RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxxxxxx BRANCH OF SERVICE: army

CASE NUMBER: Pd1100534 SEPARATION DATE: 20060103

BOARD DATE: 20120516

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a mobilized Reserve member, SGM/E-9 (92G, Food Service Operations), medically separated for chronic radiating low back pain (LBP) and dyspnea on exertion. She did not respond adequately to treatment and was unable to perform within her Military Occupational Specialty (MOS) or meet physical fitness standards. She was issued a permanent profile (P3/L3) and underwent a Medical Evaluation Board (MEB). LBP and dyspnea were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. The PEB determined the dyspnea to be pre-existing and an expected outcome of chronic tobacco use. It was following natural progression without permanent service aggravation and as such is not ratable. Three other conditions, as identified in the rating chart below, were forwarded on the MEB submission as medically acceptable conditions. The PEB adjudicated the LBP condition as unfitting, rated 0%, with application of the US Army Physical Disability Agency (USAPDA) pain policy. The CI appealed to the Formal PEB (FPEB), who affirmed the PEB. The CI elected Reserve retirement in lieu of disability severance pay.

CI CONTENTION: The CI states: “Upon release from the military, I filed a claim with the VA. I was granted 100% total from January 4, 2006.” She elaborates no specific contentions regarding rating or coding and mentions no additionally contended conditions.

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. The not unfitting conditions, cervical degenerative disc disease (DDD), depression and anxiety requested for consideration and the unfitting conditions, LBP and dyspnea, meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. 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 Army Board for the Correction of Military Records (BCMR).

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service FPEB – Dated 20051116** | **VA (6 Mo. After Separation) – All Effective Date 20060103** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Radiating Low Back Pain | 5243 | 0% | DDD, Lumbar Spine | 5243-5242 | 20% | 20060621 |
| Right Leg Sciatica | 8520 | 10% | 20060621 |
| Dyspnea On Exertion | 6603 | --%\* | Chronic Obstructive Pulmonary Disease With Sleep Apnea  | 6847-6604 | 100% | 20060621 |
| Mild Cervical DDD | Not Unfitting | Cervical Pain With DDD | 5243-5242 | 20% | 20060621 |
| Major Depression | Not Unfitting | Major Depressive Disorder | 9434 | 40% | 20060621 |
| Anxiety | Not Unfitting |
| ↓No Additional MEB/PEB Entries↓ | R Elbow Epicondylitis s/p Surgery | 5299-5024 | 10% | 20060621 |
| 0% x 1/Not Service-Connected x 2 | 20060621 |
| **Combined: 0%** | **Combined: 100%** |

\*EPTS without permanent service aggravation.

ANALYSIS SUMMARY: The Disability Evaluation System (DES) is responsible for maintaining a fit and vital fighting force. 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 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 nor for conditions determined to be service-connected by the Department of Veterans’ Affairs (DVA) but not determined to be unfitting by the PEB. However the DVA, operating under a different set of laws (Title 38, United States Code), is empowered to compensate all 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’s role is confined to the review of medical records and all evidence at hand to assess the fairness of PEB rating determinations, compared to VASRD standards, based on severity at the time of separation. 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 defined in DoDI 6044.40, 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.

Back Condition. There were two goniometric range-of-motion (ROM) evaluations 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 ~ 4 Mo. Pre-Sep | VA C&P ~ 6 Mo. After-Sep |
| Flexion (90) | 65⁰ | 70⁰ |
| Extension (30) | 15⁰ | 35⁰ |
| Combined (240)\* | 205⁰ | 200⁰ |
| Comment | Painful motion.No muscle spasm.Normal gait. | Painful motion.No muscle spasm.Normal gait. |
| §4.71a Rating | 10% | 10% |

 \*IAW VASRD §4.71a is to round to the nearest five degrees.

 Combined ROM based on no more than maximum normal ranges.

The CI developed chronic LBP with radiation of pain to the right hip and posterior knee without weakness in June 2004 associated with physical training. Physical examination was noted for positive straight leg raising of the right with normal strength and deep tendon reflexes. X-rays at the time of initial presentation demonstrated mild DDD. Magnetic resonance imaging (MRI) performed on 15 September 2004 demonstrated DDD at the L4-5 and L5-S1 levels. There was mild disc bulging at L4-5 and minimal disc bulging at L5-S1 without evidence of neural impingement. There were mild degenerative changes of the facet joints. The CI did not respond adequately to medication, physical therapy and a series of epidural steroid injections.

A discogram in August 2005 indicated the DDD at L4-5 and L5-S1 was the cause of her pain and surgery was recommended. Because she was in the MEB process and return to duty was unlikely (due to lung condition), this elective/non-urgent surgery was not approved. Spine surgeon examinations in March and July 2005 documented forward flexion reaching the fingertips 10 to 12 inches from the floor, consistent with the MEB examination. Extension was recorded as 15 degrees. There was pain at the extremes of spine motion. Deep tendon reflexes, sensation and strength were normal. At the time of the MEB NARSUM on 27 September 2005, the CI continued to experience chronic low back pain radiating into the right buttock and right posterior thigh to the knee. There was pain with range-of-motion (ROM) but no muscle spasm. Gait was normal. Strength, deep tendon reflexes and sensation were normal. Straight leg raising was negative for radicular symptoms. ROM increased by six degrees with repetition. At the time of the VA Compensation and Pension (C&P) examination, on 21 June 2006, 6 months after separation, chronic back pain remained a problem limiting activity. On examination, gait was normal, strength was normal, deep tendon reflexes intact, and sensation intact. The spinal muscles were normal, and there was no spinal tenderness or deformity. On ROM testing, there was pain with flexion from 60 degrees to 70 degrees, and with extension from 30 to 35 degrees. There was no pain with lateral bending or rotation. The examiner stated that “the patient does lose an additional 20 degrees loss of range of motion for all planes due to painful motion, lack of endurance, and flare-ups and an additional 5 degrees loss of range of motion with repetitive range of motion and motion against resistance on examination today.”

The DA Form 199 reflected the PEB’s application of the USAPDA pain policy assigning a rating of 0%. The VA 20% rating decision was based on the additional 20 degrees loss of ROM reported by the C&P examiner 6 months after separation. The Board noted that the MEB NARSUM examination supported a 10% rating using VASRD rating criteria under the general rating formula for diseases and injuries of the spine. The Board considered the C&P examination. The C&P examiner’s comments regarding the additional 20 degrees loss of range of motion was a subjective report, as he went on to specify that there was an additional 5 degrees loss after repetitive movement during his objective examination. In order to remain consistent, the Board relied on the objective examination results. An additional 5 degrees loss of range of motion however does not result in a rating higher than 10%. The Board considered a rating the back condition using the VASRD formula based on incapacitating episodes due to intervertebral disc syndrome. The criteria are based on the number of incapacitating episodes in the prior 12 months requiring bed rest prescribed by a physician. The service treatment record (STR) documents a flare of her back condition in January 2005 with placement on quarters for 48 hours. No further documented physician directed bed rest was evidence in the STR or at the time of the C&P examination. The Board concluded the evidence did not support a higher rating using this alternate formula providing no additional benefit to the CI. The Board also considered if additional disability rating was justified for peripheral nerve impairment due to radiculopathy. The CI had radiating pain. Although there were bulging discs, nerve root impingement was not shown on MRI and examinations demonstrated normal strength, reflexes and sensation. The presence of functional impairment with a direct impact on fitness is the key determinant in the Board’s decision to recommend any condition for rating as additionally unfitting. While the CI may have suffered additional pain from possible nerve involvement, this is subsumed under the general spine rating criteria, which specifically states “with or without symptoms such as pain (whether or not it radiates).” Therefore the critical decision is whether or not there was a significant motor weakness which would impact military occupation specific activities. There is no evidence in this case that motor weakness existed to any degree that could be described as functionally impairing. The Board therefore concludes that additional disability rating was not justified on this basis. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 10% for the LBP condition.

Dyspnea On Exertion / Early Emphysema Condition. The FPEB determined that the CI’s chronic lung disease existed prior to service (EPTS) and was not permanently aggravated by service beyond the natural progression of the disease. The CI was diagnosed with early emphysema associated with a moderate diffusion defect that was the consequence of smoking for 30 years. The lung abnormalities documented by pulmonary function testing developed over the 3 decades prior to entry on active duty caused by cigarette smoking. Although the CI was treated for symptoms of shortness of breath while on active duty, there is no evidence of occupational exposure that would have caused the condition or that would cause permanent aggravation beyond the natural progression of the pre-existing chronic disease. The Board noted that lung specialists concluded the condition was caused by the 30 years of cigarette smoking overcoming any presumption the condition was incurred or aggravated by military service. All evidence considered, there is not reasonable doubt in the CI’s favor supporting recharacterization of the PEB’s EPTS determination.

Contended PEB Conditions. The contended conditions adjudicated as not unfitting by the PEB were mild cervical DDD, major depression, recurrent, and anxiety NOS. The Board’s first charge with respect to these conditions is an assessment of the appropriateness of the PEB’s fitness adjudications. 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 STR document complained of neck pain and right arm and hand numbness. An MRI in May 2005 demonstrated DDD at C5-6 and C6-7 but no neural impingement. Follow up with neurosurgery in July 2005 reflected resolved symptoms after which the neck no longer a focus of attention, and was only mentioned in passing in the NARSUM. The CI had a history of anxiety and depression treated with medication EPTS. The psychiatry NARSUM in April 2005 and October 2005 noted the conditions were in full remission, and not disqualifying for continued military service.

The August 2004 NCO evaluation report documented excellent duty performance. None of these conditions were profiled; none were implicated in the commander’s statement; and, none were judged to fail retention standards. All were reviewed by the action officer and considered by the Board. There was no indication from the record that any of these conditions significantly interfered with satisfactory duty performance. 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 any of the contended conditions; and, therefore, no additional disability ratings can be recommended.

BOARD FINDINGS: IAW DoDI 6040.44, provisions of DoD or Military Department regulations or guidelines relied upon by the PEB for rating unfitting conditions will not be considered by the Board to the extent they were inconsistent with the VASRD in effect at the time of the adjudication. As discussed above, PEB reliance on the USAPDA pain policy for rating the back condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the chronic back pain condition, the Board unanimously recommends a separation rating of 10% coded 5243 IAW VASRD §4.71a. In the matter of the dyspnea on exertion/early emphysema in a smoker condition, the Board unanimously recommends no change in the PEB EPTS determination IAW DoDI 1332.38. In the matter of the mild cervical DDD, major depression, recurrent, and anxiety NOS, the Board unanimously recommends no change from the PEB adjudication as not unfitting. 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 | 5243 | 10% |
| Dyspnea On Exertion / Early Emphysema in a Smoker | 6603 | EPTS |
| **COMBINED** | **10%** |

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The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110712, 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 XXXXXXXXXXXX, AR20120011843 (PD201100534)

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 10% 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 XXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA