RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100828 DATE OF PLACEMENT ON TDRL: 20040218

BOARD DATE: 20120802 Date of Permanent SEPARATION: 20060822

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was an active duty SSG/E6 (92F, Petroleum Supply) medically separated for asthma, lumbar spine and right knee conditions. He had a history of exertional shortness of breath worsening over the years, which was ultimately diagnosed as asthma. The lumbar condition was also of chronic duration, and ultimately diagnosed as non-surgical disc disease. The right knee condition surfaced later and was diagnosed as synovitis. The asthma could not be adequately controlled, and the orthopedic conditions could not be adequately rehabilitated to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was consequently issued a permanent P3/L3 profile and referred for a Medical Evaluation Board (MEB). Asthma, lumbar spine and right knee conditions were forwarded to the Physical Evaluation Board (PEB) as medically unacceptable IAW AR 40-501. No other conditions were submitted by the MEB. The PEB adjudicated all three conditions as unfitting: asthma rated 30%, citing criteria of the Veterans Administration Schedule for Rating Disabilities (VASRD); the lumbar spine condition rated 10%, referencing the US Army Physical Disability Agency (USAPDA) pain policy; and, the right knee condition rated 0%, referencing the USAPDA pain policy. The CI was placed on the Temporary Disability Retired List (TDRL); and, after 30 months on TDRL, all 3 conditions were considered to be stable but still unfitting. The PEB ratings at that time were 10% for asthma, and 0% each for the lumbar spine and right knee; citing the same rating authorities noted for the initial ratings. The CI was permanently separated, without appeal, with a combined disability rating of 10%.

CI CONTENTION: “I was rated 30% for exercise induced Asthma fev-1 70%, 79 after inhaled Bronchodilator, 10% for back pain due to L5-S1 herniated nucleus, without neurologic abnormality combined Thoracolumbar range of motion 179 degrees, and 0% for Chronic pain, right knee, due to synovitis when placed on TDRL. There were no major changes, if any found doing the final evaluation, so I respectfully request that the board revaluate my records, and reconsider the last evaluation.” He does not elaborate further or specify a request for Board consideration of any additional conditions.

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in Department of Defense Instruction (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 rating for the unfitting asthma, lumbar spine and right knee conditions are addressed below; and, no additional conditions are within the DoDI 6040.44 defined purview of the Board. 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 (ABCMR).

RATING COMPARISON:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Final Service PEB - 20060726** | | | | **VA (34 Mo. Prior to Adjudication Date\*) – All Effective 20040218** | | | |
| **On TDRL - 20040218** | **Code** | **Rating** | | **Condition** | **Code** | **Rating** | **Exam** |
| **Condition** | **TDRL** | **Sep.** |
| Asthma | 6602 | 30% | 10% | Asthma | 6602 | 30% | 20020208 |
| Chronic Back Pain | 5243 | 10% | 0% | DDD, Lumbar Spine | 5242 | 40% | 20031024 |
| RLE Radiculopathy | 8799-8720 | 10% | 20031024 |
| Right Knee Pain | 5099-5003 | 0% | 0% | Right Knee Synovitis | 5020 | 10% | 20031024 |
| No Additional MEB Entries | | | | Adjustment Disorder | 9440 | 30% | 20031024 |
| DDD, Cervical Spine | 5242 | 20% | 20031024 |
| Tinnitus | 6260 | 10% | 20031024 |
| Hypertension | 7101 | 10% | 20031024 |
| Hepatitis C | 7354 | 10% | 20040626 |
| 0% x 1 / Not Service-Connected x 3 | | | 20031024 |
| **Combined: 40% → 10%** | | | | **Combined: 90%** | | | |

**\*Represents VA rating proximate to TDRL placement; no VA rating proximate to permanent separation.**

ANALYSIS SUMMARY: The Board clarifies that there is a significant interval (approaching 3 years) between the Department of Veterans’ Affairs (DVA) evidence and ratings proximate to placement on TDRL and the date of permanent separation; and, the Board’s permanent rating recommendation is based on the disability in evidence at final separation. DoDI 6040.44 specifies a 12-month interval for special consideration to DVA findings, and thus little probative value can be assigned to the clinical evidence rated by the DVA with regards to the Board’s permanent recommendation. Since there was no service or DVA outpatient evidence reasonably proximate to the date of permanent separation, the Board must rely heavily on the TDRL revaluation on 23 May 2006 and its addendum dated 28 June 2006, 2 months prior to final separation, to assess the severity of symptoms probative to its permanent rating recommendation.

Asthma Condition. The CI began developing intermittent shortness of breath as early as 1995, and was formally diagnosed with asthma about a year prior to initiation of MEB proceedings. His pulmonary function test (PFT) results proximate to TDRL placement were a post-treatment FEV1 of 79% predicted and an FEV1/FVC ratio of 70%. Ratable daily medications listed on the MEB’s narrative summary (NARSUM) were Singulair, Advair, and Theophylline. An Albuterol inhaler was used as needed (prn). The last clinical entry in evidence during the TDRL period prior to the final evaluation was an outpatient note dated 14 March 2005, 17 months prior to separation, and there is no record of dispensing of medication after that visit. There were no VA rating evaluations or outpatient treatment notes in evidence for the full TDRL period. At the time of the final TDRL evaluation, the pulmonologist noted that he had last seen the CI at a TDRL evaluation in April 2005; at which point the asthma was not in satisfactory control and the CI was referred to a civilian pulmonologist. No civilian records were submitted to the Board. The final TDRL evaluation referenced the above course of events, and continued with the following excerpt.

Since that time, [CI] reports no further diagnostic testing, just periodic renewal of medications and pulmonary function testing. Subjectively, [CI] states that his asthma has been approximately the same in terms of the severity of his symptoms. He is unable to exercise at all. He is using the albuterol 2 times per week. He states that he has asthma symptoms about 3 or 4 times per week during the day.

The TDRL examiner listed the same medications and dosing frequency as those noted in the pre-TDRL NARSUM, with the addition of a Spiriva inhaler. Recent PFT results were cited which showed a post-treatment FEV1 of 90% and FEV1/FVC ratio of 71%. The final PEB made a written request to the MEB, “please ask Soldier to provide medication profile(s) from all sources from which he has obtained asthma medication during the past year.” The MEB replied with documentation of VA refills for Theophylline and Albuterol dated 1 September 2005, 12 months prior to separation; and, a written response from the CI, “This statement is to inform you that I received extra medications for from [*sic*] my doctor's office and had extra from when I was put on TDRL.”

The Board directs attention to its rating recommendations based on the above evidence. The TDRL rating was compliant with the VASRD §4.100 30% criteria under 6602 (bronchial asthma) of “daily inhalational or oral bronchodilator therapy, or; inhalational anti-inflammatory medication.” The PFT results, both at TDRL entry and at permanent separation, met only 10% criteria. Members deliberated whether to concede the daily medication criteria at separation, based on the CI’s statement, in support of a permanent 30% rating recommendation. It was judged, however, that an assumption that the CI sustained daily treatment of his asthma over a 17-month period with leftover medications and physician office samples was not sufficiently tenable. 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 PEB’s TDRL or permanent adjudications of the asthma condition.

Lumbar Spine Condition. The CI’s back condition progressed over a 10-year period preceding the initial MEB, and in 2001 he was diagnosed with bi-level disc disease (L4-S1). There was mild right L5/S1 nerve encroachment linked to right sciatic radicular pain. There were no motor symptoms or findings, and surgical intervention was not required. The initial MEB and preceding VA Compensation and Pension (C&P) examinations documented normal neurological findings and no antalgic gait or spinal contour abnormalities. The final TDRL examiner noted that the CI “reports that his symptoms are essentially unchanged from previous”; and, stated that “his examination is unchanged from the previous examination dated 21 January 2005.” That examination documented spasm, tenderness, and normal neurologic testing. The range-of-motion (ROM) evidence before the Board is summarized in the chart below.

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| --- | --- | --- | --- | --- | --- | --- |
| **Thoracolumbar ROM** | **TDRL Placement** | | | **TDRL** | **Permanent Separation** | |
| NARSUM | PT | VA C&P | Jan. 2005 | PT-2 Mo. Prior | PT-1 Mo. Prior |
| Flexion (90⁰ Normal) | 60⁰ | 30⁰ | 20⁰ | 30⁰ | 35⁰ | 30⁰ |
| Combined (240⁰) | Incomplete | 170⁰ | 130⁰ | Incomplete | 120⁰ | 80⁰ |
| §4.71a Rating | 20% | 40% | 40% | 40% | 20% | 40% |

The Board directs attention to its rating recommendations based on the above evidence. Both the pre-TDRL and final PEB decisions cited criteria of the USAPDA pain policy in reference to the ROM evidence under consideration, and neither of the derived ratings were IAW the VASRD §4.71a general rating formula for the spine. As is clear from the above ROM chart, the limitations were consistently fairly severe; and, in the majority of evaluations met the §4.71a rating threshold of 30⁰ flexion for a 40% rating. It should be noted, however, that the most proximate mid-TDRL reevaluation was still 19 months prior to separation; thus, all of preceding evaluations were marginally probative to the permanent rating period. The Board must therefore make a probative value decision regarding the two physical therapy (PT) ROM evaluations proximate to final separation. The first PT encounter was the MEB ordered evaluation; and, the second one was performed by request on a walk-in visit just prior to PEB proceedings. The significantly lower combined ROMs of 80⁰ noted in the later PT measurements are in sharp contrast to the baseline, and unexplained by any clinical development in the short interval between the two final evaluations. These observations logically raise the question of a secondary gain bias in play at the second PT evaluation; and, that notwithstanding, there is a reasonable argument that the last PT evaluation was an outlier, and that the initial PT evaluation was more typical and therefore most probative to permanent rating. Members agreed that 40% was a fair TDRL rating recommendation, but deliberated between 20% and 40% recommendations for permanent rating. All members agreed that there was no separately ratable neuropathy for disability, since no functional impairment linked to fitness was in evidence. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a 40% disability rating of the lumbar spine condition for the period of TDRL and a 20% rating at permanent separation.

Right Knee Condition. No precise duration of symptoms or clinical course for this condition is found in the initial NARSUM or in the pre-TDRL VA C&P evaluation, and there are no service visits in evidence which were directed specifically at that complaint or documented any treatment for it. A single service entry 7 months prior to placement on TDRL, addresses back and knee pain. It notes a 2 year history of bilateral infrapatellar pain, with “[medical shorthand translated] right knee pain and swelling with running for a few months.” The condition was not carried on earlier temporary profiles, but appeared as “right knee synovitis” on the final permanent profile dated 19 September 2003. The initial NARSUM stated, “exam of the knee reveals a mild effusion, there is no tenderness, and he has a good ROM, strength, and stability.” The VA C&P examiner noted “pain with flexion” (cited in the VA rating decision for a 10% rating), a flexion of 110⁰ (normal 140⁰; minimal compensable 45⁰), and the absence of instability or signs of cartilage impingement. The mid-TDRL evaluation stated, “examination of his knee demonstrates full ROM without significant pain. There is no effusion and no tenderness to palpation.” The final TDRL evaluation stated, “I found no ROM deficit in his knee. He had ROM from 0 to 130 degrees, without significant pain.”

The Board directs attention to its rating recommendations based on the above evidence. There was no ROM limitation, ligamental laxity, locking or frequent effusions which would allow a compensable rating under any available code; without application of either VASRD §4.59 (painful motion) or §4.40 (functional loss) to achieve a minimum compensable rating of 10%. The paucity of clinical evidence precluded any support for §4.40, but members deliberated if §4.59 was supported by the evidence at TDRL placement and at separation. Members agreed that the VA C&P evidence during the initial MEB period was adequate justification for a compensable rating at the time of TDRL placement, based on §4.59; but, both the mid-TDRL and final TDRL examinations specifically documented the absence of significant pain with motion. After due deliberation, considering all of the evidence and mindful of VASRD §4.3 (reasonable doubt), the Board recommends a 10% disability rating of the right knee condition for the period of TDRL, and a 0% rating at permanent separation. The action officer recommended, and the Board concurred with, the code 5024 (tenosynovitis) for its clinical compatibility.

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 and right knee conditions was operant in this case and those conditions were adjudicated independently of that policy by the Board. In the matter of the asthma condition and IAW VASRD §4.100, the Board unanimously recommends no change in the PEB adjudications for the period of TDRL or permanently. In the matter of the lumbar spine condition, the Board unanimously recommends a disability rating of 40% for the period of TDRL and a 20% permanent rating, coded 5242 IAW VASRD §4.71a. In the matter of the right knee condition, the Board unanimously recommends a disability rating of 10% for the period of TDRL and a 0% permanent rating, coded 5024 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; 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** | |
| **TDRL** | **PERMANENT** |
| Asthma | 6602 | 30% | 10% |
| Degenerative Lumbar Spine and Disc Disease | 5242 | 40% | 20% |
| Synovitis, Right Knee | 5024 | 10% | 0% |
| **COMBINED** | **60%** | **30%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110829, 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 XXXXXXXXXXXXXXXXXXXXXXX, AR20120013950 (PD201100828)

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 constructively place the individual on the Temporary Disability Retired List (TDRL) at

60% rather than 40% disability for the period 18 February 2004 to 21 August 2006 and then following this period recharacterize the individual’s separation as a permanent disability retirement with the combined disability rating of 30%.

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 temporary disability 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 day following the constructive TDRL period.

c. Adjusting pay and allowances accordingly. Pay and allowance adjustment will account for recoupment of severance pay, provide 60% retired pay for the constructive temporary disability retired six month period effective the date of the individual’s original medical separation and then payment of permanent disability retired pay at 30% effective the day following the constructive TDRL period.

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 XXXXXXXXXXXXXXXXXXXXXX

Deputy Assistant Secretary

(Army Review Boards)