RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXX BRANCH OF SERVICE: air force

CASE NUMBER: PD1100605 SEPARATION DATE: 20051025

BOARD DATE: 20120511

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty Air National Guard MSGT/E-7 (2T171, Vehicle Operator) medically separated for a lumbar spine condition. The CI first injured his back as a postal worker in 1999 and was diagnosed with lumbar disc disease. He underwent a laminectomy in April 2000, and was activated with his unit 4 months later. On active duty he suffered recurrent back pain with right lower extremity radicular symptoms, but these symptoms escalated in 2003. A trial of conservative measures, including epidural steroid injections, was unsuccessful; and, he underwent an L4-5/L5-S1 laminectomy and fusion in April 2004. Post-operatively, however, his spine condition could not be adequately rehabilitated to meet the physical requirements of his Air Force Specialty (AFS) or satisfy physical fitness standards. He was issued a permanent L4 profile and referred for a Medical Evaluation Board (MEB). The lumbar spine condition was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AFI 48-123. No other conditions were submitted by the MEB. The PEB adjudicated the lumbar spine condition as unfitting, rated 10%, referencing the Veterans Administration Schedule for Rating Disabilities (VASRD). Additionally, “overweight” was listed on the PEB’s AF Form 356 as category III (conditions that are not separately unfitting and not compensable or ratable). The CI withdrew an initial request for formal proceedings, and was medically separated with a 10% disability rating.

CI CONTENTION: [Spelling errors corrected.] “The rating was grossly underrated, I was in duress to begin a new Job as offered. I was intimidated by the counsel at Lackland Air Force Base that I receive an unfavorable decision. My back is fused in 5 vertebrae, I still have distinct issues and have not received adequate medical care from the VA. I served in the military 23 years 14 of which was active, and have no identification with the Military whatsoever. I have other SC [service-connected] med problems. … [Elaborates foot surgery, “mental issues,” sleep apnea, “sexual side effects,” gout, and knee conditions.] … I had to procure my own insurance for my wife and kids at great distress, and have barley been able to secure employment.”

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 conditions “identified but not determined to be unfitting by the PEB.” Although the Board will review the service rating for the unfitting lumbar spine condition, none of the conditions forwarded in the application meet the criteria prescribed in DoDI 6040.44 for Board purview. Those conditions, or any condition or contention outside the Board’s defined scope of review, remain eligible for future consideration by the Air Force Board for the Correction of Military Records (BCMR).

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20050815** | | | **VA (1 Mo. Pre-Separation) –Effective as of 20051001** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Back Pain S/P Laminectomy … | 5241 | 10% | Failed Back Syndrome … | 5242 | 20% | 20050909 |
| Overweight | Category III | | No VA Entry | | | 20050909 |
| No Additional MEB/PEB Entries | | | Hagland’s Deformity, Right Foot | 5284 | 10%\* | 19921203 |
| Hagland’s Deformity, Left Foot | 5284 | 10%\* | 19921203 |
| **Combined: 10%** | | | **Combined: 40%** | | | |

\*Awarded 19921002 from prior period of active duty.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the gravity of his condition and the significant impairment with which his service-connected conditions continue to burden him. It is a fact, however, that the Disability Evaluation System (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. This role and authority is granted by Congress to the Department of Veterans’ Affairs (DVA). The DVA, operating under a different set of laws (Title 38, United States Code), 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. The Board utilizes DVA evidence proximal to separation in arriving at its recommendations; but, the Board’s authority as defined in DoDI 6044.44 resides in evaluating the fairness of DES rating decisions for disability at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects disability implications at the time of separation.

Lumbar Spine Condition. The narrative summary (NARSUM) related the chronology of the history as noted above, and referred to a civilian neurosurgical note for the current clinical status. The neurosurgeon’s final follow-up note (9 months post-op) stated, “he is doing good. He is fused at L4, L5, and S1. He has got no complaints at this time. He has occasional pain, but this is self-limiting and rare. In the interim, he is very happy with the way things are going.” The physical exam noted, “No paralumbar spasms. Negative straight leg raises. Equal strength throughout. Normal reflexes throughout. Normal sensation throughout.” The neurosurgeon’s report referenced in the NARSUM stated, “he has reached medical stability at this point. He has improved very well as far as strength, reflexes, and sensation are concerned.” The physical limitations imposed (as repeated in the NARSUM) were “no running, jumping, marching, prolonged standing, or wearing of rucksacks greater than 25 pounds.” The NARSUM physical examination noted right radicular pain elicited by the acts of standing or sitting, and commented that “muscle strength seems to be weaker on the right.” No detailed neurological examination was provided. There was the comment that all six planes of spinal motion were “quite painful;” but, no measured, or even grossly observed, range-of-motion (ROM) information was provided. There was, in fact, no service evidence available for measured or estimated thoracolumbar ROM. At the VA rating evaluation (a month after separation), the examiner noted a history of severe back pain “partially relieved” by surgery. Reported severity is excerpted below.

He has back pain 90% of the time, averaging a 4/10, but flare-ups occur twice monthly and last 4 to 5 days at an 8/10 pain. During the severe pain, when he is incapacitated "I have to take it totally easy," he says. This past 12 months he has lost 20 days of work because of his back pain.

The VA physical exam noted an antalgic gait, but fluid movement mounting the exam table, and paraspinal spasm. The ROM exam is excerpted below.

He has pain and limitation of motion of the lumbar spine, which he first feels pain measured with a goniometer at 31 degrees active, and passive to 38 degrees; backward extension 35 degrees; lateral flexion left 29 degrees; 30 degrees rotation on the right; 35 degrees on the left. … There is an additional 5 degrees limitation of motion because of pain, weakness, fatigability, and incoordination during flare-ups and repetitive motion. The major functional impact is pain.

Neurologic testing documented an absent right Achilles’ reflex and a sensory deficit at the ball of the right foot. There were no motor deficits.

The Board directs attention to its rating recommendation based on the above evidence. Although the PEB’s AF Form 356 referenced the VASRD for rating, it did not document ROM evidence; and, as near as can be ascertained, there were no service ROM measurements on which to base a rating grounded in VASRD §4.71a. There is no ROM evidence proximal to separation on which the Board can base its recommendation other than that excerpted above from the VA evaluation. The VA ROMs omitted right lateral flexion, so no combined ROM can be derived; but combined ROM substituting 0⁰ would still fall within the 10% range under the VASRD general spine formula. The measured flexion is somewhat in doubt since it appears to reflect only the point at which pain ensued, but clearly meets the 60⁰ threshold for a 20% rating. The noted antalgic gait would also qualify for a 20% rating. Rating under the incapacitating episodes formula, if 20 days over 12 months were conceded based on the VA examiner’s statement, would also yield a 20% rating (lack of documentation or physician orders notwithstanding). The flexion threshold for the next higher rating of 40% is 30⁰. Members deliberated if a 5⁰ DeLuca deduction, per the examiner’s repetitive motion comments, could reasonably be subtracted from the 31⁰ flexion to achieve a 40% rating. After deliberation it was concluded that this was not reasonable, given that: the flexion measurement itself is subject to speculation as to whether ROM was limited by the examiner to the first solicitation of pain; the repetitive motion limitation was caveated as “during flare-ups;” and, the VA did not apply a DeLuca deduction. 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 lumbar spine condition. The action officer recommended, and the Board concurred with, application of code 5241 (spinal fusion) for its clinical compatibility.

Associated Lumbar Radiculopathy. The Board additionally considered whether a separate rating could be recommended, under a peripheral nerve code, for the residual sciatic radiculopathy in evidence at separation. Firm Board precedent requires a functional impairment tied to fitness to support a recommendation for addition of a peripheral nerve rating to 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 (per the VA examiner) has no functional implications. Although the NARSUM raised the question of a motor weakness, this was more likely an artifact of pain and guarding; since all formal strength testing in evidence was normal. It is also noted that the VA did not confer a peripheral nerve rating. There is thus no evidence of a separately ratable functional impairment (with fitness implications) from the residual radiculopathy; and, the Board cannot support a recommendation for an additional disability rating on this basis.

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. The Board did not surmise from the record or PEB ruling in this case that any prerogatives outside the VASRD were exercised; although, as explained above, supporting VASRD criteria were not in evidence. In the matter of the unfitting lumbar spine condition, the Board unanimously recommends a disability rating of 20%, coded 5241 IAW VASRD §4.71a. The Board unanimously agreed that an additional disability rating cannot be recommended for the residual lumbar radiculopathy present at separation. 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, effective as of the date of his prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Surgical Residuals, Lumbar Disc Disease | 5241 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 201110722, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

XXXXXXXXXXXXXX

President

Physical Disability Board of Review

SAF/MRB

1500 West Perimeter Road, Suite 3700

Joint Base Andrews MD 20762

Dear XXXXXXX:

Reference your application submitted under the provisions of DoDI 6040.44 (Title 10 U.S.C. § 1554a), PDBR Case Number PD-2011-00605.

After careful consideration of your application and treatment records, the Physical Disability Board of Review determined that the rating assigned at the time of final disposition of your disability evaluation system processing was not appropriate under the guidelines of the Veterans Administration Schedule for Rating Disabilities. Accordingly, the Board recommended modification of your assigned disability rating without re-characterization of your separation with severance pay.

I have carefully reviewed the evidence of record and the recommendation of the Board. I concur with that finding, accept their recommendation and direct that your records be corrected as set forth in the attached copy of a Memorandum for the Chief of Staff, United States Air Force. The office responsible for making the correction will inform you when your records have been changed.

Sincerely,

XXXXXXXXXXXXXX

Director

Air Force Review Boards Agency

Attachments:

1. Directive

2. Record of Proceedings

cc:

SAF/MRBR

DFAS-IN

PDBR PD-2011-00605

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Physical Disability Board of Review and under the authority of Title 10, United States Code, Section 1554a (122 Stat. 466) and Title 10, United States Code, Section 1552 (70A Stat. 116) it is directed that:

The pertinent military records of the Department of the Air Force relating XXXXXXXXXX, be corrected to show that the diagnosis in his finding of unfitness was Surgical Residuals, Lumbar Disk Disease, VASRD Code 5241, rated at 20%, rather than 10%.

XXXXXXXXXXXX

Director

Air Force Review Boards Agency