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty PFC/E-3 (19D, Cavalry Scout), medically separated for a seizure disorder*.* The CI had a long history of seizures during his National Guard career that worsened after entry on active duty. With therapeutic levels of anticonvulsants his condition was well controlled. However, prudent restrictions on duty hours and activities did not allow him to fully perform within his Military Occupational Specialty (MOS). He was issued a permanent P3 profile and underwent a Medical Evaluation Board (MEB). Seizure Disorder was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. One other condition, bilateral high frequency hearing loss, was forwarded by the MEB as a medically acceptable condition. The PEB adjudicated the seizure disorder condition as existed prior to service (EPTS) and not permanently aggravated by service, but compensable in accordance with 10 USC 1207a (eight year rule); rated 10%, citing criteria from the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “10% Seizure disorder non deployable due to constant medication and doctor visits. Have had numerous seizures since leaving service and is service connected due to service in Operation Desert Storm January 1991 to June 1991. 10% Tennitis [sic] forexposure to high noises.” He elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

RATING COMPARISON:

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| **Service IPEB – Dated 20042429** | **VA (5 Mo. After Separation) – All Effective 20040621** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Seizure Disorder | 8911 | 10% | Seizure Disorder | 8911 | 10% | 20041119 |
| Bilateral Hearing Loss | Not Unfitting | Bilateral Hearing Loss | 6100 | NSC | 20041119 |
| ↓No Additional MEB/PEB Entries↓ | Tinnitus | 6260 | 10% | 20041119 |
| No Additional VA Entries | 20041119 |
| **Combined: 10%** | **Combined: 20%** |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-aggravated condition continues to burden him. It is a fact, however, that 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. This role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA). The DVA, operating under a different set of laws (Title 38, United States Code), 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 Board utilizes DVA evidence proximal to separation in arriving at its recommendations; and, DoDI 6040.44 defines a 12-month interval for special consideration to post-separation evidence. The Board’s authority as define in DoDI 6044.40, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Seizure Condition. The CI reported an onset of intermittent partial focal seizures in 1995, which were not evaluated or treated until January 2003 when his seizures worsened. The seizures were characterized by right arm jerking without loss of consciousness or incontinence. He was initially treated with carbamazepine (Tegretol™), but developed an allergic reaction. When switched to phenytoin (Dilantin™) he remained seizure free from May 2003 until separation; although, one episode of a possible mild seizure associated with lack of sleep was reported. A clinic note of 29 September 2004 states that the CI had remained seizure free for the prior year and a half. The MEB examiner documented a normal physical and neurologic exam. Brain imaging was normal, as was an electroencephalogram (EEG) in both sleep and waking states. A VA Compensation & Pension (C&P) evaluation (five months post-separation) confirmed the historical facts pertaining to the seizure disorder, and likewise documented normal findings. The PEB and VA both rated under code 8911 (epilepsy, petit mal), and assigned the same 10% rating for “a confirmed diagnosis of epilepsy with a history of seizures” requiring continuous medication for control. The VASRD provides for rating seizure disorder as either “major seizure” or “minor seizure,” with major seizure defined as a seizure that is “characterized by the generalized tonic-clonic convulsion with unconsciousness.” The Board notes that the CI’s seizure disorder does not meet this definition for major seizure, but does meet the VASRD definition of a minor seizure; a seizure characterized by “sudden jerking movements of the arms, trunk, or head (myoclonic type) or sudden loss of postural control (akinetic type).” The next higher rating of 20% under the 8911 code would require “at least one major seizure in the last two years [none in evidence]; or at least two minor seizures in the last six months [*speculatively* at best, one in evidence].” Thus a higher rating IAW VASRD §4.124a is not supported by the evidence at hand. 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 for the seizure condition.

Other PEB Conditions. The other condition forwarded by the MEB and adjudicated as not unfitting by the PEB was bilateral high frequency hearing loss (6000 Hz range). This condition was not profiled, implicated in the commander’s statement, or noted as failing retention standards. The hearing loss condition 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.

Contended Tinnitus Condition. A complaint of tinnitus does not appear in the service treatment record (STR), although a history of tinnitus during service was documented on the post-separation VA C&P evaluation. Tinnitus was not recorded on the MEB physical or at periodic audiology testing during service. 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. Although the factors discussed above in reference to hearing loss provide little support for a determination that tinnitus was an unfitting condition, it does remain eligible for consideration by the Army Board for Corrections of Military Records (ABCMR).

Remaining Conditions. Several additional non-acute conditions or medical complaints were documented identified 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.

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 seizure condition and IAW VASRD §4.124a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the high frequency hearing loss condition, the Board unanimously recommends no change from the PEB adjudication as not unfitting. In the matter of the contended tinnitus condition, the Board unanimously agrees that it is ineligible for a recommendation regarding service disability rating.

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.

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Seizure Disorder | 8911 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110620, 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

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

 Deputy Assistant Secretary

 (Army Review Boards)