RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100712 SEPARATION DATE: 20050525

BOARD DATE: 20120523

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty, SSG/E-6, (13D, Field Artillery Fire Control), medically separated for chronic non-radiating low back pain. The CI reported onset of pain with initial injury following being struck in the head, neck and lower back when a retaining pin broke on the hatch of his military vehicle. He did not respond adequately to treatment and was unable to perform within his Military Occupational Specialty (MOS) or meet physical fitness standards. He was issued a permanent L3 profile and underwent a Medical Evaluation Board (MEB). Chronic non-radiating low back pain was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions appeared on the MEB’s submission. The PEB adjudicated the chronic non-radiating low back pain condition as unfitting, rated 10%; with possible application of the US Army Physical Disability Agency (USAPDA) pain policy, and the Veteran’s Affairs Schedule for Rating Disabilities (VASRD). The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “I am unable to run, lift objects, it hurts to lift my son. It is painful to have intercourse. I have a hard time sleeping at times due to the pain in the back. I have difficulty sitting for an extended period of time without my limbs going numb.”

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 Service ratings for unfitting conditions will be reviewed in all cases. The conditions “pain in the back” as requested for consideration meet the criteria prescribed in DoDI 6040.44 for Board purview; and, is addressed below, as a review of the Service rating for the unfitting condition. The requested “limbs going numb” condition [radiculopathy including VA-rated cervical spine and bilateral upper extremity numbness] is not within the Board’s purview. 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 IPEB – Dated 20050325** | **VA (3 Mo. After Separation) – All Effective Date 20050526** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Non Radiating Low Back Pain | 5243 | 10% | Thoracolumbar Spine Degenerative Disc Disease (DDD) | 5243 | 20%\* | 20050830 |
| ↓No Additional MEB/PEB Entries↓ | Cervical Spine DDD | 5243 | 10% | 20050830 |
| Left Knee Patellofemoral Syndrome … | 5010-5257 | 10% | 20050830 |
| Right Knee Patellofemoral Syndrome … | 5010-5257 | 10% | 20050830 |
| Tinnitus | 6260 | 10% | 20050830 |
| L. (arm), Numbness, … Cervical Spine DDD | 8515 | 10% | 20050830 |
| R. (arm), Numbness, … Cervical Spine DDD | 8515 | 10% | 20050830 |
| Major Depressive Disorder | 9434 | 10% | 20050830 |
| 0% x 2/Not Service Connected x 1 | 20050830 |
| **Combined: 10%** | **Combined: 60%** |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impact that his service-incurred condition has had on his quality of life. 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. The Board utilizes DVA evidence proximal to separation in arriving at its recommendations; and, DoDI 6040.44 defines a 12-month interval for special consideration to post-separation evidence. The Board’s authority as defined in DoDI 6044.40, however, resides in evaluating the fairness of DES fitness determinations and rating decisions for disability at the time of separation. Post-separation evidence therefore is probative only to the extent that it reasonably reflects the disability and fitness implications at the time of separation.

Low Back Pain Condition. There were two goniometric range-of-motion (ROM) evaluations in evidence, with documentation of additional ratable criteria, which the Board weighed in arriving at its rating recommendation.

|  |  |  |
| --- | --- | --- |
| Thoracolumbar ROM | MEB ~2 Mo. Pre-Sep | VA C&P ~3 Mo. Post-Sep |
| Flexion (90⁰ Normal) | 70⁰ | 70⁰ |
| Ext (0-30) | 5⁰ | 30⁰ |
| R Lat Flex (0-30) | 5⁰ | 25⁰ |
| L Lat Flex 0-30) | 5⁰ | 30⁰ |
| R Rotation (0-30) | 10⁰ | 30⁰ |
| L Rotation (0-30) | 10⁰ | 30⁰ |
| Combined (240⁰) | 105⁰ | 215⁰ |
| Comment | Abnormal stance 5-degree forward flexion; gait normal, however, slow directed gait; spine straight on gross exam, + decrease in normal lumbar lordosis; + bilateral tendernessl; motor/sensory normal; negative for Waddell criteria. | No muscle spasms; + tenderness bilateral SI joints; right sciatic notch had pain on testing; straight leg raises + at 30⁰ bilaterally; guarding noted during ROM; wide-based, somewhat ataxic gait without the use of any assistive devices; was wearing a back brace; unable to tiptoe, heel walk or tandem walk due to lack of balance; no motor or sensory deficits noted in the lower extremities; negative DeLuca. |
| §4.71a Rating | 20% (PEB 10%) | 10-20% (VA 20%; “non-schedular”) |

Radiographs and MRI indicated left L5-S1 herniated disk and multiple epidural and facet injections, nerve ablation, as well as an intradiscal electrothermal annuloplasty (IDET) and rehabilitation did not improve symptoms. At the MEB exam, the CI reported difficulty with standing and walking. The CI episodically used a back brace, but no assistive devices. The MEB physical exam noted tenderness, abnormal spine contour and painful decreased ROM as charted above. The CI was on pain medications including narcotics and had no reported bowel or bladder symptoms.

At the VA Compensation and Pension (C&P) exam, performed 3 months after separation, the CI reported severe pain, use of narcotic pain medication, using a cane 30% of the time, wearing a back brace, with some unsteadiness and near falls. He related radiating pain into his right hip and buttocks. Exam is summarized in the chart above, and in addition to decreased ROMs, there was guarding and ataxia with decreased balance. There was no lower extremity sensory or motor deficit documented. A remote VA C&P exam, dated 17 months after separation, indicated increased pain and functional loss with forward flexion of 50⁰ and the VA continued their 20% rating.

The Board directs attention to its rating recommendation based on the above evidence. Both the PEB and VA used the same code. The PEB 10% rating specified “rated for forward flexion of 70⁰” and did not mention the 100⁰ combined ROM or abnormal spine contour. The VA exam documented improved ROM, but with tenderness, guarding and ataxia. The VA rating decision mentioned their 20% rating was “non-schedular”, however, “guarding severe enough to result in an abnormal gait” is a 20% rating criteria. The PEB exam independently rates at 20% for “the combined ROM of the thoracolumbar spine not greater than 120 degrees” (it may also meet the criteria for guarding and abnormal spinal contour, though “guarding” was not specified. There was evidence of at most 4 days of incapacitating pain episodes (physician prescribed bed rest) that would not warrant a higher rating under VASRD code 5243 (intervertebral disc syndrome) using the Formula for Rating Intervertebral Disc Syndrome Based on Incapacitating Episodes [… less than 4 weeks is the 20% criteria]. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 20% for the low back 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. In the matter of the low back condition, the Board unanimously recommends a disability rating of 20%, coded 5243 IAW VASRD §4.71a. 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, effective as of the date of his prior medical separation:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Non Radiating Low Back Pain | 5243 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110823, 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 XXXXXXXXXXXX, AR20120009748 (PD201100712)

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 accept the Board’s recommendation to modify the individual’s disability rating to 20% without recharacterization of the individual’s separation. This decision is final.

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.

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 XXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA