RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Air FORCE

CASE NUMBER: PD1100503 SEPARATION DATE: 20040701

BOARD DATE: 20120619

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSgt/E-5 (3E571 / Engineering Craftsman), medically separated for chronic low back pain (LBP). The CI had a long history of LBP without any identifiable cause identified which did not respond to multiple types of therapy treatment. She was unable to meet the physical requirements of her Air Force Specialty (AFS) or satisfy physical fitness standards. She was issued a permanent P4 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded no other conditions for PEB adjudication. The PEB adjudicated the chronic LBP condition as unfitting, rated 10%, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “On 1 July 2004 I was discharged from active duty with a DOS of 12 July 2007. At the time I was involuntarily separated my enlistment contract was broken-with three plus years remaining on that contract. Upon separation, I received a lump sum severance pay at a 10% disability rating totaling $42,622.20. After taxes, I received approximately $34,000. After discharge, I was informed that $205.00 would be deducted starting I August 2004 to payback the entire severance pay and has been deducting from money received to present date. Given the prior events that has [*sic*] taken place I find it highly disturbing and an injustice as a veteran to be paying back an entitlement that was separate from VA benefits. I respectfully request that the board reevaluate the events surrounding my package and discharged [*sic*] from military service.”

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in 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 ratings for unfitting conditions will be reviewed in all cases. Any conditions or contention not requested in this application, or otherwise outside the Board’s defined scope of review, remain eligible for future consideration by the Air Force Board for the Correction of Military Records (AFBCMR).

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20040507** | | | **VA (2 Mos. After Separation) – All Effective Date 20040702** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5237 | 10% | Lumbar Strain | 5237 | 20% | 20040920 |
| ↓No Additional MEB/PEB Entries↓ | | | Cervical Spondylosis | 5237 | 0%\* | 20040920 |
| Right Hip Strain | 5252 | 0%\*\* | 20040920 |
| Bilateral Tinnitus | 6260 | 10% | 20040909 |
| Residuals of Caesarian Section with Painful Scar and Dyspareunia | 7614-7804 | 10% | 20040920  20060809 |
| 0% x 2 others/Not Service-Connected x 4 | | | |
| **Combined: 10%** | | | **Combined: 40%\*\*\*** | | | |

\*Increased to 30% and condition changed to Lumbar Strain with Osteitis Condensans Ileitis effective 20060501 based on exam 20060703 and treatment records.

\*\*Increased to 10% effective 20060501 based on exam 20060703 and treatment records.

\*\*\*Increased to 60% effective 20060501

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that the gravity of her condition and predictable consequences merit consideration for a higher separation rating. 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. 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 utilizes VA 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 defined in DoDI 6040.44, however, 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.

Chronic Low Back Pain Condition. There was one 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 | VA C&P ~2 Months Post-Separation  (20040920) |
| Flexion (90⁰ Normal) | 45⁰ |
| Ext (0-30) | 15⁰ |
| R Lat Flex (0-30) | 15⁰ |
| L Lat Flex 0-30) | 15⁰ |
| R Rotation (0-30) | 15⁰ |
| L Rotation (0-30) | 15⁰ |
| Combined (240⁰) | 120⁰ |
| Comment | All motions limited by pain; no tenderness noted, no spasm, normal posture and gait; no assistive device; no leg length discrepancy; negative straight leg raise bilaterally; normal sensory, motor, and DTR exams |
| §4.71a Rating | 20% |

An MEB narrative summary (NARSUM) was performed on 26 March 2004, approximately 3 months prior to separation. A long history of LBP was described with the first evaluation occurring in November 2001. Referrals to orthopedics, physical therapy, chiropractics, pain management, and rheumatology all failed to find a specific cause or effective treatment and the CI was given a profile for running, lifting, and limited duty and was referred for a medical evaluation board. Multiple lumbar spine, pelvic, and sacral x-rays from 2001 to 2003 through were normal as was magnetic resonance imaging (MRI) of the lumbar spine in June 2003. The NARSUM examination does not include ROM measurements and none are available in the service treatment record. The examination does note tender bilateral paraspinal muscles in the lower lumbar region, no tenderness over the vertebral bodies, stiff gait but no ataxia, no sensory deficits, motor 5/5 and DTRs 2+ in bilateral lower extremities.

The VA Compensation and Pension (C&P) exam completed approximately 2 months after separation documents a similar clinical history as the NARSUM. The CI’s pain was noted to be constant, radiating down the right or left leg intermittently, described as sharp and rated at 8/10. The pain is increased with physical activity (including daily physical activities) and sitting or standing for long periods. The CI reported incapacitation periods as often as four times per month, lasting for three days. Over the past year, she reported numerous incidents with a total of fifteen days with numerous times lost from work. She noted difficulty with bending, twisting, stooping, etc. The physical examination noted normal posture and gait and equal leg lengths. No assistive device was required for ambulation. The ROM measurements are in the chart above; all were limited by pain. No pain radiating on movement was noted, no muscle spasm or tenderness was present, and straight leg raising was negative bilaterally. There were no signs of intervertebral disc syndrome and the peripheral nerve exam was within normal limits, including motor, sensory, and reflex exams of both lower extremities. The examiner noted an inconsistent, delayed exaggerated response to touching the neck and back. The CI reported she was unable to bend the lower back but was observed to get on and off the exam table and was able to get into the lithotomy position. VA lumbar spine x-rays taken on 20 September 2004 were normal.

The PEB determined a 10% rating for LBP. The VA applied a 20% after the initial C&P examination and the rating was never increased, although osteitis condensans iliitis was later added to the diagnosis. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 20% for the chronic low back pain condition.

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 low back pain condition, the Board unanimously recommends a disability rating of 20%, coded 5237 IAW VASRD §4.71a. There were no other conditions within the Board’s scope of review for consideration.

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

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Low Back Pain | 5237 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110708, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

President

Physical Disability Board of Review

SAF/MRB

1500 West Perimeter Road, Suite 3700

Joint Base Andrews MD 20762

XXXXXXXXXXXXX

Dear XXXXXXXXXX:

Reference your application submitted under the provisions of DoDI 6040.44 (Title 10 U.S.C. § 1554a), PDBR Case Number PD-2011-00503.

After careful consideration of your application and treatment records, the Physical Disability Board of Review determined that the rating assigned at the time of final disposition of your disability evaluation system processing was not appropriate under the guidelines of the Veterans Administration Schedule for Rating Disabilities. Accordingly, the Board recommended modification of your assigned disability rating without re-characterization of your separation with severance pay.

I have carefully reviewed the evidence of record and the recommendation of the Board. I concur with that finding, accept their recommendation and direct that your records be corrected as set forth in the attached copy of a Memorandum for the Chief of Staff, United States Air Force. The office responsible for making the correction will inform you when your records have been changed.

Sincerely,

Director

Air Force Review Boards Agency

Attachments:

1. Directive

2. Record of Proceedings

PDBR PD-2011-00503

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Physical Disability Board of Review and under the authority of Title 10, United States Code, Section 1554a (122 Stat. 466) and Title 10, United States Code, Section 1552 (70A Stat. 116) it is directed that:

The pertinent military records of the Department of the Air Force relating XXXXXXXXXXXX, be corrected to show that the diagnosis in her finding of unfitness is Chronic Low Back Pain, VASRD Code 5237, was rated at 20% rather than 10%.

Director

Air Force Review Boards Agency