RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100750 SEPARATION DATE: 20040428

BOARD DATE: 20120529

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a Reserve SGT/E-5 (88M20/Motor Transport Operator), medically separated for chronic daily migraine headaches requiring dark room and quiet, one to two times a week, but “not affecting daily activities.” The CI developed headaches of increasing frequency and severity while deployed in 2003. He was redeployed early secondary to this condition and he failed to respond to medical treatment. He was unable to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent L3 profile and referred for a Medical Evaluation Board (MEB). The MEB forwarded no other conditions for Physical Evaluation Board (PEB) adjudication. The PEB adjudicated the chronic daily migraine headaches condition as unfitting, rated 0% with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD) and DoDI 1332.39 (E2.A1.4.1.4). The CI made rebutted the PEB findings and the PEB and the US Army Physical Disability Agency (USAPDA) determined no change in the PEB findings was warranted. The CI was medically separated with a 0% disability rating.

CI CONTENTION: “Migraine headaches, Depression, chronic knee pain, sleep apnea” “My rating should be changed due to the fact that, I don't believe I was evaluated properly.”

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. The chronic daily migraine headaches condition requested for consideration meet the criteria prescribed in DoDI 6040.44 for Board purview, and is accordingly addressed below. The remaining conditions listed on the DA Form 294 application are 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 PEB – Dated 20040210** | | | **VA (~18 Months Post-Separation) – All Effective Date 20040428** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Daily Migraine Headaches Requiring Dark Room And Quiet, 1-2 Times/Week, But "Not Affecting Daily Activities" not considered prostrating. | 8100 | 0% | Migraine Headaches | 8100 | 30%\* | 20051007 |
| ↓No Additional MEB/PEB Entries↓ | | | Not Service-Connected x 7 | | | |
| **Combined: 0%** | | | **Combined: 30%\*\*** | | | |

\*Increased to 50% effective 20080724. The CI failed to report for his VA exam on 20040729 and based upon service treatment record, the VA determined migraine headaches had existed prior to service and was not aggravated by service. After multiple appeals including the Veteran’ Board of Appeals, the VA determined the condition was service-connected and 30% was effective 20040429.

\*\*Increased to 50% effective 20070226 when Major Depressive Disorder 9434 added at 30%; increased to 60% effective 20080402 when Chronic Fatigue Syndrome 6354 added at 20%; increased to 70% effective 20080724 when Migraine headaches 8100 increased to 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 also acknowledges the CI's contention suggesting that ratings should have been conferred for other conditions documented at the time of separation or 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 service member’s 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. 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 6040.44, 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.

Chronic Daily Migraine Headaches Condition. The record available for review documents that while deployed to Kuwait, the CI first sought care for headaches in April and May 2003. He was having daily headaches and after receiving initial treatment also experienced analgesic rebound headaches. He was referred to neurology in theater. His headaches did not respond to any of the treatments available in theater and he had possible cardiac side effects from one of his medications, Pamelor. The neurologist recommended he return to the states for further evaluation and treatment and he was transported to CONUS in August 2003. In September 2003 he was evaluated by neurology at Lyster Army Hospital. This evaluation noted chronic daily headaches with migrainous features and a possible rebound component and current treatment of Fioricet as needed. The physical examination was normal at this visit. Depakote and Zomig were added and an magnetic resonsance imaging (MRI) was ordered. Midrin was added by his primary care physician in early October 2003. The MRI was normal and Meclizine was added for dizziness. The CI failed to respond to treatment and an MEB was initiated. An MEB narrative summary (NARSUM) completed 8 December 2004, noted persistent headaches despite treatment with Zomig, Depakote, and Zoloft. The headaches were left frontal and bitemporal and occasionally accompanied by nausea and vertigo. The CI reported he always had a headache and it would increase periodically and with increased exceptional activity. His sex life and daily activities were not affected. Physical examination was normal and reference was made to the outpatient treatment notes from neurology. A NARSUM addendum submitted on 9 February 2004 at the request of the PEB noted that prostrating headaches occurred once to twice a week and required the CI to seek a dark room and quiet area. These headaches were not secondary to analgesic rebound and no combination of medications brought complete relief. The initial VA Compensation and Pension (C&P) was not completed until 7 October 2005, approximately 18 months after separation from service. It documented a similar clinical history and a normal neurologic exam.

In February 2004, the PEB determined that “chronic daily migraine headaches requiring dark room and quiet, one to two times a week but “not affecting daily activities” was not considered prostrating and a 0% rating was applied. The CI rebutted the findings but the PEB found that no change in the findings was warranted and USAPDA agreed.

The CI filed an original VA claim on 7 May 2004 and service-connection for migraine headaches with dizziness was initially denied based on the VA’s determination that this condition had existed prior to the period of active duty that began on 21 January 2003 and that there was no evidence of worsening of the condition while on active duty. The VA determined migraine headaches would have warranted a noncompensable rating both prior to and while on active duty. This determination as based on review of the service treatment record (STR) alone as the CI had failed to show for his VA C&P examination on 29 July 2004. The available record does include documentation of treatment for a migraine headache in August 2001 during a time when the CI was not on active duty. The CI appealed and VA statements of the case from 27 April 2005 and 12 December 2006 as both made the same determination. The CI continued his appeals and the Board of Veterans’ appeals determined his headaches were service-connected. It determined that whether or not the headache condition existed prior to service, it clearly increased in severity to such a degree that he was ultimately discharged from service due to this condition. Subsequent to this decision and upon review of this decision, the STR, VA C&P examination of 7 October 2005, and VA medical treatment records, the VA determined a rating of 30% for 8100 migraines based on occurrence of severe headaches four to five times per month. The rating was increased to 50% in July 2008, more than 4 years after separation, due to a worsening over time.

The VASRD §4.124a rating schedule for 8100 migraine rests heavily on the frequency of prostrating attacks. The DoDI 1332.39 (E2.A1.4.1.4) definition for prostrating effective at the time quotes “the service member must stop what he or she is doing and seek medical attention.” This instruction has since been rescinded and VA guidance uses the clear english definition of prostrating with the significant difference that seeking medical attention is not required. By precedence the Board requires evidence only that an attack forces notable abandonment of work or activity at hand in order for it to be characterized as prostrating. The Board evaluated the CI’s history for prostrating attacks and adjudged having to seek a quiet and darkened room constituted sufficient severity to meet the threshold as prostrating. This occurred once or twice per week as reported in the MEB NARSUM Addendum. This surpasses the criteria for a 30% disability rating which requires characteristic prostrating attacks occurring on an average once a month over last several months. The Board also agrees with the Board of Veterans’ appeals that whether or not the headache condition existed prior to service, it clearly increased in severity to such a degree that he was ultimately discharged from service due to this condition. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a disability rating of 30% for the migraine headache 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 (E2.A1.4.1.4) for rating the migraine headache condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the migraine headache condition, the Board unanimously recommends a disability rating of 30%, coded 8100 IAW VASRD §4.124a.

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** |
| Migraine Headaches | 8100 | 30% |
| **COMBINED** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110908, 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 XXXXXXXXXXXX, AR20120011852 (PD201100750)

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 30% 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 30% 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