RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100557 SEPARATION DATE: 20051201

BOARD DATE: 20120430

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (15R10, Helicopter Repair) medically separated for a cervical spine condition and obstructive sleep apnea (OSA). He injured his neck in a fall in 2003 with an exacerbation of symptoms during a subsequent deployment to Iraq. He was diagnosed with lumbar degenerative disc disease (DDD) and was not a surgical candidate. The condition could not be adequately rehabilitated to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. Additionally, the CI was diagnosed with OSA by a sleep study in 2004, and his treatment included a continuous positive airway pressure (CPAP) device. He was issued permanent P3 and L3 profiles and referred to a Medical Evaluation Board (MEB). The cervical spine and OSA conditions were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Six other conditions, as identified in the rating chart below, were addressed by the MEB, but forwarded as medically acceptable. The PEB adjudicated the cervical spine and OSA conditions as unfitting; assigning a disability rating of 10% to the cervical condition citing criteria of the Veterans Administration Schedule for Rating Disabilities (VASRD); and, 0% to the OSA condition referencing Department of Defense Instruction (DoDI) 1332.39. The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: “Because of one of the unfit conditons [sic] is at 50% rating. Should have been medicality [sic] retired!” He does not elaborate further or note any additionally contended conditions.

RATING COMPARISON:

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| --- | --- |
| **Service PEB – Dated 20050906** | **VA (~2 Mo. Post-Separation) – All Effective Date 20051202** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Neck Pain, DDD | 5299-5242 | 10% | Cervical Sprain | 5237 | 10% | 20060202 |
| OSA | 6847 | 0% | Sleep Apnea | 6847 | 50% | 20060202 |
| Lumbar Spondylosis | Not Unfitting | Lumbar Spondylosis | 5237 | NSC | 20060202 |
| Bilateral Cubital Tunnel Syndrome | Not Unfitting | Cubital Syndrome, Left Arm | 8699-8615 | 10% | 20060202 |
| Cubital Syndrome, Right Arm | 8699-8616 | 10% | 20060202 |
| Bilateral Pes Planus, EPTS | Not Unfitting | Bilateral Pes Planus | 5276 | 0% | 20060202 |
| Headache | Not Unfitting | Headaches | 8199-8100 | 0% | 20060202 |
| Hypertension | Not Unfitting | Hypertension | 7101 | 0% | 20060202 |
| Right Tinnitus | Not Unfitting | Tinnitus (Right) | 6260 | 10% | 20060201 |
| No Additional MEB/PEB Entries | Not Service-Connected x 1 Additional | 20060202 |
| **Combined: 10%** | **Combined: 70%** |

ANALYSIS SUMMARY:

Cervical Spine Condition. The mechanism of injury and exact timing of the CI’s original injury is not well specified in the narrative summary (NARSUM), but a profiling physician’s report in 2005 stated that he had fallen 2 years earlier doing a fireman carry of a fellow soldier. He suffered persistent neck and upper back pain associated with intermittent bilateral hand paresthesias. Although some entries in the service treatment record (STR) refer to herniated discs, a magnetic resonance imaging (MRI) report (dated 15 May 2005, and is the only MRI in evidence) described “very mild” DDD from C4 to C7 with “minimal” associated central canal stenosis and foraminal narrowing at C5/6. The condition was not amendable to neurosurgery, and did not respond to epidural steroid injections. The sensory symptoms were confirmed by electrodiagnostic studies to be of ulnar nerve origin (cubital tunnel syndrome) unrelated to spinal disease. There were two 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.

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| Cervical ROM | MEB ~5 Mo. Pre-Sep | VA C&P ~2 Mo. Post-Sep |
| Flexion (45⁰ Normal) | 55⁰ | 45⁰ |
| Combined (340⁰) | 340⁰+ | 260⁰ |
| Comments | + Tenderness | Painful motion all planes. |
| §4.71a Rating | 10% | 10% |

The MEB examiner reported an inability to tolerate Kevlar or ruck marching with load bearing. At the Department of Veterans’ Affairs (DVA) Compensation and Pension (C&P) exam after separation, the CI reported constant pain rated 9/10. No work loss was ascribed to the condition. Normal ROMs were measured by the service, and near-normal ROMs by the DVA, as charted above. The PEB’s DA Form 199 cited the §4.71a criteria of localized tenderness in support of the compensable rating. The PEB and VA applied different VASRD codes which did not affect rating, and the conferred ratings were IAW the VASRD §4.71a general rating formula for the spine. There was no evidence of associated peripheral nerve impairment or documentation of incapacitating episodes in this case which would provide for additional or higher rating. 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 cervical spine condition.

Sleep Apnea. The CI was diagnosed with “moderate” OSA by sleep study in July 2004, associated with obesity. Subsequent treatment with titrated CPAP is well documented in the STR. The CI was placed on a permanent profile that required access to electricity; and, the NARSUM quoted that profile restriction in the assessment of the condition. While service PEBs no longer considers sleep apnea syndromes to be unfitting solely on this basis, the Board, by legal opinion and firm precedent, does not make contrary recommendations to a PEB determination that a condition was unfitting. The PEB’s DA Form 199 assigned a 0% rating under DODI 1332.39 (E2.A1.2.21), but VASRD §4.100 mandates a minimum rating of 50% under 6847 for sleep apnea requiring a breathing assistance device. In consideration of the unequivocal evidence, and IAW DoDI 6040.44, the Board recommends a separation rating of 50% for the OSA condition.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were lumbar spondylosis (pain dating to same fall as for the cervical spine condition), bilateral cubital tunnel syndrome (as noted above in the cervical spine discussion), bilateral pes planus (pre-existing), headache (associated with neck pain), hypertension, and tinnitus. None of these conditions were profiled, implicated in the commander’s statement or noted as failing 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. All evidence considered, there is not reasonable doubt in the CI’s favor supporting a change in the PEB fitness adjudication for any of the stated conditions.

Remaining Conditions. The Board routinely screens the service file and VA evidence proximate to separation for all conditions present at separation. These conditions are reviewed by the action officer and Board members for fitness implications and eligibility for additional rating. Particularly scrutinized are conditions which were contended in service; conditions which were clinically acute during MEB proceedings; conditions which were referenced in the commander’s statement as impairing performance; conditions which were profiled or imposed duty restrictions; or, conditions which were judged by a physician to fail retention standards. No unaddressed condition was identified in this case which was judged by the Board to have significantly interfered with satisfactory duty performance; and, therefore no additional recommendations are forthcoming.

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 sleep apnea was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the cervical spine condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the OSA condition, the Board unanimously recommends a disability rating of 50%, coded 6847 IAW VASRD §4.100. In the matter of the lumbar spondylosis, bilateral cubital tunnel syndrome, bilateral pes planus, headache, hypertension, and tinnitus conditions; the Board unanimously recommends no change from the PEB determinations as not unfitting. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as unfitting for additional disability rating.

RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows and that the discharge with severance pay 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** |
| Obstructive Sleep Apnea | 6847 | 50% |
| Degenerative Disc Disease, Cervical Spine | 5299-5242 | 10% |
| **COMBINED** | **60%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110730, 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, AR20120008653 (PD201100557)

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 60% effective the date of the individual’s original medical separation for disability with severance pay.

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 severance pay.

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

 c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, and payment of permanent retired pay at 60% effective the date of the original medical separation for disability with severance pay.

 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 XXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA