RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: BRANCH OF SERVICE: Army

CASE NUMBER: PD1100600 SEPARATION DATE: 20070304

BOARD DATE: 20120316

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SGT/E-5 (42A, Human Resources Specialist) medically separated for chronic lumbar disc disease. The CI injured his back in 1992, and experienced recurrent bouts of back pain with right leg radicular symptoms over ensuing years. He was then diagnosed with disc disease; for which he underwent a microdiscectomy in 2000; and, ultimately a prosthetic disc replacement in 2004. Although he experienced significant relief from the latter procedure, his back could not be adequately rehabilitated 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 lumbar spine condition, characterized as “degenerative disc disease [DDD] at L5-S1 level, status post disc arthroplasty at L5-S1 with mild [DDD] at L1-2 with right lower extremity sensory radicular symptoms consistent with L5-S1 nerve root compression,” was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions were submitted by the MEB; but, other conditions evidenced in the Disability Evaluation System (DES) file, or contended, are addressed below. The PEB adjudicated the low back condition as unfitting, rated 0%, citing criteria of the US Army Physical Disability Agency (USAPDA) pain policy. The CI made no appeals, and was medically separated with a 0% disability rating.

CI CONTENTION: “The Army Physical Disability Board gave me a final disability rating of 0%. The VA later awarded me a service-connected disability rating of 80%. I am currently pending a determination of unemployability. … I had to endure 2 back surgeries while still on active duty, one of which involved implanting a prosthetic device into my back. … The VA also rated me for service-connected Anxiety disorder, as well as I.B.S. (Irritable Bowel Syndrome), and knee problems. … In summary there is no logical way that one rating agency could assess all the physical limitations I described at 80% (the VA) while the Army rates the same conditions at 0%.” He additionally lists all of his VA conditions and ratings as per the rating chart below. A contention for their inclusion in the separation rating is therefore implied.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Service PEB – Dated 20061208** | **VA (13 Mo. Post-Separation) – All Effective Date 20070305** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5299-5242 | 0% | HNP, Discectomy | 5242 | 20% | 20080410 |
| ↓No Additional MEB/PEB Entries↓ | Anxiety Disorder | 9413 | 70% | 20080410 |
| Cervical Strain | 5237 | 10% | 20080410 |
| Left Knee | 5260 | 10% | 20080410 |
| Irritable Bowel | 7319 | 10% | 20080410 |
| 0% x 2 / Not Service Connected x 5 | 20080410 |
| **Combined: 0%** | **Combined: 80%** |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which his service-incurred condition continues to burden him. The Board wishes to clarify that it is subject to the same laws for service disability entitlements as those under which the Disability Evaluation System (DES) operates. 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. That role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA), operating under a different set of laws (Title 38, United States Code). 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. The Board further acknowledges the CI’s contention for service ratings for other conditions documented at the time of separation, and notes that its recommendations in that regard must comply with the same governance. 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 DVA; however, is empowered to compensate 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.

Lumbar Spine Condition. The CI injured his lower back in December 1992 while playing racquetball. He was treated conservatively and improved; but, had repeat medical visits for low back pain increasing severity and regularity. In 2000, he reported severe back pain radiating down his right leg after working out at the gym. An magnetic resonance imaging (MRI) at that time revealed “a large disc herniation … displacing the right S1 nerve root.” He underwent his first surgery (L5/S1 hemilaminectomy and discectomy) in October 2000. He initially experienced improvement, but over time suffered progressive recurrence of pain and radicular symptoms. He was diagnosed with DDD, and did not respond to further conservative measures. A total L5/S1 disc replacement was performed in March 2004. That procedure was fairly successful for pain relief, but did not restore the CI to an acceptable level of functioning; that, despite his best efforts and a protracted attempt at adequate rehabilitation. Follow up x-rays revealed a stable prosthetic disc at L5-S1 with DDD at L4-L5. 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.

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM | MEB ~4 Mo. Pre-Sep | VA C&P ~13 Mo. Post-Sep |
| Flexion (140⁰ Normal) | 60⁰ | 50⁰ |
| Combined (240⁰) | 140⁰ | 196⁰ |
| Comments | Pain with all motion. | Pain with all motion. |
| §4.71a Rating | 20% | 20% |

At the MEB exam, the CI reported moderate occasional pain throughout the low back with numbness in his lower right extremity; aggravated by heavy lifting, running, and marching more than a quarter mile. The MEB examiner noted no radicular symptoms, and identified no tenderness or other relevant spine findings; although, his neurologic exam identified a mild sensory deficit in the right distal L5/S1 dermatome, and diminished right tendon reflexes. Strength testing was normal, however. At the VA Compensation & Pension (C&P) exam significantly remote from separation, the CI reported daily pain but was not taking any medications due to liver problems. He could walk a half-mile, sit for 15 minutes or stand for five minutes before experiencing pain. Numbness in the right lower extremity was also noted. The VA examiner noted a normal gait; and, the only neurologic finding was diminished sensation of the right heel; motor strength and reflexes were normal.

The Board directs attention to its rating recommendation based on the above evidence. Although there are no relevant differences in the ratable parameters between the MEB and VA exams, it was agreed that the MEB evidence was most probative for its proximity to the date of separation. The PEB and VA both applied the code 5242 (degenerative arthritis of the spine), which is appropriate to the diagnosis. The PEB’s 0% rating, derived from the USAPDA pain policy, is not compliant with VASRD §4.71a criteria. The ROM measurements by both the MEB and VA are consistent with a 20% rating IAW §4.71a. The Board considered whether additional service rating could be recommended under a peripheral nerve code for the residual sciatic radiculopathy at separation. Firm Board precedent requires a functional impairment tied to fitness is required to support a recommendation for addition of a peripheral nerve rating to service disability in spine cases. The pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a. The sensory component in this case has no functional implications; and no motor weakness was in evidence. Since no evidence of functional impairment exists in this case, the Board cannot support a recommendation for additional rating based on peripheral nerve impairment. There was no documentation of incapacitating episodes which would provide for higher rating. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a separation rating of 20% for the lumbar spine condition.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for anxiety disorder, irritable bowel syndrome (IBS), and knee pain. In 2005 the CI received a command referral for mental health evaluation for “a pattern of anger management problems, paranoia and threatening speech.” The outcome of this evaluation is not evidenced in the available records, but concurrent and subsequent performance evaluations do not reflect any active issues along behavioral lines. A history of anxiety and past counseling was noted by the CI on the MEB physical, but there are no mental health encounters in evidence during the MEB period; and only analgesics for the back pain were listed as medications at discharge. Neither the IBS nor the knee problem was clinically active during the MEB period. None of these conditions were profiled, implicated in the commander’s statement or noted as failing retention standards. All three conditions were reviewed by the action officer and considered by the Board. There was no evidence for concluding that any of them interfered with duty performance to a degree that could be argued as unfitting. The Board determined therefore that none of the stated conditions were subject to service disability rating.

Remaining Conditions. Other conditions identified in the DES file were headaches, heartburn, insomnia, psoriasis, and lower jaw pain. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were significantly clinically or occupationally active during the MEB period; none carried attached profiles; and, none were implicated in the commander’s statement. These conditions were reviewed by the action officer and considered by the Board. It was determined that none could be argued as unfitting and subject to separation rating. The Board therefore has no reasonable basis for recommending any additional unfitting conditions for service disability rating.

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 the lumbar spine condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the lumbar spine condition, the Board unanimously recommends a rating of 20% coded 5299-5242 IAW VASRD §4.71a. In the matter of the contended anxiety disorder, irritable bowel syndrome, and knee pain conditions; the Board unanimously agrees that it cannot recommend any findings of unfit for additional rating at separation. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as additionally unfitting for rating at separation.

RECOMMENDATION: The Board recommends that the CI’s prior determination be modified as follows, effective as of the date of his prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Degenerative Disc Disease, Lumbar Spine | 5299-5242 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110803, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans Affairs Treatment Record

 President

 Physical Disability Board of Review

SFMR-RB

MEMORANDUM FOR Commander, US Army Physical Disability Agency

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

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 20% 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

 Deputy Assistant Secretary

 (Army Review Boards)