RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXX BRANCH OF SERVICE: air force

CASE NUMBER: PD1100669 SEPARATION DATE: 20090526

BOARD DATE: 20120405

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSGT/E-5 (3E3X1, Structural Craftsman) medically separated for a lumbar spine condition. The CI had a gradual onset of back pain diagnosed as degenerative disc disease, and underwent several surgical interventions with only minimal improvement. The 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 an L4 profile and a Duty Limiting Condition Report with mobility restrictions; and, was referred to a Medical Evaluation Board (MEB). Lumbar radiculopathy was forwarded to the Informal Physical Evaluation Board (IPEB) as medically unacceptable IAW AFI 48-123. One additional condition, obesity, was listed on the MEB submission. This is not a ratable condition IAW DoD and VA regulations and will not be discussed further. The IPEB adjudicated the lumbar spine condition, characterized as “chronic low back pain with radicular symptoms, status-post diskectomies of L4 through S1 and decompression exploration,” as unfitting; rated 20%, referencing the Veterans Administration Schedule for Rating Disabilities (VASRD). The CI appealed to the Formal PEB (FPEB) for the 20% thoracolumbar rating plus additional 10% ratings each for his cervical spine and lower extremity radiculopathy. The FPEB affirmed the IPEB’s 20% thoracolumbar rating, and found no unfitting cervical or radiculopathy conditions. The CI was thus medically separated with a 20% disability rating.

CI CONTENTION: “The reason my case should be reevaluated is due to the fact that when the informal Physical Evaluation Board reviewed my case it only looked a vague description of me having chronic lower back pain when the determination should have been made based on the cause of my chronic back pain. I suffer from degenerative disc disease which affects several areas: my neck, my lower, mid and upper back.”

RATING COMPARISON:

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| **Service FPEB – Dated 20090213** | | | **VA (2 Mo. After Separation) – All Effective 20090527** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain … | 5243 | 20% | Lumbar DJD/Radiculopathy | 5242 | 40% | 20090715 |
| Obesity | Category III | | No VA Entry | | | 20090715 |
| ↓No Additional MEB/PEB Entries↓ | | | DJD Cervical Spine | 5242 | 20% | 20090715 |
| 0% x 2 / Not Service Connected x 4 | | | 20090715 |
| **Combined: 20%** | | | **Combined: 50%** | | | |

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 evaluates DVA evidence proximal to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of DES fitness decisions and rating determinations for disability at the time of separation. The Board also acknowledges the CI's contention suggesting that service ratings should have been conferred for other conditions documented at the time of separation and for conditions not diagnosed while in the service (but later determined to be service-connected by the DVA). 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 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.

Low Back Condition. The CI’s back pain was not associated with trauma or specific inciting event. It was diagnosed as degenerative disc disease in 2005, and resulted in multi-level discectomy surgery that year. He had a second lumbar spine decompression surgery in 2008 with good results initially. However, when symptoms again worsened he declined further surgical intervention. His symptoms included muscle spasm, restricted range of motion (ROM), and radicular paresthesia to the right leg without weakness. There was one goniometric and one non-goniometric ROM evaluation in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation.

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| Thoracolumbar ROM | PT ~11 Mo. Pre-Sep | VA C&P ~2 Mo. Post-Sep |
| Flexion (90⁰ Normal) | 50% (~45⁰) | 45⁰ / 30⁰\* |
| Combined (240⁰) | 40 - 75% (~145⁰) | 180⁰ / 160\* |
| Comments | Painful motion; normal gait; no spasm. | Normal gait; spasm; DeLuca positive. |
| §4.71a Rating | 20% | 20% / 40%\* |

\* With DeLuca deductions of 15⁰ flexion and 20⁰ extension.

A memorandum from the PEB dated 16 October 2008 indicates that clinic notes in the electronic medical record served the purpose of a formal narrative summary (NARSUM). The MEB physician recorded normal gait and stance, and normal muscle tone and strength. The examiner stated that “thoracolumbar spine demonstrated full range of motion except as noted;” however, no limitations of ROM were specified in the document. A physical therapy (PT) evaluation 4 months earlier recorded forward flexion at 50% (of normal), extension 40%, lateral flexion 65%, and rotation 75% bilaterally; with pain in all planes of motion. The VA Compensation & Pension (C&P) examiner also noted normal gait and spinal curvature, a normal motor and sensory examination, and bilateral paraspinous muscle spasm. ROM was limited in flexion and extension only, with evidence of painful motion. The baseline measurements, as charted above, were concordant with those noted by the MEB PT evaluation and gross observations in outpatient notes. Forward flexion was reduced to 30⁰ and extension to 10⁰ following three repetitions, although bilateral rotation and lateral flexion remained normal (before and after repetitions). The VA examiner recorded “fatigue” as “the most important factor” for the reduced ROM with repetition. A VA electrodiagnostic (EMG) study was normal without evidence of neuropathy.

The Board directs attention to its rating recommendation based on the above evidence. The MEB and VA applied different VASRD codes, but were subject to the same rating criteria. The FPEB’s AF Form 356 stated that the CI’s “thoracolumbar range of motion over the past several months has varied from 50% of normal to full within the last year.” The VA rating decision states that its determination was based on “evidence of additional limited joint function on repetition due to pain and fatigue, but not weakness; lack of endurance; or incoordination” (DeLuca language); and, the resulting 30⁰ of flexion is the threshold between 20% and 40% ratings under the VASRD general spine formula. The Board notes that the single ROM evaluation in evidence from the service, although applied to VASRD §4.71a rating standards, was not compliant with VASRD §4.46 (accurate measurement). The MEB’s ROM evaluation therefore is considered probative, but not ratable. The Board deliberated as to whether the application of DeLuca provisions to achieve the 40% rating threshold was indicated in this case. The action officer notes that forward flexion is primarily a passive motion driven by gravity. Decreased flexion due to fatigue, and without weakness or an increase in pain, is thus illogical. If the other DeLuca factors were in play, but not appropriately captured, it is difficult to explain the unaffected and normal ROMs with lateral flexion. After considerable deliberation, member consensus was that despite the clinical incongruity of the DeLuca observation, reasonable doubt was sufficient to support the higher rating based on the DeLuca derived flexion of 30⁰. The Board further considered if the FPEB’s denial of additional rating for the residual right lower extremity radiculopathy was fair. The AF Form 356 cited normal EMG findings in its conclusion that there was no ratable neuropathy. The VA incorporated “right lumbar radiculopathy” into its 40% spine rating, noting the normal neurologic findings. Firm Board precedent requires a functional impairment tied to fitness 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 evidence for incapacitating episodes to achieve a higher rating under that alternate formula.

After due deliberation, considering all of the evidence and applying the principles of the *DeLuca v. Brown* decision, the Board recommends a disability rating of 40% for the lumbar spine condition.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for degenerative disease of the upper back and neck. Per VASRD §4.71a the upper and lower back (thoracolumbar spine) are evaluated as a single unit. Therefore, any disability associated with the upper back is accounted for in the above lumbar spine rating. The CI’s cervical spine condition is scantly mentioned in the service treatment record, did not carry an attached profile, and was not implicated in the commander’s statement. It was specifically considered by the FPEB which concluded that the CI’s “neck symptomatology is not unfitting for military service.” The cervical spine condition was reviewed by the action officer and considered by the Board; and, there was no evidence for concluding that it interfered with duty performance to a degree that could be argued as unfitting. The Board determined therefore that neither of the contended conditions was subject to a separate disability rating.

Remaining Conditions. No other conditions were noted in the NARSUM or found elsewhere in the DES file. No other conditions were service connected with a compensable rating by the VA within 12 months of separation or contended by the CI. The Board therefore has no reasonable basis for recommending any additional unfitting conditions for 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 lumbar spine condition and IAW VASRD §4.71a, the Board by a vote of 2:1 recommends a rating of 40% coded 5243 IAW VASRD §4.71a. The single voter for dissent (who recommended no change from the PEB rating of 20%) submitted the addended minority opinion. In the matter of the contended lumbar radiculopathy, the Board unanimously agrees that it cannot recommend it for additional disability rating. In the matter of the contended thoracic and cervical spine conditions, the Board unanimously agrees that it cannot recommend a finding of unfit for additional disability rating. The Board unanimously agrees that there were no other conditions eligible for Board consideration which could be recommended as additionally unfitting for disability rating.

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** |
| Lumbar Disc Disease | 5243 | 40% |
| **COMBINED** | **40%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110725, w/atchs.

Exhibit B. Service Treatment Record.

Exhibit C. Department of Veterans Affairs Treatment Record.

President

Physical Disability Board of Review

MINORITY OPINION:

The service rating in this case was carefully reviewed by the FPEB, and its conclusion well articulated in its AF Form 356 narrative. This accurately observed that the CI’s range of motion “has varied from 50% of normal to full within the past year.” Although the goniometric evidence accepted by the PEB was not compliant with VA standards of measurement, it was rated IAW the VASRD general spine formula; and, was in fact rated for the more severe limitations in evidence. I have no difficulty equating the formally measured 50% of normal flexion with the conclusion that 45⁰ is 50% of the normal flexion of 90⁰. There is no evidence from physician and PT notes that flexion was ever as severely impaired as 30⁰, nor was the CI’s documented functional status consistent with such a severe reduction in spine mobility. The baseline ROM measurements by the VA post-separation examiner were equivalent to those rated by the PEB and with all other evidence of record. As stated in these proceedings, the DeLuca criteria applied by the majority in its rating recommendation are clinically incongruous. If fatigue after three repetitions (and not affecting lateral or rotational planes) did have such a profound impact on flexion, one should consider that the CI’s unratable obesity made a very significant contribution to the degradation. That is especially true given that if even 1⁰ of the DeLuca deduction was thereby unratable, then the 40% rating threshold would not have been met. One should also consider that VA rating evaluations based on ROM rely on subjective pain thresholds which are patently associated with financial incentive, thus inherently subject to some loss of objectivity. DoDI 6040.44 stipulates that this Board will apply the VASRD in its recommendations. It does not stipulate that the Board should apply all of the non-VASRD practices and policies of the DVA, which would include the very liberal interpretation of the DeLuca ruling that it conceded in this case. The DeLuca principle is sound, but the principle simply was not violated based on the clinical reality of this case. DoDI 6040.44 does state that this Board will render “fair and equitable” recommendations, and I firmly believe that 20% is a fair, equitable, and logical rating for the thoracolumbar spine condition in this case.

I respectfully submit that the Secretary consider the minority recommendation that there be no recharacterization of the CI’s disability and separation determination:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Lumbar Disc Disease | 5243 | 20% |
| **COMBINED** | **20%** |

SAF/MRB

1500 West Perimeter Road, Suite 3700

Joint Base Andrews MD 20762

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Dear XXXX

Reference your application submitted under the provisions of DoDI 6040.44 (Title 10 U.S.C. §1554a), PDBR Case Number PD-2011-00669.

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,

Director

Air Force Review Boards Agency

Attachment:

Record of Proceedings

cc:

SAF/MRBR

DFAS-IN

PDBR PD-2011-00669

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 XXXXXXXXXXXXX, be corrected to show that:

a.  The diagnosis in his finding of unfitness was Lumbar Disc Disease, VASRD code 5243, rated at 40%; rather than Chronic Low Back Pain, VASRD code 5243, rated at 20%.

b.   On 25 May 2009, he elected not to participate in the Survivor Benefit Plan.

c.   He was not discharged on 26 May 2009; rather, on that date he was released from active duty and on 27 May 2009 his name was placed on the Permanent Disability Retired List.

Director

Air Force Review Boards Agency