RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: xxxxxxxxx BRANCH OF SERVICE: Army

CASE NUMBER: PD1100791 SEPARATION DATE: 20050429

BOARD DATE: 20120517

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SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SPC/E-4 (88M10/Transportation Vehicle Driver), medically separated for chronic back pain, due to scoliosis, without neurologic abnormality. 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 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 low back pain (LBP) condition as unfitting, but also determined that it had existed prior to service (EPTS) and was not permanently aggravated beyond natural progression by such service. The CI appealed to a Formal PEB (FPEB) which determined the chronic back pain was EPTS but was subsequently aggravated by such service, and rendered the Soldier unfit. The FPEB rated the condition at 10% with application of DoDI 1332.38 para E2.1.32 (service aggravation) and Veterans Administration Schedule for Rating Disabilities (VASRD). The CI was then medically separated with a 10% combined disability rating.

CI CONTENTION: “Since active military service and my participation in Operation Enduring Freedom and Operation Iraqi Freedom I have been unable to sufficiently obtain or even keep employment due to my back injury. I have found that I am unable to participate in activities such as sitting for long periods of time, lifting objects as light as 20 pounds, bending to pick up different objects, and also sleep comfortably for days due to my back injury. Upon exiting the military service I have tried to enter the transportation field in which I was trained in the military to do, but find it hard to stay seating for different periods of time. While visiting the doctors while enlisted in the military they often told me that working out will help my condition, but I often find times where I hurt more when I try and work out. I also have tried re-enlisting back into the service, which I am being told that I am unable to do that due to my back injury and pain. I find it hard to take care of my family due to I run unable to keep a job due to my back pain. I am asking that the board reconsider their decision that was previously given to me due to the fact that my condition still exist and possibly is more worse than before.”

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 condition of chronic back pain as requested for consideration meets the criteria prescribed in DoDI 6040.44 for Board purview; and, is addressed below as a review of the service ratings for this unfitting condition. 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).

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RATING COMPARISON:

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| --- | --- |
| **Service FPEB – Dated 20050311** | **VA ~ 6 and 7 Mo. After Separation** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Back Pain, due to Scoliosis, without Neurologic Abnormality | 5299-5237 | 10% | Dextro-rotoscoliosis involving the Dorsolumbar Spine | 5299-5237 | NSC | 2005113020060105 |
| ↓No Additional MEB/PEB Entries↓ | Existed prior to service and not service aggravated |
| **Combined: 10%** | **Combined: NSC** |

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 current earning ability and quality of life. It is a fact, however, that the Disability Evaluation System (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 (DVA). 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 Back Pain. The CI first experienced back pain while he was deployed and continued to have symptoms after he returned from deployment. He was treated conservatively including chiropractic care and physical therapy and was evaluated in a spine clinic. Both MRI and x-rays document scoliosis with apex to his right side but no other abnormalities. His pain was reported as high as 6/10 during outpatient visits. He was unable to perform all the duties required of his grade and MOS, was given an L3 profile, and was referred for MEB.

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| ROM - Thoracolumbar | PT~9 Months Pre-Separation20040720 | MEB NARSUM, p. 34~6 Months Pre-Separation20041118(Exam on 20041021) | VA C&P General~7 Months Post-Separation20051130 | VA C&P Spine~8 Months Post-Separation20060105 |
| Flex (0-90) | 75° | 90⁰ | 90⁰ | 90⁰ |
| Ext (0-30) | 20° | 25⁰ | Not documented | 15⁰ |
| R Lat Flex (0-30) | 30° | 25⁰ | Not documented | 30⁰ (35⁰) |
| L Lat Flex 0-30) | 30° | 25⁰ | Not documented | 30⁰ (35⁰) |
| R Rotation (0-30) | Not documented | 30⁰ | Not documented | 10⁰ |
| L Rotation (0-30) | Not documented | 30⁰ | Not documented | 10⁰ |
| COMBINED (240) | NA | 225⁰ | NA | 185⁰ |
| Comment | Right thoracic scoliosis mild/moderate with flexion. “Research does not support the contention that scoliosis is a factor in low back pain.” | Obvious scoliosis noted; Gait normal; normal motor, sensory, and reflex exams; negative seated straight leg raise. X-ray shows dorsolumbar dexroscoliosis with apical vertebra at the T9 level, Cobb’s angle of 24 degrees. | Goniometer not noted; normal gait; normal extremities; normal neurological; no paravertebral muscle spasms; mild scoliosis in the dorsolumbar area. | Goniometer not noted; no reflex, sensory, or motor defects; no weakness; negative straight leg raise; repetitive motion does not result in increased pain or decreased ROM; no paralumbar spasm; no scoliosis clinically on examination |
| §4.71a Rating | 10% | 10% |  | 10% |

The IPEB determined his condition as EPTS and was not permanently aggravated by service and they assigned no rating. However, the FPEB determined the CI’s back pain was permanently aggravated by service and applied a 10% rating. The VA determined the condition was EPTS and was not permanently aggravated by service and therefore did not service-connect this condition. The VA rating decision (VARD) noted the CI had mild dorsal scoliosis noted at the time of his entrance physical examination but was considered asymptomatic and not considered disabling. The two VA Compensation and Pension (C&P) examinations noted “dextro-rotoscoliosis involving the dorsolumbar spine” and “normal examinations of the back with pain of unknown etiology.”

While the CI did have scoliosis documented at the time of entrance into service, he was asymptomatic at that time and did not complain of back pain until he deployed. Additionally while scoliosis can produce back pain, there is no direct evidence that the CI’s back pain condition occurred as a result of his scoliosis. In fact the scoliosis may have been an incidental finding. 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 FPEB adjudication for the chronic back pain 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 chronic back pain condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the FPEB adjudication at separation or permanently.

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

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| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Back Pain, due to Scoliosis, without Neurologic Abnormality | 5299-5237 | 10% |
| **COMBINED** | **10%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110921, 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 XXXXXXXXXXXXXX, AR20120009507 (PD201100791)

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 XXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA