RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100775 SEPARATION DATE: 20080527

BOARD DATE: 20120503

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSGT/E-6 (92A30/Automated Logistics), medically separated for lumbosacral strain. The chronic low back pain (LBP) was attributed to a fall during training in 1994. He had intermittent LBP and worsening following deployments. In 2006 the CI underwent spine surgeon consultation for lumbar disc herniations with only limited relief of symptoms from epidural steroid injections and he was not a surgical candidate. The CI 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 LBP with lumbar degenerative disc disease (DDD) was forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. Two other conditions, as identified in the rating chart below, were forwarded on the MEB submission as medically acceptable conditions. The PEB adjudicated the lumbosacral strain condition as unfitting, rated 0% with application of AR 635-40. The USAPDA issued an administrative correction to the PEB (DA Form 18) changing the rating to 10% with application of the Veterans Administration Schedule for Rating Disabilities (VASRD) and IAW NDAA 2008. The CI made no appeals, and was medically separated with a 10% combined disability rating.

CI CONTENTION: “I have service connected disabilities that have been determined by physicians to be incurable. Sciatica has been proven and medications for control have been changed many times. Arthritis has also been diagnosed. Herniated disk, and narrowing of the spinal canal has been noted. I was also diagnosed with severe Depression that was discovered while I seeking mental health assistance.” An additional memo from the CI reiterates his request for medical retirement and consideration of his depression.

RATING COMPARISON:

|  |  |
| --- | --- |
| **Administrative Correction PEB – Dated 20080227** | **VA (~1 Mo. After Separation) – All Effective Date 20080528** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Lumbosacral Strain | 5237 | 10% | Lumbar DDD | 5243 | 10% | 20081128 |
| Prediabetes | Not Unfitting | No VA Entry | 20081128 |
| Hyperlipidemia | Not Unfitting | No VA Entry | 20081128 |
| No Additional MEB/PEB Entries | DJD, Left Knee | 5010-5260 | 10% | 20081128 |
| DJD, Right Knee | 5010-5260 | 10% | 20081128 |
| Scar Status Post-Ganglion Cyst Excision, Right Wrist | 7804 | 10% | 20081128 |
| 0% x 4/Not Service-Connected x 2 | 20081128 |
| **Combined: 10%** | **Combined: 40%\*** |

\*Subsequent VARD dated February 9, 2009 is within a year of separation, but does not change the original VARD’s 40% combined rating.

ANALYSIS SUMMARY: The Board acknowledges the CI's contention suggesting that service ratings should have been conferred for other conditions documented at the time of separation, some of which were evaluated and determined not to be individually unfitting for continued service. 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 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. However the Department of Veterans’ Affairs (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 is empowered to evaluate the fairness of service fitness determinations, and to make recommendations for service rating of conditions which it concludes would have independently prevented the performance of required duties (at the time of separation). The Board’s threshold for countering DES 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.

Lumbosacral Strain. This analysis includes the lower back condition, LBP and the contended sciatica, back arthritis, herniated disk, and narrowing of the spinal canal. Imaging (MRI) documented L2-L3 and L4-5 disk herniation and DDD. 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. These three exams are summarized in the chart below.

|  |  |  |
| --- | --- | --- |
| ROM - Thoracolumbar | NARUSM ~6 Mo. Pre-Sep | VA C&P ~6 Mo. Post-Sep |
| Flex (0-90⁰) | (62⁰, 70⁰, 72⁰) 60⁰ | 90/70⁰ (repeat) |
| Ext (0-30) | 30⁰ | 30/20⁰ (repeat) |
| R Lat Flex (0-30) | (35⁰) 30⁰ | 20⁰ |
| L Lat Flex 0-30) | (35⁰) 30⁰ | 20⁰ |
| R Rotation (0-30) | (50⁰) 30⁰ | 20⁰ |
| L Rotation (0-30) | (45⁰) 30⁰ | 30⁰ |
| COMBINED (240⁰) | 210⁰ | 210/180⁰ |
| Comment: “Note (4): Round each range of motion measurement to the nearest five degrees.” | “All measurements were reproducible except for forward flexion.” Painful motion; normal gait and posture; no spasm or tenderness; normal sensory and motor exams; “While supine on the exam table, the Soldier could flex at the waist to 90 degrees with his legs fully extended”\* see text | No objective evidence of lumbar spasm and or neurological deficit; No evidence of episodes of incapacitation |
| §4.71a Rating | 10%-20% (PEB 10%) | 10% |

All exams documented painful motion which IAW VASRD §4.59 (painful motion) would meet the 10% rating criteria. The MEB's DD Form 2808, dated 19 November 2007 showed tenderness and antalgic gait. The Board considered that the PEB’s rating was likely based on the MEB narrative summary (NARSUM) exam: the USAPDA administrative correction PEB disability description stated: “chronic LBP onset in 1994 after a fall, deteriorating through the years with an L2 profile issue in 2004. Imaging reveals DDD. Pain and profile limitations prevent duty in MOS or in field conditions. Exam shows no mechanical loss of motion, no spasm, no tenderness to palpation, normal gait and posture. Rated for forward flexion < 85 degrees.” The NARSUM exam indicated the measured ROM limitation of 62⁰ (first of three, and lowest measure) that IAW VASRD §4.71a. and note (4) of the general spine formula would round to 60⁰ and meet the 20% criteria for “forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees.” The Board considered the examiner’s additional comment of “while supine on the exam table, the soldier could flex at the waist to 90 degrees with his legs fully extended.” The Board considered that the supine position is not exactly comparable to the weigh-bearing standing position for evaluating spine ROMs, especially with the CI’s documented herniated disks. It was also unclear if the supine flexion was passive or active. There was no evidence of incapacitating episodes (physician prescribed bed rest) that would warrant a higher rating under VASRD code 5243 (intervertebral disc syndrome). Only the MEB exam demonstrated an abnormal gait which would qualify for a §4.71a. rating of 20%.

The Board considered the NARSUM exam had some internal inconsistency with measurement of forward flexion and that it decreased the probative value of the goniometric measurements. The Board majority adjudged the VA exam as having the highest probative value for rating at the time of separation. The Board carefully reviewed and weighed all evidentiary information available. All evidence considered, there is not sufficient reasonable doubt in the CI’s favor to justify a Board recommendation for other than the 10% rating assigned by the PEB for the LBP condition.

LBP Condition (Radiculopathy/Sciatica). The CI endorsed episodic radiation of his pain into his left buttock area, episodic (near daily) tingling in the lateral four toes of his left foot and leg and feet numbness. Some treatment notes indicated radicular symptoms in both lower extremities. There was no bladder, bowel or sexual disturbances. Any pain-radiculopathy is considered above under the CI’s primary unfitting lumbosacral condition IAW the general rating formula for diseases and injuries of the spine, “with or without symptoms such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease.” There was no evidence of fixed sensory or motor deficits on any exam. This leaves no grounds for Board recommendation of an additionally unfitting neuropathy. All evidence considered, there is not reasonable doubt in the CI’s favor supporting addition of any lower extremity radiculopathy as an unfitting condition for separation rating.

Other PEB Conditions. The other conditions forwarded by the MEB and adjudicated as not unfitting by the PEB were pre-diabetes and hyperlipidemia. Neither of these conditions was profiled, implicated in the commander’s statement or noted as failing retention standards. Hyperlipidemia is an abnormal laboratory test and not a physical disability condition. Both conditions were reviewed by the action officer and considered by the Board. There was no indication from the record that either of these conditions significantly interfered with satisfactory duty performance. All evidence considered, there is not a preponderance of the evidence in the CI’s favor supporting recharacterization of the PEB fitness adjudication for any of the stated conditions.

Other Contended Conditions. The CI’s application asserts that compensable ratings should be considered for sciatica, herniated disk, narrowing of the spinal canal, arthritis and severe depression. Sciatica, herniated disk, narrowing of the spinal canal and back arthritis were addressed in the CI’s unfitting back condition above. Depression was not documented in the DES file. The Board does not have the authority under DoDI 6040.44 to render fitness or rating recommendations for any conditions not considered by the DES; depression remains eligible for Army Board for the Correction of Military Records (ABCMR) adjudication. The Board therefore has no reasonable basis for recommending any additional unfitting conditions for separation rating.

Remaining Conditions. Other conditions identified in the DES file were pes planus, right wrist ganglion cyst, bilateral shoulder pain, right ankle, back skin discoloration, and bilateral knee pain. Several additional non-acute conditions or medical complaints were also documented. None of these conditions were significantly clinically or occupationally active during the MEB period, none carried attached profiles, and none were implicated in the commander’s statement. These conditions were reviewed by the action officer and considered by the Board. Although it is possible that impairment from the bilateral knee pain condition was overshadowed by the LBP condition limitations and restrictions, that possibility is unduly speculative as the basis for a Board fitness recommendation. It was determined that none could be argued as unfitting and subject to separation rating. Additionally left ankle and several other non-acute conditions were noted in the VA proximal to separation, but were not documented in the DES file. The Board does not have the authority under DoDI 6040.44 to render fitness or rating recommendations for any conditions not considered by the DES. The Board therefore has no reasonable basis for recommending any additional unfitting conditions for separation 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. In the matter of the lower back condition (which includes contended herniated disk, narrowing of the spinal canal and back arthritis), and IAW VASRD §4.71a., the Board by a simple majority recommends no change in the PEB 10% adjudication. The single voter for dissent did not elect to submit a minority opinion. In the matter of the prediabetes and hyperlipidemia conditions, the Board unanimously recommends no change from the PEB adjudications as not unfitting. In the matter of the contended sciatica condition, the Board unanimously agrees that it cannot recommend a finding of unfit for additional disability rating. In the matter of the bilateral knee conditions or any other medical conditions eligible for Board consideration, the Board unanimously agrees that it cannot recommend any findings of unfit for additional service disability rating.

RECOMMENDATION: The Board, therefore, recommends that there be no recharacterization of the CI’s disability and separation determination, as follows:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Lumbosacral Strain | 5237 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110613, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 XXXXXXXXXXX

 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, AR20120008881 (PD201100775)

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 and hereby deny the individual’s application.

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 XXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA