RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXX BRANCH OF SERVICE: army

CASE NUMBER: Pd1100591 SEPARATION DATE: 20040629

BOARD DATE: 20120726

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty, SPC/E-4, 63W (Wheeled Vehicle Repairer), medically separated for mechanical low back pain (LBP). The CI 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 L3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded no other conditions for Physical Evaluation Board (PEB) adjudication. The PEB adjudicated the lumbar condition as unfitting, rated 10%. On appeal, the Formal PEB (FPEB) adjudicated a 20% rating with application of the US Army Physical Disability Agency (USAPDA) pain policy. The CI appealed the FPEB findings to the USAPDA which affirmed the FPEB findings. The CI was medically separated with a 20% disability rating.

CI CONTENTION: The CI requests reevaluation of his separation disability rating citing his VA rating of 40% and stating in his memorandum dated 17 July 2011, “as the medical board said I only had back pain, which was proven I was miss diagnosed after I was discharged. After my discharge I was seen by a Neurological Surgeon in Savannah GA, who diagnosed me with an Annular Tear at L5-S1 with Lumbar Spondylosis with a MRI, of which I had a discectomy and fusion at L5-S1.”

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 LBP condition meets the criteria prescribed in DoDI 6040.44 for Board purview and is 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 20040323** | | | **VA (9 Mos. Pre-Separation) – All Effective Date 20040630** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Mechanical Low Back Pain | 5099-5003 | 20% | Mechanical LBP with DDD | 5242 | 20%\* | 20030925 |
| ↓No Additional MEB/PEB Entries↓ | | | Left Radiculopathy | 5242-8520 | 10% | 20030925 |
| Tinnitus | 6260 | 10% | 20030925 |
| Pain Down Right Leg | 8520 | 10% | \*\* |
| R Knee Retropatellar Pain Synd. | 5260 | 10% | \*\* |
| Costochondritis | 5399-5321 | 10% | \*\* |
| 0% X 1 / Not Service-Connected x 6 | | | 20030925 |
| **Combined: 20%** | | | **Combined: 60%** | | | |

\*CI underwent back surgery 20041026 with subsequent increase in rating to 40% effective 20050201 (after temporary 100% convalescent rating) based on C&P 20050321.

\*\*Pain down right leg not found on C&P examination 20030925, granted 10% SC rating by VARD 20050601 effective 20040630 based on STR entries with complaint of pain radiating down right leg. Initial 0% ratings for costochondritis and right knee retropatellar pain syndrome increased to 10% by VARD 20050601 based on STR, post separation treatment records and C&P exam 20050321.

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 Veteran 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 has neither the jurisdiction nor authority to scrutinize or render opinions in reference to the CI’s statements in the application regarding suspected DES improprieties in the processing of his case.

Mechanical Low Back Pain with Mild L4/L5 and L5/S1 Disc Desiccation and Facet Arthropathy: There were three 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 | C&P ~ 9 Mo. Pre-Sep  (20030925) | PT ~8 Mo. Pre-Sep  (20031031) | VA C&P ~9 Mo. Post-Sep  (20050321) |
| Flexion (90⁰ Normal) | 35⁰ | 40⁰ (42, 38, 37) | 20⁰ |
| Extension (30⁰) | 0⁰ | 5⁰ (6, 5, 6) | 0⁰ |
| R Lat Flex (30⁰) | 15⁰ | 10⁰ (11, 13, 10) | 10⁰ |
| L Lat Flex (30⁰) | 15⁰ | 10⁰ (8, 8, 8) | 10⁰ |
| R Rotation (30⁰) | 5⁰ | 20⁰ (20, 22, 24) | 10⁰ |
| L Rotation (30⁰) | 5⁰ | 25⁰ (26, 24, 27) | 10⁰ |
| Combined (240⁰) | 75⁰ | 110⁰ | 60⁰ |
| Comment | ROM after 5 repetitions.  Painful motion.  Muscle spasm.  Limping gait.  Loss of lordosis. | Three repetitions. | Five months after spine surgery with decompression and L5-S1 fusion.  Painful motion, spasm, antalgic gait |
| §4.71a Rating | 20% | 20% | 40% |

The CI first sought care for acute LBP in July 2002 that began while performing vehicle maintenance duties. There was a history of mild LBP since training for which care was not sought. Due to persisting pain radiating into the legs, magnetic resonance imaging (MRI) was performed on 28 October 2002 which demonstrated presence of degenerative changes of the L4-5 and L5-S1 discs (desiccation) and protrusion of the L4-5 and L5-S1 discs “without discernable radicular effects” (no nerve root compression). Orthopedic examination performed on 18 November 2002 documented flexion of 90 degrees and extension of 10 degrees. The CI was not approved for cross-training by an MOS Medical Retention Board in March 2003 and referred for an MEB. Increased pain symptoms prompted re-evaluation and additional treatment including facet blocks and radiofrequency nerve ablation without lasting benefit. Neurosurgical evaluation in August 2003 recommended non-surgical treatment. MEB evaluation by a physical medicine and rehabilitation specialist on 26 August 2003 recorded complaints of pain radiating into both legs. On examination there was muscle spasm and an antalgic gait. Strength, reflexes and sensation were intact. The VA Compensation and Pension (C&P) examination performed on 25 September 2003 recorded complaint of back pain radiating into both thighs. Lower extremity strength, reflexes and sensation were intact. The ROM examination is recorded above. A physical therapy range of motion examination for the MEB was performed 31 October 2003, and is also recorded above. A repeat MRI performed on 11 November 2003 demonstrated bulging discs at L4-5 and L5-S1 without nerve root compression (a third MRI performed on 14 June 2004, after the FPEB and just prior to separation showed similar results). Facet joint arthrosis was present and previously facet joint injections decreased pain. Electromyogram (EMG) of the right lower extremity was negative for changes of radiculopathy. A repeat EMG by a civilian provider performed on 30 March 2004 was also negative for changes of radiculopathy in both lower extremities. Following separation, the CI was evaluated by a neurosurgeon performed on 15 September 2004. On examination, the surgeon documented normal gait, strength, reflexes and sensation and concluded the back pain was “mechanical pain to testing.” He noted the MRI findings with multilevel spondylitic disease (degenerative disc and joint) and thought that some of the pain was discogenic in nature, and possibly an annular tear at L5-S1. The neurosurgeon ordered a discogram to further evaluate whether the pain was discogenic in etiology. A discogram report dated 28 September 2004, states: “all of the disks were felt to be normal in there filling pattern and did not reproduce concordant or provocative pain from L5-S1.” On follow up with the neurosurgeon performed on 6 October 2004, the surgeon recorded that the discogram at L5-S1 demonstrated “a severe fissure in the disc with posterior leakage of the contrast dye and exact reproduction of his daily pain upon injection of dye.” The surgeon advised surgery and the CI underwent laminectomy, decompression and fusion at the L5-S1 level on 26 October 2004. Post-operatively, the CI’s pain did not improve. At the time of the C&P examination on 21 March 2005, the ROM recorded in the table above, was worse than prior to surgery and separation. The Board directs attention to its rating recommendation based on the above evidence. Although the FPEB stated its 20% rating was based on the now revoked USAPDA pain policy, it was consistent with the current VASRD §4.71a rating criteria which were in effect at the time. The Board considered the March 2005 C&P ROM examination upon which the VA based its 40% rating; however, this followed an elective spine surgery after separation and as a result is not of sufficient probative value to overcome the evidence prior to separation. Therefore, the Board relied on the evidence prior to separation in its deliberation and concluded that the preponderance of evidence most nearly approximated the 20% rating IAW the VASRD general rating formula for diseases and injuries of the spine (§4.71a). There was no evidence of incapacitating episodes due to intervertebral disc disease that would meet the criteria for a minimum rating under the alternative formula for incapacitating episodes due to intervertebral disease. The Board also considered if additional disability rating was justified for peripheral nerve impairment due to radiculopathy. Symptoms of radiating pain were present, however, examinations indicated normal strength with intact reflexes. Mild sensory changes were noted on some examinations in different locations. Although the MRI showed bulging and protruding lumbar discs, there was no neural impingement evident and EMG examinations in November 2003 and March 2004 were negative for electrodiagnostic evidence of radiculopathy. 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 radiating pain from the back condition, 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 concluded that there was insufficient cause to recommend a change in the PEB adjudication for the chronic back pain with degenerative disc disease 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. As discussed above, PEB reliance on the USAPDA pain policy for rating LBP was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the LBP condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. There were no other conditions within the Board’s scope of review for consideration.

RECOMMENDATION: The Board, therefore, recommends that there be no recharacterization of the CI’s disability and separation determination, as follows:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Mechanical Low Back Pain with Degenerative Disc Disease | 5099-5003 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110729, 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 XXXXXXXXXXXXXXXXXXXXXXXX, AR20120015224 (PD201100591)

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 and hereby deny the individual’s application.

This decision is final. The individual concerned, counsel (if any), and any Members of Congress who have shown interest in this application have been notified of this decision by mail.

BY ORDER OF THE SECRETARY OF THE ARMY:

Encl XXXXXXXXXXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA