RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME:XXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100682 SEPARATION DATE: 20050217

BOARD DATE: 20120612

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a mobilized Reserve SSG/E-6 (88M, Truck Driver), medically separated for chronic left hip and groin pain, obstructive sleep apnea (OSA) and fibromyalgia. The CI did not improve adequately with treatment to meet the physical requirements of her Military Occupational Specialty (MOS) or satisfy physical fitness standards. She was issued a permanent P3L3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded no other conditions for PEB adjudication. The PEB adjudicated the chronic left hip and groin pain, OSA condition as unfitting, rated 10% and 0% respectively; with application of the US Army Physical Disability Agency (USAPDA) pain policy and DoDI 1332.39. The PEB determined that the fibromyalgia symptoms represented the natural course of this pre-existing condition as challenged by the rigors of active service and do not constitute permanent service aggravation IAW AR 40-501. The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: The CI states: “According to 38 CFR 6844, the rating criteria for sleep apnea with CPAP warrants a 50% evaluation. The claimant was discharged for this condition and the same diagnostic code was used in making the determination.”

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 condition(s) “identified but not determined to be unfitting by the PEB.” The ratings for unfitting conditions will be reviewed in all cases. Any conditions or contention not requested in this application, or otherwise outside the Board’s defined scope of review, remain eligible for future consideration by the Army Board for the Correction of Military Records (BCMR).

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20050114** | | | **VA (5 Mo. After Separation) – All Effective Date 20050218** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Left Hip And Groin Pain | 5003 | 10% | Bursitis Left Hip with Degenerative Changes | 5019-5252 | 20%\* | 20050723 |
| Obstructive Sleep Apnea | 6847 | 0% | Sleep Apnea | 6847 | 50% | STR |
| Fibromyalgia | 5025 | --% | Fibromyalgia | 5025 | NSC | 20050712 |
| ↓No Additional MEB/PEB Entries↓ | | | 0% x 1 | | | 20050723 |
| **Combined: 10%** | | | **Combined: 60%** | | | |

\* Initial VARD 20050315 granted 10% rating for left hip condition based on STR; rating subsequently increased to 20% effective the day after separation by VARD 20050915 based on VA C&P examination 20050723 showing reduced range of motion.

ANALYSIS SUMMARY: The Disability Evaluation System (DES) is responsible for maintaining a fit and vital fighting force. 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 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 nor for conditions determined to be service-connected by the Department of Veterans’ Affairs (DVA), but not determined to be unfitting by the PEB. However the DVA, operating under a different set of laws (Title 38, United States Code), is empowered to compensate all 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’s role is confined to the review of medical records and all evidence at hand to assess the fairness of PEB rating determinations, compared to VASRD standards, based on severity at the time of separation.

Chronic Left Hip and Groin Pain. The CI developed left hip pain that began during military training and deployment to Kuwait. Evaluation with imaging indicated the presence of degenerative changes, which existed prior to service (EPTS), and clinical evaluations reflected diagnosis of strain and bursitis. Persisting hip pain interfered with performance of military duties. The orthopedic MEB narrative summary (NARSUM) performed on 27 October 2004 documented tenderness, and full active range-of-motion (ROM) with pain at extremes of motion. Strength was intact. A rheumatology examination performed on 13 October 2004 noted pain with internal rotation. The PEB and VA rated the left hip condition 10% based on the evidence of the service treatment record (STR) and orthopedic NARSUM examination. Based on a VA Compensation and Pension (C&P) examination, performed on 23 July 2005, 5 months after separation, the VA increased the rating to 20%. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board concluded that there was insufficient cause to recommend a change in the PEB adjudication for the left hip pain condition.

Obstructive sleep apnea. The CI was diagnosed with OSA and prescribed continuous positive airway pressure device (CPAP). The PEB found the CI unfit due to this condition and rated it 0% in accordance with DoDI 1332.39. MEB NARSUM and PEB noted the CI required the use of CPAP. The PEB’s DA Form 199/JDETS/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, but the Board, by legal opinion and firm precedent, does not make contrary recommendations to a PEB determination that a condition was unfitting. VASRD §4.97 mandates a minimum rating of 50% under 6847 for OSA requiring a breathing assistance device. In consideration of this evidence, and IAW DoDI 6040.44, the Board must recommend a separation rating of 50% for the OSA condition.

Fibromyalgia. The PEB determined the fibromyalgia condition, which existed prior to service, was not permanently aggravated by service beyond the natural progression of the condition. The VA reached a similar conclusion in its non-service-connected determination. The STR from 1998 reflects a diagnosis of fibromyalgia manifesting as upper back pain and other musculoskeletal complaints. According to a 9 January 1999 record entry, the CI had incurred an injury to the thoracic back in her civilian job while performing heavy lifting. A P3 profile for fibromyalgia and thoracic spasm was issued 1 May 1999. A periodic examination performed on 26 July 2002 documented a medical history of fibromyalgia with a P2 physical profile. A physical medicine evaluation performed on 25 August 2003, prior to entering active duty, noted a P3 profile, and recorded the history of myofascial upper back pain and neck pain that increased to 7/10, particularly with push-ups. The examination records 11 tender points. The physical profile was changed to P2 and the CI entered active duty on 7 December 2003. A rheumatology evaluation performed on 19 July 2004 recorded the history of myofascial upper back pain and the recent left hip injury. The rheumatologist concluded there was insufficient evidence on clinical history and physical examination to support a diagnosis of fibromyalgia. A second rheumatology evaluation performed on 13 October 2004, also noted the history of myofascial upper back pain since 1997 that was the primary manifestation. The rheumatologist also recorded the recent right hip injury, occasional left leg pain, and intermittent mild hand pain. The CI denied pain in other joints (writs, elbows, ankles, toes), but reported sleep disturbance (diagnosed as OSA). The second rheumatologist found 11 tender points on examination supportive of the diagnosis of fibromyalgia. Except for the left hip noted above, the remainder of the examination was unremarkable. The Board noted the clinical descriptions and examinations were similar between the examination in August 2003 prior to entering active duty, and the rheumatology examination in October 2004. 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 determination for the fibromyalgia condition.

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. As discussed above, PEB reliance on DoDI 1332.39 for rating OSA was operant in this case and the condition was adjudicated independently of that instruction by the Board. In the matter of the OSA, the Board unanimously recommends a disability rating of 50%, coded 6847 IAW VASRD §4.97. In the matter of the left hip and groin pain condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. In the matter of the fibromyalgia condition, the Board unanimously recommends no change from the PEB determination as not permanently aggravated by service beyond the natural progression of the condition. 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 her prior medical separation:

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Obstructive Sleep Apnea | 6847 | 50% |
| Chronic Left Hip and Groin Pain | 5252-5003 | 10% |
| Fibromyalgia | EPTS | -- |
| **COMBINED** | **60%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110824, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

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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 XXXXXXXXXXXXX, AR20120011853 (PD201100682)

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 recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 60% effective the date of the individual’s original medical separation for disability with severance pay.

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:

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

b. Providing orders showing that the individual was retired with permanent disability effective the date of the original medical separation for disability with severance pay.

c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, and payment of permanent retired pay at 60% effective the date of the original medical separation for disability with severance pay.

d. Affording the individual the opportunity to elect Survivor Benefit Plan (SBP) and medical TRICARE retiree options.

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 XXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA