RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100796 SEPARATION DATE: 20051107

BOARD DATE: 20120629

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a drilling Reserve member, CW2, 922A, Food Service Technician, medically separated for chronic neck and back pain. The neck pain was not related to a specific injury, while the lower back pain (LBP) had onset after a slip and fall in 2000. The CI did not improve adequately with treatment of chiropractic, physical therapy, or anti-inflammatory and muscle relaxant medications to meet the physical requirements of her Military Occupational Specialty (MOS). Her profile allowed for an alternate aerobic (walk) event to satisfy physical fitness requirements. She was issued a permanent U3 L3 profile and referred for a Medical Evaluation Board (MEB). Five other conditions (headaches, breast mass, sinusitis, cystic acne and smoking) identified in the rating chart below, were also identified and forwarded by the MEB. The Physical Evaluation Board (PEB) adjudicated the chronic neck pain and chronic lumbar pain as unfitting, rated 10% and 0% respectively, with application of the Veteran’s Affairs Schedule for Rating Disabilities (VASRD) and the US Army Physical Disability Agency (USAPDA) pain policy. The remaining conditions were determined to be not unfitting. The CI made no appeals, and was medically separated with a 10% disability rating.

CI CONTENTION: “Because my overall quality of life has worsened since being MEB in 2004. If I was granted a retirement I would pay for TriCare benefits and get to follow up appointments faster in the civilian world. VA specialist are not also available to me and driving from the Springs to Denver is very time consuming.” Block #5 was considered a continuation of block #3 for contention and stated: “I have went to 80% disabled within the VA system and was not awarded any compensation for such things as my migraines and also had more breast surgeries since leaving active duty. My neck injury on active duty sucks the life out of me daily and I can't just go to physical therapy within the VA system, however my primary care provider within TriCare could refer me for this. All my medical issues are service-connected.” (*sic*)

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 headaches, breast mass, sinusitis, cystic acne and left upper extremity radiculopathy conditions requested for consideration and the unfitting neck and low back conditions meet the criteria prescribed in DoDI 6040.44 for Board purview, and are accordingly addressed below. The other requested condition [smoking] is a condition or circumstance not constituting a physical disability IAW DoDI 1332.38, enclosure 5, and is not compensable. 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.

RATING COMPARISON:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Service PEB – Dated 20050919** | | | **VA (14 Mo. Pre Separation) – All Effective Date 20040715** | | | |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Neck Pain, w/o Clinical Radiculopathy | 5243 | 10% | Cervical Strain | 5237-5243 | 10% | 20040908 |
| LUE Radiculopathy | 8513 | 20% | 20040908 |
| Chronic Low Back Pain | 5237 | 0% | Lumbar Strain\* | 5237-5242 | 20% | 20040908 |
| Headaches | Not Unfitting | | Muscle Tension Headaches | 8199-8100 | 0% | 20040908 |
| Breast Mass | Not Unfitting | | L Breast Lump | 7626 | 0% | 20040908 |
| Sinusitis | Not Unfitting | | Sinusitis | 6513 | 0% | 20040908 |
| Cystic Acne | Not Unfitting | | Acne Vulgaris\* | 7899-7806 | 10% | 20040908 |
| Smoking | Not Unfitting | | No VA Entry | | | |
| ↓No Additional MEB/PEB Entries↓ | | | Kidney Stones\* | 7508 | 10% | 20040908 |
| Gallbladder Polyps | 7399-7314 | 30% | 20040908 |
| 0% x 4/Not Service-Connected x 5 | | | 20040908 |
| **Combined: 10%** | | | **Combined: 70%** | | | |

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application regarding the significant impairment with which her service-incurred condition continues to burden her. The Board wishes to clarify that it is subject to the same laws for 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 evaluates DVA evidence proximal to separation in arriving at its recommendations, but its authority resides in evaluating the fairness of DES fitness decisions and rating determinations for disability at the time of separation. The Board further acknowledges the CI’s contention for ratings for other conditions documented at the time of separation, and notes that its recommendations in that regard must comply with the same governance. 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.

Neck and Back Conditions. As summarized above, the neck pain (cervical spine) was not related to a specific injury, while the lower back (thoracolumbar spine) pain had onset after a slip and fall in 2000. In addition to treatment of chiropractic, physical therapy, anti-inflammatory and muscle relaxant medications; the CI was prescribed tricyclic antidepressants which did not lead to resolution of pain. Associated conditions were headaches and a left arm (non-dominant) intermittent pain and sensory radiculopathy discussed below. There were indications of minor radiographic abnormalities in both the cervical (spondylosis, small disk protrusion) and thoracolumbar (mild degenerative spurring) spine segments. 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; as summarized in the chart below. Both neck and back exam summaries are listed as paired below, as it is incongruent for the Board to assign a higher probative value to one exam in its rating recommendation for one of the conditions and then assign a higher probative value to a different exam for the other condition.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| ROM  Lumbar & Cervical | VA C&P ~14 Mo. Pre-Sep | | MEB ~2.5 Mo. Pre-Sep | |
| Lumbar | Cervical | Lumbar | Cervical |
| Flexion | 50⁰ | 45⁰ | (51,38,36⁰) 35⁰ | (34,28,24⁰) 25⁰ |
| Combined | 185⁰ | 250⁰ | 160⁰ | 235⁰ |
| Comment | Painful; no tenderness/spasm; “spasm of lumbar spine on x-ray” | Discomfort | Pain on motion; no TTP or spasm; Waddell +5/8\* (see text); x-ray straightening of lumbar lordosis | |
| §4.71a Rating | 20% | 10% | 20% | 20% (PEB 10%) |

At the MEB exam, the CI reported the severity and frequency of her neck and back pain as well as radicular pain and episodic paresthesias symptoms. The MEB physical exam including the referenced DD Form 2807 and 2808 details are summarized above. The narrative summary (NARSUM) listed the neck ROMs without comment regarding Waddell signs with the comments under the back ROMs of “Waddell signs were positive for superficial tenderness, tenderness with axial load, regional sensory change, and moderate overreaction on exam giving her a score of 5/8.” The VA Compensation and Pension (C&P) exam was 14 months prior to separation and indicated a similar history to the service treatment records (STR). The exam is summarized above, but was greater than 12 months from separation and therefore had a decreased probative value.

The Board directs attention to its rating recommendation based on the above evidence. There were no episodes of incapacitation IAW VASRD §4.71a criteria for 5243 (bed rest and treatment prescribed by a physician). There were episodic indications of lumbar muscle spasms as well as painful motion, pain-limited motion and positive trigger point tenderness, offset with treatment notes indicating severe pain with medication use and severe pain with an exam that was not consistent with the described level of pain. The positive Waddell signs are indicators of non-physiologic findings (as specified above); however, literature indicates no significant difference in disability pictures regardless of absence or presence of Waddell signs. The MEB ROMs each indicated decreased ROM on repeated motion would lead to the last and lowest ROM typically being indicative of the disability picture IAW DeLuca (In DeLuca v. Brown (1995), the United States Court of Appeals for Veterans’ Claims ruled that the VA must separately consider any additional functional loss due to pain, flare-ups, deformity, tenderness, arthritis, loss of motion on repetitive use, weakened movement, excess fatigability or incoordination when rating disabilities.) The PEB specified their cervical spine rating was for forward flexion 34⁰ while application of the general spine formula (IAW VASRD §4.71a. and Note 4) and DeLuca would indicate the exam should be rated for forward flexion of 25⁰. The cervical ROM criteria for 20% states forward flexion greater than 15⁰ but not greater than 30⁰. The PEB specified thoracolumbar spine rating was for motion limited by pain and “rated as mild IAW AR 635-40.” Although the DeLuca and §4.71a. rating for forward flexion of the exam would be 35⁰, even the greatest of the three measured ROMs (51⁰) would meet the 20% criteria for forward flexion of the thoracolumbar spine greater than 30⁰ but not greater than 60⁰.

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 neck condition, and a disability rating of 20% for the back condition.

Contended PEB Conditions. The contended conditions adjudicated as not unfitting by the PEB were headaches, breast mass, sinusitis, cystic acne and left upper extremity radiculopathy. The Board’s first charge with respect to these conditions is an assessment of the appropriateness of the PEB’s fitness adjudications. The Board’s threshold for countering 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. The acne, breast lump and sinusitis were chronic and noted on the 2001 VA rating determination. Only the neck and back conditions were mentioned in the profile; however, the commander’s statement implicated the left arm radiculopathy and headaches in addition to the unfitting neck and back conditions. Records indicate the CI was right handed and the left upper extremity had no motor component. Firm Board precedent requires a functional impairment tied to fitness to support a recommendation for addition of a peripheral nerve rating (left upper extremity radiculopathy) to disability in spine cases. The pain component of a radiculopathy is subsumed under the general spine rating as specified in §4.71a. There was no motor weakness in evidence. The intermittent sensory component in this case was mentioned by the commander (in conjunction with headaches) as “creates problem for her in trying to perform administrative tasks to standard.” Headaches were described as two to three times a month with decreased symptoms following medication use. The NARSUM indicated “they have never been severe enough for her to pursue a neurological evaluation,” and there was no indication of prostrating attacks proximate to separation in the service or VA records. All conditions were judged to meet retention standards. All were reviewed by the action officer and considered by the Board. There was no indication from the record that any of these conditions significantly interfered with satisfactory duty performance. 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 fitness determination for the any of the contended conditions; and therefore, no additional disability ratings can be recommended.

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 the USAPDA pain policy for rating the lumbar spine condition was operant in this case and the condition was adjudicated independently of that policy by the Board. In the matter of the neck condition, the Board unanimously recommends a disability rating of 20%, coded 5243 IAW VASRD §4.71a. In the matter of the back condition, the Board unanimously recommends a disability rating of 20%, coded 5237 IAW VASRD §4.71a. In the matter of the contended headaches, breast mass, sinusitis, cystic acne and left upper extremity radiculopathy conditions, the Board unanimously recommends no change from the PEB determinations as not unfitting. 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:

|  |  |  |
| --- | --- | --- |
| **UNFITTING CONDITION** | **VASRD CODE** | **RATING** |
| Chronic Neck Pain, w/o Clinical Radiculopathy | 5243 | 20% |
| Chronic Low Back Pain | 5237 | 20% |
| **COMBINED** | **40%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20111005, 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 22202-3557

SUBJECT: Department of Defense Physical Disability Board of Review Recommendation

for XXXXXXXXXXXXX, AR20120012025 (PD201100796)

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 40% 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 40% 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 XXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA