RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxxxxxxx BRANCH OF SERVICE: Army

CASE NUMBER: PD1100536 DATE OF PLACEMENT ON TDRL: 20031212

BOARD DATE: 20120529 Date of Permanent SEPARATION: 20050202

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSG/E-6 (77F/Petroleum Supply Specialist), medically separated for exercise induced asthma and obstructive sleep apnea requiring C-PAP (OSA). The exercise induced asthma and OSA conditions did not improve adequately with treatment to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent P3 profile and referred for a Medical Evaluation Board (MEB). Nine other conditions, identified in the rating chart below, were also identified and forwarded by the MEB as meeting standards. The PEB adjudicated the exercise induced asthma and OSA conditions as unfitting, rated 30% and 0%, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD) and specified application of the Department of Defense Instruction (DoDI) 1332.39, respectively. The remaining conditions were determined to be not unfitting. The CI was placed on Temporary Disability Retired List (TDRL) with ratings as reflected in the chart below. The CI was reevaluated during his TDRL period and his final PEB adjudicated the asthma at 10% and the OSA at 0% likely using the same rule set as the initial PEB. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “Because I went to the MMRB Board and had a recommendation to be reclassed. But the Division Commander recommended MEB/PEB”

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 conditions, exercise induced asthma and OSA requiring C-PAP as requested for consideration, meet the criteria prescribed in DoDI 6040.44 for Board purview; and, are addressed below, in addition to a review of the ratings for the unfitting conditions. 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:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Final Service FPEB – Dated 20050501** | | | | **VA\* – All Effective Date 20040309** | | | |
| **Condition** | **Code** | **Rating** | | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL – 20031212** |  | **TDRL** | **Sep.** |
| Asthma | 6602 | 30% | 10% | Exercise Induced Asthma\* | 6602 | 30%\* | 20040130 |
| OSA | 6847 | 0% | 0% | Sleep Apnea\* | 6847 | 50%\* | 20040130 |
| Mild Cardiomyopathy | | Not Unfitting | | Mild Cardiomyopathy | 7099-7007 | NSC | 20040130 |
| Essential Hypertension | | Not Unfitting | | Essential Hypertension | 7101 | 0%\* | 20040130 |
| Chronic Neck Pain | | Not Unfitting | | Cervical Spine DDD | 5243-5248 | 20% | 20040130 |
| Recurrent LBP | | Not Unfitting | | Lumbar Strain w/ mild DJD | 5243-5237 | 10% | 20040130 |
| GERD | | Not Unfitting | | GERD | 7346 | 0% | 20040130 |
| Allergic Rhinitis | | Not Unfitting | | Allergic Rhinitis | 6522 | 0% | 20040130 |
| Elevated Cholesterol | | Not Unfitting | | Elevated Cholesterol | 7099-7005 | NSC | 20040130 |
| Pes Planus | | Not Unfitting | | Bilateral Pes Planus | 5276 | NSC | 20040130 |
| Vision Defect | | Not Unfitting | | No VA Entry | | | |
| ↓No Additional MEB/PEB Entries↓ | | | | Left Shoulder Bursitis | 5201-5019 | 10% | 20040130 |
| Right Shoulder Bursitis | 5201-5019 | 10% | 20040130 |
| Left Wrist Tenosynovitis | 5215-5024 | 10% | 20040130 |
| Right Ankle Sprain | 5271 | 10% | 20040130 |
| Left Upper Extremity C7 Radiculopathy | 8599-8515 | 10% | 20040130 |
| Not Service-Connected x 1 (excluding above) | | | |
| Combined: 10% | | | | Combined: 90% | | | |

\* VA “severed” the separate Asthma 6602 rating effective 20050501 IAW VASRD §4.96 (see analysis below); Hypertension, 7101, changed to 7101-7541 at 60% effective 20100112.

ANALYSIS SUMMARY: As noted above, only the unfitting conditions are within the scope of the Board. Both unfitting diagnoses are respiratory conditions (asthma, 6602 and OSA, 6847) and the provisions of §4.96, Special provisions regarding evaluation of respiratory conditions, dictate that a single rating will be applied. The PEB(s) did not apply §4.96, nor did the initial Department of Veterans’ Affairs (DVA) rating determinations. The DVA “severed” the separate asthma 6602 coded rating effective 1 May 2005 as being considered under a consolidated “sleep apnea with exercise induced asthma” rating and an earlier clear and unmistakable error. The specific VASRD provision is excerpted below:

§4.96 Special provisions regarding evaluation of respiratory conditions.

(a) Rating coexisting respiratory conditions. Ratings under diagnostic codes 6600 through 6817 and 6822 through 6847 will not be combined with each other. Where there is lung or pleural involvement, ratings under diagnostic codes 6819 and 6820 will not be combined with each other or with diagnostic codes 6600 through 6817 or 6822 through 6847. A single rating will be assigned under the diagnostic code which reflects the predominant disability with elevation to the next higher evaluation where the severity of the overall disability warrants such elevation.

Exercise Induced Asthma Condition. The CI had shortness of breath and decreased exercise tolerance and was diagnosed with exercise induced asthma with daily inhaled medications prior to entry into TDRL. The CI’s pulmonary function testing (PFT) was slightly abnormal with post-treatment values for FEV-1 and FEV-1/FVC always above 70-percent predicted. The CI’s exertional shortness of breath symptoms remained at the end of the TDRL period, and the MEB examiner stated “he continues to use his inhaled medications and reports that he must use his inhaled Albuterol every day or two prior to going for a walk, sometimes while giving a sermon, and sometimes after climbing stairs.” At the VA Compensation and Pension (C&P) exam 4 months into the TDRL period, the VA record stated “please check the MEB.” Exam indicated a normal chest radiograph and mild wheezing on a complete expiration. VA treatment notes indicated use of daily inhaled asthma medication (Advair) in addition to the Albuterol as needed with a note dated within a week of separation. The VA treatment note dated 6 months after separation indicated possible oral Candidiasis with daily use of inhaled steroids.

The Board directs attention to its rating recommendation based on the above evidence. There was no evidence of hospitalizations, episodes of respiratory failure, use of systemic high dose corticosteroids or immuno-suppressive medications, monthly visits to a physician for required care of exacerbations, or intermittent courses of systemic corticosteroids during the TDRL period. There was no PFT evidence for an asthma rating higher than 10%. The initial PEB 30% asthma rating was for daily medication use and the final PEB was 10% for intermittent use of Albuterol. The Board discussed the independent rating as 30% for TDRL entry and between 10% and 30% at separation depending on the probative values of the medication histories. However, please see the consolidated respiratory rating discussion below.

Obstructive Sleep Apnea Condition. The CI had classical symptoms of OSA with snoring, waking up choking with heartburn and excessive daytime somnolence. A polysomnogram demonstrated severe OSA and CPAP device was prescribed with good resolution of symptoms. The VA exam during TDRL refers to the MEB. VA treatment records within a week of separation indicated that the CI required an oxygen concentrator (re-ordered) for additional use with his CPAP. The initial PEB DA Form 199 (TDRL entry) assigned a 0% rating for OSA specifying application of DoDI 1332.39 (E2.A1.2.21). The final PEB continued the unfit/0% determination and based the fitness adjudication solely on field impediments to the use of CPAP. Contemporary PEBs across all of the services no longer consider OSA to be unfitting solely on this basis; but, the Board, by legal opinion and firm precedent, does not make contrary recommendations to a PEB determination that a condition was unfitting. VASRD §4.100 mandates a minimum rating of 50% under 6847 for OSA requiring a breathing assistance device. In consideration of this evidence, and IAW DoDI 6040.44, the Board must recommend a disability rating of 50% for the OSA condition.

Overall Respiratory Conditions(s) Rating. As discussed above, the provisions of §4.96, for a single respiratory rating applies to the CI’s combined asthma (6602) and OSA (6847) unfitting conditions. Although there was some consideration if the asthma condition by itself would rate at 10% or 30%; that determination is not of importance in this case given the unfitting OSA condition and rating guidelines. The unfitting OSA condition would rate at 50% without any other respiratory condition. There was no indication in the record that the CI’s asthma condition approximated the next higher (60%) rating criteria, or that the OSA approached the next higher 100% rating criteria. After due deliberation, considering all of the evidence and, the Board recommends a disability rating of 50% for both entry into TDRL and permanent separation for the exercise induced asthma with OSA condition IAW VASRD §4.96 and §4.97.

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. As discussed above, PEB reliance on DoDI 1332.39 for rating OSA was operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the exercise induced asthma with OSA requiring CPAP conditions, the Board unanimously recommends a TDRL and permanent service disability rating of 50%, coded 6602-6847 IAW VASRD §4.96 and §4.97. There were no other conditions within the Board’s scope of review for consideration.

RECOMMENDATION: The Board recommends that the CI’s prior TDRL and separation be recharacterized to reflect that, rather than discharge with severance pay, the CI was placed on the TDRL at 50% and then permanently retired by reason of physical disability with a final 50% rating as indicated below.

|  |  |  |  |
| --- | --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** | |
| **TDRL** | **PERMANENT** |
| Exercise Induced Asthma with Sleep Apnea | 6602-6847 | 50% | 50% |
| **COMBINED** | **50%** | **50%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110715, 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, AR20120010168 (PD201100536)

1. Under the authority of Title 10, United States Code, section 1554(a), I approve the enclosed recommendation of the Department of Defense Physical Disability Board of Review (DoD PDBR) pertaining to the individual named in the subject line above to constructively place the individual on the Temporary Disability Retired List (TDRL) at

50% disability rather than 30% disability for the period March 9, 2004 to

February 1, 2005 and then following this period recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 50%.

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:

a. Providing a correction to the individual’s separation document showing that the individual was separated by reason of temporary disability effective the date of the original medical separation for disability with severance pay.

b. Providing orders showing that the individual was retired with permanent disability effective the day following the six month TDRL period.

c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, provide 50% retired pay for the constructive temporary disability retired effective the date of the individual’s original medical separation and then payment of permanent disability retired pay at 50% effective the day following the constructive TDRL period.

d. Affording the individual the opportunity to elect Survivor Benefit Plan (SBP) and medical TRICARE retiree options.

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 XXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA