RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXXXX BRANCH OF SERVICE: air force

CASE NUMBER: PD1100625 SEPARATION DATE: 20050613

BOARD DATE: 20120209

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty member, SSG/E-5 (3P051/Security Forces Journeyman), medically separated from the Air Force after 10 years of service. The medical basis for the separation was Obstructive Sleep Apnea (OSA), mild social and industrial adaptability impairment. He had symptoms of excessive daytime somnolence and snoring. He underwent sleep study testing and was provided continuous positive airway pressure therapy (CPAP). He did not improve adequately for performance within his Air Force Specialty (AFS) or meet physical fitness standards; and was consequently issued a P4 profile and underwent a Medical Evaluation Board (MEB). The MEB forwarded “severe OSA-hypopnea syndrome on CPAP at 14-16 cm water pressure” to the Physical Evaluation Board (PEB) on AF Form 618 as medically unacceptable IAW AFI 48-123. No other conditions appeared on the MEB’s submission. Other conditions included in the Disability Evaluation System (DES) packet will be discussed below. The PEB adjudicated “sleep apnea, mild social and industrial adaptability impairment” condition as unfitting, rated 0% with application of the Veterans Administration Schedule for Rating Disabilities (VASRD) and DoDI 1332.39. The PEB also addressed obesity and adjudicated it as a category III condition (conditions that are not separately unfitting and not compensable or ratable). The CI made no appeals, and was medically separated with a 0% disability rating.

CI CONTENTION: The CI states: “I was discharged from Active Duty for sleep apnea. I had been diagnosed with sleep apnea while on active duty and given a CPAP machine to wear as well. I wore the machine on active duty for approximately 7 months prior to separation. I was awarded 50% disability by the Veteran's Administration for this condition and 0% by the Air Force.”

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RATING COMPARISON:

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| --- | --- | --- | --- | --- | --- | --- |
| **Service IPEB – Dated 20050427** | | | **VA (2 Mos. After Separation) – All Effective 20050614** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| OSA | 6847 | 0% | Sleep Apnea | 6847 | 50% | 20050824 |
| Obesity | Cat III | | No VA Entry | | | |
| ↓No Additional MEB/PEB Entries↓ | | | Medial Meniscal Injury Right Knee | 5259 | 10% | 20050824 |
|  | | | 0% x 1 / Not Service Connected x 0 | | |  |
| **Combined: 0%** | | | **Combined: 60%** | | | |

ANALYSIS SUMMARY: The Board acknowledges the CI’s contention that suggests service rating should have been similar to the VA rating. 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. 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 Board’s authority as defined in DoDI 6040.44, however, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation.

Obstructive Sleep Apnea (OSA) Condition.

The PEB found the OSA condition unfitting with mild social and industrial adaptability impairment and rated this condition at 0%. The CI was seen in October 2003 for a one month complaint of constant tiredness and sleeping too much, but there was no referral for a sleep study at that time. The CI was seen again for a complaint of loud snoring and restless sleep with episodic shortness of breath and in November 2004, the CI was referred for a sleep apnea evaluation (which included the sleep study) based on symptoms of obstructive structural problems-excessively loud snoring, obesity, daytime somnolence, observed apnea periods by sleep partner, fatigue, nocturnal awakening, and altered sleep patterns. At the end of November, the CI underwent a “split night study” which demonstrated severe OSA/hypopnea syndrome with positional component, with a good response to a continuous positive airway pressure (CPAP) machine. The MEB examination four months prior to separation was completed by a pulmonologist who noted that the CI had an eight month history of OSA symptoms of awakening with choking or a gasping sensation; morning headaches; weekly choking or gasping sensation; excessive daytime somnolence; and loud snoring. The CI was given a P4 profile.

The commander’s statement indicated that the CI’s OSA clearly affected his abilities on a daily basis and that he required the use of the CPAP machine nightly. The CI wrote a letter to the PEB that stated he continued to feel extremely tired during the day, even after he started using the CPAP. He was able to take fewer naps and his symptoms had improved since he started using the CPAP, but symptoms persisted. He stated he often had other people drive for him and had trouble concentrating on tasks due to his excessive tiredness. The VA Compensation & Pension (C&P) examination performed two months after separation documented that the CI was responding well to the use of the CPAP machine for his OSA. A pulmonary function test done at this exam demonstrated a mild airflow obstruction. VA treatment notes through 2008 show the CI continued to use his CPAP machine.

The PEB’s AF Form 356 assigned a 0% rating under DODI 1332.39 (E2.A1.2.21), and based the fitness adjudication solely on field impediments to the use of CPAP. Contemporary PEBs across all of the services no longer consider OSA to be unfitting solely on this basis. However the Board, by legal opinion and firm precedent, does not make recommendations contrary to a PEB determination that a condition was unfitting. VASRD §4.100 mandates a minimum rating of 50% under 6847 for OSA requiring a breathing assistance device. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), and IAW DoDI 6040.44 and the VASRD, the Board must recommend a separation rating of 50% for the OSA condition.

Other PEB Conditions. Obesity is not a condition constituting a physical disability and is not compensable or ratable and was appropriately indicated as a category III by the PEB.

Remaining Conditions. No other conditions were noted in the narrative summary (NARSUM) or found elsewhere in the DES file. Medial Meniscal Injury Right Knee was noted in the VA rating decision proximal to separation that 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 separation 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. In the matter of the OSA condition, the Board unanimously recommends a rating of 50% coded 6847 IAW VASRD §4.97a. In the matter of the obesity condition, the Board unanimously recommends no change from the PEB adjudications as not unfitting. 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.

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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:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Obstructive Sleep Apnea | 6847 | 50% |
| **COMBINED** | **50%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110619, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans Affairs Treatment Record

XXXXXXXXXXX

President

Physical Disability Board of Review

SAF/MRB

1500 West Perimeter Road, Suite 3700

Joint Base Andrews MD 20762

Dear XXXXXXXXXXX

Reference your application submitted under the provisions of DoDI 6040.44 (Title 10 U.S.C. § 1554a), PDBR Case Number PD-2011-00625.

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 your separation be re-characterized to reflect disability retirement, rather than 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 determined that your records should be corrected accordingly. The office responsible for making the correction will inform you when your records have been changed.

As a result of the aforementioned correction, you are entitled by law to elect coverage under the Survivor Benefit Plan (SBP). Upon receipt of this letter, you must contact the Air Force Personnel Center at (210) 565-2273 to make arrangements to obtain an SBP briefing prior to rendering an election. If a valid election is not received within 30 days from the date of this letter, you will not be enrolled in the SBP program unless at the time of your separation, you were married or had an eligible dependent child, in such a case, failure to render an election will result in automatic enrollment.

Sincerely,

XXXXXXXXXXXX

Director

Air Force Review Boards Agency

Attachment:

Record of Proceedings

cc:

SAF/MRBR

DFAS-IN

PDBR PD-2011-00625

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 to XXXXXXXX, be corrected to show that:

a.  The diagnosis in his finding of unfitness for Obstructive Sleep Apnea, VASRD code 6847, was rated at 50% rather than 0%.

b.  On 12 June 2005, he elected spouse-only Survivor Benefit Plan coverage based on a reduced level of retired pay and on that same date, his spouse XXXXX, concurred with his election.

c.   He was not discharged with entitlement to disability severance pay on 13 June 2005; rather, on that date he was released from active duty and on 14 June 2005 his name was placed on the Permanent Disability Retired List.

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Director

Air Force Review Boards Agency