RECORD OF PROCEEDINGS

PHYSICAL DISABILITY BOARD OF REVIEW

NAME: XXXXXXXXXXXXXXXXXXXXXX BRANCH OF SERVICE: Army

CASE NUMBER: PD1100843 SEPARATION DATE: 20030905

BOARD DATE: 20120817

SUMMARY OF CASE: Data extracted from the available evidence of record reflects that this covered individual (CI) was a National Guard SPC/E-4 (11B/Infantryman), medically separated for chronic low back pain (LBP) with right S1 radiculopathy. This condition could not be adequately rehabilitated and the CI was not able to meet the physical requirements of his Military Occupational Specialty (MOS) or satisfy physical fitness standards. He was issued a permanent L3 profile and was referred for a Medical Evaluation Board (MEB). The MEB forwarded no other conditions for Physical Evaluation Board (PEB) adjudication. The PEB adjudicated the chronic LBP, with right S1 radiculopathy condition as unfitting, rated 20%. The CI made no appeals, and was medically separated with a 20% disability rating.

CI CONTENTION: “Condition evaluation too low.”

SCOPE OF REVIEW: The Board wishes to clarify that the scope of its review as defined in DoDI 6040.44 (4.a) is limited to those conditions which were determined by the PEB to be specifically unfitting for continued military service; and, when requested by the CI, those condition(s) “identified but not determined to be unfitting by the PEB.” 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:

|  |  |
| --- | --- |
| **Service PEB – Dated 20030505** | **VA (2 Mos. Post-Separation) – All Effective Date 20030906** |
| **Condition** | **Code** | **Rating** | **Condition** | **Code** | **Rating** | **Exam** |
| Chronic Low Back Pain with Right S1 Radiculopathy | 5293-5299-5295 | 20% | Bulging Disc L5-S1 with Foraminal Encroachment and Right L5 Radiculopathy, and Lumbar Myositis | 5021-5243 | 10% | 20031106 |
| Bulging Disc L5-S1 with Foraminal Encroachment and L5 Radiculopathy, and Lumbar Myositis Condition (Neurological Manifestations) | 5243-8620 | 10% | 20031106 |
| ↓No Additional MEB/PEB Entries↓ | Trigeminal Autonomic Cephalgia, also known as Headaches of the Migraine Type | 8100 | 10%\* | 20031106 |
| Not Service-Connected x 3 | 20031106 |
| **Combined: 20%** | **Combined: 30%** |

\*10% rating effective 20031106, not 20030906; increased to 30% effective 20101022.

\*\*Increased to 40% effective 20101022.

ANALYSIS SUMMARY: The Board acknowledges the sentiment expressed in the CI’s application, i.e., that the gravity of his condition merits consideration for a higher separation rating. 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. 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 reevaluate 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 Low Back Pain with Right S1 Radiculopathy. There was one 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.

|  |  |  |  |
| --- | --- | --- | --- |
| Thoracolumbar ROM | MEB ~5 Months Pre-Separation | VA C&P ~2 Months Post-Separation | VA C&P ~2 Months Post-SeparationNeuro |
| Flexion (90⁰ Normal) | “Full” with pain at 90⁰ | 85⁰ (87°) |  |
| Ext (0-30) |  | 30⁰ |  |
| R Lat Flex (0-30) |  | 30⁰ |  |
| L Lat Flex 0-30) |  | 30⁰ |  |
| R Rotation (0-30) |  | 30⁰  |  |
| L Rotation (0-30) |  | 30⁰  |  |
| Combined (240⁰) |  | 235⁰ |  |
| Comment | Full active ROM with pain on flexion at 90°; tender to palpation at right paravertebral muscles; normal pelvic obliquity; normal vertebral alignment; intact sensation bilateral lower extremities but slight change notes at lateral to posterior right thigh and at calf muscle region; Strength at right knee flexion and extension and ankle dorsiflexion all 4/5, right great toe extension 4+/5; positive straight leg raise on right  | Mild pain with flexion and moderate pain with extension at end of range of motion; increased pain with repetitive ROM; normal gait; normal spinal contour; some muscle spasm during ROM; no guarding; intact pinprick and light touch; motor 5/5 without atrophy or abnormal tone; reflex exam deferred; no non-organic physical signs | Normal motor examination; no atrophy; pinprick sensation decreased and vibratory sensation increased in entire right lower extremity; reflexes normal and symmetric in bilateral lower extremities. |
| §4.71a Rating |  |  |
| 2003 5292 | 10% | 10% |
| 2003 5293 | No information on frequency of incapacitating episodes |
| 2003 5295 | 10% | 10% |
| Present Day 5243  | 10% | 10% |
| 8620 | 10% | 10% | 10% |

The CI served on active duty from 12 September 2002 to 5 September 2003 and began having back pain after a fall down a ladder or stairs in late November 2002 while deployed to Kuwait. At the time of the MEB narrative summary (NARSUM) in April 2003, 5 months prior to separation, the CI reported back pain that radiated down his right leg and denied any lower extremity weakness or bowel or bladder dysfunction. Although use of a goniometer is not mentioned, goniometric measurements were not required for rating at the time of the NARSUM. The examiner did report the CI had full active ROM with pain at flexion of 90 degrees. The NARSUM does not mention any periods of incapacitation. As reported above, the exam documents altered sensation, slightly decreased strength, and a positive straight leg raise of the right lower extremity. A magnetic resonance imaging (MRI) from January 2003 documented posterior media-right lateral sharp bulging of the disc L5-S 1 compressing the right L5 nerve root with rupture of epidural fat. This bulging disc descended slightly down to the entrance of right foramina. A VA Compensation and Pension (C&P) examination was completed two months after separation and noted a similar history and examination. However, this examination included goniometric measurements and noted thoracolumbar flexion was limited by pain to 87 degrees. It also noted the CI had only one or two days a week without any back pain. He would have moderate to severe back pain that would last 2 to 3 days at a time. He was working as a police officer in a radio communication office and needed frequent breaks to stand up, stretch out his back, and walk around. There is no mention of any days of work missed for any reason. In contrast with the NARSUM examination, motor strength was 5/5 and equal bilaterally in the lower extremities and pinprick and light touch sensory examination was normal. However, a neurologic C&P examination performed the same day noted altered sensation in the right lower extremity.

The PEB adjudicated chronic LBP with right S1 radiculopathy, manifested by pain, sensory, deficit, and weakness as unfitting and applied a 20% for codes 5293 intervertebral disc syndrome and 5295 lumbosacral strain. Although the original VA rating decision (VARD) is not present in the record, later VARDs and a statement of the case dated 23 August 2005 document two separate VA ratings with codes 5021-5243 bulging disc L5-S1 with foraminal encroachment and right L5 radiculopathy and lumbar myositis at 10% and 5243-8620 L5-S1 radiculopathy (neurological manifestations of bulging disc L5-S1 with foraminal encroachment) at 10%. Although the CI appealed these ratings, the VA continued the two 10% ratings through the latest rating decision available for review which is dated 28 January 2012. It appears that the VA determined these ratings using the present day Veterans Administration Schedule for Rating Disabilities (VASRD) coding and rating standards for the spine which became effective 26 September 2003.

The Board directs attention to its rating recommendation based on the above evidence. The 2003 VASRD coding and rating standards for the spine, which were in effect at the time of separation, were changed to the present day §4.71a rating standards on 26 September 2003 approximately 3 weeks after the CI was separated. The 2003 standards for rating based on ROM impairment were subject to the rater’s opinion regarding degree of severity, whereas the current standards specify rating thresholds in degrees of ROM impairment. When older cases have goniometric measurements in evidence, the Board reconciles (to the extent possible) its opinion regarding degree of severity for the older spine codes and ratings with the objective thresholds specified in the current VASRD §4.71a general rating formula for the spine. This promotes uniformity of its recommendations for different cases from the same period and more conformity across dates of separation, without sacrificing compliance with the DoDI 6040.44 requirement for rating IAW the VASRD in effect at the time of separation. For the reader’s convenience, the 2003 rating codes under discussion in this case are excerpted below.

**5292 Spine, limitation of motion of, lumbar**:

 Severe ................................................................... 40

 Moderate .............................................................. 20

 Slight ..................................................................... 10

**5293 Intervertebral disc syndrome**:

 Evaluate intervertebral disc syndrome (preoperatively or postoperatively) either on the total duration of incapacitating episodes over the past 12 months or by combining under § 4.25 separate evaluations of its chronic orthopedic and neurologic manifestations along with evaluations for all other disabilities, whichever method results in the higher evaluation.

With incapacitating episodes having a total duration of at least six weeks during the past 12

 months ............................................................... 60

With incapacitating episodes having a total duration of at least four weeks but less than six

 weeks during the past 12 months ...................... 40

With incapacitating episodes having a total duration of at least two weeks but less than four

 weeks during the past 12 months .................... 20

With incapacitating episodes having a total duration of at least one week but less than two

 weeks during the past 12 months .................... 10

Note (1): For purposes of evaluations under 5293, an incapacitating episode is a period of acute signs and symptoms due to intervertebral disc syndrome that requires bed rest prescribed by a physician and treatment by a physician. ‘‘Chronic orthopedic and neurologic manifestations’’ means orthopedic and neurologic signs and symptoms resulting from intervertebral disc syndrome that are present constantly, or nearly so.

Note (2): When evaluating on the basis of chronic manifestations, evaluate orthopedic disabilities using evaluation criteria for the most appropriate orthopedic diagnostic code or codes. Evaluate neurologic disabilities separately using evaluation criteria for the most appropriate neurologic diagnostic code or codes.

Note (3): If intervertebral disc syndrome is present in more than one spinal segment, provided that the effects in each spinal segment are clearly distinct, evaluate each segment on the basis of chronic orthopedic and neurologic manifestations or incapacitating episodes, whichever method results in a higher evaluation for that segment.

**5295 Lumbosacral strain**:

Severe; with listing of whole spine to opposite side, positive Goldthwaite’s sign, marked limitation of forward bending in standing position, loss of lateral motion with osteo-arthritic changes, or narrowing or irregularity of joint space, or some of the above with abnormal mobility on forced motion ..................................... 40

With muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral, in standing position .................................................... 20

With characteristic pain on motion ....................... 10

With slight subjective symptoms only ..................... 0

The Board first considered the disability rating for the back condition using the 2003 VASRD and was unable to support a rating greater than 10% using codes 5292 or 5295. The code for intervertebral disc syndrome, 5293, requires quantification of incapacitating episodes and this information is not available in the record available for review. There is no mention of any missed work days. The present day VASRD also provides no mechanism for rating the back condition greater than 10%. Both the 2003 and present day VASRDs support a 10% rating based on §4.59 painful motion. As the PEB used code 5293 intervertebral disc syndrome in determining its 20%, it was prevented from applying a separate rating for radiculopathy. However, if codes 5292 or 5295 are used, the back pain and radiculopathy can be rated separately at 10% each, using either the 2003 or the present day VASRD. Neither method affords any advantage to the CI. 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 adjudication for the chronic LBP with right S1 radiculopathy 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. The Board did not surmise from the record or PEB ruling in this case that any prerogatives outside the VASRD were exercised. In the matter of the chronic LBP with right S1 radiculopathy condition and IAW VASRD §4.71a, the Board unanimously recommends no change in the PEB adjudication. There were no other conditions within the Board’s scope of review for consideration.

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** |
| Chronic Low Back Pain with Right S1 Radiculopathy | 5293-5299-5295 | 20% |
| **COMBINED** | **20%** |

The following documentary evidence was considered:

Exhibit A. DD Form 294, dated 20110929, w/atchs

Exhibit B. Service Treatment Record

Exhibit C. Department of Veterans’ Affairs Treatment Record

 XXXXXXXXXXXXXXXXXXX

 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 XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, AR20120015367 (PD201100843)

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 XXXXXXXXXXXXXXXXXXXX

 Deputy Assistant Secretary

 (Army Review Boards)

CF:

( ) DoD PDBR

( ) DVA