RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100618 DATE OF PLACEMENT ON TDRL: 20030709

BOARD DATE: 20120327 Date of Permanent SEPARATION: 20050224

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSG/E-6 (92A, Automated Logistics Specialist) medically separated for asthma. The CI first developed pulmonary symptoms in 1995; was diagnosed with asthma in 1999; and, finally could not be adequately controlled to satisfy physical fitness standards. She was issued a permanent P3 profile and referred for a Medical Evaluation Board (MEB). The asthma condition 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, contended or evidenced in the Disability Evaluation System (DES) file, are addressed below. The PEB adjudicated the asthma condition as unfitting, rated 30%, citing “daily inhalational therapy” IAW the Veterans Administration Schedule for Rating Disabilities (VASRD); and, placed the CI on the Temporary Disability Retired List (TDRL). After 18 months on TDRL, the CI’s asthma condition was considered to be stable but still unfitting. She was removed from TDRL in 2005 and permanently separated with a 0% rating, citing normal spirometry and no medication use for the ratable period based on pharmacy records. The CI appealed to the Formal (PEB), but waived her formal hearing; and, the above determination was affirmed by the U. S. Army Physical Disability Agency (USAPDA). The CI was thus medically separated with a 0% service disability rating.

CI CONTENTION:“I was diagnosed with Restricted Airway Disease in 1995 during my year long deployment to Bosnia-Herzegovina. [Provides details of environmental exposures and the subsequent clinical course.] The Army allowed me to still serving after being diagnosed with Asthma, and I was only given temporary profiles to run at my own pace and distance. I was never issue Permanent file until the Unit had to Deploy to IRAQ in April 2003 and that’s when I was given a permanent profile and recommended for MEB. There was nothing done about my condition but continued medicines steroids and inhalers, and …discharges … first with the TDRL later permanently discharged with a 0% rating. I now I am using the ADVAIR DISC 500/50 and my inhaler when needed to control my Asthma Condition.” She additionally lists all of her VA conditions and ratings as per the chart below; and, a request for consideration of service rating is implied.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Final Service PEB – Dated 20050105** | **VA (15 Mo. Prior to Adjudication Date ) – All Effective Date 20031023** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| **On TDRL –20030709** | **TDRL** | **Sep.** |
| Asthma | 6602 | 30% | 0% | Asthma | 6602 | 10% | 20031118 |
| ↓No Additional MEB/PEB Entries↓ | Migraine Headaches | 8100 | 30% | 20031118 |
| Cervical Strain | 5237 | 20% | 20031118 |
| Scar, S/P C-Section | 7804 | 10% | 20031118 |
| Sciatica | 8520 | 10% | 20031118 |
| 0% x 2 / Not Service Connected x 8 | 20031118 |
| **Combined: 0%** | **Combined: 60%** |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the persistent severity of her service-connected asthma condition. It is a fact, however, that 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. 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 further acknowledges the perception expressed by the CI that her asthma was not fully treated by the service; but, must note for the record that it has neither the jurisdiction nor authority to scrutinize or render opinions in reference to such allegations. The Board’s role is confined to the review of medical records and other evidence to assess the fairness of service ratings compared to VASRD standards at the time of separation, and the fairness of service fitness determinations.

Asthma Condition. The CI was diagnosed with asthma in 1999 via a significant response to methacholine challenge (completely reversed with bronchodilator). She was prescribed an Albuterol (bronchodilator) rescue inhaler, and inhalational triamcinolone (steroid anti-inflammatory). Adequate control was not obtained, and in 2003 she was switched to Advair (a daily inhalational steroid/long-acting bronchodilator combination); and, subsequently Singulair (oral indirect-acting bronchodilator) was added to her regimen. She continued to experience daily trouble breathing, with daily repetitive use of her rescue Albuterol inhaler. In January 2003, she was prescribed an oral course of Orednisone (systemic corticosteroid); and, repeat courses were prescribed in April and June (all three courses within 6 months of TDRL rating). At the initial MEB exam in 2003, the CI reported using her rescue Albuterol inhaler 4-5 times a day, along with daily doses of Advair and Singulair as above. A pulmonary function test (PFT) revealed the normal parameters charted below. She was able to perform in her MOS, but was not deployable. She was placed on TDRL in October 2003; and, revaluated October 2004 (the only TDRL evaluation). The CI had received an interim asthma rating of 10% from the VA, which cited only PFT parameters from an exam not in evidence; and, apparently with disregard to the service medication evidence. The TDRL examiner reported, “during the past year she has had three visits to the emergency room for dyspnea and asthma related symptoms and treatment. Also during this past year, she has had three courses of oral prednisone for asthma symptom control.” Although there is an ER visit in the service treatment record (STR) shortly following final separation, there are none in evidence for the ratable period during TDRL. Likewise, there is no STR evidence of any additional oral courses of prednisone after TDRL commenced. A prednisone taper was prescribed shortly after separation, but for generalized allergic symptoms rather than asthma control. The medications documented by the TDRL exam were Albuterol “two puffs up to four times a day as needed” and daily doses for Singulair and Advair. The TDRL examiner diagnosed the CI with “asthma, exercise induced, mild, persistent,” and opined that she continued to fail retention standards. The two PFT evaluations in evidence, documenting the ratable parameters which the Board weighed in arriving at its rating recommendation, are summarized in the chart below:

|  |  |  |
| --- | --- | --- |
| **Exam** | **~1 Mo. Pre-TDRL** | **~6 Mo. Pre-Sep** |
| FEV1 (% Predicted) | 108% | 103% |
| FEV1/FVC | 103% | 99% |
| Meds | Albuterol, Advair, Singulair daily.3 courses systemic steroids past year. | Albuterol as needed); Advair, Singulair daily. |
| §4.97 Rating | 60%\* | 30%\*\* |

 \* Based on systemic steroids. \*\* *If* conceding daily compliance with above meds.

The Board directs attention to its rating recommendations based on the above evidence. The unequivocal VASRD code for rating asthma is 6602. VASRD §4.97 defines both PFT-derived criteria and clinical treatment criteria for rating under 6602. The specified PFT parameters (as charted above) do not support *per se* a compensable rating at either temporary retirement or permanent separation. The non-PFT derived criteria under 6602 are: “intermittent inhalational or oral bronchodilator therapy” for 10%; “daily inhalational or oral bronchodilator therapy, or; inhalational anti-inflammatory medication” for 30%; and, “intermittent (at least three per year) courses of systemic (oral or parenteral) corticosteroids” for 60%. Regarding the TDRL rating, the STR evidence elaborated above documents three courses of systemic steroids over the rating period which meets the 60% criteria. This was not documented in the narrative summary (NARSUM) before the PEB in 2003, and the 30% rating conferred by the IPEB was compliant with §4.97 based on the evidence in the core DES file. The Board deliberated if a recommendation for an increase in the TDRL rating was warranted; and, concluded that the MEB examiner should have documented this significant information in the NARSUM and that the PEB was accountable for the integrity of the NARSUM. Thus, the Board recommends an increase in the TDRL rating to 60% in this case.

The Board next considered the appropriate permanent separation rating recommendation for this case. The key issue is whether either the 10% or 30% treatment criteria quoted above were satisfied by the preponderance of the evidence; since no systemic steroid treatment was documented by treatment notes. It is acknowledged that the VASRD is somewhat outdated for asthma since modern treatment has expanded to include many treatment agents not employed when the existing rating criteria were promulgated. Contemporary regimens routinely employ daily maintenance with a variety of inhaled steroid (anti-inflammatory) and/or bronchodilator agents. The VA generally concedes the 30% rating if there is a prescription for daily use of any of these agents; and, the Board’s precedent has been to follow suit, even though it is clear that this encompasses many cases of well-controlled disease associated with minimal limitations and disability. The Board however does take the reasonable position that the evidence in such cases should satisfy an assumption that the treatment regimen supporting the higher rating is necessary to maintain good control of the condition. That question is only raised in cases where there is evidence that the condition is well controlled in spite of non-compliance with prescribed regimens, or that daily use is not maintained on a consistent basis. The final PEB’s rationale for its 0% rating was based on exactly this principle. The PEB’s DA Form 199 stated, “review of pharmacy records revealed that soldier has not utilized medications as prescribed.” The CI’s rebuttal to the PEB contained the following excerpt.

Stated also, was that the Pharmacy records showed that I have not utilized my medications as prescribed. I believe these records came about if you pulled up my social security number. When I was placed on TDRL in 2003, I became a dependent because my spouse is active duty, and all my present medications are filled under the social security number of my spouse [supplies number]. With that social security number you will see that I receive all my medications through Tricare Prime.

The PEB response to the CI’s rebuttal contained the following excerpt.

[CI addressed], the PEB used the SSAN [social security account number] you provided in your rebuttal when evaluating your case. Per the pharmacy records there is no indication that you were using asthma medications from September to December of 2004. There are no records supporting the NARSUM statement that you were treated with high dose steroids (Prednisone) during the last year, and the pharmacy record does not reflect this treatment either.

The PEB’s 0% rating was therefore premised on the absence of even intermittent treatment for a significant portion of the rating period. The action officer and Board members carefully reviewed the medication log, cross-checked with the clinical entries in the STR. Concurrent clinical treatments verified the treatment regimen with daily doses, but were silent regarding compliance. There were no conflicting pharmacy entries. The findings from the medication log are summarized in the chart below. The log was in the CI’s name, but under a different SSAN; and, it must be concluded that it is the pharmacy account referenced in her rebuttal. All dispenses during the period 24 February 2004 through 24 February 2005 (12 months preceding the Boards adjudication date) are captured. Dates of dispensing are not included, although the lack of dispensing during the interval documented in the PEB response to rebuttal was verified.

|  |  |  |  |
| --- | --- | --- | --- |
| **Med** | **Dose/Unit Quantities** | **Total Dispensed/12 Mo.** | **Average Annual Use** |
| Albuterol | 1-2 puffs every 4-6 hrs; 200 puffs/inhaler | 3 Inhalers | < 2 puffs/day average |
| Singulair | 1 tab per day | 2 X 90 Tabs | 180/365 days |
| Advair | 1 puff twice per day; 60 puffs/diskus | 3 Diskus | 90/365 days |

It is clear from the above that daily medication use could not have been sustained from the supply of medication dispensed by the CI’s military treatment facility (MTF). In her rebuttal, the CI did not assert that she was dispensed meds outside the MTF. The evidence does not exclude the possibility of daily use of albuterol at a low dose, but that is not rational from a clinical standpoint. The Board thus concluded that the CI did not require daily asthma treatment on a sustained basis during the rating period; and, was satisfied that only intermittent treatment was required to maintain the satisfactory functional control evidenced by her PFT results. The Board does not support the PEB’s 0% position based on the hiatus of treatment, given the 12 month rating interval specified under VASRD Code 6602. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a TDRL rating of 60% and a permanent service disability rating of 10% for the asthma condition.

Remaining Conditions. Other conditions identified in the DES file were migraine headaches, history of c-section, plantar fasciitis, bladder infection, and low back pain (sciatica). Several additional non-acute conditions or medical complaints were also documented. None of these conditions were clinically 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 service disability rating. Additionally, cervical strain was noted in the VA rating decision proximal to separation, but was not documented in the DES file. The Board does not have the authority under DoDI 6040.44 to render fitness or rating recommendations for any conditions not considered by the DES. 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. The Board did not surmise from the record or PEB ruling in this case that any prerogatives outside the VASRD were exercised. In the matter of the asthma condition, the Board unanimously recommends a rating of 60% during the prescribed period of TDRL; and, a permanent service disability rating of 10% coded 6602 IAW VASRD §4.97. 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; with a disability rating of 60% for the prescribed period of TDRL and a final service disability rating of 10%, effective as of the date of her prior medical separation.

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| **TDRL** | **PERMANENT** |
| Asthma | 6602 | 60% | 10%  |
| **COMBINED** | **60%** | **10%**  |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110812 w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans Affairs Treatment Record

 XXXXXXXXXX

 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 XXXXXXXXX, AR20120006637 (PD201100618)

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 constructively place the individual on the Temporary Disability Retired List (TDRL) at

60% disability instead of 30% disability for the period 23 October 2003 to 23 February 2005 and then following this period no recharacterization of the individual’s separation but a modification of the permanent disability rating from 0% to 10%.

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 as follows:

 a. Providing a correction to the individual’s separation document showing that the individual was separated by reason of temporary disability effective the date of the original medical separation for disability with severance pay.

 b. Providing orders showing that the individual was separated with a permanent combined rating of 10% effective the day following the TDRL period with no recharacterization of the individual’s separation.

 c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will provide 60% retired pay for the constructive temporary disability retired period effective the date of the individual’s original medical separation and adjusting severance pay as necessary to account for the additional TDRL time in service.

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 XXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA