RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100649 SEPARATION DATE: 20050501

BOARD DATE: 20120531

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (65J/Mechanic) medically separated for lumbar spine, left ankle, obstructive sleep apnea (OSA) and pes planus conditions. The lumbar spine condition developed during a 2004 deployment to Kuwait, and was diagnosed as non-surgical degenerative disc disease (DDD). The ankle condition was due to a ligamental injury during the same deployment. OSA was diagnosed in 2005 during MEB proceedings. Pes planus was identified during the MEB evaluation and was noted on the enlistment examination, but no further historical details are in evidence. None of these conditions could be adequately rehabilitated to meet the physical requirements of the CI’s Military Occupational Specialty (MOS) or satisfy physical fitness standards. The CI was consequently issued a permanent P3/L3 profile and referred for a Medical Evaluation Board (MEB). All four of the above conditions were forwarded to the Physical Evaluation Board (PEB) as failing AR 40-501 retention standards. A psychiatric condition (adjustment disorder) was also addressed by the MEB, and forwarded as meeting retention standards. The PEB adjudicated the lumbar spine condition as unfitting, rated 10%, citing criteria of the US Army Physical Disability Agency (USAPDA) pain policy; the left ankle condition as unfitting, rated 0%, citing criteria of the Veterans Administration Schedule for Rating Disabilities (VASRD); the OSA condition as unfitting, rated 0%, citing criteria of Department of Defense Instruction (DoDI) 1332.39; and, the pes planus condition as unfitting, rated 0%, citing criteria of the USAPDA pain policy. The psychiatric condition was determined to be not unfitting. The CI made no appeals, and was medically separated with a 10% combined service disability rating.

CI CONTENTION: “I was rated by the VA at 90%. I know that a rating of 10% by the Army cannot be correct. The conditions that lead to my medical discharge have effected [*sic*] my life outside of the Military. I suffer from migraines, OSA, PTSD, bone spurs, arthritis, and herniated disc, and many other ailments.”

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in DoDI 6040.44 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 all four of the unfitting conditions are addressed below. The adjustment disorder adjudicated as not unfitting by the service is also within the defined scope, since the requested consideration for posttraumatic stress disorder (PTSD) is attached to the same condition. The other conditions listed by the CI, or any contention not requested in this application, remain eligible for future consideration by the Army Board for the Correction of Military Records (ABCMR).

RATING COMPARISON:

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| --- | --- |
| **Service PEB – Dated 20050405** | **VA (4 Mo. After Separation) – All Effective Date 20050502** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain | 5237 | 10% | Lumbar Strain | 5010-5243 | 20% | 20050829 |
| Chronic Left Ankle Pain | 5003 | 0% | Left Ankle DJD | 5010-5271 | 20% | 20050829 |
| Obstructive Sleep Apnea | 6847 | 0% | OSA | 6847 | 50% | 20050829 |
| Pes Planus | 5099-5003 | 0% | Bilateral Pes Planus | 5276 | 10% | 20050829 |
| Adjustment Disorder | Not Unfitting | Adjustment Disorder | 9440 | 30% | 20050809 |
| No Additional MEB/PEB Entries | Cervical Strain | 5243 | 20% | 20050829 |
| Tinnitus | 6260 | 10% | 20050802 |
| Migraine | 8100 | 10% | 20050829 |
| **Combined: 10%** | **Combined: 90%** |

ANALYSIS SUMMARY:

Lumbar Spine Condition. The onset of back pain was possibly associated with a fall during the Kuwait deployment, although no distinct incident is cited. Imaging after redeployment demonstrated degenerative changes and a small disc protrusion at L5/S1. There were some symptoms suggestive of a left sciatic radiculopathy, but there were no abnormal neurologic findings on numerous examinations; and, electrodiagnostic testing revealed only equivocal findings confined to the great toe extensor. There were no surgical indications; and, a failed trial of physical therapy (PT) and standard conservative measures. There were two formal 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.

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| --- | --- | --- |
| Thoracolumbar ROM | MEB PT ~5 Mo. Pre-Sep | VA C&P ~4 Mo. Post-Sep |
| Flexion (90⁰ Normal) | 40⁰ | 40⁰ |
| Combined (240⁰) | 170⁰ | 180⁰ |
| Comments | Gait abnormality. | Slight lordosis; no DeLuca reduction. |
| §4.71a Rating | 20% | 20% |

At the MEB exam, the CI was reported to be walking in a stooped posture with a cane. The Department of Veterans’ Affairs (DVA) Compensation and Pension (C&P) exam, after separation, reported that the back condition forced bed rest “once or twice a week,” but that this “has not interfered with his present work” (auto sales trainee). The ROM measurements and ratable physical signs from these evaluations are charted above. The narrative summary (NARSUM) and a MEB physical medicine consultant documented several physical signs of misleading exam findings; and, the latter opined that this was “consistent with non-organic pain” which “requires further evaluation.”

The Board directs attention to its rating recommendation based on the above evidence. The PEB’s 10% rating was supported by the USAPDA pain policy, but was not consistent with the VASRD §4.71a general rating formula for the spine. Both of the ROM evaluations in evidence, which are compliant with VASRD §4.46 (accurate measurement), achieve a 20% rating IAW §4.71a. There was no evidence of ratable peripheral nerve impairment or documentation of incapacitating episodes in this case which would provide for additional or higher rating. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a service disability rating of 20% for the lumbar spine condition. The action officer recommended, and the Board concurred with, the code 5242 (degenerative arthritis of the spine) for its clinical compatibility.

Left Ankle Condition. The CI suffered a hyperextension injury to his ankle during operations in Kuwait, and radiographs revealed no fractures. He was treated conservatively with activity restrictions in theater, and continued to suffer ankle pain after redeployment. He did not improve with profile restrictions, analgesics and an ankle brace. A podiatry addendum to the NARSUM quoted the CI’s report that he was “barely able to carry own body weight,” and he stated that he was unable to carry any additional weight or accomplish essential MOS tasks. The physical exam documented tenderness, but no edema, with “full” ROM and no joint laxity. The VA C&P examiner, after separation, noted that the ankle was “slightly puffy” with localized tenderness. The ROM exam documented 20⁰ of plantar flexion (normal 45⁰) and 10⁰ of dorsiflexion (normal 20⁰). The joint was stable and there was no DeLuca degradation.

The Board directs attention to its rating recommendation based on the above evidence. The PEB’s 0% rating under code 5003 (degenerative arthritis) cited X-ray findings of degenerative arthritis without significant loss of ROM. This is consistent with §4.4.71a criteria for 5003; but, does not account for VASRD §4.40 (functional loss), which states that “a part which becomes painful on use must be regarded as seriously disabled” and provides for the minimum compensable rating. The ROM limitations documented by the VA examiner also support a 10% rating for “moderate” limitation of motion under code 5271. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 10% for the left ankle condition under 5271.

Obstructive Sleep Apnea. The CI was first evaluated for a history of snoring and witnessed nocturnal apneic episodes in November 2004 (6 months prior to separation); and, a sleep study confirmed the diagnosis of OSA soon afterwards. The CI was recommended weight reduction; and a continuous positive airway pressure (CPAP) device was prescribed. A specialty addendum to the NARSUM noted that the CI had been using CPAP “with some improvement;” but, caveated that “he reports he is still taking it off at night.” The VA C&P examiner, after separation, noted a history of CPAP use since 2003, in conflict with the service evidence. The examiner also stated that, “he has now lost weight down to 195 and he does not suffer from the listlessness that he had previously described.” There is no evidence in the VA file for adjustment of CPAP after separation, continuing medical supervision for treatment of OSA, or any revaluation of the condition.

The Board directs attention to its rating recommendation based on the above evidence. The PEB’s DA Form 199 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 sleep apnea syndromes to be unfitting solely on this basis; but, the Board, by legal opinion and firm precedent, does not make unfavorable recommendations contrary to PEB fitness rulings. VASRD §4.100 mandates a minimum rating of 50% under 6847 for sleep apnea syndromes requiring a breathing assistance device. Although compliance with CPAP and its continued requirement was in dispute, member consensus was that reasonable doubt favored the CI in conceding that this criterion was met. In consideration of that conclusion, and IAW DoDI 6040.44, the Board recommends a disability rating of 50% for the OSA condition.

Pes Planus. The entry physical documented “pes planus, mild, asymptomatic.” The service medical record does not contain evidence of any associated clinical issues or treatment until the MEB podiatry evaluation for the ankle condition. It was first profiled 2 months prior to separation. The podiatry addendum to the NARSUM (directed to the ankle condition) yielded no ratable information, providing only the entry “flexible pes planus, bilateral feet.” The podiatrist’s analysis of functional status and link to AR 40-501 criteria addressed only the ankle condition. The NARSUM referred only to the addendum, and offered no explanation for the decision that the pes planus condition failed retention standards. The PEB’s DA Form 199 provided no rationale for its fitness determination. The VA C&P examiner, noted a history that the CI had worn orthotics in the past, but was not doing so currently. The exam documented “mild bilateral pes planus” with “minimal varus deformity of his left foot and none on the right,” and “tenderness over the metatarsal anterior arch and anterior portion of the heel.” Morning pain on arising and pain associated with standing all day at work was also documented.

The Board directs attention to its rating recommendation based on the above evidence. The PEB’s 0% rating (conceding service aggravation) was supported by the USAPDA policy, although a compensable rating IAW VASRD §4.71a would not have been supported by the service evidence (or lack thereof). All members agreed that the PEB’s fitness determination was questionable for the circumstances of this case; but, as previously elaborated the Board may not take latitude with that determination by the PEB. The VA’s rating under 5276 (flatfoot, acquired) was not supported by evidence for the anatomic abnormalities cited in the 10% criteria, although “pain on manipulation and use of the feet” is included in the rating description. The criteria elaborated in VASRD §4.57 (static foot deformities), however, would not support rating under the 5276 code for pes planus as an acquired condition. The Board considered an analogous rating under 5299-5276; analogous application of 5299-5284 (foot injuries, other); or analogous application of 5099-5024 (tenosynovitis). Any of these would achieve a minimal compensable rating of 10% if §4.40 (functional loss, as with the ankle discussion) were applied; but, this would be premised solely on the symptoms documented in the VA evaluation. Members agreed however, that this would require undue speculation for a condition that was clinically silent throughout the service career (at least as reflected by the available evidence). After due deliberation, considering all of the evidence and mindful of the reasonable doubt standard, the Board concluded that there was insufficient cause to recommend a change in the PEB adjudication for the pes planus condition; although, the Board premises its 0% recommendation on VASRD §4.71a criteria.

Adjustment Disorder (Contended as PTSD). The Board’s main charge with respect to this condition is an assessment of the appropriateness of the PEB’s fitness adjudication. The Board’s threshold for countering fitness determinations is higher than the VASRD §4.3 (reasonable doubt) standard used for its rating recommendations, but remains adherent to the DoDI 6040.44 “fair and equitable” standard. A psychiatric addendum to the NARSUM documented that the CI first sought behavioral health evaluation in October 2004 (7 months prior to separation) for “complaints of depression and worries about his family.” No criterion A stressors or diagnostic criteria for PTSD were cited in the history. He was given an Axis I diagnosis of “adjustment disorder with depressed mood,” and was assigned a Global Assessment of Functioning (GAF) score of 75 (connoting minimal if any psychiatric impairment). It was judged that the condition met retention standards. The VA psychiatrist arrived at the same diagnosis; although the condition was claimed as PTSD, citing the death of friends in Iraq as stressors. The commander’s statement referenced only physical impediments to MOS performance, and the profile was S1. The psychiatric condition was reviewed by the action officer and considered by the Board. There was no indication from the record that it significantly interfered with satisfactory duty performance. After due deliberation in consideration of the preponderance of the evidence, the Board concluded that there was insufficient cause to recommend a change in the PEB fitness determination for adjustment disorder; and, therefore, no additional service disability rating can be recommended.

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. PEB reliance on the USAPDA pain policy for rating the lumbar spine and pes planus conditions, and on DoDI 1332.39 for rating sleep apnea, was operant in this case; and, those conditions were adjudicated independently of that policy and instruction by the Board. In the matter of the lumbar spine condition, the Board unanimously recommends a disability rating of 20%, coded 5242 IAW VASRD §4.71a. In the matter of the left ankle condition, the Board unanimously recommends a disability rating of 10%, coded 5271 IAW VASRD §4.71a. In the matter of the OSA condition, the Board by a vote of 2:1 recommends a disability rating of 50%, coded 6847 IAW VASRD §4.100. The single voter for dissent (who recommended a disability rating of 0%) submitted the addended minority opinion. In the matter of the pes planus condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the contended psychiatric condition, the Board unanimously recommends no change from the PEB determination as not unfitting. 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; and, that the discharge with severance pay be recharacterized to reflect permanent disability retirement, effective as of the date of his prior medical separation:

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| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Degenerative Disc Disease, Lumbar Spine | 5242 | 20% |
| Chronic Left Ankle Pain | 5271 | 10% |
| Obstructive Sleep Apnea | 6847 | 50%  |
| Pes Planus | 5099-5003 | 0% |
| **COMBINED** | **60%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110727, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 XXXXXXXXXXXXXXXXXX

 Director of Operations

 Physical Disability Board of Review

MINORITY OPINION:

Notwithstanding my dissent to the majority recommendation for the OSA condition, I was concerned in this case about the clear evidence that there was a significant non-organic component of the lumbar spine condition; and, that a compensable rating for the left ankle condition (IAW VASRD §4.71a) could not be supported by the NARSUM alone. Furthermore the clinical history and objective data for both of these conditions is not consistent with an expectation that they should be associated with substantially severe disability. Although I and my fellow Board members appropriately conceded reasonable doubt in support of the recommended ratings for the lumbar and ankle conditions; I could not extract from the evidence a reasonable doubt in support of the majority OSA recommendation.

The VASRD §4.100 criterion for code 6847 assigns a 50% rating if OSA “requires [emphasis mine] use of a breathing assistance device.” Clearly the most probative evaluation for this condition was the NARSUM addendum which documented marginal compliance with CPAP. The history recorded by the VA examiner was inconsistent with the preponderance of the evidence regarding key chronology, therefore unlikely to have been supported by a review of the record; and, did not address compliance with, or response to, CPAP. It is thus not reasonable to rely on it as evidence of real time treatment with, and ongoing requirement for, CPAP. As noted in the proceedings, the VA file after separation is devoid of any evidence for dependence on CPAP; and, no civilian treatment records were submitted. Since 6847 specifies a requirement for (not a prescription for) the device; I cannot see how the criterion was met. 6847 assigns a 30% rating for “persistent day-time hypersomnolence,” but the evidence also suggests that this feature was not present to a significant degree. There was service documentation of daytime fatigue, but no indication that this was manifested by drowsiness; and, this complaint was also intertwined with concurrent depression and sleep disturbance secondary to pain. Barring support for the 30% rating, 6847 leaves only a 0% alternative.

I respectfully submit that the Secretary consider this minority recommendation of a 0% rating for OSA based on the criteria of VASRD §4.100; and, that the service disability determination be amended as follows:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Degenerative Disc Disease, Lumbar Spine | 5242 | 20% |
| Chronic Left Ankle Pain | 5271 | 10% |
| Obstructive Sleep Apnea | 6847 | 0%  |
| Pes Planus | 5099-5003 | 0% |
| **COMBINED** | **30%** |

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 XXXXXXXXXXXXXXXXXXXXXX, AR20120011910 (PD201100649)

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 reject the Board’s recommendation and hereby deny the individual’s application. There is insufficient justification to support the Board’s recommendation in accordance with Army and Department of Defense regulations.

2. Due to a change in law after the separation the individual was entitled to an increase in his back rating from 10% to 20%. The record, however, does not support a change in the rating for his ankle or Obstructive Sleep Apnea (OSA). I accept, therefore, the DoD PDBR recommendation to increase his rating for back pain to 20%. I also accept the recommendation of the minority member to keep the OSA rating at 0% as assigned by the Physical Evaluation Board (PEB). I reject the recommendation to increase the individual’s ankle rating. The record supports the 0% rating as assigned by the PEB.

3. I direct that all the Department of the Army records of the individual concerned be corrected no later 120 days from the date of this memorandum.

4. 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 XXXXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA