RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100555 SEPARATION DATE: 20040920

BOARD DATE: 20120530

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a mobilized National Guard, SSG/E6, 95B, Military Policeman, medically separated for chronic neck and low back pain (LBP). The CI did not improve adequately to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent U3L3H2 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded no other conditions for PEB adjudication. The PEB adjudicated the neck and low back conditions as unfitting, each rated 10% with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD) and the US Army Physical Disability Agency (USAPDA) pain policy. The CI did not concur with the PEB findings but did not demand a FPEB. The CI elected Reserve retirement in lieu of severance pay.

CI CONTENTION: “Not all evidence was considered because by the time of my retirement I had additional diagnosed conditions after the PEB proceedings of June 2004. Only physical conditions were considered, not emotional and mental condition and others.”

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 service ratings for unfitting conditions will be reviewed in all cases. The cervical radiculopathy and lumbar radiculopathy conditions requested for consideration and the unfitting neck pain and back pain conditions meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. The other requested conditions are not within the Board’s purview. 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 IPEB – Dated 20040525** | | | **VA (5 Mo. After Separation) – All Effective Date 20040921** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic neck pain | 5237 | 10% | Cervical Spine | 5243 | 30% | 20050303 |
| Chronic low back pain | 5299-5237 | 10% | Lumbosacral Strain w/radiculopathy | 5243 | 20% | 20050303 |
| ↓No Additional MEB/PEB Entries↓ | | | Left Shoulder | 5201 | 20% | 20050303 |
| PTSD | 9411 | 10%\* | 20050308 |
| 0% x 0/Not Service Connected x 5 | | | 20050308 |
| **Combined: 20%** | | | **Combined: 60%** | | | |

\*PTSD granted on appeal VARD dated 3-23-11; 10% effective 11-2-04; 30% 5-21-05 and 50% 8-24-05. TBI added effective 5-15-2008 @ 40%. Cervical Radiculopathy added 12-6-06 @ 20%. RLE/Lumbar Radiculopathy added 12-6-06 @ 10%. LLE/Lumbar Radiculopathy added 12-6-06 @ 10%.

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.

Chronic Neck Pain Condition. There were four 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.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Cervical ROM | MEB ~5 Mo. Pre-Sep  (20040422) | Physical Therapy  ~5 Mo. Pre-Sep  (20040427) | VA Physical Medicine ~2 Mo. Pre-Sep  (20040726) | VA C&P ~5 Mo. Post-Sep  (20050303) |
| Flex (45⁰ Normal) | 25⁰ | 30⁰ | Normal | 15⁰ |
| Ext (0-45) | 20⁰ | 35⁰ | 15⁰ | 20⁰ |
| R Lat Flex (0-45) | 30⁰ | 20⁰ | 15⁰ | 30⁰ |
| L Lat Flex (0-45) | 30⁰ | 20⁰ | 15⁰ | 30⁰ |
| R Rotation (0-80) | 60⁰ | 30⁰ | 20⁰ | 30⁰ |
| L Rotation (0-80) | 60⁰ | 40⁰ | 20⁰ | 30⁰ |
| COMBINED (340⁰) | 225⁰ | 175⁰ | 130⁰ | 155⁰ |
| Comment | Pain at limits of flexion and extension |  | Diffuse tenderness cervical paraspinal muscles. | Painful motion.  Tenderness.  Muscle spasm.  No evidence of weakness lack of endurance or fatigue. |
| §4.71a Rating | 20% | 20% | 20% | 30% |

The CI injured his neck on 23 September 2003 when he struck his helmeted head on a door frame when entering a HMMWV while deployed to Iraq. Service treatment records reflect medical care beginning 28 September 2003 for persisting neck pain. Computed axial tomography at that time demonstrated moderate degenerative disc disease (DDD) and joint disease consistent with a longstanding condition of several years duration. Due to concern on imaging regarding a fracture of the odontoid process of C2 and persisting pain, the CI was aero-medically evacuated from the theater of operations. Further evaluation by neurosurgery and additional imaging in Germany determined there was no fracture of the odontoid process and cervical strain was diagnosed. A physical therapy evaluation on 22 October 2003 documented absence of upper extremity symptoms to suggest any radiculopathy. Para-cervical muscles were tender. Active cervical spine range of motion was recorded as full with pain at end range of motion. Strength and reflexes were intact. Magnetic resonance imaging (MRI) in November 2003 demonstrated multi-level DDD at C4-5, C5-6, and C6-7 with left greater than right neuroforaminal narrowing at C5-6 and C6-7 but without nerve root impingement or spinal stenosis. Electrodiagnostic studies dated 14 January 2004 concluded there was evidence of radiculopathy of the left C5, C6, and C7 nerve roots and “disease” of the right C6 nerve root. Neurosurgical evaluation on 5 November 2003, documented absence of upper extremity symptoms and normal strength of the upper extremities with intact reflexes. The MEB narrative summary (NARSUM), dated 27 April 2004 (examination 22 April 2004), recorded tender paraspinal cervical muscles with normal upper extremity strength, intact reflexes. ROM is recorded in the table. A physical therapy clinic examination one week later recorded improved flexion and extension but reduced lateral bending and rotation. The PEB, dated 25 May 2004, adjudicated a 10% rating for the neck citing the absence of neurologic abnormality and the combined ROM of 225 degrees.

The CI was discharged due to disability from active duty on 23 July 2004, and subsequently separated from the Army National Guard 20 September 2004. A VA physical medicine and rehabilitation evaluation performed 26 July 2004, noted diffusely tender cervical paraspinal muscles, normal cervical lordosis, with normal active flexion but limited motion in other planes. There was pain inhibited muscle strength of the left deltoid and supraspinatus without findings of radiculopathy and a negative Spurling’s test. The VA Compensation and Pension (C&P) examination, dated 3 March 2005, 7 months after release from active duty demonstrated limited cervical spine motion with normal neurological examination and negative provocative testing for cervical nerve root impingement or radicular symptoms. The Board directs attention to its rating recommendation based on the above evidence. The PEB based its 10% rating on the combined cervical spine ROM. The Board noted that the flexion documented at the time of the MEB NARSUM examination supported the 20% in accordance with §4.71 general formula for rating diseases and injuries of the spine. The VA physical medicine ROM examination on 26 July 2004, also support a 20% rating based on limited combined range of motion but not limited flexion. Although the post separation C&P examination demonstrated limited flexion that met the threshold for the 30% rating adjudicated by the VA, this examination was 7 months after release from active duty. Board members concluded the preponderance of evidence most nearly approximated the 20% rating. The Board also considered rating under the alternate formula for incapacitating episodes due to intervertebral disease. While the CI was placed on 20 days convalescent leave for rest, there was no supporting evidence that the neck pain was incapacitating or that there was a valid medical reason for bed rest. The civilian neurologist recommending rest stated home confinement was indicated “because patient is unfit for service.” Regardless, a higher rating than 20% does not result even if this is accepted as evidence of an incapacitating episode. 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 cervical spine condition.

Chronic Low Back Pain Condition. There were four goniometric 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.

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| --- | --- | --- | --- | --- |
| Thoracolumbar ROM | MEB ~5 Mo. Pre-Sep  (20040422) | Physical Therapy  ~5 Mo. Pre-Sep  (20040427) | VA Physical Medicine ~2 Mo. Pre-Sep  (20040726) | VA C&P ~5+ Mo. Post-Sep  (20050303) |
| Flexion (90⁰) | 90⁰ | 70⁰ | 40⁰ | 60⁰ |
| Ext (30⁰) | 10⁰ | 20⁰ | 10⁰ | 30⁰ |
| R Lat Flex (30⁰) | 20⁰ | 20⁰ | normal | 30⁰ |
| L Lat Flex(30⁰) | 20⁰ | 20⁰ | Normal | 30⁰ |
| R Rotation (30⁰) | 30⁰ | 30⁰ | Normal | 45⁰ |
| L Rotation (30⁰) | 30⁰ | 30⁰ | Normal | 45⁰ |
| Combined (240⁰) | 200⁰ | 190⁰ | 170⁰ | 210⁰ |
| Comment | Pain at limits of flexion and extension. |  | Non-tender  Gait normal. | Painful motion.  Tenderness and spasms.  Gait normal.  No evidence of lack of endurance, fatigue or weakness. |
| §4.71a Rating | 10% | 10% | 20% | 20% |

The CI complained of LBP that began when he hit his head on a HMMVW door frame on 23 September 2003. A physical therapy evaluation on 22 October 2003 documented absence of lower extremity symptoms to suggest any radiculopathy. There was full active ROM of the trunk (thoracolumbar motion) in all planes, and strength and reflexes were normal. An MRI, performed 5 November 2003 demonstrated DDD at L4-5 and L5-S1 with a small posterior annular tear and a small to moderated broad based disc protrusion at L4-5 resulting in moderate spinal canal stenosis and neuroforaminal narrowing at that level. Degenerative disc changes were evidence at L5-S1 but the spinal canal and neuroforamina were patent. A record entry dated 6 November 2003 specifically noted that the CI denied any radicular symptoms. Neurosurgical evaluation 5 November 2003 documented absence of leg pain or weakness but noted bilateral calf numbness. Physical examination demonstrated normal lower extremity strength, reflexes, and intact sensation to pinprick. Electrodiagnostic studies on 28 January 2004 indicated evidence for bilateral L5 root and left S1 root disease.

The MEB NARSUM, dated 27 April 2004 (examination 22 April 2004), recorded tender lumbar muscles. ROM, recorded in the table above, was accompanied by pain at the limits of flexion and extension. Lower extremity strength and reflexes were normal with negative provocative tests for nerve root irritation or radicular signs. The physical therapy examination, on 27 April 2004 was similar. A VA physical medicine and rehabilitation evaluation on 26 July 2004, noted limited back ROM in flexion and extension but not in lateral bending or rotation. The back was non-tender without deformities, gait was normal, lower extremity strength was normal, reflexes were normal, and provocative testing for radicular signs were negative. The VA C&P examination on 3 March 2005, 7 months after release from active duty demonstrated thoracolumbar motion limited only in flexion with pain on motion. Lower extremity strength and reflexes were normal and provocative testing for radicular signs was also negative. Gait was not addressed but it was documented as normal in the general medical examination on 8 March 2005. The Board directs attention to its rating recommendation based on the above evidence. Due to the disparate results in ROM, the Board carefully considered the whole record in order to develop a consistent picture of the CI’s back condition. The examinations prior to release from active duty (October 2003 and April 2004) document normal or mildly limited thoracolumbar range of motion consistent with a 10% rating and application of §4.59 or §4.40. The 26 July 2004 physical medicine examination is not consistent with prior examinations and shows abrupt worsening of flexion with preservation of motion in all other planes without evidence of new injury or other cause for the abrupt worsening. Board members agreed that the MEB examination and service treatment record outpatient notes were more reflective of the anticipated severity based on the clinical pathology and clinical course. The Board concluded that the CI’s back condition most nearly approximated the 10% rating IAW the VASRD general rating formula for spine diseases and §4.159 (painful motion).

The Board also considered rating under the alternate formula for incapacitating episodes due to intervertebral disease. While the CI was placed on 20 days convalescent leave for rest, there was no supporting evidence that the back pain was incapacitating or that there was a valid medical reason for bed rest. The civilian neurologist recommending rest stated home confinement was indicated “because patient is unfit for service.” Regardless, a higher rating than 20% does not result even if this is accepted as evidence of an incapacitating episode. 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 chronic LPB condition.

Contended PEB Conditions. The contended conditions, cervical radiculopathy and lower extremity radiculopathy (lumbar radiculopathy) were not explicitly listed by the PEB, however the Board concluded that the PEB considered radiculopathy based on the PEB wording for the diagnoses: “chronic neck pain without neurologic abnormality,” and “chronic LBP without neurologic abnormality.” Therefore the Board considered if additional disability rating was justified for peripheral nerve impairment due to cervical radiculopathy and lumbar radiculopathy. 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 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. The critical decision with regard to radiculopathy is whether or not there was a significant motor weakness which would impact military occupation specific activities. Although an electromyogram provided evidence for cervical radiculopathy, there were no cervical radicular symptoms, provocative examination tests for nerve root impingement were negative by multiple examiners, and strength and reflexes were intact. There is no evidence in this case that upper extremity motor weakness existed to any degree that could be described as functionally impairing. The Board therefore concludes that additional disability rating for cervical radiculopathy was not justified on this basis. Although an electromyogram provided evidence for lumbar radiculopathy, there were no radicular symptoms, provocative examination tests for nerve root impingement were negative by multiple examiners, and strength and reflexes were intact. While the CI may have suffered additional discomfort from the 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).” There is no evidence in this case that lower extremity motor weakness existed to any degree that could be described as functionally impairing. The Board therefore concludes that additional disability rating for lumbar radiculopathy was not justified on this basis. The conditions 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 [or specify]; 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 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, the PEB may have applied the USAPDA pain policy for rating the chronic neck pain and chronic back pain conditions and the conditions were adjudicated independently of that policy by the Board. In the matter of the chronic neck pain condition, the Board unanimously recommends a disability rating of 20% coded 5237 IAW VASRD §4.71a. In the matter of the chronic back pain condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended cervical radiculopathy and lumbar radiculopathy conditions, the Board unanimously recommends no change from the PEB determinations 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; and, that the discharge be recharacterized to reflect permanent disability retirement, effective as of the date of his prior medical separation:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Neck Pain | 5237 | 20% |
| Chronic Low Back Pain | 5299-5237 | 10% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110720, 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 XXXXXXXXXXXXXXXXX, AR20120010171 (PD201100555)

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 recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 30% effective the date of the individual’s original medical separation for disability with Reserve retirement.

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 permanent disability retirement effective the date of the original medical separation for disability with Reserve retirement.

b. Providing orders showing that the individual was retired with permanent disability effective the date of the original medical separation for disability with Reserve retirement.

c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, and payment of permanent retired pay at 30% effective the date of the original medical separation for disability with Reserveretirement.

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 XXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA